

BEFORE THE  
WISCONSIN DEPARTMENT OF NATURAL RESOURCES

4:01 p.m.

RECEIVED

In the matter of the Rosendale Dairy LLC  
Permit No. WI-0063959-01-0 to Discharge Under  
the Wisconsin Pollutant Discharge Elimination  
System ("WPDES"), issued February 27, 2009.

APR 28 2009  
OFFICE OF THE  
SECRETARY

JP

VERIFIED PETITION AND REQUEST FOR  
REVIEW UNDER WIS. STAT. § 283.63

To the Secretary of the Wisconsin Department of Natural Resources:

In accordance with Wis. Stat. § 283.63, the undersigned, People Empowered Protect the Land (PEPL) of Rosendale, Elaine Swanson, Severin Swanson, Timothy Thiel, Lynn Thiel, Helen Parker, [REDACTED] Charles Putzer, Philip Hoopman, and Ann Lindstrom (collectively, "Petitioners") hereby petition the Wisconsin Department of Natural Resources ("DNR") for review of the final decision to issue Wisconsin Pollutant Discharge Elimination System ("WPDES") Permit No. WI-0063959-01-0 ("Permit") to Rosendale Dairy, LLC ("Rosendale Dairy"). The DNR's Final Determination to issue the Permit was dated February 27, 2009, and the effective date of the Permit is March 1, 2009.

Section 283.63 of the Wisconsin Statutes allows five or more persons to secure a review by the DNR of "any permit denial, modification, suspension or revocation, and the reasonableness of or necessity for any term or condition of any issued, reissued or modified permit,... or any water quality based effluent limitation established under s. 283.13(5)" by filing a verified petition for review with the DNR Secretary stating the interest of the petitioners and setting forth the issues sought to be reviewed and the reasons why a hearing is warranted within 60 days after notice of permit issuance by the DNR.

By the plain language of section 283.63(1), DNR must grant a petition that is procedurally sufficient. That section states that department review "*shall* be accomplished" by complying with the procedural steps given in that section, and that upon receipt of a verified petition DNR "*shall* hold a public hearing" on the matters presented. Wis. Stat. § 283.63(1) and (1)(b). The procedural requirements, compliance with each of which is demonstrated by this petition, are as follows:

- (1) A verified petition must be filed with the Secretary "setting forth the issue sought to be reviewed by the department."
- (2) The petition "must be filed within 60 days after notice of any action which is reviewable under [section 283.63] is issued by the department."

- (3) The petition must “indicate the interest of the petitioners and the reasons why a hearing is warranted.”

Wis. Stat. § 283.63(1)(a). In support of their petition, Petitioners state:

## **I. FACTUAL BACKGROUND**

Rosendale Dairy is a new concentrated animal feeding operation (“CAFO”) located on County Road M in Rosendale, Fond du Lac County, Wisconsin. Rosendale Dairy proposes to house approximately 8,300 head of cattle (11,500 animal units) at its facility, though the WPDES Permit presently caps the size of the operation at 5,750 animal units. Rosendale Dairy applied for a WPDES Permit in various stages and with many conflicting or duplicative submittals beginning in May of 2008.

As part of the WPDES Permit application process, Rosendale Dairy was required to obtain WDNR approval of the plans and specifications for certain structures, including waste storage facilities and feed storage buildings. Rosendale Dairy failed to obtain this approval, and was issued a Notice of Noncompliance by WDNR on August 26, 2008.

On December 19, 2008, WDNR published a Notice indicating availability of the Draft WPDES Permit and an Environmental Impact Statement (“EIS”) for Rosendale Dairy. On January 22, 2009, WDNR held a Public Hearing on both the Draft WPDES Permit and the EIS in Ripon, Wisconsin. Public comments on both documents were received by WDNR through February 4, 2009. On behalf of Petitioners Elaine and Severin Swanson and PEPL of Rosendale, Midwest Environmental Advocates and Garvey McNeil & McGillivray submitted extensive written comments to the DNR raising numerous concerns with both the permit and the EIS.

On February 27, 2009, the DNR published a Notice of Final Determination to issue the WPDES Permit to Rosendale Dairy, along with the DNR’s response to comments on both the WPDES Permit and the EIS and the final documents themselves. The WPDES Permit was effective on March 1, 2009.

## **II. ISSUES FOR REVIEW AND REASONS WHY A HEARING IS WARRANTED.**

The specific issues to be reviewed are given in turn below, followed by the reasons why a hearing is warranted on each specific issue, in accordance with Wis. Stat. § 283.63(1)(a).

### **Issue 1**

**The reasonableness of Section 1.5 of the Rosendale Dairy WPDES Permit, which is in part based upon the Department’s approval of a legally deficient nutrient management plan.**

- (A) *The nutrient management plan submitted by Rosendale Dairy as part of its WPDES Permit Application did not comply with NR 243.14(2)(e) because Rosendale Dairy failed to identify the presence of subsurface drainage systems in*

*fields where manure or process wastewater will be applied “to the maximum extent practicable.”*

WPDES program requirements specifically applicable to CAFOs such as Rosendale Dairy require permit applicants to prepare and follow a nutrient management plan (“NMP”) that meets the standards given in NR 243.14, Wis. Admin. Code. A complete NMP that meets the requirements of section NR 243.14 is a required component of a CAFO’s permit application; without such an NMP, the application itself cannot be ruled complete. Wis. Admin. Code §§ NR 243.14(1)(a); NR 243.12(2)(a)(6).

Of particular importance to Rosendale Dairy is the requirement that the CAFO permit applicant “identify as part of its nutrient management plan, to the maximum extent practicable, the presence of subsurface drainage systems in fields where its manure or process wastewater is applied.” Wis. Admin. Code § NR 243.14(2)(e). According to the NMP submitted by Rosendale Dairy as part of its Permit application, “[a]fter an exhaustive search, subsurface drainage system maps have not been located, and to the plan writers’ knowledge do not exist.” Rosendale Dairy NMP at 6.1.

As demonstrated in the comment letter submitted by PEPL of Rosendale, numerous tile lines, lift pumps, and other subsurface drainage systems exist in or under the fields where Rosendale Dairy intends to spread manure, and are readily identifiable by a minimum degree of effort. Maps included as attachments to the comments by PEPL of Rosendale, and therefore in the DNR’s record of decision, clearly show the location of just some of these drainage systems. These maps were created by Petitioner Timothy Thiel based on personal observation and investigation, clearly “practicable” methods of information gathering. Rosendale Dairy failed to identify these and other drainage systems to the maximum extent practicable in its NMP, rendering the NMP inconsistent with NR 243.14(2)(e) and the permit application incomplete.

In its response to public comments, DNR explicitly recognized that identification of tile lines is an essential component of an NMP:

According to the NR 243 criteria listed above, drain tile identification, monitoring and applicable best management practice must be contained within the NMP in order to *document how* the operations [sic] land application activities will comply with the applicable NR 243 subsurface drain restrictions.

Notice of Final Determination at 18 (emphasis in original). In light of Rosendale Dairy’s failure to make any effort whatsoever to identify and include the presence of tile lines in its NMP, DNR clearly erred in approving the NMP and, therefore, acting on the Permit application. For these reasons, a hearing on the above issues is warranted.

(B) *The nutrient management plan submitted by Rosendale Dairy as part of its WPDES Permit Application did not comply with NR 243.14(2)(b)(7) because Rosendale Dairy proposes to land apply manure on areas of fields where the depth to groundwater or bedrock is less than 24 inches.*

Nutrient management plan requirements contained in NR 243 and applicable to Rosendale Dairy state that “[m]anure or process wastewater may not be applied on areas of a field with a depth to groundwater or bedrock of less than 24 inches.” Wis. Admin Code § NR 243.14(2)(b)(7). Yet many if not most of the fields identified in Rosendale Dairy’s NMP for manure application are identified as “w” soils, meaning they have “an apparent water table less than 12 inches from the surface (very poorly and poorly drained).” NRCS Wisconsin Conservation Planning Technical Note 1 (Nutrient Management), Appendix A, *available at* <ftp://ftp-fc.sc.egov.usda.gov/WI/technotes/cptn1.pdf>. By definition, then, application of manure to fields containing soils identified as “w” is likely to violate NR 243.14(2)(b)(7).

While DNR claims that the NRCS soil classifications “are not regulatory” and that “NR 243 requires Nutrient Management Plans meet the depth to groundwater requirement on a field by field basis at the time of application,” DNR Wet Soils Interim Guidance for Rosendale Dairy Inc. (October 27, 2008), DNR’s proposed compliance mechanism included in that Interim Guidance is inherently unworkable and not capable of ensuring compliance with NR 243.14(2)(b)(7). DNR erred in approving the Rosendale Dairy NMP and, therefore, in issuing the Permit. For these reasons, a hearing on the above issues is warranted.

- (C) *The nutrient management plan submitted by Rosendale Dairy as part of its WPDES Permit Application did not comply with NR 243.14(4) because Rosendale Dairy proposes to use the 25 foot buffer approach of NR 243.14(4)(a)1. and 2. but has not made the requisite showing required by NR 243.14(b) that “pollutant reductions equivalent to, or better than, reductions achieved by not applying manure and process wastewater within 100 feet of downgradient navigable waters or conduits to navigable waters.”*

NR 243.14(4) addresses restrictions on manure and process wastewater application within surface water quality management areas (“SWQMAs”) required of all CAFOs. The Permit Applicant is required by that subsection to select one of the options provided by the rule for SWQMA manure applications, and to identify the option selected in its NMP.

The benchmark standard for SWQMA applications is to avoid the application of manure and process wastewater within 100 feet of downgradient navigable waters or conduits to navigable waters. If the NMP includes one of the alternatives to this standard (i.e., one of the options under NR 243.14(4)(a)1., 2., or 4.), the applicant must affirmatively demonstrate to DNR “how the practices provide for pollutant reductions equivalent to, or better than, reductions achieved by not applying manure and process wastewater within 100 feet of downgradient navigable waters or conduits to navigable waters.” Wis. Admin. Code § NR 243.14(b). Furthermore, this showing must be made “on each field” included in the NMP. *Id.*

Rosendale Dairy’s NMP submitted with its WPDES Permit Application indicates that it will use the SWQMA application restriction in NR 243.14(4)(a)1.; Rosendale Dairy will not “apply manure or process wastewater within 25 feet of a navigable water, conduit to a navigable water or wetland; and inject or immediately incorporate manure and process wastewater in all other areas within the SWQMA.” Yet nowhere in its NMP did Rosendale Dairy make the requisite demonstration of NR 243.14(4)(b), and to the record does not show that DNR has made

a determination that the chosen practice will be equivalent to or better than a 100 foot no-application restriction.

The NMP submitted by Rosendale Dairy fails to meet the requirements of NR 243.14(4), and therefore DNR's issuance of the Permit was improper and unreasonable. For these reasons, a hearing on the above issues is warranted.

## Issue 2

### **The reasonableness of Section 1.5.1 of the Rosendale Dairy WPDES Permit, which impermissibly authorizes a new discharge of phosphorus and sediment to phosphorus-impaired or sediment-impaired waters.**

The record compiled by DNR as part of the permitting process (including the EIS prepared by the DNR) makes clear that a majority of the waters to which the fields identified in Rosendale Dairy's NMP for land application of manure will drain (and, therefore, are waters to which Rosendale Dairy will discharge nutrients and sediment) are impaired for phosphorus, sediment, or both. Several of these waters are included on Wisconsin's 2008 list of impaired waters, compiled and submitted to the U.S. EPA as required by section 303(d) of the Clean Water Act.<sup>1</sup> Other waters have significant nutrient or sediment-caused impairments that are known by DNR yet are not on the 303(d) list.<sup>2</sup> As described on pages III-11 to III-16 of the Rosendale Dairy EIS:

The lower 1.5 miles of the Fond du Lac River . . . is subjected to heavy sediment and nutrient loads from upstream rural runoff pollution, urban runoff pollution, and historical industrial discharges, resulting in poor water quality.

Rosendale Dairy is located in the headwaters of the West Branch of the Fond du Lac River. . . . [The] level of disturbance [to various tributaries of the West Branch of the Fond du Lac River] severely degrades aquatic habitat. These streams provide a delivery network for transporting runoff pollution to the larger water bodies in the watershed. . . . Water quality is generally poor due to nutrient enrichment and sediment deposition from runoff pollution.

Silver Creek [a tributary to Big Green Lake] is not meeting its potential as a trout stream due to urban and rural runoff pollution reducing water quality and increasing temperatures to levels that are marginal for trout survival.

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<sup>1</sup> 33 U.S.C. § 1313(d). 303(d)-listed waters that are likely to be impacted by Rosendale Dairy's discharge of pollutants include: Sevenmile Creek (listed for sediment); Van Dyne Creek (listed for sediment); Mosher Creek (listed for sediment); Anderson Creek (listed for sediment); South Branch of the Rock River (listed for sediment and phosphorus); Parson's Creek (listed for sediment and phosphorus); West Branch of the Rock River (listed for sediment and phosphorus); Silver Creek (listed for sediment); and Lake Winnebago (listed for mercury, sediment, and phosphorus).

<sup>2</sup> Inclusion on the State's formal 303(d) list is not the sole method of identifying impaired waters. A "water quality limited segment" is any segment "where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the [CWA]." 40 C.F.R. § 130.2(j). Therefore, based on current DNR knowledge, there are many segments that are impaired for phosphorus, sediment, or both – yet not include on the 303(d) list – that will likely receive pollutants discharged by Rosendale Dairy.

Lake Winnebago . . . has severe algae blooms resulting from nutrient enrichment . . . [and] is on Wisconsin's list of Impaired Waters due to contaminants in fish, degraded habitat, and nutrient enrichment.

Despite these existing impairments, the Permit issued to Rosendale Dairy authorizes a new discharge of phosphorus and sediment (among other pollutants) to waters of the state that are known to DNR to be impaired for phosphorus and sediment. This violates binding Federal law, which prohibits the issuance of a permit to a "new source or a new discharger if the discharge from its construction or operation will cause or contribute to the violation of water quality standards." 40 C.F.R. § 122.4(i); *see also Friends of Pinto Creek v. U.S. EPA*, 504 F.3d 1007, 1012 (explaining that the CWA and implementing regulations are "very clear that no permit may be issued to a new discharger if the discharge will contribute to the violation of water quality standards.").

Even if a new discharge of pollutants to impaired waters was not unlawful *per se*, DNR failed to conduct an analysis to determine whether Rosendale Dairy's proposed or potential discharge of pollutants would cause, or have a reasonable potential to cause, a violation of water quality standards in any waters that may be affected by the discharge.

The WPDES Permit issued to Rosendale Dairy is not a no-discharge permit; in fact, it authorizes a new discharge in several ways. First, discharges are permitted from the production area in certain circumstances (see Permit Section 1.1). Second, discharges are permitted from manure application sites, either directly or through subsurface drains, due to precipitation or snowmelt in certain circumstances (see Permit Section 1.5.1).

That CAFOs such as Rosendale Dairy discharge to waters of the state even though they may have an NMP in place is well known to the DNR:

Due to the extent of water resources in the state, it is the department'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. Also, it is the department's position that storage facilities constructed at or below grade will have some pollutant discharges to groundwater.

Wis. Admin. Code § NR 243.12(d), note. Additionally, both the EIS for Rosendale Dairy and the Response to Comments are replete with explicit acknowledgements that development of and conformance with an NMP only reduces the risk of, but does not prevent, the discharge of pollutants from a CAFO. *See, e.g.*, EIS at I-18 ("It is expected that compliance with . . . NMP best management practices related to manure spreading will significantly reduce the risk for nutrient pollution of ground water."); Response to Comments at 7 ("In most cases, once a parcel of cropland comes under a chapter NR 243 based nutrient management plan, there will likely be a reduction of pollutant runoff from that parcel of land.").

Many of the discharges that are likely to occur either from the production site or the land application sites will not be agricultural stormwater (which is exempt from CWA permitting requirements) but will in fact be point source discharges, including discharges of manure not associated with precipitation; discharges where the NMP is not complied with; and discharges

where other permit conditions are not met. The DNR failed to take these discharges into account in the permitting process, and DNR's authorization of these discharges to phosphorus-impaired waters is contrary to law. For these reasons, a hearing on the above issues is warranted.

### Issue 3

#### **The reasonableness of Sections 1.1 and 1.5.1 of the Rosendale Dairy WPDES Permit, which fail to include additional water quality based effluent limitations as needed to ensure compliance with applicable water quality standards.**

DNR unreasonably issued the Rosendale Dairy WPDES Permit without imposing additional water quality based effluent limitations necessary to ensure compliance with all applicable water quality standards, in violation of Wis. Stat. § 283.13(5).

As an initial matter, Petitioners note DNR's broad authority to regulate the discharge or potential discharge of pollutants in a manner that protects water quality:

The legislature granted the DNR "all authority necessary to establish, administer and maintain a state pollutant discharge elimination system to effectuate the policy set forth under sub. (1) and consistent with all the requirements of the federal water pollution control act." Wis. Stat. § 283.001(2). This broad grant of power authorizes the DNR to implement a permit program that protects groundwater as well as surface water. As we noted previously, in this respect, the state regulatory program is broader and more stringent than the federal program. This far-reaching power complements the DNR's broad regulatory power to protect waters of the state in other legislative enactments as well. Reading § 283.001(1) and (2) together, we find that the enabling statute clearly and unambiguously empowers the DNR to regulate where groundwater may be affected by the discharge of pollutants. We perceive no implication that the legislature intended to limit the DNR's authority to protect waters of the state to discharges of pollutants occurring on sites owned by the discharger.

*Maple Leaf Farms, Inc. v. Wis. Dept. of Natural Resources*, 247 Wis.2d 96, 105-106, 633 N.W.2d 720, 725 - 726 (Wis.App. 2001). Because DNR "clearly and unambiguously" has the authority to protect groundwater and surface water where they may be harmed by the discharge of pollutants, DNR's assertion that water quality based effluent limitations cannot be imposed either to Rosendale Dairy's production area or its land application areas is baseless.

A core requirement of all WPDES Permits is that they include "[a]ny more stringent limitations, including those [n]ecessary to meet federal or state water quality standards [or] [g]roundwater protection standards established under [Wis. Stat. §] 160." Wis. Stat. § 283.31(3)(d). In addition, DNR regulations require that "[w]ater quality related effluent limitations . . . be established whenever categorical effluent limits required under s. 283.13, Stats., are less stringent than necessary to achieve the designated water quality standard. Water quality related effluent limitations for point sources shall be specified in a WPDES permit." Wis. Admin. Code § NR 212.05(1).

The Permit issued to Rosendale Dairy does not contain any water quality based effluent limitations. To Petitioners' knowledge, DNR failed to even identify the applicable surface and

groundwater quality standards, much less to apply them, in the development and issuance of the Permit. Once the applicable water quality standards have been identified, the DNR must then establish limitations more stringent than the categorical conditions found in NR 243 if they are necessary to protect water quality:

The department shall establish more stringent effluent limitations . . . and shall require compliance with such water quality based effluent limitations in any permit issued, reissued or modified if these limitations are necessary to meet applicable water quality standards, treatment standards, schedules of compliance or any other state or federal law, rule or regulation. The department shall require compliance with these water quality based effluent limitations[.]

Wis. Stat. § 283.13(5). DNR's failure to determine whether additional water quality based effluent limitations are necessary for Rosendale Dairy, and to include any such effluent limitations in the WPDES Permit issued to Rosendale Dairy, is contrary to law. Wis. Stat. § 283.13(5). For these reasons, a hearing on the above issues is warranted.

#### **Issue 4**

#### **The reasonableness of Sections 1.1 and 1.5.1 of the Rosendale Dairy WPDES Permit, which authorize a new discharge of pollutants without performing the antidegradation analysis required by law.**

As explained above and as evidenced by the terms and conditions of its NMP and WPDES Permit, Rosendale Dairy is a point source "proposing to . . . create a new discharge to the surface waters of the state" thereby triggering the antidegradation policy in section NR 102.05(1)(a), Wis. Adm. Code and the antidegradation implementation procedures in NR 207, Wis. Adm. Code. *See* Wis. Admin. Code § NR 207.01(2) (discussing applicability of the antidegradation requirements). Wisconsin's antidegradation policy prohibits any lowering of water quality unless it has been affirmatively demonstrated to the DNR that the lowering of water quality is necessary and will accommodate social and economic development. Wis. Adm. Code § NR 102.05(1)(a). DNR failed to perform the requisite antidegradation review and thus issuance of the permit is not in accordance with state law

Under state law, the antidegradation procedure is applicable to any "new discharge" which is defined as "any point source which has not received a WPDES permit from the department prior to March 1, 1989." Wis. Admin. Code § NR 207.02(8). Rosendale Dairy meets this definition because it is a point source and has not received a WPDES permit prior to March 1, 1989.

The antidegradation procedure for proposed new or increased discharges to fish and aquatic life waters<sup>3</sup> begins with the applicant's submittal of an "assessment of existing treatment capability" and "[e]ffluent quality data and background water quality data for indicator parameters so a determination will be made on whether or not a significant lowering of water

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<sup>3</sup> Presumably most of the waters to which Rosendale Dairy will discharge are classified as fish and aquatic life waters, though Petitioners' have been unable to locate any mention of the classification of the receiving waters in the record underlying the DNR's decision at issue here).

quality will occur[.]” Wis. Admin. Code § NR 207.04(1). Following certain DNR determinations, the applicant may be required to submit additional information sufficient to justify the proposed lowering of water quality. Id. § NR 207.04(1)(c) and (d).

DNR failed to conduct the requisite antidegradation analysis, and to Petitioners’ knowledge Rosendale Dairy did not submit any of the required information upon which such an analysis should have been based. For these reasons, a hearing on the above issues is warranted.

#### **Issue 5**

#### **The reasonableness of Sections 1.1 and 1.5.1 of the Rosendale Dairy WPDES Permit, which fail to specify maximum levels of discharges as required by law.**

State law requires that “[e]ach permit issued by the department under [the WPDES program] shall . . . specify maximum levels of discharges . . . developed from the permittee’s reasonably foreseeable projection of maximum frequency or maximum level of discharge resulting from production increases or process modifications during the term of the permit.” Wis. Stat. § 283.31(5). The Permit issued to Rosendale Dairy does not contain any maximum levels of discharges, in violation of state law. For this reason, a hearing on the above issues is warranted.

#### **Issue 6**

#### **The reasonableness of Section 1.6 of the Rosendale Dairy WPDES Permit, which fails to include sufficient water quality monitoring requirements to ensure compliance with its terms and conditions and compliance with state water quality standards.**

Wisconsin statute requires that WPDES permittees follow certain water quality monitoring requirements necessary to ensure that the terms and conditions of the permit are complied with, and as necessary to ensure that water quality standards will be maintained. Federal NPDES permitting regulations require all permits to specify “[r]equired monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring.” 40 C.F.R. § 122.48(b). This requirement is echoed in Wisconsin’s WPDES requirements, which state that

Every owner or operator of a point source who is required to obtain a permit . . . shall . . . [e]stablish and maintain records of the volume of effluent discharged and the amount of each pollutant discharged from each point source under the owner’s or operator’s ownership or control [and i]nstall, use and maintain such monitoring equipment or methods, including where appropriate, biological monitoring methods, as are necessary to determine the volume of effluent discharged and to identify and determine the amount of each pollutant discharged from each point source under the owner’s or operators’ ownership or control.”

Wis. Stat. § 283.55(1)(a) and (c); *see also* Wis. Admin. Code § NR 243.19(1)(c) (detailing manure, process wastewater, and soil sampling requirements for CAFOs).

Furthermore, DNR has ample authority to require additional monitoring as it deems “necessary to identify the type and quantity of any pollutants discharged from the point source[.]” Wis. Stat. § 283.55(1), which necessarily includes those pollutants discharged from the land application sites. *See, e.g., Maple Leaf Farms, Inc. v. DNR*, 247 Wis. 2d 96 (2001); Wis. Admin. Code § NR 243.142(1) (liability for management and land application of manure lies with the CAFO permittee, regardless of the ownership of the land). NR 243.15(7) further authorizes DNR to require “the installation of groundwater monitoring wells in the vicinity of manure storage facilities, runoff control systems, permanent spray irrigation systems and other treatment systems where . . . necessary to evaluate impacts to groundwater[.]” Application of manure or process wastewater to a field in accordance with an NMP is a “runoff control system” or “other treatment system” because the DNR’s stated purpose of the NMP is to achieve compliance with NRCS Standard 590, the permitting requirements of NR 243, and the conditions of the issued WPDES Permit. *See* Wis. Admin. Code § NR 243.14(1)(b). Despite these legal requirements, in the Permit issued to Rosendale Dairy only limited monitoring at the production site is required, and no groundwater or surface water quality monitoring of fields where manure will be applied is included in the Permit.

Based on these and other authorities, DNR has specifically recognized that it may impose additional restrictions or conditions where necessary to “provide additional protection to groundwater *especially in areas with shallow depth to groundwater and tiled fields.*” Response to Comments at page 17. Yet DNR failed to include even minimal monitoring requirements to determine whether the NMP or other Permit conditions will be protective of surface and groundwater quality. For these reasons, a hearing on the above issues is warranted.

### **III. INTEREST OF PETITIONERS IN THE PROCEEDING**

The interest of the Petitioners is as follows:

Petitioner People Empowered Protect the Land (PEPL) of Rosendale is an unincorporated citizens’ organization, founded in April 2008, whose mission is to protect the environment and natural resources of Rosendale, Wisconsin, and to advance sustainable methods of agriculture. PEPL of Rosendale submitted written comments on the Draft WPDES Permit for Rosendale Dairy, dated February 4, 2009. Each of the individual Petitioners below are members of PEPL of Rosendale and as such joined the comments submitted to DNR.

Petitioner Elaine Swanson is a member of PEPL of Rosendale and resides with her husband at W10732 Triangle Road, Pickett, Fond du Lac County, Wisconsin, approximately one mile northeast of Rosendale Dairy. Mrs. Swanson has lived at this address for 28 years. She and her husband have invested considerable time and energy restoring their land to its original condition as a native prairie and wildlife sanctuary. Mrs. Swanson enjoys bird and wildlife watching, gardening, landscape design and renovation, and photography on her property and on the lands and waters surrounding Rosendale Dairy. Mrs. Swanson also enjoys kayaking with her family on nearby Big Green Lake, a watershed which is at risk from the land application of manure authorized by the DNR in Rosendale Dairy’s WPDES Permit. Mrs. Swanson is concerned that the operation of Rosendale Dairy will harm her way of live and her aesthetic

interests by increasing vehicle traffic, disrupting bird and wildlife feeding and migration patterns, and contaminating local waters through the over-application of manure. Mrs. Swanson and her husband obtain their drinking water from a private well on their property; this well is currently safe to drink from, but Mrs. Swanson is concerned that Rosendale Dairy's land application of manure threatens the safety of their well.

Petitioner Severin Swanson is a member of PEPL of Rosendale and resides with his wife Elaine at W10732 Triangle Road, Pickett, Fond du Lac County, Wisconsin, approximately one mile northeast of Rosendale Dairy. Mr. Swanson has lived at this address for 28 years. He and his wife have invested considerable time and energy restoring their land to its original condition as a native prairie and wildlife sanctuary. Mr. Swanson is concerned that the effort he has expended restoring the land, shallow ponds, and wildlife habitat on his property will be jeopardized by the operation of Rosendale Dairy. Mr. Swanson's property is traversed by a creek that is fed by a lift pump and other conveyances that drain or transport water from Rosendale Dairy and fields identified by Rosendale Dairy's nutrient management plan as locations selected for the land application of manure. Mr. Swanson fears that the operation of Rosendale Dairy, as allowed by the WPDES Permit issued to it by DNR, will impact his ability to observe and enjoy wildlife, gardening, habitat restoration, and hiking on his property and the surrounding region.

Petitioner Timothy Thiel is a member of PEPL of Rosendale and resides with his wife Lynn at N8485 County Highway M, Ripon, Fond du Lac County, Wisconsin. Mr. Thiel's property is approximately one mile south of Rosendale Dairy, and he has resided at this location since 1978. Mr. Thiel's way of life depends on a clean and safe environment and productive natural landscape, both of which Mr. Thiel fears are at risk because of the operations of Rosendale Dairy. Mr. Thiel practices carpentry and heats his home by using timber harvested from his land. He has enjoyed observing wildlife, hunting, and fishing on the lands and waters surrounding Rosendale Dairy for many years, and is concerned that the application of manure to the surrounding landscape will harm the birds and wildlife he enjoys. Mr. Thiel obtains drinking water from a private well that has been contaminated in the past due to shallow soils, and Mr. Thiel is fearful that the land application of manure by Rosendale Dairy poses a risk to his well because the WPDES Permit issued to the dairy by the DNR will allow over-application of manure on fields that have a shallow depth to groundwater.

Petitioner Lynn Thiel is a member of PEPL of Rosendale and resides with her husband Timothy at N8485 County Highway M, Ripon, Fond du Lac County, Wisconsin. Mrs. Thiel's property is approximately one mile south of Rosendale Dairy, and she has resided at this location since 1978. Mrs. Thiel shares her husband's concerns about the risks posed to her drinking water well due to the operation of Rosendale Dairy, including the land application of manure on nearby farmlands, which is authorized by the DNR in the WPDES Permit issued to Rosendale Dairy. Mrs. Thiel is a Licensed Practical Nurse (LPN), and is well aware of the respiratory hazards posed by industrial livestock facilities like Rosendale Dairy from air pollution emitted from on-site open manure lagoons and the land application of untreated manure. Mrs. Thiel also enjoys long-distance running on the roads surrounding her property and Rosendale Dairy, and fears that the operation of Rosendale Dairy threatens her health.

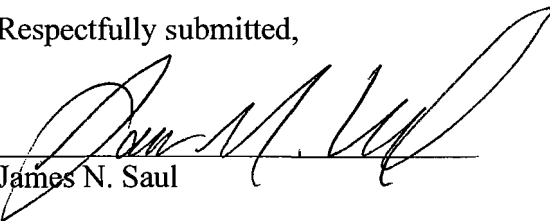
Petitioner Helen Parker is a member of PEPL of Rosendale and resides with her husband at W10001 Olden Road, Pickett, Fond du Lac County, Wisconsin. Mrs. Parker's home and property are located approximately two miles from Rosendale Dairy. A large portion of Mrs. Parker's property is adjacent to farm fields that are identified in Rosendale Dairy's nutrient management plan as sites for the land application of manure. Mrs. Parker has lived at the above address for approximately 10 years. Mrs. Parker and her husband enjoy vegetable and flower gardening, and have made an effort to re-establish native plants on their property. A pond on Mrs. Parker's property provides habitat and a source of water for the wildlife in the area. Mrs. Parker's husband is a sportsman and has fished the streams, rivers, and lakes in this area around Rosendale Dairy with his family since he was a child. The drinking water at Mrs. Parker's home comes from a well, which was tested in April 2008 and was found to be safe to drink. Mrs. Parker is very concerned about the impact Rosendale Dairy's operations, including the management of manure both at the facility itself and through land application at nearby fields, will have on the land and water resources on and near her property. Mrs. Parker is especially concerned about the potential harm to her drinking water well and pond from Rosendale Dairy's land spreading of manure. She fears that the WPDES Permit issued to Rosendale Dairy will allow harmful pollution of the area's ground and surface waters.

Petitioner Philip W. Hoopman resides at 152 Sunset Avenue, Ripon, Fond du Lac County, Wisconsin. Mr. Hoopman is employed by the City of Ripon, Wisconsin, as the Manager of the Ripon Wastewater and Water Utilities Department. He has been the Manager of the Wastewater Utility for 22 years, and the Manager of the Water Utility for two years. Mr. Hoopman has personally developed an acute awareness of the impacts of improper manure and other waste management practices on public and private drinking water supplies. He has also become personally knowledgeable about the past and present water quality of the area's wells, including municipal wells and private wells. Mr. Hoopman is gravely concerned that the manure spreading proposed by Rosendale Dairy and authorized by its WPDES Permit, especially on sensitive areas within documented wetlands in proximity to private wells, will cause these wells to become contaminated with disease-causing bacteria (pathogens) and result in elevated levels of Nitrate Nitrogen in excess of 10 mg/l; a known cause for "blue baby syndrome" as well as a special detriment to anyone with lung associated issues. Mr. Hoopman fears that documented local geology and hydrogeology features more than suggest that locally contaminated private wells could very easily act as conduits to City of Ripon public water wells and private wells farther afield. Mr. Hoopman is further concerned with the risks posed by the operation of Rosendale Dairy to the area's surface waters, including Silver Creek, which is fed in part by discharges from fields identified by Rosendale Dairy's nutrient management plan as locations for the land application of manure and which runs through the City of Ripon before entering Big Green Lake. Mr. Hoopman joins this Petition solely in his personal and individual capacity, and not in his official or professional capacity or as an agent or officer of the City of Ripon.

Petitioner Ann H. Lindstrom resides at 118 River Drive, Appleton, Wisconsin. Mrs. Lindstrom owns property at W10910 Olden Road, Rosendale, Fond du Lac County, Wisconsin. Mrs. Lindstrom has owned this land in Rosendale for over 31 years, and uses the land primarily for hunting and other outdoor recreation. Mrs. Lindstrom and her family have actively managed this property, including its marshlands, to ensure its health and continued viability as productive habitat for birds and wildlife. Mrs. Lindstrom's property in Rosendale is a registered game farm, and has been the site of a Birds without Borders study. Mrs. Lindstrom enjoys a variety of pursuits on this land, including hunting, bird-watching, horticulture, and habitat restoration. Mrs. Lindstrom is concerned that the operation of Rosendale Dairy, including on-site management practices and the land application of manure on nearby fields, will negatively impact her ability to participate in these pursuits and will harm her use and enjoyment of her property. Mrs. Lindstrom is especially concerned about the health of the marsh that exists on her property, due to the hydrologic connection between that marsh and the fields upon which Rosendale Dairy intends to apply its manure.

Dated this 28<sup>th</sup> day of April, 2009

Respectfully submitted,



James N. Saul

James N. Saul  
Midwest Environmental Advocates, Inc.  
551 W. Main Street, Suite 200  
Madison, WI 53703  
Tel. 608-251-5047  
Fax 608-268-0205

Peter E. McKeever  
Garvey McNeil & McGillivray, S.C.  
634 West Main Street  
Madison, WI 53703  
Tel. 608-256-1003

Attorneys for Petitioners PEPL of Rosendale, Elaine Swanson, Severin Swanson, Timothy Thiel, Lynn Thiel, Helen Parker, [REDACTED] Charles Putzer, Philip Hoopman, and Ann Lindstrom

**BEFORE THE  
WISCONSIN DEPARTMENT OF NATURAL RESOURCES**

---

**In the matter of the Rosendale Dairy LLC  
Permit No. WI-0063959-01-0 to Discharge Under  
the Wisconsin Pollutant Discharge Elimination  
System ("WPDES"), issued February 27, 2009.**

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**STATEMENT OF VERIFICATION  
OF PETITIONER ELAINE SWANSON REGARDING A  
PETITION FOR REVIEW UNDER WIS. STAT. § 283.63**

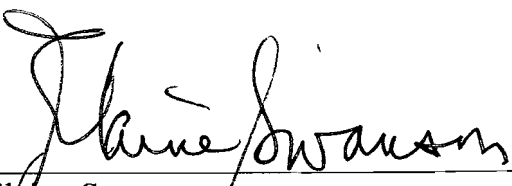
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STATE OF WISCONSIN

COUNTY OF FOND DU LAC

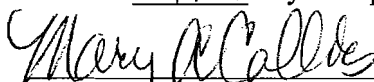
I, Elaine Swanson, hereby verify that I am a Petitioner in the above-referenced Petition for Review and Request for Contested Case Hearing. I have read the Petition and attest that it is true and correct to the best of my knowledge and belief.

Dated this 27 day of April, 2009.

  
\_\_\_\_\_  
Elaine Swanson  
W10732 Triangle Road  
Pickett, Wisconsin 54964

*State of Wisconsin  
Winnebago County*

Subscribed, sworn to, and signed before  
me this 27th day of April, 2009.

  
\_\_\_\_\_  
Notary Public, State of Wisconsin  
My commission expires 8-2-2009

**BEFORE THE  
WISCONSIN DEPARTMENT OF NATURAL RESOURCES**

---

**In the matter of the Rosendale Dairy LLC  
Permit No. WI-0063959-01-0 to Discharge Under  
the Wisconsin Pollutant Discharge Elimination  
System ("WPDES"), issued February 27, 2009.**

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**STATEMENT OF VERIFICATION  
OF PETITIONER SEVERIN SWANSON REGARDING A  
PETITION FOR REVIEW UNDER WIS. STAT. § 283.63**

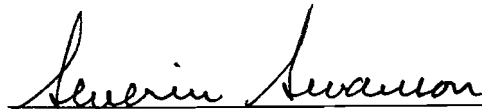
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STATE OF WISCONSIN

COUNTY OF FOND DU LAC

I, Severin Swanson, hereby verify that I am a Petitioner in the above-referenced Petition for Review and Request for Contested Case Hearing. I have read the Petition and attest that it is true and correct to the best of my knowledge and belief.

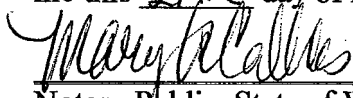
Dated this 27 day of April, 2009.



Severin Swanson  
W10732 Triangle Road  
Pickett, Wisconsin 54964

*State of Wisconsin  
Winnebago*

Subscribed, sworn to, and signed before  
me this 27th day of April, 2009.



Notary Public, State of Wisconsin

My commission expires 8-2-2009

**BEFORE THE  
WISCONSIN DEPARTMENT OF NATURAL RESOURCES**

---

**In the matter of the Rosendale Dairy LLC  
Permit No. WI-0063959-01-0 to Discharge Under  
the Wisconsin Pollutant Discharge Elimination  
System ("WPDES"), issued February 27, 2009.**

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**STATEMENT OF VERIFICATION  
OF PETITIONER TIMOTHY THIEL REGARDING A  
PETITION FOR REVIEW UNDER WIS. STAT. § 283.63**

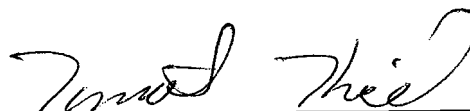
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STATE OF WISCONSIN

COUNTY OF FOND DU LAC

I, Timothy Thiel, hereby verify that I am a Petitioner in the above-referenced Petition for Review and Request for Contested Case Hearing. I have read the Petition and attest that it is true and correct to the best of my knowledge and belief.

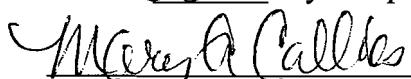
Dated this 24th day of April, 2009.



Timothy Thiel  
N8485 County Highway M  
Ripon, WI 54971

State of Wisconsin  
Winnebago County

Subscribed, sworn to, and signed before  
me this 26th day of April, 2009.



Notary Public, State of Wisconsin

My commission expires 8-2-2009

**BEFORE THE  
WISCONSIN DEPARTMENT OF NATURAL RESOURCES**

---

**In the matter of the Rosendale Dairy LLC  
Permit No. WI-0063959-01-0 to Discharge Under  
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System ("WPDES"), issued February 27, 2009.**

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**STATEMENT OF VERIFICATION  
OF PETITIONER LYNN THIEL REGARDING A  
PETITION FOR REVIEW UNDER WIS. STAT. § 283.63**

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STATE OF WISCONSIN

COUNTY OF FOND DU LAC

I, Lynn Thiel, hereby verify that I am a Petitioner in the above-referenced Petition for Review and Request for Contested Case Hearing. I have read the Petition and attest that it is true and correct to the best of my knowledge and belief.

Dated this 26<sup>th</sup> day of April, 2009.

*State of Wisconsin  
Winnebago County*

Lynn Thiel  
Lynn Thiel  
N8485 County Highway M  
Ripon, WI 54971

Subscribed, sworn to, and signed before  
me this 26<sup>th</sup> day of April, 2009.

Mary Callie  
Notary Public, State of Wisconsin  
My commission expires 8-2-2009

**BEFORE THE  
WISCONSIN DEPARTMENT OF NATURAL RESOURCES**

---

**In the matter of the Rosendale Dairy LLC  
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**STATEMENT OF VERIFICATION  
OF PETITIONER HELEN PARKER REGARDING A  
PETITION FOR REVIEW UNDER WIS. STAT. § 283.63**

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STATE OF WISCONSIN

COUNTY OF FOND DU LAC

I, Helen Parker, hereby verify that I am a Petitioner in the above-referenced Petition for Review and Request for Contested Case Hearing. I have read the Petition and attest that it is true and correct to the best of my knowledge and belief.

Dated this 26<sup>th</sup> day of April, 2009.

Helen Parker  
Helen Parker   
W10001 Olden Road   
Pickett, WI 54964

State of Wisconsin  
Winnebago County

Subscribed, sworn to, and signed before  
me this 26<sup>th</sup> day of April, 2009.

Mary A. Callies  
Notary Public, State of Wisconsin  
My commission expires 8-2-2009

**BEFORE THE  
WISCONSIN DEPARTMENT OF NATURAL RESOURCES**

---

**In the matter of the Rosendale Dairy LLC  
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System ("WPDES"), issued February 27, 2009.**

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**STATEMENT OF VERIFICATION  
OF PETITIONER [REDACTED] REGARDING A  
PETITION FOR REVIEW UNDER WIS. STAT. § 283.63**

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STATE OF WISCONSIN

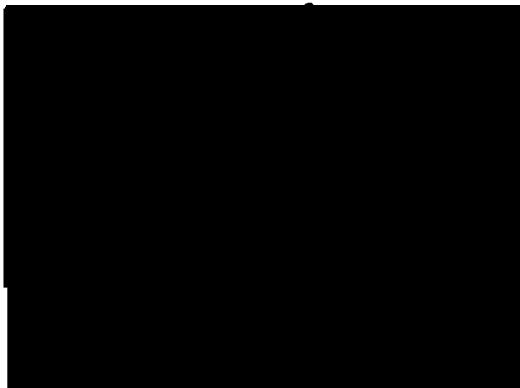
COUNTY OF FOND DU LAC

[REDACTED], hereby verify that I am a Petitioner in the above-referenced Petition for Review and Request for Contested Case Hearing. I have read the Petition and attest that it is true and correct to the best of my knowledge and belief.

Dated this 25<sup>th</sup> day of April, 2009.

Subscribed, sworn to, and signed before  
me this 25<sup>th</sup> day of April, 2009.

Mary A. Callies  
Notary Public, State of Wisconsin  
My commission expires 8-2-2009



**BEFORE THE  
WISCONSIN DEPARTMENT OF NATURAL RESOURCES**

---

**In the matter of the Rosendale Dairy LLC  
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the Wisconsin Pollutant Discharge Elimination  
System ("WPDES"), issued February 27, 2009.**

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**STATEMENT OF VERIFICATION  
OF PETITIONER CHARLES J. PUTZER REGARDING A  
PETITION FOR REVIEW UNDER WIS. STAT. § 283.63**

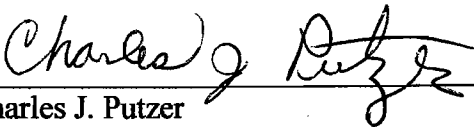
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STATE OF WISCONSIN

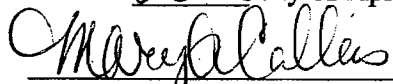
COUNTY OF FOND DU LAC

I, Charles J. Putzer, hereby verify that I am a Petitioner in the above-referenced Petition for Review and Request for Contested Case Hearing. I have read the Petition and attest that it is true and correct to the best of my knowledge and belief.

Dated this 25<sup>th</sup> day of April, 2009.

  
\_\_\_\_\_  
Charles J. Putzer  
N9417 Sam Crest Lane  
Pickett, WI 54964

Subscribed, sworn to, and signed before  
me this 25<sup>th</sup> day of April, 2009.

  
\_\_\_\_\_  
Notary Public, State of Wisconsin  
My commission expires 8-2-2009

BEFORE THE  
WISCONSIN DEPARTMENT OF NATURAL RESOURCES

In the matter of the Rosendale Dairy LLC  
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STATEMENT OF VERIFICATION  
OF PETITIONER PHILIP W. HOOPMAN REGARDING A  
PETITION FOR REVIEW UNDER WIS. STAT. § 283.63

STATE OF WISCONSIN  
COUNTY OF FOND DU LAC

I, Philip W. Hoopman, hereby verify that I am a Petitioner in the above-referenced Petition for Review and Request for Contested Case Hearing. I have read the Petition and attest that it is true and correct to the best of my knowledge and belief.

Dated this 27<sup>th</sup> day of April, 2009.

Philip W. Hoopman  
Philip W. Hoopman  
152 Sunset Ave.  
Ripon, WI 54971

Subscribed, sworn to, and signed before  
me this 27<sup>th</sup> day of April, 2009.

Karen B. Engel  
Notary Public, State of Wisconsin  
My commission expires 1/29/12

**BEFORE THE  
WISCONSIN DEPARTMENT OF NATURAL RESOURCES**

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**In the matter of the Rosendale Dairy LLC  
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System ("WPDES"), issued February 27, 2009.**

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**STATEMENT OF VERIFICATION  
OF PETITIONER ANN LINDSTROM REGARDING A  
PETITION FOR REVIEW UNDER WIS. STAT. § 283.63**

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STATE OF WISCONSIN

COUNTY OF FOND DU LAC

I, Ann Lindstrom, hereby verify that I am a Petitioner in the above-referenced Petition for Review and Request for Contested Case Hearing. I have read the Petition and attest that it is true and correct to the best of my knowledge and belief.

Dated this 27 day of April, 2009.

Ann Lindstrom  
Ann Lindstrom

Subscribed, sworn to, and signed before  
me this 27<sup>th</sup> day of April, 2009.

Melissa Oude  
Notary Public, State of Wisconsin  
My commission expires 12/11/2011