



The Honorable Mark J. McGinnis
Outagamie County Justice Center
320 S. Walnut St.
Appleton, WI 54911

December 19, 2014

Re: *New Chester Dairy, LLC, et al. v. WDNR, et al.*
Case No. 14-CV-1055

Dear Judge McGinnis,

Please find enclosed for filing Clean Wisconsin's Brief in Opposition to Motion to Intervene by Wisconsin Manufacturers & Commerce, Dairy Business Association, Midwest Food Producers Association and Wisconsin Potato & Vegetable Growers Association.

A copy of this brief has been provided to counsel listed below.

Sincerely,

Elizabeth A. Wheeler
Senior Staff Attorney
Clean Wisconsin

Enclosure

Cc w/encl: Attorney Michael Srenock/Attorney Jordan J. Hemaian
Assistant Attorney General Diane Milligan
✓ Attorney Robert I. Fassbender

NEW CHESTER DAIRY, LLC

N3569 Vanden Bosch Road

Kaukauna, WI 54130,

MS REAL ESTATE HOLDINGS, LLC

N3569 Vanden Bosch Road

Kaukauna, WI 54130,

Case No: 14CV1055

Code No: 30607

Administrative Agency Review

Petitioners,

v.

WISCONSIN DEPARTMENT OF

NATURAL RESOURCES

101 South Webster Street

P.O. Box 7921

Madison, WI 53703-7921

Respondent,

CLEAN WISCONSIN

634 W. Main Street, Suite 300

Madison, WI 53703

Intervenor.

**BRIEF IN OPPOSITION TO MOTION TO INTERVENE AS PLAINTIFFS OF
WISCONSIN MANUFACTURERS AND COMMERCE, DAIRY BUSINESS
ASSOCIATION, MIDWEST FOOD PROCESSORS ASSOCIATION, AND WISCONSIN
POTATO AND VEGETABLE GROWERS ASSOCIATION**

Introduction

Wisconsin Manufacturers & Commerce, the Dairy Business Association, the Midwest Food Producers Association and the Wisconsin Potato and Vegetable Growers Association (“the Movants”) have collectively moved to intervene in the above-captioned action, claiming that they meet the standards set forth in Wis. Stat. §803.09 for intervention because they “have a direct interest in this case of ensuring that state agencies do not impose unlawful conditions...”

(Mov. Br., p. 2). As discussed below, this stated interest does not meet the standard for intervention either under Wis. Stat. §227.53(1)(d) (which applies here) or under Wis. Stat. §803.09(1) or (2) (which do not apply here, but which Movants relied upon in their request). Therefore, Clean Wisconsin opposes the motion to intervene.

Standard for Intervention

The Movants assert that they are entitled to intervention as a matter of right under Wis. Stat. § 803.09(1), or in the alternative, permissive intervention under Wis. Stat. § 803.09(2). (Mov. Br., p.1) However, Wis. Stat. § 227.53(1)(d) is the governing standard for intervention in this case. That section provides that in a judicial review proceeding, “[t]he court may permit other interested persons to intervene.” This is a purely discretionary authority on the part of the court. As discussed already by DNR, Wis. Stat. § 227.53(1)(d) is the only procedure available to the Movants for intervention – the § 803.09(1) and (2) procedure does not apply. (DNR Br., p. 2) Therefore, intervention as a matter of right is not available to the Movants, and the court may only consider whether movants should be added at its discretion.

In exercising its discretion to grant intervenor status, the court considers whether the movant has standing and its interests are not adequately represented by an existing party. *Citizens’ Util. Bd. v. PSC*, 2003 WI App 206, ¶ 7, 267 Wis. 2d 414, 671 N.W.2d 11 (citing *In re Delavan Lake Sanitary Dist.*, 160 Wis. 2d 403, 415, 466 N.W.2d 227 (Ct. App. 1991)). The Movants here have failed to adequately show that they have met either of these requirements.

Argument

1. The Movants lack standing to intervene.

A party has standing in administrative review cases when (1) the agency's decision directly caused injury to the party's interest, and (2) its asserted interest is a legally protectable interest. *Fox v. Wis. Dep't of Health & Soc. Serv.*, 112 Wis. 2d 514, 524, 526, 334 N.W.2d 532 (1983). The Wisconsin Supreme Court later explained this test is a tool for determining the three "essential aspects" for standing: adverse effect, personal interest, and judicial policy. *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n.*, 2011 WI 36, ¶ 55, 333 Wis. 2d 402, 797 N.W.2d 789. While standing in Wisconsin is generally construed liberally, *Id.* ¶ 38, clear limits have been placed on the doctrine to prevent any unharmed person with a generalized interest in a case's possible implications from intervening. *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶ 74, 307 Wis. 2d 1, 745 N.W.2d 1. Yet this is exactly what the Movants are petitioning the court to allow. **No injury will result to the Movants as a result of the outcome of the present case.** The Movants have no legally protectable interest in the case.

a. New Chester Dairy's result will not adversely affect the Movants.

The Movants will not be injured or adversely affected by the outcome of this case. To have standing, the petitioner must show that the agency decision directly causes injury to his interest. *Fox*, 112 Wis. 2d at 524. The administrative ruling here decided two issues: 1) whether DNR had the authority to require monitoring conditions on New Chester Dairy's high-capacity well approval, and 2) whether the specific monitoring conditions as applied to New Chester Dairy's high-capacity well permit were reasonable. (Ruling on Motions for Summary Judgment, R., pp. 209-211, Findings of Fact, Conclusions of Law and Order dated 09/18/14 (hereinafter "Order"), R., pp. 48-49.) In fact, the Administrative Law Judge was very clear in his final Order that the DNR's actions were based on "site-specific concerns with the SSPA model," and that "DNR included the Condition based on 'a particular matter as applied to a specific set of facts,'

as allowed under Wis. Stat. § 227.10(1).” (Order, p. 9, R. p. 48.) If the court affirms the DNR’s decision to include monitoring requirements in the New Chester Dairy high-capacity well permit, the Movants will not be negatively impacted because the monitoring conditions at issue in this proceeding are specific to concerns with the New Chester Dairy facility and will not be broadly applied to other high-capacity well owners or applicants in the state. To the extent that the Movants claim any potential future harm as a result of the conditions as a precedent, the claim is speculative and hypothetical.

The Movants’ alleged injury arising from the legal question of DNR’s authority to impose the monitoring question is too broad to gain them standing in this case. The Movants claim they are injured by a loss of “regulatory certainty.” (Mov. Br. at 11.) This abstract and general injury is beyond the scope of this case which examines the reasonableness and necessity of requirements in a single permit. The DNR has not developed a general policy of requiring groundwater monitoring and the Movants have not shown that they or their members are or will be subject to a similar monitoring requirement for a high-capacity well. Therefore, the Movants have nothing more than a generalized interest in the case.

The Supreme Court of Wisconsin has made clear that such a “generalized interest in the subject of the instant action ... is at the far edge of what may constitute a sufficiently related interest” for intervention under civil procedure. *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶ 74, 307 Wis. 2d 1, 745 N.W.2d 1. In *Helgeland*, the Supreme Court disallowed municipalities to intervene in a case determining the state statute’s constitutionality distinguishing between spouses and same-sex partners for employee benefits. *Id.* ¶ 3, 115. The Court found the municipalities’ interest in how the litigation may affect their employee plans was not direct, immediate, or unique, despite the possible adverse exposure stare decisis may create. *Id.* ¶ 71,

84. Such a similar and broad interest was therefore adequately represented by existing parties. *Id.* ¶ 86, 115.

The Movants here, like the municipalities in *Helgeland*, have stated nothing more than an indirect, speculative, and general interest in the case. The Movants are not interested in whether New Chester Dairy's permit requirements are repealed; they are interested in a possible side effect – a loss of “regulatory certainty” – that is factually unsupported and too broad to result from this case. Moreover, an interest that “state agencies follow the law, specifically § 227.10(2m)” (Mov. Br. at 2) is not specific to the Movants, nor is it specific to the facts of this case. One can easily argue that it is in the “interest” of every business, regulated entity, and individual in the State of Wisconsin that “state agencies follow the law,” but it does not constitute an “interest” sufficient to meet standing requirements for intervention. By this logic, any individual, organization, or business entity could intervene in any proceeding, a notion that undermines the fundamental concept of standing. The argument should be rejected.

A. The Movants do not possess a legally protectable interest in New Chester Dairy.

The second prong of the standing test is that the interest asserted must be protected by statute, rule or the Constitution; in other words, it must be a legally protectable interest. *Foley-Ciccantelli*, 2011 WI at ¶¶ 42-45. The Movants have not shown that their alleged harm constitutes a legally protectable interest.

The Movants state a general interest in § 227.10(2m) and further interest in New Chester Dairy's case because they have members who are regulated by the DNR, or who have or hope to have high-capacity wells. (Mov. Br. at 6.) The Movants clearly have a general interest in § 227.10(2m), demonstrated by their combined 531 lobbying hours on the bill that created the

statute. *See* Government Accountability Board, *Eye on Lobbying*, Jan. 2011 Special Session Assembly Bill 8.¹ The Movants' assistance in shaping the statute and the fact that the Movants' members allegedly "benefit" from it (*see* Mov. Br. at 2-3, 6) do not mean that the Movants then have a legally protectable interest to intervene in every case where § 227.10(2m) is placed in issue by one of the parties. Thirty-three associations supported § 227.10(2m) when it was a bill,² including three of the Movants. Under their argument, all 33 would have a sufficient interest to have standing to intervene in all cases involving the statute.

If there is a place in civil procedure to express such a generalized concern in the overarching issues and implications of a case, it is more appropriately voiced in submitting *amicus curiae* briefs, which the Movants have done in the past. *Manley Aff.* ¶ 4; *Fischer Aff.* ¶ 4; *George Aff.* ¶ 5.

2. The Movants' interests are already adequately represented by New Chester Dairy.

New Chester Dairy adequately represents the Movants' generalized interest. The Movants correctly state this requirement is relatively minimal in satisfying the civil procedure test for intervention as a right. (Mov. Br. at 11). *Helgeland*, 2008 WI at ¶ 85. However, a generalized interest in the litigation's outcome requires a stronger showing of inadequate representation, considering whether the existing party has an adverse interest, is failing to further the potential intervenor's objective, or is in collusion with another party. *Helgeland*, 2008 WI at ¶117.

¹ <https://lobbying.wi.gov/What/BillInformation/2011REG/Information/7927>


² <https://lobbying.wi.gov/What/BillInformation/2011REG/Information/7927?tab=Principals>.

New Chester Dairy and the Movants share the same objective from the litigation, and the Movants have indicated they do not plan on introducing any new legal issues or evidence. (Mov. Br. at 13.) The Movants argue that New Chester Dairy's compliance with the monitoring requirements means New Chester cannot adequately represent their interest. (Mov. Br. at 12.) However, New Chester Dairy has given no indication that its compliance with the monitoring condition lessens its interest in pursuing this litigation, and the Movants have failed to show any evidence that compliance has compromised New Chester Dairy's case in any way. New Chester Dairy adequately represents the Movants' generalized interest in the case, and therefore the Movants fail to meet the second requirement to intervene.

Conclusion

The Movants fail to meet the requirements for intervention: their stated interest is too general to constitute a legally protectable interest that will be adversely affected by the case's outcome, and their interest is already adequately represented by the existing parties. Therefore, this Court should deny their motion to intervene.

Respectfully submitted this 19th day of December, 2014,


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