POLK COUNTY, WISCONSIN

WWW.CO.POLK.WI.US

Lisa Ross, County Clerk
100 Polk Plaza, Suite 110, Balsam Lake, WI 54810
Phone (715) 485-9226 | Email: county clerk@co.polk.wi.us

AMENDED AGENDA AND NOTICE OF MEETING

ENVIRONMENTAL SERVICES COMMITTEE

Government Center, 100 Polk County Plaza, Balsam Lake, WI 54810
County Board Room
Wednesday, June 24th, 2020 at 9:00 a.m.
A quorum of the County Board may be present

Amendments: [1] Subject Matters added, revised or struck by Amended Notice of Meeting

WebEx Virtual Meeting Info:
Meeting Number (access code): **968 663 581**
Password: **ESmeeting1**

- Join Online: https://polkwi.webex.com
- Join by Phone: 1-408-418-9388

Due to potential technical difficulties, please consider submitting written comments for consideration to countyclerk@co.polk.wi.us or by mail to: **Polk County Government Center, 100 Polk County Plaza – Suite 110, Balsam Lake, WI 54810**. Written comments received less than 24 hours prior to meetings may not be received and reviewed by Committee Members before the meeting.

1. Call to Order – Chairperson Kim O'Connell
2. Approval of Agenda
3. Approval of minutes for June 10, 2020
4. Public Comments – 3 minutes per person – not to exceed 30 minutes total
5. [1] Presentation by Wisconsin Counties Association regarding Livestock Facility Siting and CAFO's
6. Disclosure of Committee Member Conflicts of Interest regarding matters noticed on this agenda
7. Receipt of Information on Matters Noticed from Supervisors not Seated as Committee Members (5 minutes)
8. Parks, Recreation and Trails, and Dams (Ben Elfelt)
   a. Consider recommendation of Stower Seven Lakes Trail Master Plan to County Board
   b. Parks and Trail Advisory Group Update
   c. Atlas Dam Update
9. Zoning and Land Information (Jason Kjeseth)
   a. Update of July 1st and 8th 2020 Public Hearings for Swine CAFO Conditional Use Permit
   b. [1] ~~Update and discussion of Swine CAFO Conditional Use Permit~~
   c. Demonstration of Zoning Permit software
10. Divisional Form of Government (Bob Kazmierski)
    a. Annual Reports
11. Committee Calendar and Identification of Subject Matters for Upcoming Meetings
12. Adjourn

Items on the agenda not necessarily presented in the order listed. This meeting is open to the public according to Wisconsin State Statute 19.83. Persons with disabilities wishing to attend and/or participate are asked to notify the County Clerk's office (715-485-9226) at least 24 hours in advance of the scheduled meeting time so all reasonable accommodations can be made. Requests are confidential.

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MINUTES

Environmental Services Committee

Government Center County Board Room
100 Polk County Plaza Balsam Lake, WI 54810
9:00 A.M. Wednesday, June 10, 2020

Member Attendance

Attendee Name	Title	Status
Kim O'Connell	Chair	Present
Tracy LaBlanc	Supervisor	Present
Doug Route	Supervisor	Present
Brad Olson	Vice Chair	Present
Lyle Doolittle	FSA Representative	Present

Also present were: Malia Malone, Corporation Counsel; Vince Netherland, County Administrator; Emil Norby, Highway Commissioner; Jason Kjeseth, Zoning Administrator; Ben Elfelt, Parks and Trails Coordinator; Mark Gossman, Forester; Bob Kazmierski, Environmental Services Division Director; Chris Nelson, County Board Chairman, members of the public; and press.

Meeting called to order by Chair O'Connell at 9:05 a.m.

Approval of Agenda- Chair O'Connell called for a motion to approve the agenda, stipulating that the Forestry section be moved ahead of the Parks and Trails section. **Motion** (Olson/LaBlanc) to approve the agenda, carried by unanimous voice vote.

Approval of Minutes – Chair O'Connell called for a motion to approve the minutes of the May 27, 2020 meeting. **Motion** (Olson/Route) to approve the minutes of the May 27, 2020 meeting as published, carried by unanimous voice vote.

1. **Public Comment** – Public Comments – *Because of the nature of this virtual meeting, there will not be an option for public comment; however, members of the public who would like to make a written comment prior to the meeting may email their comments to: countyclerk@co.polk.wi.us You may also mail in comments to the topics, however they may not be received and provided to the Supervisors by the date of the meeting.*
   The mailing address is:
   POLK COUNTY GOVERNMENT CENTER
   100 POLK PLAZA, STE. 110
2. **Receipt of Information from Supervisors not seated as Committee Members on Matters Noticed** – Supervisors Fran Duncanson, Amy Middleton and Steve Warndahl sited safety concerns, displacing users and tax dollars spent regarding the Stower Trail Master

Planning process. Supervisor Duncanson also had concerns on the CAFO conditional use permits. A request for an application fee of $10,000 was suggested to fully compensate for any legal and any mitigation expenses that may be incurred by the County. Also if an Administrative Escrow account or performance bond could be established. She asked if a new ordinance would be easier to enforce than the CUP.

3. **Tax Delinquent Properties (Emil Norby)**
   a. Review of the bids for three lots put up on the last auction which closed on June 9th.Parcel #1 received a high bid of 65,000. #2 received a high bid of $2850 and #3 received a high bid of 46,500. **Motion** (LaBlanc/Route) to approve all high bids, carried by unanimous voice vote.
4. **Forestry (Mark Gossman)**
   a. Mark passed out copies of Chapter 2000 and 4000 for the 15 year Forestry Plan. A full copy of the 15 year Forestry Plan will be posted on the Polk County Website. Forster Gossman will be taking public comments through emails through July 14th when he will be hosting an Open House from 5-7p.m.

Break: Chair O'Connell called for recess at 9:40-9:55 a.m.

5. **Parks, Recreation, Trails, and Dams (Ben Elfelt)**
   a. Review of Video and written testimony from June 2nd and 3rd Public Hearing of Stower Seven Lakes Trail Master Plan

Break: Chair O'Connell called for recess at 11:05-11:25 a.m. (technical difficulties)

   b. Decision to review of Stower Seven Lakes Trail input including public emails will be brought back to committee for discussion and possible recommendation at the next ESC meeting, scheduled for June 24th 2020.
   c. Todd Miller submitted a request for the Committee to approve an event permit application for the Polk County Snowmobile Council Nonprofit ATV ride on the Gandy Dancer State Trail, August 22nd 2020. There were no conflicting events on that day. **Motion** (Route/Olson) to approve, carried by unanimous voice vote.

6. Zoning and Land Information (Jason Kjeseth)

a. Kjeseth reviewed the newest Draft Swine CAFO Conditional Use Permit conditions. Questions were asked about a performance bond which Corp. Council stated per Wisconsin Administrative Code ATCP 51.30(4) (b, the requirement of a performance bond is expressly prohibited. Also, an application fee must be justifiable, accounting for staff time used in creating the permit. Health and Human services would like an initial base-line study done for air quality. Chris Nelson handed out a draft ordinance from Town of Eureka. Chairman Nelson offered to fill Supervisor Edgell's position until someone can be appointed at the next County Board meeting. Supervisor Route gave his intention to pursue a resolution to create a County Ordinance. Motion (Olson/Nelson) to approve the current draft as proposed and to set a Public Hearing. Carried with 5 in favor -1 opposed. (Route) The Public Hearing will be scheduled for July 8th at 10:00 a.m. Comments will be restricted to 3 minutes each.

7. **Environmental Services Division (Bob Kazmierski)**
   a. Annual reports postponed until June 24th meeting
   b. 2021 Budget Development Calendar postponed for review at the July 22nd meeting.

Divisional Form of Government update-none

Committee Calendar & Identification of Subject Matters for Upcoming Meetings

AGENDA ITEMS: JUNE 24, 2020 9:00 A.M.

ITEMS TO INCLUDE ON AGENDA:

Tax delinquent properties: Updates on other tax delinquent properties/sales

Parks, Recreation, Trails and Dams: Consideration of Stower Seven Lakes Trail Master Plan recommendation to County Board. Update on Trail Advisory Group
Forestry: None
Zoning & Land Information: Health and Human services input on CUP, Update on Public Hearing
Divisional Form of Government: Annual reports, BOA applicants

Chairman O'Connell called for a motion to adjourn. **Motion** (Nelson/ Olson) to adjourn, carried by unanimous voice vote. Chair O'Connell declared meeting adjourned at 12:15 p.m.

Respectfully submitted,

Carol Zygowicz
LWRD Administrative Assistant

Polk County Land Information Fee Schedule -- Effective 1/1/2020

LAND USE PERMIT

House, Commercial, Bunkhouse, Conditional Use, Grading/Filling $400
Signs- For profit Organization $300
Signs- Nonprofit Organization $50
Additions to Dwellings greater than 144 sq ft $275
Additions to Dwellings 144 sq ft or less $100
Accessory Buildings greater than 144 sq ft $175
Accessory Buildings 144 sq ft or less $100
Accessory Structures (walkways, retaining walls) $75
Seasonal Travel Trailer $250
Land Use Run-off Rating Review $100
Landscaping, Vegetation Removal $50
Yearly Tourist Rooming House $100

RURAL ADDRESS (includes $25 town fee) $150
Address with State Sanitary Permit $125
Replacement Sign $75

SANITARY PERMITS

Conventional $450
Holding Tank $620
In-Ground Pressure, Mound System, Experimental System (at-grade) $450
Reconnection $150
Wisconsin Fund Application $125

SEWER INSPECTIONS $250

PLAT REVIEW

Preliminary Plat .....$600, plus $50 per lot
Final Plat $600
Minor Plat CSM $400
Survey Exempt Legal Description Review $400

ORDINANCE VIOLATIONS

Comprehensive Ordinance (per day of violation) .....$50-$1000
There shall be a penalty fee of 2 times the regular permit fee in those cases where building is commenced without first obtaining a land use permit, providing the structure is in conformance with the provisions of this ordinance.
Shoreland Ordinance (per day of violation) .....$200-$1,000
There shall be a penalty fee of 2 times the regular permit fee in those cases where building is commenced without first obtaining a land use permit, providing the structure is in conformance with the provisions of this ordinance.
Subdivision Ordinance (per day of violation) .....$500-$5,000

TELECOMMUNICATION TOWERS

Land Use Permit for New Transmission Facilities (Includes fee for Land Use Permit & Rural Address)
120ft or less.....$500
121 to 160ft 1200
160 to 200ft 2100
201ft & Up $3000

*Height is measured to the highest point on the transmission facility
Land Use Permit for Modification or Collocation on Transmission Facility $400

HEARINGS

Environmental Services Committee:
District Change, Ordinance Amendment, Conditional Use, Subdivision Variance. $750
Board of Adjustment:

Variance, Administrative Appeal.....$750

HARD COPY PRINTS

Standard Copy $.25
Laser Printer $1
Plotted
- 8 1/2”x11” $5
- 11”x17” $7.50
- 18”x18” $12
- 24”x24” $15
- 30”x30” $20
- 36”x36” $35
- 42”x42”.....$50

DIGITAL DATA

GIS, general production datasets ..... NO FEE
Orthophotos (Aerial imagery)
- 2015 Natural Color (6” res)
  - MrSID image, per section tile.....$25
  - GeoTIFF image, per section tile.....$50
  - GeoTIFF image, per section tile of a town $350
  - MrSID image, entire county $750
  - GeoTIFF image, per section tile, entire county $1,000
- 2010 Natural Color (12” res)
  - MrSID image, per 2x2 section tile $25
  - Tif image, per 2x2 section tile $50
  - Tif image, per 2x2 section tile of a town.....$350
  - MrSID image, entire county $750
  - Tif image, entire county $1,000
- 2006 Natural Color (12” res)
  - Tif image, per 1x2 section tile $25
  - MrSID image, per town $100
  - Tif image, per 1x2 section tile of a town.....$350
  - MrSID image, entire county $750
  - Tif image, entire county $1,000
- 2001 B&W (18” res)
  - Tif image, per 3x3 section tile $15
  - Tif image, per 3x3 section tile of a town $40
  - MrSID image, entire county $500
- 1996 B&W (1 meter)
  - Tif image, per town tile.....$40
  - Tif image, per town tile, entire county.....$500

OTHER FEES

650 MB Compact Disk or 4.7 GB DVD $3
(Used for shipping data)
Postage and Handling, if mailed.....$5
(Larger orders are weighed to determine postage fees)
Faxing and Handling
First page $2
Each additional page $1
ALL GIS data acquisitions are subject to a processing fee .....$25 Special requests to format, lot, or edit data..... Staff cost, plus 10% for overhead

**All credit card transactions are subject to a 2.5% convenience fee with a $2.00 minimum charge.*

LIVESTOCK FACILITY CAFOS SITING THE BASICS FOR WISCONSIN COUNTIES

–Andrew T. Phillips & Rebecca J. Roeker, von Briesen & Roper, s.c.

Wisconsin has a long tradition of agriculture and agriculture continues to be a key part of Wisconsin's economy. While the tradition of agriculture continues, the business of farming has changed over time. Since the mid-1970s, concentrated animal feeding operations, also referred to as CAFOs, have emerged as a leading business model for farms across the country and in Wisconsin.[1] Regulation of CAFOs and other agricultural operations presents a number of issues. Even before a specific analysis of what a county may and may not do in regulating livestock siting and CAFOs, it important to first determine what it is the county is attempting to regulate. A county's legal authority differs with the differing subjects.

In addition to the many potential legal questions of *what* is being regulated, the *who* and *how* of livestock siting and CAFO regulation also present challenges. Regulatory overlap of livestock siting and CAFO impacts, such as water quality and erosion control measures, occurs in both the Wisconsin Statutes and the Wisconsin Administrative Code. There is also overlap in the jurisdictional and regulatory oversight of the Wisconsin Department of Natural Resources (DNR) and the Wisconsin Department of Agriculture, Trade and Consumer Protection (DATCP), which may cause even more confusion for counties in determining what regulatory control a county has over livestock siting and CAFOs. Fortunately, both DNR and DATCP provide helpful resources for counties and farm operators to address the complex regulation of livestock facility siting and CAFOs.[2]

This article provides a general overview of livestock facility siting and CAFO issues and how those issues impact counties.[3] Given the many components of livestock facility siting and CAFO law,[4] it is imperative that counties work closely with corporation counsel and perhaps outside counsel when establishing regulations for livestock facility siting and CAFOs.

AGRICULTURAL REGULATION: A BRIEF HISTORY

Governmental regulation of farm activities dates back to the Homestead Act of 1862, which encouraged westward expansion through the selling of federal lands for farming.[5] Local regulation of farming through tools such as agricultural zoning date back to the 1920s when many communities identified the need for greater compatibility in land uses throughout a community.[6] Throughout history, increased need for agricultural production was often followed by a policy shift toward more stringent regulation to address the environmental impacts of farming, such as water pollution, soil erosion, and air pollution.

The Clean Water Act and the Wisconsin Pollution Discharge Elimination System Program

In 1972, the Clean Water Act (CWA) became the first large-scale environmental legislation that addressed the impacts of CAFOs. Generally, the CWA prohibits any person from discharging any pollutant from a point source into navigable waters unless a permit is issued pursuant to the standards in the National Pollutant Discharge Elimination System.[7] By virtue of its definitions, the CWA's

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regulations apply to CAFOs.[8] The CWA also allows states to implement their own permit programs so long as the state program imposes standards that are at least as stringent as those in the federal program.[9]

In 1973, Wisconsin adopted Wis. Stat. Ch. 283, which sets forth the requirements of the Wisconsin Pollution Discharge Elimination System (WPDES) program to implement the CWA requirements in Wisconsin. The Wisconsin Legislature granted DNR "all authority necessary to establish, administer and maintain a state pollutant discharge elimination system to effectuate the policy set forth under sub. (1) and consistent with all the requirements of the federal water pollution control act."[10] Chapter NR 243 of the Wis. Admin. Code promulgates the WPDES process and standards that are authorized under Wis. Stat. § 283.001(2). In addition to Wis. Code Ch. NR 243, several other sections of the Statutes and Wis. Admin. Code address potential CAFO regulation.[11]

Wisconsin's Livestock Facility Siting Law

While portions of the WPDES process apply to livestock facility siting, the extent of local control to regulate other aspects of livestock facility siting was unclear for many years. Given the lack of statutory specificity of livestock siting requirements, many counties incorporated siting requirements in local ordinances. Then, in 2003, the Wisconsin Legislature adopted Wis. Stat. § 93.90, also known as the "Livestock Facility Siting Law" ("LFSL"), to establish statewide uniform standards for new and expanded livestock operations. The LFSL establishes various procedures for livestock farm operators to apply for, and receive, permits from local governments to allow such facilities in particular areas.[12] Counties must follow state standards in administering the LFSL. If a county elects to implement its own livestock facility siting regulations, those regulations may not be more restrictive than state standards unless the county's regulations are approved by DATCP and DNR, as discussed in greater detail below. Unlike the WPDES process, the LFSL allows for some local participation and control in the approval of a new or expanded livestock facility site.

CURRENT LEGAL ISSUES WITH COUNTY REGULATION OF CAFOS AND LIVESTOCK FACILITY SITING

Regulatory "Overlap"

Under current law, both DNR and DATCP have regulatory authority for certain aspects of CAFOs and livestock facility siting. To summarize, DATCP is charged with livestock siting regulatory oversight pursuant to Wis. Stat. Ch. 93 and Wis. Admin. Code Ch. ATCP 51. DATCP's oversight applies to all livestock facilities, not just CAFOs. For operations that do not meet the legal definition of a CAFO, topics such as nutrient management, runoff management, and water quality are addressed within the livestock facility siting permit process through DATCP. In contrast, DNR is charged with water quality for CAFOs via WPDES oversight pursuant to Wis. Stat. Ch. 92, Wis. Stat. Ch. 281 and Wis. Admin. Code Ch. NR 243.[13] In some situations, each permit approval requires approval of the *other* department's permit, thus creating a "chicken and egg" situation of which permit to secure first: The livestock facility siting permit from DATCP or the WPDES permit from DNR? DNR and DATCP also work closely together to assist counties, municipalities, operators, and citizens with the livestock facility siting and CAFO permitting processes.

State Preemption of Local Regulation

Given the Wisconsin Legislature's clear delegation of authority to DNR and DATCP to regulate CAFOs and livestock facility siting within the context of Wis. Stat. Chs. 92, 93, 281 and Wis. Admin. Code Chs. NR 243, and ATCP 51, counties should determine the extent to which they can actually regulate CAFOs and livestock facility siting before enacting any

regulatory ordinances. This raises the legal question of preemption.

Wisconsin law provides that a local unit of government may not impose stricter regulations of a particular activity if that activity is regulated by state or federal law.[14] Several regulations relating to water quality, livestock facility siting, and CAFOs explicitly state that a local unit of government may not adopt more stringent regulations than are set forth in state law (with narrow exceptions). This explicit prohibition against more stringent local regulations signals the Wisconsin Legislature's intent to withdraw local authority to regulate in these areas.

The language set forth in Wis. Stat. Ch. 92, Wis. Stat. Ch. 281 and Wis. Admin. Code Ch. NR 243 clearly states that a county is preempted from regulating within the context of the WPDES permit process.[15] Whether counties are preempted from participating in livestock siting regulation is a different question. While counties have some regulatory authority in the livestock facility siting permit process, that authority is limited by both statute and case law. In *Adams v. State of Wis. Livestock Facilities Siting Review Board*, the Wisconsin Supreme Court recognized that the Legislature expressly withdrew local governments' ability to adopt and enforce livestock facility siting regulations that are inconsistent with state standards.[16] Nonetheless, the *Adams* court recognized certain statutory exceptions to the preemption prohibition that allow local governments to regulate certain aspects of livestock facility siting.

Exceptions to Preemption

County Ordinance Approval by DNR and DATCP

With respect to standards for "nutrient management or other conservation practices for livestock operations" and standards to achieve water quality as required in Wis. Stat. § 281.15, a county may adopt a more stringent standard so long as the county secures DNR or DATCP approval of its ordinance.[17] DNR and DATCP may approve the more stringent local standards "only if the local governmental unit demonstrates to the satisfaction of the department of agriculture, trade and consumer protection or the department of natural resources that the regulations are necessary to achieve water quality standards under s. 281.15."[18]

DNR and DATCP are required by Wis. Stat. § 92.15(3)(b) to provide "procedures for review and approval" of the more stringent regulations. DNR adopted ordinance review procedures in Wis. Admin. Code Ch. NR 151.096 and DATCP adopted ordinance review procedures in Wis. Admin. Code Ch. ATCP 50.60. While each review procedure is slightly different, below is a summary of steps a county must take when seeking DNR and DATCP approval of a more stringent regulation/ordinance:[19]

- Submit a copy of the proposed regulation/ordinance to DATCP and DNR.
- Identify the provisions of the regulation for which the county seeks approval.
- Submit documentation showing why the identified provisions are needed to achieve compliance with water quality standards, and why compliance cannot be achieved by less stringent provisions.
- DNR and DATCP must solicit a recommendation from each other in deciding its approval.
- DNR and DATCP must issue a written decision granting or denying the request for approval within 90 days after receipt of the application.

DNR and DATCP may then approve the stricter regulations if each finds that the more restrictive provision is necessary to achieve compliance with water quality standards under Wis. Stat. § 281.15 and that compliance cannot reasonably be achieved by less restrictive means.[20]

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When obtaining approval for the more stringent local regulations, a county carries the burden of providing sufficient evidence that more restrictive regulations are required in order to meet the required water quality standards in Wis. Stat. § 281.15. The Statutes and Wis. Admin. Code do not detail what is "sufficient evidence" or the type of information a county must include in its review request. However, information such as the following may be included to demonstrate the county's need for a more stringent regulation: (1) the type of waterways or other bodies of water in the county and whether those waterbodies are already endangered or at risk; (2) other unique geographical features of the county, which may increase the likelihood of water contamination, such as soil types, sloping, or steep topography; and (3) whether all areas will be covered by the more stringent regulation, or whether only a portion of the county will be subject to the more stringent requirements. In addition, the ordinance should be narrowly tailored to address the unique factors justifying the need for more stringent regulation, and the public benefits of the regulation should be clearly stated.

Disapproval or Conditional Approval of a Livestock Facility Siting Permit

The LFSL, set forth in Wis. Stat. § 93.90(3)(a), prohibits a county from denying, conditioning, or prohibiting a livestock facility siting or expansion unless specific statutory exception requirements are met.[21]

The most frequently used exception utilized to deny the permitting of a livestock facility siting permit is set forth in Wis. Stat. § 93.90(3)(a)6, which applies to a facility that has 500 or more animal units and violates a local regulation that is more stringent than the state standards. A county may utilize this exception so long as two steps are taken. First, the county must have adopted the more stringent requirement in ordinance (and the ordinance has received DNR and DATCP approval) prior to an application being submitted.[22] Second, the county must base the requirement "on reasonable and scientifically defensible findings of fact, adopted by the political subdivision, that clearly show that the requirement is necessary to protect public health or safety."[23] It is imperative that a county have specific, relevant, and applicable data to justify any more stringent regulation beyond the state standards, and the county should have a clearly articulated basis for the more stringent regulation.

Regulation Through Other Ordinances

Some counties attempt to regulate CAFOs and livestock facility siting through other ordinances, such as zoning ordinances, landscape requirements, prohibition against certain pesticides or other agricultural practices, or even public health ordinances. However, the law of preemption applies to any local regulation, regardless of whether the regulation is a livestock facility siting ordnance, a water quality or runoff management ordinance, a zoning ordinance, or stand-alone ordinance. A county may not circumvent the prohibition against improper regulation of livestock facility siting or CAFOs by calling the ordinance something else.

Challenges in the Livestock Facility Siting Permit Application Process

Pursuant to Wis. Admin. Code Ch. 51, a livestock facility siting applicant must first deliver an application to the county before it is transmitted to DATCP. This process creates significant front-end costs to a county, particularly when a county is limited to assessing an application fee at $1,000.00. Application worksheet review costs, verification of professional or other expert materials, and other expenses incurred in the initial application review oftentimes exceed $1,000.00.[24]

Enforcement of State Regulations and Permits

Another challenging aspect of the current statutory

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structure for livestock facility siting and CAFOs is the enforcement of the state regulations and permits. The Statutes and Wis. Admin. Code do not set forth the enforcement requirements for WPDES permits or livestock facility siting permits. While DNR and DATCP are technically the enforcing bodies, the reality is that enforcement often falls to counties. In addition, some counties have elected to adopt stand-alone ordinances to address the same issues set forth in state regulations (so long as the standards are not more stringent) to allow for direct enforcement at the county level. Other counties have entered into an Intergovernmental Agreement or Memoranda of Understanding (MOU) with DNR for the county to be the enforcing body of the state standards. A key benefit to an MOU is that the county and DNR can clearly set forth their respective requirements, roles, and responsibilities to ensure an efficient use of resources and ensure full implementation of the Wis. Admin. Code Ch. NR 151 standards.

Moratorium Against CAFOs

Several counties are considering adopting, or have adopted, a moratorium on CAFOs. Such a moratorium should be carefully considered in light of legal requirements to ensure that a county takes proper steps to document the basis for the moratorium.

Counties have the implied authority to adopt moratoria and more specific statutory authority to do so under Wis. Stat. § 59.69(4). However, Wis. Stat. § 59.69(4) limits a county's ability to adopt a "development moratorium," which is defined as a "moratorium on rezoning or approving any subdivision or other division of land by plat or certified survey map that is authorized under Wis. Stat. Ch. 236."[25]

Despite the limitations on a county's ability to adopt a development moratorium, a county is not limited by its inability to adopt a development moratorium in adopting any other kind of moratorium.[26] Generally, moratoria may be used to allow a local government time to take those actions it deems reasonable to encourage the most appropriate use of land within its boundaries and to respond to changing circumstances. Even in light of these legitimate planning purposes, a moratorium may still be perceived by affected parties as an extreme action due to the temporary suspension of landowners' rights. Therefore, it is advisable for a county to proceed cautiously in adopting a moratorium and provide findings of the necessity of the moratorium prior to its adoption. Such findings may include: (1) the conditions that give rise for the need for the moratorium; (2) that no other alternatives exist to the adoption of a moratorium; (3) what deficiencies the existing land use plans currently have in dealing with the proposed use will be subject to the moratorium; (4) the severity of the circumstances; and (5) other evidence documenting the necessity of the moratorium.

It is also advisable that the county establish firm timelines for completing its review of conditions precipitating the need for a moratorium and identifies firm deadlines for completing any action deemed necessary. Included in the development of these timelines should be an expiration date that reasonably allows for action to be taken but that is not excessively lengthy. The more specific the rationale for adopting a moratorium, the more legitimate the plan and timelines are and the more reasonable the moratorium is, the more likely the moratorium will be found reasonable by both stakeholders and the courts. Reasonableness can be best supported if the local government or its citizenry is facing a true emergency, such as health and welfare of the community or if the community is facing a significant new land use proposal that existing regulations were not designed to oversee. The rule of reasonableness also applies to a local government's progress in carrying out its plan and adhering to its timetables.

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CONCLUSION

A county's ability to regulate CAFOs and livestock facility siting may seem, at times, as clear as the runoff that is intended to be managed. However, counties may regulate certain aspects of these agricultural operations by following the exceptions set forth in the Wisconsin Statutes and as recognized in case law. If you have any questions about livestock facility siting or CAFO regulations please contact the Wisconsin Counties Association or any member of the von Briesen & Roper Government Law Group. ◆

Endnotes

1 CAFOs have a specific legal definition, which is the housing of 1000 or more "Animal Units," as defined by Wis. Admin. Code NR 243.03(3). Any discussion of CAFOs and agricultural regulation must identify the legal differences between CAFOs and other large farming operations because the applicable legal standards are different.

2 https://datcp.wi.gov/Documents/LawsAffectingLivestockOperations.pdf; https://dnr.wi.gov/topic/AgBusiness/CAFO/faq.html

3 This article references county authority to regulate CAFOs and agricultural facilities, but many of the same principles extend to cities, towns and village. However, this article will not discuss city, village or town regulatory authority.

4 A sample of state statutes and administrative code provisions addressing livestock siting and CAFOs include Wis. Stat. Ch. 92 (Soil, Water and Animal Waste), Wis. Stat. Ch. 93 (Agriculture, Trade and Consumer Protection), Wis. Stat. Ch. 281 (Water and Sewage), Wis. Stat. Ch. 283 (Pollution Discharge Elimination), Wis. Stat. Ch. 285 (Air Pollution); Wis. Stat. Ch. 823 (Nuisances), Wis. Admin. Code ATCP 50 (Soil and Water Resource Management Program); Wis. Admin. Code Ch. ATCP 51 (Livestock Facility Siting), Wis. Admin. Code Ch. NR 115 (Wisconsin Shoreland Protection Program), Wis. Admin. Code Ch. NR 116 (Wisconsin Floodplain Management Program), Wis. Admin. Code Ch. Wis. Admin. Code Ch. NR. 216 (Storm Water Discharge Permits), and Wis. Admin. Code Ch. NR 243 (Animal Feeding Operations).

5 "The Changing Focus of Government Regulation of Agriculture in the United States" 44 Mercer L. Rev. 763 (1993).

6 *See Town of Rhine v. Bizzell,* 2008 WI 76 ¶17-18 *citing State ex rel. American Oil Co. v. Bessent,* 27 Wis. 2d 537, 544–46, 135 N.W.2d 317 (1965). *Village of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926).

7 *See Maple Leaf Farms, Inc. v. State Dept. of Natural Resources,* 2001 WI App 96, ¶9, 247 Wis. 2d 96 *citing* 33 U.S.C. §§ 1311(a), 1362(12) (2000).

8 *Id.* at § 1362(6); § 1362(1) defining "pollutant" to include solid waste and agricultural waste and "point source" specifically including CAFOs.

9 *See Maple Leaf Farms,* 2001 WI App at ¶10 *citing Niagara of Wis. Paper Corp. v. DNR,* 84 Wis. 2d 32, 28 (1978).

10 Wis. Stat. § 283.001(2); *Maple Leaf Farms,* 2001 WI app at ¶15.

11 *See* Wis. Stat. Ch. 92 (Soil, Water and Animal Waste), Wis. Stat. Ch. 93 (Agriculture, Trade and Consumer Protection), Wis. Stat. Ch. 281 (Water and Sewage), Wis. Stat. Ch. 283 (Pollution Discharge Elimination), Wis. Stat. Ch. 285 (Air Pollution); Wis. Stat. Ch. 823 (Nuisances), Wis. Admin. Code ATCP 50 (Soil and Water Resource Management Program); Wis. Admin. Code Ch. ATCP 51 (Livestock Facility Siting), and Wis. Admin. Code Ch. NR 243 (Animal Feeding Operations).

12 *See* Wis. Stat. § 93.90; *Adams v. State Livestock Facilities Siting Review Bd.* 2012 WI 85, ¶5.

13 As noted throughout this article, there are many other Statutes and Wis. Admin. Code besides Wis. Stat. Ch 93, Wis. Admin. Code Ch. ATCP 51, Wis. Stat. Ch. 92, Wis. Stat. Ch 281 and Wis. Admin. Code Ch. 243 that apply to CAFOs and livestock facility siting.

14 *See Lake Beulah Mgmt. Dist. v. E. Troy,* 2011 WI 55, 335 Wis. 2d 92, 799 N.W.2d 787. The Wisconsin Supreme Court established a four-part test to determine whether a municipality is preempted by a state regulation: (1) Has the state legislation expressly withdrawn the powers of municipalities to act? (2) Does the local regulation logically conflict with state legislation? (3) Does the local regulation defeat the purpose of the state legislation? And (4) Does the local regulation violate the spirit of the state legislation?

15 *See Scenic Pit, LLC v. Village of Richfield,* 2015 AP 2291, ¶27, 377 Wis. 2d 280 (applying preemption to WPDES permit requirements); *see also DeRosso Landfill Co. v. City of Oak Creek,* 200 Wis. 2d 642, 652, 547 N.W.2d 770 (1996) (discussing local preemption of DNR standards).

16 *Adams v. State of Wis. Livestock Facilities Siting Review Board,* 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404.

17 Wis. Admin Code Chs. ATCP 50.60(2)(b) and NR 151.096.

18 *See* Wis. Stat. § 92.15(3)(a);

19 *See* Wis. Admin. Code Ch. ATCP 50.60(2)(a)-(b); Wis. Admin. Code Ch. NR 151.096(2)(a)-(b).

20 Wis. Admin. Code Ch. ATCP 50.60(2)(c); Wis. Admin. Code Ch. NR 151.096(2)(b).

21 A summary of the statutory exceptions in Wis. Stat. § 93.90(3)(a) are: (1) the site is located in a zoning district that is not an agricultural zoning district; (2) the site is located in an agricultural zoning district in which the proposed new or expanded livestock facility is prohibited; (3) the proposed new or expanded livestock facility violates a county shoreland zoning under Wis. Stat. § 59.692 or construction site erosion control and storm water management zoning under Wis. Stat. § 59.693; (4) the proposed new or expanded livestock facility violates a building, electrical, or plumbing code applicable to the type of facility proposed; (5) the proposed new or expanded livestock facility will have fewer than 500 animal units but will exceed a size threshold for requiring a special exception or conditional use permit that was incorporated into the political subdivision's ordinances before July 19, 2003, and the proposed new or expanded livestock facility violates a requirement that is more stringent than the state standards in Wis. Admin. Code Ch. ATCP 50; (6) the proposed new or expanded livestock facility will have 500 or more animal units and violates a state standard under Wis. Admin. Code Ch. ATCP 50; or (7) the proposed new or expanded livestock facility will have fewer than 500 animal units but will exceed a size threshold for requiring a special exception or conditional use permit that was incorporated into the political subdivision's ordinances before July 19, 2003, and the proposed new or expanded livestock facility violates a requirement that is more stringent than the state standards in Wis. Admin. Code Ch. ATCP 50. See also *Adams v. State of Wis. Livestock Facilities Siting Review Board,* 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404; *see also Scenic Pit, LLC v. Village of Richfield,* 2015 AP 2291, ¶27, 377 Wis. 2d 280, applying preemption to WPDES permit requirements.

22 Wis. Stat. § 93.90(3)(a)6.a.

23 Wis. Stat. § 93.90(3)(a)6.b.

24 During the 2019–2020 legislative session, WCA advocated for new legislation that would require an application to be submitted first to DATCP for a determination of compliance. Thereafter, any portion of the application that must go through the county process would do so, thereby allowing the county to keep the same level of regulatory oversight of livestock siting facilities while minimizing review costs. However, the legislation failed to pass.

25 Wis. Stat. § 59.69(4) adopts the definition of "development moratorium" that is set forth in Wis. Stat. § 66.1002(1)(b).

26 *See* Wis. Stat. § 59.69(4).