

**CENTERVILLE CITIZENS FOR AIR,  
RIVER, AND ENVIRONMENTAL  
SOLUTIONS, U.A.  
12505 Lakeshore Road  
Cleveland, Wisconsin 53015**

**Petitioner,**

**RUSS TOOLEY  
12505 Lakeshore Road  
Cleveland, Wisconsin 53015**

**Petitioner,**

**CASE NO.  
CASE CODE: 30607**

**WAYNE SCHUETTE, SR.  
5212 County Trunk Highway X  
Cleveland, Wisconsin, 53015**

**Petitioner,**

v.

**DEPARTMENT OF NATURAL RESOURCES,  
101 S. Webster Street  
Madison, Wisconsin 53703**

**Respondent.**

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**INITIAL BRIEF OF PETITIONERS**

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The Petitioners, Centerville Citizens for Air, River, and Environmental Solutions, U.A. (“Centerville CARES”), Russ Tooley, and Wayne Schuette, Sr., by their attorneys, Midwest Environmental Advocates, Inc., file this brief in support of their Petition for Judicial Review to this Court pursuant to WIS. STAT. § 227.52 (2004), *et seq.*, for review of the final Environmental Analysis (“EA”) decision of the Department of Natural Resources (“DNR”),

dated November 8, 2004, that an Environmental Impact Statement is not required by Wisconsin's Environmental Policy Act ("WEPA"), WIS. STAT. § 1.11, and WIS. ADMIN. CODE § NR 150, to assess the environmental impacts of granting a Wisconsin Pollutant Discharge Elimination System ("WPDES") Permit No. WI-0058602-02-0 ("Proposed Permit") to Maple Leaf Dairy, Inc., ("MLD"), a Concentrated Animal Feeding Operation, located in the Town of Centerville, Wisconsin, in southern Manitowoc County.

### **PETITIONERS' INTERESTS**

Petitioners have brought this lawsuit because MLD's existing operations have significantly infringed upon their use and enjoyment of their private property and of public air and water. MLD is now proposing a much larger expansion than what it has represented to the DNR, and what the DNR's EA attempts to evaluate. MLD's much larger expansion includes plans to confine thousands of additional cattle and dispose of 35.5 million gallons of liquid animal waste on land that includes areas surrounding two fragile streams, Point Creek and Fischer Creek, that flow directly into Lake Michigan. The DNR has underestimated the environmental impacts of MLD's current operations, and has entirely failed to review MLD's much larger potential expansion that could generate 35.5 million gallons of liquid animal waste. Under WEPA, Petitioners have a right to a full and accurate analysis of potential adverse environmental impacts from MLD's operation, including the cumulative impacts of the largest of MLD's proposed expansions. The DNR's failure to comply with WEPA, however, has denied Petitioners the full protection of the law.

Petitioner Centerville CARES is an unincorporated association under Chapter 184 of the Wisconsin Statutes, whose mailing address is 12505 Lakeshore Road, Cleveland, Wisconsin, 53015 and whose purpose is to protect the state's water resources and natural environment for

the citizens of Wisconsin, and, in particular, the Seven Mile Creek and Silver Creek watersheds, the Manitowoc River drainage basin, the watersheds of Point, Fisher, and Centerville Creeks, and Lake Michigan in southern Manitowoc and northern Sheboygan Counties, and promote responsible land use and sustainable agriculture in northeastern Wisconsin. (Affidavit of Russ Tooley, ¶ 3, *hereinafter* “Tooley Aff.”.)

Centerville CARES is a membership organization with approximately 100 members in northeastern Wisconsin, many of whom reside in the Town of Centerville area. (Tooley Aff., ¶ 4.) Petitioner Russ Tooley is the President of Centerville CARES. (Tooley Aff., ¶ 2) He resides at 12505 Lakeshore Road, Cleveland, Wisconsin, 53015. (Tooley Aff. ¶ 1) Petitioner Wayne Schuette, Sr. (“Wayne Schuette”) is a member of Centerville CARES. (Affidavit of Wayne Schuette, Sr., ¶ 3, *hereinafter* “Schuette Aff.”.) He resides at 5212 County Trunk Highway X, Cleveland, Wisconsin, 53015. (Schuette Aff. ¶ 1.)

Members of Centerville CARES, including Russ Tooley and Wayne Schuette, use, recreate on, and enjoy the aesthetic values of the Seven Mile Creek and Silver Creek watersheds, the Manitowoc River drainage basin, the watersheds of Point, Fisher, and Centerville Creeks, and Lake Michigan in southern Manitowoc and northern Sheboygan counties. (Tooley Aff. ¶ 5; Schuette Aff. ¶ 5.) Members of Centerville CARES also own property near, live near, boat in, fish in, hike along, and picnic near these water bodies. (Tooley Aff. ¶¶ 6-8; Schuette Aff. ¶¶ 5, 12.)

Members of Centerville CARES, including the named Petitioners, breathe the air surrounding MLD and have struggled for years to cope with the malodorous air pollution caused by MLD’s operations. (Tooley Aff. ¶ 13; Schuette Aff. ¶ 12.) Approximately 25 members of Centerville CARES, including the named Petitioners, live less than two miles downwind of

MLD's facilities, and are adversely affected when they are exposed to MLD's malodorous and hazardous air pollutant emissions. (Tooley Aff. ¶ 14; Schuette Aff. ¶ 13.) Some members of Centerville CARES feel nausea and a gag reflex when exposed to MLD's odors from its freestall barns and manure pits, and are forced to close their windows to avoid and minimize their exposure to the air pollution, feeling trapped in their own homes. (Tooley Aff. ¶ 17; Schuette Aff. ¶ 15.) Members of Centerville CARES are concerned for their long term health as a result of this exposure to the air pollution. (Tooley Aff. ¶ 18; Schuette Aff. ¶ 18.)

Petitioners are reasonably concerned about the potential contamination of surface water, including discharges of phosphorus-laden sediment, as well as the emission of hazardous and malodorous air pollutants such as ammonia and hydrogen sulfide that may result from MLD's operations under the Proposed Permit. (Tooley Aff. ¶¶ 10, 14; Schuette Aff. ¶¶ 14-17.) This air and water pollution will adversely affect the Petitioner's use and enjoyment of the environment surrounding MLD's operations and the air and water in southern Manitowoc County and northern Sheboygan County. (Tooley Aff. ¶¶ 1-25; Schuette Aff. ¶¶ 1-18.)

Mr. Tooley, Mr. Schuette, and other members of Centerville CARES live in the same watershed as MLD. Mr. Tooley and Mr. Schuette use and enjoy Lake Michigan, Fischer Creek, Point Creek, Centerville Creek, and other waters that drain directly into Lake Michigan. (Tooley Aff. ¶¶ 6-7; Schuette Aff. ¶ 5.) In addition, Mr. Tooley and other members of Centerville CARES own residential property on Lake Michigan near Fischer Creek and Point Creek, approximately one and one half miles due east of MLD. (Tooley Aff. ¶ 6.)

A named petitioner, Mr. Tooley uses and enjoys Fischer Creek and Point Creek, and his use and enjoyment is impaired by the degraded water quality in those creeks. (Tooley Aff. ¶¶ 5, 7-9.) Further, Mr. Tooley is unable to fully use and enjoy his property when algal blooms form

in Lake Michigan. (Tooley Aff. ¶ 8.) Mr. Tooley is concerned that MLD's land application of animal waste is causing or contributing to the algal blooms in Lake Michigan by delivering phosphorus, a plant nutrient that promotes algal growth in surface waters, to streams that ultimately drain to Lake Michigan. (Tooley Aff. ¶ 10.) Further, offensive odors from MLD's operations have reached Mr. Tooley's property, and Mr. Tooley is unable to fully use and enjoy his property when odors and air pollution from MLD's operations invade his property. (Tooley Aff. ¶¶ 15-16.)

As a named petitioner, Mr. Schuette owns a one acre pond and land on a tributary to Point Creek immediately adjacent to one of MLD's Satellite Facilities. (Schuette Aff. ¶ 6.) Mr. Schuette's pond has been polluted by MLD's past discharges of animal waste through a subsurface drain tile into the pond. (Schuette Aff. ¶ 7.) In response, Mr. Schuette has had to dredge the polluted sediment from his pond. (Schuette Aff. ¶ 8.) Also, Mr. Schuette's land has been eroded by MLD's high volume discharges of runoff and animal waste. (Schuette Aff. ¶ 9.) In response, Mr. Schuette has had to take measures to mitigate the erosion. (Schuette Aff. ¶¶ 9-10.)

Like Mr. Tooley, Mr. Schuette has also suffered the offensive odors that invade Mr. Schuette's land from MLD's operations, in part because Mr. Schuette lives approximately ½ mile closer to MLD and inland from Lake Michigan. (Schuette Aff. ¶ 12.) Like Mr. Tooley, Mr. Schuette is unable to fully use and enjoy his property when odors and air pollution invade his property. (Schuette Aff. ¶¶ 14-17.)

Petitioners have demonstrated their continued interest in this matter ever since the public announcement of MLD's first WPDES permit in 1997 ("1997 WPDES Permit"). They have attended and provided public testimony at all hearings and public meetings held on MLD's

operations. (Tooley Aff. ¶¶ 20-23.) For example, on May 28, 1997, some who are now members of Centerville CARES attended an informational hearing regarding the DNR's issuance of its first WPDES permit to MLD, authorizing MLD to house up to 1,600 cows at the facility. (DNR's Notice of Appearance and Statement of Position ("DNR Appearance"), ¶ 26.) Those members expressed concerns about the odors and air pollution generated by MLD as well as MLD's apparent history of manure mismanagement. (DNR Appearance, ¶ 26.)

On December 10, 2002, the Manitowoc County Soil and Water Conservation Department hosted a public meeting, which DNR attended, entitled "Maple Leaf Dairy Expansion Listening Session," regarding MLD's proposal to house up to 9,000 cattle at its facilities. (Tooley Aff. ¶ 21.) Many who are now members of Centerville CARES attended and expressed concerns about water quality in Lake Michigan, odors and air quality surrounding MLD's facilities, the amount of waste MLD's cattle produce, and the consequent environmental effects MLD's operation may have on the surrounding area, including Lake Michigan. (Tooley Aff. ¶ 21; DNR Appearance, ¶ 27.)

In an effort to identify and resolve conflicts between private property owners and MLD's proposed expansion, on April 7, 2003, attorneys for Centerville CARES sent a letter to the DNR describing Centerville CARES' concerns with MLD's expansion plans, as well as MLD's history of causing air quality problems and manure mismanagement. (DNR Appearance, ¶ 28; Affidavit of Andrew C. Hanson, Ex. A, *hereinafter* "Hanson Aff.") The DNR never provided a written response to the April 7, 2003, letter.

On April 21, 2004, Centerville CARES co-sponsored a public meeting, which DNR attended, regarding MLD's proposed expansion plans and any wastewater treatment system

proposed by MLD that would allegedly address Centerville CARES' concerns. (DNR Appearance, ¶ 30.)

Members of Centerville CARES and many other members of the public submitted comments to the DNR on its Draft Environmental Assessment ("Draft EA"), noticed to the public on September 1, 2004, for the DNR's issuance of the Proposed WPDES Permit. (Hanson Aff., Ex. B) They expressed concerns about the current air and water pollution in the Town of Centerville, and asked DNR to evaluate MLD's current and future impacts on the air and water. They expressed concerns about MLD's malodorous emissions of air pollutants and its potential negative impacts on water quality. (Hanson Aff., Ex. B; DNR Appearance, ¶ 31.)

On September 22, 2004, Centerville CARES, by and through its attorneys, submitted a written letter to the DNR during the public comment period on the Draft EA. The letter described flaws in the DNR's analysis of MLD's impacts on the environment, including the DNR's failure to evaluate the impacts of MLD's reasonably foreseeable expansion plans, MLD's manure management practices, and MLD's emissions of odor and hazardous air pollutants. (DNR Appearance, ¶ 32; Hanson Aff., Ex. C)

On September 30, 2004, Centerville CARES' members Donna Hammond, Russ Tooley, Garth Hammond, Marilyn Verick, Glen Verick, and Mary Tooley requested a public informational hearing on the DNR's reissuance of a Proposed WPDES Permit to MLD, stating that they live near MLD, use Fischer Creek, Point Creek, and Lake Michigan for recreation; expressing concern about MLD's adverse impacts on water quality; and requesting more information about MLD's proposed expansion plans. (DNR Appearance, ¶ 33; Hanson Aff., Ex. D) On October 11, 2004, by and through its attorneys, Centerville CARES submitted written comments regarding the Proposed WPDES Permit, expressing concern about the adequacy of the

Proposed WPDES Permit terms to protect water quality in Lake Michigan and the Town of Centerville and surrounding area. (DNR Appearance, ¶ 34.)

The DNR's decision to not require an EIS adversely impacts the Petitioners' interest in accurate information about the potential adverse environmental impacts from MLD's expansion. (Tooley Aff. ¶¶ 24-25; Schuette Aff. ¶ 18.) The decision harms Petitioners' use of private and public property, including their interests in air quality in the Town of Centerville and in protecting Lake Michigan in southern Manitowoc and northern Sheboygan Counties and its Wisconsin tributaries, such as the Seven Mile Creek and Silver Creek watersheds, the Manitowoc River drainage basin, the watersheds of Point, Fisher, and Centerville Creeks. (Tooley Aff. ¶¶ 1-25; Schuette Aff. ¶¶ 1-18.) The decision by the DNR also threatens the rural and agricultural character of the area which Petitioners seek to maintain. (Tooley Aff. ¶ 25.)

### **FACTUAL BACKGROUND**

#### **I. MLD'S CURRENT OPERATIONS HAVE POLLUTED AND CONTINUE TO POLLUTE FISCHER CREEK, POINT CREEK, LAKE MICHIGAN AND THE AIR IN THE TOWN OF CENTERVILLE.**

##### **A. MLD's Current Operations, Not Including MLD's Proposed Expansions, Confine 3,798 Cattle that Generate More than 21 Million Gallons of Liquid Animal Waste.**

MLD is a Wisconsin corporation that owns and operates a Concentrated Animal Feeding Operation ("CAFO")<sup>1</sup> located in the Town of Centerville, Wisconsin, in southern Manitowoc

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<sup>1</sup> Defined as a "point source" of pollution under the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251 et seq., 1362(14), a CAFO is an animal feeding operation that which feeds, confines, maintains or stables 1,000 animal units or more. Wis. Admin Code § NR 243.03(9). An "animal unit" is a unit of measure used to determine the total number of single animal types, or combination of animal types, which are fed, confined, maintained or stabled in animal feeding operation. Wis. Admin. Code § NR 243.03(9).

County. (Notice of Appearance and Statement of Position of Maple Leaf Dairy, Inc., ¶ 37, *hereinafter* “MLD Appearance”; DNR Appearance, ¶ 37.)

MLD’s CAFO confines a total of 3,798 dairy cattle, or 5,823 animal units,<sup>2</sup> between its Main Facility at 6832 County Trunk Highway X, Cleveland, Wisconsin, (“Main Facility”) and its five Satellite Facilities.<sup>3</sup> (DNR Appearance, ¶ 43; Hanson Aff., Ex. E at 1)

MLD’s 3,798 dairy cattle currently produce 21,114,698 gallons<sup>4</sup> of liquid animal waste per year that will be stored in up to thirteen large open-air waste lagoons at each of its confinement facilities.<sup>5</sup> (DNR Appearance, ¶ 50; Hanson Aff., Ex. F at 3)

MLD applies the more than 21 million gallons of liquid animal waste on 5,100 acres of land within and near the Town of Centerville, Wisconsin in Manitowoc and Sheboygan Counties. (DNR Appearance, ¶ 51; Hanson Aff., Ex. E at 2.)

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<sup>2</sup> DNR’s statement in the EA that MLD currently confines 5,823 animal units appears to be an error. The Administrative Record shows that either MLD or the DNR miscalculated the total number of animal units. (Hanson Aff., Ex. G at 1; DNR Appearance, ¶ 43.) However, because the DNR admits that 5,823 animal units was accurate as of the date of the EA, Petitioners use that figure in this brief.

<sup>3</sup> The five satellite facilities are called: the “Schwinn Farm,” “Wagner Farm,” “Milton’s Farm,” “Rusch Farm,” and “B. Koenig Farm.”

<sup>4</sup> The Administrative Record in this case indicates that as of October 2004, MLD generated approximately 25,154,205 gallons of liquid animal waste per year. (Hanson Aff., Ex. G at 2) If MLD expanded its herd size by just less than 20% (triggering additional DNR review), MLD would produce 29,777,722 gallons of liquid animal waste per year. (Hanson Aff., Ex. G at 3). Significantly, the fact that MLD would be allowed to store almost 10 million gallons more of animal this is omitted entirely from the EA.

<sup>5</sup> For example, the Main Facility currently contains four such lagoons, identified as Earthen Storage 001, which contains 5.9 million gallons of animal waste; Earth Storage 002, which contains 4.1 million gallons of animal waste; “Northern most slurry store,” which contains 1,000,000 gallons of animal waste; and “Southern-most slurry store,” which contains 750,000 gallons of liquid animal waste. (Hanson Aff., Ex. F at 3)

## **B. Animal Waste Can Pollute Streams and Lakes When Disposed of on Cropland.**

Animal waste can be a harmful surface water and groundwater pollutant. “Biochemical oxygen demand associated with manure can reduce dissolved oxygen levels in surface waters.” (Hanson Aff., Ex. E at 5) “In addition, ammonia in the manure can be toxic to fish and aquatic life.” (Hanson Aff., Ex. E at 5.) Animal waste also contains bacteria, and may also contain antibiotics and growth hormones injected into dairy cattle and excreted in their waste. (DNR Appearance, ¶ 132.)

Animal waste contains nitrogen and phosphorus, which are nutrients necessary for plant growth. (DNR Appearance, ¶ 133.) However, “[n]utrients associated with manure can have detrimental impacts on groundwater (nitrogen) and surface waters (nitrogen and phosphorus) if not properly land applied.” (Hanson Aff., Ex. E at 5.)

“While phosphorus is a critical component of ensuring healthy crop growth, excessive phosphorus that is applied on land can make its way to surface waters where it contributes to excessive algal growth.” (Hanson Aff., Ex. E at 6.) “Excessive algal growth contributes to such problems as low dissolved oxygen in surface waters, a problem that is occurring in [Fischer Creek].” (Hanson Aff., Ex. E at 6.)

Current Best Management Practices are not stringent enough to prevent all phosphorus from running off into valuable lakes, rivers and streams. “While best management practices required in the WPDES permit will go a long way toward minimizing excessive phosphorus delivery to nearby surface waters, soluble phosphorus and phosphorus attached to soil particulates is likely to reach nearby surface waters from fields hydraulically connected to these surface waters.” (Hanson Aff., Ex. E at 6.)

“Since all cropland must receive nutrients to grow, either via organic sources (e.g. legumes, manure) or inorganic sources (commercial fertilizer), all cropland delivers phosphorus to navigable waters unless it is hydrologically disconnected from navigable waters (a minority of cropland throughout the state).” (Hanson Aff., Ex. H at 5.)

**C. Fischer and Point Creeks and Lake Michigan Are Locally and Regionally Valuable Waters that Have Been Polluted.**

The waters affected by MLD’s operations and current expansions are highly valued by the residents of the Town of Centerville, and also by the region as whole. For example, Fischer Creek, which is one mile south of MLD, is a tributary to Lake Michigan. (Hanson Aff., Ex E at 5.) Fischer Creek supports a fishery that is mostly warm water sport fish such as Bass, Northern Pike and basic forage fish. (Hanson Aff., Ex. E at 5.) “Fischer Creek is one of the few cold-water streams in southern Manitowoc County.” (Hanson Aff., Ex. I at P00307.)

Additionally, the State of Wisconsin, Manitowoc County, and private parties expended millions of dollars to protect natural areas surrounding Fischer and Point Creeks in 1996 and 2002, respectively, arising from several years and hundreds of hours of local citizen involvement and public service. (Hanson Aff., Ex. J.)

For example, the DNR spent \$1.4 million and private donors spent \$500,000 to purchase the 39-acre Point Creek Natural Area, which includes 1,000 feet of creek bank on Point Creek and about 2,700 feet of Lake Michigan shoreline. (Hanson Aff., Ex. J at P00483A-00483B.) Point Creek Natural Area is on the north side of Point Creek in the Town of Centerville. (Hanson Aff., Ex. J at P00483B.) “The land is considered a diverse riparian ecosystem that supports communities of transient and migratory wildlife species.” (Hanson Aff., Ex. J at P00483D.)

Despite the high value and tremendous public and private effort to protect Fischer Creek, Point Creek, and the Lake Michigan shoreline, those waters all suffer from pollution caused in

part by excessive phosphorus concentrations. (DNR Appearance, ¶¶ 117-118.) Fischer Creek suffers from low dissolved oxygen and algal growth. (Hanson Aff., Ex. E at 6.) Lake Michigan, downstream of Fischer and Point Creeks, also suffers from thick mats of algae, caused in part by elevated phosphorus levels. (DNR Appearance, ¶ 119; Tooley Aff. ¶ 8.)

In August of 2004, the DNR recently placed Hika Park Bay Beach and Fischer Park Beaches on Wisconsin's list of impaired waters, meaning that they are not safe for swimming. (Hanson Aff., Ex. K.) Hika Park Bay Beach and Fischer Park Beaches are located on Lake Michigan and are downstream of Fischer and Point Creeks. The loss of the full use of these waters harms the private riparian property interests and the public property usage interests of Petitioners.

**D. MLD's Current Operations Have Discharged Animal Waste into Local Waters.**

Although not the only reason for the contamination in Point and Fischer Creeks and Hika Park Bay Beach and Fischer Park Beaches, MLD has allowed animal waste to runoff into these local waters. The DNR, for its part, has a long history of being a toothless tiger and failing to follow through with any formal enforcement actions or permit modifications to remedy MLD's ongoing pollution.

In the course of disposing of millions of gallons of liquid manure, MLD has had significant problems properly managing its manure, dating back to before 1988. Manitowoc County records reveal that in 1988 MLD spread solid manure on frozen ground along the south bank of an intermittent stream at the north end of the field. (Hanson Aff., Ex. L.) According to the Manitowoc County Soil and Water Conservation District, spreading manure on frozen ground violated MLD's Watershed Grant Agreement. *Id.*

Additionally, according to a February 1988 letter from the Manitowoc County Land Conservation Committee to Tod Leiteritz (principal and operator of MLD):

A previous fish kill a number of years ago on the stream running through your property also occurred as a result of your mismanagement of animal waste. This history of mis-management would not go lightly in enforcement actions if a future fish kill would occur again.

(Hanson Aff., Ex. M.) In March of 1990, the DNR documented a direct discharge of leachate and other pollutants from a drain tile on the MLD property to Fischer Creek. The DNR also observed pollution in drainage ways from other fields in the area, but did not observe a fish kill.

(Hanson Aff., Ex. N.)

Similarly, in November of 1994, the DNR documented a direct discharge of pollutants from a drain tile apparently installed by MLD to Fischer Creek. (Hanson Aff., Ex. O.) According to the DNR, the “pipe had a surface inlet in the ditch just east of the existing freestall” and “[w]ater in the ditch... looked contaminated...” (Hanson Aff., Ex. O at P00093.) Another source of contamination was a pool of water that MLD had apparently attempted to drain by connecting the drain tile. *Id.* The DNR became aware of the spill and responded because a neighbor had called to report a “green milky discharge” that appeared to be coming from MLD’s property. (Hanson Aff., Ex. O at P00092.) Ultimately, the DNR concluded that “the samples clearly indicate a significant discharge of pollutants [sic] to the stream from your operation.” (Hanson Aff., Ex. O at P00096.)

In November of 1995, the DNR conducted an onsite evaluation of MLD’s structures to determine what changes would have to be made in order for MLD to comply with the requirements for a WPDES permit. The DNR raised concerns about “runoff into the tile system” and the “direct pipe conveyance to the creek.” (Hanson Aff., Ex. P at P00108.)

On November 18, 1996, the DNR stated that “manure problems continue” and that “calf barn open to south still drains east to ditch and tile to stone.” (Hanson Aff., Ex. Q.)

In April of 1997, shortly after the DNR proposed to issue its first WPDES permit to MLD, the DNR advised MLD that a “hole” on the property filled with contaminated water was a suspected source of pollution in Fischer Creek in 1994 and would have to be emptied to prevent groundwater contamination. Further, the DNR warned MLD about the pollution to Fischer Creek from the tile system on the property:

Also, runoff from the tile around your feed bunkers will continue to carry contaminated water from the bunkers themselves, and **MAY NOT BE TILED INTO THE SYSTEM WHICH FLOWS INTO THE CREEK.** You will be held responsible for contaminated water flowing through your tiles into the stream and subject to substantial penalties if problems persist.

(Hanson Aff., Ex. R) (emphasis original) The DNR further noted that, regarding an upcoming hearing on MLD’s WPDES permit, “odor and past problems with tile line discharges appear to be the major concerns of your neighbors.” *Id.* Likewise, the Town of Centerville requested a public hearing on MLD’s WPDES permit issuance because the Town had received “complaints on water quality in the area and would like to know how this will be monitored and by whom especially on creeks and ponds in the area, as well as private wells that could be affected.”

(Hanson Aff., Ex. S at P00164A.)

In June of 1998, the DNR documented a substantial manure spill that appeared to come from MLD and caused a total fish kill in Fischer Creek. (Hanson Aff., Ex. I.) The DNR noted that a heavy rain caused a manure application to eventually drain through subsurface tile lines to a tributary to Fischer Creek. (Hanson Aff., Ex. I at P00353 – P00355.) The DNR also documented runoff directly from the field into the tributary to Fischer Creek. *Id.*

The manure spill contributed to more than 3,000 dead game and forage fish. (Hanson Aff., Ex. I at P00353 – P00355.) Further, “[f]isheries staff believe the mortality was actually higher but many of the dead fish had either been washed into Lake Michigan or been removed by predators before the survey could be completed.” (Hanson Aff., Ex. I at P00354.)

The DNR issued a Notice of Violation (NOV) for the permit violations on February 5, 1999, and considered referring the case to the Wisconsin Department of Justice for civil prosecution. (Hanson Aff., Ex. I at P00355.) MLD contested the NOV and attributed the pollution to a small neighboring dairy. (Hanson Aff., Ex. I at P00379.)

Approximately three weeks after the DNR issued the NOV, it sent a letter to MLD expressing concern with MLD’s high manure application rates. (Hanson Aff., Ex. T.)

In May of 2001, Manitowoc County documented yet another complaint of runoff from Maple Leaf Dairy. (Hanson Aff., Ex. U.) Manitowoc County found that MLD had plowed through former grass waterways that had appeared on United States Geological Survey (USGS) maps. *Id.*

In or around July and August of 2003, the DNR noticed that MLD had failed to install a permanent leachate collection system for its operation in accordance with plans and specifications approved by the DNR. (Hanson Aff., Ex. V; Hanson Aff., Ex. W.)

On August 1, 2003, one of MLD’s satellite operations had plowed through grassed waterway that drains to Point Creek in violation of the cost-share agreement provided under the Silver Creek Priority Watershed Project. (Hanson Aff., Ex. X.)

In addition to this long history of manure mismanagement and perhaps not coincidentally, water sampling conducted by members of Centerville CARES in coordination with the DNR revealed severe nutrient and bacterial contamination immediately downstream of

MLD's operation, with *E.coli* levels of 41,000 colonies per 100 ml immediately downstream of MLD's Main Facility on County Trunk Highway X as recently as May 10, 2004. (Hanson Aff., Ex. Y.)

Fourteen of sixteen sampling points on Fischer and Point Creeks near fields on which MLD applies animal waste revealed *E.coli* levels on May 10, 2004, that would have resulted in beach closures in Lake Michigan downstream. Centerville CARES also discovered dangerously high *E.coli* levels in samples taken on July 22, 2004. (Hanson Aff., Ex. Z.)

**E. MLD's Current Operations Are Polluting the Air With Odors, Dust, and Hazardous Air Pollution.**

MLD's Main Facility, Consolidation Site, and remaining Satellite Facilities will generate odors, dust, and emissions of hazardous air pollutants, including ammonia and/or hydrogen sulfide. (Hanson Aff., Ex. E at 4) Emissions of ammonia and hydrogen sulfide are caused by the decomposition of animal waste, including dairy cow feces and urine. (DNR Appearance, ¶ 95.)

Dust, including particulate matter, can cause asthma and irritation in persons exposed to the dust. (DNR Appearance, ¶86.) If present in "sufficient quantities," ammonia and hydrogen sulfide are highly toxic and irritating gases listed as hazardous air pollutants in Wis. Admin. Code Ch. NR 445, Table A. (DNR Appearance, ¶ 94.) Also, ammonia and hydrogen sulfide both cause odor and are respiratory irritants. (DNR Appearance, ¶ 96.) Exposure to hydrogen sulfide can cause nausea, cramps, vomiting and eye irritation. (DNR Appearance, ¶ 97.)

Moreover, ammonia emissions can also interact with the atmosphere to form chemical variants of the gas that deposit on land and water through a process known as "atmospheric deposition." (DNR Appearance, ¶ 98.)

As far back as 1997, MLD has long been a source of offensive odors for residents in the Town of Centerville. (Hanson Aff., Ex. AA; Hanson Aff., Ex. BB.)

On April 16, 1997, a Town Board Supervisor of the Town of Centerville sent a letter to the DNR, expressing concern about MLD's offensive odors and the series of complaints that the board had gotten from residents in the Town of Centerville. The letter stated:

We as a board have received enough verbal and now a series of written complaints about this large dairy operation that the owner admits [and] agrees has a sour smell noxious odor which he has assured us he is working fervently to solve but to date has been unable to.

(Hanson Aff., Ex. CC.)

On April 28, 1997, the entire Town Board of the Town of Centerville sent a letter to the DNR, requesting a public hearing on its proposed issuance of the 1997 WPDES Permit to MLD. The letter stated that “[i]tems we feel important to be covered at this hearing are: the terrible smell that comes off of this operation and whether it can be corrected, if it will get worse as the operation expands and any monitoring available on air quality.” (Hanson Aff., Ex. DD.) Residents have complained to the Town Board and the DNR from 1997 to the present about the odors and air pollution from MLD. (Tooley Aff. ¶ 20; Schuette Aff. ¶ 13.)

## **II. MLD's EXPANSIONS HAVE ESCAPED DNR REVIEW.**

### **A. MLD's Past Expansions Occurred Without DNR Review.**

Not only has MLD had a long history of polluting area streams, creeks, and lakes, MLD has expanded its operations without obtaining additional DNR permits or WEPA environmental review by the DNR. In fact, MLD's current 1997 WPDES permit has been expired for almost three years. (Hanson Aff., Ex. EE; WIS. STAT. § 283.53(1) (2004).) MLD's ability to escape DNR review for past expansions underscores Petitioners' great concern that the EA fails to account for MLD's planned and reasonably foreseeable future expansions.

MLD has expanded its Main Facility over several years, beginning in the early 1990s. (MLD Appearance, ¶ 52.) In 1997, MLD applied to the DNR for the issuance of its 1997 WPDES Permit. (MLD Appearance, ¶ 53.) The DNR’s “Briefing Memo” for MLD’s 1997 WPDES Permit stated that MLD would house approximately 1,600 milking cows. (Hanson Aff., Ex. FF.)

At a May 28, 1997, informational hearing, Tod Leiteritz, registered agent for MLD, “commented that his recent expansion is as large as the dairy will get.” (DNR Appearance, ¶ 55; Hanson Aff., Ex. GG.) However, contrary to Mr. Leiteritz’s public statement, MLD had plans to grow to approximately 2,200 head of cattle<sup>6</sup> during the course of the 1997 WPDES Permit. (Hanson Aff., Ex. E at 1.)

In fact, since obtaining the 1997 WPDES Permit, MLD acquired control over new livestock operations and built new structures, and on the date that the EA was issued MLD confined 3,798 cattle (5,823 animal units) at the Main Facility and Satellite Facilities. (Hanson Aff., Ex. E at 1; Petitioners Petition for Judicial Review, ¶ 43; DNR Appearance, ¶ 43.)

Since the issuance of the 1997 WPDES Permit and almost three years after its expiration, MLD grew from confining 1,600 head to 3,798 head without ever obtaining a WPDES permit modification or additional environmental review of potential impacts under WEPA.

**B. The DNR Has Failed to Review MLD’s Future Planned Expansion.**

MLD is poised once again to obtain a WPDES Permit and WEPA environmental review that fails to assess the potential impacts of planned and reasonably foreseeable expansions.

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<sup>6</sup> MLD now states as part of this litigation that it confines only 1,600 “lactating cows” at the Main Facility, as if only “lactating cows” and not other cattle produced animal waste. (MLD Appearance, ¶ 56) Respondent’s emphasis on the “lactating cows” at the Main Facility fails to account for all of the animals controlled by MLD and the waste they produce.

As recently as October 9, 2002, MLD communicated its intent to DNR to expand to approximately 9,400 animal units and produce an estimated total of 57 million gallons of animal waste. (Hanson Aff., Ex. HH; DNR Appearance, ¶ 59.)

In fact, MLD has already obtained the necessary building permits from the Town of Centerville for structures that could confine significantly more animal units at the Main Facility and Consolidation Site than the 5,823 animal units that the Main Facility and Satellite Facilities confined as of the date the EA was issued on November 8, 2004. (Hanson Aff., Ex. II; MLD Appearance, ¶ 60.)

Significantly, the DNR was unaware at the time it prepared the EA that MLD had applied for and been granted building permits that would allow it to confine significantly more cattle than it currently confines. (DNR Appearance, ¶¶ 60-61.)

Despite MLD's apparent plans to expand and execution of those plans (by obtaining the necessary building permits), the DNR concluded that MLD has proposed to "delay the planned expansion until further notice" and instead engage in "continued slow growth by reproduction." (Hanson Aff., Ex. E at 1-2; DNR Appearance, ¶ 61.)

The EA's description of MLD's planned expansion is inconsistent with MLD's September 8, 2004, "Engineering Report: Wisconsin Pollutant Discharge Elimination System Permit Application, Maple Leaf Dairy, Inc." (Hanson Aff., Ex. JJ.)

While the Final EA describes the Consolidation Site as containing a 10.5 million gallon manure storage facility, the Engineering Report shows that MLD intends to build two new manure storage facilities sufficient to contain 35.5 million gallons of liquid waste, as well as manure storage facilities sufficient to contain 684 tons of bedded-pack calf manure. (Hanson Aff., Ex. JJ at 2-3.)

While the EA never accurately describes the actual potential for MLD's expansion, the Engineering Report reveals that the Consolidation Site alone could contain up to 5,607<sup>7</sup> animal units. (Hanson Aff., Ex. JJ at 3.)

To date, the DNR has failed to review the impacts of the expansion described in detail in the Engineering Report. If the past is a predictor of the future, without court intervention, MLD will be able to expand to its planned 9,400 animal units (9,000 cattle) without any full environmental review or permit modifications by the DNR.

## **LAW AND ARGUMENT**

### **I. WEPA BACKGROUND AND STANDARD OF REVIEW**

#### **A. The Purpose and Policy of Wisconsin's Environmental Policy Act.**

Wisconsin's Environmental Policy Act (WEPA), WIS. STATS. § 1.11 (2004), *et seq.*, is modeled after a federal version of a similar law, the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347 (2005).<sup>8</sup> These laws were the first attempts by the federal and state government to create a process that required administrative agencies to systematically incorporate environmental considerations into decision-making. The laws are intended to adjust the priorities of all government agencies to make protection of the environment an "essential" part of state policy. *Wisconsin's Environmental Decade v. Public Service Comm'n*, 79 Wis. 2d 409, 416, 256 N.W.2d 149, 153 (1977) (*hereinafter* "WED III").

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<sup>7</sup> The DNR states that the Engineering Report states MLD will house 6,607 animal units, but this appears to be a typographical error by DNR. (DNR Appearance, ¶ 31; Hanson Aff., Ex. JJ at 2-3.)

<sup>8</sup> Wisconsin courts may look to federal cases interpreting the National Environmental Policy Act for guidance in interpreting WEPA. *Citizens' Utility Board v. Public Service Commission*, 211 Wis.2d 537, 554 n.10, 565 N.W.2d 554, 562 n.10 (Wis. Ct. App. 1997), *citing Larsen v. Munz Corp.*, 167 Wis.2d 583, 606, 482 N.W.2d 332, 342 (1992).

The Wisconsin legislature designed the WEPA process to inform the public and other agencies about proposed projects *before* they make decisions that will impact the environment. *Wisconsin's Env'tl. Decade, Inc. v. Wis. Dep't of Natural Res.*, 94 Wis. 2d 263, 271, 288 N.W.2d 168, 172 (Wis. Ct. App. 1979).

WEPA requires state agencies to prepare an Environmental Assessment ("EA") prior to making permit decisions. An EA is not a "document of justification." WIS. ADMIN. CODE § NR 150.22(1)(c) (2005). The EA is supposed to be used to determine if a project is a major action resulting in significant impacts to the quality of the human environment. If the EA indicates the project will not significantly impact the environment, the agency need not prepare an Environmental Impact Statement ("EIS"),<sup>9</sup> and the WEPA process is complete.

However, if the EA indicates that the project is a major action resulting in significant environmental impacts, the agency must conduct a more thorough evaluation of impacts through an EIS, or adequately mitigate those impacts to such a degree as to render them insignificant. *State ex rel. Boehm v. Wis. Dept. of Natural Res.*, 174 Wis. 2d 657, 676, 497 N.W.2d 445, 453-454 (1993); *see also* WIS. STAT. § 1.11(2)(c) (2004).

## **B. Standard of Review in WEPA Cases.**

When reviewing WEPA decisions, courts apply a two-pronged "reasonableness" test in light of the court's careful consideration of the facts:

1. Did the agency develop a reviewable record based on a preliminary factual investigation of the relevant areas of environmental concern in sufficient depth to permit a reasonably informed preliminary judgment of the

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<sup>9</sup> On the federal level, this decision is referred to as a finding of no significant impact (FONSI). *See Nat'l Parks & Conservation Assoc. v. Bruce Babbitt*, 241 F.3d 722, 729 (9th Cir. Alaska 2001).

environmental consequences or impacts of the proposed action?

2. Giving due regard to the agency's expertise, where it has actually been applied, did the agency's determination that the action is not a major action significantly affecting the quality of the human environment reasonably follow from a good faith investigation by the agency pursuant to WEPA?

*See WED III*, 79 Wis. 2d 409, 425, 256 N.W. 2d 149, 158 (1977).

If the Court answers either of the above questions in the negative after reviewing the administrative record, the pleadings, and the arguments of the parties, it must determine that the agency has not complied with WEPA.

The DNR's decision that an EIS was not required for MLD's proposed expansion does not reasonably follow from a good faith investigation by the DNR because the DNR: 1) failed to consider the reasonably foreseeable cumulative impacts of this project, 2) failed to identify significant adverse impacts to air and water quality, and 3) failed to mitigate significant air and water quality impacts sufficient to support a negative EIS decision.

## **II. THE DNR VIOLATED WEPA BY FAILING TO CONSIDER THE CUMULATIVE IMPACTS OF MLD'S PROJECT.**

### **A. The DNR has Performed a Boiler-Plate, Vague, Non-Review of MLD's Cumulative Impacts.**

WEPA requires an EA to contain an analysis of the "cumulative effects of repeated actions of the same type, or related actions or other activities occurring locally that can be reasonably anticipated and that would compound impacts." § NR 150.22(2)(a)(2). A "cumulative impact" is defined as:

the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.

Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7 (2005); WIS. ADMIN. CODE § NR 150.22(2) (2005) (requiring EA's to follow regulations established by the President's Council on Environmental Quality).

The cumulative impacts analysis is not optional; it is a basic requirement in order to answer the question of whether there are significant impacts and whether to require a full EIS or require permit conditions that mitigate significant impacts. The "EA must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum."

*Grand Canyon Trust v. Federal Aviation Administration*, 351 U.S. App. D.C. 253, 290 F.3d 339, 342 (D.C. Cir. 2002).

The DNR's cumulative impacts statement in the EA for MLD's planned expansion consists in its entirety as follows:

There is a trend in the livestock industry towards larger-scale facilities of this kind. Large scale operations have rapidly become an economic necessity due to changing pricing structures and the need to reduce capital inputs while maximize production. Economies of scale associated with CAFOs have allowed producers to increase production without increasing costs. If numerous projects of this type are proposed in this area there is a concern that the land base available for landspreading could be overwhelmed and would make a number of such projects nonviable, primarily with respect to costs associated with hauling manure long distances for landspreading. The Department is not aware of additional projects of this type in such a vicinity that availability of land for manure application would be inadequate.

(Hanson Aff., Ex. E at 7.)

This language is identical to that contained in multiple EA's for other large livestock facilities. (*See, e.g.*, Hanson Aff., Ex. KK at P00006, P00014, P00535-536, P00557.) All of these facilities are located in northeastern Wisconsin along with MLD. And, as of 2002, there are at least four other proposed or existing CAFOs in Manitowoc County that may consume land

for disposal of manure, (Hanson Aff., Ex. LL), other WPDES permitted livestock operations, (Hanson Aff., Ex. MM), and other livestock operations that the DNR may not be aware of that consume land for disposal of manure.

It was this type of boilerplate review that was rejected by the Court of Appeals for the District of Columbia Circuit in *Natural Resources Defense Council v. Hodel*, 275 U.S. App. D.C. 69, 865 F.2d 288, 299 (D.C. Cir. 1988). In *Hodel*, the Secretary of Interior failed to consider the cumulative impact, including interregional effects, of simultaneous offshore oil and gas leasing activity on marine mammals, including whales and salmon that migrate through the area where those and other activities would occur. *Id.* at 298-299. The Court found that the Secretary had used the same boilerplate in different EIS's:

The Secretary asserts that this treatment typifies the approach used in the FEIS for the other planning areas, and that a like analysis was used for salmon. "Typifies" is an understatement. When the FEIS does address inter-regional cumulative impacts, it simply repeats the same boilerplate for each area, varying the language only slightly in each instance...

*Id.* at 299 (citations omitted). The Court rejected the Secretary's boilerplate review as failing to comply with NEPA's mandate to consider cumulative impacts because "[t]hese perfunctory references do not constitute analysis useful to a decisionmaker in deciding whether, or how, to alter the program to lessen cumulative environmental impacts." *Id.*

As in *Hodel*, the DNR's boiler-plate non-review shown above violates WEPA's core requirement that the DNR assess the cumulative impacts surrounding the specific project that is undergoing WEPA review. *See* § NR 150.22(2)(a)(2); 40 C.F.R. § 1508.7 (2005).

As shown more fully below, the EA specifically: 1) failed to consider the cumulative impacts of MLD's reasonably foreseeably expansions to up to 9,400 animal units and 35.5 - 57

million gallons<sup>10</sup> of animal waste; 2) failed to consider the impacts of MLDs operations aggregated with the impacts of all other sources that are polluting local waters with phosphorus; and 3) failed to consider the impacts of MLD's past discharges of pollution to local waters. As a result, the DNR's boilerplate review was unreasonable and it erred in concluding that the cumulative impacts of this project would be insignificant.

**B. DNR Violated WEPA by Failing to Consider MLD's Reasonably Foreseeable Expansions.**

A cumulative impacts analysis is required to consider all "reasonably foreseeable future actions." 40 C.F.R. § 1508.7 (2005). Even when future actions are just proposals, they are foreseeable and uncertainty about the details is not an excuse for failing to analyze the impacts. *Kern v. Bureau of Land Management*, 284 F.3d 1062, 1072 (9th Cir. Or. 2002), ("NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment."); *Texas Committee on Natural Resources v. Van Winkle*, 197 F. Supp. 2d 586 (N.D. Tex. 2002), quoting *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 156 U.S. App. D.C. 395, 481 F.2d 1079, 1092 (D.C. Cir. 1973) ("we must reject any attempt by agencies to shirk their responsibility under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry'").

Contrary to WEPA, MLD's continual expansions over the past eight years have all escaped DNR's environmental review. MLD has steadily increased its herd size beyond the 1,600 cattle originally described in its 1997 WPDES Permit to 3,798 animals (5,823 animal

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<sup>10</sup> According to documents in the Administrative Record, if MLD confined 9,400 animal units, it would produce an estimated 57 million gallons of liquid animal waste that MLD would need to dispose of in and around the Town of Centerville. (Hanson Aff., Ex. HH; DNR Appearance, ¶ 59.)

units) without ever obtaining a WPDES permit modification or an additional EA. (Hanson Aff., Ex. FF; Hanson Aff., Ex. E at 1.)

Similar to past expansions that have escaped review, the Administrative Record contains facts showing that MLD's planned project is much larger than that which is described in the EA. In December of 2001, MLD communicated its intent to DNR to expand to 9,000 cattle (9,400 animal units). (Hanson Aff., Ex. HH.) Then in September of 2004 MLD submitted formal plans to the DNR via an Engineering Report that detailed plans to expand to 5,607 animal units and contain 35.5 million gallons of manure at the Consolidation Site alone. (Hanson Aff., Ex. JJ at 2-3.) It is clear that MLD envisions this expansion some time during the five-year life of the WPDES Permit. MLD has already obtained the necessary building permits. (Hanson Aff., Ex. II; MLD Appearance, ¶ 60.) Further, notes apparently taken by a DNR employee describe the Engineering Report as a "master plan... to reflect what a complete expansion would look like." (Hanson Aff., Ex. NN.)

Manitowoc County also recognizes that MLD is undertaking a significant expansion. Tony Smith, a Soil Conservationist with the Manitowoc County Soil and Water Conservation Department who oversees MLD's compliance with local manure management regulations, stated in his comments on the EA:

I maintain that the farm has chosen to move forward with the expansion project, and have provided Manitowoc County [Soil and Water Conservation Department] with partial engineering designs that show a large expansion that is soon to be underway. . . .  
*Consolidation of satellite farms is step one of the extensive expansion program.*

(Hanson Aff., Ex. B at 2) (emphasis added).

Referring to the EA's statement that storage at the Consolidation Site will have an estimated capacity of 10.5 million gallons, Mr. Smith went on to counter the EA:

Sketches provided to [the Soil and Water Conservation Department] indicate a 45 million gallon capacity storage to be built. *Tiry Engineering estimates 35.5 million gallons of liquid manure will be generated by the new facility to be built at the new site.*

*Id.* at 3.

Even the EA recognizes that the expansion has been “planned,” and will only be “delayed.” (Hanson Aff., Ex. E at 2.) The EA states that “[MLD] has, within the last two years, proposed a large expansion. In light of the current local and political climate, along with the current state of the agricultural industry in Wisconsin, [MLD] has expressed an interest, to the [DNR], to *delay the planned expansion.*” (Hanson Aff., Ex. E at 2) (emphasis added). The EA further states that “[t]his choice, on the part of [MLD], to consolidate animals at a newly developed site *does not prevent the operation from proposing an expansion in the future.*” (Hanson Aff., Ex. E at 2) (emphasis added).

Significantly, the DNR did not know at the time it drafted the EA that MLD had acquired the necessary local building permits to move forward with a significant expansion of its facility. (Hanson Aff., Ex. II; DNR Appearance, ¶ 60.) This is in spite of the fact that Petitioners provided the DNR with a copy of the building permits as part of its public comments on the EA. (Hanson Aff., Ex. C at 3; Hanson Aff., Ex. II.)

The fact is that the DNR should have been aware of how imminent MLD’s expansion was when it drafted the EA, but did not make an effort to find out. Instead, the DNR elected to avoid a thorough and searching review of the scope of the MLD’s expansion plans.

The DNR’s claim that “there is currently no formal commitment from [MLD] on [expansion]” is inconsistent with the law of WEPA. (Hanson Aff., Ex. H at 1.) A project applicant need not make a formal commitment to engage in a project expansion in order to

trigger WEPA review. *Wisconsin's Environmental Decade v. Department of Natural Resources*, 94 Wis.2d 263, 288 N.W.2d 168 (Ct. App. 1979) (“WED”). In WED, the Court of Appeals rejected Milwaukee Metropolitan Sewerage District’s (“MMSD’s”) argument that a planned extension to a proposed sewer interceptor was not sufficiently definite to require WEPA review by the DNR. 94 Wis.2d at 277. MMSD planned to connect the community of Hales Corners to the MMSD system, and then subsequently extend sewer service to New Berlin, much further away from MMSD’s service area and with less urban development than Hales Corners. *Id.*

MMSD argued that because the extension did not yet exist and was one of five options for serving New Berlin, the DNR was not required to review the potential extension of service to New Berlin. *Id.* at 274. The Court rejected the argument because although there was no formal commitment by MMSD to build the extension, the administrative record contained statements that showed that the extension was likely in the foreseeable future. *Id.* at 276-277. The Court reasoned:

We do not...equate a ‘proposal’ with a formal statement of commitment to planned future action. Something more than a mere possibility and less than a commitment is necessary to require the determination whether an EIS is necessary. Locating the middle ground involves reasonable forecasting.

*Id.* at 276; *see also WED III.*, 79 Wis.2d at 433 (“The need for a reviewable record disclosing an adequate factual investigation of environmental effects remains. So too does the need for reasonable forecasting and speculation...”) As a result, less-than-definite but reasonably foreseeable proposals are required to be reviewed under WEPA.

Similar to MMSD’s argument in *WED*, the DNR now argues that the MLD’s “large expansion” is too indefinite to assess. This is in spite of the facts that: 1) DNR has known that a “large expansion” by MLD is imminent since at least 2001 (Hanson Aff., Ex. HH); 2) DNR

received formal and significant expansion plans from MLD in September of 2004 (Hanson Aff., Ex. JJ); 3) Manitowoc County regulators have also received plans from MLD showing a significant expansion (Hanson Aff., Ex. B at 2-4); and 4) MLD has already received the necessary local building permits to move forward with the significant expansion (Hanson Aff., Ex. II). It is unclear what else the DNR needs to justify a more thorough review of environmental impacts of MLD's planned expansion at the Consolidation Site.

The EA significantly conflicts with MLD's recent Engineering Report. While the EA describes the Consolidation Site as containing one new 1,184 foot freestall barn "or portion thereof," the Engineering Report shows that MLD intends to build two 120 x 1,144 foot freestall barns. (Hanson Aff., Ex. JJ at 2-3.)

While the EA describes the Consolidation Site as containing one 452 foot freestall barn, the Engineering Report shows that MLD intends to build one 120 x 452 foot dry cow barn, 120 x 382 foot special needs barn, one 100 x 370 foot manure parlor/holding area, and one 60 x 120 foot manure treatment building. *Id.*

While the EA claims that MLD intends to engage in "continued slow growth by reproduction" (Hanson Aff., Ex. E at 1-2), the Engineering Report shows MLD plans to expand to 5,607 animal units and contain 35.5 million gallons of manure at the Consolidation Site alone. (Hanson Aff., Ex. JJ at 2-3.)

The EA directly conflicts with facts in the administrative record documenting MLD's planned and partially executed massive expansion of its operations. The DNR's failure to evaluate the cumulative impacts of the reasonably anticipated and foreseeable expansion at MLD violates WEPA. § NR 150.22(2)(a)2..

**C. DNR Failed to Adequately Evaluate the Cumulative Impacts of MLD's Landspreading of Liquid Manure in Combination with Other Sources of Phosphorus in and around the Town of Centerville and Manitowoc County.**

A cumulative impacts analysis must include a review of the “cumulative effects of repeated actions of the same type . . . that would compound impacts.” § NR 150.22(2)(a)(2).

An EA may not look only at the incremental impacts, but must look at the aggregate impacts of a proposed project. *Grand Canyon Trust v. Federal Aviation Administration*, 290 F.3d 339, 347 (D.C. Cir. 2002).

In MLD's case, the DNR should have identified the current state of impaired waters surrounding this project and then analyzed the aggregate sources of pollution to determine whether MLD would have a cumulatively significant impact.

In *Grand Canyon Trust*, the Federal Aviation Administration (FAA) conducted an EA to determine whether the construction of a replacement airport near a National Park would cause a significant environmental impact. 290 F.3d at 340. The FAA studied flight patterns, sound associated with the flights, and annoyance levels of park users. *Id.* The FAA's cumulative impacts analysis compared the impacts from the replacement airport to the impacts from increasing traffic at the existing airport, and concluded that the impacts would not be significant because there would only be a 2% increase in the number of flights near the Park. *Id.* at 345. However, the court rejected this analysis as inadequate and inconsistent with the regulations. *Id.* The court found that the FAA merely looked at the incremental impacts of the project and did not add those impacts to the already existing impacts of past projects and the potential impacts of future projects. Due to this failure to aggregate the impacts, there was no way to determine whether a 2% increase in flights would have a significant cumulative impact. 290 F. 3d at 346.

Adding the impacts from known and reasonably foreseeable projects in the impacted area is the key to a successful cumulative impacts analysis:

Even a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant. One more factory ... may represent the straw that breaks the back of the environmental camel.

*Id.* at 343, quoting, *Hanly v. Kleindienst*, 471 F.2d 823, 831 (2d Cir. N.Y. 1972).

The DNR's EA does not even bother to prepare an incremental analysis of the proposed expansion like the one rejected in *Grand Canyon Trust*, let alone prepare an aggregate analysis of impacts. The DNR merely provides a series of disjointed facts: 1) There are 185,000 acres of cropland in Manitowoc County, of which 162,000 acres are not managed under nutrient management planning requirements (Response to Comments at 5); 2) There are other CAFOs in the area surrounding MLD and there are approximately 45,000 "milking cows" in Manitowoc County (Response to Comments at 8); 3) There are multiple sources of water pollution, including other CAFOs with WPDES permits, in watersheds draining to Fischer Creek, Point Creek and Lake Michigan. (*Id.*); and 4) The "delivery of soluble phosphorus and particulate phosphorus...will occur from all croplands draining to these waters." (Hanson Aff., Ex. H at 5; Hanson Aff., Ex. LL.)

The DNR failed to analyze these facts and what they might mean in terms of cumulative impacts. The DNR recognizes that there are "numerous possible sources of phosphorus that contribute phosphorus to Point and Fischer Creeks and Lake Michigan," but claims that it is too difficult to identify those sources. (Hanson Aff., Ex. H at 5.) The DNR then "shrugs its shoulders" and states that finding out how much phosphorus will reach Fischer Creek, Point Creek, and Lake Michigan "requires a modeling effort that is beyond the scope of this EA." *Id.*

Further, the DNR compares the number of cows to the total cropland in Manitowoc County, and states that “it is likely that available cropland for land application will decrease over time” but that “it is difficult to predict the total decrease or the increase or decrease in animals over time.” (Hanson Aff., Ex. H at 8.) The DNR does not even make the attempt in the EA or Response to Comments to identify other sources of water pollution in the watersheds draining to Point Creek, Fischer Creek and Lake Michigan. Instead, the DNR just compares MLD’s fields with those of other fields and baldly concludes that MLD will not have significant impacts without considering what cumulative impact all sources of phosphorus may be having on the already-impaired waters in the watershed.

A legally-defensible cumulative impacts analysis would have analyzed whether MLD’s addition of up to 35.5 million gallons of manure, in light of the other large livestock facilities nearby and all other water pollution sources, will be the “straw that breaks the back of the environmental camel.” *Hanly*, 471 F.2d at 821. For example, the DNR must address such basic questions as: 1) What are the existing phosphorus contributions to Fischer Creek, Point Creek, and Lake Michigan? 2) How much more phosphorus will MLD add to those waters through its landspreading practices? 3) What are the existing phosphorus concentrations on fields adjacent to Fischer Creek, Point Creek, and Lake Michigan? 4) How much additional phosphorus will MLD apply on those fields? 5) How quickly will that phosphorus reach Lake Michigan? and 6) How will MLD’s addition of manure impact the ability to restore healthy water quality in Point and Fischer Creeks and Lake Michigan’s Hika Beach and Fischer Park Beaches?

The DNR has done no such analysis here. Instead, the DNR violated WEPA by isolating MLD’s expansion, viewing it in a “vacuum,” and concluding with boilerplate language and without analysis that MLD’s practices will not have significant impacts.

**D. DNR Failed to Adequately Evaluate the Cumulative Impacts of MLD's History of Manure Management Problems.**

A cumulative impact analysis must consider “the impact on the environment which results from the incremental impact when added to other *past...actions*.” 40 C.F.R. § 1508.7 (2005) (emphasis added). MLD's manure management problems are past actions that are relevant to the DNR's analysis of cumulative environmental impacts, but the EA fails to address these problems.

According to DNR and Manitowoc County records, manure management problems have existed at MLD since before 1988. (Hanson Aff., Ex. L.) Manure problems occurred throughout the 1990's at MLD's operation, including direct discharges of animal waste from tiles into Fischer Creek and a manure spill, attributed in part to MLD, that killed 3,000 fish. (*See, e.g.*, Hanson Aff., Ex. I; Hanson Aff., Ex. O; Hanson Aff., Ex. P; Hanson Aff., Ex. Q; Hanson Aff., Ex. R.) In 1999, the DNR even urged MLD to reduce its manure application rates to protect water quality. (Hanson Aff., Ex. T.)

In May of 2001, Manitowoc County documented yet another complaint of runoff from Maple Leaf Dairy. (Hanson Aff., Ex. U.) Manitowoc County found that MLD had plowed through former grass waterways. *Id.* In 2003, Manitowoc County documented that MLD plowed through intermittent waterways on cropfields draining to Point Creek. (Hanson Aff., Ex. X.) In or around July and August of 2003, the DNR noticed that MLD has failed to install a permanent feed leachate collection system for its operation in accordance with plans and specifications approved by the DNR. (Hanson Aff., Ex. V; Hanson Aff., Ex. W.) On August 28, 2003, one of MLD's satellite operations had plowed through a grassed waterway that drains to Point Creek in violation of the cost-share agreement provided under the Silver Creek Priority Watershed Project. (Hanson Aff., X.)

The DNR responds to MLD's past manure management problems in the Administrative Record by summarily concluding that "[i]t is not the intent of the EA to give a compliance history of [MLD]." (Hanson Aff., Ex. H at 6.) However, these "past actions" by MLD, including its past discharges of manure to those waters and past violations of manure management requirements, are relevant to an analysis of cumulative impacts. These past practices may have played a significant role in the current state of impairment in Point and Fischer Creeks and nearby beaches on Lake Michigan. Moreover, past practices are an indication of the likelihood of future mismanagement of an even larger amount of animal waste.

A proper cumulative impacts analysis must address what effect MLD's past actions have had on Fischer Creek, Point Creek, and Lake Michigan, and what effect MLD's expansion combined with those past effects might have on those waters. The DNR has failed undertake this analysis in violation of WEPA.

The EA should be rejected because the cumulative impacts analysis failed to consider the cumulative impacts of MLD's reasonably foreseeably expansions to up to 9,400 animal units and 35.5 - 57 million gallons of animal waste; failed to consider the impacts of MLDs operations aggregated with the impacts of all other sources that are polluting local waters with phosphorus; and failed to consider the impacts of MLD's past discharges of pollution to local waters. Without the legally-required cumulative impacts analysis, the DNR's conclusion that the project will not have significant adverse environmental impacts is unreasonable.

### **III. THE DNR VIOLATED WEPA BY ISSUING A NEGATIVE EIS DECISION THAT IS NOT REASONABLY SUPPORTED BY THE RECORD.**

Not only did the DNR fail to adequately assess the cumulative impacts of the project, but the EA fails the *WED III* test because it does not support a reasonable conclusion that no EIS is required for this project. *See WED III*, 79 Wis. 2d at 425, 256 N.W.2d at 158. The EA and the

administrative record reveal that there could be significant adverse environmental impacts from this project; however, the DNR did not even conduct a preliminary investigation capable of identifying the extent and intensity (i.e., significance) of the environmental impacts. Prior to conducting such a preliminary investigation, the DNR erroneously concluded that the impacts would be insignificant and issued its negative EIS decision. This conclusion is unreasonable in light of evidence in the record that the impacts could be significant.

**A. The DNR Negative EIS Finding Violated WEPA by Ignoring Significant Water Quality Impacts Identified in the Administrative Record.**

MLD could store up to 35.5 - 57 million gallons of liquid animal waste in and around the Town of Centerville and then spread this waste on land that drains into Point and Fischer Creeks, and ultimately Lake Michigan. (Hanson Aff., Ex. JJ at 2-3.)

In addition to MLD's past discharges of animal waste, MLD has multiple flaws in its accounting of how it manages its millions of gallons of waste annually. Hanson Aff., Ex. OO, ¶¶ 1-40.) And, the EA failed to adequately evaluate and support its proposal to allow MLD to continue to engage in the practice of "headland stacking" tons of solid dairy manure on cropfields in and around the Town of Centerville. As a result, the DNR erred by ignoring evidence in the Administrative Record about significant impacts and issuing a negative EIS decision.

**1. DNR Failed to Adequately Evaluate the Impacts of Landspreading More than 21 Million Gallons and up to 35.5 Million Gallons of Liquid Animal Waste on Fields Draining to Fischer Creek, Point Creek, and Lake Michigan.**

The DNR ignored evidence in the Administrative Record showing the potential significant environmental impacts of land applying more animal waste on fields draining to Point

and Fischer Creek, and ultimately Lake Michigan. The DNR's conclusion of no significant impacts, in light of the evidence in the administrative record, is unreasonable.

Fischer Creek, Point Creek and Lake Michigan are already polluted, in part by phosphorus. The DNR admits this. (DNR Appearance, ¶¶ 117-119.) The DNR further recognizes that, even if MLD follows best management practices, “soluble phosphorus and phosphorus attached to soil particulates is likely to reach nearby surface waters from fields hydraulically connected to these surface waters;” phosphorus can contribute to excessive algal growth; and algal growth has caused low dissolved oxygen in Fischer Creek that harms fish and aquatic life. (Hanson Aff., Ex. E at 6 Hanson Aff., Ex. H at 5.)

Yet, the EA fails to identify and analyze the potential impacts associated with land applying animal waste in and around the Town of Centerville. The EA does not provide MLD's distance from Lake Michigan, nor does it identify spreading fields adjacent to streams that drain directly to Lake Michigan. The DNR admits this. (DNR Appearance, ¶ 115.) Nor does the EA identify subsurface drain tiles underlying many of MLD's fields where it disposes of liquid manure. And, the EA does not analyze the risks associated with disposing of manure on fields drained by subsurface drain tiles. The Administrative Record in this case does not even include MLD's alleged Manure Management Plan referenced in the EA. (Hanson Aff., Ex. E at 3.)

The EA's omission of any analysis or specific facts regarding the locations of MLD's landspreading activities is significant because the pollution in Fischer Creek, Point Creek, and Lake Michigan may indeed be attributable to MLD.

In fact, there is evidence in the record that indicates that MLD may have significant impacts on Fischer Creek, Point Creek and Lake Michigan. The DNR fails to address or refute this evidence, and instead erroneously concludes that MLD will have no significant impacts.

Petitioners provided the DNR with maps showing where MLD spreads manure on fields that border Fischer and Point Creeks, including the location of subsurface drain tiles that appear to discharge directly to Fischer Creek and Point Creek. (Hanson Aff., Ex. PP.) Petitioners included a list of those fields in its comments to the DNR on the EA. (Hanson Aff., Ex. C.)

In addition to identifying MLD's subsurface drain tiles, Petitioners provided the DNR with a report by Byron Shaw, Professor Emeritus in Water Resources at the University of Wisconsin – Stevens Point (*hereinafter*, "Shaw Report"). The Shaw Report reviewed data from MLD's 2001, 2002, 2003, and 2004 Nutrient Management Reports to determine whether MLD's manure spreading practices may be impacting water quality in Fischer and Point Creeks, which drain to Lake Michigan.

The Shaw Report found several practices that are likely causing MLD to over-apply manure and fertilizer, leading to excessive nitrogen and phosphorus loading to local waters over time. (Hanson Aff., Ex. OO, ¶¶ 1-24.) These include 1) Failing to fully account for nitrogen and phosphorus that were remaining in the soil from previous years of manure application by MLD that can lead to the increased risk of runoff of those pollutants from a field. (Hanson Aff., Ex. OO, ¶¶ 6, 15); 2.) Using "assumed" rather than "actual" crop yields to estimate crop removal of nutrients from the soil that can lead to over-application of nitrogen and phosphorus (Hanson Aff., Ex. OO, ¶ 7); 3) Applying manure fields that already have phosphorus concentrations of over 50 parts per million ("ppm") (Hanson Aff., Ex. OO, ¶ 15) and 4) Applying manure on fields that have phosphorus "hot spots" that may be a source of phosphorus contamination in surface waters, but there is no mention of these fields in the EA. (Hanson Aff., Ex. OO, ¶¶ 27-28).

The DNR argues that the Proposed Permit will contain requirements to reduce phosphorus levels on landspreading fields, and in turn reduce the amount of phosphorus

delivered to surface waters. (Hanson Aff., Ex. H at 5-6.) However, the DNR does not know how much phosphorus is currently being delivered to surface waters, nor does it know whether or how much these unspecified practices will reduce the amount of phosphorus delivered to the surface waters. “Conclusory remarks...do not equip a decision maker to make an informed decision about alternative courses of action . . .” *Hodel*, 865 F.2d at 298.

Even the DNR recognizes that while current best management practices may minimize excessive phosphorus delivery to Fischer Creek, Point Creek, and Lake Michigan, “soluble phosphorus and phosphorus attached to soil particulates is likely to reach nearby surface waters from fields hydraulically connected to these surface waters.” (Hanson Aff., Ex. E at 6.) However, the DNR then states that finding out how much phosphorus will reach Fischer Creek, Point Creek, and Lake Michigan “requires a modeling effort that is beyond the scope of this EA.” (Hanson Aff., E. H at 5.) It is this “modeling effort” that WEPA imposes on DNR to determine whether MLD’s disposal of potentially up to 35.5 – 57 million gallons of liquid animal waste in and around the Town of Centerville will have significant impacts on Fischer Creek, Point Creek and Lake Michigan. *Friends of the Earth*, 109 F.Supp.2d at 42 (“[A]t the stage of an environmental assessment where the agency is affirmatively finding that there are no significant impacts...with only summary investigation, some analysis is especially necessary to allow the Court to review the agency’s decision.”)

The DNR’s conclusion that MLD’s impacts will be insignificant defies reason and does not satisfy the *WED III* test that the DNR prepare a reviewable record and exercise its reasonable judgment based on that record that no EIS is required. *WED III*, 79 Wis.2d at 424-25, 256 N.W.2d at 157.

**2. DNR Failed to Adequately Evaluate the Impacts of MLD's Proposal to Continue "Headland Stacking" Separated Solid Manure.**

The DNR ignored evidence in the Administrative Record and has unreasonably concluded the impacts associated with "headland stacking" of MLD's manure will be insignificant. Headland stacking refers to a practice of stacking solid dairy manure in elongated piles of up to several hundred feet on agricultural fields, approximately five to six feet tall and ten feet wide. (Hanson Aff., Ex. QQ.)

The EA is devoid of any evidence that the DNR evaluated the significance of impacts associated with headland stacking of solid dairy manure by MLD. The EA gives headland stacking one oblique and passing reference: "This effort entails experimentation of varying technologies and practices (including headland stacking) to formulate the most suitable system to supplement current manure handling." (Hanson Aff., Ex. E at 2.) The Response to Comments shows a similar lack of analysis. Neither the Response to Comments nor the EA even describe the practice of headland stacking. (Hanson Aff., Ex. RR.)

The DNR's conclusion that headland stacking will not have significant impacts is surprising and unreasonable in light of MLD's history of the practice since at least 1995. (Hanson Aff., Ex. P; Hanson Aff., Ex. RR; Hanson Aff., Ex. SS.)

In 1996, a DNR memorandum expressed concerns with placing headland stacks near waterways and residences and finding enough stacking sites to accommodate MLD's entire crop rotation. (Hanson Aff., Ex. TT.) Neighbors had complained of nuisance odors from one stack in the spring of 1995. *Id.* Although the DNR doubted that the odors originated from the stack, the DNR did express concern that the stack was on a "marginal site fairly close to a road ditch." *Id.* According to the memorandum, the DNR was concerned about the location of a headland stack where it continued through the lowest part of a field and where heavy rains would result in

surface runoff. *Id.* The memorandum concluded that headland stacking could be approved on a conditional basis, but that additional regulation would be necessary to protect water quality. Further, approval of the practice would have to be withdrawn if MLD's management of the headland stacks proved inadequate. *Id.*

Although the DNR allowed MLD to headland stack manure as a temporary manure management practice, it was not going to allow the practice as a permanent manure storage method. In 1998, a DNR staff person charged with evaluating the integrity of manure storage structures stated in an email to DNR specialist Mark DeBaker:

My read of the permit file indicates that they were to "temporarily" stack the solid portion of the separated manure...this was to be phased out with a more permanent solution...unfortunately they have been given a huge timeframe within which to do this.

(Hanson Aff., Ex. UU at P00320.) Shortly thereafter, the same staff person stated:

I would encourage you to be VERY PERSISTENT that they resolved their stacking situation which they were scheduled to do according to their permit!! This is a practice we are moving away from and definitely when their permit comes up for review/renewal, I can pretty much guarantee that it will not be included.

(Hanson Aff., UU at P00321) A few days later, the same staff person stated:

We still take the position that they are to move out of the "headland stacking" business according to their permit.

(Hanson Aff., Ex. UU at P00322)

The DNR issued a Notice of Noncompliance in July of 1999 when the DNR observed leachate flowing from the stacks in the fields onto County Trunk Highway X in Manitowoc County. (Hanson Aff., Ex. VV) Further, MLD had placed the stacks in an unapproved location. *Id.* The DNR determined that leachate from the stacks was entering a drain tile and causing

pollution in a tributary to Fischer Creek. *Id.* The DNR also found that the stack leachate posed a threat to groundwater pollution to an until-then undiscovered abandoned well nearby. *Id.*

In October of 2002, the DNR responded to a request by MLD to expand the tonnage of manure that MLD headland stacks in and around the Town of Centerville. (Hanson Aff., Ex. WW.) The DNR responded by stating that “Any decisions we make regarding headland stacking must be based on good science and adequate data. At this time, we do not have the necessary data to warrant the expansion of headland stacking at [MLD].” *Id.*

Despite its long-standing and well-documented concerns, the DNR has allowed MLD to continue to headland stack manure. (Hanson Aff., Ex. E at 2.) And, the DNR justifies its entirely new position by concluding, without any analysis, that continued headland stacking by MLD is allowable based on the “historical practice” of headland stacking piles of manure, the requirement on MLD to conduct a “formal evaluation” of the practice, restrictions on placement of the stacks in the Proposed Permit, the ability to stop the practice if pollution results, and other factors. (Hanson Aff., Ex. H at 2.)

Again, the DNR does not define the “historical practice” or even what history DNR is drawing on to make its conclusion. The only historical practice in the Administrative Record shows that headland stacking is a dangerous threat to water quality. Nor does the DNR describe the formal evaluation that MLD is required to undertake, or provide any analysis or detail about what headland stacking is, why its impacts will not be significant, or why the DNR can defer an impacts analysis until after its decision has been made. In fact, the DNR recognizes that it lacks data to allow MLD to expand its practice of headland stacking, and arguably does not have any data to justify MLD’s *current* headland stacking. (Hanson Aff., Ex. V.) The DNR simply asserts that what before was a serious concern is now no longer so. (Hanson Aff., Ex. H at 2.) This

does not satisfy WEPA's mandate to prepare a reviewable record that reasonably supports a conclusion that no EIS is required.

Although the DNR claims that it intends to require MLD to study the practice of headland stacking, the DNR must either require additional testing *prior* to making a final EA decision or prepare an EIS in order to more fully develop the information about the impacts of headland stacking. *See Nat'l Parks & Conservation Assoc. v. Bruce Babbitt*, 241 F.3d 722, 731 (9th Cir. Alaska 2001).<sup>11</sup> By not doing so, the negative EIS decision fails the *WED III* test because the information is not developed in sufficient depth to support a reasonably informed conclusion that there will be no significant adverse impacts to the environment. *WED III*, 79 Wis. 2d at 425, 256 N.W.2d at 158.

For example, in *Nat'l Parks & Conservation Assoc.*, the Park Service, the Court held that the Park Service erred in its decision to issue a Finding of No Significant Impact when it lacked the data necessary to determine that the environmental impacts would be insignificant. *Nat'l Parks & Conservation Assoc.*, 241 F.3d at 731. When faced with uncertainty, the Park Service had decided to issue a new policy increasing cruise ship traffic in Glacier Bay and study the impacts after the fact. *Id.* at 733. The court rejected this because “[p]reparation of an EIS is mandated where uncertainty may be resolved by further collection of data . . .” *Id.* at 732 – 733; *see also Kern*, 284 F.3d at 1072 (NEPA is not designed to postpone analysis of environmental consequences).

Like in the Park Service in *Nat'l Parks and Conservation Assoc.*, the DNR's allowance of headland stacking in this case violates WEPA's requirement to study impacts before, not after, the DNR issues a permit. Instead, the DNR should prepare an EIS that analyzes MLD's current

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<sup>11</sup> Since WEPA is modeled after NEPA, federal cases interpreting NEPA are persuasive authority when interpreting WEPA. *State ex rel. Boehm*, 174 Wis. 2d at 676-77, 497 N.W.2d at 454.

practice of headland stacking (and other impacts) before allowing MLD to continue the practice. The DNR should not be allowed to defer its WEPA obligations until after it makes its decision.

Based on evidence in the Administrative Record indicating that the DNR was concerned about the water quality impacts from headland stacking, the DNR's conclusion in the EA that the impacts would be insignificant is unreasonable and does not pass the *WED III* test.

**B. The DNR Violated WEPA by Failing to Identify Significant Air Quality Impacts.**

The DNR has utterly failed to prepare a review or analysis of MLD's air quality impacts despite the DNR's acknowledgment that there is "a potential for more particulate matter, dust, ammonia and hydrogen sulfide emissions and odors associated with the consolidation of animals near [MLD]." (Hanson Aff., Ex. H at 3.) Likewise, the EA recognizes that there will be "an increase in hazardous air pollutant emissions" including "ammonia and hydrogen sulfide" (Hanson Aff., Ex. E at 4), but concludes, without any analysis whatsoever, that the impacts will be insignificant. The conclusion is unreasonable based on the Administrative Record.

**1. MLD Emits Excessive Fugitive Dust.**

Fugitive dust emissions will result from MLD's increased truck traffic, as well as increased particulate matter emissions from grain and feed handling, grain drying, grain storage, feed milling, and manure handling. (Hanson Aff., Ex. E at 4; DNR Appearance, ¶ 85.) Dust, including particulate matter, can cause asthma and irritation in persons exposed to the dust. (DNR Appearance, ¶86.) Yet, the DNR stated that MLD may be required to prepare a fugitive dust plan (Hanson Aff., Ex. E at 4), did not quantify or evaluate the impacts associated with fugitive dust and simply concluded without support in the Administrative Record that the impacts would be insignificant. *Friends of the Earth*, 109 F.Supp.2d at 42 ("[A]t the stage of an environmental assessment where the agency is affirmatively finding that there are no significant

impacts...with only summary investigation, some analysis is especially necessary to allow the Court to review the agency's decision.”)

**2. MLD Emits Hazardous Ammonia and Hydrogen Sulfide.**

MLD will emit hazardous air pollutants, including ammonia and/or hydrogen sulfide. (Hanson Aff., Ex. E at 4; DNR Appearance, ¶ 93.) If present in “sufficient quantities,” ammonia and hydrogen sulfide are highly toxic and irritating gases listed as hazardous air pollutants in Wis. Admin. Code Ch. NR 445, Table A. (DNR Appearance, ¶ 94.) Also, ammonia and hydrogen sulfide both cause odor and are respiratory irritants. (DNR Appearance, ¶ 96.) Exposure to hydrogen sulfide can cause nausea, cramps, vomiting and eye irritation. (DNR Appearance, ¶ 97.)

To aid the DNR in preparing its analysis, Petitioners provided the DNR with expert reports by Dr. Charles Gantzer, Ph.D.. Dr. Gantzer's reports contain modeling information that estimated MLD's emissions of hazardous air pollutants of ammonia and hydrogen sulfide. (Hanson Aff., Ex. C at 7.) According to Dr. Gantzer's 2003 emissions study, MLD current emits 8.06 lbs. per hour from the Main Facility alone, and would emit 16.65 lbs. of ammonia per hour, or 400 lbs. per day, into the air in and around the Town of Centerville if it expanded according to the plans shown in MLD's building permits. (See Hanson Aff., Ex. XX at P00605; Hanson Aff., Ex. II.) Both of MLD's current and prospective emissions levels exceed DNR regulatory thresholds for ammonia contained in Wis. Admin. Code Ch. 445, Table A.

Neither the EA nor the DNR's Response to Comments refers to or reviews Dr. Gantzer's report.

Given that MLD intends to further concentrate animals and store additional waste at the Main Facility and Consolidation Site, ammonia and hydrogen sulfide emissions are likely to

increase above current levels and have significant effects on the quality of the human environment. (See, e.g., DNR Appearance, ¶ 102, admitting construction of third storage pond at Main Facility and storage of additional but unspecified amounts of animal waste; DNR Appearance at 95, admitting that decomposition of animal waste releases ammonia and hydrogen sulfide; Hanson Aff., Ex. II; and Hanson Aff., Ex. JJ at 2-3.) The DNR has not evaluated those significant air quality impacts from MLD.

In addition to the Gantzer Reports, Petitioners also provided the DNR with four technical documents from Minnesota and Iowa that comprise current research on ammonia, hydrogen sulfide, volatile organic compounds (“VOCs”), particulate matter, dust, and other pollutants from large livestock facilities, as well as the effect those pollutants can have on human health. (Hanson Aff., Ex. C at 7-8.) The DNR’s Response to Comments does not refer to those documents or demonstrate that the DNR reviewed those documents.

Further, several courts have already ruled that large livestock facilities are required to estimate, report, and control their emissions of hazardous air pollutants, and have rejected arguments that the science is too imperfect yet to estimate those emissions. *Sierra Club v. Tyson Foods*, 299 F. Supp. 2d 693(W.D. Ky 2003); see also *Sierra Club v. Seaboard Farms*, 387 F.3d 1167 (10th Cir. Okla. 2004) (confirming that the entire CAFO is a “facility” for purposes of CERCLA reporting requirements under 42 U.S.C. § 9603).

### **3. The DNR Erred in Concluding That There Would Be No Significant Air Quality Impacts.**

In place of analysis, the DNR has prepared a series of excuses for why it should not have to analyze MLD’s air quality impacts, claiming mainly that more research on emissions from large CAFOs is needed before it can assess environmental impacts. (Hanson Aff., Ex. H at 3.)

The Response to Comments provides a litany of regulatory provisions that “will apply to MLD if the air emissions from MLD exceed the applicability threshold levels.” Yet, the EA fails to give any measure of air emissions sufficient to analyze air impacts and to determine whether the various air regulations identified in the Response to Comments will apply to MLD. (Hanson Aff., Ex. H at 3-5.)

The DNR ignored information indicating the impacts would be significant. Even if the DNR was truly faced with inadequate information on which to base a negative EIS decision, it should have either required additional testing prior to making a final EA decision or required an EIS in order to more fully develop the information about impacts. *See Nat’l Parks & Conservation Assoc.*, 241 F.3d at 731. By not doing so, the negative EIS decision fails the *WED III* test because the information is not developed in sufficient depth to support a reasonably informed conclusion that there will be no significant adverse impacts to the environment. *WED III*, 79 Wis. 2d at 425, 256 N.W.2d at 158.

#### **IV. THE DNR VIOLATED WEPA BY FAILING TO ADEQUATELY MITIGATE SIGNIFICANT ENVIRONMENTAL IMPACTS.**

WEPA requires state agencies to use an EA to determine if a permit decision is a major action resulting in significant impacts to the quality of the human environment. If the project is a major action resulting in significant environmental impacts, the agency must conduct a more thorough evaluation of impacts through development of an EIS or adequately mitigate those impacts to such a degree as to render them insignificant. *State ex rel Boehm*, 174 Wis.2d at 676.

In the two Wisconsin cases that have upheld the use of conditions to mitigate significant environmental impacts, the agency had: 1) already completed a sufficient factual investigation to identify the potentially significant environmental impacts; 2) tailored concrete conditions to eliminate those identified impacts; and 3) required compliance with the conditions to obtain

approval for the project. *State ex rel. Boehm*, 174 Wis. 2d at 676-77; *City of New Richmond*, 145 Wis. 2d at 546. The federal cases interpreting NEPA follow this pattern as well. *See, e.g., Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982).

Although the DNR may condition its negative EIS decision on compliance with administrative codes, see e.g. *City of New Richmond*, 145 Wis. 2d at 546, the DNR may not merely speculate or draw unsupported conclusions that “hypothetical engineering or operational techniques” are sufficient to justify a negative EIS declaration. *Town of Centerville v. DNR*, 142 Wis.2d 240, 250-251 (Wis. Ct. App. 1987).

Further, courts have not upheld mitigating conditions that are nothing more than “tenuous assurances” and “vague statements of good intentions.” *Louisiana v. Lee*, 758 F.2d 1081, 1083 (5th Cir. La.1985); *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 860 (9th Cir. Idaho1982). Any mitigation measures forming the basis of the negative EIS decision must be clear. *Town of Centerville*, 142 Wis.2d. at 253.

**A. The DNR’s Measures to Mitigate Water Quality Impacts Are Vague and Unenforceable.**

The DNR’s mitigation measures are vague, speculative, and unenforceable, and such measures are insufficient under WEPA to mitigate significant impacts. *Town of Centerville*, 142 Wis.2d. at 253.

In the *Town of Centerville*, the Wisconsin Court of Appeals found that the DNR’s negative EIS for a sanitary landfill proposed for the Town of Centerville unreasonable. *Town of Centerville*, 142 Wis.2d. at 253. The neighbors worried that the landfill would negatively affect off-site wetland areas and Fischer Creek<sup>12</sup> only a few hundred feet away. *Id.* at 250. The DNR stated in its EA that “proper engineering and operation of the site *should* avoid impacts to these

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<sup>12</sup> This is the same Fischer Creek as in the current case.

areas.” *Id.* at 250; *see also id.* at 253 (emphasis original). However, the Court found that the “unspecified hypothetical engineering and operational techniques” in the negative EIS decision were insufficient to demonstrate that the DNR has developed a reviewable record. *Id.* at 250-251. The Court reasoned that this approach “leap frogs” over any analysis of the potential problem or the solution, and suggests that the DNR did not apply its expertise in concluding that no EIS was required. *Id.* at 251.

As in the *Town of Centerville*, the DNR’s mitigation measures are vague, unspecified and therefore inadequate for several reasons.

First, the Proposed Permit does not require phosphorus-based manure application rates, despite recognizing that phosphorus is a serious water polluting harming Point Creek, Fischer Creek and Lake Michigan, that MLD will add phosphorus to the watershed; and that current practices will allow some phosphorus to discharge to area waters over time.

All DNR has proposed can be found in Section 2.4 of the Proposed Permit, which states that MLD currently has a “P based manure management plan on select fields. Department will review, for acceptance, a narrative summary of existing P strategy to satisfy this requirement.” (Hanson Aff., Ex. F at 38.) Section 2.4 then refers to the Standard Requirements in Section 3 of the Proposed Permit. Section 3.2.9 of the Proposed Permit states that for all fields receiving manure, “the amount of manure applied to the soil on an annual basis shall not exceed the *nitrogen* requirements of the crops to be grown.” (Hanson Aff., Ex. F at 46) (emphasis added). As the Proposed Permit is written now, MLD will not be required to apply manure at these lower, phosphorus-based application rates on all fields. Instead, MLD will only apply at phosphorus-based rates on “select fields.” Mitigation measures must be clear in order to support

a negative EIS declaration, and DNR's mitigation measure here fails that test. *Town of Centerville*, 142 Wis.2d at 253.

Second, even if DNR required these lower, phosphorus based manure application rates on all fields, the DNR recognizes in the EA that "while the best management practices required by the proposed permit will go a long way toward minimizing excessive phosphorus delivery to nearby surface waters, soluble phosphorus and phosphorus attached to soil particulates is likely to reach nearby surface waters from fields hydraulically connected to these surface waters." (Hanson Aff., Ex. E at 6.) The DNR seems to admit that impacts will be significant, and that its proposed permit requirements will not mitigate those impacts enough to render them insignificant.

Third, there are no mitigation measures in the Proposed Permit that address 1) MLD's failure to "credit" existing soil phosphorus and nitrogen levels, particularly where fields already have excessive, i.e. more than 30 ppm or greater, phosphorus levels Hanson Aff., Ex. OO, ¶¶ 15-18); 2) MLD's sampling protocols that are causing MLD to underestimate the amount of phosphorus it produces in its manure and the amount of phosphorus in existing fields, (Hanson Aff., Ex. OO, ¶¶ 19-30); and 3) MLD's reporting errors that may be leading to over-application of manure, and consequently, phosphorus, on landspreading fields. (Hanson Aff., Ex. OO, ¶¶ 19-30).

Fourth, the DNR makes vague references to speculative requirements that MLD will have to meet as part of Proposed Permit. For example, the EA states that "following conditions in the Manure Management Plan for setback distances, appropriate application rates and timing, and recordkeeping *should* result in direct benefits to the environment." (Hanson Aff., Ex. E at 5.) The EA further states:

If the operation conducts landspreading in accordance with an approved Manure Management Plan, maintains an adequate land base for landspreading, and properly inspects and maintains manure storage facilities and runoff control systems, the threat to groundwater and surface water *should be minimal under normal operating and climatic conditions*.

(Hanson Aff., Ex. E at 6) (emphasis added). In fact, the DNR makes the statement twice on page 6 of the EA, both times without support or analysis. The DNR does not identify “normal operating and climatic conditions” nor does it state what constitutes a “minimal impact.”

The EA further lists vague mitigation measures, including: 1) MLD will have to comply with “additional restrictions on frozen and snow-covered ground” but does not state what those additional restrictions are or how they compare to current restrictions, if any (Hanson Aff., Ex. E at 6); 2) MLD will have to comply with “increased setbacks,” but does not state what MLD’s current setbacks are relative to what the “increased” setbacks will be (Hanson Aff., Ex. E at 6); 3) that the Proposed Permit includes “injection and incorporation requirements based on proximity to surface waters,” but does not state what those requirements are or how they change depending on the proximity to surface waters (Hanson Aff., Ex. E at 5); 4) MLD will have to comply with unspecified revisions to Wis. Admin. Code Chapter NR 243 *that have not yet been enacted* (Hanson Aff., Ex. H at 6); and 5) DNR “will evaluate compliance with the WPDES permit through soil tests required as part of the permit” and “continued evaluation of MLD’s ability to hold soil loss to tolerable levels,” but does not state what soil tests or soil loss will be deemed “acceptable.” *Id.*

Vague, contingent assertions like the ones made above by DNR in the EA are exactly what the Court in *Town of Centerville* found to be inadequate to satisfy the DNR’s WEPA obligations. 142 Wis.2d at 256. As in the *Town of Centerville*, the DNR identifies a series of vague, unspecified measures that are apparently intended to mitigate impacts, but the DNR has

not specifically identified what those impacts will be or how those vaguely stated requirements will minimize those impacts.

In contrast, the facts of this case are starkly different from those in *State ex rel. Boehm v. DNR* where the Court rejected a neighbors' challenge to the DNR's negative EIS declaration for the siting of a sanitary landfill on a parcel of land containing wetlands in Waukesha County. *State ex rel. Boehm*, 174 Wis. 2d at 673. The DNR based its negative EIS declaration on 29 specific conditions for approval. *Id.* The neighbors argued that the issuance of a negative EIS declaration in conjunction with proposed conditions improperly postponed the DNR's responsibility to conduct a preliminary investigation into the environmental impacts. *Id.* The Court rejected the neighbor's argument and found that the conditions in the landfill permit were designed to control the environmental consequences of the landfill. *Id.* at 674. If the landfill owners violated the conditions, then the project would become environmentally significant, but that the Court stated that this would be contrary to law and the DNR could halt the project and demand repair. *Id.* at 675. In the present case, the DNR does not specify "conditions" or quantify how the conditions it does identify will prevent phosphorus from polluting Fischer Creek, Point Creek, and Lake Michigan.

Likewise, this case is unlike that in *New Richmond v. Wisconsin Dep't of Natural Resources*, where the Court rejected a city's challenge to the DNR's EA for a new municipal waste incinerator. 145 Wis. 2d 535, 428 N.W.2d 279 (Wis. Ct. App. 1988). There, the DNR amended the EA in response to public comments and examined the bioaccumulation of dioxin in the food chain associated with the proposed incinerator. *Id.* at 549. The DNR found that non-inhalation risks posed by the incinerator's emissions of dioxin would be significant, and required the incinerator to install specific, additional technology to minimize the impacts of the dioxin

deposition. 145 Wis. 2d at 546. Further, the DNR cited “particular data found in the administrative record as the basis for its decision not to prepare an EIS” and mitigated impacts through enforceable permit conditions. *Id.* at 550.

In contrast to *Boehm* and *New Richmond*, here the DNR has stated that the Proposed Permit conditions will mitigate adverse environmental impacts, but has either not identified specific mitigation measures or has failed to show how the mitigation will produce measurable decreases in pollution in order to render the impacts insignificant. The supposed mitigation measures are not clear and enforceable. The DNR’s conclusion that the impacts will be insignificant is unreasonable.

**B. The DNR Has Failed to Mitigate Significant Air Impacts.**

The DNR has made no effort to determine whether MLD’s air quality impacts will be significant at its current size, much less when MLD expands to 9,000 animal units. Even if DNR had identified those significant impacts, it has not made any effort whatsoever to mitigate those impacts. Instead, the DNR states a red herring: it claims it has no authority as part of issuance of the Proposed Permit to mitigate MLD’s air quality impacts, significant or otherwise, and in turn uses this as an excuse for not undertaking an analysis of the significance of MLD’s air quality impacts.

The DNR recognizes MLD’s proposed Consolidation Site and Main Facility will pose a “potential for more particulate matter, dust, ammonia and hydrogen sulfide emissions and odors” and that “an increase in hazardous air pollutant emissions will also occur from this expansion project.” (Hanson Aff., Ex. H at 6; Hanson Aff., Ex. E at 4.)

The DNR initially admits that its issuance of the Proposed Permit will create an air quality problem, but then incorrectly claims that DNR has not yet developed air emissions

limitations. (Hanson Aff., Ex. E at 4.) The DNR corrects itself in the Response to Comments when it states that the DNR “does have regulatory provisions in place to address air emissions from CAFOs.” (Hanson Aff., Ec. H at 3.) The DNR then cites a series of provisions of the DNR’s air quality regulations that may apply to MLD’s air emissions.

However, rather than determine whether MLD’s air emissions are sufficient to trigger the requirements of DNR’s air quality regulations, the DNR cites MLD’s voluntary proposals to minimize odors, including “reducing the frequency from which landspreading occurs; emptying the pit when humidity ambient temperature and winds are such that odor is minimized; ...studying manure handling technologies including liquid/solid separation.” (Hanson Aff., Ex. E at 4.) None of these mitigation measures are enforceable because they have not been placed in any air quality permit. In fact, the DNR even states that “reductions in odors will primarily be dependent on voluntary efforts by MLD” in spite of the litany of air quality regulations it had previously cited. (Hanson Aff., Ex. H at 5.)

Courts have not upheld mitigating conditions that are nothing more than “tenuous assurances” and “vague statements of good intentions.” *Louisiana v. Lee*, 758 F.2d at 1083; *Preservation Coalition, Inc*, 667 F.2d at 860.

“Tenuous assurances” and “good intentions” are, at best, what the DNR has provided in this case. Petitioners are left with MLD’s voluntary actions when it comes to mitigating significant air quality impacts of the proposed project.

Petitioners are caught in a Catch-22: the DNR admits that MLD may be subject to a series of air pollution regulations, but then refuses to determine whether MLD’s emissions will be high enough to trigger those regulatory requirements and mitigate the air quality impacts.

(Hanson Aff., Ex. H at 3-5.) This is despite that it is the DNR's action in proposing to issue a WPDES permit to MLD that will exacerbate the air quality problem.

The result is a game of regulatory "hot potato" where both the DNR and MLD refuse to measure MLD's emissions of ammonia, hydrogen sulfide, and odors, but also refuse to consider scientific emissions data provided by the Petitioners. In the meantime, the air quality impacts are neither measured nor mitigated by DNR or MLD. The vague assertions of how to minimize air pollution and odor from MLD fail to adequately mitigate significant air pollution impacts and violates WEPA.

### **CONCLUSION**

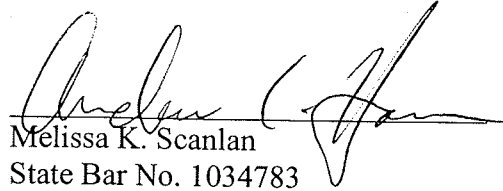
For the foregoing reasons, we respectfully request that the court find that the DNR has failed to satisfy the *WED III* test. The DNR failed to conduct a preliminary factual investigation of the relevant areas of environmental concern in sufficient depth to permit a reasonably informed preliminary judgment of the environmental consequences of MLD's proposed expansion because the DNR failed to identify and assess the cumulative impacts of the project, ignored evidence of significant impacts, and failed to mitigate significant impacts.

In light of the DNR's failure to meet the basic requirements of WEPA, we ask that the court set aside or remand the DNR's decision that no EIS is required, and stay DNR's issuance of the Proposed Permit until the requirements of WEPA have been satisfied.

Dated this 24th day of March, 2005.

Respectfully submitted,

**MIDWEST ENVIRONMENTAL ADVOCATES, INC.**

A handwritten signature in black ink, appearing to read "Melissa K. Scanlan", written over a horizontal line.

Melissa K. Scanlan

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