

**BEFORE THE
WISCONSIN DEPARTMENT OF NATURAL RESOURCES**

**In the matter of Pagels Ponderosa Dairy, LLC.
Permit No. WI-0059374-05-0 to Discharge Under
the Wisconsin Pollutant Discharge Elimination
System (“WPDES”) dated October 29, 2024.**

**VERIFIED PETITION FOR REVIEW UNDER
WIS. STAT. § 283.63**

TO THE DEPARTMENT OF NATURAL RESOURCES:

Clean Water Action Council of Northeast Wisconsin, Friends of the Forestville Dam, and Tyler Frye, by their attorneys, Midwest Environmental Advocates and Environmental Law & Policy Center, hereby petition the Wisconsin Department of Natural Resources (DNR) for a hearing to be held as a contested case, pursuant to Wis. Stat. § 283.63 and Wis. Admin. Code § NR 203.14 et seq., regarding DNR’s decision to reissue Wisconsin Pollutant Discharge Elimination System (WPDES) Permit No. WI-0059374-05-0 to Pagels Ponderosa Dairy, LLC. **A true and correct copy of the above-referenced WPDES permit is attached as Exhibit A, hereinafter the “Permit.”**

1. Pagels Ponderosa is a large concentrated animal feeding operation (CAFO) for dairy cows that has been issued previous WPDES permits in Kewaunee County, Wisconsin. Pagels Ponderosa operates three facilities: the Main Site in Kewaunee, Wisconsin; the Clyde Hill Site in Casco, Wisconsin; and the Hilltop Ponderosa Site (formerly Legend Farms Dairy) in Kewaunee County, Wisconsin. The three facilities exist within five miles of each other and abut the Kewaunee River.

2. Additionally, the Pagels family owns Dairy Dreams, a separately permitted large CAFO in Kewaunee County, Wisconsin.
3. Pagels Ponderosa currently houses 11,394 animal units at its three sites. Specifically, as of January 2024, the operation housed 6,877 milking and dry cows, 252 large heifers, 1,856 small heifers, and 1,881 calves. According to a DNR Fact Sheet produced for the permit reissuance, the 11,394 animal units annually generate approximately 104,314,148 gallons of liquid manure and process wastewater and 5,364 tons of solid manure.
4. Pagels Ponderosa spreads that waste on approximately 10,548.5 acres of land.
5. Under the Permit, Pagels Ponderosa is authorized to discharge to unnamed tributaries within the Kewaunee River and East Twin River Watersheds, the Lake Michigan Drainage Basin, and groundwaters of the state. The East Twin River and northeast lakeshore of Lake Michigan are both impaired for total phosphorus, a contaminant found in CAFO waste.
6. Private drinking water well contamination in Kewaunee County is pervasive, and studies have shown a link between CAFO field practices and nearby well contamination. Under the Permit, Pagels Ponderosa is also authorized to spread on those landscapes that are highly susceptible to groundwater contamination.
7. DNR issued a public notice on April 18, 2024 of its intent to reissue Pagels Ponderosa's WPDES permit for its expanded operation. Following a request for a public informational hearing, DNR also held a public meeting on July 11, 2024 where members of the public could comment on the proposed permit.
8. DNR issued WPDES Permit No. WI-0059374-05-0 to Pagels Ponderosa on August 30, 2024.

9. Section 283.63(1) of the Wisconsin Statutes allows five or more persons to secure a review by DNR of the reasonableness of or necessity for any term or condition of any issued, reissued, or modified permit by filing a verified petition setting forth the issues sought to be reviewed and the interest of the petitioners with the DNR Secretary within sixty days after DNR provides notice of permit reissuance.

I. INTERESTS OF THE PETITIONERS AND THE NATURE OF THEIR INJURY

In support of their petition, Petitioners show as follows:

10. Clean Water Action Council (CWAC) is a nonprofit environmental advocacy organization that has fought for environmental protection in northeast Wisconsin since 1985. CWAC and its members work to ensure compliance with the Clean Water Act, Wisconsin's delegated Clean Water Act program, and the CAFO regulatory program. CWAC and its members attend and testify at CAFO permit hearings, submit comments on CAFO permits, and more generally work to strengthen Wisconsin's CAFO regulatory program. As such, CWAC has expended significant time and resources ensuring DNR's proper administration of the WPDES program.

11. CWAC has over 540 members who reside in northeast Wisconsin, including forty-five who live in Kewaunee County. A number of CWAC's members live, work, and recreate near Pagels Ponderosa's production facilities or landspreading fields.¹ CWAC and its members thus have a substantial interest in protecting groundwater and surface water quality in the area surrounding Pagels Ponderosa and are harmed by DNR's decision to issue the Permit without the conditions necessary to protect these waters.

¹ Because Pagels Ponderosa spreads liquid manure across multiple counties, affecting numerous waterbodies, CWAC cannot identify all members who are directly impacted by the CAFO's activities.

12. Friends of the Forestville Dam (FOFD) is a community-based environmental organization based in Door County. FOFD is made up of Door County residents, sportsmen, and recreational enthusiasts with an interest in the water quality of the Door Peninsula. FOFD's members live, work, and recreate near fields where Pagels Ponderosa spreads its waste. FOFD and its members thus have a substantial interest in protecting groundwater and surface water quality impacted by Pagels Ponderosa's spreading practices and are harmed by DNR's decision to issue the Permit without the conditions necessary to protect these waters.

13. Tyler Frye resides in Kewaunee County and relies on groundwater for his drinking water and other potable uses. Since purchasing his home in March 2022, Mr. Frye has experienced nitrate contamination in his home drinking water; this contamination includes multiple instances where private well tests for nitrate exceeded the public health groundwater standard of 10 mg/L, as identified in Wis. Admin. Code §§ NR 140.10 and 809.11. As a result, Mr. Frye and his family had to purchase safe drinking water until they could eventually pay to install a water treatment system. Still, Mr. Frye is concerned about nitrate levels, especially if they continue to increase to a point where treatment is no longer effective. Mr. Frye is also an outdoor enthusiast with a substantial interest in preserving the surface waters of Kewaunee County, including the Kewaunee River, the northeast lakeshore of Lake Michigan, and inland lakes that are already experiencing excessive algal blooms. Mr. Frye's water quality interests include the preservation of those surface waters for fish and other aquatic life, recreation, and the preservation of ecological resources more broadly. For all of these reasons, Mr. Frye is concerned about the impacts that groundwater and surface water contaminants discharged by CAFOs in Kewaunee County will have on himself and his family.

II. PETITIONERS' RIGHT TO ADMINISTRATIVE REVIEW

14. Sections 227.42 and 283.63 of the Wisconsin Statutes accord Petitioners a right to administrative review.

III. SPECIFIC ISSUES REQUESTED TO BE REVIEWED

15. Petitioners seek review of the following issues related to the reasonableness of the terms and conditions in Pagels Ponderosa's Permit:

A. Issue One: Issuance of the Permit is unreasonable because DNR did not demonstrate that Pagels Ponderosa was in substantial compliance with its previous permit.

16. Section 283.53(3) of the Wisconsin Statutes requires that any permittee who wishes to continue discharging following the expiration of their permit must file an application for reissuance with DNR at least 180 days prior to the expiration of the permit. As part of the permit reissuance application review, DNR must ensure that "the permittee is in substantial compliance with all terms, conditions, requirements and schedules of compliance of the expired permit." Wis. Stat. § 283.53(3)(b)1. The Department must also ensure that the permitted discharge is consistent with "applicable effluent limitations and standards, water quality standards and any other legally applicable requirements." Wis. Stat. § 283.53(3)(b)3.

17. If the permittee does not meet those requirements, "the department shall not reissue such a permit." Wis. Stat. § 283.53(3)(c).

18. DNR received numerous comments raising concerns regarding the Department's substantial compliance determination. Those concerns ranged from production site water diversions and manure lagoon noncompliance to landspreading practices, spills, and over-applications. Holistically, Pagels Ponderosa failed to prevent runoff and overapplication and DNR did not perform the requisite reviews to ensure noncompliant practices were not still occurring.

19. In response to comments highlighting persistent overapplication of manure by Pagels Ponderosa and requests for DNR assurance that additional overapplication had not occurred, DNR stated: “department staff did not conduct comprehensive nutrient management reviews.” DNR, Pagels Ponderosa Notice of Final Determination, dated Aug. 30, 2024 (“NOFD”) at 3. To ensure substantial compliance regarding spreading practices and quantities over the previous permit, DNR staff instead relied on the fact that there were “no violations alleged for overapplications.” *Id.*

20. DNR also received comments on the need for evaluations of manure lagoons and waste transfer systems prior to permit issuance to ensure compliance with the past permit. Rather than perform a review, DNR included schedules in the reissued permit to address potential noncompliance. *See* Section 3.6. These compliance schedules do not ensure substantial compliance at the time of reissuance; instead, they kick the can down the road. Pagels Ponderosa operates manure lagoons that are over fifteen years old. If a reviewable structure is currently noncompliant, DNR has effectively authorized a continued, noncompliant discharge until remediation would occur—years into the reissued permit.

21. DNR also received comments pointing out an apparent violation of Wis. Admin. Code § NR 243.15 because Pagels Ponderosa never completed an engineering evaluation for newly constructed waste transfer systems in the calf hutch washing area or received DNR approval before making the engineering changes. In response, DNR apparently concedes that a violation of NR 243.15 took place but sought to resolve the issue by requiring the CAFO to conduct an engineering assessment by November 2024. But a forward-looking remedy does not change the fact that Pagels Ponderosa failed to get DNR’s approval before commencing construction, which is unambiguously required: “An owner or operator may not commence construction of a

proposed reviewable facility or system until plans and specifications have been approved by the department in writing.” NR 243.15(1)(a)1.

22. As explained below, Petitioners also allege that Pagels Ponderosa’s manure transfer agreement with Dairy Dreams does not comply with state law. As such, Pagels Ponderosa is not in substantial compliance with its permit because the CAFO lacks the requisite storage for the amount of waste it generates and plans to spread on fields throughout Kewaunee, Brown, Manitowoc, and Door counties.

23. Collectively then, DNR’s finding of substantial compliance is wrong and unsupported. The Department did not base the decision on a review of a nutrient management plan or current engineering evaluations. Pagels Ponderosa is unlawfully transferring waste to another permittee for storage, meaning it also is exceeding its operating capacity and discharge limits. The substantial compliance determination was made in error and based on an inadequate review.

B. Issue Two: Sections 1.7, 1.8, and 4.3.3 are unreasonable because they fail to ensure that discharges from land applications, authorized by the Permit, comply with groundwater quality standards and do not allow DNR to determine compliance with Permit conditions.

24. Sections 1.1, 1.7, 1.8, and 4.3.3 are unreasonable because DNR has not included any off-site groundwater monitoring requirements, which are required to comply with the WPDES permitting program under Wis. Stat. §§ 283.31(3)-(4), Wis. Admin. Code NR §§ 243.13(1), 243.13(5), 243.14(2), 243.14(2)(b)(3), 243.15(7), and 243.19(1).

25. Some of the primary water pollutants associated with CAFOs are bacteria and nutrient contaminants (nitrates and phosphorus). DNR may issue a WPDES permit that authorizes discharges to waters of the state only if the discharges allowed under the permit meet groundwater protection standards established under Chapter 160 of the Wisconsin Statutes. Wis. Stat. § 283.31(3)(f). DNR is required to include conditions in WPDES permits “to assure

compliance with” groundwater protection standards. Wis. Stat. § 283.31(4); *see also* Wis. Stat. § 283.31(3); Wis. Admin. Code NR § 243.13(1). At a minimum, DNR must include conditions that ensure “the discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by the permit shall constitute a violation of the terms and conditions of the permit.” Wis. Stat. § 283.31(4)(a). Further, DNR is required to include a monitoring and inspection program in the WPDES permit that will determine compliance with permit conditions. Wis. Admin. Code NR § 243.19(1).

26. The terms and conditions in the Permit are unreasonable because they fail to ensure compliance with groundwater quality standards, particularly underneath and down-gradient of landspreading fields.

27. Well contamination in Kewaunee County has long been connected to thin surficial sediments, those less than about 20 feet to bedrock. Moreover, recent studies have found that well contamination from total coliform and/or nitrates is associated with nearby agricultural land use and depth to bedrock at those sites.

28. Ongoing well tests have shown that groundwater contamination in Kewaunee County continues unabated. In 2021, researchers tested water from private wells in the five-county area that covers the fractured Silurian dolomite aquifer, and they found that 14% of the samples exceeded the EPA maximum amount of nitrate-nitrogen in drinking water.² 23% of the samples tested positive for coliform bacteria, and 2% tested positive for *E. Coli*. The study also estimated that approximately 27% of wells in Kewaunee County “[do] not meet U.S. EPA public health goals for safe drinking water.” The Permit includes a standard condition noting that the Permit does not authorize “any injury or damage to private property or any invasion of personal rights,

² Mark Borchardt et al., *Sources and Risk Factors for Nitrate and Microbial Contamination of Private Household Wells in the Fractured Dolomite Aquifer of Northeastern Wisconsin* (Jun. 2021).

or any infringement of federal, state or local laws or regulations.” Permit § 4.3.3. This condition, without additional groundwater monitoring requirements, is unreasonable because DNR is unable to evaluate whether Pagels Ponderosa is currently contributing to groundwater contamination above the state regulatory level.

29. Given DNR’s acknowledgment that it does not have the capacity to complete even the minimal reviews required under the law, *see* NOFD at 3 (“Staff workload on high priority tasks prevented the department from conducting a comprehensive NMP update review.”), DNR must require the facility itself to engage in meaningful monitoring and data gathering to determine whether any violations are occurring. This is a basic premise of entitlement to an NPDES permit: that it is the polluter’s responsibility to monitor, track, and report their discharges.³

30. Sections 1.1, 1.7, and 1.8 of the Permit are likewise unreasonable. Petitioners seek review of Section 1.1 of the Permit because it: (1) cannot ensure that any discharges to *waters of the state*, which include all groundwater and surface water, comply with surface water and groundwater quality standards; and (2) cannot ensure that DNR can collect background groundwater quality information that is necessary to determine what additional permit restrictions or requirements will protect groundwater quality. Petitioners further assert that Sections 1.7 and 1.8 are unreasonable because they do not provide for any sampling or monitoring to assess background groundwater flow and to establish background levels of contaminants and because they fail to require monitoring to evaluate impacts to groundwater and determine compliance with permit conditions.

³ U.S. EPA, “NPDES Permit Basics” available at: <https://www.epa.gov/npdes/npdes-permit-basics#:~:text=The%20permit%20will%20contain%20limits%20on%20what%20you,does%20not%20hurt%20water%20quality%20or%20people%27s%20health>.

31. Given the identified groundwater contamination, DNR has also failed to include necessary conditions in the Permit to fulfill DNR's authority and duty to require remedial action contemplated in Chapter 160 of the Wisconsin Statutes and Wisconsin Admin. Code NR Section 140.

C. Issue Three: Sections 1.1 and 1.3 are unreasonable because they fail to ensure authorized discharges from Pagels Ponderosa's three production areas comply with groundwater quality standards and do not allow DNR to determine compliance with Permit conditions.

32. Pagels Ponderosa's three production facilities are all sited in Kewaunee County, in sensitive regions, and adjacent to or near impaired surface water.

33. DNR received comments on the susceptibility of groundwater underneath and downgradient of the CAFO's production areas. Comments identified direct conduits to groundwater, potential channels of contaminant transport, and nearby wetlands that could all contribute to groundwater contamination.

34. Additionally, DNR received comments highlighting that many waste storage facilities had not been evaluated in decades.

35. Further, the Hilltop Ponderosa Site was not evaluated as part of Pagels Ponderosa's previous CAFO permit because the site was acquired during the previous permit term.

36. Collectively, the sites have not been adequately reviewed, include features that may lead to direct discharges to groundwater, and are likely to contribute to the groundwater contamination crisis in Kewaunee County.

37. Sections 1.1 and 1.3 are also unreasonable because they cannot account for Pagels Ponderosa's discharges to groundwater. DNR must include additional monitoring requirements at the production areas to ensure that these locations are not causing contamination to water resources in Kewaunee County.

D. Issue Four: Sections 1.1, 1.3.1, 1.3.2, 1.3.3, and 1.6 are unreasonable because they fail to include a maximum number of animal units necessary to ensure compliance with groundwater quality standards and/or manure storage requirements.

38. Sections 1.3.1, 1.3.3, 1.6, 2, and 3.1.12 are unreasonable because DNR has not included any maximum number of animal units, which is necessary to comply with its WPDES permitting program under Wis. Stat. § 283.31(4)-(5), Wis. Admin. Code NR §§ 243.15(3), 243.13(1), 243.17(3)(c). Approval of the nutrient management plan (NMP) should be contingent on the NMP including an animal unit cap.

39. The number of animals housed at a CAFO is a critical component of DNR's review of CAFO permit approvals. DNR uses the animal units of an operation to determine whether a CAFO has at least 180 days of manure storage. Wis. Admin. Code § NR 243.15(3)(j)-(k). DNR may issue a WPDES permit only if DNR includes appropriate effluent limits and any "additional conditions" necessary to "assure compliance" with effluent limits and groundwater protection standards. Section 283.1(4)(a) of the Wisconsin Statutes requires that WPDES permits include a condition "[t]hat the discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by the permit shall constitute a violation of the terms and conditions of the permit." Section 283.31(5) of the Wisconsin Statutes requires that all WPDES permits specify maximum levels of discharge.

40. The Permit prohibits the discharge of manure or process wastewater from the production area unless precipitation causes an overflow of a manure storage structure that is properly designed, constructed, maintained, and operated; and the discharge complies with groundwater and surface water quality standards. Permit Section 1.3.2 is completely open-ended and appears to allow the permittee to exceed maximum operating levels anytime the permittee unilaterally

determines that “conditions [] do not allow removal of material of the facility.” Permit § 1.3.2. As a result, this provision cannot establish a maximum level of discharge without including an animal unit cap and is therefore unreasonable because it fails to establish a maximum level of discharge.

41. The only limit on the quantity of manure discharged as authorized by the Permit is a limit on the quantity of manure being stored, which directly correlates to the number of animal units at the facility. The Permit requires Pagels Ponderosa to demonstrate that it has the capacity for 180 days of manure storage in the design and operation of its manure storage facilities and at other times during the WPDES application process and Permit term. *See* Permit §§ 1.3.1, 1.3.3. For reasons stated below, Pagels Ponderosa does not currently meet the 180-day requirement. As such, Permit sections 1.1, 1.3.1, 1.3.2, and 1.3.3 are unreasonable because they allow Pagels Ponderosa to generate more effluent than the maximum operating level of the collective storage at the three production sites.

42. Kewaunee County is regionally isolated, and animal feeding operations exceed the nutrient needs of the region. As such, Section 1.6 is unreasonable because it allows Pagels Ponderosa to landspread waste well beyond the capacity of the region the CAFO operates in, exceeding effluent levels and contributing to or causing groundwater contamination.

43. Given the well-documented groundwater standard exceedances in the Door Peninsula, and Kewaunee County specifically, DNR cannot issue a permit to a CAFO that is proposing to expand without adequate spreading/nutrient management limits. The failure to include an animal unit limit, triggered by established groundwater exceedances and characterized by regional capacity to accept additional manure and process wastewater, is unreasonable.

E. Issue Five: Section 4.4.2 is unreasonable because it allows for transfer of manure responsibility outside of what is allowed in Chapter NR 243 of the Wisconsin Administrative Code.

44. Section 4.4.2 is unreasonable as it allows transfer of manure responsibility/liability for storage, whereas Wisconsin regulations do not provide this exemption.

45. Chapter NR 243.14(9) of the Wisconsin Administrative Code requires that all large CAFOs have at least 180 days of manure storage. This requirement ensures that large CAFOs are able to store manure and process wastewater over the winter to avoid spreading on frozen or snow-covered fields.

46. Pagels Ponderosa will annually generate approximately 104,314,148 gallons of liquid manure and process wastewater. As of March 2024, DNR calculates that Pagels Ponderosa has 182 days of storage. Therefore, based on DNR's calculation, Pagels Ponderosa operates on very slim margins, having storage capacity just above the minimum requirements.

47. But critically, that storage capacity is not all located at Pagels Ponderosa. Pagels Ponderosa is only able to meet the 180-day manure storage threshold because the CAFO transfers six million gallons of manure and process wastewater to another CAFO, Dairy Dreams, for storage. *See* NOFD at 8. Pagels Ponderosa and Dairy Dreams executed a manure storage "agreement" on March 8, 2024, which was both signed and countersigned by John J. Pagel as the President of both entities, DNR approved the storage agreement between Pagels Ponderosa and Dairy Dreams and determined that Pagels Ponderosa met the storage capacity threshold at the time. *Id.*

48. DNR has taken the position that this agreement is lawful under Wis. Admin. Code § NR 243.142. *Id.* But Wis. Admin. Code § NR 243.142 does not allow for the transfer of manure for

the purpose of helping one CAFO increase its storage capacity by using storage capacity at a separate CAFO. A permittee may only transfer manure for the purposes of “land application, disposal or use of manure or process wastewater.” Wis. Admin. Code § NR 243.142(3). The only instance when a permittee may transfer manure to another person for “proper storage” is if the manure is being distributed as a commercial product or given to another person for “landscaping, greenhouse use, use as an animal bedding product or for other beneficial purposes that do not include application to croplands.” Wis. Admin. Code § NR 243.142(3)(c) (*citing* Wis. Admin. Code § 243.142(2)(b) or (c)).

49. There is no indication that Dairy Dreams is taking Pagels Ponderosa’s manure as a commercial product or for “landscaping, greenhouse use, use as an animal bedding product or for other beneficial purposes that do not include application to croplands.” Wis. Admin. Code § NR 243.142(3)(c). Rather, the waste is being transferred in order to be spread as waste on land in Kewaunee County and/or Door County.

50. DNR’s approval of this manure transfer agreement facially violates the language of Wis. Admin. Code § NR 243 and is thus unreasonable, as is the language of Section 4.4.2 which misrepresents when manure transfer agreements can occur. Pagels Ponderosa cannot evade the requirement of having at least 180 days of storage.

F. Issue Six: Section 3.4 (including the incorporated NMP narrative document) is unreasonable because it fails to account for the inevitable discharges Pagels Ponderosa is causing via tile drainage.

51. Section 3.4 is unreasonable because 157 fields within Pagels Ponderosa’s NMP are tile drained, yet the permit does not include provisions that will adequately protect surface waters from the well-known risk of pollutant discharges through subsurface or “tile” drainage systems.

52. These drainage systems are designed to lower the water table by drawing moisture from the surface into underground pipes, which empty into roadside ditches or streams. Liquid waste, like the CAFO waste that will be landspread by Pagels Ponderosa, behaves like water in its flow patterns, travelling quickly through the soil and into drainage pipes, eventually draining into surface waters. This means that when Pagels Ponderosa applies liquid waste to those tiled fields, some of that waste – along with its harmful components such as excess nutrients and *E. coli* – will inevitably be discharged into surface waters, even in the absence of precipitation.

53. These discharges do not fall under the agricultural stormwater exemption because the CAFO waste has not “been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients.” *See* 40 C.F.R. § 122.23(e). An NMP that allows liquid waste to be applied onto tile-drained fields is not “ensur[ing] appropriate agricultural utilization of the nutrients” because no agricultural utilization is possible when nutrients flow into tile drains and are discharged into surface waters. Secondly, the discharges will occur regardless of precipitation, further taking them out of the exemption. *See id.* (“[A] precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.”)

54. DNR asserts that Pagels Ponderosa’s NMP will adequately address tile drainage loss because the CAFO will “review[]” University of Wisconsin literature about tile drains and “identify” tile drain locations. NOFD at 7. These actions (reviewing and identifying) will not stop the flow of excess nutrients and bacteria through tile drainage. The NOFD also asserts that “all tile outlets will be visually checked for flow and water conditions,” and that the “[r]esults of all visual tile monitoring will be tracked [] and kept with the [NMP].” This is vague and insufficient because it does not clarify who needs to do the visual monitoring, what needs to be

recorded, or when any discharges need to be reported to DNR. Moreover, visual monitoring is not sufficient because visually clear discharges can still be highly contaminated.

55. The Permit purports not to authorize discharges to surface waters from landspreading fields via manmade conveyances, but in authorizing an NMP that includes landspreading on tile drained fields, the Permit unreasonably authorizes such discharges. Further, the Permit fails to require any measures that will avoid these discharges or even to effectively monitor for them. As a result, the Permit has the effect of broadening the scope of the agricultural stormwater discharge exemption, and Section 3.4 and the NMP documents on which it is based are unreasonable.

G. Issue Seven: Section 3.4 is also unreasonable because it fails to comply with DNR's Northeast Lakeshore Total Maximum Daily Load for phosphorus.

56. Pagels Ponderosa sits within DNR's Northeast Lakeshore Total Maximum Daily Load ("TMDL") region, but the Permit will not reduce phosphorus pollution as required by the TMDL. The TMDL caps the amount of total phosphorus (TP) and sediment (as Total Suspended Solids, TSS) for surface waters in the Northeast Lakeshore area of Wisconsin and recommends edge-of-field pollution reduction targets, but neither the Permit nor the NOFD are clear as to whether Pagels Ponderosa's NMP complies with these reduction targets. It should.

57. Pagels Ponderosa and Dairy Dreams, which are authorized to share manure storage and spreading responsibilities through the Permit, collectively apply CAFO waste onto approximately 11% of Kewaunee County's agricultural land.⁴ The phosphorus coming off all of that acreage needs to be reduced in order to have any chance of achieving the TMDL. In other

⁴ See Agriculture | Kewaunee County Economic Development Corporation (kcedc.org) ("Kewaunee County farms occupy over 175,000 acres of land in Kewaunee County.") Pagels Ponderosa and Dairy Dreams have permission to spread their comingled waste on over 19,000 acres of land.

words, allowing Pagels to operate according to the status quo and not requiring it to comply with the edge-of-field targets runs counter to DNR's own TMDL.

58. The edge-of-field recommendations in the TMDL should be mandatory for Pagels Ponderosa and incorporated into the Permit.

59. This failure is especially indefensible given the 157 tile-drained fields in Pagels Ponderosa's NMP which, as described above, directly discharge some amount of phosphorus through tile pipes into the region's impaired surface waters.

60. In the NOFD, DNR minimized concerns about the fact that Pagels Ponderosa is within the TMDL zone by stating: "Pagel's Ponderosa Dairy LLC is required to more meticulously manage Phosphorus levels within fields to not be in excess," (NOFD at 4) but does not clarify what "in excess" means. Unless the NMP at least complies with DNR's own edge-of-field requirements, DNR has no basis to assert that "meticulous manage[ment]" will cause any meaningful phosphorus reductions from these land application areas.

61. DNR further justifies the Permit by noting that, "[a]s stated in NR 243.14(5), the permittee must minimize the delivery potential of phosphorus to waters of the state from fields by applying manure and process wastewater in accordance with methods set forth within NR 243.14(5)." NOFD at 4. But Section NR 243.14(5) is the status quo, the standard that all CAFOs must comply with. It is necessarily insufficient to meet the heightened requirements of the TMDL, particularly in a watershed with so many CAFOs, in which Pagels Ponderosa has a significant footprint.

62. DNR also suggests that concerns about the TMDL are unfounded because "the department will have significant nutrient management oversight with WPDES permit requirements to ensure compliance with NR 243 Wis. Adm. Code." NOFD at 4. This does not

engender confidence given that DNR admitted that it did not even have time to review the Permit's NMP before it approved it. *See* NOFD at 3 (“Staff workload on high priority tasks prevented the department from conducting a comprehensive NMP update review.”).

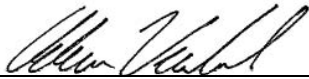
63. Given all of this, Section 3.4 is insufficient and needs to be adjusted to ensure compliance with the Northeast Lakeshore TMDL.

IV. REASONS WHY A HEARING IS WARRANTED.

For the foregoing reasons, a hearing is warranted to resolve the above material disputes of fact, to determine the reasonableness of the above-mentioned sections of Pagels Ponderosa's Permit, and to address DNR's failure to include necessary conditions to fulfill its duty to restore and maintain the chemical, physical, and biological integrity of the waters of the state.

Dated this 29th day of October 2024.

Respectfully submitted,



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Attorneys For Petitioners

VERIFICATION


STATE OF WISCONSIN)
) ss.
COUNTY OF DOOR)

I verify that Clean Water Action Council of Northeast Wisconsin is a petitioner in this matter. I have read the foregoing Petition and know its contents, and I attest that the facts alleged above are true and correct, to the best of my knowledge.

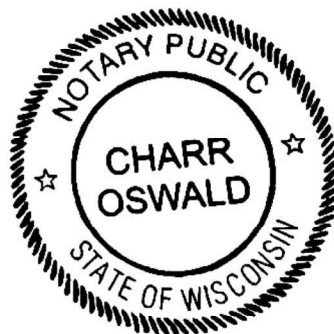


Dean Hoegger, Executive Director, Clean Water Action Council

Subscribed, sworn to, and signed before
me this 28th day of October, 2024



Notary Public, State of Wisconsin



My commission expires on 07-05-2028

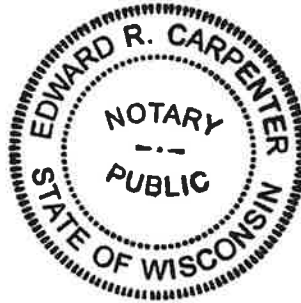
VERIFICATION

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I verify that Friends of the Forestville Dam is a petitioner in this matter. I have read the foregoing Petition and know its contents, and I attest that the facts alleged above are true and correct, to the best of my knowledge.

Christine Reid
Christine Reid, Friends of the Forestville Dam

Subscribed, sworn to, and signed before
me this 28th day of October, 2024



Edward R. Carpenter
Notary Public, State of Wisconsin

My commission expires on 2/16/2026

VERIFICATION

STATE OF WISCONSIN)
) ss.
COUNTY OF KEWAUNEE)

I verify that I am a petitioner in this matter. I have read the foregoing Petition and know its contents, and I attest that the facts alleged above are true and correct, to the best of my knowledge.

Tyler Frye
Tyler Frye

Subscribed, sworn to, and signed before
me this 28 day of October, 2024

Debra K Ausloos
Notary Public, State of Wisconsin
My commission expires on 11-29-2026

