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## **Attorney General Brad Schimel Validates Sweeping Limits on Agency Authority**

*2011 WI Act 21 requires explicit delegation of authorities to agencies, making it clear that regulatory mandates may no longer arise from implied authority.*

Madison, WI – On May 10, Attorney General Brad Schimel issued a formal opinion finding “Act 21 makes clear that permit conditions and rulemaking may no longer be premised on implied agency authority.”<sup>1</sup> Given the lack of explicit authority in the statutes, for example, “a monitoring well condition on a high capacity well permit is prohibited and unenforceable.”<sup>2</sup> Similarly, DNR lacks authority to require cumulative impact analysis as a well permit condition.

Consistent with the Foundation’s position and the court’s decision in the *New Chester* case<sup>3</sup>, Schimel also found that “much of the [Wisconsin Supreme] Court’s reasoning in *Lake Beulah*, including the breadth of the DNR’s public trust authority. . . , is no longer controlling.”<sup>4</sup>

The Attorney General Opinion reflects the clear intent of Gov. Walker and the legislature when enacting Act 21. When introducing his special session legislation that became Act 21, Gov. Walker highlighted its key purpose:

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.<sup>5</sup> (Emphasis ours.)

Whether enacting rules, imposing permit conditions, or exercising public trust authority, the Department of Natural Resources (DNR) and other agencies must point to explicit statutory delegations or their actions are legally void and unenforceable.

The Attorney General Opinion is consistent with the November 12, 2015, decision by Judge McGinnis, Outagamie County Circuit Court, that held DNR imposed unlawful permit conditions for high capacity wells. Judge McGinnis held “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.”<sup>6</sup>

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“The import of the Attorney General opinion transcends issues relating to DNR’s permit authority over high capacity wells,” says Bob Fassbender, President, the Great Lakes Legal Foundation (GLLF) “The court in *New Chester* and now the Attorney General have made it abundantly clear that agencies have only those powers tethered to explicit statutory delegations.

“Act 21 targeted expansive court interpretations such as *Lake Beulah* that found sweeping regulatory authorities in broad prefatory or general statutory provisions. In that regard, the holdings in those cases are no longer valid. This is not a shift in the law as much as a reassertion that the legislature is the source of agency authority, not the courts or the agencies themselves,” says Fassbender.

*The Great Lakes Legal Foundation is a non-profit legal foundation providing legal and policy expertise to advance economic growth and increase job opportunities in the upper Midwest.*

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<sup>1</sup> OAG-01-16 (May 10, 2016), p. 15, ¶29.

<sup>2</sup>Id. p. 22, ¶50.

<sup>3</sup> On behalf of the Wisconsin Manufacturers and Commerce, Dairy Business Association, Midwest Food Processors Association, and Wisconsin Potato and Vegetable Growers Association, the Great Lakes Legal Foundation intervened in the case. *New Chester Dairy v. DNR*, No. 14CV1055 (Wis. Cir. Ct. Outagamie Cty. Dec. 2, 2015).

<sup>4</sup> Id. P. 8, ¶16

<sup>5</sup> Walker, Regulatory Reform Informational Paper, (Dec. 21, 2010.). <http://walker.wi.gov/newsroom/press-release/regulatory-reform-info-paper>.

<sup>6</sup> *New Chester Dairy*, at p. 6.