

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 DEPARTMENT 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 Brynson, LLP, located at 2 East Mifflin Street, Suite 200, Madison, WI 53703. 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

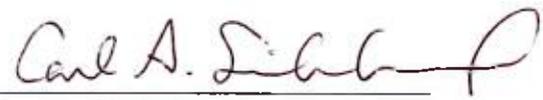
communications among counsel in this matter, and I make this affidavit based upon personal knowledge.

3. On February 8, 2016, after a request for an attorney general opinion had been submitted by Robin Vos, Speaker of the Assembly, I hand-delivered a letter to Attorney General Brad Schimel requesting that he decline to issue a formal opinion regarding the interpretation of Wis. Stat. § 227.10(2m). I made that request on behalf of Pleasant Lake Management District, a petitioner in the cases at bar. The reasons for that request, as set forth in the that letter, included, *inter alia*: a) the fact that the issue already was in litigation, and issuance of an opinion on a matter in litigation is contrary to Department of Justice long-standing policy and practice; and b) that the Attorney General could not ethically render an unbiased opinion because he already had taken a position in litigation on that matter (a reason for the underlying policy and practice).

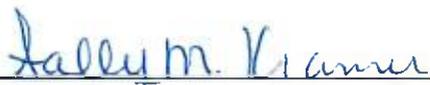
4. A true and accurate copy of the letter referenced in paragraph 3, above, is attached hereto as Exhibit A.

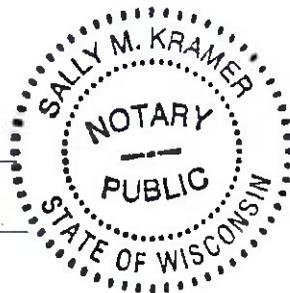
5. The Attorney General and Department of Justice never responded to Exhibit A.

6. I make this affidavit in support of Petitioners' brief and analyses on the merits of this case.


Carl A. Sinderbrand

Subscribed and sworn to before me
this 16th day of June, 2017.


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



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AXLEY BRYNELSON, LLP

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

February 8, 2016

Hand Delivery

Attorney General Brad D. Schimel
114 East State Capitol
Madison, WI 53702

Re: Legislative Request for Formal Opinion Regarding Wis. Stat. § 227.10(2m)

Dear Attorney General Schimel:

We are writing on behalf of the Pleasant Lake Management District (PLMD), a local unit of government currently involved in a dispute with the Department of Natural Resources (DNR) regarding, among other things, the interpretation and application of Wis. Stat. § 227.10(2m). We understand that the Assembly Committee on Organization has requested that you issue a formal Opinion of the Attorney General (OAG) regarding the effect of § 227.10(2m) on DNR's authority to protect waters of the state. We understand that the request was made in the context of DNR's high capacity well program; but of course an interpretation of § 227.10(2m) necessarily would affect other DNR regulatory programs and other state agencies.

The purpose of this letter is to request that you decline to issue a formal OAG, for at least the following reasons: a) the effect of § 227.10(2m) is a matter in litigation between PLMD and DNR, in which your office is representing DNR on this very issue, thereby creating a conflict of interest; b) it has been the policy and practice of the Attorney General not to issue formal opinions on matters in litigation; and c) your department already has taken a position on this very issue, in connection with a matter in dispute between DNR and local citizens affected by contaminated water supplies.

In view of these circumstances, an opinion issued by your office necessarily would be viewed as advocacy on behalf of the administration and an effort to manipulate a matter in litigation in which the Attorney General already has taken a position, and not as an objective analysis of the legal issue.

By way of background, Pleasant Lake is located on the border of Marquette and Waushara Counties, in an area of the state commonly known as the Central Sands. This area of the state is known for its exceptionally high quality lakes, streams and wetlands, including exceptional trout streams, waterfowl habitat, and rare ecological resources, such as calcareous fens. Unfortunately, over the past decades, it has also become known for an abundance of agricultural high capacity wells that have literally dried up public water resources, including area lakes and



trout streams. Approximately one-half of all high capacity wells in the state are located in the Central Sands, and the DNR receives dozens of additional applications every year.

As you know, the Wisconsin Supreme Court issued a decision in 2011 in *Lake Beulah Management Dist. v. DNR* that upheld and reinforced DNR's duty to protect state waters under both the constitutional Public Trust Doctrine and pertinent state statutes. The Court did not address the effect of Wis. Stat. § 227.10(2m), which had been enacted shortly before the decision but after the agency actions at issue in the case. Since that time, the effect of § 227.10(2m) has been raised in a number of DNR proceedings, including cases relating to both high capacity wells and permits for the discharge of pollutants to waters of the state (e.g., New Chester Dairy, Kinnard Farms, Richfield Dairy).

This past summer, DNR was faced with this issue in connection with a decision by the administrative law judge, after an evidentiary hearing, that directed DNR to require groundwater monitoring as part of the approval of a permit for a mega-dairy (also known as a confined animal feed operation, or CAFO) to protect drinking water wells in the highly contaminated groundwater in Kewaunee County. In connection with that matter, DNR legal staff and your office collaborated to generate an unusual opinion letter from your office that DNR was not required to comply with the judge's decision, and that § 227.10(2m) prevented DNR from requiring monitoring and capping the number of animal units to protect the public from the dairy's pollutant discharges.¹ This conflicted with DNR's prior position in that case, and in another case concerning a CAFO in Adams County in the Central Sands.

This issue presently is before the circuit court in a matter initiated by PLMD. In that case, DNR determined that it was not required to determine the number of permitted animal units at a CAFO in conjunction with the limitation on water withdrawals permitted under the approved high capacity wells for the CAFO. *Pleasant Lake Management District, et al. v. DNR*, Dane County Case No. 15-CV-3021. Your office is representing DNR in that litigation, and the application of § 227.10(2m) has been identified as a potential justification for DNR's actions.

The Rules of Professional Conduct of the Supreme Court preclude your providing legal advice and opinions to the Legislature that may conflict with your duty to DNR as your current client. Under Supreme Court Rule (SCR) 20:1.7(a), an attorney shall not represent a client if that representation "will be directly adverse to another client" or "there is a significant risk that the representation ... will be materially limited by the lawyer's responsibilities to another client" Here, you have undertaken a duty to represent the interests of DNR in its authority, including its interpretation of § 227.10(2m). This would conflict with your providing independent and impartial advice to the Legislature (unless you already have preemptively excluded the potential

¹ The administrative law judge who issued the underlying decision subsequently sent a letter critiquing your office's opinion, noting that it ignored the most pertinent and analogous appellate court decision on the matter.

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Attorney General Brad D. Schimel

February 8, 2016

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that your prior advice was wrong and have pre-ordained the opinion you will provide). Moreover, even if you could justify this dual representation as not conflicting with the Rules of Professional Conduct, it creates the appearance of a conflict that would undermine the integrity of both the legal system and the Office of the Attorney General.

The Attorney General's Office also has internal guidelines for issuing formal opinions. Among them is the proscription that "an opinion shall 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." 77 OAG Preface (1988), citing 62 OAG Preface (1973). This guideline reinforces the historical position of the Attorney General that it is inappropriate to issue a formal opinion that may influence the outcome of pending or anticipated litigation. *See, e.g.*, letter from Kevin Potter, DOJ Administrator of Legal Services, to Cathy Stepp, DNR Secretary, dated April 4, 2013.

This issue has been an issue in litigation (*e.g.*, *Kinnard Farms, Inc. v. DNR*; *New Chester Dairy v. DNR*), is currently an issue in pending litigation (including *PLMD v. DNR*), and is likely to continue to be litigated. Accordingly, issuance of a formal opinion would violate your own guidelines, which in turn are predicated on rules of professional ethics.

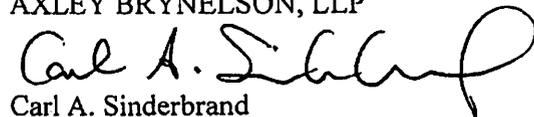
As a final matter, protection of public water resources has been a subject of substantial legislative activity in this session, and it unfortunately has become reduced to a politically charged partisan issue. Opinions of the Attorney General, to be entitled to any credibility and influence, must be free from political influence. Given the present legislative activity, it would be imprudent for your office to enter this partisan fray.

We therefore request that you decline to issue an opinion regarding the effect of § 227.10(2m) at this time.

Thank you for your consideration of this matter.

Sincerely,

AXLEY BRYNELSON, LLP



Carl A. Sinderbrand

CAS/mae

cc: Pleasant Lake Management District