August 11, 2020

BY HAND DELIVERY

Ms. Sheila Reiff
Clerk of the Supreme Court
110 East Main Street, Suite 215
Madison, WI 53703

RE: Clean Wisconsin Inc. v DNR Case No. 2018AP59

Dear Ms. Reiff:

Enclosed please find an original and nine copies of the requested memorandum discussing the status of the certified appeal and the impact of the decision in *SEIU, Local 1 v. Vos* in the above appeal. Copies are being mailed this date to counsel of record.

Sincerely,

Robert I. Fassbender
GREAT LAKES LEGAL FOUNDATION

Enclosure

cc: Tressie Kelleher Kamp
Kathryn Nekola
Evan Feinauer
Carl Sinderbrand
Henry Koltz
Eric McLeod
Lisa Lawless
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SUPREME COURT OF WISCONSIN
Appeal No. 2018AP0059

Clean Wisconsin, Inc. and
Pleasant Lake Management District,

Petitioners–Respondents,

v.

Wisconsin Department of Natural
Resources,

Respondent–Appellant,

Wisconsin Manufacturers & Commerce,
Dairy Business Association,
Midwest Food Processors Association,
Wisconsin Potato & Vegetable Growers Association,
Wisconsin Cheese Makers Association,
Wisconsin Farm Bureau Federation,
Wisconsin Paper Council and
Wisconsin Corn Growers Association

Intervenors-Co-Appellants

INTERVENORS-CO-APPELLANTS' MEMORANDUM ON CASE STATUS AND WISCONSIN LEGISLATURE'S MOTION TO INTERVENE CONSIDERING *SEIU, LOCAL 1 v. VOS.*

On July 28, 2020, the court ordered the parties and Wisconsin Legislature to file simultaneous letters/briefs no later than August 11 discussing the status of the certified appeal and the impact of *SEIU, Local 1 v. Vos*, if any, on the appeal and pending motion to intervene filed on April 25, 2019.

DISCUSSION

Once the court addresses the legislature's motion to intervene, briefing on the merits will be in order. The standard for legislative intervention has been extensively briefed by all parties in response to the court's May 30, 2019, order requesting legal memoranda "that address the correct legal standard for the Wisconsin Legislature's motion to intervene and whether the Wisconsin Legislature meets that standard." The legislature met that standard and their motion should be granted.

The issues before the court remain of paramount import to Intervenors-Co-Appellants business associations and their members. The continued confusion over DNR's authorities under the state's high capacity well permit enabling statutes, and the implications of 2011 Wis. Act 21 on all regulatory programs, should be resolved sooner rather than later. The court can provide such regulatory certainty through this case. At no time throughout this litigation has such certainty been more needed.

I. Recent Actions by The Attorney General and The Department of Natural Resources Recreated Regulatory Uncertainty for Those Needing High Capacity Well Permits.

In September 2016, the eight farmers targeted in this case by Clean Wisconsin learned that the Department of Natural Resources (DNR) had finally approved their high capacity well permit applications. For most of them, the

approval came after years of regulatory uncertainty and delay, with some permit requests dated back to March 2014. These delays were the result of the confusion created by *Lake Beulah Management District v. DNR*, which decreed that DNR had authority and a general duty to assess high capacity well permit applications on a case-by-case basis to determine their impact on the *waters of the states*. 2011 WI 54, ¶63, 335 Wis.2d 47, 799 N.W.2d 73 ("to comply with this general duty, the DNR must consider the environmental impacts of a proposed high capacity well when presented with sufficient concrete, scientific evidence of potential harm to the waters of the state."). These assessments were not just to cover an individual well subject to an application, but also nearby wells through unproven cumulative impact analysis. With no intelligible principles from the legislature or the courts to guide them, DNR was ill-equipped to undertake such a challenge and applications simply sat idle.

To alleviate the regulatory confusion created by *Lake Beulah*, the Wisconsin Assembly requested an attorney general opinion from Attorney General Schimel on DNR's authority in light of 2011 Wis. Act 21's explicit authority requirement.[1] Applying these limitations on agency authority, Schimel's AG opinion stated that Wis. Stat. §§ 281.11-.12 gave DNR no authority to regulate,

[1] Letter from Robin Voss, Speaker of the Wis. State Assembly, to Brad Schimel, Wis. Attorney General (Feb. 1, 2016).

and so could not require a cumulative impact analysis. OAG–01–16 ("Interpreting Wis. Stat. §§281.11-.12 as explicit authority to impose a specific condition would bypass the strict limitation of agency authority set forth by the Legislature.") In turn, DNR approved the waiting farmers' high capacity well permits.

But before the farmers could install and pump water from their hard-won wells, Clean Wisconsin sued DNR on November 11, 2016, in Dane County Circuit Court for not taking into consideration the public trust responsibility allegedly found in Wis. Stat. §§ 281.11-.12 when approving the permits. On October 11, 2017, the circuit court agreed with Clean Wisconsin and vacated the farmers' permits. *Clean Wis., Inc. v. DNR*, No. 16-CV-2817, 2016 WL 11661490 (Wis. Cir. Ct. Dane Cty.). The farmers did not join the litigation but instead relied on the Department of Justice (DOJ) and DNR to defend the well permits. Upon appeal, the Court of Appeals certified the case to this court.

Once the Supreme Court took the case on April 9, 2019, things began to unravel in the court and at DNR. First, Attorney General Kaul, for DOJ and on behalf of DNR, petitioned to switch sides and oppose the permits approved under Wis. Stat. § 281.34. In its motion, DOJ/DNR stated its intent to take positions that conflict with its "previous positions regarding the public trust doctrine; the import of this Court's decision in *Lake Beulah*; and the effect of 2011 Wis. Act 21 on [DNR's] authority regarding high capacity well permitting." DNR Mot. to Modify

Briefing Schedule (May 2, 2019), at 3. In all "meaningful respects," DNR will urge the court to vacate its own permits. Those farmers who reasonably trusted DNR to defend its permits were left high and dry.

Attorney General Kaul went further—despite this ongoing litigation which will determine the boundaries of DNR's authority to regulate high capacity wells, he formally withdrew Attorney General Schimel's Act 21 opinion.[2] There were questions over the legal basis of Kaul's decision and the appropriateness of issuing such decision considering this case addressing an identical issue.[3] Mostly, business groups were concerned Kaul was encouraging 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.[4]

These concerns were well founded. As a result of Kaul's withdrawal of the Schimel opinion, DNR announced it would once again make "a fact-specific determination in each case and will consider environmental impacts when reviewing a proposed high capacity well application if presented with sufficient concrete, scientific evidence of potential harm."[5] In other words, back to the

[2] Letter from Josh Kaul, Wisconsin Attorney General, to Secretary Preston Cole, Wisconsin Department of Natural Resources (May. 1, 2020), Ex. A.

[3] *See* Letter from GLLF to Josh Kaul, Wis. Attorney General (May 11, 2020), Ex. B.

[4] *Id.*

[5] Wisconsin Department of Natural Resources, High Capacity Well Application Review Process, https://dnr.wisconsin.gov/topic/Wells/HighCap/Review.html (last visited August 10, 2020). The website provides no clarity on how it will enforce this standard.

unintelligible *Lake Beulah* criteria, including unproven, costly and project killing cumulative impact analysis.[6]

Meanwhile, the legislature passed 2017 Wis. Act 369, which allows the legislature to intervene in litigation when a case triggers one of three legislative interests, including a challenge to the constitutionality or the construction or validity of a statute. Wis. Stat. § 803.09(2m). This court upheld the facial constitutionality of legislative intervention in *SEIU, Local 1 v. Vos*, 2020 WI 67, discussed further below.

The legislature clearly has an institutional interest in this litigation. The history of this case and the related high capacity well policies evidence this interest at the highest level. Moreover, a "representative legislature provides the most legitimate institution for identifying the opinions of the people, collecting them together, and negotiating their interests." Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 Fla. L. Rev. 1, 23 (2018). The court would be well served having them brief the matter.

II. Because the Legislature Met the Requirements of Wis. Stat. § 803.09(2m) Its Petition for Intervention Should Be Granted.

In its May 30, 2019, order, the court directed parties and the Wisconsin Legislature to file legal memoranda "that address the correct legal standard for the

[6] *See* Letter from GLLF to Adam Freihoefer, Department of Natural Resources (July 6, 2020), Ex. C.

Wisconsin Legislature's motion to intervene and whether the Wisconsin Legislature meets that standard." Specifically, the memoranda were to address the interplay of the legislative intervention provisions in 2017 Wis. Act 369 that provides the legislature with an unqualified right of intervention and Wis. Stat. § 227.53(l)(d) relating to intervention at the circuit courts.

In response to this order, all parties and the legislature filed memoranda on June 19, 2019, and response memoranda on July 9, 2019. These memoranda by the four parties provided an exhaustive analysis of Act 369 provisions relating to legislative intervention.

DNR argues that Wis. Stat. § 227.53(1)(d) is the exclusive means to intervene, including timing and standing requirements that would bar the legislature from intervening in this case. If DNR is correct, the legislature and any other interested parties would have no mechanism to intervene in Chapter 227 cases at the appellate level. The legislature asserts that Wis. Stat. § 803.09(2m) provides an unconditional right to intervene in this case. The legislature is correct and the motion to intervene should be granted.

Wis. Stat. § 809.13 provides:

> A person who is not a party to an appeal may file in the court of appeals a petition to intervene in the appeal. A party may file a response to the petition within 11 days after service of the petition. The court may grant the petition upon a showing that the petitioner's interest meets the requirements of s. 803.09(1). (2). or (2m).

There are no statutory or judicial qualifications on this provision, nor do DNR or Clean Wisconsin cite any. Given the application of Wis. Stat. § 809.13, the requirements of Wis. Stat. § 803.09—whether (1), (2), or (2m)—come into play. Wis. Stat. § 803.09(2m), as created by Act 369, provides:

> *When a party to an action challenges in state or federal court the constitutionality of a statute*, facially or as applied, challenges a statute as violating or preempted by federal law, *or otherwise challenges the construction or validity of a statute*, as part of a claim or affirmative defense, the assembly, the senate, and the legislature may intervene as set forth under s. 13.365 at any time in the action as a matter of right by serving a motion upon the parties as provided in s. 801.14.
>
> (Emphasis added.)

In this provision, the legislature set forth an unqualified right of intervention. *SEIU, Local 1 v. Vos*, as discussed below, imposes no conditions on this right to intervene other than the requirement that it be applied in a constitutionally valid manner. To the extent this is a qualification, it is a qualification that applies to all enactments.

Wis. Stat. § 809.13(2m) requires the litigation involve a challenge to "the constitutionality of a statute, facially or as applied, challenges a statute as violating or preempted by federal law, or otherwise challenges the construction or validity of a statute." Here, Clean Wisconsin challenges the constitutionality of Wis. Stat. § 227.10(2m) as applied, arguing that DNR's interpretation of (2m) is "an unconstitutional abrogation of DNR's Public Trust authority and duties."

Wisconsin Legislature's Pet. to Intervene (April 25, 2019), Exhibit A. Additionally, Clean Wisconsin challenges the construction of a statute, arguing DNR's application of Wis. Stat. § 227.10(2m) must be rejected because it misconstrues the statute's use of the word "explicit" and creates "an insufficient basis to regulate." Clean Wisconsin Resp. Br. (June 1, 2018), at 26, 28. Finally, Clean Wisconsin challenges the validity of the statute, arguing the DNR's construal of "explicit" to mean "statutory authority must be so specific as to leave nothing to the discretion of the agency is inimical to the structure of administrative law and the Administrative Procedures [sic] Act." *Id.* at 28.

Similarly, DOJ, on behalf of DNR, has stated in its motion for a revised briefing schedule that it intends in all "meaningful respects" to urge the court to vacate its own permits and align its positions with Clean Wisconsin.

The legislature's request to intervene as a matter of right is consistent with 2017 Wis. Act 369 and the statute's clear intent that the legislature be given an opportunity to defend its enactments. The need for such intervention is nowhere more evident than when the attorney general and DNR not only refuse to defend legislative enactments such as Act 21 but argue that the court should invalidate the legislative enactments and permits previously approved under them.

Having established the institutional interests of the legislature—litigation challenging the constitutionality and validity of legislative enactments—the

legislature can then intervene "at any time in the action as a matter of right by serving a motion upon the parties as provided in s. 801.14." Wis. Stat. § 803.09(2m). Attaching any additional requirements would undermine the very concept of intervention as a matter of right and require courts to override legislative policy choices with their own.

III. The Court in *SEIU, Local 1 v. Vos* Merely Articulated the Obvious: Upon Surviving A Facial Constitutional Challenge, Act 369 Must Still Be Applied in a Constitutionally Acceptable Manner.

Of all the provisions in the extraordinary session laws challenged in *SEIU, Local 1 v. Vos*, the right of intervention by the legislature was less worrisome for the majority from a constitutional perspective.

> In at least some cases, we see no constitutional violation in allowing the legislature to intervene in litigation concerning the validity of a statute, *at least where its institutional interests are implicated.* See Wis. Stat. § 13.365; Wis. Stat. § 803.09(2m).
>
> *SEIU, Local 1 v. Vos,* 2020 WI 67, ¶72.

Justice Rebecca Dallet concurred in part, dissented in part, and on this issue opined:

> I do not contest that the *legislature's institutional interest* may permit it to intervene in litigation on its own branch's behalf. For this reason, I join Justice Hagedorn's opinion with respect to 2017 Wis. Act 369, § 5 (Wis. Stat. § 13.365) and § 97 (Wis. Stat. § 803.09(2m)).
>
> *Id.*, n. 11, ¶174.

In his ruling, Dane County Circuit Court Judge Remington similarly found:

> The plaintiffs, (and the Governor), have not, in this court's opinion, adequately explained how to distinguish the points made above, with the fact that the Senate and the Assembly, and various committees, have been parties for many years in many other cases. In fact, in his brief, the Attorney General seems to concede that the Senate and Assembly should be allowed to intervene. See Dkt. 75, at 41 ("[a]nd *even if members of the Legislature had not been named as defendants, they could (and surely would) have moved to intervene and defend Act 369. That is exactly how the system should work [when the Attorney General refuses to defend the validity of a state statute].")*.
>
> *SEIU, Local 1 v. Vos*, No. 19CV302, 2019 WL 1396826, at 21 (Wis. Cir. Mar. 26, 2019) (emphasis added).

Wis. Stat. § 803.09 (2m), as created by Act 369, provides a clear declaration of interest when a party "*challenges in state or federal court the constitutionality of a statute*, facially or as applied" or "*or otherwise challenges the construction or validity of a statute.*" This interest is clear, valid, and self-evident. It is not the province of the courts to qualify or otherwise question it. Such "line-drawing that is effectively policy-making, [is] a clear overstep of [the court's] constitutional role." *SEIU, Local 1 v. Vos*, 2020 WI 67, ¶179.

We urge the court not to second-guess the legitimacy of the legislature's interests in *any* cases involving constitutional or other challenges to the validity of a statute.

CONCLUSION

For the reasons discussed, Intervenors-Co-Appellants ask the court to recognize the legislature's absolute right to intervene by granting the legislature's motion to intervene. It is time to set a briefing schedule on the merits.

Respectfully summitted,

Robert I. Fassbender (1013985)
Great Lakes Legal Foundation

Attorney for Intervenors–Co-Appellants

Wisconsin Manufacturers & Commerce,
Dairy Business Association,
Midwest Food Products Association,
Wisconsin Potato & Vegetable Growers Association,
Wisconsin Cheese Makers Association,
Wisconsin Farm Bureau Federation,
Wisconsin Paper Council and
Wisconsin Corn Growers Association

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STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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May 1, 2020

SENT VIA EMAIL

Secretary Preston Cole
Department of Natural Resources
101 South Webster Street
Madison, WI 53703

Dear Secretary Cole,

The Department of Natural Resources (DNR) has asked about the continuing validity of a previous opinion from this office, OAG–01–16 (May 10, 2016), https://www.doj.state.wi.us/sites/default/files/dls/ag-opinion-archive/2016/2016.pdf. In that opinion, this office concluded that 2011 Wis. Act 21 (specifically, Wis. Stat. § 227.10(2m)) prohibits DNR from conducting environmental review of high-capacity well applications and that, in light of Act 21, the Wisconsin Supreme Court's contrary conclusion regarding such environmental review in *Lake Beulah Management District v. DNR*, 2011 WI 54, ¶¶ 39, 63, 335 Wis. 2d 47, 799 N.W.2d 73, is "no longer controlling." OAG–01–16, ¶ 16.

DNR, following that opinion, issued multiple high-capacity well approvals that were challenged on the grounds that the agency failed to properly consider the impacts the wells could have on waters of the state. *See Clean Wis., Inc. v. DNR*, No. 16-CV-2817 (Wis. Cir. Ct. Dane Cty.) (consolidated). The challengers argued that the well approvals disregarded *Lake Beulah*'s holding that DNR has "broad authority and a general duty . . . to manage, protect, and maintain waters of the state," including "the authority and a general duty to consider the environmental impact of a proposed high capacity well on waters of the state," 2011 WI 54, ¶¶ 39, 63.

The circuit court vacated all but one of the challenged well approvals. Order at 13, *Clean Wis.*, No. 16-CV-2817 (Wis. Cir. Ct. Dane Cty. Oct. 11, 2017). It explained that "[t]he only reason the [high-capacity well] permits were approved was based on the incorrect OAG decision which contradicts the holding in *Lake Beulah*." *Id.* "Absent the Attorney General opinion," the court wrote, "DNR would have denied all but one of these well applications" due to the adverse impacts the proposed wells would have

on navigable waters. *Id.* at 12–13. Subsequently, in an order certifying that case to the Wisconsin Supreme Court for review, the Wisconsin Court of Appeals recognized that "*Lake Beulah* has not been overruled" and that "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).

Thus, 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.[1]

Sincerely,

Joshua L. Kaul
Attorney General

JLK:GJK:njz

Cc via email: Cheryl Heilman, DNR (Chief Legal Counsel)

[1] The case in which those orders were issued is currently pending before the Wisconsin Supreme Court. While the opinion in that case will likely resolve whether OAG-01-16 accurately interpreted Wisconsin law, the withdrawal of OAG-01-16 resolves any uncertainty as to whether DNR should apply the reasoning and conclusions of that opinion to permitting decisions made prior to the issuance of the supreme court's decision.

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.

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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

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[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

Great Lakes Legal Foundation

Sent Via Email to:
DNRDGGuidanceComment@wisconsin.gov

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.

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
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