



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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November 25, 2005

Ms. Lynn Zigmunt  
Clerk of Circuit Court  
Manitowoc County Courthouse  
Post Office Box 2000  
Manitowoc, WI 54221-2000

Re: *Centerville Citizens for Air, River, and Environmental  
Solutions, U.A., et al. v. Department of Natural Resources*  
Case No. 05-CV-553

Dear Ms. Zigmunt:

Enclosed for filing please find respondent's Notice of Appearance and Statement of Position in the above-entitled matter. Copies are being mailed this date to counsel of record.

I will be forwarding to the Court, under separate cover, a certified copy of the record in this matter.

Sincerely,

Christopher J. Blythe  
Assistant Attorney General  
State Bar #1026147

CJB:ajw

Enclosure

c: Andrew C. Hanson  
Ronald R. Ragatz

CENTERVILLE CITIZENS FOR AIR,  
RIVER, AND ENVIRONMENTAL  
SOLUTIONS, U.A., RUSS TOOLEY  
and WAYNE SCHUETTE, SR.,

Petitioners,

Case No. 05-CV-553

v.

DEPARTMENT OF NATURAL RESOURCES,

Respondent.

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NOTICE OF APPEARANCE AND STATEMENT OF POSITION

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Respondent Wisconsin Department of Natural Resources (“DNR”) appears in this case by its attorneys, Attorney General Peggy A. Lautenschlager and Assistant Attorney General Christopher J. Blythe, and responds as follows to the petitioners’ Petition for Judicial Review (“Petition”).

DNR responds to the allegations of the Petition as follows:

1. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.
2. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.
3. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.

4. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.
5. DNR denies the allegations of paragraph 6.
6. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegations.
7. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegations.
8. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegations.
9. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegations.
10. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.
11. DNR denies the allegations of paragraph 11.
12. DNR denies the allegations of paragraph 12.
13. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegations.
14. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.
15. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.

16. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.

17. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.

18. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.

19. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.

20. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.

21. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.

22. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.

23. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.

24. DNR is without knowledge or information sufficient to verify that all petitioners participated in all hearings since 1997.

25. DNR admits the allegations of paragraph 25.

26. DNR admits the allegations of paragraph 26.

27. DNR admits the allegations of paragraph 27.

28. DNR admits that no written response was made, but denies the implication that a response was warranted.

29. DNR admits the allegations of paragraph 29.

30. DNR admits the allegations of paragraph 30.

31. DNR admits the allegations of paragraph 31.

32. DNR admits the allegations of paragraph 32.

33. DNR admits the allegations of paragraph 33.

34. DNR admits the allegations of paragraph 34.

35. DNR admits the allegations of paragraph 35.

36. DNR admits the allegations of paragraph 36.

37. DNR admits the allegations of paragraph 37.

38. DNR admits the allegations of paragraph 38.

39. DNR admits that the petition correctly quotes the Court's Order of August 10, 2005, and affirmatively alleges that the document speaks for itself.

40. DNR admits the allegations of paragraph 40.

41. DNR admits the allegations of paragraph 41.

42. DNR denies the allegations of paragraph 42.

43. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegations.

44. DNR admits the allegations of paragraph 44, and affirmatively alleges that the referenced fishkill is the subject of an ongoing DNR investigation, and the DNR

cannot, therefore, respond further to any related allegations in petitioners' petition at this time.

45. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegations.

46. DNR admits the allegations of paragraph 46 that petitioners submitted written comments on the Amended EA (with attachments) but denies the implication that some of the information could be used to definitively identify MLD's contributions to surface water pollution in the Centerville area.

47. DNR admits the allegations of paragraph 47 that the DNR responded to petitioners' comments on or around October 6, 2005, but denies the implication that the DNR has available modeling capabilities that can estimate MLD's contribution to surface water pollution in the Centerville area.

48. DNR admits the allegations of paragraph 48.

49. DNR admits the allegations of paragraph 49.

50. DNR admits the allegations of paragraph 50 with the clarification that the discharge that was investigated involved a tributary to Fischer Creek.

51. DNR admits the allegations of paragraph 51 and affirmatively asserts that the liquid manure was contained on-site and had no impact on surface waters or groundwater. DNR also affirmatively asserts that it is without information or belief as to who pumped the liquid manure into the livestock yard and that the matter is being investigated by the local sheriff.

52. DNR denies the allegations of paragraph 52.

53. DNR admits the allegations of paragraph 53.
54. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation. The permit application simply indicates that the applicant is incorporated.
55. DNR admits that the referenced definition appears in the administrative code; denies that the definition appears in the statute.
56. DNR admits the allegations of paragraph 56.
57. DNR admits the allegations of paragraph 57.
58. DNR admits the allegations of paragraph 58.
59. DNR admits the allegations of paragraph 59.
60. DNR admits the allegations of paragraph 60 as to milk production and animal manure, process wastewater, non-contact cooling water and milking center waste, which includes washwater as a component. DNR is without knowledge or information sufficient to form a belief as to the allegations of paragraph 60 regarding leachate, harmful bacteria, antibiotics, hormones and other pollutants.
61. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 61 as to the exact number of animal units housed at MLD, but admits that it is more than 4,000.
62. DNR admits the allegations of paragraph 62.
63. DNR admits the allegations of paragraph 63.
64. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation as to when MLD began expanding its operation.

65. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation in that DNR cannot locate MLD's original application.

66. DNR denies the allegations of paragraph 66, and affirmatively alleges that the permit authorized operation above 1,000 animal units as stated in the May 5, 1997, public informational hearing minutes.

67. DNR admits the allegations of paragraph 67.

68. DNR admits that MLD at some point had plans to grow to approximately 2,200 head of cattle, but is without knowledge or information sufficient to form a belief as to when those plans were made.

69. DNR denies the allegations of paragraph 69, and affirmatively alleges that the main facility grew to 1,700 cattle and that the original permit did not account for or include satellite facilities.

70. DNR admits the allegations of paragraph 70 and affirmatively alleges that the proposed expansion and the construction of a Consolidation Site have occurred.

71. DNR admits the allegations of paragraph 71.

72. DNR admits the allegations of paragraph 72.

73. DNR admits the allegations of paragraph 73.

74. DNR denies the allegations of paragraph 74.

75. DNR denies that the engineering report is actually MLD's expansion plan, as implied by the Petition.

76. DNR denies the allegations of paragraph 76, in that the engineering report does not actually represent MLD's expansion plan, as implied by the Petition.

77. DNR admits that the report differs from the description in the Final EA, but denies the implication that they both describe the same situation.

78. DNR admits that the EA identifies one new 1,184 foot freestall barn, but denies that MLD actually intends to build everything indicated in the September 2004 Engineering Report.

79. DNR admits that the EA describes the one 452 foot freestall barn, but affirmatively alleges that it also discussed other existing and potential new structures. DNR denies that MLD actually intends to build everything indicated in the September 2004 Engineering Report.

80. DNR admits that the EA describes the Consolidation Site as containing a 10.5 million gallon manure storage facility, but denies that MLD actually intends to build everything indicated in the September 2004 Engineering Report.

81. DNR admits that the September 2004 Engineering Report indicated that the Consolidated Site could physically contain up to 5,607 animal units, but denies any implication that MLD would have the requisite authorizations from the DNR to place that many animals on the site.

82. DNR admits that MLD has begun housing cattle at the Consolidation Site and that MLD has completed construction of a manure pit, but is without knowledge or information sufficient to form a belief as to the exact number of cattle or the exact size of the manure pit.

83. DNR denies the allegations of paragraph 83, in that the engineering report does not actually represent MLD's expansion plan, as implied by the Petition.

84. DNR admits that the facility will generate odors and dust, but denies that it has information to suggest that the facility will emit the referenced air pollutants at hazardous levels.

85. DNR admits the allegations of paragraph 85.

86. DNR admits that it did not place air quality-related requirements in the Wisconsin Pollutant Discharge Elimination System ("WPDES") permit that regulates water quality.

87. DNR admits that it included the reference to the administrative code in the Amended EA, but denies the implication that an EA is the mechanism to control or mitigate air emissions.

88. DNR admits that all facilities are subject to air quality regulations, but denies the implication that it has information to conclude that MLD would require an air pollution permit.

89. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.

90. DNR denies the allegations of paragraph 90.

91. DNR denies the allegations of paragraph 91.

92. DNR admits the allegations of paragraph 92.

93. DNR admits the allegations of paragraph 93, but affirmatively alleges that spreading restrictions in the permit will address concerns regarding the spreading sites.

94. DNR admits the allegations of paragraph 94.

95. DNR admits the allegations of paragraph 95.

96. DNR admits the allegations of paragraph 96.

97. DNR admits the allegations of paragraph 97.

98. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.

99. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.

100. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.

101. DNR admits the allegations of paragraph 101, but affirmatively alleges that the data collection and analysis were incomplete.

102. DNR admits the allegations of paragraph 102, but affirmatively alleges that the data collection and analysis were incomplete.

103. DNR admits the allegations of paragraph 103 in that the DNR discovered a fishkill in Fischer Creek on or around the week of September 12, 2005, but is without knowledge or information sufficient to form a belief as to the exact number of fish that were killed.

104. DNR denies the allegations of paragraph 104.

105. DNR admits the allegations of paragraph 105.

106. DNR admits that animal waste may contain antibiotics and growth hormones. DNR denies that bacteria are necessarily harmful.

107. DNR admits the allegations of paragraph 107.

108. DNR admits the allegations of paragraph 108.

109. DNR admits the allegations of paragraph 109.

110. DNR admits the allegations of paragraph 110.

111. DNR admits the allegations of paragraph 111.

112. DNR admits the allegations of paragraph 112.

113. DNR denies the allegations of paragraph 113, and affirmatively alleges that the document speaks for itself.

114. DNR denies the allegations of paragraph 114.

115. DNR admits that neither the Final EA nor the Amended EA state the specific amounts of waste produced by MLD, but denies the implication that the DNR has the authority to regulate the total amount of waste produced by MLD.

116. DNR denies the allegations of paragraph 116.

117. DNR admits the allegations of paragraph 117.

118. DNR admits the allegations of paragraph 118.

119. DNR denies the allegations of paragraph 119 to the extent that the allegations suggest that the methodology used in the Shaw Report was valid, and affirmatively alleges that the document speaks for itself.

120. DNR denies the allegations of paragraph 120 to the extent that the allegations suggest that the methodology and conclusions in the Shaw Report were valid, and affirmatively alleges that the document speaks for itself.

121. DNR admits the allegations of paragraph 121.

122. DNR admits the allegations of paragraph 122.

123. DNR admits the allegations of paragraph 123.

124. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.

125. DNR admits the allegations of paragraph 125 with the clarification that the discharge that was investigated involved a tributary to Fischer Creek.

126. DNR denies the allegations of paragraph 126.

127. DNR admits the allegations of paragraph 127.

128. DNR admits the allegations of paragraph 128.

129. DNR admits the allegations of paragraph 129.

130. DNR denies the allegations of paragraph 130 in that they assume that MLD is negatively impacting water quality.

131. DNR denies the allegations of paragraph 131.

132. DNR denies the allegations of paragraph 132.

133. DNR admits the allegations of paragraph 133.

134. DNR denies the allegations of paragraph 134.

135. DNR admits the allegations of paragraph 135, and affirmatively alleges that none of the problems have involved department enforcement action beyond a notice of violation.

136. DNR denies the allegations of paragraph 136, in that there is not a history of noncompliance to be discussed.

137. DNR denies the allegations of paragraph 137.

138. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.

139. DNR admits the allegations of paragraph 139 that it investigated a possible manure discharge to Fischer Creek on or around October 12, 2005, but denies the implications and assumptions of paragraph 126 as to the source or cause of a possible discharge.

140. DNR is without knowledge or information sufficient to form a belief as to the truth of the allegation.

141. DNR admits the allegations of paragraph 141.

142. DNR admits the allegations of paragraph 142.

143. DNR admits the allegations of paragraph 143 that the DNR investigated alleged discharges, but denies the implication that a definitive determination was made as to any actual discharges.

144. DNR denies the allegations of paragraph 144.

145. DNR denies the allegations of paragraph 145 and affirmatively alleges that the statute speaks for itself.

146. DNR denies the allegations of paragraph 146.

147. DNR denies the allegations of paragraph 147.

148. DNR denies the implications of paragraph 148 that the WPDES permit does not comply with the provisions of NRCS 313, and therefore denies the allegations of paragraph 148.

149. DNR admits the allegations of paragraph 149 that Section 3.2.14 of the 2005 WPDES Permit does not require specific containment structures, but denies the implication that the permit disregards concerns related to releases of manure to

groundwater and/or surface water, and affirmatively alleges that other provisions in the permit are designed to address such issues.

150. DNR denies the allegations of paragraph 150.

151. DNR admits the allegations of paragraph 151.

152. DNR admits the allegations of paragraph 152.

153. DNR denies the allegations of paragraph 153.

154. DNR denies the allegations of paragraph 154.

155. DNR denies the allegations of paragraph 155.

156. DNR denies the allegations of paragraph 156.

157. DNR denies the allegations of paragraph 157.

158. DNR realleges and reincorporates herein each preceding paragraph of this

Notice of Appearance and Statement of Position.

159. DNR admits the allegations of paragraph 159.

160. DNR admits the allegations of paragraph 160.

161. DNR denies the allegations of paragraph 161.

162. DNR denies the allegations of paragraph 162.

163. DNR denies the allegations of paragraph 163.

164. DNR realleges and reincorporates herein each preceding paragraph of this

Notice of Appearance and Statement of Position.

165. DNR admits the allegations of paragraph 165.

166. DNR denies the allegations of paragraph 166.

167. DNR denies the allegations of paragraph 167.

168. DNR denies the allegations of paragraph 168.

169. DNR realleges and reincorporates herein each preceding paragraph of this Notice of Appearance and Statement of Position.

170. DNR admits the allegations of paragraph 170.

171. DNR denies the allegations of paragraph 171.

172. DNR denies the allegations of paragraph 172.

173. DNR denies the allegations of paragraph 173.

174. DNR realleges and reincorporates herein each preceding paragraph of this Notice of Appearance and Statement of Position.

175. DNR admits the allegations of paragraph 175.

176. DNR admits the allegations of paragraph 176.

177. DNR denies the allegations of paragraph 177.

178. DNR denies the allegations of paragraph 178.

179. DNR realleges and reincorporates herein each preceding paragraph of this Notice of Appearance and Statement of Position.

180. DNR admits the allegations of paragraph 180.

181. DNR admits the allegations of paragraph 181.

182. DNR denies the allegations of paragraph 182 in that the statement is not true with respect to all effluent limitations and that it is an oversimplification for others.

183. DNR admits the allegations of paragraph 183.

184. DNR denies the allegations of paragraph 184.

185. DNR denies the allegations of paragraph 185.

186. DNR denies the allegations of paragraph 186.

187. DNR denies the allegations of paragraph 187.

WHEREFORE, the Wisconsin Department of Natural Resources respectfully asks the Court to AFFIRM the DNR's decision that an environmental impact statement is not required for the DNR to comply with the Wisconsin Environmental Protection Act, Wis. Stat. § 1.11, and Wis. Admin. Code ch. NR 150, and it further asks the Court to DENY all requests for relief.

WHEREFORE, the Wisconsin Department of Natural Resources also asserts that petitioners' request that this Court review the DNR's issuance of Wisconsin Pollutant Discharge Elimination System Permit No. WI-0058602-02-0 be denied on the grounds that petitioners failed to exhaust their administrative remedies by failing to seek review of the permit within sixty (60) days of the date of issuance of the permit (May 24, 2005) as required by Wis. Stat. § 283.63.

WHEREFORE, the Wisconsin Department of Natural Resources also asserts that petitioners have raised issues that have been the subject of previous litigation and that such issues are barred from being re-raised in this matter by the doctrine of *res judicata*, and respectfully asks this Court to strike petitioners' claims reflected in Issues One, Four and Five of the Petition and to hold that this matter is limited to a review of the items remanded

to the DNR by the court in Manitowoc County Case No. 04-CV-584, specifically Issues Two and Three of the Petition in this matter.

Dated this 25<sup>th</sup> day of November 2005.

PEGGY A. LAUTENSCHLAGER  
Attorney General



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