

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

Petitioners,

v.

Case No. 2014CV1055
Code No.: 30607
Administrative Agency Review

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,

Respondent,

CLEAN WISCONSIN,

Intervenor.

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

Wisconsin Manufacturers and Commerce, Dairy Business Association, Midwest Food Processors Association, and Wisconsin Potato and Vegetable Growers Association (“Movants”) submit this brief in support of their motion to intervene as a matter of right pursuant to Wis. Stat. § 803.09(1), or, alternatively, to seek permissive intervention under Wis. Stat. § 803.09(2).

BACKGROUND

On Friday, October 17, 2014, New Chester Dairy, LLC and MS Real Estate Holdings, LLC (collectively, “New Chester Dairy”) filed a petition for review in the above-captioned case, which involved a final decision of Defendant-Wisconsin Department of Natural

Resources (DNR) regarding “A Conditional High Capacity Well Approval for Two Potable Wells to be Located in the Town of New Chester, Adams County, File Reference No. 01-1-180, with conditions.”

The Movants are four trade associations whose members own and operate high capacity wells to support their respective businesses. The Movants’ members include dairy producers (small and large), potato and vegetable growers, food processors, and manufacturers. The Movants’ members benefit from recent legislation that precludes DNR from imposing conditions on well approvals in the absence of explicit statutory or regulatory authority, and their interests are thus affected by New Chester Dairy’s petition for review.

A. Movants Have an Interest of Ensuring that State Agencies Do Not Impose Unlawful Conditions

The Movants have a direct interest in this case of ensuring that state agencies do not impose unlawful conditions without explicit legislative authority as prescribed by 2011 Wisconsin Act 21 (Wis. Stat. §§ 227.10(2m), 227.11(2)(a)1.-3.) (“Act 21”). In January 2011, Gov. Scott Walker issued an executive order calling a special session of the Wisconsin Legislature to help promote regulatory certainty and generate economic development in Wisconsin.¹ One of the bills introduced by Gov. Walker was Special Session Assembly Bill 8 (SSAB 8),² which proposed important new limitations on state agency rulemaking and regulatory authority, and ultimately was signed into law as Act 21 on May 24, 2011.

Prior to introduction of SSAB 8, Gov. Walker issued a “Regulatory Reform White Paper”³ explaining the need for the legislation. Specifically, the white paper noted that the legislation was aimed at preventing state agencies from “drafting rules and regulations based

¹ https://docs.legis.wisconsin.gov/code/executive_orders/2011_scott_walker/2011-1.pdf.

² <http://docs.legis.wisconsin.gov/2011/proposals/jr1/ab8>.

³ <http://walker.wi.gov/newsroom/press-release/regulatory-reform-info-paper>.

on the department’s general duties provisions, not based on the more specific laws” enacted by the legislature.

This specific concept from Gov. Walker’s white paper became a key element of Act 21’s codification of significant new limitations on state agency regulatory authority. For example, the new law provides that “[n]o agency may implement or enforce any standard, or threshold, including as a term or condition of any license issued by the agency, unless the standard, requirement, or threshold is explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter...” Wis. Stat. § 227.10 (2m). Three of the Movants (Wisconsin Manufacturers & Commerce, Dairy Business Association, and Midwest Food Processors Association) actively supported the legislation that was signed into law as Act 21,⁴ and 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.

B. Wisconsin DNR Unlawfully Imposed the Monitoring and Reporting Condition Without Explicit Legislative Authority

In 2011, New Chester Dairy sought and obtained from the DNR a Wisconsin Pollutant Discharge Elimination System (WPDES) permit and a high capacity well approval for construction of a dairy operation in the Town of New Chester, Adams County (“Approval”).

During the WPDES permit process, DNR staff notified New Chester Dairy about concerns that the original location of the high capacity wells could cause an impact on nearby Patrick Lake. As a result, New Chester Dairy hired S.S. Papadopoulos & Associates (SSPA) to undertake a groundwater modeling study to determine whether the proposed high capacity

⁴ <https://lobbying.wi.gov/What/BillInformation/2011REG/Information/7927>.

wells would have a significant impact to Patrick Lake and to identify potential alternate locations for construction of the high capacity wells.

SSPA identified a new location 2.5 miles away from the New Chester Dairy production area and prepared a report explaining the new location of the wells. The DNR accepted SSPA's report and signaled that it would approve the new well locations.

However, the DNR stated that it would condition approval of the new well locations by requiring New Chester Dairy to install groundwater monitoring wells, collect monitoring data, and provide that data to the DNR ("Monitoring and Reporting Condition"), even though nothing under Wis. Stat. § 281.34, which regulates high capacity well water withdrawals, explicitly grants DNR the authority to impose said conditions. The DNR argued that its authority to condition the New Chester Dairy well approval was provided in the agency's general duties provisions under Wis. Stat. §§ 281.11 and .12.

On January 17, 2013, the DNR included the Monitoring and Reporting Condition in the New Chester Dairy High Capacity Well Approval. New Chester Dairy requested a contested hearing under Wis. Stat. § 227.42, which was granted by the DNR. New Chester Dairy argued the DNR had no explicit statutory or administrative authority to impose the Monitoring and Reporting Condition based on Act 21.

Specifically, New Chester Dairy cited to a provision created by Act 21, Wis. Stat. § 227.10(2m), which prohibits an agency from "enforce[ing] any standard, or threshold, including as a term or condition of any license issued by the agency, unless the standard, requirement, or threshold is explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter..."

The following issue was before the Administrative Law Judge (ALJ):

Whether DNR properly included a condition in the Approval requiring Petitioners [New Chester Dairy] to comply with certain requirements for the construction of monitoring wells and a piezometer near the high capacity wells, collection of groundwater level elevations and reporting of that data to DNR, in order to verify the changes in groundwater levels predicted by the groundwater modeling, which was conducted on behalf of Petitioners for the purpose of evaluating the significance of impacts to waters of the state resulting from operation of the high capacity wells.

On December 13, 2013, the ALJ granted partial summary judgment to the DNR ruling that the DNR had legal authority to include conditions in the high capacity wells permit. Citing DNR's general duties provision under Wis. Stat. §§ 281.11 and .12, the ALJ concluded that "DNR has the authority and general duty to consider the environmental impacts of any proposed high capacity well" and "is authorized to condition a high capacity well approval if necessary to avoid adverse environmental impacts." The ALJ's decision stands contrary to the plain language and intent of Wis. Stat. § 227.10(2m) and is therefore unsupportable as a matter of law.

The ALJ also ruled that the issue of whether the specific conditions in the Approval were reasonable and necessary needed to be heard given that there were disputed issues of material fact. A separate hearing was scheduled and held on January 16 and 17, 2014.

On September 18, 2014, the ALJ issued the Findings of Fact, Conclusions of Law and Order (Case No. DNR-13-011) regarding the remaining issue of whether the specific conditions in the Approval were reasonable and necessary. The ALJ again ruled in favor of the DNR, concluding that the Monitoring and Reporting Condition was "reasonable and supported by substantial evidence in the record." The ALJ further ordered that the "Conditional Approval remain in full force and effect and the petition for review be Dismissed."

On October 17, 2014, New Chester Dairy, LLC and MS Real Estate Holdings, LLC filed a petition for review in this Court.

The Movants now file this brief in support of their motion to intervene either as a matter of right, or, in the alternative, as a permissive intervention.

INTEREST OF PROPOSED INTERVENOR-PLAINTIFFS

The Movants are four trade associations whose members interact with DNR and other state agencies on a regular basis. The Movants' members own and operate businesses in nearly every category of agricultural, business, and industrial activity. Many of the Movants' members own and operate high capacity wells that are regulated by DNR, and many others are contemplating the construction of high capacity wells to support planned business development and expansion activities. The Movants' members benefit from the legislative protection afforded by Act 21 and their interests will be affected by the final judgment in this action as it pertains to DNR's interpretation and application of Act 21.

Wisconsin Manufacturers and Commerce ("WMC") is a non-profit business trade organization with roughly 3,700 members statewide in the manufacturing, dairy, energy, commercial, health care, insurance, banking and service sectors of the economy. *Manley Aff.* ¶ 2. Roughly one-quarter of the private sector employees in Wisconsin are employed by WMC members. WMC is dedicated to ensuring that Wisconsin is the most competitive state in the nation to do business. *Id.*

Since 1911, WMC has been representing the interests of Wisconsin's business community before administrative agencies, administrative law judges, and the legislature to ensure that commerce is not impeded by regulatory actions. *Manley Aff.* ¶ 3. WMC frequently participates in the rulemaking process by commenting on various issues affecting its members. WMC is also involved in the legislative process, and actively participated in the development of

2003 Wisconsin Act 310,⁵ which established the statutory framework for high capacity well approvals like the one sought by New Chester Dairy. *Id.* In addition, WMC actively participated in development of 2011 Wisconsin Act 21, Gov. Walker’s regulatory reform legislation. *Manley Aff.* ¶ 4. WMC also submitted non-party *amicus curiae* briefs in *Lake Beulah Mgmt. Dist. v. Wisconsin Dep’t of Natural Res.*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73, and *Rock-Koshkonong Lake Dist. v. Dep’t of Natural Res.*, 2013 WI 74, ___ Wis. 2d ___, 833 N.W.2d 800, cases dealing with high capacity wells and the public trust doctrine. *Id.*

Dairy Business Association, Inc. (“DBA”) is a nonprofit, statewide organization of dairy producers, vendors, allied industry partners, and professionals actively working to ensure that dairy producers, large and small, remain an active, thriving part of Wisconsin’s economy, communities, and food chain. *Fischer Aff.* ¶ 3. DBA is dedicated to being proactive in helping create and protect consistent water, environmental, and waste management regulation. *Id.* DBA’s mission is to “promote the growth and success of all dairy farms in Wisconsin by fostering a positive business and political environment.” *Id.*

Water is essential to many parts of the dairy industry, from raising livestock to dairy product production. *Fischer Aff.* ¶ 4. DBA’s members rely on high capacity wells to conduct business, and will be particularly affected by DNR’s unlawful imposition of well approval conditions. *Id.* DBA also submitted a non-party *amicus curiae* brief in *Lake Beulah Mgmt. Dist. v. Wisconsin Dep’t of Natural Res.*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73. *Id.*

The Midwest Food Processors Association (“MWFPA”) is a trade association that advocates on behalf of food processing companies and affiliated industries in Illinois, Minnesota, and Wisconsin. *George Aff.* ¶ 2. Established in 1905 as the Wisconsin Canners Association,

⁵ <http://docs.legis.wisconsin.gov/2003/related/acts/310.pdf>.

today MWFPA represents a diverse group of food processors on a variety of food issues. *Id.*

The primary role of MWFPA is to influence public policy and make the Midwest a great place for food processors to do business. *George Aff.* ¶ 3. To achieve this goal, MWFPA represents food processors before the legislature and regulatory agencies. *Id.*

Water is a critical resource throughout all food industry sub-sectors. *George Aff.* ¶ 4. For instance, water is used in the fruit and vegetable processing industry for process cooling, boiler systems, water fluming, blanching, peeling, cooking, product rinsing, and equipment cleaning, as well as in the products themselves as an ingredient. *Id.* MWFPA is concerned about state agencies acting beyond their legislative authority by imposing unlawful permit conditions. *Id.*

MWFPA actively participated in development of 2011 Wisconsin Act 21, Gov. Walker's regulatory reform legislation. *George Aff.* ¶ 5. MWFPA also submitted non-party *amicus curiae* briefs in *Lake Beulah Mgmt. Dist. v. Wisconsin Dep't of Natural Res.*, 2011 WI 54, 335 Wis. 2d 47, 799 N.W.2d 73 and *Rock-Koshkonong Lake Dist. v. Dep't of Natural Res.*, 2013 WI 74, ___ Wis. 2d ___, 833 N.W.2d 800. *Id.*

Wisconsin Potato and Vegetable Growers Association ("WPVGA") is a non-profit statewide organization representing 300 farm operations and related business associate members. *Houlihan Aff.* ¶ 2. WPVGA was created to help its grower-members conduct and utilize the latest research and technologies, garner government support, produce environmentally sound research and stay in touch with consumers. *Id.* Wisconsin ranks third in the United States in potato production and generally ranks number one in canning vegetable production. *Houlihan Aff.* ¶ 3. The Wisconsin potato and vegetable industry provides 35,000 jobs in Wisconsin and generates \$7.5 billion in gross state product. *Id.*

As with to the other Movants, water is a critical resource for WPVGA's members who rely heavily on groundwater from high capacity well permits to irrigate their crops. Houlihan Aff. ¶ 4. Therefore, WPVGA has a particular interest of ensuring that the DNR does not impose unlawful conditions when issuing high capacity well permits.

ARGUMENT

I. The Proposed Intervenor-Plaintiffs Satisfy Wis. Stat. § 803.09(1)'s Four-Part Test for Intervention as Matter of Right

The Supreme Court of Wisconsin has set forth a four-part test for intervention as of right under Wis. Stat. § 803.09(1): “1) the motion to intervene must be timely; 2) the movant must claim an interest in the subject of the action; 3) the disposition of the action may as a practical matter impair or impede the movant’s ability to protect that interest; and 4) the existing parties do not adequately represent the movant’s interest.” *City of Madison v. Wis. Employment Relations Comm’n*, 2000 WI 39, ¶ 11, 234 Wis. 2d 550, 610 N.W.2d 94 (citation and footnote omitted). *See also*, Wis. Stat. § 803.09(1).

The Supreme Court has further explained that the “criteria need not be analyzed in isolation from one another, and a movant’s strong showing with respect to one requirement may contribute to the movant’s ability to meet other requirements as well.” *Helgeland v. Wisconsin Municipalities*, 2008 WI 9, ¶ 39, 307 Wis. 2d. 1, 745 N.W.2d 1 (footnotes omitted). Courts are to apply a “flexible and pragmatic” approach to determining intervention as of right. *Helgeland* at ¶ 40, n. 30.

A. The Motion is Timely

The petition for review was filed by the plaintiffs on October 17, 2014 and the Movants’ motion was filed on November 10, 2014, shortly after the deadline for the DNR and Clean Wisconsin to file their notices of appearance pursuant to Wis. Stat. § 227.53(2). This

Court has not conducted any proceedings in this matter. Therefore, no party shall be prejudiced by intervention.

B. As Associations Representing Businesses that Are Subject to Permits from State Agencies, Movants Have a Direct Interest in this Litigation

The Movants claim an interest in the subject matter of the above-captioned case. “The interest which entitles one to intervene in a suit between other parties must be an interest of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment.” *City of Madison*, at ¶ 11, n. 9 (quoting *Lodge 78, Int’l Ass’n of Machinists v. Nickel*, 20 Wis. 2d 42, 46, 121 N.W.2d 297 (1963)).

As state-wide associations representing businesses in Wisconsin, Movants have a direct interest of ensuring that state agencies properly follow the law when issuing permits.

Specifically, the Movants all have a direct interest in making sure that state agencies do not impose unlawful conditions in all types of permits beyond just the permit at issue in this case.

The Act 21 provision at issue in this case is intended to allow regulated entities, such as Movants’ members, to rely on the statutes and administrative code chapters that have been duly enacted by the legislature to understand their rights and obligations. A regulated entity’s rights and obligations define the scope and extent of investment necessary to operate in a jurisdiction, as well as the level of compliance required and potential risks of enforcement. Act 21 is not only intended to create regulatory certainty, but also to protect entities from unauthorized regulatory overreach by state agencies that are in a position of power over entities seeking to do business in this state.

Movants’ members all require permits issued by Wisconsin state agencies, and the DNR in particular, to lawfully construct and operate their businesses. If the DNR’s interpretation and application of Act 21 is upheld, it will eliminate that regulatory certainty and

undermine the very purpose of the legislation. A judicial determination on this issue will have a direct and substantial impact on the Movants' members. As a result, the Movants meet the second prong of the four-part test.

C. Disposition of This Action May Impede or Impair Movants' Interests

Movants' members are directly affected by conditions imposed by state agencies in permits. In this case, the DNR imposed permit conditions that are not explicitly authorized by the Wisconsin Legislature, and which directly affect the regulated businesses that Movants represent on regulatory matters. If the ALJ's decision is upheld by this Court and the DNR is deemed able to issue permits with requirements and conditions that are not explicitly authorized by statute or rule, Movants' significant interest in regulatory certainty will be impeded and impaired, as will their ability to rely on duly enacted statutes and rules. Therefore, Movants have met the third prong of the four-part test.

D. Movants' Interests Are Not Adequately Represented by the Parties

The existing parties in the above-captioned case do not adequately represent the Movants' interests. "This requirement is satisfied 'if the applicant shows that the representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal.'" *Wolff v. Town of Jametown*, 229 Wis. 2d 738, 747, 601 N.W.2d 301 (Ct. App. 1999) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)).

As explained above, while the Movants' interests are similar to the petitioners, the Movants' interests extend beyond the single permit involved in this case. Movants represent numerous members conducting business in a broad variety of economic sectors, including both agricultural and non-agricultural business, that are subject to high capacity well regulation. These diverse businesses have a direct interest of ensuring that state agencies properly follow

the law. Specifically, Movants' interests are 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.

By contrast, the petitioners' interest involves the single permit and specific unauthorized conditions in this case and its ability to proceed with its dairy operations. The record developed in the DNR proceeding below demonstrates that New Chester Dairy has already installed the monitoring wells that are at issue in this proceeding and is already collecting groundwater monitoring data. Movants are justifiably concerned that under these circumstances, the petitioners may not adequately represent the Movants' broader interests.

Therefore, the Movants' interests are not adequately represented by the parties in the case. Movants have therefore meet the fourth prong of the four-part test for intervention as a matter of right.

II. In the Alternative, Movants Should be Granted Permissive Intervention

Wis. Stat. § 803.09(2) provides in relevant part:

“[U]pon timely motion anyone may be permitted to intervene in an action when a movant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order or rule administered by federal or state governmental officer or agency or upon any regulation, order, rule, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely motion may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.”

Permissive intervention requires only that the proposed intervenor be a proper party.

City of Madison v. WERC, 2000 WI 39, ¶ 11 n.11, 234 Wis. 2d 550, 610 N.W.2d 94.

First, the Movants' claim in this case has a question of law in common with the main action. Specifically, Movants' claim, similar to the petitioners' claim in the main action, is that the DNR unlawfully imposed a permit condition without explicit legislative authority, and without following rulemaking requirements prescribed by Wis. Stat. § 227.10(1).

Second, the original parties' rights will not be unduly delayed or prejudiced by the intervention. As explained above, this case was recently filed and this Court has not conducted any proceedings. The Movants do not propose to inject into the action any new or different legal issue. Moreover, this is a judicial review action in which the Court is reviewing the evidentiary record developed below and the Movants will not be permitted to introduce additional evidence that could be construed to delay the proceedings or prejudice the other parties. In short, allowing the Movants to intervene will not cause any undue delay to the proceedings or unduly prejudice any other party.

CONCLUSION

Based on the foregoing, the proposed plaintiff-intervenors Wisconsin Manufacturers and Commerce, Dairy Business Association, Midwest Food Processors Association, and Wisconsin Potato and Vegetable Growers Association respectfully request that the Court grant their motion for mandatory intervention, pursuant to Wis. Stat. § 803.09(1). In the alternative, the proposed plaintiff-intervenors request the Court to grant their motion for permissive intervention, pursuant to Wis. Stat. § 803.09(2).

Dated this 10th day of November, 2014.

Respectfully submitted,

GREAT LAKES LEGAL FOUNDATION
Attorneys for Proposed Intervenor-Plaintiffs
Wisconsin Manufacturers & Commerce, Dairy
Business Association, Midwest Food Processors
Association, Wisconsin Potato & Vegetable
Growers Association

/s/

Andrew C. Cook, SBN 1071146
Robert I. Fassbender, SBN 1013985
10 East Doty Street, Suite 504
Madison, WI 53703
Telephone: (608) 310-5315
Facsimile: (608) 283-2589
cook@greatlakeslegalfoundation.org