STATE OF WISCONSIN: CIRCUIT COURT: CALUMET COUNTY
BRANCH 2

WISCONSIN DAIRY ALLIANCE INC and
VENTURE DAIRY COOPERATIVE,

Plaintiffs,

Case No. 23-CV-0066

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES, and
WISCONSIN NATURAL RESOURCES BOARD

Defendants.

BRIEF IN SUPPORT OF MOTION TO INTERVENE

Clean Wisconsin, Inc., and Wisconsin Farmers Union ("Farmers Union") (collectively, "Movants") submit this brief in support of the motion to intervene.

Clean Wisconsin is a nonprofit organization that has worked to protect Wisconsin's waters from contamination for over 50 years. Founded in 1970 as Wisconsin's Environmental Decade, Clean Wisconsin has thousands of members across the state who entrust us to represent their interests in a clean, healthy environment. Clean Wisconsin seeks to intervene in this action as a defendant to protect its interest and the interests of its members in clean water. Plaintiffs Wisconsin Dairy Alliance and Venture Dairy Cooperative (hereafter collectively "WDA") challenge rules that protect water quality. Invalidation of these rules would directly harm the interests of Clean Wisconsin and its members.

Farmers Union is a nonprofit organization that is comprised of farmers, rural community members, and agricultural advocates. For over 90 years, Farmers Union has been committed to providing grassroots leadership to build sustainable economic systems in which family farms and rural communities can thrive and prosper. Farmers Union's organizational goals and policies are member-driven; each year, delegates from across the state debate and adopt policies that guide the organization. Farmers Union members have first-hand experience with the pervasive contamination caused by CAFOs in Wisconsin, both to surface and groundwater. Farmers Union seeks to intervene to protect its interests and those of its members in clean water, stewardship of natural resources, and economic and regulatory systems that protect family farmers, rural communities, and food security for the nation.

Clean Wisconsin and Farmers Union respectfully submit that they have the right to intervene in this case pursuant to Wis. Stat. § 803.09(1).

STANDARD OF REVIEW

To intervene as of right, a proposed intervenor must satisfy the four criteria specified in Wis. Stat. § 803.09(1):

A. its motion to intervene must be timely;
B. it must claim an interest sufficiently related to the subject of the action;
C. it must show that the disposition of the action may, as a practical matter, impair or impede its ability to protect that interest; and
D. it must demonstrate that the existing parties do not adequately represent its interest.

Helgeland v. Wis. Muns., 2008 WI 9, ¶38, 307 Wis. 2d 1, 745 N.W.2d 1. There is "no precise formula for determining whether a potential intervenor meets the requirements of [Wis. Stat.] § 803.09(1) … [t]he analysis is holistic, flexible, and highly fact-specific. A court must look at the facts and circumstances of each case against the background of the policies underlying the intervention rule." *Id.* ¶40. Intervention must be granted if these elements are satisfied. *Armada Broad., Inc. v. Stirn*, 183 Wis.

2d 463, 471, 516 N.W.2d 357 (1994) ("If [movant] meets each of the requirements [in Wis. Stat. § 803.09(1)], we must allow him to intervene."). "Wisconsin Stat. § 803.09(1) is based on Rule 24(a)(2) of the Federal Rules of Civil Procedure, and interpretation and application of the federal rule provide guidance in interpreting and applying § 803.09(1)." *Helgeland*, 2008 WI 9, ¶37. In evaluating a motion to intervene, the movant's allegations are accepted as true. *Ill. v. City of Chi*., 912 F.3d 979, 984 (7th Cir. 2019).

ARGUMENT

CLEAN WISCONSIN AND FARMERS UNION HAVE A RIGHT TO INTERVENE IN THIS CASE

Movants meet the requirements for intervention as of right set forth in Wis. Stat. § 803.09(1): the motion to intervene is timely; Movants possess interests sufficiently related to the subject of the action; disposition of the action may impair Movants' ability to protect their interests; and the existing parties do not adequately represent those interests. *Helgeland*, 2008 WI 9, ¶¶38-40.

I. The Motion is Timely.

There is no statutory definition of when a motion is timely. *Olivarez v. Unitrin Prop. & Cas. Ins. Co.*, 2006 WI App 189, ¶14, 296 Wis. 2d 337, 723 N.W.2d 131. Instead, "the question of the timeliness of a motion to intervene is left to the discretion of the circuit court." *Helgeland*, 2008 WI 9, ¶42. Courts have looked to two factors. The first "factor is whether in view of all the circumstances the proposed intervenor acted promptly. The second factor is whether the intervention will prejudice the original parties to the lawsuit." *State ex rel. Bilder v. Town of Delavan*, 112 Wis. 2d 539, 550, 334 N.W.2d 252 (1983) (internal citations omitted). "Promptness can be further broken down into two factors: when the proposed intervenor discovered its interest was at risk and how far litigation has proceeded." *Olivarez*, 2006 WI

App 189, ¶15 (citing *Roth v. LaFarge School Dist. Bd. of Canvassers,* 2001 WI App 221, ¶17, 247 Wis. 2d 708, 634 N.W.2d 882).

a. The motion to intervene is prompt because it was filed within a reasonable time of Movants becoming aware of the case and the litigation is still at an early stage.

Movants filed the motion to intervene as soon as practicable after becoming aware of this case and the issues involved.

Clean Wisconsin became aware of this case on June 15, 2023, during a routine check for litigation involving the Department of Natural Resources ("DNR"). To litigate, Clean Wisconsin requires approval of its board of directors. Approval to intervene in this matter was granted at a July 21 meeting of the board, the first following Clean Wisconsin's awareness of this case. Clean Wisconsin attorneys began contacting members to serve as affiants in this case that same day.

Farmers Union first learned of this case on July 17, 2023, in a news story about the litigation. Von Ruden Aff. ¶20. At that time, defendants had only just filed an answer four days prior. Farmers Union reviewed the case and quickly determined that its interests could be impacted by the outcome. Even then, it took time for the Farmers Union board of directors to consider intervention, retain counsel, and file the present motion. Indeed, Farmers Union did not have a scheduled meeting in August, and instead convened a special board meeting on August 29, 2023, to discuss and vote on the decision to intervene. Von Ruden Aff. ¶¶22-23. Farmers Union moved to intervene within one week of that board vote.

Movants acted promptly to intervene as soon as practicable following awareness of this case's existence, and in response to developing facts about the case's status and schedule, including that the matter could be resolved via summary disposition. *See State ex rel. Jones v. Gerhardstein*, 135 Wis. 2d 161, 168 n.2, 168-69, 400 N.W.2d 1 (Ct. App. 1986) (finding circuit court did not abuse discretion in

denying motion to intervene as untimely when motion was filed seven months after case initiated and no reason for the delay was given).

This case is still at its earliest stage. No hearings have been held and no briefs have been filed. Wisconsin courts have consistently found a motion to intervene at this early stage is timely. *Armada*, 183 Wis. 2d at 469 (finding motion to intervene filed the same day as the first hearing to be timely); *Bilder*, 112 Wis. 2d at 551 (finding motion to intervene filed after a settlement agreement between existing parties was submitted to court but before the court considered the agreement was still timely); *see Jones*, 135 Wis. 2d 161, 168 n.2 (Ct. App. 1986) (circuit court did not abuse discretion in denying motion to intervene as untimely when significant portions of the petitioner's testimony had already been taken).

b. Intervention will not prejudice the existing parties.

Neither the plaintiffs nor the defendants are prejudiced by Movants' intervention. Unsurprisingly, a court's analysis of how far the litigation has proceeded is often related to its finding as to prejudice to existing parties. Given the early stage of the present litigation, there is no risk of prejudice to existing parties. *Bilder*, 112 Wis. 2d at 551 (finding intervention would not prejudice existing parties even after existing parties submitted settlement agreement to court); *Roth*, 2001 WI App 221, ¶18 (finding motion to intervene filed ten days before first hearing would not prejudice existing parties); *see Jones*, 135 Wis. 2d at 168 n.2 (circuit court did not abuse discretion in denying motion to intervene as untimely because intervention after party testimony was taken would be prejudicial).

It is not enough to establish prejudice for existing parties to "merely assert their interest in concluding their lawsuit." *C.L. v. Edson*, 140 Wis. 2d 168, 179, 409 N.W.2d 417, 421 (Ct. App. 1987) (finding circuit court's decision to grant motion to intervene nine months post judgment was not an abuse of discretion). In this regard, it is worth noting that the rules petitioners here challenge were promulgated in 2007, 16 years ago. Wis. Admin. Code §§ NR 243.11(3)(a)-(b), 243.03(2). The federal cases WDA

bases its arguments on were decided in 2005 and 2011, 18 and 12 years ago, respectively. Compl. ¶31. This case is not filed in response to an emergent situation, new case law, or a change in policy. This precludes any argument that intervention would prejudicially delay the disposition of WDA's suit. Also, there is no reason to expect that intervention would "prejudice the parties by making the lawsuit complex or unending." *Edson*, 140 Wis. 2d at 177.

II. Movants have an Interest Sufficiently Related to the Subject Matter of the Action.

A party seeking to intervene as of right must have an interest "sufficiently related to the subject of the action." Wis. Stat. § 803.09(1). As with timeliness, courts do not use a precise test; rather, "courts employ a broader, pragmatic approach to intervention as of right, viewing the interest sufficient to allow the intervention practically rather than technically." *Helgeland*, 2008 WI 9, ¶43. An interest is sufficiently related if it is "of such direct and immediate character that the intervenor will either gain or lose by the direct operation of the judgment." *Id*. at ¶45 (internal quotations and citations omitted). "[A] claimed interest does not support intervention if it is only remotely related to the subject of the action." *Id*. This approach is "a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Armada,* 183 Wis. 2d at 472 (internal quotations and citations omitted).

This section is organized in two parts. First, we identify the subject matter of the present action: a request to invalidate two DNR rules requiring large CAFOs to have water pollution control permits and defining "agricultural storm water discharge," respectively. Second, we identify the various interests of Clean Wisconsin, its members, Farmers Union, and its members, and we explain how our interests would be directly and immediately harmed by invalidation of the challenged rules.

a. WDA is challenging rules requiring large CAFOs to have Wisconsin Pollutant Discharge Elimination System permits.

This is a declaratory judgment action seeking the invalidation of two administrative rules. First, WDA asks this court to declare a rule requiring large CAFOs to obtain a Wisconsin Pollutant Discharge Elimination System ("WPDES") permit invalid. Compl., ¶¶35, 48; Wis. Admin. Code § NR 243.11(3)(a) and (b). Second, WDA asks the court to declare that a rule defining "agricultural storm water discharge" invalid. Compl., ¶¶58, 69; Wis. Admin. Code § NR 243.03(2).

To properly contextualize what it would mean to invalidate these rules, and thus how invalidation would harm Movants' interests, it is necessary to briefly describe the WPDES permitting program and how it applies to CAFOs.

The WPDES program is Wisconsin's state-level program for administering the requirements of the federal Clean Water Act (CWA) and other state laws, including Wisconsin's groundwater protection standards. *See* Wis. Stat. Ch. 160; Wis. Stat. § 283.001(2). The purpose of the WPDES permitting program is to limit the extent of water pollution. Wis. Stat. § 283.001(1)-(2); *see also, Clean Wis., Inc. v. Wis. Dep't of Nat. Res.,* 2021 WI 71, ¶17, 398 Wis. 2d 386, 961 N.W.2d 346.

It is illegal for any point source to discharge pollutants to waters of the state without a permit. Wis. Stat. § 283.31(1). "Waters of the state" "means those portions of Lake Michigan and Lake Superior within the boundaries of Wisconsin, all lakes, bays, rivers, streams, springs, ponds, wells, impounding reservoirs, marshes, water courses, drainage systems and other surface water or groundwater, natural or artificial, public or private within the state or under its jurisdiction, except those waters which are entirely confined and retained completely upon the property of a person." Wis. Stat. § 283.01(20). A "discharge of pollutants" "means any addition of any pollutant to the waters of this state from any point source." Wis. Stat. § 283.01(5). CAFOs are defined as point sources. Wis. Stat. § 283.01(12). As "agricultural waste,"

manure is a pollutant, as is "process wastewater," *i.e.*, water that comes into contact with manure and animal feed. Wis. Stat. § 283.01(12); *Clean Wis.,* 2021 WI 71, ¶19.

Accordingly, it is illegal for CAFOs to discharge manure or process wastewater to any of Wisconsin's surface or groundwaters without a WPDES permit. Wis. Admin. Code § NR 243.11(3).[1] As discussed in more detail below, WPDES permits address water pollution from CAFOs by requiring compliance with standards for managing manure and process wastewater. *Clean Wis.,* 2021 WI 71, ¶¶18-20; *See generally*, Wis. Admin. Code Ch. NR 243. Indeed, WPDES permits *must* include conditions that assure compliance with water quality standards, including groundwater standards established under Wis. Stat. Ch. 160. *Clean Wis.,* 2021 WI 71, ¶¶28-30; Wis. Stat. § 283.31(3)-(4); Wis. Admin. Code § NR 243.13(5).

WPDES permittees must monitor their activities and submit reports to DNR and allow DNR access to the premises in certain situations. Wis. Stat. § 283.55. In the CAFO context, there are specific requirements to monitor, inspect, record, and report facts about the facility to DNR. Wis. Admin. Code § NR 243.19. CAFOs must inspect storage areas, productions areas, land spreading equipment, land spreading areas, and take immediate corrective action if a problem is observed. Wis. Admin. Code § NR 243.19(1). The CAFO must keep records on the facility's activities at both the production facility and in land spreading areas. Wis. Admin. Code § NR 243.19(2). CAFOs must submit quarterly and annual reports about the facility's activities and inspection results to DNR. Wis. Admin. Code § NR 243.19(3).

As part of the WPDES permitting process, DNR must hold a notice and comment period, requiring the public to be notified of issued, reissued, or modified WPDES permits, the contents of those permits,

[1] This is one of the two rules challenged by WDA. The text of Wis. Admin. Code § NR 243.13(a) reads, in relevant part, "any person owning or operating a large CAFO that stores manure or process wastewater in a structure that is at or below grade or that land applies manure or process wastewater shall have a WPDES permit. A discharge of pollutants from manure or process wastewater to waters of the state by an unpermitted animal feeding operation with 1,000 animal units or more is prohibited."

and be given an opportunity to comment on DNR's proposed permitting decision. Wis. Stat. § 283.39. If requested, DNR must hold a public hearing. Wis. Stat. § 283.49. DNR is also required to provide public access to information about WPDES permits and permitted facilities. Wis. Stat. § 283.43. Groups and individuals may challenge WPDES permitting decisions in a contested case hearing, and the decision in that proceeding is subject to judicial review. Wis. Stat. § 283.63.

The CWA and state law both contain an exemption for "agricultural storm water." Wis. Stat. § 283.01(12); Wis. Admin. Code § NR 243.14(2)(a). A DNR rule—one of two challenged by WDA—defines this term, in relevant part, as:

> a precipitation related discharge of manure or process wastewater pollutants to surface waters from a land application area that may occur after the owner or operator of the CAFO has land applied the manure or process wastewater in compliance with the nutrient management requirements of this chapter and the terms and conditions of its WPDES permit.

Wis. Admin. Code § NR 243.03(2)(b). Thus, if a large CAFO follows nutrient management requirements and its permit, then "precipitation related discharge[s]" "to surface waters from a land application area" will not typically violate state law. Importantly, this exemption does not apply to discharges to groundwater, or to discharges from the production facility to surface waters.

CAFOs discharge pollutants to the waters of the state when manure is produced[2], transported[3], stored[4], and land applied[5].

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[2] Activities in the "production area," create discharges. *Clean Wis.*, 2021 WI 71, ¶19. The animal confinement area discharges to waters of the state because the area where the animals are confined and fed is washed with water, generating process wastewater.

[3] Manure spills are not uncommon in Wisconsin. These acute discharges can result in tremendous quantities of manure entering surface and groundwaters in a short amount of time.

[4] Manure lagoons leak and thus pollute groundwater. Rudko, Muenich, Garcia, & Xu, *Development of a point-source model to improve simulations of manure lagoon interactions with the environment*, J. of Env. Mgmt (2022). Those leaks are discharges to waters of the state and WPDES permits therefore include standards to limit the extent of discharges from manure lagoons. Wis. Admin. Code § NR 243.14(9). CAFOs are required to have adequate storage to ensure manure can be land applied in a controlled fashion and without overflow events. Wis. Admin. Code § NR 243.14(9); *Clean Wis.*, 2021 WI 71, ¶20.

[5] Land spreading of manure also causes discharges to surface and groundwater. *Clean Wis.*, 2021 WI 71, ¶19. *See also*, Raff & Meyer, *CAFOs and Surface Water Quality: Evidence from Wisconsin*, 104 Am. J. Agric. Econ. 161, 162 (2021) ("The connection between CAFOs and water quality has been well-studied, particularly in the ecological literature. The animal

The various discharges by large CAFOs harm the environment and threaten public health because of two basic facts about manure (and process wastewater): it contains the nutrients nitrogen and phosphorus, and it contains pathogens, *i.e.*, viruses and bacteria. *Clean Wis.*, 2021 WI 71, ¶20; Wisconsin Groundwater Coordinating Council, *Report to the Legislature Fiscal Year 2023*, at 96-103 (pathogens), 104-124 (nitrates).

Nitrogen is an essential nutrient for plant growth. That is why manure is used to fertilize crops. The problem, however, is that much of the nitrogen in manure that is land applied by large CAFOs is not taken up by plants and soils and instead moves to groundwater (and surface water) where, after chemical transformation, it appears in the chemical form of nitrate. Wisconsin Groundwater Coordinating Council at 104, 107 ("Nitrate is Wisconsin's most widespread groundwater contaminant and nitrate is increasing in extent and severity in the state.").

Under Wisconsin's groundwater protection law, nitrates are a "substance[] of public health concern" with an "enforcement standard" of 10 mg/l because they cause a host of health issues.[6] Wis. Admin. Code § NR 140.10, Table 1. Wisconsin's increased concentration of nitrates is primarily caused by agricultural activities, with manure being a major source. Wisconsin Groundwater Coordinating Council at 109-110 (citing study finding that "90% of nitrogen inputs to groundwater in Wisconsin can be traced to agricultural sources including manure spreading").

Since there is a state groundwater protection standard for nitrates, large CAFOs discharge nitrogen to groundwater, and DNR is required to include conditions in WPDES permits that assure compliance

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waste produced by CAFOs is not treated like that of humans, so the excessive nutrients present in animal waste can increase eutrophication in surface water bodies via discharge events.").

[6] Exposure to elevated nitrate levels has been linked to: Blue Baby Syndrome, neural birth defects, thyroid disease, colon cancer, and Non-Hodgkins lymphoma. Ward et al., *Drinking Water Nitrate and Human Health: An Updated Review*, Int'l J. Envtl. Research and Pub. Health (2018).

with groundwater standards, all WPDES permits must assure that discharges of nitrogen to groundwater by CAFOs do not cause exceedances of the 10 mg/l enforcement standard. *Clean Wis.,* 2021 WI 71, ¶30.

Manure also contains *E. coli* and other, even more dangerous, pathogens. *Clean Wis.*, 2021 WI 71, ¶20; Tucker R. Burch, et al., *Quantitative Microbial Risk Assessment for Contaminated Private Wells in the Fractured Dolomite Aquifer of Kewaunee County, Wisconsin*, Environmental Health Perspectives 129:6 (2021). Like nitrates, "Bacteria, *E. coli*" is a substance of public health concern. Wis. Admin. Code § NR 140.10, Table 1. The enforcement standard for *E. coli* is 0 gm/l because any small amount can result in serious gastrointestinal illness. *Clean Wis.*, 2021 WI 71, ¶20 (citing National Association of Local Boards of Health, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities* (2010)). For this reason, WPDES permits for CAFOs prohibit any land application of manure or process wastewater that causes fecal contamination of water in a well. Wis. Admin. Code § NR 243.14(2)(b)3.

Contamination of surface and groundwater with manure threatens the environment in other ways. As mentioned above, the nutrients in manure, namely nitrogen and phosphorus, are not entirely absorbed by plants or soils in areas where the manure is stored or land applied. Instead, much of it enters the state's water system where it causes significant environmental problems:

> In addition to phosphorus, nitrogen contributes significantly to nutrient-related water quality degradation of lakes and streams in Wisconsin. Groundwater and drain tile transported nitrate, along with urea and ammonium play a significant role in the over-enrichment of water bodies, driving excessive algae and cyanobacteria growth, along with increasing the potential for harmful algal bloom toxin formation.

Groundwater Coordinating Council at 107.[7]

[7] In 2019, a study on CAFOS in the Great Lakes area comprised data of 283 Wisconsin CAFOS. This study found that Wisconsin CAFOS generated 10,300 kilotons per year of manure. The CAFOS released 8,200 tons of phosphorus per year. Edgar Martín-Hernández et al., *Analysis of Incentive Policies for Phosphorus Recovery at Livestock Facilities in the Great Lakes Area*, 177 Res., Conservation and Recycling 105973 (2022). Another study compared the relationship between the growth of CAFOs in Wisconsin from 1995 to 2017 with the rise of surface water total phosphorus levels. Significantly, the

WPDES permits for CAFOs can thus reduce nutrient loading caused by discharges from CAFOs by requiring compliance with standards for how manure is stored and land applied.

With this background in place, we can now circle back to the challenged rules. If successful, WDA's challenge to Wis. Admin. Code § NR 243.11(3)(a) and (b) would eliminate the requirement that all large CAFOs in Wisconsin apply for and receive a WPDES permit, and thus they would no longer be required to comply with WPDES permit standards designed to reduce water pollution from CAFOs, as detailed above. Large CAFOs would no longer be subject to the monitoring, recordkeeping, and inspections requirements in Wis. Admin. Code § NR Ch. 243. It would mean that the public notice and comment opportunities provided via the WPDES program would no longer exist. It would also mean that the WPDES provisions allowing interested individuals to challenge WPDES permits would no longer apply. Taken together with this first challenge, WDA's challenge to Wis. Admin. Code. § NR 243.03(2) would eliminate the requirement that large CAFOs land apply manure in compliance with nutrient management standards and WPDES permit terms to qualify for the agricultural storm water exemption.

b. Movants have interests in safe drinking water, healthy surface waters, and fair farm systems, and these interests would be directly and immediately harmed by invalidation of the challenged rules.

Clean Wisconsin and Farmers Union have sufficient interests to intervene in this case, both as organizations and on behalf of their members. *See Munger v. Seehafer*, 2016 WI App 89, ¶53 ("An organizational plaintiff may have standing to bring suit on either its own behalf ('organizational standing') or on the behalf of one or more of its members ('associational standing')") (citing *PETA v. USDA*, 797 F.3d 1087, 1093, 418 U.S. App. D.C. 223 (D.C. Cir. 2015)). Movants have at least four types of interest

study found that "the average total phosphorus reading in Wisconsin is approximately 10.9% higher than it would be" without any CAFOs. Zach Raff & Andrew Meyer, at 161, 173-174, 183.

that would be directly and immediately harmed by invalidation of the challenged rules. *Helgeland*, 2008 WI 9, ¶45.

First, Movants have organizational interests in a strong WPDES program as applied to CAFOs.

Clean Wisconsin is an environmental advocacy group that has placed safeguarding water quality at the heart of its organizational mission for over 50 years. This means advocating for laws and government decisions that support clean water using all the tools available. Particularly relevant here, Clean Wisconsin has expended and continues to expend considerable resources, in staff time and money, to advocate for improvements to the WPDES program as applied to CAFOs, a program that this action seeks to undermine. This includes lobbying on bills and proposed regulations, commenting on draft permits, conducting scientific research, extensive communications and public education efforts, cooperative endeavors with dairy business groups to make dairy farming in Wisconsin more environmentally sustainable, and litigation. This includes the years Clean Wisconsin spent in court to ensure that DNR's incorrect interpretations of state law did not erroneously limit DNR's ability to implement the WPDES program for CAFOs. *Clean Wis.*, 2021 WI 71, ¶12. In the past six years, Clean Wisconsin has also petitioned for contested case hearing or intervened as a party in a contested case hearing concerning WPDES permits issued to CAFOs on three occasions, separate from the *Clean Wisconsin v. DNR* litigation that ended in 2021. *In the Matter of Wisconsin Pollutant Discharge Elimination System Permit Modification WI-0064815-01-1 Issued to Richfield Dairy, LLC, to be located in the Town of Richfield, Adams County Wisconsin*, Case No. DNR 15-069 (A copy of Prehearing Conference Report and Scheduling Order attached as Exhibit 1); *In the matter of Gordondale Farms Inc. Permit No. WI-0062359-03-0 to Discharge Under the Wisconsin Pollutant Discharge Elimination System ("WPDES") dated July 31, 2020* (A copy of the Verified Petition for Review is attached as Exhibit 2); *In the Matter of WPDES Permit No. WI-0059536-04-2, Issued to Kinnard Farms Inc.* (A copy of the Prehearing Conference Report

and Scheduling Order is attached as Exhibit 3).[8] It is not an overstatement to say that the WPDES program for CAFOs has been a major focus of Clean Wisconsin's work for over a decade.

Farmers Union is a nonprofit agricultural organization that has worked for over 90 years to protect family farms and rural communities. Farmers Union currently has over 2,200 members and is a voice for Wisconsin farmers. Farmers Union is committed to representing the interests of Wisconsin farmers on issues like quality of life in rural communities, sustainability, competitive markets, monopolies and consolidation, conservation, and the environment. A core belief of Farmers Union is that family farming plays a critical role in protecting and restoring the environment. However, Farmers Union recognizes the threat that industrial models of farming and agricultural concentration pose to the family farm system.

Farmers Union has a direct interest in the continued administration of the CAFO Program as exemplified by Farmers Union's established policies. Farmers Union's policies are democratically adopted and represent the interests of the majority of its members, many of these policy positions directly relate to the subject of this litigation and would be affected by its outcome. Von Ruden Aff. ¶¶ 5-8. Farmers Union's policy positions are inherently "pro-agriculture" and are intended to support thriving family farms, safe rural communities, and healthy resources. Von Ruden Aff. ¶7-8. Farmers Union policy positions directly express support for adequate environmental oversight of CAFOs through the WPDES permitting program, while other policy positions are highly related to the program, including positions that support targeted groundwater mapping and more stringent regulation of nutrient application on susceptible landscapes. Von Ruden Aff. ¶¶9-13. Lastly, Farmers Union recently passed a resolution recognizing that its members and rural communities in general "should not need to worry about their

[8] In none of these cases did DNR or the CAFOs argue that Clean Wisconsin lacked the requisite interests to challenge those permits, or to intervene as a full party. It would be bizarre if Clean Wisconsin were found to have adequate interests to challenge individual CAFO permits based on the environmental impact of a single CAFO not having to comply with additional permit standards, but not intervene in a challenge that could result in many CAFOs across the state no longer needing permits *at all*.

family's health … or endure a general decline of their community…as a result of contaminated groundwater." In passing the resolution, Farmers Union recognized the need for state support in responding to groundwater contamination in Wisconsin. Von Ruden Aff. ¶14. In advancing these positions through advocacy, lobbying, and education, Farmers Union has expended significant time and resources, and the present litigation contradicts much of Farmers Union's established policies and active work. Von Ruden Aff. ¶16-17.

Further, Farmers Union has an interest in the outcome of the litigation because the WPDES program and environmental oversight of CAFOs support the viability of family farms in Wisconsin. This is because CAFO regulations, to some extent, rebalance the economic and social inequities created by agricultural concentration. Environmental pollution and other externalities associated with intensive, concentrated agriculture are reduced through regulation by requiring CAFOs to internalize those costs.[9] Requiring CAFOs to bear financial responsibility for mitigating their significant environmental impact is necessary for fairer competition between industrial-scale agriculture and smaller family farms. Farmers Union helps family farms compete in agricultural markets while complying with state and federal regulations. Von Ruden Aff. ¶¶18-19. Therefore, Farmers Union and their members also have an interest in sustaining small- and medium- sized farms, and the CAFO Program contributes to maintaining a fairer playing field.

Granting the relief WDA requests would significantly undermine the WPDES program as applied to CAFOs by allowing some large CAFOs to improperly operate without a permit and thus evade permitting standards.[10] This would create a direct and immediate injury to Clean Wisconsin's

[9] *See e.g.,* Zach Raff, *CAFOs and Surface Water Quality: Evidence from Wisconsin*, Amer. J. Agr. Econ. (2021); James MacDonald, *Scale Economies Provide Advantages to Large Dairy Farms*, USDA (2020).

[10] WDA's apparent argument that the rules are invalid stems from a misinterpretation of federal and state law, and a complete disregard of the basic fact that large CAFOs in Wisconsin are discharging to waters of the state in the myriad ways described above. WDA's framing that the challenged rule is invalid because it requires permit coverage before any actual discharge

organizational mission of ensuring access to safe, clean water for drinking, recreation, fishing, and other purposes for the people of Wisconsin and Farmers Union's organizational and policy goals of enhancing the life for family farmers and rural communities by ensuring safe, clean, and health water resources. A successful attack on the WPDES permitting program would be a significant setback to the wide range of activities Movants have conducted to address water pollution caused by CAFOs. Federal courts have found that preserving the benefits derived from advocacy efforts are a cognizable interest for the purposes of intervention. For example, in *W. Energy Alliance v. Zinke*, 877 F.3d 1157, 1165-66 (10th Cir. 2017), environmental non-profit organizations were granted intervention as of right because they had an interest in "preserving the [policy] that they spent years . . . litigating" to achieve.[11] If large CAFOs no longer need to have WPDES permits at all, Clean Wisconsin's years of litigation to compel DNR to use the full reach of its authority would be significantly impaired. *See also*, *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1200 (10th Cir. 2010) (finding interest requirement satisfied when a hunting group asserted an interest in preserving the interpretation of law that permitted culling); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (finding "[a] public interest group is entitled to intervene as a matter of right in an action challenging the legality of a measure it has supported."). This is also the kind of injury that would require enormous expenditures of time and resources to counteract. *PETA*, 797 F.3d. at 1095.

occurs is thus incorrect and, more importantly for the present motion, not one the court should adopt in evaluating this motion to intervene. We nonetheless anticipate that WDA will attempt to minimize the impact of its action and thus any impacts to Movants' interests, by making the claim that no discharging CAFO will ever actually evade permitting standards. This is wrong for a range of reasons that go to the merits of their claim and are thus beyond the scope of this motion. It is sufficient here that Movants make nonconclusory allegations that the practical effect of invalidating of these rules would be some number of large CAFOs that do discharge to waters of the state, but nonetheless operate without a WPDES permit, thus leading to increased water pollution. *Ill. v. City of Chi.*, 912 F.3d 979, 984 (7th Cir. 2019).

[11] *Helgeland*, 2008 WI 9, ¶37 ("Wisconsin Stat. § 803.09(1) is based on Rule 24(a)(2) of the Federal Rules of Civil Procedure, and interpretation and application of the federal rule provide guidance in interpreting and applying § 803.09(1).")

Further, absent the WPDES permitting process, Movants would lose the ability to continue pressing for *improved* standards in WPDES permits, either in legislation, agency rulemaking proceedings, or in the context of permitting decisions for individual CAFOs. The WPDES program is the single best tool DNR has to manage water pollution from large CAFOs—a major contributor to both surface and groundwater quality challenges in Wisconsin—and without it we would immediately lose the most efficacious route for meaningful change. Clean Wisconsin and Farmers Union move to intervene in this case not merely to defend the status quo, but to preserve the opportunity to realize a better future. The loss of this opportunity is a direct and immediate injury to concrete and demonstrable organizational interests. *See Helgeland*, 2008 WI 9, ¶43; *See PETA*, 797 F.3d at 1093.

Second, Movants also represent the interests of their many members throughout the state who are affected and/or potentially affected by water pollution caused by CAFOs. Clean Wisconsin members have unsafe levels of nitrates and/or *E. coli* in their private drinking water wells. Skoien Aff. ¶¶13-14; Wagner Aff. ¶¶8, 18. Movants' members worry about their health and the health of their family members. Drath Aff. ¶14; Skoien Aff. ¶14; Wagner Aff. ¶18, Utesch Aff. ¶6. These individuals have spent significant time and money attempting to understand and resolve their drinking water issues. They have paid and/or will pay for well water quality tests into the future. Wagner Aff. ¶¶17-18; Skoien Aff. ¶14; Drath ¶14, Utesch Aff. ¶7. They have dug entirely new private drinking water wells, only to find the new well they spent $10,000 to have constructed quickly became contaminated with nitrates too. Wagner Aff. ¶14. They have paid to install and maintain their own filtration systems. Skoien Aff. ¶13; Wagner Aff. ¶15. They worry about the proper functioning of these filters, knowing that their raw well water is unsafe to drink due to nitrate contamination. Drath Aff. ¶14; Skoien Aff. ¶14; Wagner Aff. ¶18. This worry leads them to pay for bottled drinking water. Skoien Aff. ¶15; Wagner Aff. ¶16. The contamination of groundwater with

nitrates also leads our members to worry about how pollution from CAFOs has impacted the value of their homes and properties. Wagner Aff. ¶35, Utesch Aff. ¶12.

Movants have members who live near CAFOs and have a credible fear that known groundwater contamination in their area associated with CAFOs will soon reach their well. Drath Aff. ¶14, Utesch Aff. ¶9. CAFOs near our members have had unreported spills and other legal violations for failure to follow WPDES permit conditions, and they are afraid that if some large CAFOs do not need permits any longer then these spills will become more frequent. Drath Aff. ¶¶18-23, Utesch Aff. ¶¶9-10.

Movants have members who can no longer swim, fish, boat, or otherwise enjoy surface waters due to nutrient fed free floating plant growth that chokes the life from these waters, *i.e.*, algal blooms. Unmuth Aff. ¶¶8-10, Utesch Aff. ¶¶13-14. These waters are severely impaired due to manure that is stored and land applied in locations that cause discharges to these surface waters and to groundwater that feeds these surface waters. Unmuth Aff. ¶¶10-19. These waters have been studied for many years and went from near pristine condition to severe impairment in just a few decades, coinciding with changed land use patterns in the upgradient area. Unmuth Aff. ¶16. Other members are threatened by encroaching nutrient loading that has not yet fully impaired the lake they live on, but observed nutrient levels are rising. Skoien Aff. ¶¶22-24. Our members worry that their home has lost and will continue losing value because the lake they live near is being degraded by nutrient loading from manure. Skoien Aff. ¶27.

If the current WPDES standards for CAFOs that limit the extent of discharges were no longer applicable, this would directly and immediately harm Movants' members who rely on the protection they provide, imperfect as it is. These harms could not be more direct and immediate.

Third, Movants and their members have availed themselves of the public participation opportunities afforded by the WPDES program. Drath Aff. ¶¶24-27, Von Ruden Aff. ¶¶16-17, Utesch Aff. ¶¶15, 17-18. These are important public avenues for Movants and their members to be heard. Drath

Aff. ¶¶34-35. Movants and their members would no longer be able to participate in the notice and comment periods that attend issuance of a WPDES permit, including holding of a public hearing. Notice and comment periods serve critical democratic, transparency, and accountability purposes, and aim to ensure informed agency decision making. *See, e.g., Asiana Airlines v. FAA*, 328 U.S. App. D.C. 237, 134 F.3d 393, 396 (1998); *Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013). Without notice and comment opportunities, Movants and their members will not be able to bring their concerns about CAFOs to the department in the same way.

Fourth, Movants and their members would lose the ability to avail themselves of Wis. Stat. § 283.63, which confers individuals and organizations a right to a contested case hearing challenging a WPDES permit issued, reissued, or modified by DNR. As noted above, Clean Wisconsin has challenged WPDES permits issued to CAFOs numerous times in recent years.

Movants' members do not share a uniform view on CAFOs. But what they do share is an understanding that large CAFOs impact their well-being by affecting the environment where they and their families live and spend their time, and thus a credible fear that this case will worsen those effects by preventing DNR from requiring large CAFOs to comply with WPDES permit standards. Both Clean Wisconsin's and Farmers Union's members support intervention because they want all large CAFOs to continue operating under WPDES permits, to preserve the benefits of the current permitting approach, and to give us an opportunity to do better in the future. Wagner Aff. ¶¶31-37; Skoien Aff. ¶¶29-33; Unmuth Aff. ¶¶24-29; Drath Aff. ¶¶28-36, Utesch Aff. ¶¶19-23.

III. Disposition of this case would impair Movants' ability to protect their interest and the interests of their members.

The third part of the intervention as of right standard provides that a movant may intervene as of right when "the movant is so situated that the disposition of the action *may* as a practical matter impair or impede the movant's ability to protect that interest." Wis. Stat. § 803.09 (emphasis added). The Wisconsin

Supreme Court has clarified that a movant is not required to make a showing "that impairment or impediment will *necessarily* occur" or that the intervenor is "*necessary* to the adjudication of the action." *Helgeland,* 2008 WI 9, ¶40, n.30 (emphasis added). Instead, in determining whether a movant's ability to protect its interests "may" be impaired or impeded, a court should "take a pragmatic approach and focus on the facts of each case and the policies underlying the intervention statute." *Id*. at ¶79.

That Movants' ability to protect their interests would be impaired by disposition of this case follows inexorably from what has already been said about the pollution CAFOs cause, the nature of Movants' interests, and the relief sought by WDA.

This is a declaratory judgment act that would invalidate administrative rules entirely, as they apply to every single large CAFO in the state. There is no legal proceeding other than the present action in which to defend these rules. *See Olivarez*, 2006 WI App 189, ¶29 (approving of circuit court's denial of a motion to intervene where the movant was "left with the right to pursue an independent remedy against the parties in the primary proceeding"); *Roth*, 2001 WI App 221, ¶11 (movant's "ability to protect [her] interest will be impeded if she cannot intervene because she will otherwise have no opportunity to assert her claims"). Given the breadth of the relief sought, the statewide distribution of CAFOs, and the absence of other proceedings in which to defend the current permitting approach, Movants' ability to protect their interests would be impaired and impeded by disposition of this case.

IV. DNR does not Adequately Represent the Interests of Clean Wisconsin or its Members.

The fourth and final prong of the intervention as of right standard asks whether existing parties adequately represent Movants' and their members' interests. This prong is "blended and balanced" with the first three, meaning that a strong showing as to the other three factors is relevant in deciding whether this fourth prong is met. *Helgeland*, 2008 WI 9, ¶86.

The Wisconsin Supreme Court has held that the showing required for proving inadequate representation "should be treated as minimal." *Armada*, 183 Wis. 2d at 476 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). The United States Supreme Court has recently reiterated its past statements that this prong "present[s] proposed intervenors with only a minimal challenge." *Berger v. N.C. State Conference of the NAACP*, 142 S. Ct. 2191, 2203, 213 L.Ed.2d 517, 532 (2022). This "lenient default rule" is applied unless one of two rebuttable presumptions of adequate representation applies. *Bost v. Ill. State Bd. of Elections*, No. 22-3034, 2023 U.S. App. LEXIS 19346, at *9 (7th Cir. July 27, 2023).[12] If the first presumption is present, then an "intermediate" standard applies, requiring that the movant show some "conflict" between itself and the existing party. If the second presumption is present, then the highest standard is applied, requiring the movant to show bad faith or negligence on the part of the existing party. *Id*. at *7-8. If neither is present, then the lenient default rule applies, which requires a showing only that representation by existing parties "*may*" be inadequate. *Id*. at *7. (emphasis in original).

This section will take each of these presumptions in turn and explain why they do not apply to Movants' motion to intervene. Movants will then explain why the motion to intervene must be granted under the "minimal" showing required under the lenient default rule applicable here.

a. DNR and Movants do not share the "same goal" and therefore the presumption that representation is adequate for parties that share the same goal does not apply to this motion to intervene.

First, representation is presumed adequate when the movant and the existing party have the same "ultimate objective" in the action, sometimes stated as having the "same goal". *Compare Helgeland*, 2008 WI 9, ¶90, *with Bost,* at *7.

The Seventh Circuit Court of Appeals has recently reiterated:

[12] Given the recency of this decision, pagination in the federal reporter is not yet available. Clean Wisconsin submits a copy of *Bost* as Exhibit 4.

> [t]o have the same goal, it is not enough that they seek the same outcome in the case. After all, a prospective intervenor must intervene on one side of the 'v.' or the other and will have the same general goal as the party on that side. If that's all it takes to defeat intervention, then intervention as of right will almost always fail. And so we require a more discriminating comparison of the absentee's interests and the interests of existing parties.

Bost, at *8 (internal quotations omitted). This is consistent with earlier opinions in that circuit that have criticized application of the presumption of adequate representation simply because both the movant and the existing party sought to dismiss the plaintiff's claims. *Driftless Area Land Conservancy v. Huebsch*, 969 F.3d 742, 748 (7th Cir. 2020).

Instead, "[w]hen we compare the interests of a would-be intervenor and an existing party, we find that they have 'the same goal' only where the interests are genuinely 'identical.' Otherwise, we apply our lenient default rule." *Bost,* at *8-9. This tracks the U.S. Supreme Court's observation that "this presumption applies only when interests overlap fully. Where the absentee's interest is similar to, but not identical with, that of one of the parties, that normally is not enough to trigger a presumption of adequate representation." *Berger v. N.C. State Conference of the NAACP*, 142 S. Ct. 2191, 2204, 213 L.Ed.2d 517, 533 (2022) (internal quotations and citations omitted).[13]

This approach to the "same goal" presumption of adequate representation is in accord with state court decisions. *See Wolff v. Town of Jamestown*, 229 Wis. 2d 738, 748, 601 N.W.2d 301 (Ct. App. 1999). The court in *Wolff* held that that the interests of the movant and existing parties need not be "wholly adverse" to find inadequate representation; it is enough that there is a "serious possibility" that movants' interests would not be adequately represented. *Id*. This "serious possibility" may be present even when the parties might "ostensibly seek the same outcome" or make "similar arguments" to the court. *Id*. In *Wolff*, the court found persuasive the notion that, despite these apparent similarities between the parties,

[13] Indeed, the U.S. Supreme Court drew into question whether presumptions of adequate representation are *ever* appropriate, but declined to address the issue because it could decide the care on narrower grounds. *See Bost,* at *9 n.3 (discussing *Berger*).

the movant might be in a better position to raise certain aspects "of the legal and factual context of the dispute" than an existing party and this was enough to ground a "serious possibility" of inadequate representation. *Id*. (citing *Nuesse v. Camp*, 128 U.S. App. D.C. 172, 385 F.2d 694, 703 (D.C. Cir. 1967)). The court similarly observed that the parties had different interests generating different incentives to vigorously contest the suit, and this too sufficed to establish a serious possibility of inadequate representation. *Wolff*, 229 Wis. 2d. at 749-750. In *Armada*, an employee of a school district was the subject of an investigative report concerning allegations of sexual harassment. *Armada*, 183 Wis. 2d at 468. After Armada Broadcasting sought a copy of the report via state open records law, the district denied the request. When Armada Broadcasting sought judicial review of the school district's decision, the employee attempted to intervene. The Wisconsin Supreme Court ultimately concluded that the employee should have been allowed to intervene, and the school district's representation was not adequate, notwithstanding the fact that the school district and the employee both sought to prevent disclosure of the investigative report via the open records law. *Id*. at 476-477. The court concluded that:

> Although the District argued at the motion hearing that disclosure of the Weiland report could potentially harm the reputations of the subjects investigated, we cannot expect the District to defend the mandamus action with the vehemence of someone who is directly affected by public disclosure of the report. The personal nature of the interests at stake in the Weiland report make Schauf the best person to protect those interests.

Id.

These cases make a couple points plain.

First, the presumption of adequate representation does not apply merely because Movants and DNR both want WDA's challenge to the rules' validity to fail. "[I]t's not enough that a defense-side intervenor 'shares the same goal' as the defendant in the brute sense that they both want the case dismissed . . . that's not how the presumption works." *Driftless Area Land Conservancy*, 969 F.3d at 748.

Second, DNR cannot be presumed to adequately represent Movants and their members unless these parties have interests that "fully overlap." *Berger*, 142 S. Ct. at 2204. Movants and their members do not have the same interests as existing party-defendant DNR. Movants and their members stand to be directly impacted by invalidation of these rules in ways that DNR simply is not, which affects the adequacy of DNR's representation in this matter. *Wolff*, 229 Wis. 2d at 748 (finding that having more at stake and differing incentives to settle satisfy this prong of the intervention analysis).

As discussed at length above, Movants' members' "ultimate objective" or "goal" is to have water that is safe to drink, and rivers and lakes that are safe to fish, boat, and recreate on. *See supra*, Section II.b. The "personal nature" of these interests differs markedly from those of a state agency, and certainly do not fully overlap. *Armada,* 183 Wis. 2d at 476-477. Clean Wisconsin's organizational interest is in a strong WPDES program for CAFOs, to move toward its organizational mission of ensuring safe, clean water for all Wisconsinites. Farmers Union's organizational interest is in a sustainable and thriving quality of life for farmers and rural communities, which requires a robust CAFO WPDES program. Both Movant organizations have a point of view about how to best run the WPDES program as applied to CAFOs, and we undertake significant organizational activities in pursuit of that vision. For this reason, Movants expect to illuminate different aspects "of the factual or legal context of the dispute" than DNR. *Wolff*, 229 Wis. 2d at 748.

DNR's ultimate objective is none of these things. DNR must balance a variety of political and social interests; it does not drink water, does not fish, and does not worry about how increasing contamination is affecting its health and well-being. As an executive branch agency DNR is bound to faithfully follow state statute, the constitution, and existing agency rules, and defend the same from legal challenges, as directed by the state legislature. That is a far cry from fully overlapping with Movants' interests. This presumption does not apply here.

b. DNR is not charged by law with representing Movants or their members' interests.

Second, representation is presumed adequate "when the putative representative is a governmental body or officer charged by law with representing the interests of the [movant] and the would-be intervenor is a citizen[.]" *Helgeland*, 2008 WI 9, ¶¶90-91; *see also*, *Driftless Area Land Conservancy*, 969 F.3d at 747.

While DNR is generally charged with defending the validity of its rules, and the government can be viewed as representing interests of the public generally, that is different than being charged by law with defending Movants' interests, specifically. Movants are aware of no published cases in Wisconsin dealing with the question of when an environmental protection or resource management agency, like DNR, can be said to represent the interests of an environmental, conservation, or agricultural advocacy organization like Clean Wisconsin or Farmers Union. However, federal courts have held that "[e]ven if the government is required to represent the interest of the public, a public entity may still intervene" because "in litigating on behalf of the general public, the government is obligated to consider a broad spectrum of views, many of which may conflict with the particular interest of the would-be intervenor…This potential conflict exists even when the government is called upon to defend against a claim which the would-be intervenor also wishes to contest." *W. Energy All. v. Zinke*, 877 F.3d at 1168 (internal quotations and citations omitted). This case is a perfect example of such a situation.

While Movants and DNR agree that the challenged rules should not be invalidated, this is a point of agreement existing against a backdrop of disagreement. As expressed above, Movants and their members are often at odds with DNR's implementation and enforcement of the WPDES program for CAFOs. This occurs because DNR is charged with not just protecting the public's interest in water that is free of pollution, but also the public's interest in a successful dairy industry. *See* M*aple Leaf Farms, Inc. v. State Dep't of Nat. Res.*, 2001 WI App 170, ¶31, 247 Wis. 2d 96, 633 N.W.2d 720 (observing a

legislative choice to give DNR flexibility in drafting permit terms that "balance the specific needs of the permit holder with public environmental concerns."); *W. Energy All. v. Zinke*, 877 F.3d at 1168 ("the government is obligated to consider a broad spectrum of views"). If DNR represented Clean Wisconsin's interest, how could Clean Wisconsin and DNR be on opposing sides of litigation involving CAFOs so frequently? For this reason alone, the presumption of adequate representation does not apply here.

Movants are also reasonably concerned that DNR will not durably defend the challenged rules in this matter and thus will not represent our interests in a rather concrete manner recognized in the case law. To be blunt, DNR's position on the CAFO program has changed with the result of recent elections. *See* Melissa Scanlon, *The Public Trust Doctrine: Regulatory Reform, Climate Disruption, and Unintended Consequences*, 49:3 Ecology Law Quarterly 779, 839-840 (2023) ("The attorney general, as the DNR's top legal representative, offered conflicting interpretations of Act 21 [in *Clean Wisconsin v. DNR*, 2021 WI 71] after an election caused the office to change leadership."). Perhaps this is even appropriate; government actors are responsive to political pressures for a good reason. But it does mean that the permanence of DNR's present position is uncertain. In *Clean Wis*., DNR initially did not oppose an administrative law judge's ruling that DNR had the authority and, in that specific case, an obligation to condition a WPDES permit to require CAFOs to monitor the groundwater in places where they spread manure and to impose limits on the total number of animals present. Then DNR changed its position, contending it lacked the authority to impose those conditions. Finally, it took a position supporting its authority to require those conditions in WPDES permits. *Clean Wis*., 2021 WI 71, ¶¶3-13 (case procedural history); *Scanlon* at 839-840.

This recent experience, with this specific state agency, regarding this specific regulatory program, is a legitimate basis for finding DNR does not adequately represent Movants. *See W. Energy All. v. Zinke*, 877 F.3d at1168 ("We do not assume that the government agency's position will stay static or unaffected

by unanticipated policy shifts"). This is not a remote or a conjectural possibility; it has been Clean Wisconsin's lived experience in recent years.

There are also simple reasons Movants and DNR may choose to litigate this matter differently. DNR's answer to WDA's complaint raises four defenses: WDA lacks standing, WDA's claims are not ripe, WDA's claims are barred by sovereign immunity, and WDA fails to state a claim on which relief may be granted because it fails to satisfy the standard in Wis. Stat. § 227.40(1). Doc. 14. Clean Wisconsin and DNR have been on opposing sides of two separate cases involving standing in the past couple of years, with Clean Wisconsin submitting amicus briefs arguing *against* what it views as DNR's too narrow view of standing in judicial review actions. *Friends of the Black River Forest v. Kohler Co.*, 2022 WI 52, 402 Wis. 2d 587, 977 N.W.2d 342; *Friends of Blue Mound State Park v. Wis. Dep't of Nat. Res.*, 2023 WI App 38. This is not to say that Movants anticipate they will agree with WDA's arguments for standing in this case: we do not. However, as a membership-based organization that has a history of challenging DNR actions in court, Clean Wisconsin has a different view of standing doctrine than DNR, which has an institutional interest in limiting challenges to its decisions. A similar point could be made regarding DNR's other defenses, as well. For example, given our divergent institutional interests, Movants may differ with DNR about the breadth of sovereign immunity doctrine, or what precisely is required of a plaintiff to show that "the rule or guidance document or its threatened application interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the plaintiff." Wis. Stat. § 227.40(1). There is thus a reasonable possibility Movants and DNR will differ on these questions.

For these reasons, DNR is not charged by law with representing Movants' interests, and the presumption of adequate representation does not apply.

c. Under the minimal, lenient default rule, Clean Wisconsin has shown that DNR's representation of its interests "*may*" be inadequate.

Since neither of the presumptions of adequate representation apply, only the minimal, lenient default rule applies. Clean Wisconsin needs only to show that DNR's representation "may" be inadequate. *Helgeland*, 2008 WI 9, ¶85; *Bost*, at *7. There are numerous reasons that DNR's representation "may" be inadequate.

Movants have different goals and different underlying interests, generating different incentives and stakes for the parties. *Wolff*, 229 Wis. 2d at 748. These different interests "may not always dictate precisely the same approach to the conduct of the litigation" *Bost*, at *11-12 (quoting *Trbovich*, 404 U.S. at 538-39). These divergent interests could manifest in not simply different litigation strategies, but also different approaches to settlement or appeal. *Id*. Movants will illuminate different aspects of the factual and legal context of this case. *Wolff*, 229 Wis. 2d at 748. Movants may differ with DNR on the proper formulation of the raised affirmative defenses. Movants may yet again be exposed to a change in agency position regarding the WPDES permitting program for CAFOs. Any one of these reasons is sufficient to make the "minimal" showing that an existing party "may" inadequately represent the movant.

IN THE ALTERNATIVE, THE COURT SHOULD GRANT LEAVE TO INTERVENE

In the alternative, Movants seek leave to intervene pursuant to Wis. Stat. § 803.09(2). "While intervention as a matter of right requires a person to be necessary to the adjudication of the action, permissive intervention requires a person to be merely a proper party." *City of Madison v. WERC*, 2000 WI 39, ¶11 n. 11, 234 Wis. 2d 550, 610 N.W.2d 94. Upon timely motion, anyone may be allowed 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." Wis. Stat. § 803.09(2). In exercising its discretion to grant permissive intervention, the court "shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id*. Movants meet these conditions and permissive intervention would be

appropriate here. For reasons set forth above, the motion to intervene is timely and intervention will neither delay the proceedings nor prejudice the original parties to the action.

CONCLUSION

For the foregoing reasons, Movants respectfully ask this court to grant their Motion to Intervene.

Dated this 5th day of September, 2023.

Electronically Signed by Evan Feinauer

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Before the
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of Wisconsin Pollutant Discharge Elimination System Permit Modification WI-0064815-01-1 Issued to Richfield Dairy, LLC, to be located in the Town of Richfield, Adams County Wisconsin.	Case No. DNR-15-069
In the Matter of the Wisconsin Pollutant Discharge Elimination System Permit No. WI-0064815-02-0 (WPDES Permit) Issued to Richfield Dairy, LLC	Case No. DNR-17-0006

PREHEARING CONFERENCE REPORT
AND
SCHEDULING ORDER

On August 7, 2017, a prehearing conference was held at the Division of Hearings and Appeals, 5005 University Avenue, Madison, Wisconsin. Administrative Law Judge Eric D. Défort presided over the proceeding.

This report is filed pursuant to Wis. Stat. § 227.44(4)(b).

The PARTIES to this proceeding are certified on a preliminary basis as follows:

Pleasant Lake Management District, Jean McCubbin, and Frances Rowe (Petitioners), by

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Madison, Wisconsin 53703

Clean Wisconsin, by

Attorney Evan Feinauer and Attorney Katie Nekola
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Wisconsin Department of Natural Resources, by

Attorney Jane Landretti
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Division of Legal Services
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Richfield Dairy, by

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STIPULATIONS

The parties stipulated that depositions may be taken of no more than five Department of Natural Resources employees, as part of the discovery process in these cases. Moreover, the parties stipulated that they shall seek authorization from the Division of Hearings and Appeals prior to deposing any additional witnesses, beyond the original five.

SCHEDULING ORDER

Based upon the representations of the parties, the following schedule is hereby ordered:

1. Discovery shall be completed by January 2, 2018. The usual rules of civil procedure shall govern the time limits for discovery.

2. All dispositive motions, motions for summary judgment, or partial summary judgment, and briefs in support of said motions shall be filed no later than February 5, 2018.

3. Any pleadings in *response* to any dispositive motion, motion for summary judgment, or partial summary judgment, shall be filed by opposing counsel no later than March 12, 2018.

4. Any *reply* to the responsive pleadings shall be filed no later than March 26, 2018.

5. With regard to any motions for summary judgment, all of the parties have requested that a decision be made on the briefs and without an opportunity for oral argument. Therefore, a decision will be issued prior to the status and scheduling conference referenced in § 6.

6. A status and scheduling conference will be held at 9:30 a.m. on Tuesday, May 15, 2018, at the offices of the Division of Hearings and Appeals, Madison, Wisconsin.

7. In this order whenever the term "filed" is used, this means received by mail or facsimile transmission by the Division of Hearings and Appeals and all other parties listed above.

Dated at Milwaukee, Wisconsin, on August 15th, 2017.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
819 North 6th Street, Room 92
Milwaukee, WI 53203-1685
Telephone: (414) 227-4781
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By:
Eric D. Défort
Administrative Law Judge

BEFORE THE
WISCONSIN DEPARTMENT OF NATURAL RESOURCES

In the matter of Gordondale Farms Inc. Permit No. WI-0062359-03-0 to Discharge Under the Wisconsin Pollutant Discharge Elimination System ("WPDES") dated July 31, 2020.

VERIFIED PETITION FOR REVIEW UNDER WIS. STAT. § 283.63

TO THE DEPARTMENT OF NATURAL RESOURCES:

1. In accordance with Wis. Stat. § 283.63 and Wis. Admin. Code NR § 203.17, the undersigned individuals and Clean Wisconsin, a small non-profit corporation, (hereafter "Petitioners") hereby petition for a review of the Wisconsin Department of Natural Resources' (DNR) decision to reissue Wisconsin Pollutant Discharge Elimination System (WPDES) Permit No. WI-0062359-03-0 to Gordondale Farms Inc. (Gordondale Farms). Hereinafter "Permit" attached as Exhibit A.

2. Gordondale Farms is a large concentrated animal feeding operation (CAFO) for dairy cows that has been issued previous WPDES permits in Portage County, Wisconsin. Gordondale Farms operates three facilities: Deere Ridge Dairy in Amherst, Wisconsin; the Home Farm in Nelsonville, Wisconsin; and the Hog Farm in Amherst Junction, Wisconsin. The three facilities exist within 1.5 miles of each other along Highway 161 surrounding the Village of Nelsonville, Wisconsin (Nelsonville). The farm applied for a WPDES permit reissuance in 2017.

3. Gordondale Farms houses 2,160 animal units and has proposed to expand to approximately 2,505 animal units in its application for WPDES permit reissuance. According to

a DNR Fact Sheet produced for WPDES Permit No. WI-0062359-03-0, the 2,160 animals produce approximately 12.5 million gallons of liquid manure and process wastewater and approximately 4,000 tons of solid manure per year which is spread on approximately 5,000 acres.

4. Under the Permit, Gordondale Farms is authorized to discharge to both the Tomorrow River and to groundwater. The Tomorrow River is classified in parts above Highway 161 and below Nelsonville as a Class I trout stream and an outstanding resource water. Gordondale Farms operates and spreads manure in the area that serves as the groundwater recharge zone for drinking water wells in Nelsonville.

5. DNR issued a public notice on March 28, 2018 of its intent to reissue Gordondale Farms' WPDES permit for its expanded operation. In addition to accepting written comment, DNR held a public meeting on June 19, 2018 where members of the public commented on the proposed WPDES permit.

6. DNR issued WPDES Permit No. WI-0062359-03-0 to Gordondale Farms on July 31, 2020.

7. Section 283.63(1) of the Wisconsin Statutes allows five or more persons to secure a review by DNR of the reasonableness of or necessity for any term or condition of any issued, reissued, or modified permit by filing a verified petition setting forth the issues sought to be reviewed and the interest of the petitioners with the DNR Secretary within 60 days after DNR provides notice of permit reissuance.

I. INTERESTS OF THE PETITIONERS AND THE NATURE OF THEIR INJURY

In support of their petition, Petitioners show as follows:

8. Individual Petitioners (Petitioners other than Clean Wisconsin) reside in Nelsonville and rely on groundwater in the region for their drinking water and other potable water uses. These

Petitioners have seen an increase in nitrate contamination in private well samples in recent years. Moreover, many of the Petitioners currently have private water wells that test above the nitrate public health groundwater quality standard of 10 mg/l identified in Wis. Admin. Code NR §§ 140.10 and 809.11. Some individual Petitioners paid to install reverse-osmosis filtration systems to improve their drinking water nitrate levels. The reverse-osmosis systems are an imperfect solution because maintenance is a continued cost and they are installed on individual faucets, raising concerns about continued exposure from unfiltered water. Those Petitioners with reverse-osmosis systems are concerned because nitrate levels are continuing to rise in their treated water. Of note, nitrate contamination is linked to significant health impacts in vulnerable populations, including birth defects, blue-baby syndrome, and colon cancer. Universally, individual Petitioners are concerned about the impacts groundwater contamination will have on themselves and their family members.

9. Individual Petitioners, most of whom are property owners and outdoor enthusiasts, also have a substantial interest in the preservation and quality of the Tomorrow River, including but not limited to its water quality, its fish and other aquatic life, its use for recreation, and its other ecological resources. Portions of the Tomorrow River downstream of Nelsonville are considered Outstanding Resource Waters, and Petitioners have a particular interest in protecting those waters against incremental losses to water quality through excessive nutrients or contaminants that may flow into the River.

10. Petitioner Clean Wisconsin is a nonprofit membership organization dedicated to environmental education, advocacy, and legal action to protect air quality, water quality, and natural resources in the State of Wisconsin. Founded in 1970, Clean Wisconsin has been fighting to protect Wisconsin's Waters for over 50 years. Clean Wisconsin represents over 16,000

members and supporters throughout the state and over 50 members who reside in Portage County, including members who live, work, and recreate near Gordondale Farms. Clean Wisconsin and its members thus have a substantial interest in protecting groundwater and surface water quality in the area surrounding Gordondale Farms, and are harmed by DNR's decision to issue the Permit without the conditions necessary to protect these waters. Clean Wisconsin has also expended significant time and resources ensuring DNR's proper administration of the WPDES program, including by litigating the Department's authority to implement WPDES permit conditions relevant to this Petition.

11. Substantial interests of the Petitioners are injured or threatened with injury because of DNR's decision to approve the Permit that threatens water resources in Portage County. Specifically, Petitioners are injured or threatened with injury because of the Permit's impacts on groundwater and surface water quality in the areas downstream or down-gradient of Gordondale Farms, and DNR's failure to comply with the requirements of state law to protect groundwater and surface water quality, including DNR's failure to require groundwater monitoring to allow Petitioners to understand and address well contamination. They are also injured based on DNR's decision to reissue the Permit with an unlimited authorized number of animal units.

12. The injury to individual Petitioners is different in kind and degree from the injury to the general public caused by the challenged Permit. The anticipated impacts from the reissued Permit will uniquely and substantially burden the Petitioners who rely on potable groundwater and clean surface water that are within and down-gradient of those areas affected by activities authorized under the Permit. The Petitioners live within three-quarter miles or less of the areas subject to the Permit and have seen a consistent decline in private well water quality in recent years, and they anticipate further contamination as a result of the most recent Permit.

Additionally, Petitioners have a unique and substantial interest in preserving the recreational, aesthetic, and property interests associated with healthy land practices and high water quality in and around Nelsonville. Many of the Petitioners enjoy outdoor activities such as kayaking or trail-running. Many Petitioners also intend to sell their properties in the future and groundwater contamination has been shown to substantially lower values, making it difficult or impossible for those with contaminated wells to sell their properties. DNR's failure to adequately monitor, regulate, and control the continued wastewater and manure disposal and landspreading activities under the Permit will impair these interests.

13. The injury to Petitioner Clean Wisconsin is different in kind or degree from injury to the general public caused by issuance of the Permit because its members live, travel to, and recreate near the areas affected by the Permit. Clean Wisconsin members thus have a particularly direct and unique interest in the physical environment that is affected by DNR's action.

14. There is no evidence of legislative intent that Petitioners' interests are not to be protected. Wis. Stat. chs 160 and 283 and Wisconsin's Public Trust doctrine, Wis. Const. art. IX, § 1, all indicate that the interests of Petitioners are protected.

II. PETITIONERS' RIGHT TO ADMINISTRATIVE REVIEW

15. Sections 227.42 and 283.63 of the Wisconsin Statutes accords Petitioners a right to administrative review.

III. SPECIFIC ISSUES REQUESTED TO BE REVIEWED

16. Petitioners seek review of the following issues related to the reasonableness of the terms and conditions in Gordondale Farms' Permit:

A. Issue One: Sections 1.1, 1.7, 1.8, and 3.1.3 Are Unreasonable Because They Fail to Ensure That Discharges Authorized By the Permit Comply with Groundwater Quality Standards and Do Not Allow DNR to Determine Compliance With Permit Conditions

17. Sections 1.1, 1.7, 1.8, and 3.1.3 are unreasonable because DNR has not included any off-site groundwater monitoring requirements, which are required to comply with the WPDES permitting program under Wis. Stat. § 283.31(3)-(4), Wis. Admin. Code NR §§ 243.13(1), 243.13(5), 243.14(2), 243.14(2)(b)(3), 243.15(7), and 243.19(1).

18. The primary water pollutants associated with CAFOs are bacteria and nitrate contaminants. DNR may issue a WPDES permit that authorizes discharges to waters of the state only if the discharges allowed under the permit meet groundwater protection standards established under Chapter 160 of the Wisconsin Statutes. Wis. Stat. § 283.31(3)(f). DNR is required to include conditions in WPDES permits "to assure compliance with" groundwater protection standards. Wis. Stat. § 283.31(4); *see also* Wis. Stat. § 283.31(3); Wis. Admin. Code NR § 243.13(1). At a minimum, DNR must include conditions that ensure "the discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by the permit shall constitute a violation of the terms and conditions of the permit." Wis. Stat. § 283.31(4)(a). Further, DNR is required to include a monitoring and inspection program in the WPDES permit that will determine compliance with permit conditions. Wis. Admin. Code NR § 243.19(1).

19. The terms and conditions in the Permit are unreasonable because they fail to ensure compliance with groundwater quality standards, particularly underneath and down-gradient of landspreading fields. In Nelsonville, a 2020 report identified 36 of 58 private residential wells tested in recent years had nitrate-N exceeding the 10 mg/L limit; three of those exceeding wells belong to four individual Petitioners. Sandy loam soil, which is associated with an increased risk

of groundwater contamination from surface activities, is present throughout the area. Rather than evaluate the risk posed by Gordondale Farms' spreading, DNR unreasonably and inaccurately identified the contamination as a regional problem and reissued the WPDES permit without requiring off-site groundwater monitoring. In addition, DNR staff recommended in October 2019 that the Permit include a condition requiring a plan for groundwater monitoring, but the Permit did not include such a condition. Therefore, it was unreasonable for DNR to reissue the Permit without this necessary condition and without evaluating background concentrations of pollutants or requiring groundwater monitoring.

20. The Permit includes a standard condition noting that the Permit does not authorize "any injury or damage to private property or any invasion of personal rights, or any infringement of federal, state or local laws or regulations." Permit § 3.1.3. This condition, without additional groundwater monitoring requirements, is unreasonable because DNR is unable to evaluate whether Gordondale Farms is currently contributing to groundwater contamination above the state regulatory level.

21. Sections 1.1, 1.7, and 1.8 of the Permit are likewise unreasonable. Petitioners seek review of Section 1.1 of the Permit because it: (1) Cannot ensure that any discharges to *waters of the state*, which include all groundwater and surface water, comply with surface water and groundwater quality standards; and (2) Cannot ensure that DNR can collect background groundwater quality information that is necessary to determine what additional permit restrictions or requirements will protect groundwater quality. Petitioners further assert that Sections 1.7 and 1.8 are unreasonable because they do not provide for any sampling or monitoring to assess background groundwater flow and to establish background levels of

contaminants, and because they fail to require monitoring to evaluate impacts to groundwater and determine compliance with permit conditions.

22. Given the identified groundwater contamination, DNR has also failed to include necessary conditions in the Permit to fulfill DNR's authority and duty to require remedial action contemplated in Chapter 160 of the Wisconsin Statutes and Wisconsin Admin. Code NR Section 140.

B. Issue Two: Sections 1.3.1, 1.3.3, 1.6, 2 and 3.1.12 Are Unreasonable Because They Fail To Include the Current and Proposed Maximum Number of Animal Units Necessary To Ensure Compliance With Manure Storage Requirements.

23. Sections 1.3.1, 1.3.3, 1.6, 2, and 3.1.12 are unreasonable because DNR has not included any maximum number of animal units, which is required to comply with its WPDES permitting program under Wis. Stat. § 283.31(4)-(5), Wis. Admin. Code NR §§ 243.15(3), 243.13(1), 243.17(3)(c). For the same reasons, these sections also fail to require a necessary condition. Approval of the nutrient management plan (NMP) should be contingent on the NMP including an animal unit cap.

24. The number of animals housed at a farm is a critical component of DNR's review of permit approvals for those farms. DNR uses the animal units of an operation to determine whether a CAFO has at least 180 days of manure storage. Wis. Admin. Code NR § 243.15(3)(j)-(k). DNR may issue a WPDES permit only if DNR includes appropriate effluent limits and any "additional conditions" necessary to "assure compliance" with effluent limits and groundwater protection standards. Section 283.31(4)(a) of the Wisconsin Statutes requires that WPDES permits include a condition "[t]hat the discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by the permit shall constitute a violation of the

terms and conditions of the permit." Section 283.31(5) of the Wisconsin Statutes requires that all WPDES permits specify maximum levels of discharges.

25. The Permit prohibits the discharge of manure or process wastewater from the production area unless precipitation causes an overflow of a manure storage structure that is properly designed, constructed, maintained, and operated, and the discharge complies with groundwater and surface water quality standards. Permit Section 3.1.12 cannot establish a maximum level of discharge without including an animal unit cap and is therefore unreasonable because it fails to establish a maximum level of discharge. It also fails to comply with Wis. Admin. Code NR Section 243.17(3)(c) because it does not include an established threshold beyond which a permittee must report changes to DNR and because it does not require Gordondale Farms to show compliance when it submits plans and specifications for proposed reviewable facilities or systems.

26. The only limit on the quantity of manure discharged as authorized by the Permit is a limit on the quantity of manure being stored, which directly correlates to the number of animal units at the facility. The Permit requires Gordondale Farms to demonstrate that it has the capacity for 180 days of manure storage in the design and operation of its manure storage facilities and at other times during the WPDES application process and Permit term. *See* Permit §§ 1.3.1, 1.3.3. These conditions are meaningless and the Permit fails to comply with state regulations unless the WPDES permit provides the current, proposed, and maximum number of animal units allowed. The Permit does nothing to stop the permittee from constructing additional manure storage facilities and expanding the number of animal units at the facility, thus increasing the amount of manure discharged. The only way to set a maximum level of discharge in the WPDES permit and to provide some threshold to trigger the requirement in Wis. Admin. Code NR Section

243.17(3)(c) is to set a maximum number of animal units in the WPDES permit. The Permit conditions listed above fail to satisfy these requirements.

C. Issue Three: Sections 1.1 and 2.5 Are Unreasonable Because They Consider a Potentially Noncompliant Waste Structure in Determining Manure Capacity and Cannot Guarantee that Gordondale Farms is Not Currently Discharging From Waste Storage Facility 003.

27. Sections 1.1 and 2.5 are unreasonable because DNR's consideration and inclusion of Waste Storage Facility 003 (WSF 003) in operational capacity without an assurance of compliance and without a sufficient engineering evaluation does not comply with Wis. Stat. Section 283.31(4) or Wis. Admin. Code NR Sections 243.15(1)(a)3, 243.16(1)(c).

28. The status and capacity of liquid manure storage facilities is crucial because those facilities house immense quantities of waste that can result in nitrate or bacteria contamination of water resources. Manure storage facilities have the potential to contaminate groundwater and surface water in a region should they leak, crack, or otherwise fail. All existing operations that construct liquid manure storage facilities are required to maintain manure storage facilities that are properly designed and able to provide the requisite 180 days of storage. Wis. Admin. Code NR § 243.15(3)(j). When reissuing a WPDES permit, DNR is required to include conditions that ensure compliance with surface water and groundwater quality standards pursuant to Wis. Admin. Code NR Section 243.13(1).

29. WSF 003 at Gordondale Farms is an inground concrete-lined manure storage structure which was previously an under-barn storage. WSF 003 is the second largest liquid manure storage structure at Gordondale Farms with a capacity of 500,000 gallons. During the previous permit term, the barn housing WSF 003 collapsed. The 2018 Permit reissuance fact sheet outlined an evaluation and construction schedule occurring from 2018 and 2020. However, to date, no evaluation has occurred to ensure the facility is meeting production area discharge

limitations. Likewise, on information and belief, no construction repairing the damage from the collapsed barn has been performed. Nonetheless, DNR included the operational capacity of WSF 003 (500,000 gallons) in the reissuance of the Permit.

30. The Permit guarantees that the "all structures…designed and operated" by Gordondale Farms must meet surface water and groundwater quality standards. Permit § 1.1. Importantly, DNR may issue a WPDES permit that authorizes discharges to waters of the state only if the discharges allowed under the permit meet groundwater protections standards established under Chapter 160 of the Wisconsin Statutes. Section 1.1 is unreasonable and fails to include necessary conditions because the Permit guarantees that the production area is designed and operated in accordance with Wisconsin Admin. Code NR Sections 243.15 and 243.17, even though DNR has not seen an engineering evaluation or approved plans and specifications for potential repairs to WSF 003.

31. Section 2.5 of the Permit is also unreasonable because the construction schedule promotes potential noncompliance years into the reissued permit term. Because the scheduled date for an engineering evaluation has yet to occur, it appears that no evaluation of WSF 003 has been performed, nor have plans and specifications been submitted to DNR for approval following the collapse of the barn housing WSF 003 during the previous permit term. While plans and specifications may be submitted during a permit term, Wis. Admin. Code NR Sections 254.15(1)(a)1 and 243.16, it is unreasonable for DNR to rely on manure storage capacity for unapproved and potentially noncompliant structures for multiple years into a permit term. The only way to ensure substantial compliance and Gordondale Farms' manure capacity is for DNR to require an engineering evaluation and associated plans and specifications for necessary repairs prior to permit reissuance.

IV. REASONS WHY A HEARING IS WARRANTED.

For the foregoing reasons a hearing is warranted to resolve the above material disputes of fact to determine the reasonableness of the above-mentioned sections of Gordondale Farms' Permit and failure to include necessary conditions to fulfill DNR's authority and duty to restore and maintain the chemical, physical, and biological integrity of the waters of the state.

Dated this 24th day of September, 2020.

Respectfully submitted,

MIDWEST ENVIRONMENTAL ADVOCATES, INC.

Adam Voskuil (SB 1114260)
Andrea Gelatt (SB 1118712)
612 West Main Street, Suite 302
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Tel. 608-251-5047
Fax 608-268-0205

Attorneys For: Lisa Anderson, Katy Bailey, Robert Bailey, Dave Mangin, and Marianne Walker

CLEAN WISCONSIN

Evan Feinauer (SB 1106524)
634 West Main Street, Suite 300
Madison, Wisconsin 53703
Tel: 608-251-7020 x21

VERIFICATION

STATE OF TENNESSEE)
) ss.
COUNTY OF SEVIER)

I verify that I am a petitioner in this matter. I have read the foregoing Petition and know its contents, and I attest that the facts alleged above are true and correct, to the best of my knowledge.

Katy Bailey

On this 23rd day of September, 2020, before me personally and proving on the basis of satisfactory evidence, acknowledged that such person executed the within instrument for the purposes therein contained.

Notary Public, State of Tennessee

My commission expires on 05/29/2022

JOSHUA L. TITLOW
STATE OF TENNESSEE
NOTARY PUBLIC
SEVIER COUNTY

VERIFICATION

STATE OF TENNESSEE)
) ss.
COUNTY OF SEVIER)

I verify that I am a petitioner in this matter. I have read the foregoing Petition and know its contents, and I attest that the facts alleged above are true and correct, to the best of my knowledge.

Robert Bailey

On this 23 day of September, 2020, before me personally and proving on the basis of satisfactory evidence, acknowledged that such person executed the within instrument for the purposes therein contained.

Notary Public, State of Tennessee

My commission expires on 05/29/2022

JOSHUA L. TITLOW
STATE OF TENNESSEE
NOTARY PUBLIC
SEVIER COUNTY

VERIFICATION

STATE OF WISCONSIN)
) ss.
COUNTY OF PORTAGE)

I verify that I am a petitioner in this matter. I have read the foregoing Petition and know its contents, and I attest that the facts alleged above are true and correct, to the best of my knowledge.

David Mangin MSDS-1737-7161-06

Subscribed, sworn to, and signed before
me this 2nd day of September, 2020

Michelle J Easton
Notary Public, State of Wisconsin

My commission expires on 2/6/2024

MICHELLE J EASTON
Notary Public
State of Wisconsin
Portage County

VERIFICATION

STATE OF WISCONSIN)
) ss.
COUNTY OF PORTAGE)

I verify that I am a petitioner in this matter. I have read the foregoing Petition and know its contents, and I attest that the facts alleged above are true and correct, to the best of my knowledge.

Marianne Walker

Marianne Walker

Subscribed, sworn to, and signed before me this 23 day of September, 2020

TAMARA L BEATY
NOTARY PUBLIC
STATE OF WISCONSIN

Tamara L Beaty

Notary Public, State of Wisconsin

My commission expires on 4/4/2023

VERIFICATION

STATE OF WISCONSIN)
) ss.
COUNTY OF PORTAGE)

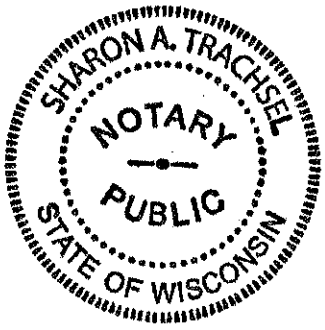
I verify that I am a petitioner in this matter. I have read the foregoing Petition and know its contents, and I attest that the facts alleged above are true and correct, to the best of my knowledge.

Lisa Anderson

Subscribed, sworn to, and signed before me this 24 day of September, 2020

Sharon A. Trachsel
Notary Public, State of Wisconsin

My commission expires on 02/08/23



VERIFICATION

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I verify that Clean Wisconsin is a petitioner in this request for a Contested Case hearing. I have read the foregoing Petition for review and the information contained therein is true and correct, to the best of my knowledge and belief.

Mark Redsten, CEO and President, Clean Wisconsin

Subscribed, sworn to, and signed before me this 23 day of September, 2020

Notary Public, State of Wisconsin

My commission expires on N/A

EXHIBIT A

WISCONSIN
DEPT. OF NATURAL RESOURCES

WPDES PERMIT

STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

PERMIT TO DISCHARGE UNDER THE WISCONSIN POLLUTANT DISCHARGE ELIMINATION SYSTEM

Gordondale Farms Inc

is permitted, under the authority of Chapter 283, Wisconsin Statutes, to discharge from a livestock operation located at
9845 Hwy 161 Amherst, WI 54406 (Deere Ridge Dairy), 54458
2823 County Rd Q Nelsonville, WI 54458 (Home Farm), and
9488 Hwy 161Amherst Junction, WI 54407 (Hog Farm)
to
the Tomorrow River within the Waupaca River Watershed, and groundwaters of the state

in accordance with the effluent limitations, monitoring requirements and other conditions on the management and utilization of manure and process wastewater set forth in this permit.

The permittee shall not discharge after the date of expiration. If the permittee wishes to continue to discharge after this expiration date an application shall be filed for reissuance of this permit, according to Chapter NR 200, Wis. Adm. Code, at least 180 days prior to the expiration date given below.

State of Wisconsin Department of Natural Resources
For the Secretary

By _____
Mark Kaczorowski
Agricultural Runoff Management Specialist

7/31/2020
Date Permit Signed/Issued

PERMIT TERM:
EFFECTIVE DATE - August 01, 2020 **EXPIRATION DATE - July 31, 2025**

TABLE OF CONTENTS

1 Livestock Operational and Sampling Requirements

1.1 Production Area Discharge Limitations

The permittee shall comply with the livestock performance standards and prohibitions in ch. NR 151. In accordance with s. NR 243.13, the permittee may not discharge manure or process wastewater pollutants to navigable waters from the production area, including approved manure stacking sites, unless all of the following apply:

- Precipitation causes an overflow of manure or process wastewater from a containment or storage structure.
- The containment or storage structure is properly designed, constructed and maintained to contain all manure and process wastewater from the operation, including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event for this location **(Portage County – 4.5 inches)**.
- The production area is operated in accordance with the inspection, maintenance and record keeping requirements in s. NR 243.19.
- The discharge complies with surface water quality standards.

For all new or increased discharges to an ORW or ERW, any pollutant discharged shall not exceed existing levels of the pollutant immediately upstream of the discharge site.
All structures shall be designed and operated in accordance with ss. NR 243.15 and NR 243.17 to control manure and process wastewater for the purpose of complying with discharge limitations established above and groundwater standards.

The permittee may not discharge pollutants to navigable waters under any circumstance or storm event from areas of the production area, including manure stacks on cropland, where manure or process wastewater is not properly stored or contained by a structure.

NOTE: Wastewater treatment strips, grassed waterways or buffers are examples of facilities or systems that by themselves do not constitute a structure.

Production area discharges to waters of the state authorized under this permit shall comply with water quality standards, groundwater standards and may not impair wetland functional values.

1.2 Runoff Control

All runoff control systems shall be designed and maintained to comply with production area discharge limitations. Uncontaminated runoff shall be diverted away from manure and process wastewater storage and containment areas, raw materials storage and containment areas, and outdoor animal lots. All storage and containment structures associated with runoff control systems shall be operated in accordance with the "Proper Operations and Maintenance" section.

1.3 Manure and Process Wastewater Storage

All permittees shall have and maintain adequate storage for all manure and process wastewater generated at the operation to ensure that wastes can be properly stored and land applied in compliance with the conditions and timing restrictions of the permit, a Department approved nutrient management plan and s. NR 243.14(9).

1.3.1 Proper Operation and Maintenance

The permittee shall at all times properly operate and maintain all manure and process wastewater facilities and systems in compliance with the conditions of this permit. The permittee shall comply with the permit and s. NR 243.17, including the following requirements:

- All liquid manure and process wastewater storage or containment facilities shall have the permanent markers specified in s. NR 243.15(3)(e) (margin of safety and maximum operating level for liquid manure and process wastewater storage and the 180-day storage marker for liquid manure storage).

- Chemicals and other pollutants may not be added to manure, process wastewater or stormwater storage facilities or treatment systems without prior Department approval.
- Liquid manure storage facilities or systems shall be emptied to the point that the 180-day level indicator is visible on at least one day between October 1 and November 30, except for liquid manure remaining due to unusual fall weather conditions prohibiting manure applications during this time period. The permittee shall record the day on which the 180-day level indicator was visible during this time period. Permittees unable to empty their storage facility to the 180-day level indicator between October 1 and November 30, shall notify the department in writing by December 5.
- The permittee shall maintain a design storage capacity of 180 days for liquid manure unless the Department approves a temporary reduction in design storage capacity to 150 days in accordance with s. NR 243.17(4).
- Prior to introducing any influent additives to a digester, other than manure, the permittee shall obtain written Department approval. If any materials other than manure are used in the digester, the permittee shall maintain daily records of the volumes of all manure and non-manure components added to the digester influent. As part of its approval, the Department may apply additional requirements in accordance with s. NR 243.17(1). As part of the Department's review, the Department may also require amendments to the permittee's nutrient management plan and the permittee shall submit an amended plan to the Department to incorporate the additional requirements.

1.3.2 Discharge Prevention

A permittee shall operate and maintain storage and containment facilities to prevent overflows and discharges to waters of the state.

- The permittee may not exceed the maximum operating level in liquid storage or containment facilities except as a result of recent precipitation or conditions that do not allow removal of material from the facility in accordance with permit conditions.
- The permittee shall maintain a margin of safety in liquid storage or containment facilities that levels of manure, process wastewater and other wastes placed in the storage or containment facility may not exceed. Materials shall be removed from the facility in accordance with the approved nutrient management plan to ensure that the margin of safety is not exceeded. Failure to maintain a margin of safety is permit noncompliance that must be reported to the Department in accordance with the timeframes specified in the Noncompliance-24 Hour Reporting subsection in the Standard Requirements.

1.3.3 Liquid Manure – 180-day storage

The permittee shall demonstrate compliance with the 180-day design storage capacity requirement at all the following times:

- As part of an application for permit reissuance.
- At the time of submittal of plans and specifications for proposed reviewable facilities or systems.
- In annual reports to the department.
- When an operation is proposing, at any time, a 20% expansion in animal units or an increase by an amount of 1,000 animal units or more unless the Department has approved reductions in design storage in accordance with s. NR 243.17(4).

1.3.4 Facility Closure and Abandonment

In accordance with s. NR 243.17, if the permittee plans to close or abandon structures or systems regulated by this permit, a closure or abandonment plan shall be submitted to the Department and written Department approval must be granted before closing the facility. Manure storage facilities shall be closed or abandoned in accordance with NRCS Standard 360 (December 2002). Closure or abandonment of a manure storage facility shall occur when manure has not been added or removed for a period of 24 months, unless the owner or operator can provide information to the Department that the structure is designed to store manure for a longer period of time or that the storage structure will be utilized within a specific period of time.

1.4 Solid Manure Stacking

All proposed stacking of solid manure outside of a Department approved storage facility shall be submitted to the department for approval and identified in the permittee's nutrient management plan. A permittee may not stack manure on a site unless the permittee has obtained Department approval to stack. Stacking practices shall comply with requirements of s. NR 243.141. Stacking approvals may be rescinded by the Department based on documented impacts to waters of the state at or from the stacking site or runoff onto another persons land. Stacking shall comply with following requirements:

- When piled in a stack, the solid manure stack must be able to maintain its shape with minimal sloughing such that an angle of repose of 45 degrees or greater is maintained when the manure is not frozen.
- Stacking of solid manure outside of a department approved manure storage facility shall, at a minimum, meet the specifications in NRCS Standard 313, Table 9, dated December 2005. Alternatively, stacks may be placed on sites with soils in the hydrologic soil group D provided the manure has a solids content of greater than 32% and all other criteria in NRCS Standard 313, Table 9, are met.
- The permittee shall implement any necessary additional best management practices to ensure stacking areas maintain compliance with the production area requirements in s. NR 243.13. Best management practices may include upslope clean water diversions or downslope containment structures.
- The stacked manure shall have minimal leaching so that leachate from the stack is contained within the designated stacking area and does not cause an exceedance of groundwater quality standards.
- Solid manure may not be stacked in a water quality management area.
- Stacks may only be placed on cropland.

As part of the Department approval, the Department may require additional restrictions on stacking of solid manure needed to protect water quality. The permittee shall manage the stack in compliance with the additional restrictions specified in the approval.

1.5 Ancillary Service and Storage Areas

The permittee may discharge contaminated storm water to waters of the state from ancillary service and storage areas provided the discharges of contaminated storm water comply with groundwater and surface water quality standards. The permittee shall take preventive maintenance actions and conduct periodic visual inspections to minimize the discharge of pollutants from these areas to surface waters. For CAFO outdoor vegetated areas, the permittee shall also implement the following practices:

- Manage stocking densities, implement management systems and manage feed sources to ensure that sufficient vegetative cover is maintained over the entire area at all times.
- Prohibit direct access of livestock or poultry to surface waters or wetlands located in or adjacent to the area unless approved by the Department.

1.6 Nutrient Management

Except as provided for in s. NR 243.142(2), the permittee is responsible for ensuring that the manure and process wastewater generated by the operation is land applied or disposed of in a manner that complies with the terms of this permit, the approved nutrient management plan and s. NR 243.14.

The permittee shall land apply manure and process wastewater in compliance with the Department approved nutrient management plan, s. NR 243.14 and the terms and conditions of this permit. Land application practices shall not exceed crop nutrient budgets determined in accordance with NRCS Standard 590, this permit and s. NR 243.14 and shall be based on manure and process wastewater analyses, soil tests, as well as other nutrient sources applied to a field. The permittee shall review and amend the nutrient management plan on an annual basis to reflect any changes in operations over the previous year (including incorporation of the previous year's amendments and new soil test results) and to include projected changes for the upcoming year. Annual updates are due in accordance with the Schedules section of the permit.

The management plan may be amended at any time provided the proposed amendments are approved in writing by the Department and meet the requirements of s. NR 243.14. Changes requiring a plan amendment include, but are not limited to, changes to application rates, new spreading sites, changes in the number of livestock, changes in manure storage procedures, or changes in the type of manure spreading equipment. Unless specified in the "Special Permit Conditions" section of the permit, an amendment does not become effective and may not be implemented until the Department has reviewed and approved the amendment. In addition, all approved amendments in a given year shall be included in the Annual Update.

The permittee shall maintain daily spreading records and submit annual reports relating to land application activities in accordance with s. NR 243.19.

1.6.1 General Spreading Restrictions

The permittee shall land apply manure and process wastewater in compliance with the following:

- Manure or process wastewater may not pond on the application site.
- During dry weather conditions, manure or process wastewater may not run off the application site, nor discharge to waters of the state through subsurface drains.
- Manure or process wastewater may not cause the fecal contamination of water in a well.
- Manure or process wastewater may not run off the application site nor discharge to waters of the state through subsurface drains due to precipitation or snowmelt except if the permittee has complied with all land application restrictions in NR 243 and this permit, and the runoff or discharge occurs as a result of a rain event that is equal to or greater than a 25-year, 24-hour rain event.
- Manure or process wastewater may not be applied to saturated soils.
- Land application practices shall maximize the use of available nutrients for crop production, prevent delivery of manure and process wastewater to waters of the state, and minimize the loss of nutrients and other contaminants to waters of the state to prevent exceedances of groundwater and surface water quality standards and to prevent impairment of wetland functional values. Practices shall retain land applied manure and process wastewater on the soil where they are applied with minimal movement.
- Manure or process wastewater may not be applied on areas of a field with a depth to groundwater or bedrock of less than 24 inches.
- Manure or process wastewater may not be applied within 100 feet of a direct conduit to groundwater.
- Manure or process wastewater may not be applied within 100 feet of a private well or non-community system as defined in ch. NR 812 or within 1000 feet of a community well as defined in ch. NR 811.
- Unless specified otherwise in this permit, where incorporation of land applied manure is required, the incorporation shall occur within 48 hours of application.
- Manure or process wastewater may not be surface applied when precipitation capable of producing runoff is forecast within 24 hours of the time of planned application.
- Manure or process wastewater may not be spread on surface waters, established concentrated flow channels, or non-harvested vegetative buffers.
- Fields receiving manure and process wastewater may not exceed tolerable soil loss ("T").

1.6.2 Non-Cropland Applications

Manure may be applied to non-cropland if pre-approval in writing is issued by the Department. Considerations for approval may include acceptable application timing, amounts and methods.

1.6.3 Additional Nutrient Management Plan Requirements

- If applicable, the permittee shall specify the method(s) of incorporation in its nutrient management plan.
- The permittee shall identify, to the maximum extent practicable, the presence of subsurface drainage systems in fields where its manure or process wastewater is applied as part of the nutrient management plan.
- In accordance with s. NR 243.14(3), the permittee shall account for 1st and 2nd year nutrient credits.
- On a field-by-field basis, the permittee shall select and implement one of the practices listed in s. NR 243.14(4) for manure and process wastewater applications in a SWQMA (defined in ch. NR 243), and include the selected

practices in the nutrient management plan. Whenever manure or process wastewater is applied within a SWQMA, the permittee shall apply the material in compliance with the SWQMA practices specified in the approved nutrient management plan.

- On a field-by-field basis, the permittee shall select one of the methods specified in s. NR 243.14(5) for assessing and minimizing the potential delivery of phosphorus to surface waters, and include the selected method in the nutrient management plan. The permittee shall apply manure and process wastewater to fields in compliance with the phosphorus methods specified in the approved nutrient management plan. On a field-by-field basis, the permittee shall select and implement one of the methods.

1.6.4 Frozen or Snow Covered Ground – General Spreading Restrictions

If the permittee applies manure on frozen or snow-covered ground, the permittee shall land apply the manure in compliance with all of the restrictions in s. NR 243.14(6)-(8). Some of these restrictions include:

- Any incorporation of manure on frozen or snow-covered ground must be done immediately after application.
- The permittee shall identify acceptable sites for allowable applications on frozen or snow-covered ground as part of its nutrient management plan.
- The permittee shall evaluate each field at the time of application to determine if conditions are suitable for applying manure and complying with the requirements of this permit. All surface applications of manure or process wastewater on frozen or snow-covered ground shall occur on those fields that represent the lowest risk of pollutant delivery to waters of the state and where the application results in a winter acute loss index value of 4 or less using the Wisconsin phosphorus index.
- Manure or process wastewater may not be land applied on fields when snow is actively melting such that water is flowing off the field.
- On fields with soils that are 60 inches thick or less over fractured bedrock, manure may not be applied on frozen ground or where snow is present.
- Manure may not be incorporated on areas of fields with greater than 4 inches of snow.

[NOTE: Please refer to ch. NR 243 for all requirements contained in s. NR 243.14(6)-(8).]

1.6.5 Frozen or Snow Covered Ground – Solid Manure (12% solids or more)

The permittee may surface apply solid manure on frozen or snow-covered ground in compliance with the following restrictions:

- Solid manure may not be surface applied on slopes greater than 9%.
- Solid manure may not be surface applied from February 1 through March 31 on areas of fields where an inch or more of snow is present or where the ground is frozen.
- The surface application shall comply with the restrictions in Table 1.

Table 1
Restrictions for Surface Applying Solid Manure on Frozen or Snow Covered Ground

Criteria	Restrictions for fields with 0-6% slopes	Restrictions for fields with slopes > 6% and up to 9%
Required fall tillage practice prior to application	Chisel or moldboard plow, no-till or a department approved equivalent[A]	Chisel or moldboard plow, no-till or department approved equivalent[A]
Minimum % solids allowed	12%	> 20%

Table 1
Restrictions for Surface Applying Solid Manure on Frozen or Snow Covered Ground

Criteria	Restrictions for fields with 0-6% slopes	Restrictions for fields with slopes > 6% and up to 9%
Application rate (cumulative per acre)	Not to exceed 60 lbs. P_2O_5 per winter season, the following growing season's crop P_2O_5 budget taking into account nutrients already applied, or phosphorus application restrictions specified in a department approved nutrient management plan, whichever is less	Not to exceed 60 lbs. P_2O_5 per winter season, the following growing season's crop P_2O_5 budget taking into account nutrients already applied, or phosphorus application restrictions specified in a department approved nutrient management plan, whichever is less
Setbacks from surface waters	No application allowed within SWQMA	No application allowed within 2.0 x SWQMA
Setbacks from downslope areas of channelized flow, vegetated buffers, and wetlands	200 feet	400 feet
Setbacks from direct conduits to groundwater	300 feet	600 feet
A – All tillage and farming practices shall be conducted in accordance with the following requirements; 0-2% slope = no contouring required, >2-6% slope = tillage and practices conducted along the general contour, >6% slope = tillage and farming practices conducted along the contour. The department may approve alternative tillage practices on a case-by-case basis in situations where conducting practices along the contour is not possible. Allowances for application on no-till fields only apply to fields where no-till practices have been in place for a minimum of 3 years.		

1.6.6 Frozen or Snow Covered Ground – Allowances for Surface Applications of Liquid Manure (<12% solids)

The permittee is prohibited from surface applying liquid manure during February and March, and is prohibited from surface applying liquid manure on frozen or snow-covered ground except for the following conditions:

- The permittee may surface apply liquid manure on frozen or snow covered ground, including during February and March, on an emergency basis in accordance with Table 2 and s. NR 243.14(7)(d) on fields the Department has approved for emergency applications. The permittee must notify the department verbally prior to the emergency application. Unless the emergency application is necessitated by imminent impacts to the environment or human or animal health, the permittee may not apply manure to a field on an emergency basis until the department has verbally approved the application. The permittee shall submit a written description of the emergency application and the events leading to the emergency application to the department within 5 days of the emergency application.
- Liquid manure that is frozen and cannot be transferred to a manure storage facility may be surface applied on frozen or snow-covered ground, including during February and March, in accordance with the restrictions in Tables 2 and s. NR 243.14(7)(f). Surface applications of frozen liquid manure do not require prior department approval or notification provided application sites for frozen liquid manure are identified in the approved nutrient management plan. During February and March, the permittee shall notify the department if the permittee expects to surface apply frozen liquid manure more than 5 days in any one month.

Table 2
Restrictions for Surface Applications of Liquid Manure on Frozen or Snow Covered Ground

Criteria	Restrictions for fields with 0-2% slopes	Restrictions for fields with >2-6% slopes
Required fall tillage practice prior to application	Chisel or moldboard plow or department approved equivalent[A]	Chisel or moldboard plow or department approved equivalent[A]
Application rate (cumulative per acre)	Maximum application volume of 7,000 gallons per acre per winter season, not to exceed 60 lbs. P_2O_5, the following growing season's crop P_2O_5 budget taking into account nutrients already applied or other phosphorus application restrictions specified in a department approved nutrient management plan, whichever is less	Maximum application volume of 3,500 gallons per acre per winter season, not to exceed 30 lbs. P_2O_5, the following growing season's crop P_2O_5 budget taking into account nutrients already applied, or other phosphorus application restrictions specified in a department approved nutrient management plan, whichever is less
Setbacks from surface waters	No application allowed within SWQMA	No application allowed within SWQMA
Setbacks from downslope areas of channelized flow, vegetated buffers, wetlands	200 feet	200 feet
Setbacks from direct conduits to groundwater	300 feet	300 feet

A – All tillage and farming practices shall be conducted along the contour in accordance with the following requirements; 0-2% slope = no contouring required, >2-6% slope = tillage and practices conducted along the general contour. The department may approve alternative tillage practices on a case-by-case basis in situations where conducting practices along the contour is not possible

1.6.7 Frozen or Snow Covered Ground – Process Wastewater

If a permittee land applies process wastewater on frozen or snow-covered ground, the permittee shall land apply the process wastewater in compliance with s. NR 214.17(2) through (6) and the other land application restrictions in this permit, except for the restrictions in the "Frozen or Snow Covered Ground – Solid Manure (12% solids or more)" and "Frozen or Snow Covered Ground – Allowances for Surface Applications of Liquid Manure (<12% solids)" sections of this permit.

1.6.8 Spreading Sites Submittals

Permittee requests to amend a nutrient management plan to include landspreading sites not found in an approved management plan shall include the following information:

- The location of the site on maps and aerial photographs, and soil survey maps.
- A unique site identification number
- Information used to verify the site meets locational requirements of the permit,
- A nutrient budget for the site consistent with permit requirements. This includes a completed worksheet outlining the process in determining appropriate spreading rates for each additional site, including a crop history identifying the previous season's crops and future cropping plans for each site and estimated nutrient uptake.

- A demonstration that the field(s) in question meets tolerable soil loss rate.
- Maps that show where land application is prohibited or restricted on a map or aerial photograph of the site.
- Soil samples if available for one-time applications. If the permittee wishes to use the site for subsequent applications, soil samples shall be submitted prior to additional landspreading.

1.7 Monitoring and Sampling Requirements

The permittee shall comply with the monitoring and sampling requirements specified below for the listed sampling point(s), and the following conditions.

1.7.1 Monitoring and Inspection Program

As specified in the Schedules section of this permit, the permittee shall submit a monitoring and inspection program designed to determine compliance with permit requirements. The program shall be consistent with the requirements of this section and shall identify the areas that the permittee will inspect, the person responsible for conducting the inspections and how inspections will be recorded and submitted to the department.

Visual inspections shall be completed by the permittee or designee in accordance with the following frequencies:

- Daily inspections for leakage of all water lines that potentially come into contact with pollutants or drain to storage or containment structures or runoff control systems, including drinking or cooling water lines.
- Weekly inspections to ensure proper operation of all storm water diversion devices and devices channeling contaminated runoff to storage or containment structures.
- Weekly inspections of liquid storage and containment structures. For liquid storage and containment facilities, the berms shall be inspected for leakage, seepage, erosion, cracks and corrosion, rodent damage, excessive vegetation and other signs of structural weakness. In addition, the level of material in all liquid storage and containment facilities shall be measured and recorded in feet or inches above or below the margin of safety level.
- Quarterly inspections of the production area, including outdoor animal pens, barnyards and raw material storage areas. CAFO outdoor vegetated areas shall be inspected quarterly.
- Periodic inspections and calibration of landspreading equipment to detect leaks and ensure accurate application rates for manure and process wastewater. An initial calibration of spreading equipment shall be followed by additional calibration after any equipment modification that may impact application of manure or process wastewater or after changes in product or manure or process wastewater consistency. Spreading equipment for both liquid and solid manure shall be inspected just prior to the hauling season, and equipment used for spreading liquids shall be inspected at least once per month during months when hauling occurs.
- Inspections of fields each time manure or process wastewater is surface applied on frozen or snow-covered ground to determine if applied materials have run off the application site. Inspections shall occur during and shortly after application.

The permittee shall take corrective actions as soon as practicable to address any equipment, structure or system malfunction, noncompliance, failure or other problem identified through monitoring or inspections. If the permittee fails to take corrective actions within 30 days of identifying a malfunction, noncompliance, failure or other problem, the permittee shall contact the Department immediately following the 30-day period and provide an explanation for its failure to take action.

1.7.2 Sampling Requirements

The permittee shall collect and analyze representative samples of land applied manure and process wastewater for the parameters outlined in the monitoring requirements for each sample point. The permittee shall also collect and analyze soils from fields used for manure or process wastewater applications at least once every four years. Sampling of manure, process wastewater and soils shall be done in accordance with s. NR 243.19(1)(c).

1.8 Sampling Point(s)

The permittee is authorized to use only the facilities identified below, in accordance with the conditions specified in this permit. The permittee may not install or use new facilities or structures or land apply manure or other process wastewaters from these facilities unless written Department approval is received. A new facility is any facility that is not specifically identified in this permit. If a new facility is approved in writing by the Department, the conditions in the corresponding 'New Facility' sampling point (e.g. Manure Storage Facilities, Runoff Control Systems) will apply.

1.8.1 Manure and Process Wastewater Storage Facilities - Sampling Required

In accordance with the Production Area Discharge Limitations subsection, manure and process wastewater storage facilities shall be operated and maintained to prevent discharges to navigable waters and to comply with surface water quality standards. In addition, manure and process wastewater storage facilities shall be operated and maintained to minimize leakage for the purpose of complying with groundwater standards. Unless specifically approved and designated by the Department as a sampling point, in-field unconfined storage of manure (manure stacking) is prohibited. The permittee is authorized to use facilities identified below, in accordance with the conditions specified in this permit.

Sampling Point Designation	
Sampling Point Number	**Sampling Point Location, System Description (including capacity, legal location, and action needed as applicable), and Treatment Description**
001	Solids 001: Sample point 001 is for separated manure solids. These are typically reused as bedding and stored under roof in the generator building. Separated solids may also be land applied or distributed to another party according to Department approval and Distribution of Manure and Process Wastewater section of the Permit.
002	Waste Storage Facility (WSF) 001. Sample point 002 is for liquid waste storage facility 001 (WSF 001) located at Deere Ridge Dairy. WSF 001 is a concrete lined manure storage located north of the heifer barn. This facility has a capacity of 230,000 gallons and was constructed in 1989. The facility accepts manure and process wastewater from the heifer barn. Manure can also be pumped to the storage from the main barn or the Home Farm.
003	Waste Storage Facility (WSF) 002: Sample point 003 is for Liquid waste storage facility 002 located at Deere Ridge Dairy. WSF 002 is a concrete lined storage located on the south side of the digester. The facility has a capacity of 7 million gallons and was constructed in 2010. The storage accepts manure and process wastewater from the main dairy including the freestall barns and the digester.
004	Waste Storage Facility (WSF) 003: Sample point 004 is for liquid waste storage facility 003 located at the home farm. WSF 003 is an inground concrete lined manure storage which was previously an under barn storage. The barn collapsed under snow load. The facility has a capacity of 500,000 gallons and was constructed in 1981. WSF 003 will require an engineering evaluation, see Schedules section for due dates.
005	Process wastewater facility (PWF) 004: Sample point 005 is for liquid process wastewater facility 004 (PWF 004) located at the Home Farm. PWF 004 is a concrete lined inground storage which was constructed as an under barn storage and is located to the East of the feed storage area. The barn was removed in 2011. The storage has a designed storage capacity of 110,000 gallons. The facility collects runoff from the feed storage area. Waste is then transferred to the storages at Deere Ridge Dairy or the Hog Farm. PWF 004 was last evaluated in 2012 and met permit requirements.
006	Waste Storage Facility (WSF) 005: Sample point 006 is for liquid waste storage facility 005 (WSF 005) located at the Hog Farm. This storage is used as additional manure and process wastewater storage on an as needed basis. WSF 005 is an under barn concrete manure storage which is under an unused hog barn. The facility was constructed in 1996 with a design capacity of 330,000 gallons.
007	Anaerobic Digester #1 (Deere Ridge). This sample point addresses all manure and process wastewater stored within the anaerobic digester vessel #1. The digester vessel is east of the generator building and north of WSF #2. The Anaerobic Digester system was constructed in 2000, with a design capacity of 500,000 gallons. Sampling liquids within the digester vessel for nutrient content is only required if the liquid is directly pumped from the vessel and land applied.
008	Anaerobic Digester #2 (Deere Ridge). This sample point addresses all manure and process wastewater stored within anaerobic digester vessel #2. The proposed digester vessel would be located immediately adjacent and South of digester vessel #1 (sample point 007) with a design capacity of 500,000 gallons. Plans and Specifications would need to be submitted for approval prior to construction. Sampling for nutrient content is only required if the liquid is directly pumped from the vessel and land applied.
009	Solids 002: Sample point 009 is for solid manure sources from Deere Ridge Dairy that are directly land applied and not stored in a waste storage facility. This includes solid sources such as calf hutch manure, maternity pen bedpack, heifer bedpack, steer manure, etc. Representative samples shall be taken for

	each manure source type.
010	Solids 003: Sample point 010 is for solid manure sources from the Home Farm that are directly land applied and not stored in a waste storage facility. This includes solid sources such as calf hutch manure, maternity pen bedpack, heifer bedpack, steer manure, etc. Representative samples shall be taken for each manure source type.
011	Solids 004: Sample point 011 is for any manure solids removed from bottom of liquid waste storage facilities. This includes manure-laden sand solids, manure fiber solids, etc. Representative samples shall be taken from each waste storage facility.
012	Solids 005: Sample point 012 is for solid manure stacked in approved headland locations. Representative samples shall be taken of this manure prior to land application. Note: Headland stacking sites are subject to production site discharge limitations; weekly visual monitoring is required during use of stacking sites to ensure discharges meet permit requirements.

Manure and Process Wastewater Storage Facilities - Action Needed: For manure and process wastewater storage facilities that are to be installed, evaluated or abandoned (as indicated in the above table), see the Schedules section herein for actions required. Although this permit may require actions for installing permanent facilities, or controls, or modifications to existing facilities, interim measures shall be immediately implemented to prevent discharges of pollutants to navigable waters. Specifically, if monitoring or inspection reports indicate any storage facility may not be able to prevent discharges to navigable waters in accordance with the conditions in the Production Area Discharge Limitations subsection, the permittee shall immediately install interim control measures to contain the discharges. Plans and specifications for permanent facilities must be submitted to the Department for review and approval in accordance with Chapter 281.41, Wis. Statutes, and Chapter NR 243, Wis. Adm. Code.

1.8.2 Runoff Control System(s) - No Sampling Required

In accordance with the Production Area Discharge Limitations subsection, the permittee shall control contaminated runoff from all elements of the livestock operation to prevent a discharge of pollutants to navigable waters and to comply with surface water quality standards and groundwater standards.

Sampling Point Designation	
Sampling Point Number	**Sampling Point Location, System Description (including capacity, legal location, and action needed as applicable), and Treatment Description**
013	Feed Storage Area and Runoff Control System: Sample Point 013 is for visual monitoring and inspection of the feed storage area and associated runoff control system located at the Home Farm. Proper operation and maintenance is required to ensure discharges meet permit requirements. Weekly inspections are required and shall be recorded according to monitoring program.
014	Calf Hutch Area and Runoff Control Systems: Sample point 014 is for visual monitoring and inspection of the calf hutch area and associated runoff control system located at the Home Farm. Proper operation and maintenance is required to ensure discharges meet permit requirements. Weekly inspections are required and shall be recorded according to the monitoring program.
015	Storm Water Runoff Control System: Sample point 015 is for visual monitoring and inspection of all production site storm water conveyance systems. This includes roof gutter and downspout structures, drainage tile systems, grassed waterways, and other diversion systems that transport uncontaminated storm water. Proper operation and maintenance is required to keep uncontaminated runoff diverted away from manure and process wastewater handling systems. Weekly inspections are required and shall be recording according to monitoring program.

Runoff Control System(s) - Action Needed: For runoff control systems that are to be installed, evaluated or abandoned (as indicated in the above table), see the Schedules section herein for actions required. Although permanent control measures may be required by this permit, interim measures shall be implemented to prevent discharges of pollutants to navigable waters. Specifically, if monitoring or inspection reports indicate that manure or process wastewater may be discharged to navigable waters from the animal production area, in violation of the conditions in the Production Area Discharge Limitations subsection, the permittee shall immediately install interim control measures to contain the discharges. Plans and specifications for permanent runoff controls must be submitted to the Department for review and approval in accordance with Chapter 281.41, Wis. Statutes, and Chapter NR 243, Wis. Adm. Code.

1.8.3 Sampling Point 001 - Separated Solids; 009- Dairy Solid (Deere Ridge); 010- Dairy Solid (Home Farm); 011- Dairy Solid (Liquid Storages); 012- Dairy Solid (Headland Stacks)

Monitoring Requirements and Limitations					
Parameter	**Limit Type**	**Limits and Units**	**Sample Frequency**	**Sample Type**	**Notes**
Nitrogen, Total		lbs/ton	Quarterly	Grab	
Nitrogen, Available		lbs/ton	Quarterly	Calculated	
Phosphorus, Total		lbs/ton	Quarterly	Grab	
Phosphorus, Available		lbs/ton	Quarterly	Calculated	
Solids, Total		Percent	Quarterly	Grab	

Reporting: Sampling test results shall be submitted with the Annual Report. Sampling is only required when land application has actually occurred.

Daily Log Requirements The permittee shall document all discharge and monitoring activities on daily log report form 3200-123A or a Department approved equivalent log sheet. Originals of the daily log reports shall be kept by the permittee as described under Record Keeping and Retention in the Standard Requirements section, and if requested, made available to the Department.	
Parameters	**Units**
Date of Application	Date
Field ID	Number/Name
Acres Applied	Number of Acres
Manure/Process Wastewater Source	Specify Storage Facility or Barn
Spreader Volume	Tons or Gallons
Number of Loads	Number
Soil Conditions	Dry, Wet, Frozen, Snow Covered

Daily Log Requirements

The permittee shall document all discharge and monitoring activities on daily log report form 3200-123A or a Department approved equivalent log sheet. Originals of the daily log reports shall be kept by the permittee as described under Record Keeping and Retention in the Standard Requirements section, and if requested, made available to the Department.

Parameters	Units
Temperature During Application	°F
Precipitation During Application	Describe Precipitation
Application Method	Surface Applied, Injected, Incorporated

Annual Report

The permittee shall submit an Annual Report, including Form 3200-123 or a Department approved equivalent, that summarizes all landspreading activities and includes the information identified below, the lab analyses of the manure and other waste landspread, the "T" compliance worksheet for all fields, and the soil test frequency in the past four years. The Annual Report is due each year by the date specified in the Schedules section of this permit. Nitrogen and phosphorus from all sources applied to a given field, including commercial fertilizers, shall be included in the "Total Nitrogen" and "Total Phosphorus" sections of the Annual Report.

Parameters	Units	Sample Type
Date of Application	Date	-
Field ID	Number/Name	-
Acres Applied	Number of Acres	-
Slope	Percent	-
Soil Test P Ave.	ppm	-
Manure Source	-	Composite
Current Crop	-	-
Crop Nitrogen Needs (per soil test)	Pounds/Acre	-
Crop P_2O_5 Needs (per soil test)	Pounds/Acre	-
Manure Analysis: Available Nitrogen	Pounds/Ton	Calculated
Manure Analysis: Available P_2O_5	Pounds/Ton	Calculated
Manure Application Rate	Tons/Acre	-
Manure/Process Wastewater Applied: Nitrogen	Pounds/Acre	-
Manure/ Process Wastewater Applied: P_2O_5	Pounds/Acre	-
Previous Crop	-	-
Legume Nitrogen Credit	Pounds/Acre	-

Annual Report
The permittee shall submit an Annual Report, including Form 3200-123 or a Department approved equivalent, that summarizes all landspreading activities and includes the information identified below, the lab analyses of the manure and other waste landspread, the "T" compliance worksheet for all fields, and the soil test frequency in the past four years. The Annual Report is due each year by the date specified in the Schedules section of this permit. Nitrogen and phosphorus from all sources applied to a given field, including commercial fertilizers, shall be included in the "Total Nitrogen" and "Total Phosphorus" sections of the Annual Report.

Parameters	Units	Sample Type
Second Year Manure Credit	Pounds/Acre	-
Additional Fertilizer: Nitrogen	Pounds/Acre	-
Additional Fertilizer: P_2O_5	Pounds/Acre	-
Total Nitrogen Applied	Pounds/Acre	-
Total P_2O_5 Applied	Pounds/Acre	-
Soil Conditions	Dry, Wet, Frozen, Snow Covered	-
Application Method	Surface Applied, Injected, Incorporated	-
Banked	Yes/No	-
Field Restrictions	Per Nutrient Management Plan	-

1.8.4 Sampling Point 002 - WSF 001 (Deere Ridge); 003- WSF 002 (Deere Ridge); 004- WSF 003 (Home Farm); 005- PWF 004 (Home Farm); 006- WSF 005 (Hog Farm); 007- Digester #1 (Deere Ridge); 008- Digester #2 (Deere Ridge)

Monitoring Requirements and Limitations					
Parameter	**Limit Type**	**Limits and Units**	**Sample Frequency**	**Sample Type**	**Notes**
Nitrogen, Total		lb/1000gal	2/Month	Grab	
Nitrogen, Available		lb/1000gal	2/Month	Calculated	
Phosphorus, Total		lb/1000gal	2/Month	Grab	
Phosphorus, Available		lb/1000gal	2/Month	Calculated	
Solids, Total		Percent	2/Month	Grab	

Reporting: Sampling test results shall be submitted with the Annual Report. Sampling is only required when land application has actually occurred.

Daily Log Requirements

The permittee shall document all discharge and monitoring activities on daily log report form 3200-123A or a Department approved equivalent log sheet. Originals of the daily log reports shall be kept by the permittee as described under Record Keeping and Retention in the Standard Requirements section, and if requested, made available to the Department.

Parameters	Units
Date of Application	Date
Field ID	Number/Name
Acres Applied	Number of Acres
Manure/Process Wastewater Source	Specify Storage Facility or Barn
Spreader Volume	Tons or Gallons
Number of Loads	Number
Soil Conditions	Dry, Wet, Frozen, Snow Covered
Temperature During Application	°F
Precipitation During Application	Describe Precipitation
Application Method	Surface Applied, Injected, Incorporated

Annual Report

The permittee shall submit an Annual Report, including Form 3200-123 or a Department approved equivalent, that summarizes all landspreading activities and includes the information identified below, the lab analyses of the manure and other waste landspread, the "T" compliance worksheet for all fields, and the soil test frequency in the past four years. The Annual Report is due each year by the date specified in the Schedules section of this permit. Nitrogen and phosphorus from all sources applied to a given field, including commercial fertilizers, shall be included in the "Total Nitrogen" and "Total Phosphorus" sections of the Annual Report.

Parameters	Units	Sample Type
Date of Application	Date	-
Field ID	Number/Name	-
Acres Applied	Number of Acres	-
Slope	Percent	-
Soil Test P Ave.	ppm	-
Manure Source	-	Composite
Current Crop	-	-
Crop Nitrogen Needs (per soil test)	Pounds/Acre	-
Crop P_2O_5 Needs (per soil test)	Pounds/Acre	-
Manure/Process Wastewater Analysis: Available Nitrogen	Pounds/1000 Gallons	Calculated

Annual Report

The permittee shall submit an Annual Report, including Form 3200-123 or a Department approved equivalent, that summarizes all landspreading activities and includes the information identified below, the lab analyses of the manure and other waste landspread, the "T" compliance worksheet for all fields, and the soil test frequency in the past four years. The Annual Report is due each year by the date specified in the Schedules section of this permit. Nitrogen and phosphorus from all sources applied to a given field, including commercial fertilizers, shall be included in the "Total Nitrogen" and "Total Phosphorus" sections of the Annual Report.

Parameters	Units	Sample Type
Manure/Process Wastewater Analysis: Available P_2O_5	Pounds/1000 Gallons	Calculated
Manure/Process Wastewater Application Rate	Gallons/Acre	-
Manure/Process Wastewater Applied: Nitrogen	Pounds/Acre	-
Manure/ Process Wastewater Applied: P_2O_5	Pounds/Acre	-
Previous Crop	-	-
Legume Nitrogen Credit	Pounds/Acre	-
Second Year Manure Credit	Pounds/Acre	-
Additional Fertilizer: Nitrogen	Pounds/Acre	-
Additional Fertilizer: P_2O_5	Pounds/Acre	-
Total Nitrogen Applied	Pounds/Acre	-
Total P_2O_5 Applied	Pounds/Acre	-
Soil Conditions	Dry, Wet, Frozen, Snow Covered	-
Application Method	Surface Applied, Injected, Incorporated	-
Banked	Yes/No	-
Field Restrictions	Per Nutrient Management Plan	-

2 Schedules

2.1 Emergency Response Plan

Required Action	Due Date
Develop Emergency Response Plan: Develop a written Emergency Response Plan within 30 days of permit coverage, available to the Department upon request.	08/31/2020

2.2 Monitoring & Inspection Program

Required Action	Due Date
Proposed Monitoring and Inspection Program: Consistent with the Monitoring and Sampling Requirements subsection, the permittee shall submit a proposed monitoring and inspection program within 90 days of the effective date of this permit.	10/31/2020

2.3 Annual Reports

Submit Annual Reports by January 31st of each year in accordance with the Annual Reports subsection in Standard Requirements.

Required Action	Due Date
Submit Annual Report #1:	01/31/2021
Submit Annual Report #2:	01/31/2022
Submit Annual Report #3:	01/31/2023
Submit Annual Report #4:	01/31/2024
Submit Annual Report #5:	01/31/2025
Ongoing Annual Reports: Continue to submit Annual Reports until permit reissuance has been completed.	

2.4 Nutrient Management Plan

Required Action	Due Date
Management Plan Submittal: Submit a proposed methodology for Department review and approval that accounts for nitrogen applied to cropland through irrigation. Methodology must account for spatial and temporal variations in nitrogen concentration and irrigation volume. Implement and include approved methodology in future Management Plan Annual Updates.	11/30/2021
Management Plan Annual Update #1: Submit an Annual Update to the Nutrient Management Plan by March 31st of each year. Note: In addition to Annual Updates, submit Management Plan Amendments to the Department for written approval prior to implementation of any changes to nutrient management practices, in accordance with the Nutrient Management requirements in the Livestock Operational and Sampling Requirements section.	03/31/2021

Management Plan Annual Update #2: Submit an Annual Update to the Nutrient Management Plan.	03/31/2022
Management Plan Annual Update #3: Submit an Annual Update to the Nutrient Management Plan.	03/31/2023
Management Plan Annual Update #4: Submit an Annual Update to the Nutrient Management Plan.	03/31/2024
Management Plan Annual Update #5: Submit an Annual Update to the Nutrient Management Plan.	03/31/2025
Ongoing Management Plan Annual Updates: Continue to submit Annual Updates to the Nutrient Management Plan until permit reissuance has been completed.	

2.5 Manure Storage Facility - Engineering Evaluation WSF 003

Required Action	Due Date
Retain Expert: Retain a qualified expert to complete an engineering evaluation for waste storage facility #3 (WSF 003) do to the collapse of the barn and report the name of the expert to the Department.	09/30/2020
Written Report: Submit a written report evaluating the existing manure storage facility's ability to meet the conditions in the Production Area Discharge Limitations and Manure and Process Wastewater Storage subsections and s. NR 243.15, Wis. Adm. Code. (See Standard Requirements for report details.)	07/01/2021
Plans and Specifications: Submit plans and specifications for Department review and approval in accordance with Chapter 281.41, Wis. Stats., and Chapter NR 243, Wis. Adm. Code, to permanently correct any adverse manure storage conditions.	12/31/2021
Corrections and Post Construction Documentation: Complete construction on the manure storage facility that permanently corrects any adverse conditions in concurrence with and approval by the Department, by the specified Date Due. Submit post construction documentation within 60 days of completion of the project.	10/31/2022

2.6 Submit Permit Reissuance Application

Required Action	Due Date
Reissuance Application: Submit a complete permit reissuance application 180 days prior to permit expiration.	02/01/2025

3 Standard Requirements

3.1 General Conditions

NR 205, Wisconsin Administrative Code: The conditions in s. NR 205.07(1), Wis. Adm. Code, are included by reference in this permit. The permittee shall comply with all of these requirements. Some of these requirements are outlined in the Standard Requirements section of this permit. Requirements not specifically outlined in the Standard Requirement section of this permit can be found in s. NR 205.07(1).

3.1.1 Duty to comply

The permittee shall comply with all conditions of the permit. Any permit noncompliance is a violation of the permit and is grounds for enforcement action; permit termination, revocation and reissuance or modification; or denial of a permit reissuance application. If a permittee violates any terms of the permit, the permittee is subject to the penalties established in ch. 283, Wis. Stats.

3.1.2 Permit Actions

As provided in s. 283.53, Wis. Stats., after notice and opportunity for a hearing the permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.

3.1.3 Property Rights

The permit does not convey any property rights of any sort, or any exclusive privilege. The permit does not authorize any injury or damage to private property or any invasion of personal rights, or any infringement of federal, state or local laws or regulations.

3.1.4 Schedules

Reports of compliance or noncompliance with interim and final requirements contained in any schedule of the permit shall be submitted in writing within 14 days after the schedule date, except that progress reports shall be submitted in writing on or before each schedule date for each report. Any report of noncompliance shall include the cause of noncompliance, a description of remedial actions taken and an estimate of the effect of the noncompliance on the permittee's ability to meet the remaining schedule dates.

3.1.5 Inspection and Entry

The permittee shall allow an authorized representative of the Department, upon the presentation of credentials, to:

- enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records are required under the conditions of the permit;
- have access to and copy, at reasonable times, any records that are required under the conditions of the permit;
- inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices or operations regulated or required under the permit; and
- sample or monitor at reasonable times, for the purposes of assuring permit compliance, any substances or parameters at any location.

3.1.6 Transfers

A permit is not transferable to any person except after notice to the Department. In the event of a transfer of control of a permitted facility, the prospective owner or operator shall file a new permit application and shall file a stipulation of permit acceptance with the Department WPDES permit section. The Department may require modification or

revocation and reissuance of the permit to change the name of the permittee and to reflect the requirements of ch. 283, Stats.

3.1.7 Duty to Mitigate

The permittee shall take all reasonable steps to minimize or prevent any adverse impact on the waters of the state resulting from noncompliance with the permit.

3.1.8 Duty to Provide Information

The permittee shall furnish to the Department, within a reasonable time, any information which the Department may request to determine whether cause exists for modifying, revoking or reissuing the permit or to determine compliance with the permit. The permittee shall also furnish to the Department, upon request, copies of records required to be kept by the permittee.

3.1.9 Recording of Results-Sampling

For each manure, process wastewater or soil sample taken by the permittee, the permittee shall record the following information:

- The date, exact place, method and time of sampling or measurements,
- The individual or lab that performed the sampling or measurements,
- The date of the analysis was performed,
- The individual who performed the analysis,
- The analytical techniques or methods used
- The results of the analysis.

3.1.10 Recording of Results-Inspections

For each inspection conducted by the permittee, the permittee shall record the following information:

- The date and name of the person(s) performing the inspection,
- An inspection description, including components inspected,
- Details of what was discovered during the inspection,
- Recommendations for repair or maintenance,
- Any corrective actions taken.

3.1.11 Spill Reporting

The permittee shall notify the Department in in the event that a spill or accidental release of any material or substance results in the discharge of pollutants to the waters of the state at a rate or concentration greater than the effluent limitations or restrictions established in this permit, or the spill or accidental release of the material that is unregulated in this permit, unless the spill or release of pollutants has been reported to the Department in accordance with s. NR 205.07 (1)(s), Wis. Adm. Code, and the "Noncompliance - 24 Hour Reporting,"section of this permit.

3.1.12 Planned Changes

The permittee shall report to the Department any facility or operation expansion, production increase or process modifications which will result in new, different or increased amount of manure or process wastewater produced or handled by the permittee or which will result in new, different or increased discharges of pollutants to waters of the state. The report shall either be a new permit application, or if the new discharge will not violate the conditions of this permit, a written notice of the planned change. The report shall contain a description of the planned change, an estimate of the new, different or increased discharge of pollutants and a description of the effect of change will on current manure and process wastewater handling practices. Changes cannot be implemented prior to reporting changes to the Department. Following receipt of this report, the Department may require that the permittee submit

plans and specifications, or modify its nutrient management plan to address the planned change. Changes requiring Department action or approval may not be initiated prior to Department action or approval.

3.1.13 Submittal of Plans and Specifications

In accordance with s. NR 243.15, the permittee shall submit plans and specifications for proposed new or upgraded reviewable facilities or systems to the Department for approval prior to construction. Post construction documentation for these projects shall be submitted within 60 days of completion of the project, or as otherwise specified by the Department.

3.1.14 Other Information

Where the permittee becomes aware that it failed to submit any relevant facts in a permit application or submitted incorrect information in a permit application or in any report to the department, it shall promptly submit such facts or correct information to the department.

3.1.15 Reporting Requirements – Alterations or Additions

The permittee shall give notice to the Department as soon as possible of any planned physical alterations or additions to the permitted facility. Notice is only required when:

- The alteration or addition to the permitted facility may meet one of the criteria for determining whether a facility is a new source.
- The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification requirement applies to pollutants which are not subject to effluent limitations in the existing permit.
- The alteration or addition results in a significant change in the permittee's sludge use or disposal practices, and such alteration, addition, or change may justify the application of permit conditions that are different from or absent in the existing permit, including notification of additional use of disposal sites not reported during the permit application process nor reported pursuant to an approved land application plan. Additional sites may not be used for the land application of sludge until department approval is received.

Noncompliance - 24 Hour Reporting

The permittee shall report any noncompliance which may endanger health or the environment. Any information shall be provided orally within 24 hours from the time the permittee becomes aware of the circumstances. A written submission shall also be provided within 5 days of the time the permittee becomes aware of the circumstances. This includes any upset which exceeds any effluent limitation in the permit, or violations of the discharge limitations listed in the permit.

NOTE: Section 292.11(2)(a), Wisconsin Statutes, requires any person who possesses or controls a hazardous substance or who causes the discharge of a hazardous substance to notify the Department of Natural Resources **immediately** of any discharge not authorized by the permit. The discharge of a hazardous substance that is not authorized by this permit or that violates this permit may be a hazardous substance spill. To report a hazardous substance spill, call DNR's 24-hour HOTLINE at **1-800-943-0003.**

3.1.16 Reports and Submittal Certification

Signature(s) on reports required by this permit shall certify to the best of the permittee's knowledge the reports to be true, accurate and complete. All reports required by this permit shall be signed by:

- a responsible executive officer, manager, partner or proprietor as specified in s. 283.37(3), Wis. Stats., or
- a duly authorized representative of the officer, manager, partner or proprietor that has been delegated signature authority pursuant to s. NR 205.07(1)(g)2, Wis. Adm. Code.

3.2 Livestock Operation General Requirements

3.2.1 Responsibility for Manure and Process Wastewater

The permittee is responsible for the storage, management and land application of all manure and process wastewater generated by the operation. The permittee is also responsible for any manure or process wastewater received from non-permitted operations that are accepted by the permittee for storage, management or land application.

3.2.2 Distribution of Manure and Process Wastewater

All manure and process wastewater generated by the permittee is the responsibility of the permittee and shall be stored and applied in compliance with the terms and conditions of this permit and the approved nutrient management plan, except if the manure or process wastewater is distributed to another person in accordance with s. NR 243.142 and the Department has approved the transfer of responsibility in writing.

To transfer responsibility for handling, storage and application of manure or process wastewater, a permittee shall submit a written request to the Department. At minimum the request shall indicate how the permittee will comply with all conditions identified in ch. NR 243.142(3), Wis. Adm. Code. If approved, the permittee will be responsible for the following recordkeeping and reporting:

- Update the nutrient management plan to include the estimated amount of manure and process wastewater to be transferred, and record the actual amount transferred at the time of transfer.
- Maintain records that identify the name and address of the recipient of the manure or process wastewater, quantity, and dates of transfer.
- Provide the recipient with written information regarding the nutrient content (nitrogen and phosphorus at minimum) of the manure and process wastewater.
- Submit transfer reports to the Department with the annual report.
- Records shall be maintained for at least 5 years.

Upon written approval from the Department, the permittee is not responsible for the land application, use or disposal of distributed manure or process wastewater if the manure or process wastewater is distributed in compliance with the conditions of the Department approval and s. NR 243.142.

3.2.3 Emergency Response Plans

Within 30 days of the effective date of the permit, the permittee shall develop a written emergency response plan, or update an existing plan if necessary, in accordance with s. NR 243.13(6). The plan shall be made available to the Department upon request. The emergency response plan shall be reviewed and, if appropriate or necessary, amended whenever the operation undergoes significant expansions or other changes that affect the volume or location of potential unauthorized spills or discharges. The plan shall be amended as needed to reflect changes in available equipment, available clean-up contractors or procedures to address unauthorized spills or discharges, or amended in accordance with comments provided by the department. The plan shall be retained at the production area and the permittee shall notify all employees involved in manure and process wastewater handling of the location of the plan.

3.2.4 Mortality Management

Animal carcasses may not be disposed of in a manner that results in a discharge of pollutants to surface waters, violates groundwater standards or impairs wetland functional values. Animal carcasses may not be disposed of directly into waters of the state. In addition, carcasses may not be disposed of in liquid manure or process wastewater containment, storage or treatment facilities unless the containment, storage or treatment facility is adequately designed to contain and treat carcasses and the facility has been approved by the department for that use.

The permittee shall record the date and method of carcass disposal.

[NOTE: The permittee should be aware that there are additional restrictions on the disposal of animal carcasses in ch. 95, Stats., and ATCP 3, Wis. Adm. Code. Furthermore, there may be local regulations regarding disposal of carcasses. If a carcass is disposed of off-site, the disposal may be subject to the requirements in ch. NR 502.12 or 518, Wis. Adm. Code]

3.2.5 Department Review of Nutrient Management Plans

The Department reserves the right to review the Nutrient Management Plan at any time for application rates and cover crop nutrient removal rates, as well as the timing and methods of application. If the Department determines that a landspreading site is no longer acceptable for manure and process wastewater applications, the permittee shall modify the Nutrient Management Plan to remove the site from the plan. In addition, if the Department determines application rates need to be adjusted for individual fields, the permittee shall modify the Nutrient Management Plan. All Department initiated modifications shall be completed by the permittee within 3 months of written notification from the Department.

3.2.6 Existing Manure Storage Facilities Evaluation

The following information shall be included in the written report evaluating all existing manure storage facilities:

- a narrative providing general background and operational information on the existing storage facility(s);
- the adequacy of each facility's linings to prevent exfiltration of manure contaminants to groundwater, and the facility's ability to permanently meet the conditions in the Production Area Discharge Limitations and Manure and Process Wastewater Storage subsections;
- the proximity of bedrock and the water table to the floors of the facility(s);
- scaled drawings showing the locations of each storage unit, any surface water, water supply wells, property boundaries, and other pertinent information;
- any post construction documentation available, including the date and materials of construction;
- an assessment of the ability of the facility to meet the design requirements for manure storage in s. NR 243.15; and
- any proposed actions to address issues identified as part of the evaluation.

3.2.7 Requirements for Digesters for Biogas Production

New Installation - Plans and Specifications: New construction of digester facilities for biogas production shall be in accordance s. NR 243.15. In accordance with s. NR 243.15, additional requirements under ch. NR 213, Wis. Adm. Code, may apply based on materials added or chemical characterization of the digester influent/effluent. Exemptions to the design criteria may be given on a case-by-case basis. Prior written approval is required. The following (minimum) information shall be included in the plans and specifications submitted for the new construction of a digester for biogas production (three complete copies are required):

- a narrative describing the proposed facility(s);
- a written management and site assessment;
- an operation and maintenance plan;
- an assessment of the ability of the facility(s) to meet the applicable design requirements in s. NR 243.15;
- the adequacy of each facility's proposed linings to prevent exfiltration of manure (untreated or digested) and other contaminants to groundwater and the facility's ability to permanently meet the conditions in the Production Area Discharge Limitations and Manure and Process Wastewater Storage subsections;
- the proximity of bedrock and the water table to the proposed elevation of each facility's floors verified through on-site soil test borings or pits;
- scaled drawings showing the design details and locations of each proposed storage unit, any surface water, water supply wells, property boundaries, and other pertinent information;
- details concerning the proposed materials of construction;
- relevant engineering calculations; and

- additional design considerations based on operation of the digester (e.g., proposed additives, operational temperatures, etc.).

3.2.8 Record Keeping and Retention

The permittee shall keep records associated with production area and land application activities in accordance with s. NR 243.19(2). The permittee shall retain these records and copies of all reports required by the permit, and records of all data used to complete the application for the permit for a period of at least 5 years from the date of the sample, measurement, report or application. The Department may request that this period be extended by issuing a public notice to modify the permit to extend this period. These records shall be made available to the Department upon request.

Note: A form for recording daily land application activities (Form 3200-123A) can be obtained at regional offices of the Department or the Department's Bureau of Watershed Management, 101 S. Webster St., P.O. Box 7921, Madison, Wisconsin 53707.

3.2.9 Reporting Requirements

The permittee shall submit the following reports in accordance with s. NR 243.19(3)

- **Corrective Actions:** If the permittee fails to take corrective action within 30 days of identifying a malfunction, failure, permit noncompliance or other identified problem, the permittee shall contact the Department immediately following the 30-day period and provide an explanation for its failure to take action.
- **Quarterly Reports:** The permittee shall summarize the results of inspections conducted at the production area in a written quarterly report. The permittee shall maintain the quarterly reports onsite until the quarterly report is submitted to the Department as part of the annual report.
- **Annual Reports:** The permittee shall submit written annual reports to the department by the date specified in the Schedules section of permit for all manure and other process wastewater that is generated by the permittee. These annual reports shall cover quarterly reports, annual spreading activities and other information required in s. NR 243.19(3) for the previous calendar year or cropping year, as specified in this permit.

Note: Form 3200-123 (Annual Spreading Report) can be obtained at regional offices of the department or the department's Bureau of Watershed Management, 101 S. Webster St., P.O. Box 7921, Madison, Wisconsin 53707.

3.2.10 Duty to Maintain Permit Coverage

The permittee shall submit a reissuance application in accordance with s. NR 243.12(2)(b) at least 180 days prior to the expiration date of its current WPDES permit, unless the permittee submits a letter to the Department documenting all of the following:

- That the permittee has ceased operation or is no longer defined as a large CAFO under s. NR 243.03(28).
- That the permittee has demonstrated to the Department's satisfaction that it has no remaining potential to discharge of manure or process wastewater pollutants to waters of the state that was generated while the operation was a CAFO.

4 Summary of Reports Due

FOR INFORMATIONAL PURPOSES ONLY

Description	Date	Page
Emergency Response Plan -Develop Emergency Response Plan	August 31, 2020	17
Monitoring & Inspection Program -Proposed Monitoring and Inspection Program	October 31, 2020	17
Annual Reports -Submit Annual Report #1	January 31, 2021	17
Annual Reports -Submit Annual Report #2	January 31, 2022	17
Annual Reports -Submit Annual Report #3	January 31, 2023	17
Annual Reports -Submit Annual Report #4	January 31, 2024	17
Annual Reports -Submit Annual Report #5	January 31, 2025	17
Annual Reports -Ongoing Annual Reports	See Permit	17
Nutrient Management Plan -Management Plan Submittal	November 30, 2021	17
Nutrient Management Plan -Management Plan Annual Update #1	March 31, 2021	17
Nutrient Management Plan -Management Plan Annual Update #2	March 31, 2022	18
Nutrient Management Plan -Management Plan Annual Update #3	March 31, 2023	18
Nutrient Management Plan -Management Plan Annual Update #4	March 31, 2024	18
Nutrient Management Plan -Management Plan Annual Update #5	March 31, 2025	18
Nutrient Management Plan -Ongoing Management Plan Annual Updates	See Permit	18
Manure Storage Facility - Engineering Evaluation WSF 003 -Retain Expert	September 30, 2020	18
Manure Storage Facility - Engineering Evaluation WSF 003 -Written Report	July 1, 2021	18
Manure Storage Facility - Engineering Evaluation WSF 003 -Plans and Specifications	December 31, 2021	18
Manure Storage Facility - Engineering Evaluation WSF 003 -Corrections and Post Construction Documentation	October 31, 2022	18
Submit Permit Reissuance Application -Reissuance Application	February 1, 2025	18

Report forms shall be submitted electronically in accordance with the reporting requirements herein. Any plans and specifications for proposed new, modified or upgraded reviewable facilities or systems, nutrient management plan updates and annual reports, and WPDES permit reissuance or modification applications shall be submitted online through the Department's ePermitting System. This system is accessed through the Water Permit Applications web portal page located at http://dnr.wi.gov/permits/water. All other submittals required by this permit shall be submitted to:
West Central Region-WI Rapids, 473 Griffith Avenue, Wisconsin Rapids, WI 54494-7859

Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of WPDES Permit No. WI-0059536-04-2, Issued to Kinnard Farms Inc.

Case No. DNR-22-0002

PREHEARING CONFERENCE REPORT
AND
SCHEDULING ORDER

On September 9, 2022, a prehearing conference was held via telephone conference. Administrative Law Judge Angela Chaput Foy presided over the proceeding. The parties appeared by counsel at the prehearing conference.

This report is filed pursuant to Wis. Admin. Code § NR 2.12 and Wis. Stat. § 227.44(4)(b).

The PARTIES to this proceeding are certified as follows:

Kinnard Farms, Inc. (Petitioner), by

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Michael Best & Friedrich, LLP
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P.O. Box 1806
Madison, WI 53701-1806

Wisconsin Department of Natural Resources, by

Attorney P. Duncan Moss
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Madison, WI 53707-7921

Clean Wisconsin, by

Attorney Evan Feinauer
Clean Wisconsin
634 West Main Street, Suite 300
Madison, WI 53703

Sue Owens, Marilyn Sagrillo, Suzie Vania, Jodi Parins, Denise Skarvan, and Sandra Winnemueller, by

Attorney Adam Voskuil
Midwest Environmental Advocates, Inc.
612 W. Main St., Suite 302
Madison, WI 53703

PROCEDURAL FACTS

On June 24, 2022, the Division of Hearings and Appeals received an original request for hearing from the DNR. The parties conferred and agreed to a date for a prehearing conference. As a result, the prehearing conference was scheduled for September 9, 2022, and notice of the conference was published in the Green Bay Press Gazette on August 10, 2022.

SCHEDULING ORDER

Based on the representations and agreements of the parties at the prehearing conference, IT IS ORDERED THAT:

1. The issues for hearing are as follows:
    a. Whether the animal unit maximum of 11,369 provided in Section 1.1.1 of the Permit is reasonable;
    b. Whether the requirement to conduct groundwater monitoring at land application sites provided for in Section 2.1.2 of the Permit is reasonable;
    c. Whether the frequency for groundwater monitoring at land application sites provided for in Section 2.1.2 of the Permit is reasonable or necessary;
    d. Whether monitoring at least two land application sites as provided for in Section 3.10 of the Permit is reasonable or necessary; and
    e. Whether the deadlines for submitting Phase 1 and Phase 2 groundwater monitoring plans provided for in Section 3.10 are reasonable or necessary.

2. If a hearing is scheduled, it will be a Class 1 administrative proceeding, governed by Wis. Stat. § 227.01(3)(a) and Wis. Admin. Code § NR 2.065. Pursuant to Wis. Admin. Code § NR 2.13(3)(b), the Petitioner has the burden to prove the issues identified above by a preponderance of the evidence. As the party with the burden of proof, the Petitioner will also proceed first at the hearing.

3. The matter is stayed to allow the parties to explore settlement. The stay is dissolvable by any party by email notice to the undersigned ALJ and all parties. If the stay is dissolved, an adjourned prehearing conference shall be scheduled.

4. A status conference will be held on Friday, December 9, 2022 at 9:30 am. And that proceeding shall be held by Teams telephone conference. To connect to the conference call, dial 1-608-571-2209, and then enter the Meeting ID: 584 922 680#. Each party will also receive an email invitation for the conference.

Pursuant to the Americans with Disabilities Act, reasonable accommodations will be made to any qualified individual upon request. Please call the Division of Hearings and Appeals at (608) 266-3865 with specific information on your request prior to the date of the scheduled prehearing or hearing.

Dated at Madison, Wisconsin on September 19, 2022.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
4822 Madison Yards Way, 5th Floor North
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885
Email: Angela.ChaputFoy@wisconsin.gov

By: _____

Angela Chaput Foy
Administrative Law Judge

In the

United States Court of Appeals

For the Seventh Circuit

No. 22-3034

MICHAEL J. BOST, *et al.*,

Plaintiffs-Appellees,

v.

ILLINOIS STATE BOARD OF ELECTIONS and BERNADETTE MATTHEWS, in her capacity as the Executive Director of the Illinois State Board of Elections,

Defendants-Appellees.

APPEAL OF: DEMOCRATIC PARTY OF ILLINOIS,

Proposed Intervenor.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 22-CV-2754 — **John F. Kness**, *Judge.*

ARGUED APRIL 20, 2023 — DECIDED JULY 27, 2023

Before EASTERBROOK, ROVNER, and ST. EVE, *Circuit Judges*.

ST. EVE, *Circuit Judge*. Illinois law allows mail-in ballots postmarked on or by Election Day to be counted if received

up to two weeks after Election Day. The plaintiffs in this case contend that this extended ballot counting violates federal law and filed this suit to enjoin the practice. Within a month, the Democratic Party of Illinois ("DPI") filed a motion to intervene in defense of the law, arguing for either intervention as of right or, in the alternative, permissive intervention. The district court denied DPI's motion, and this appeal followed.

The only question before us on interlocutory appeal is whether the district court erred in denying DPI's motion to intervene. Because DPI failed to point to any reason that the state's representation of its interests "may be" inadequate, and because the district court's focus on public time and resources over DPI's individual interests was not an abuse of its discretion, we affirm.

I. Background

Federal law establishes "[t]he Tuesday after the 1st Monday in November[] in every even numbered year" as "the day for the election." 2 U.S.C. § 7. State Congressman Michael Bost, and two voters and former presidential electors, Laura Pollastrini and Susan Sweeney (collectively, "Plaintiffs") contend that the Illinois statute allowing the counting of ballots received after Election Day contravenes this federal requirement. *See* 10 ILCS § 5/19-8(c). Together, they filed this suit against the Illinois State Board of Elections ("the Board"), which is "responsible for supervising the administration of election laws throughout Illinois," and Bernadette Matthews, in her official capacity as Executive Director of the Board.

DPI became concerned about the impact of this suit on its work as a political organization and on the voting rights of its members. To protect these interests, DPI filed a motion in the

district court to intervene as a defendant under Federal Rule of Civil Procedure 24. In that motion, DPI maintained that it was entitled to intervention as of right or, in the alternative, that the district court should grant it permissive intervention.

The district court denied the motion. First, the court found that DPI's interests were adequately represented by the state's defense of the statute and therefore denied its motion to intervene as of right. It next rejected DPI's argument for permissive intervention, concluding that allowing another party to intervene would divert court time and resources from an already time-sensitive case. Nevertheless, the court allowed DPI to proceed as amicus curiae if it decided to do so.

We now affirm, but take this opportunity to clarify again our standards for intervention as of right.

II. Analysis

"Because denial of a motion to intervene essentially ends the litigation for the movant, such orders are final and appealable." *State v. City of Chicago*, 912 F.3d 979, 984 (7th Cir. 2019) (quoting *Reich v. ABC/York-Estes Corp.*, 64 F.3d 316, 321 (7th Cir. 1995)). We consider first the arguments for intervention as of right and then those for permissive intervention.

A. Intervention as of Right

Rule 24(a)(2) requires the court to allow intervention if the would-be intervenor can prove: "(1) timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment, as a practical matter, of that interest by the disposition of the action; and (4) lack of adequate representation of the interest by the existing parties to the action." *City of Chicago*, 912 F.3d at 984 (cleaned up). We review these factors de novo, *Driftless Area Land Conservancy v. Huebsch*, 969

F.3d 742, 746 (7th Cir. 2020), except for the timeliness factor, which we review for abuse of discretion. *Cook Cnty., Illinois v. Texas*, 37 F.4th 1335, 1341 (7th Cir. 2022), *cert. denied sub nom. Texas v. Cook Cnty.*, 143 S. Ct. 565 (2023).

This case focuses on factors two and four of the test for intervention as of right: whether DPI has any interests in the subject matter of the litigation that warrant intervention and whether the board adequately represents those interests. We take each in turn.

1. Unique Interests

Intervention as of right requires a would-be intervenor to have a "direct, significant and legally protectable interest in the [subject] at issue in the lawsuit." *Keith v. Daley*, 764 F.2d 1265, 1268 (7th Cir. 1985). We have used the shorthand "unique," *Wisconsin Education Association Council v. Walker* ("*WEAC*"), 705 F.3d 640, 658 (7th Cir. 2013), referenced by the district court, to require that the interest be "based on a right that belongs to the proposed intervenor rather than to an existing party in the suit." *See Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 798 (7th Cir. 2019) (quoting *Keith*, 764 F.2d at 1268 and clarifying our use of "unique"). But we have never required a right that belongs *only* to the proposed intervenor, or even a right that belongs to the proposed intervenor *and not to* the existing party. Properly understood, the "unique" interest requirement demands only that an interest belong to the would-be intervenor in its own right, rather than derived from the rights of an existing party. *See id.* at 806 (Sykes, J., concurring).

DPI points to two interests that warrant its intervention in the lawsuit: (1) an interest as an organization that would have

to expend additional resources to "get out the vote," should Illinois election law change; and (2) an associational interest on behalf of its members, Illinois voters whose mail-in ballots might not be counted, should the law change. Both satisfy our requirement for a "direct, significant and legally protectable interest."[1] Each interest belongs to DPI irrespective of the role of the Board. That is what our precedent requires: a personal stake that is not dependent on the interests of an existing party.[2]

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[1] We have held that this interest must be at least as significant as the injury required for Article III standing. *Planned Parenthood*, 942 F.3d at 798. Well-settled standing precedent supports both of DPI's asserted interests. *See Common Cause Indiana v. Lawson*, 937 F.3d 944, 950 (7th Cir. 2019) (organizational interest) *and Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 188 n.7 (2008) (associational interest).

[2] Indeed, tracing the "unique" term back to its initial use reveals exactly that: We first used the term in *Keith* as shorthand for an interest that is "based on a right that belongs to the proposed intervenor rather than to an existing party in the suit." *See Planned Parenthood*, 942 F.3d at 798 (quoting *Keith*, 764 F.2d at 1268). *Keith*, in turn, took this requirement from our opinion in *Wade v. Goldschmidt*, 673 F.2d 182, 185 n.5 (7th Cir. 1982). *Wade* quoted this proposition directly from a district court opinion, *In re Penn Cent. Com. Paper Litig.*, 62 F.R.D. 341 (S.D.N.Y. 1974), *aff'd sub nom. Shulman v. Goldman, Sachs, & Co.*, 515 F.2d 505 (2d Cir. 1975), which denied intervention to a party that sought to assert an interest exclusively derived from the existing defendant's rights rather than its own. As one of our colleagues recently put it, "'unique' means an interest that is *independent of* an existing party's, not *different from* an existing party's." *Planned Parenthood*, 942 F.3d at 806 (Sykes, J., concurring). While a *shared* interest can satisfy the requirements for intervention, a wholly derivative interest cannot.

While the district court properly reached this conclusion as to DPI's organizational interest, it erred in holding that DPI's associational interest was not "unique" within the meaning of our caselaw. As the district court saw it, the problem was that "the State Board's interest is in preserving the law for *all* Illinois voters, DPI Members and constituents included." But again, an interest need not belong *only* to the applicant for intervention to be "unique" as we have used it. To the contrary, while DPI and the Board each have an interest in representing some of the same voters, it is because DPI's interest is not dependent on the Board's that DPI's associational interest is "unique" and passes the first hurdle of our intervention analysis.

2. Adequate Representation

We turn next to the question of whether DPI's two interests are adequately represented by the Board. The burden is on DPI to show that its interests are not adequately represented. *Planned Parenthood*, 942 F.3d at 797.

a. Tiered Tests for Adequacy

Our case law recognizes that some litigants are better suited to represent the interests of third parties than others. Accordingly, we apply three different standards for showing inadequacy depending on the relationship between the party and the intervenor. Put simply, the stronger the relationship between the interests of the existing party and the interests of the party attempting to intervene, the more proof of inadequacy we require before allowing intervention.

Our default rule, which applies when there is no notable relationship between the existing party and the applicant for intervention, is a lenient one: the applicant for intervention

need only show "that representation of his interest [by the existing party] '*may be*' inadequate." *Planned Parenthood*, 942 F.3d at 799 (emphasis added). We apply an intermediate standard if "the prospective intervenor and the named party have 'the same goal.'" *Id*. (citations omitted). This is a higher bar, under which the applicant can only show inadequate representation by pointing to "some conflict" between itself and the existing party. *Id.* (citations omitted). And finally, our strictest test applies "when the representative party 'is a governmental body charged by law with protecting the interests of the proposed intervenors[.]'" *Id.* In those cases, because the existing party is legally required to represent the interests of the would-be intervenor, we presume it is an "adequate representative 'unless there is a showing of gross negligence or bad faith.'" *Id*. (citations omitted).

On appeal, it is uncontested that the Board (though a governmental body) is not "legally required to represent the interests of" DPI. This rules out our third and strictest adequacy test. The parties instead debate whether DPI and the Board share "the same goal," warranting application of the intermediate standard, or if instead the default rule applies.

b. When Do Two Parties Share "The Same Goal"?

For the potential intervenor and the named party to have "the same goal," it is not enough that they seek the same outcome in the case. After all, "a prospective intervenor must intervene on one side of the 'v.' or the other and will have the same general goal as the party on that side. If that's all it takes to defeat intervention, then intervention as of right will almost always fail." *Driftless*, 969 F.3d 742, 748 (7th Cir. 2020). And so we "require[] a more discriminating comparison of the absentee's interests and the interests of existing parties." *Id.*

When we compare the interests of a would-be intervenor and an existing party, we find that they have "the same goal" only where the interests are genuinely "identical." Otherwise, we apply our lenient default rule.[3] The analysis in *Driftless* is instructive. In that case, two environmental groups sued the Wisconsin Public Service Commission, which regulated public utilities in the state. *Id.* at 744. They sought to invalidate the permits granted to three private companies to develop land. *Id.* The permit-holding corporations moved to intervene as defendants, seeking to protect their own financial interests in the validity of the permits. *Id.* We found that the companies' interests and "[t]he Commission's interests and objectives overlap in certain respects but are importantly different. The Commission is a regulatory body, and its obligations are to the general public, not to the transmission companies or their investors." *Id.* at 748. Furthermore, we noted that "the Commission *regulates* the transmission companies, it does not *advocate for* them or represent their interests." *Id.* (emphasis in original). With these two key differences, the Commission

[3] This broad application of the lenient default rule is supported elsewhere in our caselaw. *See WEAC*, 705 F.3d 640, 659 (applying the intermediate presumption where the goals were "exactly the same"); *Driftless*, 969 F.3d at 747 (the intermediate standard applies only where interests are "identical"); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 101 F.3d 503, 508 (7th Cir. 1996) (requiring "identical" interests before presuming adequate representation, and then applying the intermediate rule because the existing party's interests *entirely subsumed* the would-be intervenor's interests). We note, however, that the Supreme Court in *Berger v. North Carolina State Conference of the NAACP*, called into question whether any presumption of adequate representation is appropriate. 142 S. Ct. 2191, 2204 (2022). That is an issue for another day, as we apply the "minimal" default standard here, applying no presumption of adequacy at all. *Id.*

and the private companies did not have "identical" interests. They did not share "the same goal." And so we applied our lenient default standard. *Id.*

c. DPI and the Board Do Not Share "The Same Goal"

The "discriminating comparison" of DPI's two interests to the interests of the Board shows that they do not "share the same goal" for Rule 24 purposes. We begin with DPI's interest as an organization: should 10 ILCS § 5/19-8(c) be enjoined, DPI would have to reallocate resources to properly educate voters on a change in law. Importantly, this interest does not overlap with the Board's interests. Nothing in the record or in the briefing suggests that the Board is interested in DPI's financial expenditures, the execution of DPI's mission, or the elements of DPI's work that will suffer if resources are diverted elsewhere. So while DPI and the Board each want the law upheld, the stakes for each of them are different.

Similarly, DPI's associational interest in representing its members is not identical to or completely included within the Board's interests. Just as in *Driftless*, the Board is a "regulatory body, and its obligations are to the general public, not to" DPI or its members alone. These responsibilities mean it has a certain amount of authority over DPI—*not* that it represents DPI's interests. So while the Board's "interests and objectives overlap in certain respects" with DPI's, in particular in their goal of having votes counted for fourteen days after Election Day as the district court noted, their interests are also

"importantly different." *Driftless*, 969 F.3d at 748. This ultimately leads us to the application of the default rule.[4]

d. Applying the Default Rule

Under the default rule, "the applicant [must] show[] that representation of his interest 'may be' inadequate," before he is granted intervention as of right. *Planned Parenthood*, 942 F.3d at 799 (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). This burden is "minimal," *Ligas ex rel. Foster v. Maram*, 478 F.3d 771, 774 (7th Cir. 2007), but it is not nonexistent. The lenient default standard is satisfied when the named party fails to make an argument before the trial court that would further the intervenor's interests. *See Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2205 (2022) (finding that representation was inadequate because of the existing party's failure to offer evidence in response to a motion for preliminary injunction and refusal to seek a stay of that injunction, both adverse to the litigation strategy sought by the would-be intervenors); *City of Chicago v. Fed. Emergency Mgmt. Agency ("FEMA")*, 660 F.3d 980, 985 (7th Cir. 2011); *Reich*, 64 F.3d at 323; *Trbovich*, 404 U.S. at 538–39 (noting risk of inadequate representation of a would-be intervenor where the interests of the existing party "may not always dictate precisely the same approach to the conduct of the litigation"). Similarly, when the existing party declines to appeal a ruling that the intervenor wants to appeal, the lenient

[4] The district court applied the intermediate rule because "[b]oth DPI and the State Board seek … to have timely-cast ballots counted for up to 14 days following Election Day." This is simply saying that they each want the law upheld. This kind of general similarity is insufficient to warrant application of the intermediate rule. *Driftless*, 969 F.3d at 748.

default rule is satisfied. *See Flying J, Inc. v. Van Hollen*, 578 F.3d 569, 572 (7th Cir. 2009). And in *FEMA*, 660 F.3d at 985, we suggested—although we did not decide—that proposing a potential conflict of interest in future settlement negotiations was enough to make a showing of inadequacy under the default rule.

DPI's briefing points to nothing to suggest that the Board's representation "may be" inadequate.[5] DPI does not point to any arguments that it would make that the Board has not already made.[6] *See FEMA*, 660 F.3d at 985; *Flying J.*, 578 F.3d at 572. And though DPI cites many out-of-circuit cases for the proposition that even *hypothetical* conflicts are enough under the default standard, DPI has not proposed even a possible conflict between itself and the Board. It is hard to imagine how we could hold that there "may be" a conflict if DPI itself cannot point to one.

DPI's sole argument for inadequate representation is that its interests diverge with the Board's. But the comparison of interests determines which of the three adequacy tests applies. This comparison alone cannot also make the showing

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[5] DPI contends that Plaintiffs waived any argument that DPI did not meet the burden under the default rule by failing to develop the argument in their response brief. The record shows otherwise—Plaintiffs specifically addressed this argument. And at any rate, our review is de novo, and the burden is on DPI to make the minimal showing required under the default standard to show inadequacy and warrant intervention as of right.

[6] At oral argument, DPI pointed for the first time to one potential difference between its briefing below and the Board's. As laid out above, that might be enough to meet the lenient default standard. But by failing to raise this in its briefing, DPI has waived it on appeal. *Wonsey v. City of Chicago*, 940 F.3d 394, 399 (7th Cir. 2019).

required under the default rule to prove inadequacy. If that were the case, then the default rule would simply be that intervention as of right is automatic. That has never been our law.

Without any showing of conflict—potential or otherwise—DPI has failed to carry its burden and is not entitled to intervention as of right.

B. Permissive Intervention

We turn finally to the issue of permissive intervention. Rule 24(b)(1)(B) gives the district court the power to allow anyone to intervene who "has a claim or defense that shares with the main action a common question of law or fact." Whether to allow permissive intervention is a highly discretionary decision. "[U]nlike the more mechanical elements of intervention as of right, it leaves the district court with ample authority to manage the litigation before it." *Planned Parenthood*, 942 F.3d at 803. Because the only *required* considerations by the district court are undue delay and prejudice to the rights of the original parties, "reversal of a district court's denial of permissive intervention is a very rare bird indeed[.]" *Id.* (cleaned up). We review for abuse of discretion. *Id.*

There are many sound reasons to deny a motion for permissive intervention. We have noted in the past that adding parties is not costless, and time is not the only payment:

> Increasing the number of parties to a suit can make the suit unwieldy. … An intervenor acquires the rights of a party. He can continue the litigation even if the party on whose side he intervened is eager to settle. This blocking right is appropriate if that party cannot be

> considered an adequate representative of the intervenor's interests, but not otherwise.

Solid Waste, 101 F.3d at 508.

Here, the district court denied permissive intervention for exactly those reasons—because it would use up the court's time and resources; because this is an election-law case that needs to be streamlined and decided quickly; and because DPI's legal interests and arguments are closely aligned with those of the Board, meaning DPI's addition as a party would add little substance.

DPI pushes back on this concern about court time and resources, insisting that "by this standard, the court would never grant permissive intervention," because an additional party will always require some extra work. That misses the point—if court resources were the *only* factor, a district court could not use that to deny every motion for permissive intervention. But that is not the case here. The district court weighed the cost of diverting its resources against the minimal value DPI offered as a party—explaining that DPI's arguments varied very little from those made by the Board. That kind of weighing is squarely within the discretion of the district court and we find no abuse in its denial of permissive intervention.

III. Conclusion

The district court's conclusion that intervention as of right was not warranted was correct, as DPI made no showing that the Board's representation of its interests "may be" inadequate. And the district court's reliance on reasonable factors to deny the motion for permissive intervention was well within its discretion. That does not preclude DPI from

proceeding as amicus curiae, as the district court suggested, or from filing another motion, should a conflict arise. But until such a showing as to inadequate representation can be made, the judgment of the district court is

AFFIRMED.

EASTERBROOK, *Circuit Judge*, concurring. My colleagues accurately apply this circuit's norms for evaluating attempts to intervene as of right, so I join the court's opinion. But I doubt that this circuit's standards are appropriate, so I add a few additional words.

The governing rule is Fed. R. Civ. P. 24(a)(2), which says that a district court must allow someone to intervene when that person

> claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Notice the difference between this language and the criteria that appear throughout the court's opinion. Rule 24 does not mention tiers of justification or whether any given interest is unique. This court has invented those additional standards, a process to which my colleagues advert at page 5 n.2.

If the need to search for unique interests, or the multiple tiers of justification, came from the Supreme Court, we would be obliged to conform. As far as I can see, however, the Justices have not told us to use the approach that now prevails in this circuit. It can't be traced to the text of Rule 24 or to the Committee Notes on that text. Nor does it have the support of scholarly sources. It is homegrown and lacks any apparent provenance.

Courts should not add layers of complexity to the Federal Rules. Legal texts sometimes set out complex rules, but to increase the complexity of a simple rule is unwarranted. Complexity adds to delay and expense, neither of which promotes justice.

Under the text of Rule 24(a)(2), the Democratic Party is entitled to intervene unless existing parties—here the State Board of Elections and its Executive Director—adequately represent its interest. The Rule does not ask whether the Board and the Party have the *same* interest, a blind alley into which some of this court's decisions deflect attention. The Board's interest is in defending and enforcing state law, while the Party's interest lies in *using* that law for the benefit of its candidates and members. But if the Board vigorously defends the statutes, that defense protects the Party's interest as well.

By the Party's lights, any private person with a concrete interest at stake can intervene in every suit against a public official, because the official's interest inevitably diverges from the private interest. Intervenors could number in the dozens, making discovery and settlement difficult if not impossible. Delay and expense would be sure to rise. Far better to apply Rule 24 as written and ask whether the original defendants "adequately represent" the putative intervenor's interests. If the answer is yes, then people potentially affected by the judicial decision can explain their circumstances (unique or not) and present their own arguments in briefs as *amici curiae*, allowing them to be heard without complicating management of the litigation.

Public officials' defense of a statute at the start of a suit does not prevent them from changing course. *Cameron v. EMW Women's Surgical Center, P.S.C.*, 142 S. Ct. 1002 (2022), holds that intervention becomes proper if the defendants drop or impair their support of the law. But the Democratic Party does not contend that the two public officials named as defendants have done that or are likely to do so. Whatever ambiguity lurks in the word "adequately"—what happens,

for example, if the defendants concede the plaintiffs' main contentions and offer only weak fallback arguments?—need not concern us. Everyone agrees that the public officials' defense in this suit is vigorous rather than a façade. It follows that the Party's appropriate role is as *amicus curiae*.