

LIVESTOCK FACILITY SITING REVIEW BOARD
c/o Wisconsin Department of Agriculture, Trade and Consumer Protection
2811 Agriculture Drive, PO Box 8911
Madison, WI 53708-8911

LEDGEVIEW FARMS, LLC
3870 Dickinson Road,
De Pere, WI 54115,

v.

Docket No. 19-LFSRB-01

TOWN OF LEDGEVIEW
3700 Dickinson Road
De Pere, WI 54115

**TOWN OF LEDGEVIEW'S
STATEMENT OF POSITION**

By its attorneys, Stafford Rosenbaum LLP, the Town of Ledgeview ("Town") submits this Statement of Position regarding Ledgeview Farms, LLC's petition for review of the Town's March 4, 2019 denial of a livestock facility siting permit.

BACKGROUND

This application for an expansion of the number of animal units allowed at its farm ("the Application") was the second of three livestock siting applications for the same property that were submitted to the Town by Ledgeview Farms LLC ("Ledgeview Farms" or "the farm") in just over a year, from December 2017 to January 2019. In fact, the Application was submitted in November 2018, while the first application was still before the Livestock Facility Siting Review Board ("Siting Board") on review.

The Town denied the first application on June 4, 2018. The Siting Board affirmed the Town's decision on that application on three separate grounds.¹ [18-LFSRB-02.] The third application was submitted earlier this year, while the Town was actively engaged in evaluating the second application. The Town dismissed the third application without rendering a decision because it was not timely and it was not appropriately submitted.²

¹The Siting Board also disagreed with the Town with respect to six other reasons the Town provided in support of its decision to deny the application.

² Ledgeview Farms submitted a petition for review to the Siting Board with respect to the Town's decision to dismiss this third application. Department of Agriculture Trade, and Consumer Protection ("DATCP") officials determined that the Siting Board did not have jurisdiction over the Town's dismissal of this

On March 4, 2019, the Town held a public meeting regarding the Application. After public comment and discussion, the Town dismissed and denied this Application. The Town provided written findings of fact and conclusions of law supporting its decision in accordance with Wis. Stat. § 93.90(4)(c) and Wis. Admin. Code § ATCP 51.34(3), and other applicable law (“Decision”).

In the Decision, the Town identified 1 reason for dismissal and 7 separate reasons for denial of the Application. Each of these reasons stands alone as sufficient, separate support for the Town’s action. In Section I of this Statement of Position, the Town explains why the decision by the Town to dismiss the Application is not subject to review and no further action need be taken by the Siting Board on this Application. In Section II, the Town addresses the issue of the relevance and effect of the issuance of a Wisconsin Pollutant Discharge Elimination System (“WPDES”) permit recently issued to the farm. In Section III, the Town responds to the remaining arguments made by the farm in its challenge to the Town’s Decision. Where possible, the Town does so by reference to the applicable sections of its Decision to avoid unnecessary repetition of its reasoning here.

Despite suggestions to the contrary in the farm’s petition for review, the Town is not opposed to animal agriculture. The Town views its agricultural businesses as an important part of the character of the community. In fact, the Town has recently added 2,056 acres to its Farmland Preservation zoning district. Most importantly, the Town even acknowledges the right of Ledgeview Farms to continue to conduct its dairy farming operations in the Town, at appropriate animal unit levels, as long as it moves into compliance with environmental laws that provide important protections for the Town’s resources, citizens, and visitors. The Town has even laid out a path for Ledgeview Farms to seek to grow its livestock operations consistent with the law and in a manner and in a direction that will limit negative impacts to other residents.

This has been a long and trying matter for the Town and its staff. Despite a near-constant string of threats, criticism, and personal attacks from Ledgeview Farms, the Town staff have consistently risen above these antics and maintained their professionalism. The Town Board’s decisions have all been made fairly, and in the best interests of the community.

With this context in mind, and for the reasons articulated below, the Siting Board should uphold the Town’s decision to dismiss and deny the Application.

I. THE TOWN’S DECISION TO DISMISS THE APPLICATION IS OUTSIDE OF THE SCOPE OF SITING BOARD REVIEW.

The Town determined that Ledgeview Farms constructively withdrew the Application when it denied the Town access to inspect the farm.³ Such a determination is outside the scope of Siting Board review.

application because this action was not a type of decision subject to Siting Board review under Wis. Stat. § 93.90(5)(b).

³ See Section A. ¶ 23 of the Town’s Decision. In its Statement of the Issues, Ledgeview Farms identifies this as the “Town’s Reason No. 1” for the Decision.

In the Town of Ledgeview, a livestock siting approval is provided in the form of a conditional use permit under zoning law. The Application contained a host of information and assertions about the current and proposed status and operations at the farm, and information fundamental to the applicability of the state livestock siting law to the proposal. The Town has jurisdiction as the zoning authority to conduct an inspection to assess and verify that information. The Town zoning staff were twice denied access to the farm for inspection. Both attempted inspections were preceded by notice from the Town to the farm. The Town even obtained a municipal inspection warrant prior to the second inspection attempt, as demanded by Ledgeview Farms, and the Town's zoning staff and a sheriff's deputy were turned away from the premises.

Because Ledgeview Farms denied the Town the opportunity to inspect the farm to determine the accuracy of the lengthy application and numerous assertions about the then-current and proposed operations at the farm, and to verify information fundamental to the applicability of the state livestock siting law to the proposal, the Town determined that the Application was constructively withdrawn by the Ledgeview Farms. The Town therefore dismissed the Application without reaching a decision on the merits.

The Town's dismissal of the Application is outside of the scope of the review authority of the Siting Board. The Siting Board only has jurisdiction where the local government has made a *decision* to approve or deny an application for local approval and a person alleges that the political subdivision incorrectly applied applicable state livestock siting standards under Wis. Stat. § 93.90(2)(a) or violated the provisions related to political subdivision authority under Wis. Stat. § 93.90(3). Wis. Stat. § 93.90(5)(b).

When the Town dismissed the Application because it was constructively withdrawn, no decision of the Town was made on the merits of the Application. Therefore, the Town did not "disapprove or prohibit" the proposed expansion under Wis. Stat. § 93.90 (3)(a). Ledgeview Farms foreclosed the Town's ability to gather sufficient information to render an approval. As a result, the Siting Board does not have jurisdiction to review the Town's dismissal of the application and the Siting Board should summarily dismiss Ledgeview Farms' petition for review in its entirety.⁴

The constructive withdrawal of the Application is dispositive in this case. Thus, if the Siting Board summarily dismisses Ledgeview Farms' Petition for Review on this ground, there is no need to address any other issues presented. Furthermore, the Application is essentially identical

⁴ The Siting Board has addressed this issue in the context of the failure of a political subdivision to make a completeness decision. In *Larson Acres Inc. v. Town of Magnolia*, 06-L-01, the Siting Board determined that it did not have authority to review a local government's determination of an application's completeness and that the Board can only review a final decision made on an application. <https://datcp.wi.gov/Documents/LSDecisionLarson06L01.pdf>. Similarly, as noted above, DATCP staff determined that the Siting Board did not have jurisdiction over the Town's dismissal of Ledgeview Farms' third livestock siting application earlier this year because the Town had not made a decision that was within the scope of the review of the Siting Board.

to the prior application for which the Siting Board upheld the Town's denial.⁵ Thus, the Siting Board has already addressed virtually all of the substantive application issues in this case, and there would be little additional value in doing so again here.

II. THE ISSUANCE OF A WPDES PERMIT TO LEDGEVIEW FARMS BY THE DNR HAS NO RELEVANCE TO THE TOWN'S DETERMINATION.

In its Statement of Position, Ledgeview Farms relies heavily on the fact that the farm was finally issued a WPDES permit⁶ by the Department of Natural Resources ("DNR") on March 14, 2019. Ledgeview Farms makes a rash of claims associated with the issuance of this permit, all of which are intended to distract the Siting Board from the appropriate scope of review in this matter. Among other things, Ledgeview Farms asserts that: the Town knew that the DNR was planning to issue the WPDES permit; the farm had informed the Town that it would be issued a WPDES permit "imminently;" the Town thought that its ability to deny the farm's Application would be hamstrung by the issuance of this permit; and that the Town "sped up" its decision-making process to render a final decision prior to its issuance.

Each of the above claims are either false or intentionally misleading. These claims are also wholly irrelevant.

First, Ledgeview Farms fundamentally mischaracterizes the relevance and effect of the issuance of this permit by DNR. State law specifically requires that the Siting Board "shall base its decision only on the evidence in the record" and, similarly, that the political subdivision making the underlying decision "shall base its decision on an application for approval on written findings of fact that are supported by the evidence in the record. . ." Wis. Stat. § 93.90(4)(c) and (5)(c). The WPDES permit was not issued prior to the Town's decision, and therefore, *was not in the record* upon which the Town based its decision and *is not in the record* upon which the Siting Board must make its decision. The arguments posed by Ledgeview Farms in asking the Siting Board to ignore these statutes are without precedent or merit and should be disregarded.

Second, *even if the WPDES permit had been issued prior to the Town's decision*, it would not affect the outcome of this matter in any way. DNR does not issue initial WPDES permits to farms to signify compliance with environmental laws, as Ledgeview Farms appears to assert. In fact, the exact opposite is true in this case. DNR staff and administrative officials from both the present and prior administrations repeatedly informed the Town that they were disappointed in the enforcement options that DNR could use to combat the numerous noncompliance issues at Ledgeview Farms, because many of the enforcement provisions in Wis. Admin. Code ch NR 243 apply only after a WPDES permit has been issued to a farm. DNR regards the issuance of a WPDES Permit in instances such as this as a means to put teeth into its enforcement options to

⁵ The minor differences between applications, for example the farm's previous failure to meet state setback requirements for its proposed waste storage facility, do not form the basis for the Town's Decision nor are they a subject of the farm's Petition for Review.

⁶ The WPDES permit issued to Ledgeview Farms establishes effluent limitations, monitoring requirements, and other conditions applicable to the management and utilization of manure and process wastewater generated at the farm.

attempt to bring the farm into compliance. To that end, DNR has already been on-site at Ledgeview Farms multiple times since the issuance of the WPDES permit, documenting instances of noncompliance with state and federal environmental laws. In fact, DNR recently issued a Notice of Violation (“NOV”) to Ledgeview Farms for failure to comply with its WPDES permit. Ledgeview Farms’ assertion that the issuance of a WPDES permit signifies that the farm is in compliance with state requirements fundamentally mischaracterizes the purpose of the permitting process, as underscored by the recent issuance of the NOV to Ledgeview Farms.

Third, even if the WPDES permit were relevant in the Siting Board’s review, it does not change or undermine any of the Town’s reasons for dismissing and denying the Application, or the scope of authority under which the Town was required to make its decision. Ledgeview Farms spends multiple pages of its Statement of the Issues attempting to convince the Siting Board to ignore its statutory charge and conclude that because a WPDES permit has been issued, the Town could not have relied upon the state waste storage and runoff management standards in making its Decision, pursuant to the exemptions under Wis. Admin. Code §§ ATCP 51.18(7) and 51.20(10). However, these exemptions do not apply in this case. These two exemptions from requirements for waste storage facilities and runoff management provide:

Exemption. This section [establishing requirements for wastes storage facilities or runoff management] does not apply **if all of the following apply:**

- (a) The operator holds a WPDES permit for the same proposed livestock facility, and that permit is based on housing for a number of animal units **that is equal to or greater than the number for which the operator seeks local approval.**
- (b) The operator includes a copy of the WPDES permit **with the operator's application for local approval.**

Wis. Admin. Code §§ ATCP 51.18(7) and 51.20(10) (Emphasis added.). In other words, if a WPDES permit that meets the requirements of these exemptions has been issued, a political subdivision arguably may not base a livestock siting decision on the requirements in these code sections. However, *neither of the two conditions* on the applicability of these exemptions applies in this case.

Under par. (b), the operator is required to have included a copy of the WPDES permit *with its application for local approval*. The Application in question was submitted to the Town four months prior to issuance of the WPDES permit. The WPDES permit was not issued ten days too late for consideration in the Town’s decision under this exemption condition, as alleged by Ledgeview Farms, it was issued *four months too late*. Ledgeview Farms’ assertion that the Town sped up its decision making process to get ahead of the WPDES issuance date is not only unfounded, it ignores the applicable law.

More importantly, the exemptions under Wis. Admin. Code §§ ATCP 51.18(7) and 51.20(10) only apply if a WPDES permit “is based on housing for a number of animal units that is equal to or greater than the number for which the operator seeks local approval.” The Application seeks approval of expansion of the Ledgeview Farms operations to 3,483 animal units. The

WPDES permit only allows for expansion of up to 3,077 animal units.⁷ *On the very face of the applications* submitted by Ledgeview Farms to the DNR, the WPDES permit is not based on “housing for a number of animal units that is equal to or greater than the number for which Town approval is sought.” Therefore, the exemptions under Wis. Admin. Code §§ ATCP 51.18(7) and 51.20(10) do not apply and the existence of the WPDES permit has no bearing on the Town’s decision-making. This would be true even if the WPDES permit had been issued *years before* the farm submitted its application to the Town.

Finally, it is important to note that the WPDES permit was so recently issued that the time period for challenges to the issuance of the permit has still not closed. There may very well be formal objections to this permit, especially given the degree to which the criteria for approval of a WPDES permit for a large farm are based on accurate reporting by the farm of important facts such as the number of animal units present and the number of acres available for landspreading of manure.⁸ Ledgeview Farms’ lack of credibility casts doubt on the reliability of any such reporting.

In conclusion, DATCP regulations make clear that the Siting Board may not consider the fact that DNR issued a WPDES permit to the farm ten days after the Town issued its Decision on the Application. However, it is also clear that even if the Siting Board could acknowledge the existence of the WPDES permit, issuance of that permit would not change the decision-making process or underlying authority of the Town with respect to the Decision. In fact, the very exemptions that Ledgeview Farms hopes to use related to the issuance of the after-the-fact WPDES permit do not apply in this case. The Application asks for approval of more animal units than are contemplated in the WPDES permit, making these exemptions inapplicable on their face. The same would be true if the WPDES permit had been issued a year ago, or even five years ago. The Siting Board should reject Ledgeview Farms’ arguments on these grounds.

III. RESPONSE TO THE REMAINING ARGUMENTS IN LEDGEVIEW FARM’S STATEMENT OF THE ISSUES.

As explained in Section I of this Statement of Position, the Siting Board should summarily dismiss Ledgeview Farms Petition for review based on the Towns’ dismissal of the Application, which is outside of the scope of Siting Board review jurisdiction. If the Siting Board either decides not to do so, or seeks to also address the other reasons put forth by the Town in support of a denial of the application on its merits, Ledgeview Farms’ remaining challenges to the Town’s Decision should be disregarded for the following reasons.

⁷ See Email Correspondence from Mr. Philip Moss, Wisconsin DNR, March 11, 2019 (“The basis for the draft WPDES permit was a current number of 2,764 animal units, expanding to 3,077 animal units by 2023”); see also Public Notice of Availability of a Nutrient Management Plan and Informational Hearing and Intent to Issue a Wisconsin Pollutant Discharge Elimination System (WPDES) Permit No. WI-0065421-01-0 dated May 30, 2018 (explaining that Ledgeview Farms “is proposing to expand through internal growth to 3,077 animal units). Multiple other changes to the farm’s infrastructure and operations would have to be undertaken prior to expansion even to this level, such as the addition of waste storage capacity.

⁸ The requirements that a WPDES permit be filed along with and at the same time as a siting application is filed in order for the exemptions under Wis. Admin. Code §§ ATCP 51.18(7) and 51.20(10) to apply may relate to the lack of instructive value of a permit that is still ripe for challenge.

A. The Application Did Not Present Credible Information (Town's Reason No. 2).

The Town denied the Application because Ledgeview Farms did not present an application to the Town that contained credible information that it would meet or exceed the state livestock siting standards.⁹ Wisconsin Admin. Code § ATCP 51.34(1)(b) allows a municipality to deny an application if the application does not contain "sufficient credible information to show, in the absence of clear and convincing information to the contrary, that the proposed livestock facility meets or is exempt from the standards in subch. II."

Because of Ledgeview Farms' extensive history of disregard for federal, state, and local laws as described in detail in the Town's Decision (including continuing noncompliance with state and federal environmental laws through the date of the Decision and following that date), its willingness to ignore its own promises made to avoid prosecution when caught in violation of the law, along with material, false statements that it has made in its applications and to regulators, the farm has failed to present the necessary credible evidence that it meets and will meet the applicable state standards.

The Siting Board acknowledged the authority of the Town to consider the credibility of the farm in its decision on the first application.¹⁰ This Application was filed almost a month *before* the Siting Board issued that decision, and during a time when the DNR had informed the farm that it was failing to comply with environmental laws applicable to its operations. The promises of the farm were not credible then, they were not credible when this Application was submitted, and the farm has done nothing to resurrect its credibility to date. In fact, possibly the worst blow to the farm's credibility was struck by its own decision to deny Town zoning staff access to the farm, even with a valid inspection warrant, to conduct an inspection to verify the farm's claims that it had implemented changes intended to restore its credibility.

It is important for the Siting Board to focus on the fact that Ledgeview Farms fails to contest the *reasons* put forward by the Town supporting its finding that the farm does not currently meet the "credibility" requirement under Wis. Admin. Code § ATCP 51.34(1)(b). Instead, the farm confines its arguments on this issue to the assertion that the Town *may not consider* the credibility of the farm's assertions, which is the same argument the Siting Board dismissed in its decision on Ledgeview Farms' first application. Because Ledgeview Farms does not challenge the Town's *reasons* for concluding that the farm's assertions in the Application are not credible, and because the Siting Board has already ruled that credibility may be considered, the Siting Board must uphold the Town's Decision.

⁹ See the Town's Decision, Section B. ¶ 24.

¹⁰ In the Siting Board's decision on the first siting permit application, it wrote that "the Town was allowed to consider the Applicant's past practices related to continuing runoff violations, because these past practices were linked to information in the application promising to rectify continuing discharges" and that the "Town had legal grounds to deny local approval based upon a determination that the application lacked credible information as it relates to the applicant's commitments to rectify continuing discharges." Ledgeview Farms, Inc., Docket No. 18-LFSRB-02, November 30, 2018.

B. Material Misrepresentations (Town’s Reason No. 3).

The Town also denied the Application because the farm included a number of misrepresentations in its Application that the Town determined were material and intended to mislead, in violation of Wis. Admin. Code § ATCP 51.34(4).¹¹ That section provides that a siting approval is “conditioned on” “representations made in the application for approval” and that the Town may “withdraw an approval, or seek other redress provided by law, if . . . the operator materially misrepresented relevant information in the application for local approval.” In Ledgeview Farms’ argument on this point in its Statement of Issues the farm *does not even argue that it did not make misrepresentations* in its application, or that its misrepresentations were minor or inconsequential. It only argues that its misrepresentations may only be held against it after an approval is issued, and not during the application process. This is a fundamental mischaracterization of the law.

C. Violation of State Livestock Siting Standards. (Town’s Reason No. 4).

The Town also based its denial of the Application on the fact that the farm was in violation of multiple state livestock siting standards in Wis. Admin. Code § ATCP 51 Subch. II at the time the Town rendered its Decision.¹² It still is in violation, based on the most recent information provided to the Town by DNR. Ledgeview Farms devotes more pages of its Statement of the Issues to its response to this reason for the Decision than to any other issue. Yet, inexplicably, *the farm never asserts that the Town is incorrect in its conclusion that the farm is in violation of these standards.* It spends the entirety of its argument asserting that the Siting Board should include the WPDES permit in its consideration of this case, and that if it does so, it should conclude that the farm is absolved of the responsibility of meeting these state standards because of the exemptions under Wis. Admin. Code §§ ATCP 51.18(7) and 51.20(10). As explained in detail in Section II of this Statement of Position above, the Siting Board should not consider the WPDES permit in this matter, and even if it does, the exemptions relied upon by the farm do not apply here on their express terms.

Simply put, if the WPDES permit is not relevant in this review, the Town’s decision on this point must be upheld because Ledgeview Farms did not challenge the underlying assertion of noncompliance. Even if the Siting Board chooses to consider the WPDES permit, it is indisputable that the exemptions relied upon by the farm do not apply, and the same result must issue. The Siting Board should uphold the Town’s decision on this basis.

D. The Farm Currently Violates State Standards (Town’s Reason No. 5).

The Town also denied the Application on the grounds that it cannot be required to issue an approval that it could revoke immediately thereafter, in accordance with Wis. Admin. Code § ATCP 51.34 (4).¹³ The farm is already operating at the very limit of the number of animal units

¹¹ See the Towns Decision, Section B. ¶25.

¹² See the Towns Decision, Section B. ¶26.

¹³ See the Towns Decision, Section B. ¶27.

that can be supported by its existing manure storage and spreading capacity. The Farm grew to almost three times the limit applicable to it under state and federal law without required approvals, and is today a “large concentrated animal feeding operation” that is not in compliance with environmental laws. Under this line of reasoning in the Town’s decision, the Town denied the Application not because the *proposed* new manure pit would violate state standards or because a *proposed* new feed storage area would be deficient, but because the facilities and practices in place right now on this farm *violate the very state standards that the Town must apply to this operation.*

Ledgeview Farms again relies on its after-the-fact WPDES permit to claim that the Town would not even have the authority to revoke a siting approval under Wis. Admin. Code § ATCP 51.34 (4) if such an approval were issued. However, it again bases this assertion on its debunked claim that Wis. Admin. Code §§ ATCP 51.18(7) and 51.20(10) exempt it from the applicability of state standards. As provided in Section II and Section III, Reason 4, this Application fails under every criteria for applicability of those exemptions.

E. Setback Requirements (Town’s Reason No. 6).

The Town has imposed more stringent setback requirements for new manure storage facilities than the setback distances required under state law.¹⁴ In its decision on the first siting application, the Siting Board found that the Town did not include adequate findings of fact related to this setback requirement in its ordinance. The Town took action to bolster these findings in its ordinance, which were adopted on December 18, 2018. These additional findings were adopted well before Ledgeview Farms had submitted a complete application to the Town. Multiple reasons supporting this more stringent setback requirement are included in the Town ordinance and in the Decision.

The Town asserts that both its previously-existing and its revised ordinance related to setback requirements applicable to manure storage facilities apply to the proposed manure storage facility in the Application, and because this proposed facility does not meet the Town’s setback requirement, the Town’s denial of the Application must be upheld.

F. CUP Approval (Town’s Reason No. 7).

Lastly, the Town also incorporated the findings and conclusions in the Town’s prior decision on the first siting application that were based on general CUP approval criteria in the Town’s ordinances into its Decision on this Application.¹⁵ The Siting Board has already determined that these reasons may not be relied upon by the Town in making its Decision, and they were only included to preserve this argument should there be a judicial appeal of the Siting Board’s decision in this matter.

CONCLUSION

The Town dismissed the Application because it was constructively withdrawn by

¹⁴ See the Towns Decision, Section B. ¶28.

¹⁵ See the Towns Decision, Section B. ¶29.

Ledgeview Farms. This is not a decision subject to review and therefore, the Siting Board should summarily dismiss this petition. In addition, the Town denied the Application on the merits for multiple, stand-alone reasons. For the reasons articulated above, the Board should reject each of the farm's challenges and uphold the Town's Decision.

If the Siting Board overturns all of the reasons supporting the Town's Decision, the Town requests that the Board remand the Application to the Town so that the Town can impose appropriate conditions on the required conditional use permit for Ledgeview Farms. Given the extensive history of noncompliance at Ledgeview Farms and the lack of transparency in operating procedures, the imposition of conditions is necessary to ensure protection of public health and safety. In addition, the limited scope of the review that may be undertaken by the Board, and pursuant to judicial review of a Board decision under Wis. Stat. § 93.90 (5), this review process alone will not encompass the range of potential legal challenges that may be filed, and will not include all potential parties who may have standing to bring such challenges, should the Town be directed to approve this Application. To protect these interests, remand would be necessary if the Town's Decision is overturned.

Dated: May 10, 2019.

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