



STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

COPY

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December 4, 2014

Mr. Lonnie Wolf
Outagamie County Clerk of Courts
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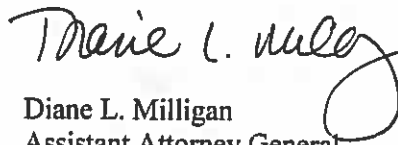
Re: *New Chester Dairy, LLC, et al. v. WDNR, et al.*
Case No. 14-CV-1055

Dear Mr. Wolf:

Enclosed for filing please find WDNR'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 the same has been provided to counsel listed below.

Sincerely,


Diane L. Milligan
Assistant Attorney General

DLM:lil
Enclosure
c w/enc:

Attorney Michael Screnock/Attorney Jordan J. Hemaïdan
Attorney Elizabeth Wheeler
Attorney Andrew C. Cook
Judith Ohm, DNR (via email)

STATE OF WISCONSIN

CIRCUIT COURT

OUTAGAMIE COUNTY

NEW CHESTER DAIRY, LLC,
and MS REAL ESTATE
HOLDINGS, LLC,

Petitioners,

v.

Case No. 14-CV-1055
Administrative Agency Review: 30607

WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,

Respondent,

and

CLEAN WISCONSIN,

Intervenor.

WDNR'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

INTRODUCTION

To be granted intervenor status in a judicial review proceeding, a party must show that it has standing and that its interests are not adequately represented by another party. Movants Wisconsin Manufacturers & Commerce, the Dairy Business Association, the Midwest Food Producers Association and Wisconsin Potato & Vegetable Growers Association show neither. Their motion should therefore be denied.

ARGUMENT

- A. Under Wis. Stat. § 227.53(1)(d), an entity seeking permission to intervene must show it has standing and that its interests are not adequately represented by another party.

The movants seek to intervene in this judicial review proceeding pursuant to Wis. Stat. § 893.09(1) or Wis. Stat. § 893.09(2), the mandatory and permissive intervention sections in Wisconsin's general civil procedure rules. However, Wis. Stat. § 227.53(1)(d), which provides only for permissive intervention, is the exclusive provision governing intervention in a judicial review proceeding. *See Wagner v. State Med. Examining Bd.*, 181 Wis. 2d 633, 639, 511 N.W.2d 874, 877 (1994) ("when a conflict occurs between the rules of civil procedure and ch. 227, the dictates of ch. 227 must prevail."). The arguments provided by the movants to address the standards in Wis. Stat. § 893.02(1) also address the standards in Wis. Stat. § 227.53(1)(d). Thus, in the event that the Court construes the motion as one filed under the correct statute, the remainder of this brief applies the standards in Wis. Stat. § 227.53(1)(d) to those arguments.

The standards for permissive intervention under Wis. Stat. § 227.53(1)(d) require the Court to consider "whether the potential intervenor has standing and whether that intervenor's interests are already represented by another party." *Citizens' Utility Bd. v. Public Service Com'n of Wisconsin*, 2003 WI App 206 ¶ 7, 267 Wis. 2d 414, 420-21, 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).

B. The movants fail to establish standing.

To establish standing in a judicial review proceeding, a potential intervenor must satisfy a two-part test. *In re Delavan Lake Sanitary Dist.*, 160 Wis. 2d at 410-11. First, it must show it has sustained an "injury in fact" due to the agency's decision at issue, rather than a hypothetical injury or a conjectural injury. *Id.*, citing *Fox v. DHSS*, 112 Wis. 2d 514, 524-25, 334 N.W.2d 532, 537 (1983). Second, it must show that the injury is "to an interest which the law recognizes or seeks to regulate or protect." *In re Delavan Lake Sanitary Dist.*, 160 Wis. 2d at 411, citing *Waste Mgmt. of Wisconsin, Inc. v. State of Wis. Dep't of Natural Res.*, 144 Wis. 2d 499, 505, 424 N.W.2d 685 (1988).

1. The movants have not sustained an injury in fact.

The movants do not identify any injury in fact associated with the decision being challenged in this case, a decision to include a monitoring and reporting condition in the high capacity well approval for New Chester Dairy's dairy facility in Adams County. At best, they allege a hypothetical injury: they state that "many" of their members own and operate high capacity wells (Br. at 6), that "many others are contemplating the construction of high capacity wells" (*id.*), and suggest that these members would not want "unlawful" conditions placed on approvals for new high capacity wells by the State of Wisconsin Department of Natural Resources (WDNR) (Br. at 2).

If all a party needed to do to establish standing in any judicial proceeding were to say it is interested in ensuring consistent application of a law that may apply to it at some time in the future, then anyone could have standing to participate in any proceeding. This is not enough. Movants' assertions that do not identify an injury in fact based on the

specific decision at issue in this proceeding do not establish standing. Since the movants fail this first part of the test, the Court can stop its analysis here.

2. Movants' stated interests are not interests the law recognizes or seeks to protect.

If the Court were to analyze the motion with respect to the second part of the standing test, the movants also fail. In their brief, movants assert that three of the four trade groups lobbied for the passage of 2011 Wisconsin Act 21, that all of their members were intended to "benefit" from this Act, and that all of the movants have members "with a direct and fundamental interest in securing the regulatory certainty that Act 21 was intended to provide Wisconsin's regulated communities." *Id.* at 2, 3. These groups "seek to protect entities from unauthorized regulatory overreach by state agencies," and they assert that if the Court upholds WDNR's decision on New Chester Dairy's permit, "Movants' significant interest in regulatory certainty will be impeded or impaired." *Id.* at 10, 11. As an initial matter, movants do not explain how WDNR's decision to include the monitoring and reporting condition in the approval at issue leads to a lack of "regulatory certainty." More importantly, the movants do not cite any legal authority for the proposition that an "interest in regulatory certainty" is an interest that the law recognizes or seeks to protect by conferring legal standing on a party asserting such an interest. An interest in "regulatory certainty" is inherently speculative and theoretical, whereas Wis. Stat. §§ 227.52 and 227.53 resolve actual disputes about actual agency decisions.

If an interest in the potential future application of a law was enough of an interest to establish standing, anyone could assert standing in any proceeding. Speculative potential interests are not recognized for establishing standing, so the motion should be denied.

- C. The movants' interests are adequately represented by New Chester Dairy, LLC and MS Real Estate Holdings, LLC.

The movants make the same argument as New Chester Dairy and MS Real Estate Holdings (collectively New Chester Dairy): they allege that WDNR exceeded its authority and acted in a manner inconsistent with 2011 Act 21 by imposing monitoring and reporting conditions on New Chester Dairy's high capacity well permit. In fact, they state that they will not "inject into the action any new or different legal issue." Br. at 13. This statement concedes that the movants' interests will be adequately represented by the petitioners.

The only argument movants make to suggest that petitioners may not adequately represent their interests is an assertion that since New Chester Dairy already installed the groundwater monitoring wells and began collecting data, the movants are "concerned" that petitioners may not adequately represent the movants' broader interests. Br. at 12. These interests are their desires "to ensure that the DNR and other state agencies comply with 2011 Wisconsin Act 21 and stop imposing permit conditions without explicit legislative authority, and follow statutory requirements applicable to state agencies under Wis. Stats. Ch. 227." *Id.*

The argument that the movants' interests are not adequately represented by New Chester Dairy fails in two ways. First, the movants present no facts to justify their concern that New Chester Dairy will not pursue its arguments with the same diligence as the movants would. Moreover, it is New Chester Dairy's permit that New Chester Dairy is challenging, so one would expect that they will pursue their position with greater vigor than groups with a more theoretical interest in the matter. Second, the interests that the movants seek to promote are beyond the scope of this proceeding. One decision issued by one agency on one permit is being challenged before this Court. If the movants desire to make arguments with respect to a decision impacting many agencies and other future potential permittees, the proper vehicle would be an amicus brief filed with the Court of Appeals if this case is ultimately appealed. As the movants note, this is how they frequently participate in the legal process. Br. at 7-8.

Wisconsin's Supreme Court has articulated additional standards for evaluating whether existing parties adequately represent a proposed intervenor's interests:

When determining whether a party's representation is deemed adequate we look to see if there is a showing of collusion between the representative and the opposing party; if the representative's interest is adverse to that of the proposed intervenor; or if the representative fails in the fulfillment of his duty.

Armada Broad., Inc. v. Stirn, 183 Wis. 2d 463, 476, 516 N.W.2d 357, 361 (1994). The *Armada* case involved an open records request seeking a school district's report related to the investigation of a teacher charged with sexual harassment. *Id.* at 468. The court found that a teacher, who had filed a grievance against the school district and who had personal reputational interests at stake if the report were disclosed by the school district, should not be forced to rely on an adverse party to represent his interests. *Id.* at 476.

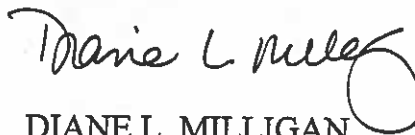
Here, there is no showing that the movants are adverse to New Chester Dairy. Nor is there a showing that New Chester Dairy and WDNR are in collusion. Furthermore, it is clear from the scope and detail of the petition that the movants will be more than adequately represented by New Chester Dairy, so they have not met the second standard for intervention.

CONCLUSION

Wisconsin Manufacturers & Commerce, the Dairy Business Association, the Midwest Food Producers Association and Wisconsin Potato & Vegetable Growers Association have not shown that they have sustained an injury in fact as the result of WDNR's decision to issue New Chester Dairy a permit that contains monitoring conditions, so they lack standing. Their generalized interest in advocating for an interpretation of a particular law does not satisfy the second prong for establishing standing, and they provide no facts to support an argument that New Chester Dairy will not adequately advocate for that same position. Their motion should therefore be denied.

Dated this 4th day of December, 2014.

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