FILED
05-26-2023
Clerk of Circuit Court
Calumet County
2023CV000066

STATE OF WISCONSIN CIRCUIT COURT CALUMET COUNTY

WISCONSIN DAIRY ALLIANCE INC.,
946 Progress Way,
Chilton, Wisconsin 53014,

and

VENTURE DAIRY
COOPERATIVE,
310 North Division Street,
Loyal, Wisconsin 54446,

Plaintiffs,

v.

WISCONSIN DEPARTMENT
OF NATURAL RESOURCES
101 South Webster Street
Madison, Wisconsin 53707,

and

WISCONSIN NATURAL
RESOURCES BOARD,
101 South Webster Street,
Madison, Wisconsin 53707,

Defendants.

Case No. 2023-CV-
Case Code: 30701
Case Type: Declaratory Judgment

SUMMONS

THE STATE OF WISCONSIN, To each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The complaint, which is attached, states the nature and basis of the legal action.

Within 45 days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the complaint. The court may reject or

disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is **Calumet County Courthouse, 206 Court Street, Chilton, Wisconsin 53014**, and to the WMC Litigation Center, Plaintiffs' attorneys, whose address is **501 East Washington Avenue, Madison, Wisconsin 53703**. You may have an attorney help or represent you.

If you do not provide a proper answer within 45 days, the court may grant judgment against you for the award of money or other legal action requested in the complaint, and you may lose your right to object to anything that is or may be incorrect in the complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future, and may also be enforced by garnishment or seizure of property.

Dated this 26th day of May 2023.

Respectfully submitted,

Electronically signed by
Scott E. Rosenow

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Defendants.

COMPLAINT

Plaintiffs Wisconsin Dairy Alliance Inc. and Venture Dairy Cooperative, by their undersigned counsel, allege the following as their complaint:

INTRODUCTION

1. The Defendant, Wisconsin Department of Natural Resources ("Department"), maintains and enforces two administrative rules that unlawfully require certain livestock farms

defined as concentrated animal feeding operations ("CAFOs") to obtain a Wisconsin Pollutant Discharge Elimination System ("WPDES") permit.

2. One of these rules requires CAFOs to obtain a WPDES permit for the discharge of pollutants regardless of whether they actually discharge pollutants into waters of the state. Wisconsin Stat. ch. 283 authorizes the Department to regulate discharges, not "point sources." This rule exceeds the Department's statutory authority, conflicts with state law, and unlawfully exceeds the requirements of the federal Clean Water Act ("CWA").

3. The other rule challenged in this complaint defines "agricultural storm water discharge" too narrowly. Agricultural storm water discharges are statutorily exempt from WPDES permit requirements, and the Legislature has forbidden the Department from requiring a permit for such discharges. Yet this Department rule requires certain CAFOs to have a WPDES permit in order to qualify for this statutory permitting exemption. This rule exceeds the Department's statutory authority, conflicts with state law, and unlawfully exceeds the requirements of the CWA.

4. Applying for and obtaining a WPDES permit is a time-consuming, costly process.

5. The two rules challenged in this complaint impose substantial costs and regulatory burdens on Plaintiffs' members.

PARTIES

6. Plaintiff Wisconsin Dairy Alliance is a non-profit organization that represents modern regulated dairy farms in Wisconsin and works diligently to preserve Wisconsin's heritage as the Dairy State. Wisconsin Dairy Alliance contests unnecessary regulations that do not protect natural resources.

7. Plaintiff Venture Dairy Cooperative is a milk marketing cooperative that also works to positively affect policy at the state and local levels, improve public perception of agriculture,

and protect the overall use of technology and innovation in how farmers grow and raise food. Venture Dairy Cooperative works with legislators and their staff and key statewide business allies to combat unnecessary regulations, reduce government bureaucracy, and advance smart policy to support the future of Wisconsin's dairy farmers.

8. Wisconsin Dairy Alliance, Venture Dairy Cooperative, and their members have a strong interest in this case. Their members are adversely affected by the Department's regulations challenged in this complaint.

9. Defendant Wisconsin Department of Natural Resources is an "agency" of the State of Wisconsin as defined by Wis. Stat. § 227.01(1) and as used throughout Wis. Stat. ch. 227. The Department's principal place of business is at 101 South Webster Street, in the City of Madison, Dane County, Wisconsin. The Department is responsible for promulgating and enforcing Wis. Admin. Code ch. NR 243, which is the subject of this complaint.

10. Defendant Wisconsin Natural Resources Board ("Board") is an "agency" of the State of Wisconsin as defined by Wis. Stat. § 227.01(1) and as used throughout Wis. Stat. ch. 227. The Board's principal place of business is at 101 South Webster Street, in the City of Madison, Dane County, Wisconsin. The Board is responsible for promulgating Wis. Admin. Code ch. NR 243, which is the subject of this complaint. The Department is under the direction and control of the Board pursuant to Wis. Stat. § 15.34.

JURISDICTION AND VENUE

11. This Court has jurisdiction over this action under Wis. Stat. §§ 227.40(1) and 806.04.

12. Plaintiff Wisconsin Dairy Alliance's principal place of business is in Calumet County, making venue proper in this Court under Wis. Stat. §§ 227.40(1) and 801.50(3)(b).

13. Plaintiffs have standing to bring this lawsuit and assert the claims in this complaint on behalf of their members who are negatively affected by the Department's regulations challenged in this complaint. Plaintiffs have standing to sue to protect any such member's pecuniary interests. The interests at stake in this suit are germane to Plaintiffs' organizational purpose of contesting unnecessary regulations. The claims asserted and relief requested do not require the participation of any of Plaintiffs' members in this lawsuit.

14. In addition, Plaintiffs have standing to bring this lawsuit and assert the claims in this complaint because they pay taxes to the State of Wisconsin, and enforcement of the regulations challenged in this complaint will result in an unlawful expenditure of state taxpayer funds.

15. In addition, Plaintiffs have standing to bring this lawsuit and assert the claims in this complaint on behalf of their members because Plaintiffs have members who pay taxes to the State of Wisconsin, and enforcement of the regulations challenged in this complaint will result in an unlawful expenditure of state taxpayer funds.

FACTUAL BACKGROUND

16. The Department requires that "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." Wis. Admin. Code § NR 243.11(3)(a). "'Large CAFO' means an animal feeding operation that has 1,000 animal units or more at any time." Wis. Admin. Code § NR 243.03(31).

17. This permit requirement is based on the Department's "position" that these storage and spreading activities "will" eventually cause pollutants to enter surface water or groundwater. Note to Wis. Admin. Code § NR 243.12(1)(d). "Due to the extent of water resources in the state, it is the [D]epartment's position that if the manure or process wastewater from a CAFO is land

applied to sites in Wisconsin, pollutants from the manure or process wastewater will reach waters of the state either via leaching to groundwater or surface runoff." *Id.* "Also, it is the [D]epartment's position that storage facilities constructed at or below grade will have some pollutant discharges to groundwater." *Id.* "Therefore, all large CAFOs must apply for a WPDES permit." *Id.*

18. The Department also requires a person to apply for a WPDES permit within 90 days of expanding his or her animal feeding operation "to 1000 animal units or more due to the purchase of another animal feeding operation." Wis. Admin. Code § NR 243.11(3)(b).

19. Under Wis. Stat. § 283.33(8), "the [D]epartment may not require a permit under this section for . . . agricultural storm water discharges."

20. Yet the Department defines "agricultural storm water discharge" in a way that requires a CAFO with more than 999 animal units to have a WPDES permit in order for any of its discharges to qualify as agricultural storm water runoff.

21. Specifically, the Department defines "agricultural storm water discharge" to mean, "[f]or permitted CAFOs, 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).

22. The Department defines "agricultural storm water discharge" differently "[f]or unpermitted animal feeding operations with 300 to 999 animal units." Wis. Admin. Code § NR 243.03(2)(a).

23. A CAFO with 1,000 or more animal units thus falls outside the scope of the Department's definition of "agricultural storm water discharge" if the CAFO does not have a WPDES permit.

CLAIM ONE FOR DECLARATORY AND INJUNCTIVE RELIEF:
The Department's Permit Requirements in Section NR 243.11(3)(a) and (b) Conflict with the Uniformity Mandate in Wis. Stat. § 283.11(2)(a)

24. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

25. In a declaratory-judgment action, a court "shall declare" an agency rule "invalid" if the rule "exceeds the statutory authority of the agency." Wis. Stat. § 227.40(4)(a).

26. "No agency may promulgate a rule which conflicts with state law." Wis. Stat. § 227.10(2).

27. "A rule exceeds an agency's statutory authority if it conflicts with an unambiguous statute." *Seider v. O'Connell*, 2000 WI 76, ¶ 72, 236 Wis. 2d 211, 612 N.W.2d 659.

28. The Department's permit requirements in Wis. Admin. Code § NR 243.11(3)(a) and (b) conflict with the uniformity mandate in Wis. Stat. § 283.11(2)(a).

29. This statute provides: "[A]ll rules promulgated by the [D]epartment under this chapter as they relate to point source discharges, effluent limitations, municipal monitoring requirements, standards of performance for new sources, toxic effluent standards or prohibitions and pretreatment standards shall comply with and not exceed the requirements of the [CWA] and regulations adopted under that act." Wis. Stat. § 283.11(2)(a).

30. A federal regulation adopted under the CWA requires that "[a] CAFO must be covered by a permit at the time that it discharges." 40 C.F.R. § 122.23(f).

31. Previously, federal regulations required a CAFO to obtain a permit *before* actually discharging into navigable water, but those regulations were declared invalid for exceeding the U.S. Environmental Protection Agency's ("EPA") statutory authority. *Nat'l Pork Producers*

Council v. U.S. EPA, 635 F.3d 738 (5th Cir. 2011); *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486 (2d Cir. 2005).

32. Section NR 243.11(3)(a) and (b) require a CAFO to obtain a WPDES permit *before* an actual discharge into waters of the state occurs.

33. Section NR 243.11(3)(a) and (b) thus exceed the requirements of the CWA and regulations adopted under that act, in conflict with the uniformity mandate in Wis. Stat. § 283.11(2)(a).

34. Because section NR 243.11(3)(a) and (b) conflict with state law, they exceed the Department's authority.

35. This Court should thus declare section NR 243.11(3)(a) and (b) invalid under Wis. Stat. § 227.40(4)(a).

CLAIM TWO FOR DECLARATORY AND INJUNCTIVE RELIEF:
The Department's Permit Requirements in Section NR 243.11(3)(a) and (b) Exceed the Department's Statutory Authority

36. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

37. The Department's permit requirements in Wis. Admin. Code § NR 243.11(3)(a) and (b) exceed the Department's statutory authority.

38. "Where a Wisconsin statute is similar to a federal statute and there are no Wisconsin cases interpreting the state law, [courts] view the federal decisions in that area as persuasive authority." *State v. Fettig*, 172 Wis. 2d 428, 444, 493 N.W.2d 254 (Ct. App. 1992).

39. Two EPA regulations required CAFOs to obtain a permit before they discharged, based on the assumption that they would discharge. Federal appellate courts struck down both regulations for exceeding the EPA's statutory authority, reasoning that the CWA "gives the EPA jurisdiction to regulate and control only *actual* discharges—not potential discharges, and certainly not point sources themselves." *Waterkeeper Alliance*, 399 F.3d at 505. There is "no doubt that

there must be an actual discharge into navigable waters to trigger the CWA's requirements and the EPA's authority." *Nat'l Pork Producers*, 635 F.3d at 751. Thus, "the EPA cannot impose a duty to apply for a permit on a CAFO that 'proposes to discharge' or any CAFO before there is an *actual* discharge." *Id.* The EPA also cannot create liability for failing to apply for a permit, separate from liability for an unauthorized discharge. *Id.* at 751–53.

40. Wisconsin Stat. ch. 283 is materially identical to the CWA in ways relevant to the reasoning of *Waterkeeper Alliance* and *National Pork Producers*.

41. Under that reasoning, Wis. Stat. ch. 283 authorizes the Department to regulate *discharges* of pollutants into waters of the state—but not to regulate a point source *before* it actually discharges a pollutant into waters of the state.

42. Yet Wis. Admin. Code § NR 243.11(3)(a) and (b) require a CAFO to obtain a WPDES permit before the CAFO actually discharges a pollutant into waters of the state.

43. The permit requirements in section NR 243.11(3)(a) and (b) thus exceed the Department's statutory authority.

44. In addition, the potential liability created by section NR 243.11(3)(a) and (b) also exceeds the Department's authority.

45. Violation of any rule promulgated under Wis. Stat. ch. 283 can result in liability. *See, e.g.*, Wis. Stat. §§ 283.89(1), 283.91(1)–(3).

46. Accordingly, failure to obtain a permit as required by section NR 243.11(3)(a) and (b) can result in liability.

47. The Department exceeded its statutory authority by creating liability for failing to obtain a WPDES permit, separate from liability for an unauthorized discharge.

48. This Court should thus declare section NR 243.11(3)(a) and (b) invalid under Wis. Stat. § 227.40(4)(a).

CLAIM THREE FOR DECLARATORY AND INJUNCTIVE RELIEF:
The Department's Narrow Definition of "Agricultural Storm Water Discharge" Conflicts with the Uniformity Mandate in Wis. Stat. § 283.11(2)(b)

49. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

50. "Rules concerning storm water discharges may be no more stringent than the requirements under the [CWA] and regulations adopted under that act." Wis. Stat. § 283.11(2)(b).

51. Under federal law, "[t]he CWA specifically exempts 'agricultural stormwater discharges and return flows from irrigation agriculture' from the definition of a point source." *Fishermen Against Destruction of Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002) (citing 33 U.S.C. § 1362(14)).

52. "Because [agricultural stormwater] discharges are not considered to be point sources, there is no requirement that a property owner discharging these waters have [a National Pollutant Discharge Elimination System or NPDES] permit." *Closter Farms*, 300 F.3d at 1297 (citing 33 U.S.C. §§ 1311, 1342).

53. In other words, "agricultural stormwater run-off has always been considered nonpoint-source pollution exempt from the [CWA]." *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 120 (2d Cir. 1994).

54. Accordingly, the federal definition of "agricultural stormwater discharge" does not require any CAFO to have a NPDES permit in order for any of its runoff to qualify as an agricultural storm water discharge. 40 C.F.R. § 122.23(e)(1)–(2).

55. By contrast, under Wis. Admin. Code § NR 243.03(2)(a)–(b), the Department requires a CAFO with more than 999 animal units to have a WPDES permit in order for any of its runoff to qualify as an agricultural storm water discharge.

56. Wisconsin Admin. Code § NR 243.03(2) is thus more stringent than federal law and conflicts with the uniformity mandate in Wis. Stat. § 283.11(2)(b).

57. Because section NR 243.03(2) conflicts with state law, it exceeds the Department's authority.

58. This Court should thus declare section NR 243.03(2) invalid under Wis. Stat. § 227.40(4)(a).

CLAIM FOUR FOR DECLARATORY AND INJUNCTIVE RELIEF:
The Department's Narrow Definition of "Agricultural Storm Water Discharge" Exceeds the Department's Statutory Authority

59. Plaintiffs re-allege and incorporate the preceding allegations of this complaint.

60. Like the CWA, Wis. Stat. ch. 283 exempts agricultural storm water discharges from WPDES permit requirements because ch. 283 excludes such discharges from the definition of the term "point source." *See* Wis. Stat. § 283.01(12).

61. Wisconsin law states that "[t]he [D]epartment may not require a permit under this section for . . . agricultural storm water discharges." Wis. Stat. § 283.33(8).

62. Yet the Department defines "agricultural storm water discharge" in a way that requires a CAFO with more than 999 animal units to have a WPDES permit in order for any of its runoff to qualify as an agricultural storm water discharge. *See* Wis. Admin. Code § NR 243.03(2)(a)–(b).

63. In other words, section NR 243.03(2) requires certain CAFOs *to have a WPDES permit* in order for any of their runoff to qualify for the statutory *permit exemption* for agricultural storm water discharges.

64. Section NR 243.03(2) thus effectively requires certain CAFOs to obtain a permit for runoff that is statutorily exempt from permit requirements.

65. By requiring a WPDES permit for runoff that is statutorily exempt from WPDES permit requirements, section NR 243.03(2) exceeds the Department's statutory authority.

66. In addition, because an agricultural storm water discharge is not a point source, a person may not be liable under Wis. Stat. ch. 283 for such a discharge.

67. The Department's definition of "agricultural storm water discharge" in section NR 243.03(2) exposes unpermitted CAFOs with 1,000 or more animal units to liability for such a discharge.

68. By creating potential liability where none exists statutorily, section NR 243.03(2) exceeds the Department's statutory authority.

69. This Court should thus declare section NR 243.03(2) invalid under Wis. Stat. § 227.40(4)(a).

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request the following relief:

1. A declaration that the permit requirements in Wis. Admin. Code § NR 243.11(3)(a) and (b) conflict with state law, exceed the Department's statutory authority, and are invalid and unenforceable.

2. A declaration that the Department's definition of "agricultural storm water discharge" in Wis. Admin. Code § NR 243.03(2) conflicts with state law, exceeds the Department's statutory authority, and is invalid and unenforceable.

3. Any such other relief as the Court deems appropriate.

Dated this 26th day of May 2023.

Respectfully submitted,

Electronically signed by
Scott E. Rosenow

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