STATE OF WISCONSIN | CIRCUIT COURT BRANCH V | OUTAGAMIE COUNTY

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

Petitioners,

v.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES,

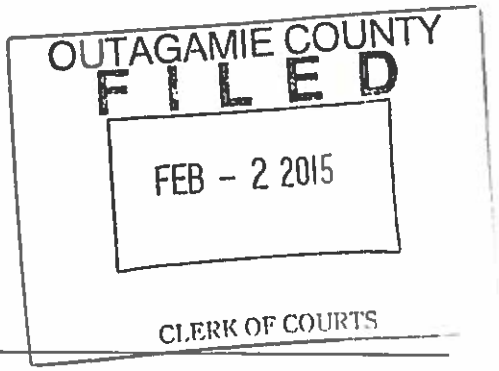
Respondent,

CLEAN WISCONSIN,

Intervenor.

FILE COPY

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



REPLY BRIEF OF WISCONSIN MANUFACTURERS & COMMERCE, DAIRY BUSINESS ASSOCIATION, MIDWEST FOOD PROCESSORS ASSOCIATION, AND WISCONSIN POTATO & VEGETABLE GROWERS ASSOCIATION TO RESPONSE BRIEFS OF WDNR AND CLEAN WISCONSIN IN OPPOSITION TO MOTION TO INTERVENE

Wisconsin Manufacturers and Commerce, Dairy Business Association, Midwest Food Processors Association, and Wisconsin Potato and Vegetable Growers Association ("Movants") submit this brief in reply to the briefs filed by the Wisconsin Department of Natural Resources and Clean Wisconsin in opposition to Movants' motion to intervene. In addition, the Movants file this brief in support of their amended motion to intervene pursuant to Wis. Stat. § 227.53(1)(d).

BACKGROUND

On 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."

On November 14, 2014, the Movants filed a motion to intervene pursuant to Wis. Stat. §§ 803.09(1) and (2). 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.

On December 4, 2014, the Wisconsin Department of Natural Resources (DNR) filed a brief in opposition to the Movants' motion to intervene. On December 19, 2014, Clean Wisconsin filed a brief in opposition to the Movants' motion to intervene.

ARGUMENT

A. The Movants, As Associations, Have Standing to Seek Intervention under Wis. Stat. 227.53(1)(d)

Although the Movants originally filed their motion under Wis. Stat. §§ 803.09(1) and (2),[1] Movants amend their motion to seek intervention under Wis. Stat. § 227.53(1)(d), which provides in relevant part:

[1] DNR incorrectly states that Movants filed their original motion under Wis. Stat. 893.09. The correct citation is Wis. Stat. § 803.09.

> "The court may permit other interested parties to intervene. Any person petitioning the court to intervene shall serve a copy of the petition on each party who appeared before the agency and any additional parties to the judicial review at least 5 days prior to the date set for hearing on the petition."

Wisconsin courts have applied a two-part test for determining whether a party is aggrieved and has standing under Wis. Stat. §§ 227.52 and 227.53(1).

The first step is to "ascertain whether the decision of the agency directly causes injury to the interest of the petitioner." *Wisconsin's Environmental Decade, Inc. v. Public Service Comm. (WED)*, 69 Wis. 2d 1, 230 N.W.2d 243 (1975). "The second step is to determine whether the interest asserted is recognized by law." *WED*, 69 Wis. 2d at 10.

Courts have liberally construed the standing requirement and "recognized that public policy should play a role in that construction." *Metropolitan Builders Ass'n of Greater Milwaukee (MBA) v. Village of Germantown*, 282 Wis. 2d 458, 468, 698 N.W.2d 301 (2005). This is especially true regarding associations. *See MBA*, 282 Wis. 2d at 468 ("The *WED* court recognized a special variation of this standing rule for associations when it allowed an organization devoted to environmental protection and preservation to sue, provided it could demonstrate sufficient facts on remand *to show that a member of the organization could have sued.*") (Emphasis added).

As demonstrated below, the Movants have standing to intervene in this case.

1. Movants Have Sustained an Injury in Fact

As explained by the *WED* court, an "[i]njury alleged, which is remote in time or which will only occur as an end result of a sequence of events set in motion by the agency action challenged, can be a sufficiently direct result of the agency's decision to serve as a basis for standing." *WED* at 250.

Each of the Movants have members that rely on the use of high capacity wells. DNR's criticism of New Chester Dairy's model on which DNR based its conclusion that groundwater monitoring was necessary is a criticism likely to be leveled against other models given a certain degree of uncertainty with all models. It follows, then, that DNR will make similar findings that monitoring is needed to validate other groundwater drawdown predictions by models. In fact, the Movants are aware of several instances in which DNR has imposed similar monitoring requirements as conditions of other high capacity well approvals.

The first example is a March 13, 2013, DNR approval for two potable high capacity wells for the proposed Richfield Dairy in Adams County. The condition states that: "Monitoring of groundwater levels near the high capacity wells is required to confirm the scale of water table drawdown predicted by the S.S. Papadopulos and Associates model, submitted by the owner during the SEA process." (High capacity well approval issued to Richfield Dairy, dated 3/13/13, submitted to the Court by DNR as part of the record at page R. 0763.) A second example is a December 17, 2012, DNR approval of a new water supply well for the Village of Poynette that required water level elevations to be measured and recorded at least three time each day. (Water System Facilities Plan and Specification Approval, Issued to Village of Poynette, dated 12/17/12, submitted to the Court by DNR as part of the record at page R. 0779.)

The Movants' members are aggrieved, then, by DNR's imposition of conditions that are not explicitly authorized by statute. They will have to expend significant sums of money to install monitoring wells and comply with these unlawfully imposed conditions. These unlawful permit conditions in turn cause enhanced regulatory uncertainty, which adversely affects Movants' members' ability to do business in this state.

In summary, the Movants and their members have sustained an injury in fact and therefore have met the first prong of the standing test.[2]

2. Movants' Interest of Ensuring Agencies Follow the Proper Rulemaking Process and Not Impose Unlawful Conditions is Recognized by Law

The second part of the standing test is to determine whether the interest asserted is recognized by law. *WED* at 14. In this case, the Movants' interests are specific provisions under Wis. Stat. ch. 227 (Administrative Procedure and Review), as amended by 2011 Wisconsin Act 21 (Act 21), that protect their members from unlawful permit conditions and unlawful rulemaking, which could in turn cause their members direct financial harm. Therefore, DNR imposition of unlawful permit conditions violates Movants' interests that are protected by Wis. Stat. ch. 227.

Act 21 provides new safeguards for regulated entities by preventing state agencies from imposing permit conditions when no explicit authority existed. Act 21 (Wis. Stat. § 227.10(2m)) provides:

> No agency may implement or enforce any standard, requirement, or threshold, including *as a term or condition of any license issued by the agency*, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter. (Emphasis added.)

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[2] Clean Wisconsin's assertion the Movants will not be injured or adversely affected appears inconsistent with their own motion to intervene. Clean Wisconsin moved to intervene pursuant to Wis. Stat. § 227.44(2m), which provides that "[a]ny person *whose substantial interest may be affected* by the decision following the hearing shall, upon the person's request, be admitted as a party." (Emphasis added.) This language is arguably more restrictive than the permissive intervention statute applicable to judicial review, which provides that "[t]he court may permit other interested persons to intervene." Wis. Stat. § 227.53(1)(d). Clean Wisconsin's "substantial interest" was merely to note a generalized interest in "[e]nsuring that DNR is able to protect important water resources for use and enjoyment by the public by imposing necessary conditions on high-capacity well property owners. . . ." (Clean Wisconsin's Motion to Intervene and Notice of Appearance (Apr. 24, 2013), p. 1, submitted to the Court by DNR as part of the record at page R. 0571.)

In addition, Act 21 contains other provisions precluding state agencies from imposing rules without explicit statutory authority. Act 21 (Wis. Stat. § 227.11(2)(a)) provides in relevant part:

1. *A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy* does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
2. *A statutory provision describing the agency's general powers or duties* does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.
3. A statutory provision containing a specific standard, requirement, or threshold does not confer on the agency the authority to promulgate, enforce, or administer a rule that contains a standard, requirement, or threshold that is more restrictive than the standard, requirement, or threshold contained in the statutory provision. (Emphasis added.)

DNR uses as authority to impose monitoring requirements in New Chester Dairy's permit on such general provisions that Act 21 prescribes as off limits for such purposes. Act 21 was enacted precisely to protect businesses from the types of unlawful conditions and regulations being imposed by DNR in this case. By imposing the conditions in this case that are not "explicitly permitted by statute" or were not properly promulgated as a rule, DNR exceeded its regulatory authority under Wis. Stat. §§ 227.10(2m) and .11(2)(a).

For example, DNR argued before the Administrative Law Judge that it had authority to impose the monitoring conditions based on Wis. Stat. §§ 281.11 and .12, which are the statutory provisions containing a statement or declaration of legislative intent, purpose, finding, or policy. However, as explained under Wis. Stat. § 227.11(2)(a), DNR does not have the authority to rely on those provisions to impose conditions. This is especially true given that the high capacity well statute (Wis. Stat. § 281.34) specifically regulates high capacity well water

withdrawals and does not contain any authority for DNR to include a condition requiring groundwater monitoring.

In summary, Movants' interests asserted by the Movants are recognized by the law. Therefore, Movants have satisfied the second prong of the standing test.

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

DNR and Clean Wisconsin further claim that the Movants' interests are represented by the parties. The test of whether existing parties adequately represent the interests of the party seeking to intervene is "minimal." *See Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 747 601 N.W.2d 301 (Ct. App. 1999) ("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.")

Here, New Chester Dairy's representation of the Movants' interests would be inadequate. New Chester Dairy's overarching interest is to obtain regulatory approval to expand and make more profitable their operations. Movants' interest here is to avoid the imposition of unlawful conditions in a New Chester Dairy permit that subsequently will lead to the imposition of unlawful and costly permit conditions in their members' permits. The risk of this occurring is amplified if New Chester Dairy, simply, and arguably reasonably, finds that continuing a legal challenge is not in their best financial interest and thus accepts the invalid permit conditions to resolve the litigation. This scenario becomes more plausible in light of the fact New Chester Dairy has already received its permit. This would leave unresolved the issue of whether the DNR unlawfully imposed the permit conditions.

In fact, the essence of Movants' interest in this case is driven by this divergence of interests between individual permit applicants and the broader interests that are a fundamental

purpose of business associations. Given the import of permit delays or denials on projects, waiving a legal challenge on invalid permit conditions would not be considered an unreasonable financial decision for a company; not so for associations representing broad industrial sectors.

Permit by permit, an agency can regulate entire industrial sectors without undertaking required rulemaking, or as here, without having necessary statutory authority. The Movants represent these sectors; New Chester Dairy does not.

Also, there "is simply nothing to be gained from repeated litigation of the same issue," which will occur if the Movants are not granted standing and allowed to continue litigating this case. *See MBA*, 282 Wis. 2d at 469 (explaining that allowing the association to sue a local government challenging an ordinance is most effective when done through collective action).

Although New Chester Dairy is currently appealing the DNR's decision, it is conceivable that the individual petitioners at some point may no longer continue the appeal given that they have received their permits and are able to operate their businesses. If this scenario were to occur and the Movants are not granted permission to intervene, no party would remain to continue appealing the case. This would in turn result in future litigation on the same legal issue by other individual companies. As explained by the *MBA case*, it makes more sense from a judicial economy standpoint to issue only one decision rather than have future cases addressing the same issue. *Id.*

Finally, allowing associations to intervene and have standing is sound public policy. Specifically, it protects individual companies from possible retaliation by the state when seeking future permits. While the petitioners in this case challenged the DNR's decision, many

other companies would simply accept the added cost of doing business rather than expend more money and face the possibility of retaliation by the agency.

Therefore, Movants have met the "minimal" burden of showing that the existing parties do not adequately represent their interests.

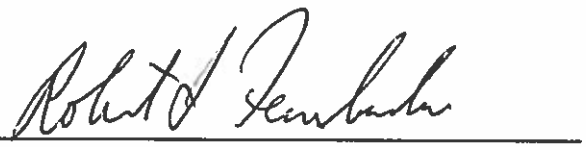
CONCLUSION

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 to intervene.

Dated this ___ day of January, 2015.

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



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