



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

PREHEARING CONFERENCE REPORT
AND
SCHEDULING ORDER

On October 5, 2016, 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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Axley Brynelson
2 East Mifflin Street, Suite 201
Madison, Wisconsin 53703

Wisconsin Department of Natural Resources, by

Attorney Jane Landretti
Department of Natural Resources
Division of Legal Services
101 South Webster Street
Madison, Wisconsin 53703

Richfield Dairy, by

Attorney Joseph Brydges
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PROCEDURAL FACTS

On September 3, 2014, in Case Nos. IH-12-04 and IH-12-08, Administrative Law Judge (ALJ) Jeffrey Boldt ordered “that the WPDES permit be modified to establish a cap on the number of animal units which can sustainably be accommodated at the site in conjunction with the high capacity well conditional approval modification.”

On October 27, 2015, the Department of Natural Resources (DNR) issued a modified WPDES permit to Richfield Dairy. The modified permit implemented the order by ALJ Boldt by setting the animal unit limit at 6,270. Thus, the modified permit included a new term or condition.

On December 22, 2015, a verified petition for contested case hearing was submitted to the DNR, pursuant to Wis. Stat. §§ 227.42 and 283.63. The petition includes the following factual dispute for a hearing: “Whether the 6,270 animal units authorized by the WPDES permit can be maintained on the 52.5 million gallons per year of water authorized by the well approval.”

On March 18, 2016, the DNR granted the petitioner’s request for review under § 283.63.

On July 18, 2016, the DNR requested that the Division of Hearings and Appeals (Division) conduct a limited review without giving the parties the opportunity to develop the record as to the factual dispute that was asserted in the December 22, 2015, petition. The specific issue granted for review by the DNR is: “Whether the Animal Unit Limit in the Modified Permit complies with the ALJ Order and DNR’s authority under state law.” The DNR’s proposed legal issue actually states two issues: 1. Whether the animal unit limit complies with the ALJ’s order, and 2. Whether the DNR has the authority to set an animal unit limit under the State laws of Wisconsin.

LIMITATION OF ISSUES FOR HEARING

The DNR’s hearing request was made pursuant to Wis. Stat. § 283.63. As noted earlier, the DNR has actually proposed two issues for review: 1. Whether the animal unit limit complies with the ALJ’s order, and 2. Whether the DNR has the authority to set an animal unit limit under the State laws of Wisconsin.

At the prehearing conference, Pleasant Lake Management District (the petitioner) confirmed that they are not seeking review of the DNR’s legal authority to set an animal unit limit. Furthermore, a review of the petitioner’s petition for contested case hearing confirms that the petitioner did not seek review of the DNR’s legal authority to set an animal unit limit. This is

significant because it is the petitioner who has the burden of proving the allegations made in their petition for contested case hearing:

“Wis. Stat. § 283.63(1)(b) At the beginning of each such hearing the petitioner shall present evidence to the department which is in support of the allegation made in the petition. All interested persons or their representative shall be afforded an opportunity to present facts, views or arguments relevant to the issues raised by the petitioners, and cross-examination shall be allowed.”

It is undisputed that the petitioner did not seek review of the DNR’s legal authority to set an animal unit limit and that the petitioner has no intent to prove such an allegation. As a result, that issue is not properly before the Division of Hearings and Appeals. Accordingly, the issue of the DNR’s authority to set an animal unit limit under the State laws of Wisconsin is dismissed from the current action.

The remaining issue of compliance with the ALJ’s order necessarily calls for an examination of whether the animal unit limit of 6,270 can sustainably be accommodated at the site and in conjunction with the high capacity well conditional approval modification. Ultimately, this is a factually-driven question.

OTHER ACTION TAKEN AT CONFERENCE

The DNR has requested a limited review proceeding where the petitioner would have no right to present evidence. At the prehearing conference, the DNR attempted to support that request by arguing that there has already been a § 283.63 fact-finding on the underlying permit. However, there has not been a fact-finding on the sustainability of the specific number that the DNR chose as the animal unit limit. Wisconsin Statute § 283.63 provides for a new fact-finding hearing whenever there is a challenge to a new condition that has been added to a permit. First, any permit applicant, permittee, affected state or 5 or more persons may secure a review of “any term or condition of any issued, reissued or modified permit.” Wis. Stat. Sec. 283.63(1). The new term or condition involved in the current action is the specific number that the DNR chose as the animal unit limit for the Richfield Dairy; that number is 6,270. Second, the statute requires the petitioner to present evidence in support of the allegations made in their petition for the contested case hearing. Wis. Stat. § 283.63(1)(b). In other words, the petitioner is entitled to a hearing where they are allowed to present evidence. Accordingly, if the matter proceeds to hearing, the Division of Hearings and Appeals will provide the type of hearing described in § 283.63(1)(b).

SCHEDULING ORDER

At the prehearing conference, the parties expressed an interest in litigating a motion for summary judgment. Based upon the representations of the parties, the following schedule is hereby ordered:

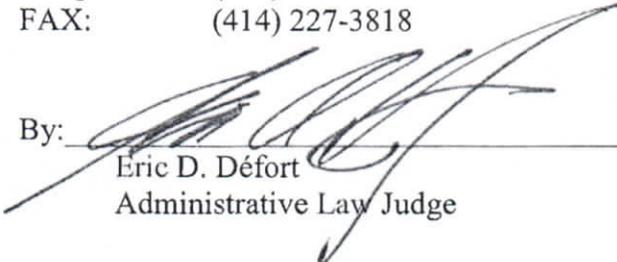
1. Any discovery in support of the motion for summary judgment shall be completed by December 16, 2016. The usual rules of civil procedure shall govern time limits for discovery.

2. Petitioner's motion for summary judgment, or partial summary judgment, and brief in support of said motion shall be filed no later than January 9th, 2017.
3. Any pleadings in response to petitioner's motion for summary judgment, or partial summary judgment, shall be filed by opposing counsel no later than February 10th, 2017.
4. Any reply by the petitioner to opposing counsel's responsive pleadings shall be filed no later than March 3, 2017.
5. The hearing on the motion for summary judgment will commence at 9 a.m. on Tuesday, March 14, 2017 at the Division of Hearings and Appeals, 5005 University Avenue, Madison, Wisconsin.
6. In this order whenever the term "filed" is used, it shall be understood that 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 October 11th, 2016.

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By: _____


Eric D. Défort
Administrative Law Judge