



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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May 20, 1999

OAG 1-99

Mr. Donald J. Peterson
Corporation Counsel
Columbia County
Post Office Box 256
Portage, WI 53901

Dear Mr. Peterson:

You indicate that Columbia County, the city of Portage and numerous towns within the county have entered into an agreement in order to execute the Local Emergency Planning Committee ("LEPC")¹ Plan for Hazardous Materials ("HAZ-MAT") Response Services mandated by Wis. Stat. § 166.20. The agreement provides fiscal resources for the LEPC Plan, contains provisions for reimbursement by local units of government to the county and designates the city's HAZ-MAT Response Team as the county HAZ-MAT Response Team.

Under the agreement, the HAZ-MAT Response Team designated by the county is to provide assistance upon the request of a local unit of government in connection with any Level B release that occurs within the geographic boundaries of the requesting local unit. Emergency response services are provided only to local units that sign the agreement. Each local unit is responsible to contract and pay for additional support services necessary to facilitate a response by the HAZ-MAT Response Team. Examples of such support services include the costs associated with obtaining such items as backhoes and bulldozers.

The agreement requires each requesting local unit to indemnify and hold the city harmless for all claims not covered by the city's insurance policy. It also requires each requesting local unit to waive any and all claims against the city for acts of the HAZ-MAT Response Team except for those claims involving the city's own negligent acts. The requesting local unit is also required to indemnify the city if the requesting local unit fails to provide reasonable and necessary support services to the HAZ-MAT Response Team. The requesting local unit assumes responsibility for losses or claims concerning personal injury or property damage involving the HAZ-MAT Response Team that are not attributable to HAZ-MAT Response Team's own negligence and that are in excess of the city's insurance policy limits. The requesting local unit must hold the city and county harmless from certain third party actions. Because of liability concerns, one town within the county has refused to sign the agreement.

¹These committees and their place within the governmental structure are discussed in 81 Op. Att'y Gen. 17 (1993).

You ask a number of questions concerning municipal liability and responsibility under Wis. Stat. ch. 166. I have rephrased and renumbered your questions, as follows:

1. Is the county or the town in which a hazardous spill occurs ordinarily required to provide the emergency response to a Level B release?

In my opinion the county is ordinarily required to respond to a Level B release within a town.

2. Is a town that provides an emergency response to a Level B release in its own capacity in the absence of a countywide HAZ-MAT agreement statutorily immune from civil liability for acts or omissions related thereto under Wis. Stat. § 895.483(2)?

In my opinion, a town that provides an emergency response to a Level B release in the absence of a countywide HAZ-MAT agreement is not statutorily immune from civil liability for acts or omissions related thereto under Wis. Stat. § 895.483(2). Other statutory and common law immunities are available.

3. Is a town that provides or makes provision for the payment of the cost of any emergency response to a Level B release under a countywide HAZ-MAT agreement statutorily immune from civil liability for acts or omissions related thereto under Wis. Stat. § 895.483(2)?

In my opinion, the intent of the Legislature under Wis. Stat. § 895.483(2) is to immunize a town that provides or makes provision for the payment of the cost of an emergency response to any Level B release under a countywide HAZ-MAT agreement from civil liability for acts or omissions related thereto.

4. Does a town have the authority to enter into an enforceable agreement to indemnify a county from damages resulting from an emergency response to a Level B release within the town under a countywide HAZ-MAT agreement?

In my opinion, a town does have the authority to enter into an enforceable agreement to indemnify a county from damages resulting from an emergency response to a Level B release within the town under a countywide HAZ-MAT agreement.

5. If a town agrees to indemnify a county from damages resulting from an emergency response to a Level B release within the town under a countywide HAZ-MAT agreement, does the existence of such an agreement in any way affect the county's immunity from civil liability under Wis. Stat. § 895.483(2)?

In my opinion, the county's immunity from civil liability under Wis. Stat. § 895.483(2) is unaffected if a town agrees to indemnify a county from damages resulting from an emergency response to a Level B release within the town under a countywide HAZ-MAT agreement.

PRINCIPAL EMERGENCY PLANNING STATUTES INVOLVED

Wisconsin Stat. § 59.54(8) provides in part:

LOCAL EMERGENCY PLANNING COMMITTEES. (a) The [county] board shall do all of the following:

1. Create a local emergency planning committee, with members as specified in 42 USC 11001(c), which shall have the powers and the duties established for such committees under 42 USC 11000 to 11050 and under ss. 166.20 and 166.21.

Wisconsin Stat. § 166.03 provides in part:

(4)

. . . .

(4)(d) . . . Nothing in this chapter prohibits counties and municipalities from employing their emergency management organizations, facilities and resources to cope with the problems of local public emergencies except where restrictions are imposed by federal regulations on property donated by the federal government.

(5) POWERS AND DUTIES OF HEAD OF EMERGENCY MANAGEMENT SERVICES.

(a) The head of emergency management services in each county, town and municipality shall for his or her respective county, town or municipality, develop and promulgate emergency management plans consistent with state plans, direct the emergency management program and perform such other duties related to emergency management as are required by the governing body and the emergency management committee of the governing body when applicable.

(b) The head of emergency management services in each county shall coordinate and assist in developing town and municipal emergency management plans within the county, integrate such plans with the county plan, advise the department of all emergency management planning in the county and submit to the adjutant general such reports as he or she requires, direct and coordinate emergency management activities throughout the county during a state of

emergency, and direct countywide emergency management training programs and exercises.

....

(7) COOPERATION. (a) Counties, towns and municipalities may cooperate under s. 66.30 to furnish services, combine offices and finance emergency management services.

(b) Counties, towns and municipalities may contract for emergency management services with political subdivisions, emergency management units and civil defense units of this state

(c) The state and its departments and independent agencies and each county, town and municipality shall furnish whatever services, equipment, supplies and personnel are required of them under this chapter.

Wisconsin Stat. § 166.20 provides in part:

(1) DEFINITIONS. In ss. 166.20 to 166.215:

(b) "Committee" means a local emergency planning committee created under s. 59.54(8)(a).

....

(g) "Hazardous substance" means an extremely hazardous substance included in the list published by the administrator of the U.S. environmental protection agency under 42 USC 11002(a)(2) or a hazardous substance as defined under 42 USC 9601(14) or designated by the administrator of the U.S. environmental protection agency under 42 USC 9602(a).

(ge) "Level A release" means a release of a hazardous substance that necessitates the highest level of protective equipment for the skin and respiratory systems of emergency response personnel

....

(gi) "Level B release" means a release of a hazardous substance that necessitates the highest level of protective equipment for the respiratory systems of emergency response personnel, but less skin protection than a level A release, because operations at the site of the release do not involve a high potential for

exposure to liquids or particulates that are harmful to the skin or capable of being absorbed through intact skin . . . :

....

(3) DUTIES OF COMMITTEES. A committee shall:

(a) Carry out all requirements of a committee under the federal act.

(b) Upon receipt by the committee or the committee's designated community emergency coordinator of a notification under sub. (5)(a)2. of the release of a hazardous substance, take all actions necessary to ensure the implementation of the local emergency response plan.

....

(4m) COOPERATION. A state agency or local governmental unit may assist the division or a committee in the performance of its duties and may enter into an agreement with the division or a committee.

Your first question is whether the county or the town in which a hazardous spill occurs ordinarily is required to provide the emergency response to a Level B release.

In my opinion, the county ordinarily has such responsibility.

Wisconsin Stat. § 166.03(4)(a) requires every county, town and municipality to adopt an effective program of emergency management that is consistent with the state plan of emergency management. Wisconsin Stat. § 166.03(4)(c) requires every county board to designate a committee of the board as a county emergency management committee. Wisconsin Stat. § 166.03(5)(b) requires the head of emergency management services in each county to coordinate and assist in developing town and municipal emergency management plans within the county and to integrate those plans with the county plan. The head of emergency management services in each county is also given authority to coordinate and direct countywide emergency management training programs and exercises.

Wisconsin Stat. § 59.54(8)(a)1. requires every county to create a LEPC and to establish the LEPC Plan required by 42 U.S.C.A. § 11003 (West 1993). Since I have not been furnished with a copy of the Columbia County LEPC Plan, I must assume that any provisions of the plan concerning the obligation of each municipality to respond to Level B releases generally reflect the legal obligations imposed upon local units of government by statute. It is, however, my opinion that Wis. Stat. §§ 66.30 and 166.03(7)(a) are broad enough to permit a town to assume responsibility for responding to Level B releases within its geographical boundaries.

Wisconsin Stat. § 166.20(3)(b) requires the LEPC or the county coordinator to take all actions necessary to ensure the implementation of the local emergency response plan in the event of receipt of notification of the discharge of a hazardous substance under Wis. Stat. § 166.20(5)(a)2. In addition, Wis. Stat. § 166.21(2m)(e) makes LEPCs eligible for emergency planning grants if the LEPC Plan includes the following:

Identification of a county emergency response team that is capable of responding to a level B release that occurs at any place in the county and whose members meet the standards for hazardous materials technicians in 29 CFR 1910.120(q)(6)(iii) and national fire protection association standards NFPA 471 and 472.

I therefore conclude that, under Wis. Stat. §§ 59.54(8)(a)1. and 166.21(2m)(e), the county ordinarily is required to respond to Level B releases within a town.

Your second question is whether a town that provides an emergency response to a Level B release in its own capacity in the absence of a countywide HAZ-MAT agreement is statutorily immune from civil liability for acts or omissions related thereto under Wis. Stat. § 895.483(2).

In my opinion, the answer to your second question as stated is no. A town that provides an emergency response in the absence of a countywide HAZ-MAT agreement does not receive the benefit of the statutory immunity granted under Wis. Stat. § 895.483(2).

A town could provide a response to a level B release under the authority granted in Wis. Stat. § 166.20(3)(b). If such a response is provided, Wis. Stat. § 895.483(2) by its terms immunizes:

A county emergency response team, a member of such a team and the county, city, village or town that contracts to provide the emergency response team to the county . . . from civil liability for acts or omissions related to carrying out responsibilities pursuant to a designation under s. 166.21(2m)(e).

The statutory language clearly immunizes both team members and the municipalities that contract to provide the team to the town from liability. In the situation described in your second question, there is no contract of any kind between the town and the county and none of the team members are town employees. The refusal of a town or other local unit of government to enter into a contract may affect the ability of the county to make the identification required under Wis. Stat. § 166.21(2m)(e) in order to claim immunity under Wis. Stat. § 895.483(2).

Immunities other than that accorded by Wis. Stat. §§ 166.21(2m)(e) and 895.483(2) are available even in the absence of a countywide HAZ-MAT agreement. The statutory immunity

Mr. Donald J. Peterson

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provided under Wis. Stat. § 893.80(4) which includes the common law immunity for discretionary acts is available to towns, their officer, employees and agents. Municipal officials are generally immune from liability for the execution of those actions that do not involve the negligent performance of a ministerial duty. See C.L. v. Olson, 143 Wis. 2d 701, 710, 422 N.W.2d 614 (1988). Such immunity has been found to exist in connection with "moment-to-moment decision making and crisis management[.]" Barillari v. Milwaukee, 194 Wis. 2d 247, 260, 533 N.W.2d 759 (1995).

The enactment of Wis. Stat. § 895.483(2) did not abrogate other preexisting immunities. I therefore conclude that, while a town that responds to a Level B release in its own capacity in the absence of a countywide HAZ-MAT agreement does not receive immunity from civil liability under Wis. Stat. § 895.483(2), the statutory and common law immunities afforded in connection with such emergency management activities are plentiful.

Your third question is whether a town that provides or makes provision for payment of the cost of an emergency response to any Level B release under a countywide HAZ-MAT agreement is statutorily immune from civil liability for acts or omissions related thereto under Wis. Stat. § 895.483(2).

In my opinion, the legislative intent is to accord immunity to a town in those circumstances.

In the fact situation you have described, the city employees who comprise the HAZ-MAT team are immune from liability under Wis. Stat. § 895.483(2). The city itself is also immune because it has agreed to provide the emergency response team to the county. If town employees were part of the countywide HAZ-MAT team, they clearly would also be immune from liability under Wis. Stat. § 895.483(2) even if the LEPC Plan provided that such employees would only respond to Level B releases within the geographic boundaries of that town. Similarly, if a town were to contract with the county to furnish a qualified response team that is under contract with the town to respond to any Level B releases within that town's boundaries, the town would be immune from liability under Wis. Stat. § 895.483(2).

The statute does not specifically mention the circumstance where a local unit of government defrays a proportionate share of the costs incurred by a countywide HAZ-MAT team rather than directly providing personnel for that team. A statute should be construed so as to effectuate the intent of the Legislature and a court will favor a construction which fulfills the purpose of the statute over one which does not. See Heaton v. Independent Mortuary Corp., 97 Wis. 2d 379, 393, 294 N.W.2d 15 (1980). The legislative intent is to immunize municipalities that relieve the county from carrying out what otherwise would be the county's primary responsibility to respond to any Level B release. I therefore conclude that a court would hold that that legislative policy would extend to a town that agrees to reimburse the county for the

costs incurred by the response team designated by the county for responding to all Level B releases within town boundaries.

Your fourth question is whether a town has the authority to enter into an enforceable agreement to indemnify a county from damages resulting from an emergency response to a Level B release within the town under a countywide HAZ-MAT agreement.

In my opinion, the answer is yes.

There is general authority for the proposition that municipalities may enter into indemnification agreements with other local governmental entities. 18 McQuillen Municipal Corporations § 53.77 (3rd ed. 1993). Indemnity agreements were permissible at common law under the principle of freedom of contract. Gerdmann v. United States Fire Ins. Co., 119 Wis. 2d 367, 373, 350 N.W.2d 730 (Ct. App. 1984). Consequently, any claimed limitations on the validity of such agreements are strictly construed. Gerdmann, 119 Wis. 2d at 373-74.

Under Wis. Stat. § 59.54(8)(a)1. and 3., county LEPCs have the authority to establish LEPC Plans and to ensure that those plans are executed. LEPCs are also directed under Wis. Stat. § 166.21(2m)(e) to establish countywide procedures for responses to Level B releases. Under Wis. Stat. § 166.03(4)(a), towns also have a statutory role in the provision of emergency management services. Wisconsin Stat. § 166.03(7)(a) authorizes towns and counties to cooperate in the provision of such services. Wisconsin Stat. § 66.30 contains broad authority for towns and counties to enter into intergovernmental agreements. Wisconsin Stat. §§ 166.21(2m)(e) and 895.483(2) explicitly recognize that contracts concerning Level B responses may be made between towns and counties. I therefore conclude that there is sufficient statutory authority to permit contracts for indemnification under the circumstances you describe.

Your fifth question is whether a county's immunity from civil liability under Wis. Stat. § 895.483(2) is affected if a town agrees to indemnify the county from damages resulting from an emergency response to a Level B release within the town under a countywide HAZ-MAT agreement.

In my opinion, the answer is no.

A progression of cases addressing the potential waiver of statutory immunity from municipal tort liability as a result of the purchase of insurance is summarized in Anderson v. City of Milwaukee, 208 Wis. 2d 18, 28-30, 559 N.W.2d 563 (1997). First, in Sambs v. Brookfield, 66 Wis. 2d 296, 224 N.W.2d 582 (1975), the Wisconsin Supreme Court held that the purchase of insurance did not waive the \$50,000 limit on municipal liability now found in Wis. Stat. § 893.80(3). Then, in Stanhope v. Brown County, 90 Wis. 2d 823, 842, 280 N.W.2d 711 (1979), the court held that a municipality can waive a statutory limitation on liability by entering into an insurance contract that contains a clause prohibiting the insurer from raising the statutory

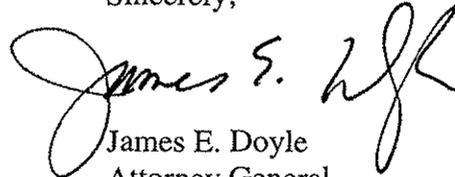
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immunity defense. Finally, in Gonzalez v. City of Franklin, 137 Wis. 2d 109, 128-29, 403 N.W.2d 747 (1987), the court held that a municipality cannot waive a statutory limitation on liability merely by entering into an insurance contract for coverage in excess of the liability limit.

I view the legal principles applicable to the potential waiver of municipal tort liability through the purchase of insurance as roughly analogous to the legal concerns applicable to the potential waiver of municipal liability under Wis. Stat. § 895.483(2) resulting from entry into an indemnification agreement. At most, under these cases, statutory immunity is not lost or waived unless the indemnification agreement specifically precludes the assertion of that statutory immunity from liability. I therefore conclude that a county's immunity from civil liability under Wis. Stat. § 895.483(2) is unaffected when a town merely agrees to indemnify the county from damages resulting from an emergency response to a Level B release within the town.

In conclusion, the financial obligation of the town that has refused to sign the countywide HAZ-MAT agreement appears to be less than \$600 annually. These statutes are designed to ensure that municipalities work together to ensure the availability of prompt responses to Level B releases on a countywide basis. I would encourage the municipalities involved to make every effort to effectuate that goal.

Sincerely,

A handwritten signature in black ink, appearing to read "James E. Doyle", with a stylized flourish at the end.

James E. Doyle
Attorney General

JED:FTC:cla

CAPTION:

Authority and responsibility of local units of government to respond to Level B hazardous substance releases discussed.



STATE OF WISCONSIN
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May 28, 1999

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OAG 2-99

The Honorable Chuck Chvala
Chairman
Senate Committee on Organization
119 Martin Luther King Jr. Blvd., Room 101
Madison, WI 53702

Dear Senator Chvala:

You have asked a series of questions regarding the construction and operation of private incarceration facilities in Wisconsin. For ease of analysis, I have organized your inquiry into four areas:

- (1) Can a private company build an incarceration facility in Wisconsin?
- (2) Can a privately built incarceration facility be sold or leased to the state?
- (3) Can out-of-state prisoners be housed in Wisconsin?
- (4) Can an incarceration facility in Wisconsin be operated by a private company?

As a starting point, the management of incarceration facilities is a core state function. Torcasio v. Murray, 57 F.3d 1340 (4th Cir. 1995). The U.S. Supreme Court has stated: "It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." Preiser v. Rodriguez, 411 U.S. 475, 491-92 (1973). Other cases have noted that the maintenance of penal institutions is an "essential part" of one of government's "primary functions," which is the preservation of societal order through enforcement of criminal law. Procunier v. Martinez, 416 U.S. 396, 412 (1974).

In a 1988 opinion regarding privatization of the jailer function by a county, Attorney General Hanaway articulated the underlying framework of the sovereign power of the state as follows:

As explained in State ex rel. Hammermill Paper Co. v. La Plante, 58 Wis. 2d 32, 80, 205 N.W.2d 784 (1973), a governmental subdivision "may, by contract, curtail its right to exercise functions of a business or proprietary nature, but, in the absence of express legislative authority, it cannot surrender or contract away its governmental functions and powers," not even partially. See also

Wausau Jt. Venture v. Redevelopment Authority, 118 Wis. 2d 50, 59, 347 N.W.2d 604 (Ct. App. 1984). Consistent with this basic proposition, it is said that such an entity may not contract for the performance of public duties which the law requires its public officers or employees to perform

. . . .

. . . The maintenance of law and order encompassed in the jailer function involves just such an exercise of the sovereign power of the state.

77 Op. Att'y Gen. 94, 95-96 (1988).

In 1996, in answer to a related question, I adopted this rationale:

This reasoning is applicable to all forms of incarceration for commitment of a crime In my opinion, with respect to matters exclusively or primarily of statewide concern, "if the legislature did not specifically confer a power, it is evidence of legislative intent not to permit the exercise of the power." See State ex rel. Harris v. Larson, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974).

OAG 1-96 at 7.

With these basic principles in mind, your questions are specifically addressed:

1. Can a private company build an incarceration facility?

In OAG 1-96, I concluded that a private company could construct a facility which conceivably could be used as a county house of corrections. The same would be possible for any incarceration facility. The building would have to be constructed in compliance with all applicable state laws, rules, codes and regulations, and would be subject to the ordinances or regulations of the municipality in which construction takes place, the same as any building.

This answer is limited only to the bricks or mortar. The building's use as an incarceration facility, its purchase or lease by the state, whether it could be run by a private company or whether out-of-state prisoners could be housed there, are entirely separate questions. Merely constructing a building and calling it an incarceration facility does not in any way mean it can be operated as such.

2. Can a privately built incarceration facility be sold or leased to the state?

The acquisition of a privately built incarceration facility by the state would have to be within the state's long-range public building program as expressed in Wis. Stat. § 13.48,¹ and have the additional approval of the Joint Committee on Finance, which is required by Wis. Stat. § 301.18(4).

Wisconsin Stat. § 13.48(27) specifically allows the building commission to lease a correctional facility as part of the authorized state building program, with an option to purchase the facility by the state. Any lease must provide that the facility is in accordance with requirements and specifications approved by the Department of Administration. *Id.* Such a facility could also be purchased outright in lieu of state construction as long as the project were enumerated in the authorized state building program. Wis. Stat. § 13.48(19). Wisconsin Stat. § 301.18(4) additionally requires the approval of the Joint Committee on Finance for "[a]ny purchase, lease or construction of additional correctional facilities"

3. Can Out of State prisoners be housed in Wisconsin?

The brief answer is that out of state prisoners, like any other prisoner, may be housed in Wisconsin only as expressly authorized by the state. Incarceration is one of the state's sovereign powers. *See* 60 Am. Jur. 2d Penal and Correctional Institutions § 8 (1987). Sovereign powers belong exclusively to the state, and may be delegated only by express state action. *See* 81A C.J.S. States § 16 (1977) ("[T]he [sovereign] power of a state may be abridged only by its own action, which must be sanctioned by its statutes.") The State of Wisconsin has only authorized the incarceration of out of state prisoners as set forth in the Interstate Corrections Compact. *See* Wis. Stat. § 302.25. It follows that no other entity may house out of state prisoners in Wisconsin, be it local units of government, sister states or private organizations, absent express legislative authorization.²

Municipalities

Municipalities may not incarcerate out of state prisoners. Municipalities do not possess inherent sovereign powers. *See* Van Gilder v. Madison, 222 Wis. 58, 72-73, 267 N.W. 25 (1936). Municipalities are created by the state, and hold all powers and privileges subject to the state's sovereign will. *See id.* (citing City of Trenton v. State of New Jersey, 262 U.S. 182 (1923)). The state may grant powers to municipalities either through its state constitution or by legislation. *See id.* Limited only by the state constitution, the state may revoke or modify these

¹Unless otherwise noted, all statutory references are to the 1997-98 volume of the Wisconsin Statutes.

²The federal government, by virtue of the supremacy clause, is sovereign over Wisconsin. *See* U.S. Const. art. VI. Therefore, the federal government may house federal prisoners in Wisconsin, subject to federal law. *See* 18 U.S.C. §§ 4001, 4002, 4003, 4013(a)(3) and 4013(b)(2).

powers at its pleasure. See id. ("In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state.")

The Wisconsin Constitution grants municipalities broad power over local affairs. See Wis. Const. art. XI, § 3. This "home rule" provision of the constitution reads:

(1) Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.

Id.

The Wisconsin Legislature has similarly made a statutory grant of power to municipalities. See Wis. Stat. § 62.11(5); but see Wis. Stat. § 62.03(1) (Wis. Stat. § 62.11(5) "does not apply to 1st class cities under special charter"). The power granted under the "home rule" statute is broader than the power granted under the constitution, by allowing a municipality to enact ordinances on matters of statewide concern. See Wis. Environmental Decade, Inc. v. DNR, 85 Wis. 2d 518, 533, 271 N.W.2d 69 (1978); see also Anchor Savings & Loan Ass'n v. Madison EOC, 120 Wis. 2d 391, 395, 355 N.W.2d 234 (1984) ("A city ordinance may be authorized by sec. 62.11(5), Stats., notwithstanding statewide concern in the matter it regulates.") However, municipalities' ability to regulate statewide matters is not unlimited. See DeRosso Landfill Co. v. City of Oak Creek, 200 Wis. 2d 642, 651, 547 N.W.2d 770 (1996). Wisconsin courts have long held that "municipalities may enact ordinances in the same field and on the same subject covered by state legislation where such ordinances do not conflict with . . . the state legislation." Id. (citing Fox v. Racine, 225 Wis. 542, 546, 275 N.W. 513 (1937)). As a result, municipalities may not make regulations that are inconsistent with those of the state. See DeRosso, 200 Wis. 2d at 651; see also Gloudeman v. City of St. Francis, 143 Wis. 2d 780, 789, 422 N.W.2d 864 (Ct. App. 1988) (when provisions of a statute are primarily of statewide concern, municipality may not under Wis. Stat. § 66.01(4) elect not to be bound by such statute).

Municipalities are pre-empted from regulating matters of statewide concern if any one of the four conditions set out by the Wisconsin Supreme Court in Anchor is met. See Anchor, 120 Wis. 2d at 397. The Anchor test is used whether the ordinance was enacted based on the home rule statute, see Local Union No. 487 v. Eau Claire, 147 Wis. 2d 519, 525, 433 N.W.2d 578 (1989), or based on the home rule amendment, see DeRosso, 200 Wis. 2d at 656-57. The Anchor test provides that the state has pre-empted municipal regulation if: "(1) the legislature has expressly withdrawn the power of municipalities to act; (2) the local regulation logically conflicts with state legislation; (3) the local regulation defeats the purpose of state legislation; or (4) the local regulation violates the spirit of state legislation." Id. at 657 (citing Anchor, 120

Wis. 2d at 397). It cannot be disputed that one area of statewide concern is the preservation of order. See Van Gilder, 222 Wis. at 76. Included in this is the power to incarcerate. See 60 Am. Jur. 2d Penal and Correctional Institutions § 8 (1987) (“[Penal] institutions are a public necessity and part of the police system for the preservation of order and the security of society. They are established by the state in the exercise of its sovereign powers.”). Therefore, a municipality may only regulate in the field of incarceration if state legislation has not pre-empted such regulation. Applying the Anchor test to the ability of municipalities to incarcerate out of state prisoners, it is apparent that state legislation pre-empts such a possibility. Not just one, but all four of the conditions would be met, precluding municipal regulation in this area.

Addressing the first test, the Legislature has expressly withdrawn the power of municipalities to act in the area of incarcerating out of state prisoners. The state has specifically defined “jail” to include “municipal prisons . . . by whatever name they are known.” Wis. Stat. § 302.30. The state has enumerated specific uses for which such facilities may be employed, which do not include the incarceration of out of state felons. See Wis. Stat. § 302.31. The state has therefore expressly limited the power of municipalities to use their prisons to incarcerate out of state prisoners.

Turning to the second test, local ordinances authorizing the incarceration of out of state felons would logically conflict with state legislation. Wisconsin has enacted the Interstate Corrections Compact, which gives a detailed description of how the state intends to treat incarceration of prisoners from other states. See Wis. Stat. § 302.25. Municipalities could not logically incarcerate out of state prisoners outside this statutory scheme. As to the third and fourth tests, the state legislature has enacted a comprehensive system of laws to regulate incarceration within the state. See Wis. Stat. chs. 301 and 302. Municipal ordinances regarding the statewide concern of incarceration of out of state felons would “defeat[] the purpose of state legislation and violate[] the spirit of the legislature’s ‘complex and comprehensive statutory structure.’” DeRosso, 200 Wis. 2d at 662 (citing Anchor, 120 Wis. 2d at 397).

Because municipal incarceration of out of state felons would logically conflict with and “violate[] the express letter, the purpose and the spirit of statutes addressing a matter of statewide concern,” state legislation has pre-empted municipalities from regulating in this area. DeRosso, 200 Wis. 2d at 664.

Counties

Counties may not incarcerate out of state prisoners. Counties are also creations of the state, with limited powers. In the 1988 opinion, Attorney General Hanaway stated: “It has been repeatedly held in Wisconsin that ‘a county board has only such powers as are expressly conferred upon it [by the legislature] or necessarily implied from the powers expressly given or from the nature of the grant of power.’” 77 Op. Att’y Gen. at 96 (citing State ex rel. Teunas v. Kenosha County, 142 Wis. 2d 498, 504, 418 N.W.2d 833 (1988)).

County powers conferred by the Legislature are addressed in the county “home rule” and “board powers” statutes. See Wis. Stat. §§ 59.03, 59.04 and 59.51. These powers are less expansive than the powers granted to municipalities. As I explained in the 1996 opinion, addressing the privatization of a county house of correction:

[T]he statutory language defining the substantive nature of the power granted [to counties] is modelled [sic] primarily upon language contained in article XI, section 3 of the Wisconsin Constitution rather than upon language contained in section 62.11(5)

. . . .

Unlike section 62.11(5), which contains a grant of substantive power for municipalities to act even in connection with matters primarily of statewide concern, county municipal home rule statues “expand upon and ‘fill the gaps’ in the organizational and administrative structure which is already in place.”

OAG 1-96 at 4-5 (citations omitted). Because the grant to counties is so limited, “if the legislature did not specifically confer a power, it is evidence of legislative intent not to permit the exercise of the power.” Id. at 7 (citing State ex rel. Harris v. Larson, 64 Wis. 2d 521, 527, 219 N.W.2d 335 (1974)). The Legislature has made no express grant of power to counties to house out of state prisoners; therefore counties have no power to do so.

Sister States

Another state cannot lease or buy a correctional facility in Wisconsin and operate it according to its laws. Although states are sovereign within their territory, sovereignty ends at the border. See K-S Pharmacies v. American Home Products, 962 F.2d 728 (7th Cir. 1992) (states lack power to reach outside their borders, giving rise to strong presumption of exclusive domestic application of state statutes); see also World-Wide Volkswagen Corp v. Woodson, 444 U.S. 286, 294 (1980) (sovereignty of each state implies limitation on sovereignty of all its sister states). Even were one state to acquire property in another, it is “elementary law that . . . [the acquiring state] does not thereby project its sovereignty into the state where the property is situated.” State v. City of Hudson, 231 Minn. 127, 42 N.W.2d 546, 548 (1950). It is clear that state sovereignty does not permit one state to house prisoners in another state without that state’s express consent.

Because states have long recognized that they may house their prisoners in another state only by consent of that state, they have devised a contractual method to arrange such housing. The Interstate Corrections Compact is the means by which Wisconsin and other subscribers address the housing of out of state prisoners. See Wis. Stat. § 302.25. The compact is a detailed cooperative agreement whereby participating states may contractually provide for the confinement of prisoners of other states. See id. Providing housing for out of state prisoners is

voluntary, and occurs only after entering into a contract. See Wis. Stat. § 302.25(3)(a) (“Each party state may make one or more contracts . . . [with other party states].”). This is the only manner in which Wisconsin expressly provides for the housing of out of state prisoners.

Private Organizations

Because the power to incarcerate belongs exclusively to the state, incarceration may be performed only by those whom the state expressly authorizes. See 81A C.J.S. States § 16 (1977). Consequently, private organizations may not incarcerate any prisoners including out of state prisoners, as the state has made no provision, statutory or constitutional, for such incarceration. Indeed, the state has made no provisions for a private organization to operate an incarceration facility at all, which leads to your fourth question.

4. Can a Private company operate an incarceration facility in Wisconsin?

Private companies may not operate an incarceration facility of any sort. As discussed above, incarceration is a sovereign power of the state. See 60 Am. Jur. 2d Penal and Correctional Institutions § 8 (1987). From this it follows that “detention is a power reserved to the government, and is an exclusive prerogative of the state.” Medina v. O’Neill, 589 F. Supp 1028, 1038 (S.D. Tex. 1984), modified on other grounds, 838 F.2d 800 (5th Cir. 1988). Thus, incarceration of prisoners may only be performed by the state or under its express authority. Because Wisconsin has made no express authorization, private companies may not operate an incarceration facility of any sort.

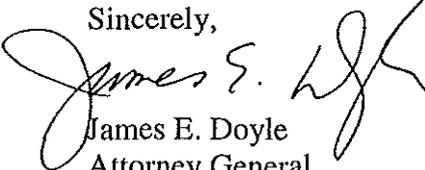
Previous opinions of the Attorney General, concluding that county incarceration functions may not be performed by private companies, form the foundation for the conclusion. In 1988, Attorney General Hanaway addressed the narrower issue of whether the jailer function of a sheriff’s duties under Wis. Stat. § 59.23(1) could legally be “privatized” by contract with a private firm; he concluded that it could not. See 77 Op. Att’y Gen. 94 (1988). In a later opinion, I concluded that neither could a private firm operate a county house of correction. See OAG 1-96. One factor leading to the result in both of these situations is that “the privatization of law and order functions relating to the incarceration of prisoners involves a matter exclusively or primarily of statewide concern.” Id. at 6. As I explained:

This reasoning is applicable to all forms of incarceration for commitment of a crime and is not limited to functions performed under the auspices of the sheriff as a constitutional officer. In my opinion, with respect to matters exclusively or primarily of statewide concern, “if the legislature did not

specifically confer a power, it is evidence of legislative intent not to permit the exercise of the power.”

Id. at 7 (citation omitted). While this opinion was limited to the privatization of county incarceration functions, the reasoning is applicable to all forms of incarceration, whether at statewide or local levels. Because incarceration is a sovereign power and incarceration functions involve matters of statewide concern, specific legislation would be needed in order to permit private companies to perform such functions.

I, therefore, conclude that under existing statutes, while a private company could conceivably build an incarceration facility, and sell or lease it to the state, private companies may not operate incarceration facilities in Wisconsin, nor may out of state prisoners be housed within Wisconsin except as provided in the Interstate Corrections Compact.

Sincerely,

James E. Doyle
Attorney General

JED:SJN:jlw

CAPTION:

While a private company may conceivably build an incarceration facility in Wisconsin, without enabling legislation it cannot be operated by a private company. The purchase or lease of a privately built incarceration facility by the state must be within the state's long range building program as expressed in Wis. Stat. § 13.48. A purchase must also be approved by the Joint Finance Committee. Out of state prisoners may be housed in Wisconsin by the state, a county or a municipality, only as expressly authorized by state statute. Currently that authorization is limited to the Interstate Corrections Compact (Wis. Stat. § 302.25).



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

990215036

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June 15, 1999

OAG 3-99

The Honorable Charles Chvala
Chairperson
Senate Organization Committee
211 South, State Capitol
Madison, WI 53702

Dear Senator Chvala:

You have asked for a formal opinion on whether the promulgation of rules that prescribe the use of risk-based methodologies, such as the American Society for Testing and Materials' Risk-Based Corrective Action, to respond to petroleum contamination under Wisconsin's Petroleum Environmental Cleanup Fund, would be consistent with the provisions in Wis. Stat. ch. 160 ("chapter 160"). Petroleum contamination can affect both soil and groundwater, and the Petroleum Environmental Cleanup Fund provides a mechanism for funding the remediation of petroleum contamination wherever it occurs. Chapter 160 is known as Wisconsin's groundwater law and sets forth the standards for the remediation of contaminated groundwater. Your question is whether rules incorporating Risk-Based Corrective Action would provide for the remediation of petroleum contamination in groundwater consistent with the groundwater standards prescribed in chapter 160. It is my opinion that certain core components of Risk-Based Corrective Action are not consistent with chapter 160.

I will first provide a brief overview of the regulatory framework relating to petroleum contamination, as background for those unfamiliar with that framework and the Petroleum Environmental Cleanup Fund program. Petroleum is a hazardous substance, and Wisconsin's hazardous substance spills law requires that certain persons remediate the contamination resulting from the discharge of a hazardous substance. These persons include those who cause the discharge, own or control the substance that is discharged, or own or control the contaminated property. Wis. Stat. §§ 292.01(5) and 292.11(3). These general provisions provide the authority to require cleanup of petroleum contamination from leaking underground petroleum storage tanks. Federal law imposes additional mandates applicable to discharges from underground storage tanks. See 40 C.F.R. §§ 280.40-280.67 and 40 C.F.R. ch. 281 (1998). Pursuant to these state and federal laws, the Department of Natural Resources and Department of Commerce have promulgated rules specific to discharges from underground storage tanks. See Wis. Admin. Code §§ NR 706.11-706.17, and Wis. Admin. Code ch. Comm 47.

Petroleum contamination from older underground storage tanks is a national problem. In response to this problem, federal law requires that underground storage tank owners upgrade or close existing underground storage tanks, and obtain \$500,000, \$1 million or \$2 million

(depending on location and number of tanks) in insurance to be used to address contamination caused by leaks from the tanks. 40 C.F.R. §§ 280.93-280.116 and 281.37 (1998). Most states have established cleanup assistance funds to enable owners to meet this insurance mandate. The Wisconsin fund is called the Petroleum Environmental Cleanup Fund ("PECFA"), and reimburses owners that clean up soil and groundwater contamination from petroleum storage tanks. See Wis. Stat. §§ 101.143-101.144.

The Department of Commerce administers PECFA. The Department of Commerce is responsible for the financial management of PECFA and the processing of PECFA reimbursement claims. The Department of Commerce also oversees the remediation of lower priority sites, which are typically sites that involve soil contamination only or groundwater contamination below state groundwater standards. The Department of Natural Resources oversees the remediation of higher priority sites, where groundwater contamination exceeds state standards, and sets the clean-up standards and procedures for all sites. See Wis. Stat. §§ 101.143-101.144.

PECFA is funded by a \$0.03 per gallon inspection fee assessed on petroleum products imported into the state by wholesalers. Wis. Stat. §§ 20.143(3)(v), 25.47 and 168.12. Reimbursement claims have greatly exceeded the revenue from that fee. In response to the growing gap between PECFA revenue and costs, the legislature directed the Department of Commerce and the Department of Natural Resources to promulgate rules to implement cost controls and to facilitate less expensive and quicker remediation of sites. In response to that directive, the departments considered adopting by rule the risk-based approach to remediation of petroleum contamination known as the American Society for Testing and Materials' Risk-Based Corrective Action. The question arose whether that approach would allow sites to be closed with contamination above the groundwater standards in chapter 160, in violation of chapter 160. As discussed below, it is my opinion that the answer is yes.

The American Society for Testing and Materials' Risk-Based Corrective Action is known as "RBCA" and is described in detail in the American Society for Testing and Materials' "E1739-95e1 Standard Guide for Risk-Based Corrective Action Applied at Petroleum Release Sites (1995) ("ASTM Standard Guide"). The general difference between RBCA and chapter 160 is that RBCA directs remediation efforts based on the risk of human exposure, while chapter 160 requires remediation of all sites to meet the numeric groundwater standards prescribed in that chapter. Because chapter 160 requires the state to protect all groundwater, regardless of the risk of human exposure, chapter 160 imposes a more stringent remediation standard for sites with groundwater contamination than RBCA.

Many components of RBCA, notably the risk-based assessment and cost-saving objectives, are expressly authorized by chapter 160. These components are also already incorporated in the regulations in chapter NR 700 of the Wisconsin Administrative Code ("NR 700"), which address the investigation and remediation of any kind of environmental

pollution, in both soil and groundwater, consistent with chapter 160. The range of remediation responses authorized by chapter 160 and Wisconsin Administrative Code ch. NR 726 includes the range of responses possible under RBCA. However, it is shown below that certain key elements of RBCA violate both the letter and intent of chapter 160. In particular, RBCA calls for the development of groundwater standards other than, and less protective than, the numerical standards prescribed by chapter 160. In addition, RBCA's unconditional allowance of continued contamination above those numerical standards, both on the property where the contamination originated and on neighboring properties to which the contamination has spread, is also inconsistent with chapter 160.

The critical conflicts between chapter 160 and RBCA arise in three areas. The first area is the scope of the investigation of and response to contamination, and involves where contamination must be measured. The second area of conflict concerns the level of protection, or what standards must be met in remediating the contamination. The third area relates to the degree of assurance that the remediation is effective, and involves when a site may be closed and no further remedial action is required. In order to show the sources of these conflicts, I begin with an overview of chapter 160 and certain of the rules implementing its mandates, continue with an overview of RBCA, and conclude with a comparison of the two regulatory schemes.

Chapter 160 was developed to meet the need to maintain groundwater resources "at some level of quality for both consumptive and non-consumptive uses." Wisconsin Legislative Council Memorandum No. 2, Identification of the Problems in Protecting Wisconsin's Groundwater Resources, May 24, 1982, to Members of the Special Committee on Groundwater Management, at 1. Chapter 160 establishes a process for the protection of the state's groundwater resources based on quantitative standards, called numerical standards in the statute. Wis. Stat. § 160.001. These numerical standards are to be developed and used to minimize the concentration of polluting substances in groundwater. Wis. Stat. § 160.001(1). These numerical standards must be used and achieved by all groundwater programs. Wis. Stat. § 160.001 (intro.), (1), (3) and (4). Regulations that provide greater protection than the statutory numerical standards are also allowed. Wis. Stat. § 160.001(5)-(6). Both the Department of Commerce and the Department of Natural Resources are subject to the requirements of, and standards set by, chapter 160. Wis. Stat. §§ 160.001(3)-(7) and 160.01(7).

The statute creates two types of numerical standards: enforcement standards and preventive action limits. Wis. Stat. § 160.001(1). Enforcement standards are derived primarily from federal or state drinking water standards. Wis. Stat. §§ 160.01(2)-(3) and 160.07-160.13. Generally, a regulatory agency may not allow a facility or activity to violate enforcement standards, and must require that contaminated sites be remediated so as to meet enforcement standards. Wis. Stat. §§ 160.19, 160.21 and 160.25. Preventive action limits are a certain percentage of the enforcement standards. Wis. Stat. § 160.15. Preventive action limits act as a trigger for remedial action, and are to be met if technically and economically feasible. Wis. Stat. §§ 160.001(8), 160.19, 160.21 and 160.23.

The Department of Natural Resources must set these numerical standards for substances that are in or likely to enter the groundwater resources of the state, and which affect public health or welfare. Wis. Stat. §§ 160.05(1) and (6), 160.07, 160.09 and 160.15. In identifying substances that affect public health, the department must consider a substance's effect on mortality, illness, and other aspects of human health. Wis. Stat. § 160.05(6)(b)-(c). In identifying substances that affect public welfare, the department must consider a substance's effect on the water's suitability for human use and for uses other than drinking water, and on plants and animals. Wis. Stat. § 160.05(6)(d)1.-3. Any other characteristics of a substance connected to public welfare may also be considered. Wis. Stat. § 160.05(6)(e). Chapter NR 140 of the Wisconsin Administrative Code identifies the substances and their numerical standards as required by chapter 160.

The places where contamination must be measured to determine whether the numerical standards mandated by chapter 160 are met are called "points of standards application." Wis. Stat. § 160.01(5). These points are determined based on whether monitoring is required. Wis. Stat. § 160.21. If monitoring is required, the points of standards application (where contamination must be measured) are wherever the monitoring is being done, wherever groundwater is being used, and on other properties where the contamination has spread. Wis. Stat. § 160.21(2)(a)1.-2. If monitoring is not required, the only difference is that no measurements need be taken at points of nonpotable groundwater use. Wis. Stat. § 160.21(2)(b)1.a. The department may by rule establish points of standards application, or measurement, at additional points to those identified above, to protect future groundwater uses and the public interest in state waters. Wis. Stat. § 160.21(2)(b)2.

The Department of Natural Resources is required to mandate monitoring in certain situations. Wis. Stat. § 160.27. Monitoring is required at contaminated sites, both to determine whether enforcement standards or preventive action limits are violated, and to determine the appropriate response to any such violations. Wis. Stat. § 160.27(2)(a)-(b). Accordingly, monitoring is required at all sites involved with PECFA because those sites are contaminated with petroleum from leaking underground storage tanks. Because monitoring is required at PECFA sites, continued violation of preventive action limits is prohibited wherever groundwater is monitored on those sites, unless compliance is not technically or economically feasible. Wis. Stat. §§ 160.21(2)(a)1. and 160.23(1)(b). Because monitoring is required at PECFA sites, enforcement standards may never be allowed to continue to be violated at any point of present groundwater use, or beyond the property lines off-site. Wis. Stat. §§ 160.21(2)(a)2. and 160.23(1)(c).¹

¹ Where monitoring is not required, enforcement standards may still not be allowed to continue to be violated off-site, and at any point of present groundwater use, unless the use is of nonpotable water and will not be affected by the contamination. Wis. Stat. §§ 160.21(2)(b)1. and 160.23(1)(c).

Where a preventive action limit or enforcement standard is attained or exceeded, the response may vary depending on many factors, including risk and cost effectiveness. Wis. Stat. § 160.21(3) and (4). However, whatever response is chosen must ensure compliance with enforcement standards at all points of standards application. Wis. Stat. §§ 160.23(1)(c) and 160.25(1) and (2). For PECFA sites, as noted above, those points are, at a minimum, at any point of groundwater use and any point off-site. In addition, the preventive action limits should be met unless technically or economically infeasible. Wis. Stat. § 160.23(1)(b).

Chapter 160 authorizes state agencies to promulgate regulations consistent with the requirements set forth above. Wis. Stat. § 160.19(1). The Department of Natural Resources has since 1974 adopted a series of regulations in chapters NR 700-750 of the Wisconsin Administrative Code to address contamination by hazardous substances generally. The proposed RBCA regulations would provide a separate regimen for responding to sites containing petroleum contamination.

Both sets of regulations aim to provide for more flexible and less costly clean-ups. Many of the points at which the NR 700 rules and RBCA diverge are merely variants of similar processes based on similar factors. Other points of divergence are where RBCA is not consistent with chapter 160. The basis for these inconsistencies is that while the NR 700 rules incorporate chapter 160 standards, RBCA does not.

The NR 700 series of regulations was adopted to address the identification, investigation and remediation of contaminated sites, in a consistent but flexible and cost-effective, even cost-saving, way. Wis. Admin. Code § NR 700.01(2); Adoption of Order SW-12-96, Memorandum to Natural Resources Board Members, June 12, 1996, at 13 (Response to Comment 4); Authorization for Hearing, January 11, 1996. Under these comprehensive environmental clean-up rules, contaminated sites are prioritized (Wis. Admin. Code ch. NR 710), investigated so as to determine the full extent of violations of soil and groundwater standards (Wis. Admin. Code ch. NR 716), remediated in a technically feasible and cost-effective way (Wis. Admin. Code ch. NR 722), monitored based on actual site measurements (Wis. Admin. Code ch. NR 724), and closed upon compliance with soil and groundwater standards (Wis. Admin. Code ch. NR 726).

The NR 700 regulations prescribe a process for remediating contamination at almost any site, with the response determined in part on coming into compliance with chapter 160 groundwater standards. The NR 700 regulations allow closure of a site where chapter 160 groundwater enforcement standards have not been met, only if: 1) adequate source control measures have been implemented (for example, enough work has been done to control a groundwater plume so as to prevent additional contamination in violation of groundwater standards), 2) natural attenuation is, and is shown to be, reducing the contamination so as to attain groundwater standards in a reasonable period of time, 3) there is no off-site violation of

groundwater preventive action limits, and 4) a groundwater use restriction is placed on the property deed. Wis. Admin. Code § NR 726.05.

RBCA is a process for addressing contamination only at petroleum-contaminated sites, with remediation dependent on exposure and determined by margins of safety. As with the NR 700 rules, the RBCA process progresses from prioritizing a contaminated site, to investigation (called evaluation under RBCA), remediation and closure. However, the scope of the investigation and appropriate response, the level of remediation, and the standards for closure under RBCA differ substantively from the NR 700 rules, and these differences are precisely the points where RBCA is not consistent with chapter 160.

The first set of inconsistencies involves the scope of the investigation and response required by the regulations. To ensure compliance with chapter 160's groundwater standards, NR 700 requires a site investigation sufficient to determine the full extent of the contamination. Wis. Admin. Code ch. NR 716. In contrast, RBCA calls for a site to be evaluated primarily to identify the sources of the contamination, any people, structures, utilities, surface waters or drinking wells adversely affected by the contamination (called "receptors"), and pathways of certain chemicals. ASTM Standard Guide §§ 3.1.29 and 6.6. If there are no receptors on or near a property, the extent of the contamination need not be determined under RBCA, with the result that contamination at or above the groundwater standards prescribed in chapter 160 may be left unaddressed. ASTM Standard Guide § 6.6.2 and 6.6.4.

A key difference between RBCA and chapter 160 (and the NR 700 regulations) involves where measurements must be taken. As explained above, chapter 160 requires measurements of contamination to determine compliance with preventive action limits wherever groundwater is monitored, and compliance with enforcement standards at any point of groundwater use and off-site. As explained below, RBCA requires measurements only onsite and only if there are points of human contact.² If there are no points of human contact, no measurement is required, and so there is no contamination to which to respond. If there are points of human contact, measurements are taken only on-site.

RBCA's measurement points, called points of compliance, do not match chapter 160's measurement points, called points of standards application, and in fact limit measurement of contamination. Measurements for response and closure under RBCA are taken at points of compliance, which are points between source areas (where chemical concentrations are highest) and potential points of exposure. ASTM Standard Guide §§ 3.1.23, 6.7, 6.10, 6.12 and 6.13. Points of exposure are points of human contact with a chemical (such as a drinking well). ASTM Standard Guide § 3.1.24. If there are no points of human contact on a site, then there are

² One result of RBCA's more limited measurement requirements could be that the extent of a plume is not fully identified under RBCA.

no measurements to be made and no basis for remediation. ASTM Standard Guide §§ 3.1.23, 3.1.24 and 6.7.1.

If points of human contact do exist at a site, points of compliance must be selected for measurement. Because points of compliance must be between the points of human contact and source areas, and source areas are most likely to be onsite (hence use of the term source), only onsite points need to be selected for measurement. When screening or site-specific levels are met at those points, no additional response is necessary and the site is closed. ASTM Standard Guide §§ 6.7.1.1 and 6.7.3. No response at all is necessary if no receptors (people, structures, utilities, surface waters or drinking wells adversely affected by contamination) exist. ASTM Standard Guide §§ 3.1.29, 6.6.2 and 6.6.4.

The result of the differences between points of compliance and points of standards application is that contamination caught under chapter 160 may never be caught, or may be inadequately defined and therefore responded to, under RBCA rules, in violation of chapter 160 standards. For example, chapter 160 requires action if a plume is expanding so as to exceed groundwater standards. RBCA requires no response at all if there are no receptors or points of human contact, even if contamination is spreading. And RBCA requires no measurement of, and therefore no response to, contamination off-site. Consequently, violations of enforcement standards, which chapter 160 prohibits, may under RBCA be allowed to remain, and even to get worse, off-site. Violations of enforcement standards may also be allowed to remain on-site if there are no receptors or points of human contact.

The second set of inconsistencies involves the standards that dictate when action must be taken and when compliance is achieved. These standards define the different levels of protection provided under chapter 160 and RBCA. Chapter 160 mandates only two numerical groundwater standards: preventive action limits and enforcement standards. These standards are uniform throughout the state, based primarily on federal or state drinking water standards.

RBCA calls for the development of other numerical standards not authorized by chapter 160. The basic RBCA standards are risk-based screening levels, which are derived for standard exposure scenarios, such as residential or commercial use of the property. ASTM Standard Guide §§ 6.4-6.7. RBCA provides the option of developing site-specific target levels that are also related to exposure. ASTM Standard Guide §§6.8-6.9. RBCA's risk-based screening levels and site-specific target levels are specific to a site or class of sites, based on exposure at that site or within that class. There is no authority under chapter 160 to generate RBCA's table of screening levels or to develop RBCA's site-specific target levels, both of which are different from chapter 160 preventive action limits and enforcement standards.

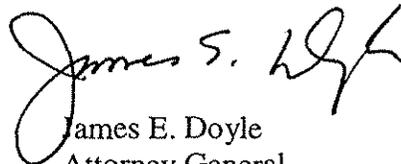
These differences in standards and measurement points result in inconsistencies in the degree of assurance prescribed by chapter 160 and provided under RBCA. Chapter 160 does not allow a site to be closed without its coming (or its being shown to be coming) into compliance

with enforcement standards (and also with preventive action limits if technically and economically feasible). Contrary to this statutory mandate, RBCA unconditionally allows violations of both standards to persist—on-site if there are no receptors or human exposure, and off-site if off-site contamination is not measured.

These inconsistencies between chapter 160 and RBCA stem from their different orientations. Chapter 160 requires regulatory oversight for the sake of the groundwater (see Wis. Stat. § 160.001), whereas RBCA requires regulatory oversight for the sake of who is at risk (see ATSM Standard Guide, § 1.1). Chapter 160 expressly requires the clean-up process to be based on a property's coming into compliance with the chapter's numerical standards. RBCA conditions the clean-up process on exposure and margins of safety, based on a limited view of the source of risk.

It is my opinion that neither the scope, nor the standards, nor the degree of assurance defined by RBCA are consistent with chapter 160. RBCA limits the measurement of contamination so that a response sufficient to meet chapter 160 standards is not ensured. RBCA bases corrective action on standards other than the numerical groundwater standards—enforcement standards and preventive action limits—mandated by chapter 160. Finally, RBCA allows the level of contamination at a site to remain in violation of those statutory groundwater standards. In these ways, RBCA is not consistent with chapter 160.

Sincerely,



James E. Doyle
Attorney General

JED:JFK:hms

CAPTION:

The promulgation of rules that prescribe the use of risk-based methodologies, such as the American Society for Testing and Materials' Risk-Based Corrective Action, to respond to petroleum contamination in soil and groundwater, would violate Wis. Stat. ch. 160. The risk-based program limits the measurement of contamination so that a response sufficient to meet chapter 160 groundwater standards is not ensured, bases corrective action on standards other than the groundwater standards mandated by chapter 160, and allows the level of contamination at a site to remain in violation of those statutory groundwater standards.



STATE OF WISCONSIN
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July 6, 1999

OAG - 4 99

Ms. Marlene A. Cummings
Secretary
Wisconsin Department of Regulation and Licensing
1400 East Washington Avenue
Madison, WI 53702

Dear Ms. Cummings:

At the request of the Examining Board of Social Workers, Marriage and Family Therapists and Professional Counselors ("Board"), you ask my opinion on two questions concerning the certification of social workers, marriage and family therapists and professional counselors. The first question concerns testing applicants for reciprocal certificates on Wisconsin law. The second question concerns the standards for granting reciprocal certificates.

First, you ask:

(1) Whether the interested Section of the Examining Board of Social Workers, Marriage and Family Therapists and Professional Counselors . . . may require applicants who are applying for Wisconsin certification under the "reciprocal certificates" provisions in sec. 457.15, Stats., to pass an examination covering Wisconsin law as it relates to professional practice.

The answer to your first question is "no."

Wis. Stat. § 457.15(1), (2) and (3) defines the conditions under which an interested section of the Board "shall . . . [g]rant a . . . certificate to any individual." In each case, the individual (a) must apply; (b) must pay the required fee; (c) must possess "a similar certificate in another state or territory of the United States"; and (d) the interested section must "determine[]" that the requirements for obtaining the certificate in the other state or territory are substantially equivalent to the requirements under [the applicable subsection of sections 457.08, 457.10 or 457.12]." In summary, these Wisconsin statutes require a person to file an application, pay a fee, have an academic degree, pass an examination demonstrating minimum competence and, for some certificates, have certain kinds of experience. Where each of these conditions are met, Wis. Stat. § 457.15 directs that the section "shall grant" the appropriate certificate.

A substantially similar question was presented to the Attorney General in 1987. Your predecessor asked whether the Examining Board of Architects, Professional Engineers, Designers and Land Surveyors may adopt a rule requiring land surveyors applying for Wisconsin

registration under the reciprocity provision to pass an examination on knowledge of Wisconsin practice and procedures. The Board was concerned that surveyors from other states applying for Wisconsin registration may not know Wisconsin practices and procedures. The Attorney General concluded that a credentialing board could not impose conditions for obtaining a credential different from or in addition to those established by statute. The opinion stated, 76 Op. Att'y Gen. 49, 50 (1987):

An examining board may not lawfully deny an applicant for licensure, under a reciprocity statute, based upon a board rule establishing an additional qualification for licensure, if the applicant otherwise meets the criteria established by statute, *Application of State Board of Medical Examiners*, 201 Okl. 365, 206 P.2d 211 (1949), and an applicant under such circumstances may compel board action by mandamus. *Levin v. Board of Medical Examiners of California*, 74 Cal. 104, 239 P. 410 (1925).

The Legislature has established the criteria for the granting of a certificate of registration applied for under the reciprocal provision. The criteria are explicit. The proposed rule would add a condition not contemplated in the statute, and thus would not be a correct interpretation of the law. Section 227.10(2) provides: "No agency may promulgate a rule which conflicts with state law." And section 227.11(2)(a) provides that a rule of an agency "is not valid if it exceeds the bounds of correct interpretation."

The use of the word "shall" in the statutes is presumed to be mandatory rather than directory. *Karow v. Milwaukee County Civil Serv. Comm.*, 82 Wis. 2d 565, 570, 263 N.W.2d 214 (1978). After an interested section has obtained an application and fee from a person seeking a reciprocal application, and has determined the substantial equivalency of the licensing requirements in the other state, the section "shall . . . [g]rant a . . . certificate to [the applicant]." Wis. Stat. § 457.15(1), (2) and (3). Thus, an interested section must grant a certificate when the criteria contained in the applicable statutes are satisfied, and may not decline to grant a certificate based on a criterion outside those in the statute. The Board correctly observes that the practice of social work, family, marriage and professional counseling are distinguishable from the practice of land surveying, in that incompetent practice could directly and immediately affect the health and safety of the certificate holder's clients in a way that incompetent land surveying may not. However, although there may well be sound public policy reasons for requiring the holders of Wisconsin certificates to be knowledgeable in the area of Wisconsin professional practice, that public policy determination is for the Legislature to make, not the individual sections or the Board.

Second, you ask whether the interested section of the Board is required by Wis. Stat. § 457.15 to grant a certificate to an applicant who holds a similar certificate granted by another state or territory that has requirements similar to Wisconsin for obtaining the certificate if the

applicant did not in fact meet the substantially similar requirements of the other state because the applicant was granted an exception by the other state or territory.

The answer to your second question is that the interested Board section may not grant a reciprocal social work, marriage and family therapy or professional counselor credential to a person who applied after May 31, 1995, and cannot demonstrate that he or she obtained his or her non-Wisconsin credential under state or territorial requirements that are substantially equivalent to the examination, education and experience requirements of Wis. Stat. § 457.08, 457.10 or 457.12, respectively.

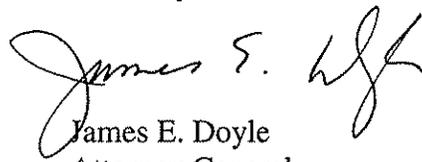
Prior to May 31, 1995, an applicant seeking a Wisconsin credential as a social worker, marriage and family therapist or professional counselor could obtain his or her certificate through three alternative routes. First, an applicant could qualify by passing an examination and satisfying the education and experience requirements prescribed by statute in Wis. Stat. § 457.08, 457.10 or 457.12 (the "statutory" route). Second, an applicant could apply under the non-statutory provisions created by 1991 Wisconsin Act 160, § 21, and could qualify without passing an examination, provided the applicant met specified alternative education and experience requirements (the "nonstatutory grandfathering" route). See 1991 Wisconsin Act 160, § 21(2)(a)-(d) (social workers), 21(2)(e) (marriage and family therapists) and 21(2)(f)-(g) (professional counselors). Third, an applicant could apply by presenting a qualifying certificate from another state (the "reciprocal certificate" route). See Wis. Stat. § 457.15. By contrast, 1991 Wisconsin Act 160 provides that persons who apply for certification after May 31, 1995, are required to satisfy the statutory examination, education and experience requirements (the "statutory" route), or present a qualifying certificate from another state (the "reciprocal certificate" route). At the present time, no person may receive a Wisconsin credential through the "non-statutory grandfathering" route, because the window for those applications was closed on May 31, 1995.

The issue of what applicants for reciprocal credentials were required to demonstrate became moot on May 31, 1995, when the "non-statutory grandfathering" route ended. By statute, applicants for Wisconsin certificates who do not hold certificates in other states must now satisfy the examination, education and experience requirements of the respective certification statutes; there is no non-statutory alternative route to certification. These requirements also apply to applicants holding certificates from another state. A person who holds a certificate in another state can obtain a Wisconsin certificate under Wis. Stat. § 457.15 only if he or she "holds a similar certificate in another state or territory of the United States" and the respective section "determines that the requirements for obtaining the certificate in the other state or territory are substantially equivalent to the requirements under s. 457.08 [and its relevant subsections, or sections 457.10 or 457.12]." Wis. Stat. §§ 457.15(1)(a)-(c) (social workers), 457.15(2) (marriage and family therapists) and 457.15(3) (professional counselors).

Ms. Marlene A. Cummings
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1991 Wisconsin Act 160, read in its entirety, clearly reflects the Legislature's intent that persons who apply for credentials under that act after May 31, 1995, should satisfy specific educational requirements, demonstrate competence by passing an approved examination, and, for certain credentials, and satisfy specific experience requirements. To the extent that the holder of a certificate from another state or territory cannot demonstrate that his or her certificate was obtained by satisfying substantially equivalent requirements, the Board has no authority to grant a reciprocal certificate under Wis. Stat. § 457.15.

Sincerely,

A handwritten signature in cursive script, appearing to read "James E. Doyle".

James E. Doyle
Attorney General

JED:BAO:mmp

CAPTION:

The Examining Board of Social Workers, Marriage and Family Therapists and Professional Counselors may not require applicants for reciprocal certificates to pass an examination covering Wisconsin law, where the statutes do not provide for such a requirement. Applicants for Wisconsin certificates under reciprocal certification must demonstrate that they obtained their certificates under a state law which was substantially equivalent to Wisconsin's educational, experience and examination requirements.



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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Revised OAG 5 - 99

December 18, 2000

Mr. William R. Glaves
Corporation Counsel
Vilas County
Post Office Box 369
Eagle River, WI 54521

Dear Mr. Glaves:

You have requested my opinion on the authority of persons appointed as guardians under the Wisconsin Statutes to consent to medical treatment, including involuntary administration of psychotropic medications, for their wards. Specifically, you have asked:

1. May a guardian authorize or give consent for medication or medical treatment, including psychotropic medication, for the guardian's ward?

A guardian may give consent for general medical treatment without a court order. A guardian may make health care decisions for the ward unless a court specifically finds that the ward is competent to make health care decisions, or unless the ward has a health care agent, under a valid power of attorney for health care, who is not the guardian. A guardian's consent to administer psychotropic medication probably must be preceded by a finding by a court under Wis. Stat. §§ 880.07(1m) and 880.33(4m) that the ward is not competent to refuse psychotropic medication.

2. May a guardian authorize or give consent for the involuntary or forcible administration of medication or treatment, including psychotropic medication, for the guardian's ward?

Neither Wisconsin courts nor the Wisconsin Legislature have addressed whether a guardian may consent to involuntary administration of medication or medical treatment other than psychotropic medication. I conclude that it is likely that the courts would find that a guardian has authority to consent to the involuntary administration of medication or medical treatment that is clearly in the ward's best interest. A guardian probably does not have authority to consent to involuntary or forcible administration of psychotropic medication without a court order authorizing this consent under Wis. Stat. § 880.33(4r).

3. Would the answer to either of the above questions change if the guardian's ward is protectively placed in a nursing home or other facility?

Wisconsin Stat. ch. 55, establishing the protective service and protective placement systems, does not expand a guardian's rights as provided elsewhere in the statutes. Consequently, the guardian's authority to consent to medication is neither expanded nor reduced by the ward's protective placement under Wis. Stat. ch. 55.

This opinion begins with a discussion of pertinent definitions. It then considers a guardian's authority to consent to medication or medical treatment other than psychotropic medication. Next, the opinion considers the guardian's authority to consent to the administration of psychotropic medication. The opinion then addresses the guardian's authority to consent to forcible or involuntary administration of psychotropic medications and of general medications or medical treatment. The opinion concludes with an analysis of the effect of an order for protective placement on a guardian's authority to consent to medication, including psychotropic medication.

Guardians' Authority Under Wis. Stat. Chs. 48 and 880

Under Wisconsin law, all minors and incompetents are subject to guardianship. *See* Wis. Stat. § 880.03. A "guardian" is defined as "one appointed by a court to have care, custody and control of the person of a minor or an incompetent or the management of the estate of a minor, an incompetent or a spendthrift." *See* Wis. Stat. § 880.01(3). An "[i]ncompetent" is one "adjudged by a court of record to be substantially incapable of managing his or her property or caring for himself or herself by reason of infirmities of aging, developmental disabilities, or other like incapacities. Physical disability without mental incapacity is not sufficient to establish incompetence." *See* Wis. Stat. § 880.01(4). A guardian may be a guardian of the person of an incompetent, or a guardian of the property of the incompetent, or both. *See* Wis. Stat. § 880.03. A "ward" is one for whom a guardian has been appointed. *See* Wis. Stat. § 880.01(10). I understand your questions to relate to the powers vested in a guardian of the person. Throughout this opinion, therefore, the use of the term "guardian" is meant to refer to a guardian of the person.

The courts also have authority under Wis. Stat. chs. 48 and 880 to appoint a guardian for a child. A guardian appointed under Wis. Stat. ch. 48 has

the duty and authority to make important decisions in matters having a permanent effect on the life and development of the child and the duty to be concerned about the child's general welfare, including but not limited to:

- (1) The authority to consent to . . . major medical, psychiatric and surgical treatment

See Wis. Stat. § 48.023. Where the court appoints a guardian for a child adjudged to be in need of protection or services, that guardian may be a relative of the child as provided in Wis. Stat.

§ 48.977. The court may also appoint a “standby” guardian for a child. *See* Wis. Stat. § 48.978. Both of these sections provide that the duties and authority of guardians under Wis. Stat. ch. 880 remain in effect even if the guardianship appointment is made under Wis. Stat. ch. 48. *See* Wis. Stat. §§ 48.977(8) and 48.978(7). Thus, while certain provisions of the guardianship and mental health statutes treat adults and minors separately, the rights of their guardians to consent to or refuse medical treatment are the same in all important respects.

Consent to Medication or Medical Treatment Other Than Psychotropic Medication

As a general matter, guardians have authority to consent to medical treatment for their wards. *See* Viney, *Guardianship and Protective Placement for the Elderly in Wisconsin* § 6.6 (1996) (“a guardian of the person is considered to have the power to consent to medical treatment for the benefit of the ward. The guardian does not have the authority, however, to consent to medical care that does not serve the ward’s interest. Nor may the guardian consent to psychosurgery, electroconvulsive treatment, or ‘other drastic treatment procedures.’”). This authority comes from the guardian’s obligation to “endeavor to secure necessary care, services or appropriate protective placement on behalf of the ward.” *See* Wis. Stat. § 880.38(2). The guardian is also obligated to make an annual report on the ward’s health condition to the court that ordered the guardianship. *See* Wis. Stat. § 880.38(3).

A guardian appointed for an incompetent ward may exercise the same health care decision-making authority that could be vested in a health care agent under Wis. Stat. ch. 155, unless the ward also has a health care agent. *See In Matter of Guardianship of L.W.*, 167 Wis. 2d 53, 82, 482 N.W.2d 60 (1992) (analyzing Wis. Stat. §§ 880.33(3) and 155.60(2) and concluding that “the clear indication is that a guardian has identical decision-making powers as a health care agent”). Under Wis. Stat. ch. 155, a health care agent has authority to make health care decisions for the principal, although the agent may not admit or commit the principal to an inpatient facility except for recuperative or respite care, or under the commitment and placement proceedings in Wis. Stat. chs. 51 and 55. *See* Wis. Stat. § 155.20(2). In addition, a health care agent may not consent to “experimental mental health research or to psychosurgery, electroconvulsive treatment or drastic mental health treatment procedures for the principal.” *See* Wis. Stat. § 155.20(3). The health care agent, therefore, may make all other medical decisions for the principal, consistent with the principal’s wishes as expressed in the power of attorney for health care instrument. *See* Wis. Stat. § 155.20(5). The desires of a principal who is not incapacitated, however, supersede the power of attorney for health care instrument at all times. *See* Wis. Stat. § 155.05(4).

Where a ward is incompetent and, prior to becoming incompetent, has executed a power of attorney for health care under Wis. Stat. ch. 155, the court appointing a guardian for that person may leave that power of attorney instrument in effect. *See* Wis. Stat. § 880.33(8)(b). If the court allows the power of attorney to remain effective, the court shall, as part of the guardianship appointment, order that the guardian’s authority to make health care decisions for

the ward be limited by the terms of the power of attorney for health care. *See id.*; *see also* Wis. Stat. § 155.60(2). Conversely, if the court does not order the power of attorney for health care to remain effective as part of the guardianship appointment, then the power of attorney for health care is revoked upon the appointment of the guardian. *See* Wis. Stat. § 155.60(2).

A guardian is appointed to exercise the ward's rights on his or her behalf, where the ward is incompetent to exercise those rights. Accordingly, the court may make a finding of limited incompetence and may determine that the ward is competent to exercise certain rights. *See* Wis. Stat. § 880.33(3). If the court orders that the ward is competent to make health care decisions, his or her guardian would be without authority to make those decisions. If a court has not found the ward to be competent to make health care decisions, and if the ward does not have a valid power of attorney for health care, a guardian may make health care decisions on the ward's behalf, including consenting to medical treatment other than the administration of psychotropic medication.

Consent to Psychotropic Medication

A guardian is probably required to obtain a court order authorizing the guardian to consent to the voluntary administration of psychotropic medication for the ward. Under current law, a petition for guardianship may include allegations that the prospective ward is not competent to refuse psychotropic medication. *See* Wis. Stat. § 880.07(1m). The petition must allege, in part, that the ward would benefit from psychotropic medication, that the ward is substantially likely to suffer harm or to cause harm to others without the medication and that the ward has a history of refusing medication. *See id.* If these elements are proven, the court may order the appointment of a guardian to consent to or refuse psychotropic medication. *See* Wis. Stat. § 880.33(4m). Along with this appointment, the court must order the county to develop a treatment plan for the ward, review and approve the plan, order protective services under Wis. Stat. ch. 55 and order the county to ensure that appropriate protective services are provided to the ward. *See id.*

Wisconsin Stat. ch. 880 defines "[n]ot competent to refuse psychotropic medication' . . ." to include those who, because of chronic mental illness, are incapable of expressing an understanding of the advantages and disadvantages of treatment and its alternatives or of applying such an understanding in order to make an informed choice. *See* Wis. Stat. § 880.01(7m). The findings of Wis. Stat. § 880.07(1m) appear to be limited to those who reside in the community and are unable to provide for their care in the community because they refuse to take needed medication. Despite the limitations contained in these two sections, I conclude that a court would likely hold that a judicial determination that a ward is not competent to refuse psychotropic medication is required before a guardian may consent to the administration of that medication to any ward.

Individuals who are not chronically mentally ill, and individuals who are no longer living independently, have no less right to due process protections before being deprived of their right to give consent to the administration of psychotropic medications. *Cf. Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (holding that competent, incarcerated individuals had substantial liberty interests in refusing administration of psychotropic medication). As a matter of equal protection, therefore, it appears that a court faced with this question would conclude that all individuals, including those who are not currently institutionalized and not chronically mentally ill, would be entitled to a judicial determination that they are not competent to refuse psychotropic medication under Wis. Stat. § 880.33(4m) before their guardians could act on their behalf and consent to the administration of that medication. *Cf. Jones v. Gerhardstein*, 141 Wis. 2d 710, 416 N.W.2d 883 (1987); *State ex rel. Watts v. Combined Community Services*, 122 Wis. 2d 65, 91, 362 N.W.2d 104 (1985) (holding that guardians could not consent to admission of wards to psychiatric hospitals without following relevant procedures of Wis. Stat. ch. 51).

Wisconsin Stat. §§ 880.07(1m) and 880.33(4m) were created by 1987 Wisconsin Act 366, which was enacted on April 22, 1988, following the Wisconsin Supreme Court's decision in *Jones*. In *Jones*, the court concluded that individuals committed under Wis. Stat. ch. 51 were entitled to the same due process protections as pre-commitment detainees, including a finding of incompetence to refuse medication, before having medication administered to them without their consent. The record in the case demonstrated that many individuals who were proper subjects for commitment under Wis. Stat. ch. 51 nevertheless were competent to make decisions regarding the acceptance of psychotropic medication. *See Jones*, 141 Wis. 2d at 730. The court concluded that no rational basis existed for extending the right to refuse medication, absent a court order, to pre-commitment detainees but not to those who had been committed. *See id.* at 735. Although *Jones* involved the involuntary administration of psychotropic medication, discussed in more detail below, its equal protection analysis is instructive.

Similarly, it is unlikely that a court would conclude that a rational basis exists for providing extensive procedural protections before permitting a guardian to consent to the administration of psychotropic medication to a chronically mentally ill individual who is living independently, *see* Wis. Stat. §§ 880.01(7m) and 880.07(1m)(b), while denying those same protections to other wards or prospective wards. An individual may be found to be incompetent to care for himself or herself within the meaning of Wis. Stat. § 880.01(4), but it does not follow *a fortiori* that the same individual is incompetent to make decisions regarding psychotropic medication. *Cf. Wis. Stat. § 880.33(3)* (permitting limited guardianships where the ward remains authorized to exercise certain rights); *Jones*, 141 Wis. 2d at 737 (“In each class competency to choose must be presumed unless the condition of the individual is shown to be otherwise.”). If the mere appointment of a guardian conferred authority to consent to the administration of psychotropic medication, there would have been no need for the Legislature to add the particular findings required under Wis. Stat. § 880.07(1m) regarding consent to psychotropic medication.

Reading Wis. Stat. ch. 880 to require a court to authorize any guardian to consent to the administration of psychotropic medication is further supported by Wis. Stat. § 55.05(2)(d), which provides that even where an individual is determined to be incompetent and a guardian is appointed under Wis. Stat. § 880.33, a court must make the findings required by Wis. Stat. § 880.33(4m) before ordering psychotropic medication as a protective service. Wisconsin Stat. § 55.05(2)(b) provides that “[a] guardian may request and consent to protective services on behalf of the guardian’s ward,” but a court must order psychotropic medication.

Accordingly, I expect that a Wisconsin court faced with the question would conclude, in light of the provisions of Wis. Stat. §§ 880.07(1m) and 880.33(4m) and equal protection principles, that a court must specifically determine that the individual is not competent to refuse psychotropic medication before permitting the guardian to consent to such medication.

Forcible Administration of Psychotropic Medication

If the ward refuses to take the psychotropic medication voluntarily and the court has appointed a guardian to consent to or refuse psychotropic medication under Wis. Stat. § 880.33(4m), the court may authorize the guardian to consent to the forcible administration of the medication under the circumstances provided in Wis. Stat. § 880.33(4r). This section of the statutes specifically applies to wards who are receiving protective services under Wis. Stat. § 55.05(2)(d). The statutes are silent on whether the requirements of Wis. Stat. § 880.33(4r) apply to wards who have been protectively placed under Wis. Stat. § 55.06. Nevertheless, because of the important constitutional interests at issue, it is likely that a court would conclude that a guardian could not consent to the involuntary or forcible administration of psychotropic medication for a ward who has been protectively placed without a court order under either Wis. Stat. ch. 880 or 51. A guardian who has been authorized to consent to the involuntary administration of psychotropic medication under Wis. Stat. § 880.33(4r) may, of course, decline to give that consent. In such a case, the court must employ the procedures in Wis. Stat. § 51.61(1)(g)2. to order the forcible administration of psychotropic medication without the guardian’s consent.

The steps provided in Wis. Stat. § 880.33(4r), while potentially cumbersome, are required to preserve the ward’s liberty interest in not being subjected to unwarranted administration of psychotropic medication. In *St. ex rel. Roberta S. v. Waukesha DHS*, 171 Wis. 2d 266, 491 N.W.2d 114 (Ct. App.), *review denied*, 494 N.W.2d 211 (1992), the court described the role of the guardian in consenting to or refusing psychotropic medication:

[A] guardianship for the purpose of consenting to or refusing psychotropic medication is to be used primarily for the protection of the ward. A guardian, therefore, is appointed to ensure that a ward is not unnecessarily or improperly medicated. The guardian’s exercise of consent simply means that he or she makes

an informed decision about the propriety of the treatment when the ward is unable to do so.

Id. at 275. The court counseled that guardianships are not to be used as “weapons with which to force medication on unwilling individuals.” *Id.* Less than two years after this decision, the Legislature adopted 1993 Wisconsin Act 316, which amended Wis. Stat. chs. 51, 55 and 880 to give guardians authority to consent to forcible administration of psychotropic medication, contingent upon a court’s approval.

Roberta S. involved an individual who was living independently and had not been protectively placed. *See* 171 Wis. 2d at 271. The court’s opinion did not turn on this factual circumstance, however, but was based instead upon the protective nature of guardianships and the important liberty interests in refusing unwanted administration of psychotropic medication. The United States Supreme Court has held that competent individuals, including incarcerated individuals, possess a “significant liberty interest” under the United States Constitution in refusing the forced administration of psychotropic drugs. *See Washington*, 494 U.S. at 221-22. Incompetent individuals possess the same interests. *See Enis v. Dept. of Health & Social Services of Wisc.*, 962 F. Supp. 1192, 1200 (W.D. Wis. 1996). Various courts have held that this right stems from the liberty interest against unwanted bodily invasions, as well as from the substantial risks and side effects of some psychotropic medications. *See Washington*, 494 U.S. at 229-30; *Felce v. Fiedler*, 974 F.2d 1484, 1497 (7th Cir. 1992); *Jones*, 141 Wis. 2d at 727-28. An individual’s interest in avoiding the involuntary administration of psychotropic medication is sufficient to require substantial due process protections before such medications may be administered. *See Washington*, 494 U.S. at 235; *Felce*, 974 F.2d at 1500 (holding that a process that allowed a parole agent to impose as a condition of parole the involuntary administration of psychotropic medication violated the parolee’s constitutionally protected liberty interests, and requiring a hearing before an independent decision maker to determine whether this condition furthered the objectives of parole).

Wisconsin courts have consistently declined to permit orders for involuntary psychotropic medication to be made unless they are specifically authorized by statutes that provide due process to the individual who may be medicated. *See, e.g., In Matter of Mental Condition of Virgil D.*, 189 Wis. 2d 1, 524 N.W.2d 894 (1994); *Roberta S.*, 171 Wis. 2d at 268; *Jones*, 141 Wis. 2d at 745; *Matter of Guardianship of K.N.K.*, 139 Wis. 2d 190, 206, 407 N.W.2d 281 (1987), *review denied sub nom, K.N.K. v. Buhler*, 138 Wis. 2d 532, 412 N.W.2d 893 (1987). In *Matter of Guardianship of K.N.K.*, the court of appeals concluded that the procedures in Wis. Stat. ch. 55 for securing protective placement and protective services did not include authority for a court to order involuntary administration of psychotropic medication for an individual in need of protective placement or services. *See Matter of Guardianship of K.N.K.*, 139 Wis. 2d at 205-06. In *In Matter of Mental Condition of Virgil D.*, the Wisconsin Supreme Court held that a court’s authority to order involuntary medication under Wis. Stat. § 51.61(1)(g)4. is limited to circumstances where the conditions set forth in that section are

satisfied. *See In Matter of Mental Condition of Virgil D.*, 189 Wis. 2d at 5. The court found that the circuit court had erred by ordering involuntary administration of psychotropic medication based on a finding not reflected in the statutes. *See id.*

The process set forth in Wis. Stat. § 880.33(4r) must be followed even though the guardian has been authorized to consent to the voluntary administration of psychotropic medication under Wis. Stat. § 880.33(4m). Because of the uniquely invasive nature of forced administration of medication that is designed to alter cognitive processes, however, the Legislature has chosen to require court involvement before such medication may be involuntarily or forcibly administered. *See Jones*, 141 Wis. 2d at 742; Wis. Stat. §§ 51.61(1)(g) and 880.33(4r). I am aware that the concerns about psychotropic medication expressed in *Washington*, *Jones* and other cases may be outdated in light of advances in the development and prescription of these medications. Until the courts and the Legislature adopt a more permissive approach toward these medications, however, I must conclude that a guardian has authority to consent to the forcible or involuntary administration of psychotropic medication for a ward who has not been protectively placed only where the procedures of Wis. Stat. § 880.33(4r) have been followed.

The procedures in Wis. Stat. § 880.33(4r) do not explicitly apply to individuals who have been protectively placed in a nursing or residential facility under Wis. Stat. § 55.06. *See, e.g.*, Wis. Stat. § 880.33(4r)(b) (empowering the court, upon appropriate findings, to authorize a guardian to consent to forcible administration of psychotropic medication on an outpatient basis). An argument could therefore be made that the guardian of a ward who has been protectively placed may consent to the involuntary or forcible administration of these medications to such a ward without court involvement. Because I do not read Wis. Stat. ch. 55 to alter the otherwise existing rights and responsibilities of wards and guardians regarding consent for all types of medication, as discussed below, I am unable to conclude that a guardian may consent to the involuntary or forcible administration of psychotropic medication for a protectively placed ward without court involvement under either Wis. Stat. ch. 51 or 880. *See Roberta S.*, 171 Wis. 2d at 277-78; *Matter of Guardianship of K.N.K.*, 139 Wis. 2d at 206-07.

I am similarly unable to conclude that the Legislature's use of the term "forcible administration" in Wis. Stat. § 880.33(4r) means that a guardian may consent, without court involvement, to the administration of psychotropic medication in a manner that is involuntary but not forcible. The cases discussed above recognize two parts to the constitutional interest at stake: the right to be free from unwanted bodily invasion, including forcible invasion, and the right to be free from the unwarranted administration of drugs whose purpose is "to alter the chemical balance in a patient's brain, leading to changes, intended to be beneficial, in his or her cognitive processes." *See Washington*, 494 U.S. at 229. While involuntary administration of psychotropic medications, making use of sleight of hand rather than physical force, satisfies the concern about forcible bodily invasions, it does not address the second part of the analysis. *Felce*, for example, addressed the due process required before a parolee could be subjected to

psychotropic administration administered involuntarily, not forcibly. *See Felce*, 974 F.2d at 1495 (holding that Felce had a liberty interest in being free from the involuntary use of psychotropic medication during mandatory parole). Wisconsin courts, however, have not yet provided guidance as to whether the distinction between involuntary and forcible administration is a constitutionally meaningful one.

Forcible Administration of Other Medication or Medical Treatment

Wisconsin courts have not addressed the scope of the guardian's authority to consent to the involuntary administration of clearly beneficial medication or medical treatment, such as medication needed to ameliorate a treatable disease or medical condition, if the ward is resistant to the medication or medical treatment. Suppose, for example, that an individual determined to be incompetent to make medical decisions contracts strep throat, needs antibiotics to treat the infection, but refuses to swallow those antibiotics voluntarily. Two prior cases suggest that a guardian would be without authority to consent to highly invasive, irreversible medical procedures that were of little or no benefit to the ward. *See In Matter of Guardianship of Eberhardy*, 102 Wis. 2d 539, 578, 307 N.W.2d 881 (1981) (directing the circuit courts to refrain from exercising jurisdiction over guardians' requests to give consent to the sterilization of their wards due to the relatively irreversible nature of the procedure and the lack of legislative guidance on the underlying policy issues); *In re Guardianship of Pescinski*, 67 Wis. 2d 4, 7, 266 N.W.2d 180 (1975) (declining to authorize a guardian to consent to the removal of a ward's kidney for purposes of donation to the ward's sister because "[t]here is absolutely no evidence here that any interests of the ward will be served by the transplant."). These cases do not, however, address a guardian's authority to consent to medical procedures that are in the ward's best interest.

In *Spahn v. Eisenberg*, 210 Wis. 2d 557, 563 N.W.2d 485 (1997), a case addressing the guardian's authority to consent to the termination of life-sustaining medical procedures for a ward not in a persistent vegetative state, the court concluded that where a ward's wishes regarding medical treatment can be determined by a preponderance of the evidence, then it is in the ward's best interest to have those wishes honored. *See id.* at 569. This might suggest that the ward's refusal to participate voluntarily in any medical treatment, however benign, should be honored as an expression of the ward's wishes. *See generally* Viney, *Guardianship and Protective Placement for the Elderly in Wisconsin* § 6.6 (citing *Roberta S.*, 171 Wis. 2d at 266, for the proposition that "[a] guardian of the person probably does not have the authority to force medical treatment on an unwilling ward."). However, the court in *Spahn* also held that where a ward is not in a persistent vegetative state, and where the ward has not made her wishes as to medical decisions perfectly plain, it is in the ward's best interest to continue life-sustaining measures. In other words, it is in the ward's best interest to pursue treatment. *See id.* at 567-68; *see also In re Guardianship of Pescinski*, 67 Wis. 2d at 7 (holding that the guardian's obligation in making medical decisions is to act "loyally in the best interests of his ward"), *quoting Guardianship of Nelson*, 21 Wis. 2d 24, 32, 123 N.W.2d 505 (1963).

If the ward has been found incompetent to make health care decisions, I conclude that Wisconsin courts would likely find that a guardian has authority to consent to the forcible administration of medication and treatment that is in the ward's best interest, that is to say for the ward's benefit, other than psychotropic medication or the experimental and extraordinary measures described in Wis. Stat. §§ 155.20(3) and 51.61. This conclusion follows from the guardian's general obligation to secure necessary care and services for a ward, and from the presumption that the ward has been determined to be incompetent to make an informed, independent judgment on medical matters. A ward's refusal to take medication, or to follow a course of medical treatment, cannot necessarily be viewed as an expression of the ward's conscious desire to refuse that medication or medical treatment. An incompetent individual for whom a guardian has been appointed is presumed to be unable to care for himself or herself or to make appropriate decisions about medical care. Without the guardian's consenting to forcible administration of medication or treatment that the ward refuses, the ward's health could easily be jeopardized.

Although *In Matter of Guardianship of L.W.* dealt with a guardian's authority to refuse life-sustaining medical treatment for a ward in a persistent vegetative state, its instruction on the appropriate exercise of the best interest analysis may provide guidance for guardians faced with difficult medical decisions. The court counseled the guardian to begin with the presumption that treatment of the medical condition at issue is in the ward's best interest. See *In Matter of Guardianship of L.W.*, 167 Wis. 2d at 86. Assessment of the ward's best interests involves consideration of the invasiveness of the medication or procedure, its chances of success and its likely side effects. See *id.* at 87. The guardian is to assess these factors "from the standpoint of the patient, and should not substitute his or her own view of the 'quality of life' of the ward." See *id.* at 88.

Given the courts' extended discussions of the guardian's obligation to act in the ward's best interests, and given the preference expressed in *Spahn*, *In Matter of Guardianship of L.W.* and *In re Guardianship of Pescinski* for continued treatment, a court would likely find that a guardian may consent to the forced administration of medically necessary, beneficial medication or medical treatment that is in the ward's best interest. Because this is an open question under Wisconsin law, however, we will have to await further guidance from the courts.

Protective Placement

Your final question asks whether the guardian's authority to consent to medical treatment of any kind, including psychotropic medication, whether administered voluntarily or involuntarily, is affected by the ward's protective placement under Wis. Stat. ch. 55. I conclude that the guardian's authority is not affected by such a placement.

Wisconsin Stat. ch. 55 contains a declaration of policy that provides some guidance on this issue:

The legislature recognizes that many citizens of the state, because of the infirmities of aging, chronic mental illness, mental retardation, other developmental disabilities or like incapacities incurred at any age, are in need of protective services. These services should, to the maximum degree of feasibility under programs, services and resources that the county board of supervisors is reasonably able to provide within the limits of available state and federal funds and of county funds required to be appropriated to match state funds, *allow the individual the same rights as other citizens, and at the same time protect the individual from exploitation, abuse and degrading treatment.* This chapter is designed to establish those services and assure their availability to all persons when in need of them, and *to place the least possible restriction on personal liberty and exercise of constitutional rights consistent with due process and protection from abuse, exploitation and neglect.*

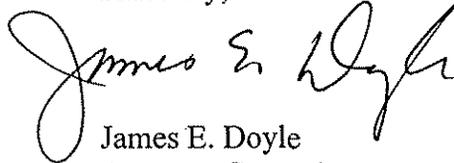
Wis. Stat. § 55.01. Wisconsin Stat. § 55.07 provides that the patients' rights provided in Wis. Stat. § 51.61 apply to individuals who receive services under Wis. Stat. ch. 55. Accordingly, individuals who are protectively placed under Wis. Stat. ch. 55 have the right to be free from the involuntary or forcible administration of psychotropic medications absent due process. *See* Wis. Stat. § 51.61(1) and (1)(g). The guardian's role when a ward is protectively placed under Wis. Stat. ch. 55 is to "take reasonable steps to assure that the ward is well treated, properly cared for, and is provided with the opportunity to exercise legal rights." *See* Wis. Stat. § 55.06(15).

In addition to this statutory guidance, the equal protection guarantees of the Wisconsin and United States Constitutions would appear to require that individuals who are protectively placed have the same rights to refuse psychotropic medication, absent due process, that are extended to individuals who are not protectively placed. *See* Wis. Const. art. I, § 1; U.S. Const. amend XIV, § 1. Various courts have held that incarcerated individuals, for example, have constitutionally protected liberty interests in being free from unwanted administration of psychotropic medication without due process. *See, e.g., Washington*, 494 U.S. at 229-30; *Felce*, 974 F.2d at 1497; *Enis*, 962 F. Supp. at 1200. The Wisconsin Court of Appeals held in *Matter of Guardianship of K.N.K.*, 139 Wis. 2d at 205-06, that Wis. Stat. ch. 55 did not give the courts authority to enter orders for involuntary administration of psychotropic medication, and also held that the patients' rights in Wis. Stat. § 51.61 applied to protectively placed individuals.

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In light of the statutes and cases discussed above, I find no basis to conclude that a ward's right to be free from involuntary administration of medication, including psychotropic medication, is affected by an order for protective placement or services under Wis. Stat. ch. 55.

Sincerely,

A handwritten signature in black ink, appearing to read "James E. Doyle". The signature is fluid and cursive, with a large initial "J" and "D".

James E. Doyle
Attorney General

JED:KET:mmp

CAPTION:

A guardian appointed under Wis. Stat. ch. 880 or 48 has authority to consent to medication, other than psychotropic medication, or medical treatment for an incompetent ward. A guardian may consent to psychotropic medication only under the procedures of Wis. Stat. §§ 880.07(1m) and 880.33(4m). A guardian may consent to involuntary or forcible administration of psychotropic medication only as provided by Wis. Stat. § 880.33(4r). A guardian's authority to consent to medication or medical treatment of any kind is not affected by an order for protective placement or services under Wis. Stat. ch. 55.