

Regulatory Reform in Wisconsin

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In 2011, Wisconsin Act 21¹ (Act 21) was passed by the Wisconsin legislature and signed by Governor Walker. In short, Act 21 changed administrative rulemaking in three important and predominant ways:

- Act 21 empowered the Governor to approve an agency's preliminary administrative rule plans (scope statements) and gave the Governor authority to approve or reject final rules;
- Agencies must have explicit statutory authority to promulgate a rule, whereas in the past, agencies have relied upon statutory provisions that conveyed general powers and duties to even promulgate specific rules; and
- Act 21 significantly expanded the role of Economic Impact Analysis that state agencies must utilize.

On November 2nd, 2011, Governor Walker issued Executive Order 50, meant to further explain the new rule-making process, establish uniform guidelines for all state agencies, and create the Governor's Office of Regulatory Compliance.²

Given the dramatic law changes that Act 21 made to Wisconsin's administrative rule process, it was no surprise that Act 21 has been the subject of litigation. In *Coyne v. Walker*, plaintiffs challenged the application of Act 21 to the Superintendent of Public Instruction. The State Supreme Court—affirming both lower courts—concluded that Act 21 was “unconstitutional and therefore void as applied to the Superintendent of Public Instruction and his subordinates.” In *New Chester Dairy, Inc. v. DNR*, the Outagamie County Circuit court concluded that DNR did not have explicit authority to place the monitoring condition at issue on New Chester Dairy.³ That case continues through the appellate process.

The most recent development in the state's implementation of Act 21 occurred on May 10, 2016, when Attorney General Brad Schimel issued a formal opinion on Act 21 in response to questions posed by Speaker of the Assembly Robin Vos.⁴ The Attorney General, in the hotly-

¹ <https://docs.legis.wisconsin.gov/2011/related/acts/21>

² https://docs.legis.wisconsin.gov/code/executive_orders/2011_scott_walker/2011-50.pdf

³ <http://greatlakeslegalfoundation.org/wwcms/wp-content/uploads/2015/12/NCD-Decision-and-Order.pdf>

⁴ <https://www.doj.state.wi.us/sites/default/files/OAG-01-16%20FINAL.pdf>

contested issue of high capacity wells, concluded that the DNR does not have the authority to place conditions on these wells unless the DNR has explicit statutory authority, and the DNR's reliance on the public trust doctrine to provide that authority is insufficient.

Not only is this Attorney General opinion important for those concerned about high capacity wells, but it is also important for all agency rulemaking because it further clarified when explicit authority arises and the retroactivity of Act 21. Since the Attorney General's opinion was issued, several state agencies have begun to reevaluate their statutory authority and whether the agency has improperly promulgated any rules or conditions. As state agencies turn more focus on administrative rules, regulated clients who interact with state government will increasingly find themselves involved in these Act 21 issues.

Whether it be Michael Best's litigation practice group, an industry-specific team, or Michael Best Strategies' Government Relations team, Michael Best is uniquely positioned to guide you through Act 21 issues. Our team is made up of professionals who have worked on Act 21 legal cases, who in the past oversaw the Governor's Office of Regulatory Compliance, and who helped implement Act 21 while serving in Government. We understand why Act 21 is important to you.