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DNRDGGuidanceComment@wisconsin.gov

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July 6, 2020

Mr. Adam Freihoefer
101 S. Webster St.
Madison, WI 53707

Re: Comments on Guidance Document DG-20-0002-D, "High Capacity Well Application Review Process Website"

Dear Mr. Freihoefer,

The Great Lakes Legal Foundation (GLLF) provides these comments on Guidance Document DG-20-0002-D, "High Capacity Well Application Review Process Website," published June 15, 2020. We oppose the issuance of this guidance for the reasons set forth here.

As discussed more fully below, DNR cites the *Lake Beulah* Wisconsin Supreme Court decision as its authority to compel cumulative impact analysis when reviewing high capacity well permit applications. DNR has no legal authority to impose this requirement. And even if DNR had the requisite statutory authority, an agency can only issue such regulatory edicts through rulemaking. This fundamental principle of fairness to those regulated by state agencies was recently affirmed by the Supreme Court in *Wisconsin Legislature v. Palm,* 2020 WI 42, 391 Wis.2d 497, 942 N.W.2d 900.

In addition, the validity of those policies set forth in the proposed guidance is currently before the Wisconsin Supreme Court in *Clean Wisconsin Inc. v. DNR* (Appeal No. 2018AP0059). In that case, GLLF represents eight Wisconsin business associations who are supporting Wisconsin farmers who were lawfully granted high capacity well permits by DNR. We view this effort — arising from Attorney General Josh Kaul's withdrawal of former Attorney General Schimel's opinion on DNR's high capacity well permit authority — as a thinly veiled attempt by the Attorney General to prejudice this case to the detriment of our clients and those farmers previously granted permits by DNR.

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I. Background—We've Seen This Movie Before and It Does Not End Well for Wisconsin Farmers.

In *Clean Wisconsin v. DNR*, Clean Wisconsin got a Dane County Circuit Court to invalidate eight high capacity well permits. All these wells were for agricultural irrigation; thus, the ruling denied access to groundwater needed to grow crops and raise livestock. DNR initially defended its permits at the circuit and appellate court level. However, at the Wisconsin Supreme Court, Kaul, on behalf of DNR, filed a motion to switch sides and in all "meaningful respects" he will be urging the Court to vacate DNR's own permits. That is, DNR will argue in its briefs that DNR's permits are unlawful.

When unveiling the policies set forth in the proposed guidance, DNR relied entirely upon Kaul's May 1 letter withdrawing the Schimel opinion, to wit: "Attorney General Kaul says that the DNR has an obligation, if not a duty, to pay very close attention to the *science* when considering whether to issue or deny high capacity well permit applications." (Emphasis ours.) DNR's position in *Clean Wisconsin v. DNR* will be that the science requires the Supreme Court to affirm the Dane County court decision to invalidate the eight well permits.

But where is the science on cumulative impact analysis? We assert that science is not particularly relevant at this point in the ongoing high capacity well debate. DNR will surely endorse the sketchy science behind the circuit court decision. For example, in their brief at the circuit court, Clean Wisconsin quotes from a DNR analysis that "the 1.7-inch model drawn down at Pheasant Lake, coupled with the calculated drawdown for the not yet constructed Richfield Dairy well, would reach the level [DNR] considered a significant impact for the lake (more than 2.5-3 inches)." Clean Wisconsin conveniently omits the next sentence in that exhibit in which DNR states "[h]owever, because the impact is modeled for steady state conditions at the maximum conditioned pumping rate, it is likely that the actual drawdown would be less than 1.7 inches." (Exhibits available upon request.)

This is not science. Clean Wisconsin, as will DNR before the Supreme Court, is simply using Pleasant Lake and other water bodies most affected by precipitation for their useful optics to help block agricultural development. These seepage lakes recede in dry weather and fill when it's wet. Agricultural wells are not relevant in any meaningful way to either groundwater or lake levels in the region.

Both Pleasant Lake and Long Lake that are subject to DNR's Central Sands Lakes Study are now at all-time highs. Groundwater depth as measured in eight existing agricultural wells in the central sands region are on average over seven feet above those levels when the wells were installed over 50 years ago. Even DNR acknowledges there is no current evidence of groundwater depletion in the central sands region. In a July 2019 update on the Central Sands Lakes Study, DNR notes that "lake levels on each of the three study lakes, are very high and continue to rise. This is similar to precipitation increases that have resulted in groundwater flooding (high water table) in many areas across the state." It appears the groundwater levels are so high in the region that it's literally spilling out of the ground.

It is a fact, then, that the groundwater and lake levels in the central sands region are approaching or exceeding all-time highs. Despite no scientific evidence that there is a threat from the wells in that region, DNR will argue in court in the months ahead that the *science* dictates those well permits be revoked.

This is how we see the proposed guidance hurting farmers needing water to irrigate crops and raise livestock. The guidance requires DNR to assess high capacity well permit applications using unproven, costly and project killing cumulative impact analysis. This is why Clean Wisconsin fights so hard for such an analysis. Previous attempts to use this black box analysis essentially froze the permit program until the Schimel opinion pointed out DNR had no authority to require such analysis.

II. DNR Lacks Statutory Authority to Impose the Proposed Changes to the High Capacity Well Application Review Process.

Administrative agencies only have authority if the Wisconsin legislature explicitly confers it on them. Wisconsin law explains that statutes "containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer…or augment the agency's rule-making authority." Wis. Stat. § 227.11 (2)(a)1. A statute "describing the agency's general powers or duties" also does not confer authority. Wis. Stat. § 227.11 (2)(a) 2.

DNR bases its new high capacity well-review process on authority from Wis. Stat. §§ 281.11 and .12. But Wis. Stat. §§ 281.11 and .12 are, by their very titles, "Statement of policy and purpose" and "General department powers and duties." And under Wis. Stat. § 227.11 (2)(a)1 and 2, that means Wis. Stat. §§ 281.11 and .12 cannot provide explicit delegations of authority.

In addition, the Wisconsin Supreme Court plainly upheld Schimel's opinion on Act 21 in *Wisconsin Legislature v. Palm*. In that case, the court stated three things about Act 21:

- First, it acknowledged that with Act 21 "the Legislature significantly altered our administrative law jurisprudence by imposing an "explicit authority requirement" on our interpretations of agency powers." *Id.*, ¶51.
- Second, it stated that Act 21's "explicit authority requirement is, in effect, a legislatively-imposed canon of construction that *requires us to narrowly construe imprecise delegations of power* to administrative agencies." *Id.*, ¶52 (emphasis added).
- And third, it noted that Act 21 "prevents agencies from circumventing this new 'explicit authority' requirement by simply utilizing broad statutes describing the agency's general duties or legislative purpose as a blank check for regulatory authority." *Id.*

In other words, Act 21 significantly changed the law, it narrowly construes interpretations of delegated authority, and it prevents agencies from relying on broad, descriptive statutes for authority.

Compare these conclusions with how Attorney General Schimel approached parallel questions:

- First, Attorney General Schimel stated: "Act 21 restricts that authority by withdrawing DNR's ability to implement or enforce any standard, requirement, or threshold, including as a term or condition of a permit issued by the agency, unless explicitly permitted in statute or rule."
- Second, he looked to the statute and found: "Neither Wis. Stat. § 281.11 nor § 281.12 explicitly allows DNR to require any term or condition on high capacity well permits."
- And finally, he concluded that because the statutes do not explicitly allow DNR to act the way they did, they "do not give DNR the authority to require or impose any term or condition absent explicit statutory or rule-based language sanctioning that specific term or condition."

Thus, far from throwing doubt on the Schimel opinion's legitimacy, the most recent and binding case law on Act 21 expressly affirms Attorney General Schimel's use of the statute to analyze DNR's authority. Regardless of whether Attorney General Kaul rescinded the Schimel opinion, the court upheld his interpretation, meaning his reading of DNR's high capacity well permit authority remains valid.

The legislature clearly specified the explicit boundaries of the high capacity well permit program when it set the criteria in Wis. Stat. § 281.34 for high capacity wells. Any policies, such as cumulative impact analysis, residing outside those clear boundaries lack statutory authority.

III. The Proposed Changes to the High Capacity Well Application Review Process Must Go Through Rulemaking—Issuing A Guidance Document is Insufficient.

Even if the legislature delegated DNR authority like it claims, any changes in policy must go through rulemaking. Guidance documents simply provide insufficient notice for changed interpretations of the law. Under Wisconsin law, agencies must create a rule for "each statement of general policy and each interpretation of a statute which it specifically adopts to govern its enforcement or administration of that statute." Wis. Stat. § 227.10.

Under the Wisconsin Supreme Court's ruling in *Lamar Central Outdoor, LLC v. DHA*, new interpretations and *changes in interpretation* must go through rulemaking. As the court stated:

> But when an agency changes its interpretation of an ambiguous statute, it is engaging in rulemaking… Under those circumstances, "[t]hose who are or will be affected generally by this interpretation should have the opportunity to be informed as to the manner in which the terms of the statute regulating their operations will be applied." *Id*. The agency informs those affected by the changed interpretation by promulgating a

new rule. *Id.* ("This is accomplished by the issuance and filing procedures established by ss. 227.01(4) and 227.023(1).").

Lamar Central Outdoor, LLC v. DHA, 2019 WI 109, ¶24, 389 Wis.2d 486, 936 N.W.2d 573.

Rulemaking alone allows adequate "advance notice of permissible and impermissible conduct." 1 Richard J. Pierce, Jr., Administrative Law Treatise § 6.8 (4th ed. 2002). It informs the regulated how and when an agency will regulate them. *See Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530 (D.C. Cir. 1982). Thus, rulemaking upholds "[t]raditional concepts of due process…preclud[ing] an agency from penalizing a private party for violating a rule without first providing adequate notice." *Satellite Broad. Co. v. F.C.C.*, 824 F.2d 1, 3 (D.C. Cir. 1987).

The process of issuing a guidance document simply does not provide the same level of protection as rulemaking—nor is it intended to. A guidance document looks like a rule except for one important distinction: guidance documents cannot have the force of law. Wis. Stat. § 227.112(3).

A policy has the force of law when "criminal or civil sanctions can result as a violation; *where licensure can be denied*; and where the interest of individuals in a class can be legally affected through enforcement of the agency action." *Cholvin v. DHFS*, 2008 WI App 127, 313 Wis. 2d 749, 758 N.W.2d 118 (emphasis added). DNR's changed interpretation of the statute will apply new requirements to permit seekers—and failure to comply with the new requirements could lead to the denial of a license.

Plainly, DNR's actions under the proposed guidance implicate the force of law. And so, issuing this guidance document is insufficient due process protections due farmers whose livelihood depend upon DNR's high capacity well policies. The purpose and plain meaning of the Wisconsin Administrative Procedures Act is that agencies cannot regulate through guidance, bulletins, or press releases; in this instance, a two-page narrative with a rudimentary flowchart depicting the permit review process.

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 if Legal Counsel, Department of Natural Resources
Ryan Nilsestuen, Chief Legal Counsel, Office of Governor Tony Evers
Members, Joint Committee for Review of Administrative Rules