Axley

CARL A. SINDERBRAND
csinderbrand@axley.com
(608) 260-2472

MADISON
2 East Mifflin Street
Suite 200
Madison, WI 53703
PO Box 1767
Madison, WI 53701-1767
tel: (608) 257-5661
fax: (608) 257-5444

WAUKESHA
N20W22961
Watertown Road
Waukesha, WI 53186
tel: (262) 524-8500
fax: (262) 524-9200

April 12, 2017

Honorable Valerie L. Bailey-Rihn
Dane County Circuit Court, Branch 3
Dane County Courthouse
215 South Hamilton Street
Madison, WI 53703

RE: *Clean Wisconsin, et al. v. DNR*, Case Nos. 16-CV-2817, *et seq.*

Dear Judge Bailey-Rihn:

Enclosed please find Petitioners' Notice of Motion and Motion for Fees and Costs, together with a supporting brief and affidavits.

Thank you for your attention to this matter.

Sincerely,

AXLEY BRYNELSON, LLP

Electronically signed by Carl A. Sinderbrand
Carl A. Sinderbrand

CAS:sal
Enclosures
cc: Jennifer L. Vandermeuse, Assistant Attorney General
Attorney Robert L. Fassbender
Attorney Kathryn Nekola
Dr. Frances Rowe
Mr. Tom Kunes

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 3

CLEAN WISCONSIN, INC.
634 West Main Street, Suite 300
Madison, WI 53703

and

PLEASANT LAKE MANAGEMENT DISTRICT
P.O. Box 230
Coloma, WI 54930,

Petitioners,

v.

WISCONSIN DEPTARMENT OF
NATURAL RESOURCES,
101 South Webster Street
Madison, WI 53707,

Respondent.

Case Nos. 16-CV-2817
16-CV-2818
16-CV-2819
16-CV-2820
16-CV-2821
16-CV-2822
16-CV-2823
16-CV-2824

Case Code: 30607
Administrative Agency Review

NOTICE OF MOTION AND MOTION
FOR FEES AND COSTS UNDER WIS. STAT. § 895.044

TO: Attorney Jennifer L. Vandermeuse
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

PLEASE TAKE NOTICE that the Petitioners will move the Court, the Honorable Valerie L. Bailey-Rihn presiding, on the 26th day of April, 2017, at 1:30 p.m., at the Dane County Courthouse, 215 South Hamilton Street, Madison, Wisconsin, for an order awarding Petitioners their attorneys' fees and other costs incurred in connection with Respondent's motion to dismiss, pursuant to Wis. Stat. § 895.044. The grounds for this motion are set forth in Petitioners' accompanying brief and affidavits.

Dated this 12th day April, 2017.

AXLEY BRYNELSON, LLP

Electronically signed by Carl A. Sinderbrand
Carl A. Sinderbrand
SBN: 1018593
Attorneys for Petitioners

2 East Mifflin Street, Suite 200
P.O. Box 1767
Madison, WI 53701
Tel. 608-257-5661
Fax 608-257-5444

Electronically signed by Kathryn Nekola
Kathryn Nekola
SBN: 1053203
Attorney for Clean Wisconsin, Inc.

634 W. Main Street, Suite 300
Madison, WI 53707
Tel. 608 251-7020 ext. 14

STATE OF WISCONSIN | CIRCUIT COURT Branch 3 | DANE COUNTY

CLEAN WISCONSIN, INC.
634 West Main Street, Suite 300
Madison, WI 53703

and

PLEASANT LAKE MANAGEMENT DISTRICT
P.O. Box 230
Coloma, WI 54930,

Petitioners,

v.

WISCONSIN DEPTARMENT OF
NATURAL RESOURCES,
101 South Webster Street
Madison, WI 53707,

Respondent.

Case Nos. 16-CV-2817
16-CV-2818
16-CV-2819
16-CV-2820
16-CV-2821
16-CV-2822
16-CV-2823
16-CV-2824

Case Code: 30607
Administrative Agency Review

AFFIDAVIT OF CARL A. SINDERBRAND

STATE OF WISCONSIN)
COUNTY OF DANE)

I, Carl A. Sinderbrand, being duly sworn under oath, deposes and states as follows:

1. I am an attorney admitted to practice law in the State of Wisconsin, and have been so licensed continuously since 1978.

2. I am a senior partner at Axley Brynelson, LLP, located at 2 East Mifflin Street, Suite 200, Madison, WI 53703. I have been practicing environmental and administrative law for over thirty-five years, and I have been a partner at Axley Brynelson since joining the firm approximately eleven years ago.

3. I am one of the attorneys of record for Petitioners Clean Wisconsin, Inc. and Pleasant Lake Management District in the above-captioned judicial review proceeding. In that capacity, I am familiar with the proceedings, documents, and communications among counsel in this matter, and I make this affidavit based upon personal knowledge,

4. Clean Wisconsin and Pleasant Lake Management District seek attorney fees associated with the Department of Natural Resources' motion to dismiss in this action, pursuant to Wis. Stat. § 895.044.

5. On December 20, 2016, shortly after DNR filed and served its motion to dismiss, I sent DNR's attorney a "safe harbor" letter advising her that unless DNR withdrew its motion to dismiss, Petitioners intended to file a motion for fees under Wis. Stat. § 895.044. A true and accurate copy of that letter is attached hereto as Exhibit 1.

6. DNR did not withdraw its motion. Rather, its attorney notified me that DNR would proceed with its motion. A true and accurate copy of that letter, dated December 22, 2017, is attached hereto as Exhibit 2.

7. Subsequent to the Court's denial of DNR's motion to dismiss, I contacted counsel for DNR to determine whether DNR would agree to settle the matter of attorneys' fee. Counsel for DNR refused to settle this matter. A true and accurate copy of that email correspondence between the parties is attached as Exhibit 3.

7. A true and accurate detailed statement of fees incurred by Axley Brynelson on behalf of Petitioners through the date of the motion hearing is attached as Exhibit 4. This statement was generated by searching timesheets for time that I personally spent on this matter, exclusively for defending against the motion to dismiss, and without including any fees incurred unrelated to the motion to dismiss.

8. The billing rate that I am charging Petitioners is $275.00 per hour, which is discounted from my standard billing rate because Petitioners are a non-profit organization and a local unit of government. I know this rate to be less than attorneys with comparable experience and skills charge for similar environmental litigation.

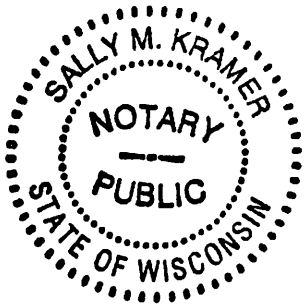
9. On behalf of Petitioners, we are requesting recovery of fees for Axley Brynelson for 28.6 hours of attorney time at $ 275.00 per hour, for a fee award of $ 7,865.00.

10. I make this affidavit in support of Petitioners' Motion for Fees and Costs under Wis. Stat. § 895.044.

Carl A. Sinderbrand

Carl A. Sinderbrand

Subscribed and sworn to before me
this 11th day of April, 2017.



Sally M. Kramer

Notary Public, State of Wisconsin
My Commission expires: 3-5-18.

F:\EAFDATA\13687\77010\02215376.DOCX

SALLY M. KRAMER
NOTARY
PUBLIC
STATE OF WISCONSIN

Axley
Attorneys Since 1885

AXLEY BRYNELSON, LLP

• • • • • •

CARL A. SINDERBRAND
(608) 260-2472
csinderbrand@axley.com

December 20, 2016

Via E-Mail and U.S. Mail

Jennifer L. Vandermeuse, Assistant Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

RE: *Clean Wisconsin, Inc., et al. v. DNR*
Dane County Case Nos. 16-CV-2816, *et seq.*

Dear Ms. Vandermeuse:

The purpose of this letter is to provide you notice of our proposed motion for sanctions under Wis. Stat. § 895.044, based on your motion to dismiss, and to provide you an opportunity to withdraw your motion to dismiss.

Your motion to dismiss necessarily relies on an assertion that Petitioners' use of the terms "individual" and "cumulative" impacts in the Petitions are "interchangeable," *i.e.,* that Petitioners intended that they mean the same thing. You make this assertion without any substantiation. Additionally, the assertion defies common definitions of the two terms, which are in fact both opposites and mutually exclusive. In the absence of this assertion, your motion necessarily fails, as it can be granted only – if at all – if the Petitions allege exclusively "lack of consideration of the cumulative impacts ...", within the meaning of Wis. Stat. § 281.34(5m).

We are in the process of preparing our brief in opposition to your motion to dismiss. We will withhold additional work on that brief, with the associated attorneys' fees, until after the holiday break to provide you with time to voluntarily withdraw your motion to dismiss.

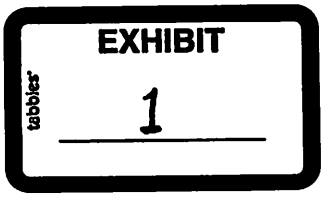
We would appreciate your response to this letter by no later than next Tuesday, December 27, 2016.

Sincerely,

AXLEY BRYNELSON, LLP

Carl A. Sinderbrand
CAS/mae

\\axleyserver2\axley\EAFDATA\13687\77010\02122956.DOCX



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Paul W. Connell
Deputy Attorney General

Delanie M. Breuer
Chief of Staff

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Jennifer L. Vandermeuse
Assistant Attorney General
vandermeusejl@doj.state.wi.us
608/266-7741
FAX 608/267-2223

December 22, 2016

Mr. Carl A. Sinderbrand
Axley Brynelson, LLP
Post Office Box 1767
Madison, WI 53701-1767

Re: *Clean Wisconsin, Inc. and Pleasant Lake Management District v. Wisconsin Department of Natural Resources*
Case No. 16-CV-2816, *et seq.*

Dear Mr. Sinderbrand:

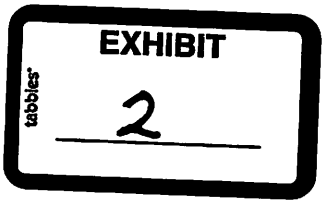
We received your letter dated December 20, 2016, and are writing to inform you that the Wisconsin Department of Natural Resources will not be withdrawing its motion to dismiss. As explained in the motion, Wis. Stat. § 281.34(5m) clearly prohibits a person from challenging a high capacity well approval on the ground that the agency approved the application without addressing the cumulative impacts of the well. It is DNR's position that all claims based on cumulative impacts must be dismissed from the petitions for judicial review.

The petitions for judicial review use the terms "cumulative impacts," "cumulative effects," and "individual impacts" imprecisely and without definition. It was therefore unclear to us whether your claims all pertained to a challenge based on cumulative impacts, or whether you intended to bring different claims in addition to a claim based on cumulative impacts. If your intent was the latter, then some of the claims may survive the motion. We're sure that the Court would appreciate clarification from you on this point in your response brief.

Sincerely,

Jennifer L. Vandermeuse
Assistant Attorney General

JLV:ajw



Carl A. Sinderbrand

From: Vandermeuse, Jennifer L. <VandermeuseJL@doj.state.wi.us>
Sent: Monday, April 03, 2017 4:21 PM
To: Carl A. Sinderbrand
Subject: RE: costs

Carl:

Just wanted to let you know that the Department is comfortable that it did not make a frivolous argument, and as such, is not interested in settling.

Jenny

Jennifer L. Vandermeuse
Assistant Attorney General
Special Litigation & Appeals Unit
Wisconsin Department of Justice
PO Box 7857
Madison, WI 53707-7857
Direct Line: (608) 266-7741
Fax: (608) 267-2223

From: Carl A. Sinderbrand [mailto:CSinderbrand@axley.com]
Sent: Wednesday, March 29, 2017 3:10 PM
To: Vandermeuse, Jennifer L. <VandermeuseJL@doj.state.wi.us>
Subject: FW: costs

Jenny:

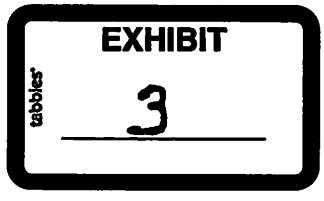
Attached are our attorneys fees regarding the motion to dismiss. The total amount incurred to date is $9,545. We would be willing to settle these fees [redacted] We would avoid having to make a motion and are assured of payment of most of our fees. DOJ would avoid the publicity of the frivolousness argument and the risk of high fees.

Please let me know by the end of the week if DOJ is interested in this compromise. If not, we will move ahead with our motion for fees.

Carl

Carl A. Sinderbrand
Phone: 608.260.2472
Axley Brynelson, LLP

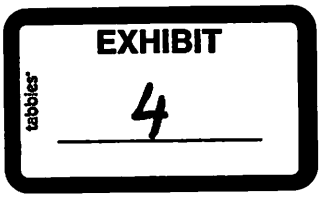
From: Katie Nekola [mailto:knekola@cleanwisconsin.org]
Sent: Wednesday, March 29, 2017 12:43 PM
To: Carl A. Sinderbrand
Subject: costs



Katie Nekola
General Counsel
Clean Wisconsin
634 W. Main St., Suite 300
Madison, WI 54703
(608) 251-7020 ext. 14

High Capacity Well Lawsuit - Motion to Dismiss Action
Time Spent - Attorney Carl A. Sinderbrand

Date	Notes	Hours	Rate	Amount
12/8/2016	Review and evaluate motion to dismiss. Emails with co-counsel and client.	0.8	$ 275.00	$ 220.00
12/12/2016	Begin legal research on Department of Natural Resources' Motion to Dismiss.	1.5	$ 275.00	$ 412.50
12/14/2016	Begin drafting brief in opposition to Motion to Dismiss.	4.8	$ 275.00	$ 1,320.00
12/15/2016	Continue to work on brief in opposition to Motion to Dismiss.	2.4	$ 275.00	$ 660.00
12/19/2016	Research and prepare safe harbor letter re: frivolous motion.	0.8	$ 275.00	$ 220.00
12/20/2016	Continue to work on brief in opposition to Motion to Dismiss.	1.5	$ 275.00	$ 412.50
12/22/2016	Complete draft brief and related legal research. E-mail Katie Nekola and Ena Kovacevic.	2.2	$ 275.00	$ 605.00
1/4/2017	Emails with Jennifer Vandermuese. Revisions to motion brief. Related legal research. Meeting with Katie Nekola	2.5	$ 275.00	$ 687.50
1/5/2017	Complete draft brief, related legal research. Emails with clients and amici. Additional edits.	1.5	$ 275.00	$ 412.50
1/11/2017	Review and finalize brief in opposition to motion to dismiss.	0.6	$ 275.00	$ 165.00
2/3/2017	Detailed review and evaluation of DNR reply brief, cited cases. Prepare draft sur-reply brief. Emails with co-counsel/clients/amici.	2.4	$ 275.00	$ 660.00
2/6/2017	Revise and finalize sur-reply brief, motion and letter to court. Additional legal research. Related emails.	1.7	$ 275.00	$ 467.50
2/8/2017	Telephone call with Katie and Ena regarding Ena's research.	0.4	$ 275.00	$ 110.00
2/10/2017	Telephone call from clerk of courts. Emails with Jennifer Vandermeuse regarding motion hearing.	0.3	$ 275.00	$ 82.50
3/1/2017	Meeting with Clean Wisconsin lawyers regarding case strategy. Legal research	1.5	$ 275.00	$ 412.50
3/15/2017	Preparation for court hearing.	1.2	$ 275.00	$ 330.00
3/16/2017	Complete preparation for court hearing. Hearing on motion to dismiss.	2.5	$ 275.00	$ 687.50
TOTAL		**28.6**		**$ 7,865.00**



STATE OF WISCONSIN | CIRCUIT COURT Branch 3 | DANE COUNTY

CLEAN WISCONSIN, INC.
634 West Main Street, Suite 300
Madison, WI 53703

and

PLEASANT LAKE MANAGEMENT DISTRICT
P.O. Box 230
Coloma, WI 54930,

Petitioners,

v.

WISCONSIN DEPTARMENT OF
NATURAL RESOURCES,
101 South Webster Street
Madison, WI 53707,

Respondent.

Case Nos. 16-CV-2817
16-CV-2818
16-CV-2819
16-CV-2820
16-CV-2821
16-CV-2822
16-CV-2823
16-CV-2824

Case Code: 30607
Administrative Agency Review

AFFIDAVIT OF KATHRYN A. NEKOLA

STATE OF WISCONSIN)
COUNTY OF DANE)

I, Kathryn A. Nekola, being duly sworn under oath, deposes and states as follows:

1. I am an attorney admitted to practice law in the State of Wisconsin, and have been so licensed continuously since 2005.

2. I am General Counsel at Clean Wisconsin, Inc., located at 634 W. Main Street, Suite 300, Madison, WI 53703. I have been practicing environmental and administrative law for over 11 years, since joining Clean Wisconsin in 2005.

3. I am one of the attorneys of record for Petitioners Clean Wisconsin, Inc. and Pleasant Lake Management District in the above-captioned judicial review proceeding. In that capacity, I am familiar with the proceedings, documents, and communications among counsel in this matter, and I make this affidavit based upon personal knowledge,

4. Clean Wisconsin and Pleasant Lake Management District seek attorney fees associated with the Department of Natural Resources' motion to dismiss in this action, pursuant to Wis. Stat. § 895.044.

5. Petitioners' efforts to resolve this motion through a "safe harbor" letter and the response by DNR's counsel, as well as related communications after the motion to dismiss were decided, are set forth in the accompanying Affidavit of my co-counsel, Carl S. Sinderbrand. I was party to those communications and believe his Affidavit to be true and accurate.

7. A true and accurate detailed statement of fees incurred by Clean Wisconsin on behalf of Petitioners through the date of the motion hearing, is attached as Exhibit 5. This statement was generated by searching timesheets for time that I personally spent on this matter, exclusively for defending against the motion to dismiss, and without including any fees incurred unrelated to the motion to dismiss.

8. The billing rate that I am charging Petitioners is $150.00 per hour, which is my typical billing rate as an attorney for a nonprofit, 501(c)3 organization. I know this rate to be less than attorneys with comparable experience and skills charge for similar environmental litigation.

9. On behalf of Petitioners, we are requesting recovery of fees for Clean Wisconsin for 11.2 hours of attorney time at $ 150.00 per hour, for a fee award of $ 1,680.00.

10. I make this affidavit in support of Petitioners' Motion for Fees and Costs under Wis. Stat. § 895.044.

Kathryn A. Nekola

Kathryn A. Nekola

Subscribed and sworn to before me
this 11th day of April, 2017.

Carol A. Lilienkamp

Notary Public, State of Wisconsin
My Commission ~~expires~~: is permanent

F:\EAFDATA\13687\77010\02216691.DOCX

High Capacity Well Lawsuit - Motion to Dismiss Action
Time Spent - Attorney Kathryn Nekola

Date	Notes	Hours	Rate	Amount
12/8/2016	Review motion to dismiss. Emails with co-counsel.	0.5	$ 150.00	$ 75.00
12/19/2016	Review letter to DOJ; emails, calls with Carl Sinderbrand	0.5	$ 150.00	$ 75.00
12/22/2016	Review/edit draft brief in opposition to Department of Natural Resources' Motion to Dismiss	1.2	$ 150.00	$ 180.00
12/30/2016	Review/edit revised brief; emails with co-counsel	1	$ 150.00	$ 150.00
1/4/2017	Meeting with Carl Sinderbrand	1.5	$ 150.00	$ 225.00
1/5/2017	Review final brief; emails	1	$ 150.00	$ 150.00
1/30/2017	Review DOJ reply brief in support of Motion to Dismiss	0.5	$ 150.00	$ 75.00
2/3/2017	Review DNR reply brief; emails	1	$ 150.00	$ 150.00
2/4/2017	Legal research	0.5	$ 150.00	$ 75.00
2/8/2017	Telephone call with Carl Sinderbrand; review legal research	0.5	$ 150.00	$ 75.00
3/1/2017	Meeting with Carl Sinderbrand	1.5	$ 150.00	$ 225.00
3/16/2017	Hearing on motion to dismiss	1.5	$ 150.00	$ 225.00
TOTAL		**11.2**		**$ 1,680.00**

EXHIBIT
tabbies
5

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
Branch 3

CLEAN WISCONSIN, INC.
634 West Main Street, Suite 300
Madison, WI 53703

and

PLEASANT LAKE MANAGEMENT DISTRICT
P.O. Box 230
Coloma, WI 54930,

Petitioners,

v.

WISCONSIN DEPTARMENT OF
NATURAL RESOURCES,
101 South Webster Street
Madison, WI 53707,

Respondent.

Case Nos. 16-CV-2817
16-CV-2818
16-CV-2819
16-CV-2820
16-CV-2821
16-CV-2822
16-CV-2823
16-CV-2824

Case Code: 30607
Administrative Agency Review

PETITIONERS' BRIEF IN SUPPORT OF
MOTION FOR FEES AND COSTS UNDER WIS. STAT. § 895.044

INTRODUCTION

Petitioners have incurred substantial attorneys' fees and costs to defend against the motion to dismiss filed and pursued by Respondent, Department of Natural Resources ("DNR"). That motion was denied by the Court on March 16, 2017. Petitioners now respectfully request that the Court grant their motion for fees and other costs, pursuant to Wis. Stat. § 895.044. Petitioners are entitled to such relief as a prevailing party because DNR or its attorney knew or should have known that its motion was without any reasonable basis in law or equity and could not be supported by a good faith argument.

Petitioners' counsel provided a "safe harbor" letter to counsel for DNR, dated December 20, 2016, requesting that DNR withdraw its motion and advising that Petitioners would seek frivolous action attorneys' fees under Wis. Stat. § 895.044. Sinderbrand Affidavit, Exhibit 1. DNR failed and refused to timely withdraw its Motion to Dismiss. *Id.*, Exhibit 2. Petitioners are entitled to their attorneys' fees and costs because under no circumstances could DNR prevail in its motion, as a matter of law.

ARGUMENT

I. PETITIONERS ARE ENTITLED TO AN AWARD OF ATTORNEY FEES AND COSTS UNDER WIS. STAT. § 895.044

A. Petitioners Have Complied with the Procedural Requirements of Wis. Stat. § 895.044.

Wisconsin Statute § 895.044 states, in relevant part:

> (1) A party or party's attorney may be liable for costs and fees under this section for commencing, using, or continuing an action . . . . to which any of the following applies:
>
> * * *
>
> (b) The party or the party's attorney knew, or should have known, that the . . . defense ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.
>
> (2) Upon either party's motion made at any time during the proceeding or upon judgment, if a court finds, upon clear and convincing evidence, that sub. (1)(a) or (b) applies to an action . . . . commenced or continued by a defendant, the court:
>
> * * *
>
> (b) Shall, if a withdrawal or correction under par. (a) is not timely made, award to the party making the motion, as damages, the actual costs incurred by the party as a result of the action, . . . including the actual reasonable attorney fees the party incurred, including fees incurred in any dispute over the application of this section.

A motion under Wis. Stat. § 895.044(2) may be made at any time during the proceeding.

An award of costs and fees is appropriate under Wis. Stat. § 895.044 (2)(b) because DNR was served with a safe harbor letter on December 20, 2016, shortly after the motion was filed and before Petitioners incurred substantial fees defending against the motion. Sinderbrand Aff., Exh. 1. Respondent declined to withdraw its motion, based on its absurd argument that the terms

"cumulative" and "individual" were undefined and meant the same thing. *Id.*, Exh. 2. At the hearing on March 16, 2017, the Court denied the DNR's Motion to Dismiss in its entirety, based on Petitioners' defenses to the motion.

Frivolous claims waste the time and resources of the judicial system. In this case, DNR's Motion to Dismiss, which lacked any reasonable basis in law, caused Petitioner to incur unnecessary costs and attorney fees. In January 2011, the Wisconsin Legislature enacted Wis. Stat. § 895.044, to deter frivolous claims that cause a significant drain on resources and waste time. Consequently, the statute provides for a mandatory award of attorney fees and costs if the court finds the action was commenced or continued in bad faith, or if the party "knew or should have known" that the action was without any reasonable basis in law or equity. See Wis. Stat. § 895.044(1)(a) and (b).

B. DNR's Motion to Dismiss Relied on False Assumptions, Erroneous Arguments, and Misapplication of the Law.

DNR's motion relied exclusively on § 281.34(5m), which on its face only applies if the petition attempts to challenge DNR's failure to "consider" cumulative impacts in conjunction with "existing" wells.[1] On its face, there is nothing in the Petitions that limit the challenges to a failure to consider cumulative impacts with existing wells. To the contrary, each of the petitions alleges failure to protect Public Trust waters for "individual and cumulative" effects.

DNR's motion necessarily was based on the frivolous argument that "individual" and "cumulative" mean the same thing, arguing that Petitioners did not define those terms. In fact, under common dictionary definitions, they are mutually exclusive terms that cannot mean the same thing.

[1] In addition asserting that § 281.34(5m) deprived the Court of jurisdiction, it argued that § 281.34(5m) was an exception to the waiver of sovereign immunity. However, these are essentially the same argument, as they both rely on DNR's fundamentally flawed arguments regarding the allegations in the Petitions and the scope of § 281.34(5m).

Additionally, the Petitions do not limit those cumulative effects to other existing wells, and do not preclude impacts that are cumulative to other sources of impacts (*e.g.*, stream diversion, climate). To the contrary, DNR's own documents show that in three of the cases, DNR evaluated the cumulative effect of, *inter alia*, the three proposed wells. In the *Frozene* case, DNR evaluated the impacts of the proposed well with another not-yet-existing well. And in the *Laskowski* case, DNR considered the effect of the proposed well with impacts from stream diversions for cranberry operations.

Finally, a motion to dismiss is a claim screening tool, which can only be granted if there are no circumstances under which the petitioner can prevail, liberally construing the pleadings in favor of the petitioner. *See, e.g.*, *Meyers v. Bayer AG*, 2007 WI 99, ¶ 21, 303 Wis. 2d 295, 735 N.W.2d 251. DNR's motion, however, at best only sought to preclude an argument, construing the Petitions narrowly against Petitioners.

For each of these reasons, individually and collectively, DNR and its attorneys knew or should have known that their argument was false and frivolous. [2]

II. PETITIONERS' REQUESTED FEES ARE REASONABLE AND APPROPRIATE.

Petitioners' motion requests an award of $9,545.00 in attorneys' fees through the date of the hearing on the motion to dismiss, together with statutory costs. The basis for these fees is set forth in the Affidavits of Carl A. Sinderbrand and Kathryn Nekola. These affidavits reflect a modest, lower-than-standard billing rate for both attorneys, and a reasonable amount of time spent performing work exclusively for responding to DNR's motion to dismiss.

[2] DNR's motion also improperly relied upon broadly inclusive interpretation of the term "consideration" in § 281.34(5m) to include action as well as evaluation, contrary to both *Lake Beulah* and the principle that an exception to access to court must be narrowly construed. However, the Court need not address this error to find that the motion was frivolous.

The exhibits to the supporting affidavits include attorneys' fees through the motion hearing. However, § 895.044(2)(b) also calls for the award to include fees incurred in any dispute over the award of fees. Prior to filing this motion, Attorney Sinderbrand again communicated with counsel for DNR, to determine whether we could agree on a fee amount. DNR rejected that effort. Accordingly, Petitioners' motion also requests the award of an additional amount associated with this motion, to be determined at the hearing on this motion.

CONCLUSION

For the reasons stated above, Petitioners Clean Wisconsin and Pleasant Lake Management District respectfully request the Court GRANT their motion for attorneys' fees in the amount of $9,545.00 and costs, plus an additional amount of fees incurred by Petitioners in connection with this motion.

Dated this 12th day April, 2017.

AXLEY BRYNELSON, LLP

Electronically signed by Carl A. Sinderbrand
Carl A. Sinderbrand
SBN: 1018593
Attorneys for Petitioners

2 East Mifflin Street, Suite 200
P.O. Box 1767
Madison, WI 53701
Tel. 608-257-5661
Fax 608-257-5444

Electronically signed by Kathryn Nekola
Kathryn Nekola
SBN: 1053203
Attorney for Clean Wisconsin, Inc.

634 W. Main Street, Suite 300
Madison, WI 53707
Tel. 608 251-7020 ext. 14