WMC LITIGATION CENTER

October 06, 2023

David Anderson – Town Clerk, Town of Eureka
2395 210th Avenue
St. Croix Falls, WI 54024

RE: Notice of Circumstances Giving Rise to a Claim and Notice of Claim Pursuant to Wis. Stat. § 893.80

To the Town Clerk:

PLEASE TAKE NOTICE THAT Claimants hereby provide formal notice to the Town of Eureka (hereafter "the Town") of circumstances giving rise to a claim and further give notice of claim, including a statement of relief sought.

With this letter, Claimants notify you that certain provisions in the Town's Ordinance No. 22-01-0, titled "Concentrated Animal Feeding Operations (CAFO) Ordinance" (hereafter "the Ordinance"), are unlawful.

You are hereby notified of these claims pursuant to Wis. Stat. § 893.80.

Claimants' names and addresses are as follows:

Ben Binversie and Jenny Binversie
2285 220th Street
Luck, WI 54853

Claimants reside in and pay taxes to the Town. The Ordinance harms Claimants as taxpayers.

I. The Ordinance contains at least 18 provisions that are preempted by the Livestock Facility Siting Law and illegal.

a. The Siting Law and its state regulations preempt most local control over the approval process for siting or expanding a livestock facility, and these state laws apply to the Ordinance.

The Wisconsin Legislature has greatly limited the authority of political subdivisions, including towns, to impose local requirements on the permitting process for a new or expanded livestock facility. *See* Wis. Stat. § 93.90(3)(a); *see generally Adams v. State Livestock Facilities Siting Rev. Bd.*, 2012 WI 85, 342 Wis. 2d 444, 820 N.W.2d 404. Specifically, and without limitation, Claimants believe that at least 18 provisions in the Ordinance violate and are preempted by the Siting Law and state administrative rules promulgated thereunder.

Claimants believe that the Siting Law applies to the Ordinance's requirements for obtaining a livestock facility siting or expansion permit. The Siting Law provides that "a political subdivision may not disapprove or prohibit a livestock facility siting or expansion unless at least one" statutory exception applies. Wis. Stat. § 93.90(3)(a). "The key language, 'may not disapprove or prohibit,' plainly contemplates all decisions on siting and expansion applications. The double negative 'may not disapprove' necessarily means 'must approve.'" *Adams v. State Livestock Facilities Siting Rev. Bd.*, 2010 WI App 88, ¶ 19, 327 Wis. 2d 676, 787 N.W.2d 941, *aff'd*, 2012 WI 85. "Properly read, sub. (3)(a) directs that a political subdivision must approve a livestock siting or expansion application, unless a listed exception applies." *Id.* "[A]ny attempt by [a town] to regulate the livestock facility siting process outside the parameters set by the Siting Law is preempted." *Adams*, 2012 WI 85, ¶ 50.

So, the Siting Law applies to each of the Ordinance's requirements for obtaining a permit for a new or expanded livestock facility. If an applicant does not satisfy the Ordinance's permit requirements, the Ordinance allows the Town to "disapprove or prohibit a livestock facility siting or expansion" within the meaning of Wis. Stat. § 93.90(3)(a).

"The Siting Law expressly withdraws political subdivisions' authority to disapprove livestock facility siting permits unless one of eight narrow exceptions applies." *Adams*, 2012 WI 85, ¶ 40. These narrow exceptions are codified at Wis. Stat. § 93.90(3)(a)1.–9. *Adams*, 2012 WI 85, ¶ 45.

The Ordinance purports to rely on one of those narrow exceptions, stating that the Ordinance "is based upon the Town's obligation to protect the health, safety and general welfare of the public and is based upon reasonable and scientifically defensible findings, as adopted by the Town Board, clearly showing that these requirements are absolutely necessary to protect public health and safety." Ordinance § 2. As relevant here, this statutory exception allows a political subdivision to deny a permit if "[t]he proposed new or expanded livestock facility will have 500 or more animal units and violates a requirement that is more stringent than the state standards under sub. (2)(a)"—but only if the political subdivision "[b]ases 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." Wis. Stat. § 93.90(3)(a)6.b.[1]

Pursuant to Wis. Stat. § 93.90, the Department of Agriculture, Trade and Consumer Protection ("DATCP") promulgated state standards that are codified at Wisconsin Administrative Code ch. ATCP 51 ("ATCP 51"). *Adams*, 2012 WI 85, ¶ 7.

Claimants believe that the narrow exception in Wis. Stat. § 93.90(3)(a)6. can apply only to local requirements that are "more stringent" than the state standards in ATCP 51, meaning this exception does *not* allow local requirements *in addition to* those state standards. In other words, this exception can apply only if a local requirement has a less-stringent direct counterpart in ATCP 51. Claimants also believe that a political subdivision can satisfy Wis. Stat. § 93.90(3)(a)6. only if its findings are specific to local circumstances in that political subdivision.

[1] This exception mirrors the language in Wis. Stat. § 93.90(3)(ar), which governs a political subdivision's ability to impose conditions on a permit when granting the permit. *Adams*, 2012 WI 85, ¶¶ 48–49.

b. Ordinance § 4.2 violates and is preempted by the Siting Law and a DATCP regulation.

The Ordinance requires a preexisting livestock facility to apply for a permit if "its owner proposes to house a different livestock species." Ordinance § 4.2. That requirement is preempted by a DATCP regulation that states: "Except as provided in sub. (2), a local ordinance may not require local approval under this chapter for . . . [a] livestock facility that existed . . . before the effective date of the local approval requirement." ATCP § 51.06(1)(a). A municipality may require local approval only for the "expansion of a pre-existing or previously approved livestock facility." ATCP § 51.06(2). This state regulation thus preempts Ordinance § 4.2 to the extent that Ordinance § 4.2 applies to a preexisting livestock facility that is proposing only to house a new animal species, without proposing to expand.[2]

c. The Ordinance's fee sections violate and are preempted by the Siting Law and a DATCP regulation.

The Ordinance imposes several fees that are unlawful. It requires a permit applicant to: (1) pay a fee of $1 per proposed animal unit (Ordinance § 7); (2) agree "to fully compensate the Town for all legal services, expert consulting services, and other expenses which may be reasonably incurred by the Town in reviewing and considering the application" and "submit an administrative fee deposit as required by the Town Clerk" (Ordinance § 8.2); and (3) "ensure that sufficient funds will be available for Pollution clean-up, nuisance abatement, and proper closure of the operation if it is abandoned or otherwise ceases to operate as planned and permitted" (Ordinance § 9). The Ordinance also requires a permittee to pay "an annual renewal fee in the amount of One Dollar ($1.00) per animal unit" (Ordinance § 14).

Those fee requirements are preempted by the Siting Law and a DATCP regulation. This regulation provides that "[a] political subdivision may charge an application fee established by local ordinance, not to exceed $1,000, to offset the political subdivision's costs to review and process an application." ATCP § 51.30(4)(a). This regulation also provides that "[a] political subdivision may not require an applicant to pay any fee, or post any bond or security with the political subdivision, except as provided in par. (a)." ATCP § 51.30(4)(b). Read together, these two provisions prohibit a town from charging an applicant any fee or requiring an applicant to post any bond or security except for a one-time application fee up to $1,000.

Sections 7, 8.2, 9, and 14 of the Ordinance are preempted because state law expressly withdraws local governments' power to impose monetary requirements like these ones, because these monetary requirements are logically inconsistent with state law, because they defeat the purpose of state law, and because they violate the spirit of state law. Specifically, Ordinance § 7 is preempted by ATCP § 51.30(4) and the Siting Law to the extent that it would require an application fee in excess of $1,000. Ordinance §§ 8.2, 9, and 14 are preempted because those sections require fees, bonds, or securities that are prohibited by the language, purpose, and spirit of ATCP § 51.30(4) and the Siting Law.

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[2] An "administrative rule having the force and effect of law is superior to any conflicting action of [a municipality]." *Law Enf't Standards Bd. v. Vill. of Lyndon Station*, 101 Wis. 2d 472, 489, 305 N.W.2d 89 (1981). The regulations in ATCP 51 can thus preempt a local ordinance. *See Adams*, 2012 WI 85, ¶¶ 37–39.

d. The Ordinance's application requirements violate and are preempted by the Siting Law and DATCP regulations.

Ordinance § 8 imposes 11 requirements before an applicant may receive a permit. All 11 requirements are unlawful and preempted by state law.

Ordinance § 8.1.a. requires an applicant to have a licensed engineer or geoscientist attest that the applicant's plans will "[p]revent the spread of infectious diseases from the CAFO to other animals, livestock and humans." This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of Wis. Stat. § 93.90(3)(a)6. because it has no direct counterpart in ATCP 51—in other words, it is not "more stringent" than any regulation in ATCP 51. It instead is *additional to* state regulations, and Wis. Stat. § 93.90(3)(a)6. has no exception for local requirements that are additional to state regulations. Even if local requirements can be considered "more stringent" without a direct counterpart in ATCP 51, Ordinance § 8.1.a. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because the Town's findings do not show that this requirement is clearly necessary for protecting public health or safety.

Ordinance § 8.1.b. requires an applicant to create a "CAFO Waste Management Plan." This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of Wis. Stat. § 93.90(3)(a)6. because it is additional to the state regulations in ATCP 51. Even if this requirement has direct counterparts in ATCP 51 such that it is "more stringent" than them, it is still preempted because the Town's findings do not show that it is clearly necessary for protecting public health or safety.

Ordinance § 8.1.c. requires an applicant to create "Animal Population Control and Depopulation Plans." This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of Wis. Stat. § 93.90(3)(a)6. because it has no direct counterpart in ATCP 51—in other words, it is not "more stringent" than any regulation in ATCP 51. It instead is *additional to* state regulations, and Wis. Stat. § 93.90(3)(a)6. has no exception for local requirements that are additional to state regulations. Even if local requirements can be considered "more stringent" without a direct counterpart in ATCP 51, Ordinance § 8.1.c. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because the Town's findings do not show that this requirement is clearly necessary for protecting public health or safety.

Ordinance § 8.1.d. requires an applicant to create a "Biosecurity and Animal Health Plan." This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of Wis. Stat. § 93.90(3)(a)6. because it has no direct counterpart in ATCP 51—in other words, it is not "more stringent" than any regulation in ATCP 51. It instead is *additional to* state regulations, and Wis. Stat. § 93.90(3)(a)6. has no exception for local requirements that are additional to state regulations. Even if local requirements can be considered "more stringent" without a direct counterpart in ATCP 51, Ordinance § 8.1.d. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because the Town's findings do not show that this requirement is clearly necessary for protecting public health or safety.

Ordinance § 8.1.e. requires an applicant to create an "Animal Transportation Plan." This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of Wis. Stat. § 93.90(3)(a)6. because it has no direct counterpart in ATCP 51—in other words, it is not "more stringent" than any regulation in ATCP 51. It instead is *additional to* state regulations, and Wis. Stat. § 93.90(3)(a)6. has no exception for local requirements that are additional to state regulations. Even if local requirements can be considered "more stringent" without a direct counterpart in ATCP 51, Ordinance § 8.1.e. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because the Town's findings do not show that this requirement is clearly necessary for protecting public health or safety.

Ordinance § 8.1.f. requires an applicant to create a "Water Use Plan." This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of Wis. Stat. § 93.90(3)(a)6. because it is additional to the state regulations in ATCP 51. Even if this requirement has direct counterparts in ATCP 51 such that it is "more stringent" than them, it is still preempted because the Town's findings do not show that it is clearly necessary for protecting public health or safety.

Ordinance § 8.1.g. requires an applicant to create an "Odor and Toxic Air Pollution Prevention Plan." This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of Wis. Stat. § 93.90(3)(a)6. because it is additional to the state regulations in ATCP 51. Even if this requirement has direct counterparts in ATCP 51 such that it is "more stringent" than them, it is still preempted because the Town's findings do not show that it is clearly necessary for protecting public health or safety.

Ordinance § 8.1.h. requires an applicant to create a "Community Economic, Land Use and Property Value Assessment and Impact Study." This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of Wis. Stat. § 93.90(3)(a)6. because it has no direct counterpart in ATCP 51—in other words, it is not "more stringent" than any regulation in ATCP 51. It instead is *additional to* state regulations, and Wis. Stat. § 93.90(3)(a)6. has no exception for local requirements that are additional to state regulations. Even if local requirements can be considered "more stringent" without a direct counterpart in ATCP 51, Ordinance § 8.1.h. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because the Town's findings do not show that this requirement is clearly necessary for protecting public health or safety.

Ordinance § 8.1.i. requires an applicant to create "Construction, Fire and Road Plans." This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of Wis. Stat. § 93.90(3)(a)6. because it has no direct counterpart in ATCP 51—in other words, it is not "more stringent" than any regulation in ATCP 51. It instead is *additional to* state regulations, and Wis. Stat. § 93.90(3)(a)6. has no exception for local requirements that are additional to state regulations. Even if local requirements can be considered "more stringent" without a direct counterpart in ATCP 51, Ordinance § 8.1.i. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because the Town's findings do not show that this requirement is clearly necessary for protecting public health or safety.

Ordinance § 8.1.j. requires an applicant to create a "Compliance Assurance Testing, Sampling and Monitoring Plan." This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of Wis. Stat. § 93.90(3)(a)6. because it has no direct counterpart in ATCP 51—in other words, it is not "more stringent" than any regulation in ATCP 51. It instead is *additional to* state regulations, and Wis. Stat. § 93.90(3)(a)6. has no exception for local requirements that are additional to state regulations. Even if local requirements can be considered "more stringent" without a direct counterpart in ATCP 51, Ordinance § 8.1.j. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because the Town's findings do not show that this requirement is clearly necessary for protecting public health or safety.

Ordinance § 8.1.k. requires an applicant to create a "Compliance Assurance Plan." This requirement is preempted because it does not satisfy any exception in Wis. Stat. § 93.90(3)(a). This requirement does not come within the scope of Wis. Stat. § 93.90(3)(a)6. because it has no direct counterpart in ATCP 51—in other words, it is not "more stringent" than any regulation in ATCP 51. It instead is *additional to* state regulations, and Wis. Stat. § 93.90(3)(a)6. has no exception for local requirements that are additional to state regulations. Even if local requirements can be considered "more stringent" without a direct counterpart in ATCP 51, Ordinance § 8.1.k. fails to satisfy Wis. Stat. § 93.90(3)(a)6. because the Town's findings do not show that this requirement is clearly necessary for protecting public health or safety.

Finally, Ordinance § 6 requires a permit applicant to submit "clear and convincing evidence" to show that its proposed facility "will protect public health (including human and animal health), safety, and general welfare, prevent pollution, prevent the creation of private nuisances, prevent the creation of public nuisances and preserve the quality of life, environment, existing small-scale livestock and other agricultural operations of the Town of Eureka." Essentially verbatim language appears in Ordinance § 8.7. To the extent this language imposes requirements that go beyond the requirements in Ordinance § 8.1a.–k., this language is preempted for the same reasons that Ordinance § 8.1a.–k. are preempted. Specifically, the requirements in Ordinance §§ 6 and 8.7 are additional to the state standards, and the Town's findings do not clearly show that these requirements are necessary for public health or safety.

II. Alternatively, the Ordinance contains at least 18 provisions that are preempted by Wis. Stat. § 92.15.

If the Siting Law and ACTP 51 do not apply to the Ordinance provisions discussed above, then they are preempted by Wis. Stat. § 92.15. This statute provides that "a local governmental unit may enact regulations of livestock operations that are consistent with and do not exceed the performance standards, prohibitions, conservation practices and technical standards under [Wis. Stat. § 281.16(3)." Wis. Stat. § 92.15(2). This statute also provides that "a local governmental unit may enact regulations of livestock operations that exceed the performance standards, prohibitions, conservation practices and technical standards under [Wis. Stat. §] 281.16(3) 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 [("DNR")] that the regulations are necessary to achieve water quality standards under [Wis. Stat. §] 281.15." Wis. Stat. § 92.15(3)(a).

If the Ordinance provisions discussed above constitute regulations of livestock operations, then they are preempted by Wis. Stat. § 92.15. These Ordinance provisions exceed and are inconsistent with the performance standards, prohibitions, conservation practices and technical standards promulgated under Wis. Stat. § 281.16(3). In addition, neither DATCP nor DNR has approved these Ordinance provisions pursuant to Wis. Stat. § 92.15(3)(a). For all these reasons, section 92.15 preempts the Ordinance provisions discussed above in section I.

III. In addition, Wis. Stat. ch. 283 preempts the Ordinance provisions at issue here.

If the Siting Law and ACTP 51 do not apply to the Ordinance provisions discussed above, then they are preempted by Wis. Stat. ch. 283.

"[I]f a local ordinance prohibits what the DNR has authorized pursuant to the statutes, its rules, and its role as manager of water resources, that ordinance is preempted because it frustrates the purpose of the state law." *Lake Beulah Mgmt. Dist. v. Vill. of E. Troy*, 2011 WI 55, ¶ 18, 335 Wis. 2d 92, 799 N.W.2d 787. An ordinance is thus preempted if it imposes additional requirements that may prohibit an operation that the DNR has authorized. *See id.* ¶ 19.

A concentrated animal feeding operation is "a 'point source' subject to the [Wisconsin Pollutant Discharge Elimination System or WPDES] permit program, as outlined in [Wis. Stat.] ch. 283." *Clean Wisconsin, Inc. v. DNR*, 2021 WI 71, ¶ 3 n.3, 398 Wis. 2d 386, 961 N.W.2d 346. "All owners and operators of point sources in Wisconsin must obtain a WPDES permit in order to discharge pollutants into the waters of the State." *Id.* The DNR has broad authority to impose conditions in a WPDES permit. *See id.* ¶¶ 2, 25–26, 30.

Under the Ordinance, if a livestock facility is required to obtain a permit, the facility may not operate in the Town without applying for a permit. Ordinance §§ 4, 6. To obtain such a permit, an applicant must prove that "the applicant can and will comply with all conditions imposed by the Town . . . and that the applicant and the application *meet all other requirements of this Ordinance*." Ordinance § 6 (emphasis added). So, if a new or expanded livestock facility does not comply with all the requirements in the Ordinance, the facility may be prohibited from operating within the Town.

The Ordinance thus imposes requirements that may prohibit a CAFO from operating, even if the CAFO is authorized under a WPDES permit issued by the DNR. Under the reasoning of *Lake Beulah*, the DNR's broad authority to regulate CAFOs under Wis. Stat. ch. 283 preempts the Ordinance.

IV. In addition, the Ordinance provisions at issue here are unconstitutional.

Besides being preempted by state law, the Ordinance provisions discussed above in section I violate the United States Constitution. Further elaboration is not required here because a litigant need not provide notice of claim under Wis. Stat. § 893.80 before bringing federal constitutional claims in state court. *Felder v. Casey*, 487 U.S. 131, 136–38 (1988).

V. Statement of relief sought

For the reasons stated herein, provisions in the Ordinance are unlawful, preempted by state law, and unconstitutional. The Ordinance harms Claimants as taxpayers. They are injured on an ongoing basis because of the Ordinance.

Accordingly, unless the Town repeals the Ordinance, Claimants will commence an action in the Polk County Circuit Court seeking declaratory relief and/or certiorari review, and further will seek injunctive relief preventing the Town from enforcing the provisions of the Ordinance challenged herein. Claimants may also seek costs and attorney fees pursuant to 42 U.S.C. §§ 1983 and 1988.

VI. Conclusion

Service of this Notice of Claim does not waive any other claims against the Ordinance or arguments to support the claims that Claimants may make.

In the future, any communications to Claimants on this matter should be directed to my attention.

Sincerely,

Scott E. Rosenow

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Attorneys for Claimants

ADMISSION OF SERVICE

1. I am authorized to accept service of process on behalf of the Town of Eureka, Wisconsin.

2. I acknowledge that Attorney Scott Rosenow delivered a notice of claim to me by email on October 06, 2023, and on that date I accepted that notice of claim as service of process on behalf of the Town of Eureka.

3. The Town of Eureka has been served with a copy of this notice of claim, and any defect in the method of service is hereby expressly waived.

Date: _____

_____
David Anderson
Town Clerk, Town of Eureka, Wisconsin