Great Lakes Legal Foundation

Sent Via Email

May 11, 2020



The Honorable Joshua Kaul, Attorney General
Wisconsin Department of Justice
State Capitol, Room 114 East
Madison, Wisconsin 53702

Re: Your May 1 Letter Withdrawal of OAG–01–16

Dear Attorney General Kaul:

The Great Lakes Legal Foundation (GLLF) respectfully provides these comments on your May 1, 2020, letter to Sec. Preston Cole, Department of Natural Resources (DNR) withdrawing OAG–01–16.

We question the legal basis of your decision and the appropriateness of issuing such decision considering the pending Supreme Court case on this matter. Mostly, we are concerned your letter encourages DNR to revert to those project-killing strategies for its high capacity well permit program that were in place before the issuance of OAG–01–16.

DNR must continue to operate within the boundaries of its high capacity well enabling legislation at Wis. Stat. § 281.34. The legislature set forth its comprehensive regulatory scheme in those provisions and nowhere else. Withdrawing OAG–01–16 does change this legal foundation for the program, nor does it alter DNR's duty to issue permits in a timely manner.

Regardless, any policies arising out of a changed DNR statutory interpretation that your letter encourages must be promulgated as a rule. Attempting to advance such policies through ad hoc permit conditions lack the due process required by Wisconsin's Administrative Procedure Act (Chapter 227). Such policies would be invalid as unpromulgated rules and patently unfair to businesses needing water permits to operate.

OAG–01–16 was issued by former Attorney General Brad Schimel on May 10, 2016. The 23-page opinion responded to a February 2016 request by the Committee on Assembly Organization pertaining to DNR's statutory authority for its high capacity well permit program in light of 2011 Wis.

10 East Doty Street, Suite 504 | Madison, WI 53703 | Phone (608) 310-5315 | Fax (608) 283-2589
www.greatlakeslegalfoundation.org

Act 21.[1] It brought reason and order to the chaos and related permitting backlog resulting from the *Lake Beulah* Supreme Court decision.[2] In his opinion, AG Schimel found that "Act 21 makes clear that *permit conditions and rulemaking may no longer be premised on implied agency authority*." OAG–01–16 at ¶29. (Emphasis ours)

> Laws are created by the elected officials in the legislature who have been empowered by the taxpayers, not employees of the State of Wisconsin. The practice of creating rules *without explicit legislative authority* is a constitutionally questionable practice that grants power to individuals who are not accountable to Wisconsin citizens. *Id.*, ¶50. (Emphasis ours.)

Withdrawing the Schimel opinion and returning DNR's program to the *Lake Beulah* paradigm will recreate regulatory chaos and halt projects for hundreds of Wisconsin businesses requiring high capacity wells. As you note, the legal issues in dispute are before the Wisconsin Supreme Court. From that decision, DNR can base its high capacity well permitting program on solid statutory foundation.

**There is No Legal Basis to Rescind OAG–01–16.**

You state that the basis of withdrawing OAG–01–16 is that "a circuit court expressly concluded, and the Wisconsin Court of Appeals strongly implied, that the conclusion at the crux of OAG–01–16 is incorrect. In light of those orders, OAG–01–16 is withdrawn in its entirety."

The referenced circuit court case—*Clean Wis., Inc. v. DNR*, No. 16-CV-2817 (Wis. Cir. Ct. Dane Cty.)—is currently before the Supreme Court. GLLF represents eight Wisconsin associations as intervenors in the case, *Clean Wisconsin, Inc. v. DNR* (2018 AP 59).

We do not dispute your rendition of the Dane County Circuit Court decision. We do, however, disagree with the decision and your use of it as a basis for withdrawing OAG–01–16. Moreover, it is unclear why you did not juxtapose the Dane County decision with the Nov. 12, 2015, decision by the Outagamie County Circuit Court on essentially the same matter, *New Chester Dairy v. DNR*, No. 14-CV-1055 (Wis. Cir. Ct. Outagamie Cty.).[3]

As in Dane County, the *New Chester* court addressed DNR's high capacity well permitting authorities considering Act 21, namely, Wis. Stat. § 227.10(2m). Judge Mark McGinnis found:

> The language of Wis. Stat. § 227.10(2m) states very clearly that an agency can only implement or enforce a requirement 'including as a term or condition of any license' if

[1] The Assembly request notes: "This interpretation of Wisconsin law will help address confusion surrounding the authority of the DNR under Chapter 281 and the public trust doctrine to impose conditions on the issuance of high capacity well permits. These permit conditions have created a substantial backlog in permit requests, bringing the issuance of new permits to a standstill." Letter from Robin Voss, Speaker of the Wis. State Assembly, to Brad Schimel, Wis. Attorney General (Feb. 1, 2016).

[2] *Lake Beulah Mgmt. Dist. v. DNR.*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73.

[3] GLLF represented four business associations as intervenors in *New Chester*.

> that requirement is 'explicitly required or explicitly permitted by statute or by a rule.' Thus, under the plain language of Wis. Stat. § 227.10(2m), *agencies cannot rely on implied authority to impose conditions*. Rather, those agencies must seek amendment to a statute or promulgate a rule. *Id*. at 4-5. (Emphasis ours.)

Thus, on the pivotal issue of explicit versus implied authorities, AG Schimel found "permit conditions and rulemaking may no longer be premised on implied agency authority." On this precise issue, Judge McGinnis found "agencies cannot rely on implied authority to impose conditions." Without question, the Outagamie County Circuit Court decision is consistent with OAG–01–16 and contrary to the Dane County Circuit Court decision and your underlying premise for withdrawing OAG–01–16.

So, there are two circuit court decisions: one supporting your position on OAG–01–16 and one antagonistic to your position on OAG–01–16. Relying upon the former while ignoring the latter in your May 1, 2020, letter to DNR is not evenhanded. Your position unfairly prejudices our clients. Moreover, using as legal authority any circuit court decision—particularly one that is before the Supreme Court—is questionable practice.

Equally questionable is your assertion that the "Wisconsin Court of Appeals strongly implied" that "the conclusion at the crux of OAG–01–16 is incorrect." In that case, the court concluded:

> The crux of this case is the interplay between *Lake Beulah* and Act 21. *Lake Beulah* has not been overruled, and neither the circuit court nor the court of appeals may dismiss any statement within *Lake Beulah* as "dictum."
>
> Order Certifying Appeal at 5, *Clean Wis., Inc. v. DNR*, No. 2018AP59 (Wis. Ct. App. Jan. 16, 2019).

Consistent with this finding, a threshold question currently before the Supreme Court in *Clean Wisconsin* is the *Lake Beulah* court's treatment of Act 21; that is, what was meant by the Court in its footnote reference to Act 21. In that footnote, the Court stated that they "agree with the parties that 2011 Wisconsin Act 21 does not affect our analysis in this case. Therefore, we do not address this statutory change any further." *Lake Beulah*, 335 Wis. 2d 47, ¶39 n.31. That's it. Nowhere in the body of the 48-page decision did the Supreme Court discuss Act 21 or its provisions. It would have been astonishing for the Supreme Court to rule on Act 21's transformational change to Wisconsin administrative law in a footnote. We expect the Supreme Court will make short shrift of this assertion.[4]

We will surely debate this issue in our upcoming briefs in *Clean Wisconsin*. But relevant here is the fact when certifying the *Clean Wisconsin* case, the Court of Appeals merely noted they are powerless to ignore Act 21's reference in *Lake Beulah*, even if mere

[4] Even counsel for Clean Wisconsin agrees. "As you know, the Wisconsin Supreme Court issued a decision in 2011 in *Lake Beulah Management Dist.* v. *DNR*. . . *The Court did not address the effect of Wis. Stat. § 227.10(2m)*, Affidavit of Carl A. Sinderbrand (June 16, 2017) See Co-Appellant's Reply Brief at 7. (Emphasis ours.)

dictum. *See Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682 ("We therefore conclude that to uphold the principles of predictability, certainty, and finality, the court of appeals may not dismiss a statement from an opinion by this court by concluding that it is dictum.") While acknowledging in its *background* that the Schimel opinion addressed the high-capacity well permitting backlog,[5] at no point in this *discussion* is OAG–01–16 referenced. Rejecting this opinion without discussing it is *not* fairly implied.

In summary, these opinions—the Dane County Circuit Court decision and the Court of Appeals certification—are invalid legal justification to withdraw OAG–01–16.

**It Is Improper for The Attorney General to Render an Opinion on Issues Pending Before the Wisconsin Supreme Court**

Rendering an opinion on an issue soon to be addressed by the state's highest court would be inconsistent with those principles you endorsed relating to attorney general opinions. In an October 25, 2019, letter, GLLF asked that you decline Gov. Evers August 6, 2019, request that you provide a formal opinion on agency rulemaking authorities. We appreciate you did not issue such an opinion.

But your May 1 letter rescinding OAG–01–16 has the markings of a backdoor attempt to issue an opinion on the implications of Act 21 on DNR's high capacity well permitting program. In that vein, it appears you are using the Dane County Circuit Court decision as a surrogate for your opinion on this matter. You have ample opportunity to brief your support for this decision in the *Clean Wisconsin* case.

In conjunction with your transparency reforms to the AG opinion process, you cite as applicable 77 Op. Att'y Gen. Preface (1988).[6] That 1988 opinion states:

> An opinion should not be requested on an issue that is the subject of current or reasonably imminent litigation, since an opinion of the attorney general might affect such litigation. 62 Op. Att'y Gen. Preface (1973).[7]

The referenced 1973 opinion provides:

> An opinion normally should not be requested on an issue that is the subject of current or reasonably imminent litigation. Presumably, the answer to the issue will be furnished by the court's decision and *opinions of the Attorney General should not be utilized for the purpose of briefing current litigation*. 62 Op. Att'y Gen. Preface (1973). (Emphasis ours.)

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[5] "The DNR thereafter adopted the opinion of the Attorney General and began approving backlogged well applications. . ." *Id.* at 5

[6] Attorney General Josh Kaul, Transparency Reforms to Opinion Process (July 15, 2019), https://www.doj.state.wi.us/news-releases/ag-kaul-announces-transparency-reforms-opinion-process.

[7] 77 Op. Att'y Gen. Preface (1988), https://www.doj.state.wi.us/sites/all/themes/wi-doj-ag/ag/files/77-op-atty-gen-preface.pdf.

In your motion to the Supreme Court on behalf of DNR aligning your position with Clean Wisconsin and opposing DNR's own permits, you state your intent to brief "the effect of 2011 Wis. Act 21 on the [DNR's] authority regarding high-capacity-well permitting."[8] Clearly, you will oppose our clients' positions on the implications of Act 21 on agency authorities. Your May 1 letter essentially advises DNR to implement its high capacity well permit program consistent with the law as you see it and as you will brief it in the *Clean Wisconsin* case. Beyond being inconsistent with your own policies, the letter is not helpful to DNR and is unfair to the regulated community.

**Even If the *Lake Beulah* Decision Is Affirmed in The Current Litigation, DNR Must Still Follow Chapter 227 Rulemaking Procedures.**

Our clients and the entire regulated community strongly oppose any attempt by DNR to implement *Lake Beulah* protocol at this time. Regardless, implementing the high capacity well permit program consistent with the *Lake Beulah* decision would require rulemaking. For example, DNR would have to set forth policies of general application relating to cumulative impact analysis.[9] That can only be done through a rule.

Your May 1 letter presents a related rulemaking concern. There is no dispute that DNR adopted a statutory interpretation of its high capacity well permitting authorities consistent with the OAG–01–16. Any change to that interpretation can only be done through rulemaking.

On December 19, 2019, the Wisconsin Supreme Court issued its decision in *Lamar Central Outdoor, LLC v. DHA.* (GLLF filed an amicus brief on behalf of five Wisconsin associations.) Justice Kelly, writing for a unanimous court, could not have been clearer:

> ¶1 From time to time an administrative agency changes its interpretation of a statute in a manner that adversely affects a regulated activity.
> * * *
> ¶23 The plain meaning of Wis. Stat. § 227.10(1) …is that it describes only one pathway by which an agency can adopt a new interpretation of an ambiguous statute: The agency must adopt a rule.

Rulemaking is vital in promoting fairness by providing notice, consistency, and opportunity to comment. The rulemaking process gives the regulated community the opportunity to engage with potential regulations and express concerns before it binds them. Rulemaking also provides necessary legislative and gubernatorial oversight. So, even assuming the Supreme Court concludes DNR has broad authorities and discretion in implementing its high capacity well permit program, to do so on the permit-by-permit basis

[8] Respondent-Appellant's [DNR] Motion to Modify the Briefing Schedule, https://greatlakeslegalfoundation.org/wwcms/wp-content/uploads/2019/05/HICap_DOJ-DNR-Motion-to-Modify-Briefing-Schedule_05-02-19.pdf.

[9] DNR's attempts to implement its high capacity well program post *Lake Beulah* resulted in various policies of general application that required rulemaking. Following OAG–01–16 allowed DNR to avoid Chapter 227 litigation of those policies.

rather than rulemaking would be inconsistent with the fundamental principles behind Wisconsin's Administrative Procedures Act. It would violate Chapter 227.

For example, in *Wisconsin Elec. Power Co. v. DNR*, the court held that despite a rulemaking exemption for fact-specific permits, DNR's practice of "adoption and uniform application" of chlorine limitations in its permit approvals counted as a statement of policy and therefore a rule, even though DNR never announced or placed the limitations in a document of general application. 93 Wis. 2d 222, 235, 287 N.W.2d 113 (1980). In *Lamar v. DHA*, the Department of Transportation (DOT) changed its interpretation of a statute and the court ruled the changed interpretation required rulemaking, even though DOT only applied the change in an administrative proceeding and never formally announced it. 2019 WI 109, ¶39, 389 Wis.2d 486, 936 N.W.2d 573. Thus, even unwritten policies can trigger rulemaking. What matters is that the agency consistently apply its policies.

We cannot envision a scenario in which DNR can implement a high capacity well permit program consistent with *Lake Beulah* or your May 1 letter without rulemaking.

Thank you for this opportunity to provide our thoughts on this important matter,

Sincerely,

/s/

Robert I Fassbender
President and General Counsel
Great Lakes Legal Foundation

Cc: Preston Cole, Secretary, Department of Natural Resources
Cheryl Heilman, Chief Legal Counsel, Department of Natural Resources
Ryan Nilsestuen, Chief Legal Counsel, Office of Governor Tony Evers
Members, Joint Committee for Review of Administrative Rules
Assembly Speaker Robin Vos
Senate Majority Leader Scott L. Fitzgerald