

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into by and between the Dairy Business Association, Inc. (hereinafter "DBA" or "Plaintiff") and the Wisconsin Department of Natural Resources (hereinafter "DNR"), Daniel Meyer in his official capacity as Secretary of the DNR and Mark D. Aquino in his official capacity as Administrator of the Division of External Services for the DNR (collectively "Defendants"). This Agreement is effective of as the date of the final signature affixed hereto.

RECITALS

- A. On July 31, 2017, Plaintiff Dairy Business Association, Inc. sued Defendant Wisconsin Department of Natural Resources for declaratory and injunctive relief. The case is pending in the Brown County Circuit Court and is captioned as *Dairy Business Association, Inc. v. Wisconsin Department of Natural Resources, et al.*, Case No. 17-CV-1014.
- B. On September 8, 2017, Plaintiff amended its complaint to add then Acting Secretary Kurt Thiede and Division Administrator Mark D. Aquino, both in their official capacities, as Defendants. A copy of the Amended Complaint is attached to this Settlement Agreement as Exhibit A.
- C. Since that time Daniel Meyer has been appointed as Secretary of the DNR and Mr. Thiede has remained at DNR as the Deputy Secretary.
- D. In Count 1, Plaintiff alleges that Defendants do not have legal authority to require a Concentrated Animal Feeding Operations ("CAFO") to apply for and obtain a permit, unless a CAFO actually discharges or intends to actually discharge into navigable waters.
- E. In Count 2, Plaintiff alleges that Defendants, without legal authority or requisite rulemaking, announced and enforced new standards and requirements for feed storage leachate runoff management (specifically regarding Vegetated Treatment Areas, or "VTAs") through a draft guidance document attached to the Amended Complaint as Exhibit C. Plaintiff further alleges that these new standards and requirements are presently being enforced, and have been enforced since on or about March 2016, against individual applicants for permits as evidenced by letters attached to the Amended Complaint as Exhibits F and G, and without legal authority.
- F. In Count 3, Plaintiff alleges that Defendants, without legal authority or requisite rulemaking, announced and enforced new standards and requirements for calf

hutch lots. Plaintiff further alleges that on March 9, 2016, without legal authority, Defendants required certain permittees to subject their calf hutch lots to engineering plan and specification review and approval as provided under Wis. Admin. Code § NR 243.05(56).

- G. In the Amended Complaint, Plaintiff sought declaratory and injunctive relief, on behalf of its members, to prevent Defendants from enforcing these complained of standards and requirements.

NOW, THEREFORE, in consideration of the promises and the mutual covenants of the Parties stated in this Agreement, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. **Recitations.** The above recitations are true and correct and are incorporated herein by this reference.
2. **Representation.** This Agreement is entered into voluntarily, and all signatories hereto stipulate and agree that they are under no duress or undue influence, represent that in the execution of this Agreement they had the opportunity to consult legal counsel and that said attorneys have had the opportunity to review this Agreement, make any desired changes and advised their respective clients with respect to the advisability of making the settlement provided herein and of executing this Agreement. Neither of the Parties shall be deemed the drafter of this Agreement. Further, all signatories of this Agreement warrant and guarantee that they are legally authorized to enter into this Agreement on behalf of their respective entities and are legally authorized to bind their entities and its officers, agents, employees and representatives.
3. **Jurisdiction.** The Parties agree that the Brown County Circuit Court has jurisdiction of the pending case pursuant to Wis. Stat. §§ 806.04 and 227.40. DNR further agrees that it has no defenses and/or waives any defenses based on any theory that the Brown County Circuit Court lacks personal or subject matter jurisdiction over the Parties or the matters addressed in the Amended Complaint.
4. **Terms.** The Parties specifically agree as follows:
 - a. Upon execution of this Agreement by all Parties, Plaintiff will voluntarily dismiss the Amended Complaint and all the claims therein without prejudice pursuant to Wis. Stat. § 805.04(1).
 - b. As to Count 1 of the Amended Complaint, DBA agrees that it will not pursue this claim in any future litigation provided that DNR remains in

compliance with the terms of this Agreement.

c. As to Count 2 of the Amended Complaint:

- i. Unless pursuant to explicit requirements in a lawfully enacted statute or promulgated rule, Defendants shall not enforce any standards or requirements for feed storage leachate or runoff management except those standards and requirements explicitly permitted by Wisconsin law.
- ii. The VTA standards and requirements announced in Defendants' draft program guidance entitled, "Feed Storage Area Runoff Controls for CAFOs," attached to the Amended Complaint as Exhibit C constitutes a rule under Wis. Stat. § 227.01(13). Therefore, because it was not lawfully promulgated under Wis. Stat. § 227.10 it cannot be enforced, is null and void, and cannot be used for any purpose by DNR, including in support of regulatory determination letters sent to regulated entities, examples of which are attached as Exhibits F and G to the Amended Complaint. DNR agrees that it will formally withdraw the draft program guidance and will provide electronic notification of such action to permittees and interested stakeholders within 30 days of the execution of this Agreement.
- iii. The Parties to this Agreement acknowledge and agree that VTAs, when designed and constructed in compliance with NRC Standard 635 (January 2002) and Wis. Admin. Code § NR 243.15 as part of permanent runoff control systems constitute valid and lawful runoff control systems consistent with accepted management practices, and discharges to navigable waters from production areas at CAFOs with such control systems may be permitted under the Wisconsin Pollution Discharge Elimination System permit program. The Parties further recognize and agree that such systems should be constructed and designed with other control features in the production area to ensure compliance with the effluent limitations standard in Wis. Admin. Code § NR 243.13. In determining the applicability or enforceability of Wis. Admin. Code § NR 243.13 to any regulated discharge to navigable waters from the production area at a CAFO, DNR agrees that it may not presume the presence or future occurrence of such discharge. DNR, in implementing its program authorities, shall take those actions necessary to determine if an actual discharge is occurring or will occur under the actual or projected site conditions.

d. As to Count 3 of the Amended Complaint:

- i. Unless pursuant to explicit requirements in a lawfully enacted statute or promulgated rule, DNR shall not consider calf hutch lots to be included in the definition of a "reviewable facility or system" requiring independent engineering plan and specification review and approval under Wis. Admin. Code § NR 243.03(56).
- ii. The determination that calf hutch lots are "reviewable facilities or systems" under Wis. Admin. Code § NR 243.03(56) together with the standards and requirements announced by DNR in Exhibit H to the Amended Complaint constitute rules under Wis. Stat. § 227.01(13). Therefore, because the determination and associated standards and requirements were not lawfully promulgated under Wis. Stat. § 227.10 they cannot be enforced, are null and void, and cannot be used for any purpose by DNR. DNR agrees that it will formally rescind the determination and associated standards and requirements and shall provide electronic notification of such action to permittees and interested stakeholders within 30 days of the execution of this Agreement.

e. Nothing in this Agreement shall be construed as authorizing a violation of federal or state law.

5. Enforcement and Consent Judgment. DNR, the Secretary of the DNR, and/or DNR staff shall take all necessary steps to comply with the terms of this Agreement. In the event that DNR, the Secretary of the DNR, and/or DNR staff fail to comply with any provision of this Agreement, the Parties agree:

- a. That DBA shall have the right to file suit against DNR and the Secretary of the DNR in his official capacity in the Brown County Circuit Court. DBA will provide the DNR and Secretary of DNR 30 days advance notice prior to filing suit and the Parties will work in good faith to resolve their differences prior to suit being filed by DBA.
- b. If the Parties are unable to resolve their differences within 30 days of DBA providing the notice required by subparagraph 5.a above, the Parties agree that DBA shall have the right to move the Court for the immediate entry of a Consent Judgment converting the terms of this Agreement into

an enforceable judgment. The Consent Judgment shall be in a form substantially similar and substantively identical to the Consent Judgment attached hereto as Exhibit B.

- c. With regard to any such lawsuit and the entry of the Consent Judgment, DNR and the Secretary of the DNR authorize DBA to submit this Agreement and the Consent Judgment to the court and to inform the court that DNR and the Secretary consent to and stipulate to final judgment against DNR and the Secretary as expressed in the Consent Judgment.
 - d. If DNR, the Secretary of DNR and/or DNR staff remain in compliance with this Agreement, DNR reserves its right to enforce the terms of this Agreement in any future litigation DBA initiates with respect to Claim One of the Amended Complaint, as provided in subparagraph 4.b above.
6. **Entire Agreement.** This Agreement is an integrated agreement and constitutes the sole and entire agreement between the Parties, and supersedes all prior and contemporaneous statements, promises, understandings or agreements, whether written or oral.
 7. **Amendments.** Any amendment of this Agreement must be in writing and signed by all Parties in order for such amendment to be of any force and effect.
 8. **Partial Invalidity.** In the event that any provision of this Agreement is declared by any court of competent jurisdiction or any administrative judge to be void or otherwise invalid, all of the other terms, conditions and provisions of this Agreement shall remain in full force and effect.
 9. **Counterparts.** This Agreement may be signed and executed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one Agreement. Delivery of an executed counterpart of a signature page of this Agreement by facsimile or email shall be effective as delivery of an originally executed counterpart of this Agreement.
 10. **No Adverse Construction.** The Parties acknowledge that this Agreement has been prepared by each of them through counsel. In the event any part of this Agreement is found to be ambiguous, such ambiguity shall not be construed against any Party.
 11. **Not Evidence.** This Agreement shall not be used as evidence in any proceeding other than one to enforce this Agreement, or one seeking damages arising from a breach of this Agreement.

12. Choice of Law. This Agreement shall be governed by, construed, interpreted and enforced under and according to the laws of the State of Wisconsin.

BY SIGNING BELOW, EACH PARTY CERTIFIES THAT IT HAS READ THE ABOVE AGREEMENT, UNDERSTANDS IT COMPLETELY, HAS THE AUTHORITY TO SIGN IT, AND FULLY AND FREELY CONSENTS TO ALL OF ITS TERMS.

DAIRY BUSINESS ASSOCIATION

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES

By: Tim Trott
Its Executive Director

By: Daniel L. Meyer
Its Secretary