

Town Official's Vote to Curb Challenge Raises CAFO Conflict-of-Interest Question

by Tony Ends

Road repair, fire and rescue, snow removal, trash pick-up.

All are obvious, important services that rural town residents everywhere elect officials to manage in the public's interest.

Yet interests are changing for citizens living close to concentrated animal feeding operations (CAFOs) expanding across Wisconsin's 1,250 townships.

Water, safety, public health now top growing concerns over CAFOs.

A single CAFO farm, for instance, can generate more than 20 times the liquid waste of the human population in Green County, Wis. A single CAFO farm on little more than 125 acres can require more than 7,000 acres of rental accords to handle 95.2 million gallons of liquid manure the dairy will generate and apply annually.

For some in the Town of Sylvester, Green County home to its fifth and biggest CAFO called Pinnacle Dairy, there's more to local government interest than meets the eye.

Sylvester's sole board survivor of spring elections, Dave Schenk, in June leveled conflict of interest charges at a new supervisor elected last April. That new supervisor, Mike Witt, does custom farming business with the 5,800-cow Pinnacle Dairy. Witt also takes manure from Pinnacle for his farmland.

Charges against Witt followed Witt's motion to back Sylvester away from contesting state DNR waste permitting of Pinnacle Dairy last year.

Nebraska-based Tuls family of five CAFOs owns Pinnacle, whose wet siting on a former wetland the DNR at first refused to permit in Sugar River Watershed near Brodhead, Wis.

Town, county and state agency concerns actually held up Pinnacle's permitting for 2 years. The Town of Sylvester and six citizens are still scheduled to go before an administrative law judge at a contested case hearing in early 2020.

Yet new town supervisor Witt, with a newly elected town chair's support, has greatly narrowed his town's challenge. Some locals now fear the conflict of interest charges raise specter of a new expression of CAFO political power and influence over local citizens' interests.

Wis. Stat. Chapter 19.59, notes Wisconsin Towns Association literature, prohibits a public official from using his or her position to "obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated."

In determining whether an action on a public matter conflicts with public interests, the association's literature suggests a public official ask himself or herself, "how will this look on the front page of the paper?"

Besides Pinnacle Dairy in Green County, the Tuls family's other CAFOs include Emerald Sky Dairy in St. Croix County, which just finally settled waste permit violations with the Wisconsin Department of Justice in May. That was for a 275,000-gallon manure spill in late 2016 that went unreported for 3 months. *The Milkweed* reported outcome and significance in-depth of the massive spill from a cracked transfer pipe in its June 2019 issue.

State records also show a 15,000-gallon Rock Prairie Dairy manure spill near Janesville, Wis., in 2013. The records indicate the Tuls attributed that spill to vandalism, and the DNR closed the case without penalty following dairy reporting and clean-up.

In the CAFO case at hand, residents in and around the Town of Sylvester among 25 who showed up for the June meeting, peppered Witt with questions about conflict of interest.

New supervisor Witt readily admitted he grows silage for the new dairy and harvests and hauls silage from neighboring fields for Pinnacle. He also takes liquid manure from its slurries as part of Pinnacle's land base.

Yet in a strange and jumbled series of votes, Witt never recused himself from the decision-making. He ultimately and successfully disassociated the town from all but one permit challenge.

"I sought legal counsel on my own," said Witt, who told the public meeting a lawyer advised him unless he benefits directly from a vote on town business, there is no conflict of interest. "There is no guarantee Pinnacle will benefit from this (town) permit decision. Yes, I do business with them, but I was doing business before Pinnacle was built, and I'll still be here if Pinnacle is not."

Town Chairman Dan Moehn, also new to the board, seconded Witt's motion, strongly supporting Sylvester's withdrawal from contesting the state waste permit. Both new members to the town board said the town doesn't have enough money for expensive expert witness testimony to successfully contest the state DNR waste permit to Pinnacle.

Pinnacle Dairy LLC received the DNR permit, which regulates discharge from the livestock operation at N4135 Decatur Sylvester Road. This waste is discharging on land adjacent 10-mile long Searles Creek within the Lower Middle Sugar River Watershed, and a broad area of especially Eastern Green County's groundwaters.

The 2018 permit is to ensure Pinnacle's discharge accords with effluent limitations, monitoring requirements, and other conditions to manage and use manure and process wastewater.

By letter dated July 13, 2018, however, the DNR granted the local request for a contested case hearing of its permit. It limited the town and citizens' hearing to the following issues:

1. Whether the permit is unreasonable because it does not demonstrate separation of the base of the storage facility from water saturation in accordance with federal standards.

2. Whether the permit is unreasonable because it does not assure that the perched water table will be drained at the wet site of the dairy, where thick, water-bearing layers of soil – as much as 7 to 23 feet thick – were found at many locations on the 127 acres of cropland.



It didn't take long for newly-elected Town of Sylvester supervisor Mike Witt to get right into the muck. Witt – a local farmer and trucker – was elected as supervisor in this rural Green County, Wisconsin town last spring. Local citizens have recently made formal complaints to the Wisconsin Ethics Commission about potential conflicts of interest involving Witt and operators of a local mega-dairy, Pinnacle Dairy.

3. Whether four sections of the permit are unreasonable because they don't require constructing and operating manure and wastewater storage in ways assuring compliance with groundwater protection standards and effluent limitations.

4. Whether seven sections of the WPDES permit, and the approved Nutrient Management Plan are unreasonable because they don't require sampling or monitoring at land application sites.

5. Whether the permit's groundwater monitoring is unreasonable because it insufficiently determines whether Pinnacle Dairy is complying with applicable groundwater protection standards, and protecting groundwater and drinking water supplies.

6. Whether five sections of the permit are unreasonable because they authorize discharging manure and process wastewater pollutants that exceed state water quality standards and cause or contribute to exceeding state groundwater standards.

7. Whether the permit fails to indicate whether Pinnacle Dairy is eligible for alternative concentration limits and, if so, does not include such limits.

8. Whether four sections of the permit, and the approved Nutrient Management Plan, are unreasonable because they don't limit the number of animal units the permit authorized.

As an outcome of the June 2019 Town of Sylvester meeting, Witt and Moehn, have now reduced the contested issues to the saturation problem. They also set a limit on town legal fees in the contested case hearing of up to \$10,000 to obtain expert testimony to prove the saturation concern.

Voting over objections of Schenk and citizens to Witt and Moehn whittling down the town's contested case to a single issue, however, was anything but smooth.

Witt first moved and voted with Moehn's second and supportive vote against Schenk to take the town totally out of the DNR permit challenge.

After the vote, Moehn then disclosed town attorney Vanessa Wishart of Stafford Rosenbaum, Madison, had laid out town dismissal of the contested case (and implications of doing that) as the last of three possible town options in a June 21 overview email to the new town board chairman.

Moehn then revealed the second option in Wishart's memo – limiting the contested case proceeding to the major separation from saturation issue, which would greatly cut expert witness costs and could result in additional monitoring at the site and possibly additional engineering requirements for onsite waste management.

Citizens and Schenk pointed out that, with their vote to dismiss the town's petition against the DNR waste permit, the town would have to wait years for periodic permit review to press the single issue again. Witt and Moehn had just cut short town efforts that had properly followed strict timelines for challenging the 2018 waste permit approval.

Per former town board Chair Anna Anderson's instructions, Witt then motioned and voted to rescind the town's dismissal of its contested case proceeding. Witt then recommended limiting the case to the separation from saturation issue, with all three board members approving. Anderson, whom Moehn defeated in April, has continued to attend town meetings, as she did for 18 years as town chair.

In exchanges before the jumbled back and forth, Schenk charged Moehn with inflating costs associated with the first option – proceeding with the full, contested case hearing, using old estimates from a year ago instead of figures in Wishart's memo, which Moehn had in hand throughout the public meeting. Wishart's most recent range of possible costs put expert witnesses at anywhere from \$10,000 to \$50,000 and legal fees to persuade the administrative law judge of all issues at \$20,000 to \$50,000. A previous tally a year ago ranged as high as \$150,000.

In justifying the town's dismissal of the contested case proceeding, Moehn also tried to limit town responsibilities to such duties as road maintenance, insisting that it is up to the state Department of Natural Resources to address clean water issues and monitor water safety. Reading from state statutes accessed online via Smart phone, Schenk quoted to Moehn the additionally empowered duties of towns to protect watersheds and soil and water conservation. Citizens present groaned at Moehn's suggestion the DNR will protect and monitor Pinnacle's impact on their water. In fact, Wisconsin's non-partisan Legislative Audit Bureau reported a decade-review of DNR wastewater oversight in November 2016. The audit showed the DNR inspected 17 farms after – not before

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June Cheese Curd Promo Links Ellsworth Co-op & Kwik-Trip Stores

by Pete Hardin

For the second consecutive year, the Ellsworth Cooperative Creamery has worked with Kwik-Trip stores in the Upper Midwest to offer a June Dairy Month special: 12-oz packages of cheese curds priced at \$1.99 each. The Ellsworth Co-op is famous for marketing quality cheese curds.

That special offer on Ellsworth's cheese curds was part of a bigger June Dairy Month promotion for Kwik-Trip. Kwik-Trip also offered containers of its high-quality, Nature's Touch® premium ice cream and Nature's Touch® gallons of milk for \$1.99 each.

Kwik-Trip's 600+ convenience stores are go-to destinations in the Upper Midwest – a sterling example of a well-run, Wisconsin-based business. (Kwik-Trip is headquartered in La Crosse.)

While specific sales volumes are confidential, Ellsworth Co-op's CEO/general manager, Paul Bauer, reports that several semi-trailers of cheese curds were shipped to Kwik-Trip's distribution center during the promotion. Bauer admits that volume strained employees and logistics at the co-op's packaging department. But June Dairy Month is June Dairy Month, and Ellsworth's employees soldiered through that hectic period.

This June was the second year for the Ellsworth Co-op partnering with Kwik-Trip. Bauer explains that Kwik-Trip originally came to Ellsworth with the idea for a special cheese curd promotion in early 2018. Kwik-Trip marketers wanted a 12-oz. package with a \$1.99 price point for the June Dairy Month special deal. The Ellsworth Co-op had to revise its packaging to accommodate the 12-oz. No problem.

After the June Dairy Month promotion is over, sales of Ellsworth Co-op cheese curds will continue at Kwik-Trip.

"We're very pleased with the Kwik-Trip cheese curd promotion," Bauer explained. He likes doing business with Kwik-Trip and "Kwik-Trip likes us." The direct relationship between the cooperative and the convenience store chain allows Ellsworth's dairy producers to be "better connected to consumers." Paul Bauer hopes that early success working with Kwik-Trip may lead to more innovative marketing co-ventures.

Quickly responding to marketing opportunities is a attribute at the Ellsworth Co-op. Example: Last winter, when the Minnesota Vikings were in the National Football League playoffs, Ellsworth got an order for purple colored cheese curds. Sound goofy? In a little more than a week, the Ellsworth Co-op produced and marketed 21,000 lbs. of purple-hued cheese curds to hungry Vikings fans.

The Ellsworth Co-op's history dates back 109 years. Currently, the co-op has 320 member/producers who ship just under two million lbs. of milk per day. Ellsworth operates three cheese plants and has two retail stores. Curds are Ellsworth's marketing strength, observes one Wisconsin cheese industry source. That source further explained that the Ellsworth Co-op has continually invested in its processing facilities.

Ellsworth's work force totals 270 employees. Ellsworth also produces primary barrel Cheddar. Industry sources say that Midwest barrel Cheddar's flavor profile is highly desirable for production of quality, processed cheese products.



As a June Dairy month bargain, Kwik-Trip stores offered 12-oz. bags of cheese curds manufactured by the Ellsworth Cooperative Creamery, La Crosse, Wisconsin.

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– it issued them the WDEPS permit. The audit showed 98 percent of 1,900 reports DNR required WDEPS permitted facilities to submit were not electronically recorded as being received, making it difficult for staff to identify problems in wastewater protection. The audit showed state staff cuts to DNR have resulted in notices of violations issued to polluters dwindling to just 33 of 558 instances serious enough for such citations under the DNR's own policies.

Schenk pointed out to the new board members state certified engineers had determined two or three times that Pinnacle's 20 acres of waste containment facilities were too close to the water table. Citizens pointed out a March 2018 county hydrological study had looked at what was happening to the area's land of fractured bedrock below the soil surface, and a February 2016 volunteer science panel had put together an environmental and health impact study for the town before the DNR granted a waste permit to Pinnacle.

Witt asserted that he is not regulated for manure applications on his cropland, though as a CAFO, Pinnacle does have to have a nutrient management plan. Green County conservation staff in recent years determined only a small percentage of producers have nutrient management plans as state law require for all livestock owners. The admission raises another conflict of interest question since Witt ultimately voted the town back off monitoring requirements of Pinnacle's land base manure application, which includes his farm. "In the last 10 years, I think there have been almost 80 farmers I've trained to write their own nutrient management plans," said Tanya Gratz, of Green County's Land and Water Conservation staff. Of about 280,000 acres of cropland in Green County, the state estimates 81 percent may have no plan for managing fertilizer and manure applications.

Town of Sylvester has only \$6,000 budgeted presently for legal fees, but Moehn said he had not contacted Midwest Environmental Advocates about legal assistance available to towns since citizens asked him to do so in a May meeting. Citizens pressed him again to contact the nonprofit MEA for help.

Wisconsin's administrative rules allow the DNR to modify a permit if the DNR and petitioners, such as the Town of Sylvester and its residents, challenging the permit enter into a signed agreement.

The town's attorney could thus have negotiated to resolve the contested case hearing with a compromise that presses changes to strengthen water protections and monitoring.

State Administrative Law Judge Kristine M. Kerig initially gave the town, the DNR, and an attorney from Michael, Best and Friedrich representing Pinnacle Dairy, time to work out a scheduling order and calendar up until the proposed case hearing date next February 2020.

If resolution of that issue fails, procedures of the contested case hearing will closely resemble a trial in state circuit court.

Since the June 2019 Town of Sylvester meeting, several citizens reported to the press that they unsuccessfully attempted to contact the Green County District Attorney Craig Nolen. They said they sought to press Nolen to investigate conflict of interest charges against Witt in changing the town's course over the DNR waste permit to Pinnacle Dairy.

In response to a telephone call Friday, July 5, Nolen's assistant told this reporter that Nolen had contacted the Wisconsin Ethics Commission. She said the state has agreed to handle any conflict of interest charges in the Town of Sylvester DNR contested case proceeding over its waste permit to Pinnacle Dairy.

Nolen's assistant refused to answer any other general questions about the district attorney or the citizen complaints. She said Nolen was unavailable.

Wisconsin Ethics Commission Administrator Dan Carlton, also reached July 5 by phone, confirmed that the commission holds co-equal jurisdiction with county district attorneys on conflict of issues involving local officials.

"If citizens want to file a complaint, they can fill out a form from the state website, get it notarized, scan it and send it electronically or mail it to us," said Carlton, an attorney with the commission just since September.

Ethics Commission staff will inspect the form for necessary detail requested, determine whether it is within the commission's jurisdiction, log and assign a case a number, Carlton said Friday.

"Within 5 days of that, we would give the complaint to a respondent, and the respondent would have 15 days to respond," he said. The person a citizen cites in the complaint as in violation of state ethics laws must answer or "respond" to the charges in writing to the commission.

Wisconsin's six-member ethics commission, which the legislature devised along with a separate elections commission 3 years ago, replaced the Government Accountability Board. The Ethics Commission determines from complaints (and their responses from public officials) whether there is a reasonable suspicion of a conflict of interest violation.

"If they do, they will order an investigation, which is typically handled by the commission's staff," Carlton said. "The commission can also hire an outside investigation."

If the commission determines there is no reasonable suspicion of a violation, the matter is terminated. Determination of probable cause from the commission staff or hired investigators' report could result in civil penalties up to \$5,000 or a settlement offer in lieu of a court proceeding.

Carlton conducted a quick scan through all of the complaints that the relatively new Ethics Commission has handled since its inception. "The Commission addressed approximately 52 filed local complaints. Of those local complaints, 30 were campaign finance related and 25 were ethics related," he stated by email, July 9.

"However, there was one local complaint that was filed against 10 individuals. That complaint had a mix of campaign finance and ethics violations," he said, "So, there may be a few additional local complaints that were filed in each category."

Carlton cannot speak to specifics of complaints in progress with his state office. State law requires the Commission to keep its actions regarding each complaint confidential.

"Generally speaking, the Commission and district attorneys both have jurisdiction over violations of the state's ethics laws," Carlton said. "So, as a result, citizens can bring complaints to either entity. If the Commission determines that a complaint should be investigated, it can do so on its own or the matter could be referred to a local DA to investigate and resolve.

"There are many reasons why a DA might not be able to investigate a matter. If a DA determines that he or she cannot proceed, the DA can always advise people to bring complaints to the Commission since we also have jurisdiction. No agreement is necessary. All that would be required is that a citizen file a sworn complaint with us."

At the time of this writing, according to citizen reports to the press, citizens from at least seven households concerned about the conflict of interest in the Town of Sylvester have downloaded state ethics complaint forms. Three had filed complaints with the state by July 10. The Town of Sylvester also had already filed public notice for a town meeting on July 12 concerning the charges.