STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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SENT VIA EMAIL

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

Dear Secretary Cole,

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

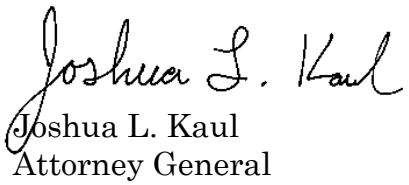
DNR, following that opinion, issued multiple high-capacity well approvals that were challenged on the grounds that the agency failed to properly consider the impacts the wells could have on waters of the state. *See Clean Wis., Inc. v. DNR*, No. 16-CV-2817 (Wis. Cir. Ct. Dane Cty.) (consolidated). The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

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

on navigable waters. *Id.* at 12–13. Subsequently, in an order certifying that case to the Wisconsin Supreme Court for review, the Wisconsin Court of Appeals recognized that "*Lake Beulah* has not been overruled" and that "neither the circuit court nor the court of appeals may dismiss any statement within *Lake Beulah* as 'dictum.'" Order Certifying Appeal at 5, *Clean Wis., Inc. v. DNR*, No. 2018AP59 (Wis. Ct. App. Jan. 16, 2019).

Thus, a circuit court expressly concluded, and the Wisconsin Court of Appeals strongly implied, that the conclusion at the crux of OAG–01–16 is incorrect. In light of those orders, OAG–01–16 is withdrawn in its entirety.[1]

Sincerely,



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

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