

On June 22, 2009, under the authority of the Board and its bylaws, Board Attorney Cheryl Furstace Daniels sent a Notice of Request for Review and a Request for Certified Copy of Decision-Making Record to the County, Van Dyke and Noble. The Request for Review included a date of July 31, 2009 for all Statements of Position to be postmarked to the Board.

On July 17, 2009, the County sent a copy of the decision-making record for the Noble case, with a certificate of record from the Racine County Assistant Corporation Counsel. On July 31, 2009, the County sent a Statement of Position for consideration by the Board.

The Board held a properly noticed meeting on August 21, 2009. Included in the meeting agenda was *Audrey Van Dyke v. Racine County, Docket No. 09-L-01*. At this meeting, in open session, the Board discussed the case. Several other position statements were received by the Board in the period prior to July 31, 2009. The Board received these statements into the record and the persons are included in both the Board's sending of position statements to all aggrieved persons, the applicant and the County. However, because these statements did not properly address the issues in the challenge to the County's decision, the Board decided not to consider them in making its decision.

The Board voted unanimously to deny the challenge to the County's decision to grant the permit to Noble Farms LLC on June 5, 2009. The Board directed Board Attorney Cheryl Furstace Daniels to prepare a draft written decision for their review, editing and signing at the next Board meeting on September 18, 2009. Attorney Daniels

did so and sent the draft to the Board, Van Dyke, Noble, Racine County and all aggrieved persons who wrote to the Board, expressing an opinion on the merits of the challenge. The draft was posted on the Board's website and notice was given to interested persons that it was available to be viewed, downloaded or copied.

The Board met by teleconference on September 18, 2009 to consider the draft decision in *Van Dyke v. Racine County, Docket No. 09-L-01*. After review and edits, the Board voted unanimously to approve and sign the decision.

Therefore, based upon the record in the matter, including the record submitted by the County and the statements of position by Van Dyke and the County, the Board issues the following decision.

ISSUES FOR DECISION

1. Does the Noble application comply with the waste storage facility standards set under s. 93.90(2)(a), Wis. Stats., and s. ATCP 51.18, Wis. Adm. Code?
2. Does the Noble application comply with the nutrient management standards set under s. 93.90(2)(a), Wis. Stats., and s. ATCP 51.16, Wis. Adm. Code?
3. Are the challenges to the application valid?

RELEVANT STATUTES AND RULES

S. 93.90 Livestock facility siting and expansion.

(2) DEPARTMENT DUTIES. (a) For the purposes of this section, the department shall promulgate rules specifying standards for siting and expanding livestock facilities. . .

(3) POLITICAL SUBDIVISION AUTHORITY.

(ae) A political subdivision that requires a special exception or conditional use permit for the siting or expansion of any of the following livestock facilities shall require compliance with the applicable state standards under sub. (2)(a) as a condition of issuing the special exception or conditional use permit:

1. A new or expanded livestock facility that will have 500 or more animal units.

(5) REVIEW OF SITING DECISIONS. (a) In this subsection "aggrieved person" means a person who applied to a political subdivision for approval of a livestock facility siting or expansion, a person who lives within 2 miles of a livestock facility that is proposed to be sited or expanded, or a person who owns land within 2 miles of a livestock facility that is proposed to be sited or expanded.

(b) An aggrieved person may challenge the decision of a political subdivision on an application for approval on the grounds that the political subdivision incorrectly applied the state standards under sub. (2)(a) that are applicable to the livestock facility siting or expansion or violated sub. (3), by requesting the board to review the decision. . .

(bm) Upon receiving a request under par.(b), the board shall notify the political subdivision of the request. The political subdivision shall provide a certified copy of the record under sub. (4) to the board within 30 days after the day on which it receives the notice.

(c) Upon receiving the certified copy of the record under par. (bm), the board shall determine whether the challenge is valid. The board shall make its decision without deference to the decision of the political subdivision and shall base its decision only on the evidence in the record under sub. (4)(b). . . The board shall make its decision within 60 days after the day on which it receives the certified copy of the record under par. (bm), except that the board may extend this time limit for good cause specified in writing by the board.

(d) If the board determines that a challenge is valid, the board shall reverse the decision of the political subdivision. The decision of the board is binding on the political subdivision, subject to par. (e). If a political subdivision fails to comply with a decision of the board that has not been appealed under par. (e), an aggrieved person may bring an action to enforce the decision.

Chapter ATCP 51 LIVESTOCK FACILITY SITING

ATCP 51.16 Nutrient management. (1) NUTRIENT MANAGEMENT STANDARD. (a) Except as provided in par. (c):

1. Land applications of waste from a livestock facility approved under this chapter shall comply with NRCS nutrient management technical standard 590 (September, 2005), except for sections V.A.2.b.(2), V.D., V.E. and VI.

(2) PRESUMPTION. For purposes of local approval, an operator is presumed to comply with sub. (1) if the application for local approval complies with s. ATCP 51.30.

ATCP 51.18 Waste storage facilities. (2) EXISTING FACILITIES. For purposes of local approval, an existing waste storage facility is presumed to comply with sub. (1) if a registered professional engineer or certified agricultural engineering practitioner certifies one of the following in the application for local approval:

(e) The facility is in good condition and repair, shows no apparent signs of structural failure or significant leakage, is located entirely above ground, and is located on a site at which the soils comply with *NRCS technical guide manure storage facility standard 313, table 5 (November, 2004)*.

(5) STORAGE CAPACITY. The waste storage capacity of a livestock facility, not counting any excess storage capacity required for open waste storage facilities under par. (b), shall be adequate for reasonably foreseeable storage needs based on the operator's waste and nutrient management strategy under s. ATCP 51.16.

ATCP 51.30 Application. (1) GENERAL. If local approval is required for a new or expanded livestock facility, a person seeking local approval shall complete and file with the political subdivision the application form shown in *Appendix A*. The application shall include all of the information required by *Appendix A* and attached *worksheets*, including any authorized modifications made by the political subdivision under sub. (2). The information contained in the application shall be credible and internally consistent.

(5) COMPLETE APPLICATION. Within 45 days after a political subdivision receives an application under sub. (1), the political subdivision shall notify the applicant whether the application contains everything required under subs. (1) to (4). If the application is not complete, the notice shall specifically describe what else is needed. Within 14 days after the applicant has provided everything required under subs. (1) to (4), the political subdivision shall notify the applicant that the application is complete. A notice of completeness does not constitute an approval of the proposed livestock facility.

ATCP 51.34 Granting or denying an application. (1) GRANTING AN APPLICATION. Except as provided in sub. (2), a political subdivision shall grant an application under s. ATCP 51.30(1) if all of the following apply:

(a) The application complies with s. ATCP 51.30.

(b) The application contains 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. To the extent that a standard under subch. II vests discretion in a political subdivision, the political subdivision may exercise that discretion.

(3) WRITTEN DECISION. (a) A political subdivision shall issue its decision under sub. (1) or (2) in writing. The decision shall be based on written findings of fact included in the decision. The findings of fact shall be supported by evidence in the record under s. ATCP 51.36. Findings may be based on presumptions created by this chapter.

(4) TERMS OF APPROVAL. An approval under sub. (1) is conditioned on the operator's compliance with subch. II and representations made in the application for approval. This chapter does not limit a political subdivision's authority to do any of the following:

(a) Monitor compliance.

(b) Withdraw an approval, or seek other redress provided by law, if any of the following apply:

1. The operator materially misrepresented relevant information in the application for local approval.

2. The operator, without authorization from the political subdivision, fails to honor relevant commitments made in the application for local approval. A political subdivision may not withhold authorization, under this subdivision, for reasonable changes that maintain compliance with the standards in subch. II.

3. The livestock facility fails to comply with applicable standards in subch. II.

FINDINGS OF FACT

1. On April 20, 2009, Noble View Farms LLC filed an application for local approval with Racine County for an expansion of its livestock facility to an 800 animal unit dairy cattle operation.

2. On that date, the county advised Noble that the application was complete under s. 93.90(4)(a), Stats.

3. On April 28, 2009, the County sent notification to adjacent landowners of the Noble application.

4. Racine County also accepted written testimony until May 15, 2009, regarding the Noble View Farms application.

5. On May 18, 2009, Racine County held a public hearing where it accepted testimony regarding Noble View Farms' application.

6. On May 18, 2009, the Racine County Economic Development and Land Use Planning Committee unanimously approved Noble's application.

7. On June 5, 2009, Racine County issued the zoning permit to the Walter and Elizabeth Noble View Farms, LLC, Jay Noble Agent.

8. On June 16, 2009, Audrey Van Dyke filed a challenge with the Board concerning Racine County's granting of the conditional use permit to Noble View Farms LLC. She included a statement of position with her challenge.

9. On June 22, 2009, Board Attorney Cheryl Furstace Daniels sent a Notice of Request for Review and a Request for Certified Copy of Decision-Making Record to the County, with copies

to Van Dyke and Noble, stating that the Board would take up Van Dyke's challenge within 60 days of receiving the certified record from the County.

10. On July 23, 2009, the County sent a copy of its record, with a certification.

11. Prior to July 31, 2009, the Board received statements from 17 persons who live within 2 miles of the proposed expansion at Noble Farms LLC.

12. On July 31, 2009, the Board received a Statement of Position from Racine County.

13. On August 21, 2009, the Board met and took up *Van Dyke v. Racine County, Docket No. 09-L-01*.

14. On August 21, 2009, the Board voted unanimously to deny the challenge of Van Dyke to Racine County's granting of a conditional use permit for an expanded livestock facility for Noble View Farms LLC.

CONCLUSIONS OF LAW

1. The standards to be applied in this matter are those under s. 93.90, Stats., and ch. ATCP 51, Wis. Adm. Code.

2. The challenge, under s. ATCP 51.18(2), Wis. Adm. Code, involving the certification, that was approximately 11 months old, of pre-existing waste storage lagoons by an engineer, fails because the certification was within a reasonable time frame and there was nothing to indicate in the record that there was any alteration of the lagoons in the months following the certification until now.

3. The challenge, under s. ATCP 51.18(5), Wis. Adm. Code, that the volume capacity of the waste storage facilities was inadequate for the maximum number of animal units, fails because the waste storage facility design and management in the application is consistent with the nutrient management plan.

4. The challenges to the nutrient management plan, under s. ATCP 51.16, Wis. Adm. Code, concerning the discrepancies in the calculations for acreage within the plan that allegedly show that the plan is not credible, fail because of the following:

- a. The inconsistencies are minor.
- b. The challenges include assertions of fact not supported by the record.
- c. The professional certification gives the plan a presumption of adequacy.
- d. The use of the Snap-Plus program in building the nutrient management plan takes into account all of the requirements under s. 93.90, Stats., and ch. ATCP 51, Wis. Adm. Code.

5. The aggrieved person has not shown, by clear and convincing evidence in the record or by looking at the applicant's, that the presumption of the adequacy of the plan has been overcome.

6. Noble Farms LLC's application for an expanded livestock facility is internally consistent, credible and complete.

OPINION OF THE BOARD

The challenges in this case involve certain questions that have not been previously presented to the Board. First, the Board must decide if a waste storage certification that was made, approximately 11 months before the date the application was submitted, was adequate. In this case, there is no evidence that there has been any alteration in the facilities used for waste storage. Therefore, although the Board cannot state with certainty when a certification is no longer valid due to age, in this case the certification is less than a year old and there is no evidence of alteration. Therefore, the Board concludes that the certification is still adequate.

Second, as to the adequacy of the waste storage facility, in the first calendar year of operation under the approval, a challenger must take into account the date the permit was approved. In this case, the permit was granted on June 5, 2009. The challenge cannot be based on a calculation of waste for the maximum number of animal units for the entire calendar year.

Third, while there are some inconsistencies across some of the calculations in the conservation plan versus the nutrient management plan, these inconsistencies are recognized by the Board to be minor and micromanagement of any plan is not within the Board's authority. Only material inconsistencies in the plan can overcome the

presumption of adequacy that the professional certification gives the plan. The question before the Board is whether the minimum standards set forth in the statutes and rule have been met. If the answer is yes, the plan will not be deemed inadequate by the Board.

In addition, while inconsistencies were found by looking at the initial conservation plan, that plan is just the starting foundation for building the nutrient management plan. If, as in this case, the plan uses the Snap Plus program to generate the nutrient management plan, that program utilizes information on soil tests, soil erosion rates, crop rotations, rates of nutrient application and utilization of nutrients by fields. The Snap Plus program fulfills the requirements of the Siting Law so the results from that program in generating that part of the application is most germane to the question of whether the plan is adequate.

Finally, the Board's authority is to take a second look at the record and plan generated at the local level. Any challenges must reflect information that is in the record from the local political subdivision. In addition, supervision of the plan's execution is left, by the statutory scheme, to the local political subdivision. Monitoring and enforcement of the plan is statutorily left with the County, in this case.

ORDER

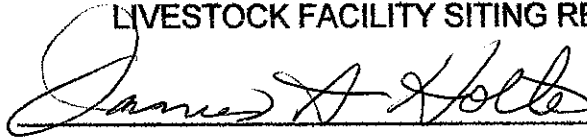
NOW, THEREFORE, IT IS ORDERED, pursuant to s. 93.90(5)(d), Stats.

The granting of the livestock siting expansion permit to Noble View Farms LLC for an 800 animal unit facility by Racine County, voted on May 18, 2009 and granted on June 5, 2009, is sustained.

Dated this 19th day of October, 2009.

STATE OF WISCONSIN
LIVESTOCK FACILITY SITING REVIEW BOARD

James Hofte, Chair



Andrew Johnson, Vice Chair

Robert Selk, Secretary

Fran Byerly

Lee Engelbrecht

Jerome Gaska

Robert Topel

Dated this 20th day of October, 2009.

STATE OF WISCONSIN
LIVESTOCK FACILITY SITING REVIEW BOARD

James Holte, Chair

Andrew Johnson, Vice Chair

Andrew B Johnson

Robert Selk, Secretary

Fran Byerly

Lee Engelbrecht

Jerome Gaska

Robert Topel

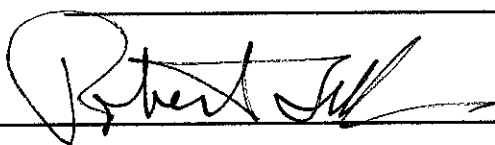
Dated this 20th day of October, 2009.

STATE OF WISCONSIN
LIVESTOCK FACILITY SITING REVIEW BOARD

James Holte, Chair

Andrew Johnson, Vice Chair

Robert Selk, Secretary



Fran Byerly

Lee Engelbrecht

Jerome Gaska

Robert Topel

Dated this _____ day of _____, 2009.

STATE OF WISCONSIN
LIVESTOCK FACILITY SITING REVIEW BOARD

James Holte, Chair _____

Andrew Johnson, Vice Chair _____

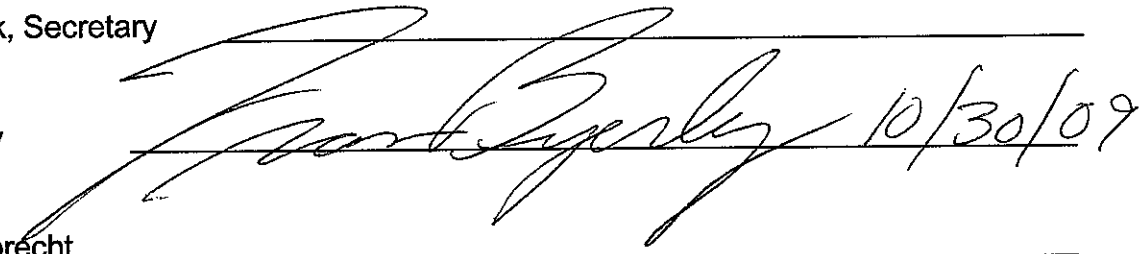
Robert Selk, Secretary _____

Fran Byerly _____

Lee Engelbrecht _____

Jerome Gaska _____

Robert Topel _____

A large, handwritten signature in black ink, which appears to be "Fran Byerly", is written over the signature line for Fran Byerly. To the right of the signature, the date "10/30/09" is handwritten in black ink.

Dated this 30th day of October, 2009.

STATE OF WISCONSIN
LIVESTOCK FACILITY SITING REVIEW BOARD

James Holte, Chair _____

Andrew Johnson, Vice Chair _____

Robert Selk, Secretary _____

Fran Byerly _____

Lee Engelbrecht Lee Engelbrecht _____

Jerome Gaska _____

Robert Topel _____

Dated this 15th day of October, 2009.

STATE OF WISCONSIN
LIVESTOCK FACILITY SITING REVIEW BOARD

James Holte, Chair _____

Andrew Johnson, Vice Chair _____

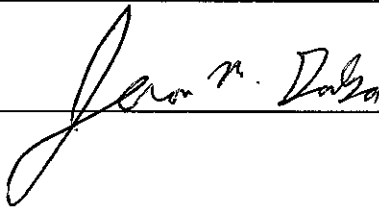
Robert Selk, Secretary _____

Fran Byerly _____

Lee Engelbrecht _____

Jerome Gaska _____

Robert Topel _____



Dated this 20th day of October, 2009.

STATE OF WISCONSIN
LIVESTOCK FACILITY SITING REVIEW BOARD

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Robert Topel

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