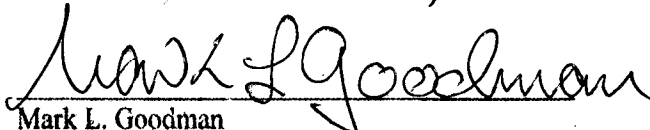


BY THE COURT:

Dated this 16th day of MAY, 2024


Mark L. Goodman
Circuit Judge – Branch II

FILED

MAY 16 2024

Clerk of Circuit Court
Monroe County Wisconsin

STATE OF WISCONSIN

CIRCUIT COURT

MONROE COUNTY

STATE OF WISCONSIN,
(Plaintiff),

v.

Case No. 2022-CX-004

PHIL G. MLSNA, and
MLSNA DAIRY SUPPLY, INC.,
(Defendants).

ORDER FOR JUDGMENT

ISSUE: What penalties should be imposed on the operators of a Concentrated Animal Feed Operation (“CAFO”) who admit certain violations, including they continued to operate after failing to timely renew their Wisconsin Pollutant Elimination System permit (“WPDES”)?

RULE: A) Any person owning or operating a large CAFO that stores manure or processes wastewater in a structure that is at or below grade of the land that applies manure or process wastewater shall have a WPDES permit. *NR 243.11(3)(a).*

RULE: B) An owner or operator of a large CAFO that already holds a WPDES permit shall re-apply at least 180 days prior to the expiration date of its current WPDES permit, *Wis. Adm. Code NR 243.12(1)(d).*

RULE: C) Plans and specifications for proposed reviewable facilities or systems shall be submitted as part of the permit application unless written department approval is received for later submittal. *NR 243.15(1)(a)1*.

RULE: D) The discharge of any pollutant into any waters of the state . . . by any person is unlawful unless such discharge or disposal is done under a permit issued by the department. *Wis. Stats. sec. 283.91(2)*.

CIVIL REMEDY: Any person who violates this chapter, any rule promulgated under this chapter, any term or condition of a permit issued under this chapter, or any rule promulgated or order issued under s. 200.45(1) or (2) shall forfeit not less than \$10 nor more than \$10,000 for each day of violation, except the minimum forfeiture does not apply if the point source at which the violation occurred is an animal feeding operation. *Wis. Stats. sec. 283.91(2)*

STIPULATED FACTS & LIABILITY: The defendants (collectively “Mlsna”) do not contest liability for all three violations lodged in the state’s complaint (Doc. 3). They concede liability as follows:

1) VIOLATION ONE: One day of violating *NR 243.12(1)(d)*, Failure to Re-Apply for a WPDES Permit;

2) VIOLATION TWO: 2,499 days of violating *Wis. Stats. 283.31(1)* and *NR 243.11(3)(a)a*, Operating a Large CAFO Without a WPDES Permit; and

3) VIOLATION THREE: One day of violating *NR 243.15(1)(a)*, Construction of a Reviewable Facility Without Approved Plans and Specifications.

DISCUSSION

Mlsna operates a Monroe County CAFO in the Town of Leon. In 2006, they began operating under a series of WPDES permits. Their milking operation currently consists of more than 2,243 milking and dry cows, 500 heifers, and 200 calves. By 2027, they plan to expand their herd to 3,000 milking and dry cows, 200 heifers, and 600 calves.

According to the state, Mlsna annually generates 25.2 million gallons of liquid manure and process wastewater. Upon expansion, it estimates the operation will generate 32.2 million gallons of liquid manure and process wastewater. If a CAFO improperly manages its manure storage, such failure presents a higher risk of storage overflow and groundwater contamination.

Wisconsin Statutes require large CAFOs to apply to the Dept. of Natural Resources (“DNR” or “department”) for a WPDES permit because they are “point sources” of pollutants. *Wis. Stats. sec. 283.01(12)*. Due to their size, large CAFOs produce as much manure as do small and medium-size cities. For example, a farm with 2,500 dairy cattle is similar in waste load to a city of 411,000 people, *Clean Wisconsin v. DNR*, 398 Wis.2d 386, 399 (Sup. Ct. 2021), *cit. omitted*.

According to the DNR, approximately 336 large CAFOs currently operate in Wisconsin. Most are dairy operations like Mlsna’s. About 74 Wisconsin CAFOs presently operate under expired permits. The state contends almost all continue operating under expired permits that the department administratively continued. In this case, it did not administratively continue Mlsna’s expired permit.

VIOLATIONS ONE & TWO

On Dec. 31, 2015, Mlsna’s WPDES permit expired. The Wis. Adm. Code requires CAFOs to apply for permit reissuance at least 180 days before expiration. Thus, Mlsna’s deadline was July 6, 2015. The state contends it is uncommon for a large CAFO to miss this deadline.

Defendant Phil Mlsna testified he hired a third party to prepare the renewal application. Additionally, Mlsna bore responsibility for hiring an engineer to prepare plans and propose specifications required under the renewal process. Unfortunately, the party they initially selected did not follow through. In 2016, they delegated the task to another person.

A complete WPDES permit re-application must provide a significant amount of complex information. Applications must include standard forms, animal unit calculations, maps of the production area, a nutrient management plan, calculations demonstrating 180 days of manure storage capacity, and any

required engineering materials. Plans and specifications for reviewable facilities required to be built during the upcoming permit term must accompany the application.

One of the state's witnesses, Jesse Ray, testified he believed it takes approximately two years for a CAFO operator to submit a complete permit application and to complete construction of any facilities required as part of the application.

Mlsna asserts important CAFO rules changed in 2015. One major change required CAFOs to implement runoff controls for feed storage facilities to capture rainwater and any silage liquids that may seep out. Mlsna also bemoans a new requirement mandating calf hutches be replaced by a calf barn. In addition, the DNR no longer allowed CAFOs to confine cattle in outdoor lots.

Mlsna represents their cows "essentially must be on concrete, which is tied into a manure containment system with a roof over their head." They lament the difficulty arising in complying with renewal requirements, complaining they are complex and costly.

In this regard, the state agrees Mlsna spent more than \$2.3 million building facilities in the production area. Those costs include \$203,454 to construct a dairy barn, \$723,113.88 for a heifer barn, and \$181,975 to expand a calf barn. Other costs include \$99,931 for a barn addition and \$1,092,022 for a sand separation system.

The state further notes the defendants spent more than \$9.7 million since 2015 to purchase more land.

Mlsna did not submit the WPDES renewal application until Dec. 4, 2016. The department rejected the application, finding it was incomplete. Specifically, it lacked a nutrient management plan, calculations showing the CAFO had 180 days of manure storage, plus other required plans and specifications.

Tyler Dix testified one of the main issues preventing re-issuance of Mlsna's permit was the lack of runoff controls for the CAFO's feed storage area.

A nutrient management plan is an essential part of the application. A Certified Nutrient Management Planner typically prepares it. Among other things, it establishes “restriction plans” a CAFO must follow when applying manure.

Manure contains a high level of phosphorus. Wisconsin’s regulations prohibit applying manure on fields containing more than 200 ppm of phosphorus. Adding a new field, or “spreading site,” to a nutrient management plan requires department approval. Additionally, CAFOs are required to maintain daily spreading records and to submit annual reports of manure application.

Mlsna re-submitted renewal applications several times. Finally, on Aug. 31, 2022, their application submitted on July 22, 2022, satisfied the department. It approved application and issued a WPDES permit, effective Sept. 1, 2023.

From Dec. 31, 2015, until Sept. 1, 2022, Mlsna admits operating without a WPDES permit. During this period, DNR personnel frequently contacted Mlsna. Between October 2016 and December 2018, the department issued eight notices of violation. The state’s Proposed Findings of Fact (Doc. 122) painstakingly recounts departmental contacts and its attempted enforcement steps.

VIOLATION 3

In 2016, Mlsna began construction of a sand separation system. This CAFO uses sand to bed livestock. A separation system extracts manure from contaminated sand bedding so the sand can be re-used. Removing the sand reportedly improves the performance of manure handling equipment.

Mlsna admits commencing construction of this system without department approval. Phil Mlsna believed a consultant told him that he was “good to go.” According to the defendants’ submission (Doc.124), they contend on Aug. 24, 2016, that their engineer submitted plans and specifications to the DNR for review. They further contend they submitted a revised plan and specifications on Oct. 28, 2016. They maintain the department requested additional information on Nov. 4, 2016.

On the other hand, the state maintains Mlsna did not submit an evaluation for the sand separation system until Oct. 6, 2017, with a revision on Nov. 8, 2017.

Mlsna admits completing construction of the system without DNR approval of its plans and specifications, contrary to *NR 243.15(1) (a) one*. Following completion of construction, the department approved the system as built.

Before addressing the issue of forfeitures, the court briefly touches upon various issues spotlighted at trial.

Although not charged as a violation, the DNR complains Mlsna failed to maintain an adequate manure storage capacity. Long-term manure storage requirements are common in states like Wisconsin. Long, cold winters prevent liquid manure spreading for several months each year. Thus, CAFOs are required to have a minimum of 180 days of storage designed and maintained in accordance with *NR 243.15(3) (i) to (k)*. See *Clean Wisconsin v. DNR*, 398 Wis.2d 386, 400 (Sup. Ct. 2021).

State's witness Tyler Dix viewed Mlsna's storage facilities on Aug. 31, 2018. He testified manure was seeping over the top of a storage pit. He maintained the pit's permanent markers were incorrectly placed because while manure was topping the pit, the markers were still visible below. He testified Mlsna continued to add more manure

A heavy storm flooded the Leon Valley on Aug. 27-28, 2018. The state alleges manure overflowed from the storage facilities. The DNR believed the overflow ran along a ditch and a series of culverts, discharging into the Little La Crosse River. It pointed to a ditch near the CAFO facility where the department personnel observed residual dried manure and knocked down vegetation. It maintains these were indicators of a heavy flow of manure.

Tyler Dix testified Phil Mlsna admitted to him that the storage facilities did overflow during this storm.

In its submission, the state contends Mlsna “repeatedly managed manure in a way that would have violated the terms of a WPDES permit if the operation had renewed its permit.”

Besides the department’s strong misgivings about the manure storage facilities, the state contends Mlsna applied manure on fields not approved for spreading or spraying. As noted above, fields containing high levels of phosphorus are prohibited from receiving manure. Other fields containing acceptable levels of phosphorus still may not be approved because of drainage or groundwater concerns.

Mlsna owns or leases approximately 200 fields. Many are small. The state contends Mlsna once improperly spread manure on a frozen field and did not incorporate it into the soil. Mlsna disputes this allegation.

The department cites the CAFO’s failure to keep records of manure application and to conduct twice-monthly manure testing.

Aside from manure storage and handling, the department decried Mlsna’s tardy compliance with implementing runoff controls for the operation’s feed storage area. Beginning in 2015 and until 2020, the DNR argues Mlsna’s lack of runoff controls impacted water quality. It alleges runoff from the defendants’ feed storage area chronically flowed along a grassed waterway, eventually reaching an intermittent stream feeding the Little La Crosse River. According to the DNR, this type of runoff can cause fish kills.

In October of 2021, a manure spill occurred on a leased field. A licensed contractor, hired by Mlsna to spread manure, reported the spill on the department’s spill hotline. A coupling in the contractor’s hose broke, causing a mixture of manure and sand to leak into an adjacent ditch. The ditch drained into a culvert discharging into a tributary of the Little La Crosse River. The defendants subsequently reported a spillage of 4,500 gallons of manure.

When Phil Mlsna heard word of spill, he came to the field with a backhoe. He blocked the ditch and excavated manure and sand that spilled into the ditch. The ditch was vacuumed. Nevertheless, the department contends he prematurely

unblocked the ditch. After Phil Mlsna left the site, DNR collected water samples. Water from the unblocked ditch tested positive for manure contamination. Other samples taken from the tributary and from downstream crossings of the Little La Crosse River tested negative.

The state recounts other instances of the department's monitoring of the Mlsna operation. They mostly involved the department's concerns over manure storage or Mlsna's application of manure on farm fields. It repeatedly argues Mlsna's manure management would have violated the terms of a WPDES permit if they held one. The defendants counter, maintaining the state's purpose of presenting evidence of alleged but uncharged violations was to persuade the court to impose "a very substantial forfeiture."

For example, the state alleged Mlsna failed to have permanent markers in all liquid manure storage facilities indicating the margin of safety level, maximum operating level, and 180-day storage level. It recounts one time when a manure storage pit threatened to over-top, the defendants piled sand around the pit's edges to prevent the manure from escaping. Mlsna concedes a small amount of liquid manure did escape

Mlsna takes issue the department's alleged but un-charged violations. They view them as a sideshow. To the contrary, the state believes they are relevant pertaining to the defendants' lack of cooperation in remediating violations, their economic benefit from their non-compliance, and the environmental harm caused by the various violations. Both parties give good arguments in this regard.

The court's "Big Picture" remains deciding the appropriate level of forfeiture plus costs to impose for three uncontested violations. There are no statutorily mandated factors for to consider. Instead, our Supreme Court instructs the circuit court to consider these factors:

- 1) The defendant's cooperation with the DNR in remediating the violations;
- 2) The defendant's initiation of remedial activities without being compelled to do so by the DNR via judicial or administrative enforcement procedures;

- 3) The environmental harm caused; and
- 4) The degree of the defendant's culpability in the matter. *See State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 174 (Sup. Ct. 1998).

In assessing Mlsna's cooperation, the state's witnesses varied.

A former DNR employee "Rohland" wrote, "Owner Phil Mlsna is verbally cooperative but required action has not occurred."

Tyler Dix testified it was "challenging" to work with Mlsna during the permit reissuance process. He said that while Mlsna was receptive during meetings and enforcement conferences, but once he went back to the CAFO, "his things weren't coming through the door."

Deborah Dix testified that Mlsna, "for the most part, seemed like he was trying to be cooperative but then follow up was never really complete."

Andrea Gruen testified she did not believe Phil Mlsna was cooperative, based on "an inordinately high number of Notices of Violations" sent to him. She said he was difficult to reach when she needed to access to the CAFO, although he eventually did return her calls.

Clair O'Connell testified Phil Mlsna was impatient to leave the scene of the October 2021, manure spill. As noted above, she believes he prematurely removed a berm stopping manure-contaminated water from entering an intermittent stream.

To Phil Mlsna's credit, he attended half-dozen enforcement conferences. He acted promptly in responding to the October 2021 manure spill. While O'Connell contends he prematurely removed a berm causing manure to enter an intermittent stream, DNR stream and river samples tested negative for contamination.

The court concludes Phil Mlsna was attentive at least to the point of paying lip service to the department. It also concludes he was tardy in following through with various promises.

The court further concludes Phil Mlsna was careless in missing the 2015 WPDES permit renewal deadline. This deadline was a critical event. The 2015 renewal application needed to inform the department how Mlsna intended to comply new requirements. Aggravating this error was Mlsna's selection of a third party to prepare this complicated application. Mlsna's inattention to this process unduly prolonged the CAFO's inability to submit an acceptable renewal application.

Worsening the matter was the CAFO's construction of a complex sand-separation system without DNR approval.

Next, the court turns to Mlsna's initiation of remedial activities without being compelled to do so by enforcement procedures. While the department issued eight Notices of Violation, it commenced no enforcement procedures until the state filed its Summons and Complaint on July 19, 2022. (Doc. 3) Days later, Mlsna on July 22, 2022, submitted an acceptable renewal application. The sheriff did not serve Mlsna until July 26, 2022. (Docs. 5, 6)

The department had not commenced any administrative enforcement beforehand. On these facts, the court concludes the state's commencement of this lawsuit did not compel the defendants to initiate remedial activities.

On the factor of environmental harm, the department had the burden of proving such harm occurred. Improper storage and handling of manure poses a risk of contamination of streams, rivers, and groundwater. Manure is a hazardous substance. It is a breeding ground for many pathogens, including E. coli. Manure creates a serious risk of disease outbreak if it enters the groundwater. *Clean Wisconsin v. DNR*, 398 Wis. 2d 386, 400 (Sup. Ct. 2021). One way to prove a violation of discharging manure without a permit starts with testing water samples for contamination.

At times, Mlsna's storage and application of manure were far from ideal. However, the department offered no solid evidence linking this CAFO's manure handling with contamination of the nearby Little La Crosse River. The same is true about feed storage runoff discharging into the river.

The only water samples tested by the department were those taken during its investigation of the October 2021 manure spill. As noted above, the samples taken from the Little La Crosse River and its tributary tested negative for contamination.

No doubt, Mlsna's manure pit overflowed in August of 2018, when a 100-year flood inundating the Leon Valley. However, this flood likely carried away manure from all corners in the valley. No operator or farmer could have prevented this from happening.

The defendants' submission recounts their cross-examination of seven of the state's witnesses. (Doc. 124) None of them could speak of any environmental harm caused by the CAFO's operations.

A fourth factor for the court to consider is the degree of defendant's culpability. They have no one to blame but themselves for missing the WPDES Permit renewal deadline. They operated for more than half-dozen years without a permit. They are entitled to their complaints about the expense and complexity in complying with new regulation. However, such excuse minimally diminishes their culpability.

Looking at the three violations, Violation One is the least serious. It was the catalyst sparking Violation Two. By far, Violation Three is the most egregious violation: Construction of a Reviewable Facility Without Approved Plans and Specifications.

For 10 or so years beforehand, Mlsna complied with DNR regulations by obtaining a series of WPDES permits. These defendants either knew or should have known their plans and specifications for a sand separation system required department approval prior to construction. For reasons that remain unclear to the court, Mlsna boldly defied the DNR's regulatory authority by constructing a complex, million-dollar system with no departmental oversight whatsoever.

FORFEITURES

On Violation One, the court orders the defendants to pay a forfeiture of \$1,000.00.

On Violation Two, the court orders the defendants to pay a \$25.00 daily forfeiture totaling \$62,475.00, based on 2,499 days of violation multiplied by \$25.00.

On Violation Three, the court orders the defendants to pay the maximum \$10,000.00 forfeiture.

COSTS

The court awards the following costs and fees:

ATTORNEY FEES: The circuit court has specialized knowledge regarding attorney fees. It finds the attorney fees requested by the state are reasonable. This complex litigation involved nearly a dozen witnesses, nine of whom testified for the state. The parties engaged in extensive discovery. They attempted to mediate. The case climaxed in a three-day-long circuit court hearing.

The state's \$180 hourly rate is well below the current hourly rate charged in Monroe County by attorneys having a similar level of expertise. Thus, the court concludes the requested \$180 hourly rate and the total number of hours charged are reasonable under the facts and circumstances.

The court orders the imposition of the following costs and fees:

- 1) Plaintiff's attorney fees of \$92,952 plus expenses of prosecution, \$8,553.72, together totaling \$101,505.72;
- 2) A 26 percent penalty surcharge of \$19,103.50;
- 3) A 20 percent environmental surcharge of \$14,695.00;
- 4) Court costs of \$25.00, pursuant to *Wis. Stats. 814.63(1)*;
- 5) A \$13.00 crime laboratories and drug enforcement surcharge, pursuant to *Wis. Stats. 814.75(3)*;
- 6) A one percent jail surcharge of \$734.75, pursuant to *Wis. Stats. 814.75(14)*;

- 7) A \$68.00 court support services surcharge, pursuant to *Wis. Stats.* 814.75(14); and
- 8) A \$21.50 justice information system surcharge, pursuant to *Wis. Stats.* 814.75.

Total forfeitures plus costs: \$73,475.00 + \$136,166.47 = \$209,641.47

The clerk of court shall enter judgment in favor of the state accordingly.

THIS IS A FINAL ORDER FOR PURPOSE OF AN APPEAL.