



**Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Denial by the Department of
Natural Resources of an Application for an Air
Pollution Control Construction Permit from
Central Wisconsin Alcohol, Inc.

Case No. DNR-15-045

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Pursuant to due notice, a hearing was held at the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, Wisconsin on Tuesday, March 15, 2016, Eric D. Défort, Administrative Law Judge presiding.

The parties filed written closing briefs after the hearing. The last brief was received on April 18, 2016.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are identified as follows:

Central Wisconsin Alcohol, Inc., by

Roger Hinner
Central Wisconsin Alcohol, Inc.
1211 West Water Street
Merrill, WI 54452

Wisconsin Department of Natural Resources, by

Attorney Michael G. Szabo &
Attorney Cassandra M. Lang
Department of Natural Resources
101 S. Webster Street
PO Box 7921
Madison, WI 53707-7921

ISSUES FOR HEARING

- i. Whether the Wisconsin Department of Natural Resources (DNR) was justified in determining that Central Wisconsin Alcohol (CWA) had not demonstrated its ability to comply with the requirements for fugitive dust control provided in Wis. Admin. Code § NR 415.04.

- ii. Whether the DNR properly determined that CWA had not demonstrated its ability to comply with the requirements to institute a leak detection and repair program under 40 CFR Part 60 Subpart VV, as required by Wis. Stat. § 285.65(13).
- iii. Whether the DNR properly determined that CWA had not demonstrated that its proposed waste storage stillage tank would comply with the requirements of Wis. Admin. Code § NR 419.03 and Wis. Admin. Code chapter NR 429.
- iv. Whether the DNR properly determined that CWA had not demonstrated its ability to satisfy the requirements of Wis. Admin. Code chapter NR 445 regarding benzene emissions from ethanol tanker truck loading.
- v. Whether the DNR properly determined that dispersion modeling of anticipated plant emissions predicted violations of the PM_{2.5}, PM₁₀, and the NO_x standards.
- vi. Whether the DNR properly denied the permit on the basis of water quality issues.

FINDINGS OF FACT

1. CWA is located at 5641 Hwy. 54, Plover, Portage County, Wisconsin. Exh. 136 at 3.
2. CWA is an ethanol plant that proposed using residual dairy processing wastewater to produce ethanol. Exh. 136 at 3.
3. CWA applied for an air pollution control construction permit on December 23, 2009. Exh. 106.
4. The DNR assigned permit number 10-DCF-007 to the permit application. Exh. 107.
5. Roger Hinner is the president of CWA. Exh. 112.

Fugitive dust control, pursuant to Wis. Admin. Code § NR 415.04

6. In a letter dated June 30, 2010, the DNR notified Mr. Hinner that the permit application was incomplete and not approvable as submitted. Exh. 111 at 1.
7. On November 8, 2010, the DNR requested that CWA quantify fugitive dust emissions and submit a fugitive dust plan, among other things. Exh. 113 at 3.
8. On December 10, 2010, the DNR received a letter from Mr. Hinner, responding to the DNR's request for information. Mr. Hinner's letter describes CWA's roads as "hard surface gravel," of less than 20,000 square feet, but fails to quantify fugitive dust emissions and fails to provide a fugitive dust plan. Exh. 114 at 4.

9. On December 15, 2010, the DNR again requested that CWA quantify fugitive dust emissions and submit a fugitive dust plan. Exh. 115 at 4.
10. In January of 2011, Mr. Hinner responded, but did not provide a coherent fugitive dust plan. Exh. 116.
11. In February of 2011, Mr. Hinner provided the DNR with a quantification of the fugitive dust emissions from truck-traffic on “unpaved roads.” Exh. 117.
12. On March 7, 2011, the DNR wrote to Mr. Hinner and again requested that CWA provide a fugitive dust control plan. Exh. 118.
13. On April 4, 2011, the DNR received a letter from Mr. Hinner wherein Mr. Hinner claimed that the fugitive dust emissions fall beneath the allowable emission standard set out in “NB. 415.04.SUB (3) [sic]” for roadways of 20,000 square feet or more. Exh. 119. Additionally, he wrote that the average truck traffic is less than one load per hour. Exh. 119. Furthermore, he wrote: “No dust control installed. Well cooling water available to control dust if needed.” Exh. 119.
14. On April 12, 2011, the DNR wrote to Mr. Hinner and notified him that he is not exempt from having to comply with Wis. Admin. Code § NR 415.04. Exh. 120. The DNR suggested that a fugitive dust control plan would normally contain a description of practices, routine observation and documentation of fugitive emissions, and a discussion of when additional practices should be implemented to reduce fugitive dust emissions. Exh. 120. The DNR then notified Mr. Hinner that “[t]his plan needs to be developed and submitted for approval as a portion of the permit process.” Exh. 120.
15. In a letter dated May 2, 2011, Mr. Hinner responded that he has a hard surface driveway of less than 20,000 square feet, that there is an average of 1 truck per hour, and he mentions “Dust Control Spread Clean Process water if needed.” Exh. 122.
16. On May 3, 2011, Mr. Hinner suggested, in a letter sent to the DNR and others, that it is his understanding that “construction or operating permits are not needed.” Exh. 121.
17. In a letter dated August 31, 2011, the DNR notified Mr. Hinner that the fugitive dust plan that Hinner provided was incomplete. Exh. 131.
18. On November 17, 2011, the DNR found that CWA “has claimed that it is not subject to the requirements of s. NR 415.04(1)” and that CWA’s “proposal does not meet this requirement.” Exh. 136 at 28.
19. On December 13, 2011, in response to the preliminary determination, CWA claimed that it is exempt from certain requirements and that it will use clean cooling water for dust control when needed. Exh. 139.
20. On February 16, 2012, and on March 20, 2012, the Department issued letters notifying CWA of the DNR’s final decision to deny the CWA permit application for construction permit 10-DCF-007. Exh. 140, Exh. 143.

21. At the contested case hearing, Mr. Hinner submitted a collection of documents which include a fugitive dust control plan. *See* Exh. 12. The plan is titled “Fugitive Dust Control Plan Central Wisconsin Alcohols, Inc. – Plover, WI Revision 1 – June 2012.” *See* Exh. 12. While being cross examined, Mr. Hinner admitted that this plan was submitted after the denial of the permit application.

*Leak detection and repair program under 40 CFR § 60, Subpart VV, and Wis.
Admin. Code § NR 440.62*

22. In the letter dated June 30, 2010, the DNR notified Mr. Hinner, on behalf of CWA, that the permit application was incomplete and not approvable as submitted. Exh. 111 at 1. In that letter, the DNR notified Mr. Hinner that the application would need to formally identify and quantify any fugitive volatile organic compound (VOC) emissions from CWA’s operations involving the production and processing of ethanol. Exh. 111 at 3. Furthermore, the DNR notified Mr. Hinner that fugitive VOC emissions from the operations, such as valves, pumps, and sampling ports, are subject to the new source performance standards (NSPS) leak detection and repair (LDAR) requirements of Wis. Admin. Code § NR 440.62 and the federal NSPS standards of “Part 60, Subpart VV.” Exh. 111 at 3. The DNR then directed Mr. Hinner to “outline how you will implement these state and federal standards.” Exh. 111 at 3.
23. On October 25, 2010, Mr. Hinner responded, but failed to provide the DNR with the requested information. Exh. 112.
24. The DNR requested the information a second time in a letter dated November 8, 2010. Exh. 113 at 3.
25. On December 10, 2010, the DNR received a letter from Mr. Hinner, responding to the DNR’s request for information. In the letter, Mr. Hinner wrote:

“Distillation and dehydration system containing (7) vapor valves and (3) pump heavy liquid service constructed before Nov. 7th, 2006. Exclude this NSPS Leak Detection and repair of Part 60. Regular maintenance will provide adequate leak detection. Copy of Subpart VVa enclosed (ADDN #12).”

Exh. 114 at 4.

26. On December 15, 2010, the DNR explained to Mr. Hinner that CWA is not exempt from the NSPS standards because CWA was proposing to construct a 5 million gallon fuel grade ethanol plant and the affected facility would involve the entire operation used to produce ethanol. Exh. 115 at 3. Furthermore, the DNR notified Mr. Hinner that all of the tanks, pumps, valves, sampling ports, piping, and other connections need to be considered in determining the potential emission from VOC leaks. Exh. 115 at 3. Additionally, the DNR directed Mr. Hinner to formally quantify the emissions using the appropriate calculation protocol and to outline how CWA would implement the standards of Part 60, Subpart VVa. Exh. 115 at 3.

27. On January 7, 2011, the DNR received a letter from Mr. Hinner. Exh. 116. In that letter, Mr. Hinner indicated that there are three processing tanks and that these would be “visually inspected weekly for leaks.” Exh. 116 at 5. He also noted that there are two standard light service pumps, which would be visually inspected each week for indication of liquid drying from pump seals. Exh. 116 at 5. Mr. Hinner noted that there are standard valves in gas vapor service and lite service, which would be monitored for leaks on a monthly basis. *See* Exh. 116 at 5. Furthermore, Mr. Hinner wrote that there is a sampling connection system. Exh. 116 at 5. Mr. Hinner also noted that there is piping and there are flanges present and that he would check all valves, stems, bolted flanges, and gaskets on a monthly basis for leaks, with instruments detecting 500 PPM. *See* Exh. 116 at 5.
28. On April 4, 2011, the DNR received a letter from Mr. Hinner. Exh. 119. In the letter, Mr. Hinner declares that CWA will “only” comply with NSPS Part 60, Subpart VVa, requirements related to “good maintenance procedures.” Exh. 119 at 3.
29. On November 17, 2011, the DNR found that CWA “has not agreed to conduct inspections for VOC leaks in accordance with the federal New Source Performance Standards (with the use of an instrument used to detect VOC leaks), based on a false claim that all operations will be under vacuum.” Exh. 136 at 28.
30. On December 13, 2011, CWA provided comments in response to the Department’s preliminary determination to deny the application. Exh. 139. Mr. Hinner’s letter referred to new source performance standards and suggested that he would comply with those standards.
31. On February 16, 2012, and on March 20, 2012, the DNR issued letters notifying CWA of the DNR’s final decision to deny the CWA permit application for construction permit 10-DCF-007. Exh. 140, Exh. 143.
32. At the contested case hearing, Mr. Hinner testified that he believes that CWA is exempt from the leak detection requirement, if the system is under vacuum. However, he went on to testify that he did not actually know if the system is under vacuum. Additionally, he testified that there is a big vacuum pump on the system. On cross-examination, Mr. Hinner could not remember when he may have submitted information to the DNR about a vacuum pump.

*Waste storage stillage tank and the requirements of Wis. Admin. Code § NR
419.03 and Wis. Admin. Code Chapter NR 429*

33. In the letter dated June 30, 2010, the DNR notified Mr. Hinner, on behalf of CWA, that the permit application would need to formally quantify the VOC emissions from each of the storage tanks, including “ ‘big blue,’ ” or demonstrate that the emissions are less than the thresholds of Wis. Admin. Code Ch. NR 407. *See* Exh. 111 at 1.
34. At the contested case hearing, Mr. Hinner referred to the open top storage stillage tank and claimed that there are no emissions from the tank, that the tank contains wastewater from making alcohol from seed corn, that there is no odor at all, that the contents of the tank is 15 years old, that whey is not available on the market, that whey was causing the odor, and that he would limit alcohol production to starch.

35. Previously, on November 8, 2010, the DNR requested that Mr. Hinner provide the basis for his assertion that the wastewater storage tank would not produce VOC emissions. Exh. 113 at 1.
36. In a letter received by the DNR on December 10, 2010, Mr. Hinner responded, but did not provide a valid basis for the assertion that there would not be VOC emissions produced by the wastewater storage tank. *See* Exh. 114 at 2-3. The only explanation offered by Mr. Hinner was that Carbon Dioxide scrubber blowdown water would be processed through the distillation process to remove ethanol. *See* Exh. 114 at 2.
37. In a letter dated December 15, 2010, the DNR notified Mr. Hinner that his explanation was invalid on its face. *See* Exh. 115 at 2. The DNR explained that the distillation process itself will produce a VOC containing aqueous waste. Exh. 115 at 2.
38. In January of 2011, Mr. Hinner wrote that the scrubber water containing the VOC would be returned to a fermentation tank and then processed along with fermented whey to distillation and dehydration. Exh. 116 at 3. He went on to explain that the waste water from this process would be pumped to an outside storage tank, called "Big Blue," for land-spreading. *See* Exh. 116 at 3.
39. In April of 2011, the DNR notified Mr. Hinner that he should outline his practices and procedures for limiting malodorous emissions if they are observed. Exh. 120 at 3. The DNR also notified Mr. Hinner that the requirement to limit malodorous emissions is based on Wis. Admin. Code. Ch. NR 429. Exh. 120 at 3.
40. On September 14, 2011, the DNR notified Mr. Hinner that he needs to be more specific about the amount of process contact water (containing VOC) that CWA would be storing, pursuant to Wis. Admin. Code. § NR 419.03. Exh. 133 at 1.
41. On November 17, 2011, the DNR found that CWA "has noted that it will store VOC containing wastewater within an open top tank, such that the source would be considered in violation of s. NR 419.03, and s. NR 429.03, Wis. Adm. Code." Exh. 136 at 28.
42. On December 13, 2011, CWA provided comments in response to the Department's preliminary determination to deny the application. Exh. 139. The letter failed to provide the amount of process contact water that CWA would be storing in the tank.
43. On February 16, 2012, and on March 20, 2012, the Department issued letters notifying CWA of the DNR's final decision to deny the CWA permit application for construction permit 10-DCF-007. Exh. 140, Exh. 143.

*Benzene emissions from ethanol tanker truck loading and the requirements of
Wis. Admin. Code Chapter NR 445*

44. In the letter dated June 30, 2010, the DNR notified Mr. Hinner that his application omits the expected emissions associated with loading ethanol into tanker trucks. *See* Exh. 111 at 1.

The DNR informed Mr. Hinner that such trucks are normally used to transport gasoline and that the process of loading ethanol into the truck will normally result in significant emissions of volatile organic compounds (VOCs) when the gasoline vapors are displaced. *See* Exh. 111 at 1. These VOCs include hazardous air pollutants such as benzene, toluene, xylene, and hexane. *See* Exh. 111 at 1. Therefore, the DNR directed Mr. Hinner to “provide the calculations by which you arrive at your emission estimates.” *See* Exh. 111 at 1.

45. In his December 2010 and January 2011 responses, Mr. Hinner claimed that all of the ethanol will be transported in tankers used only to transport ethanol. *See* Exh. 114 at ADDN #2 and Exh. 116 at 3.
46. On March 7, 2011, the DNR requested that CWA provide formal documentation from the fuel transport company affirmatively indicating that only dedicated ethanol tankers would be used. Exh. 118 at 1.
47. Mr. Hinner responded, but failed to provide the requested documentation. Exh. 119.
48. Therefore, in April of 2011, the DNR again requested that he submit the information. Exh. 120 at 1.
49. On August 22, 2011, Mr. Hinner sent an email to the DNR with a materials safety data sheet that revealed that there would be between 1 and 5% of benzene, by volume, in gasoline received at CWA. Exh. 131 at 3 – 4.
50. The DNR calculated that, at the expected emissions potential from loading 5 million gallons of ethanol product, the quantity of benzene from displaced gasoline vapors could be as much as 300 to 600 pounds of benzene per year. Exh. 131 at 1. The DNR notified Mr. Hinner that this would trigger the requirements of Wis. Admin. Code § NR 445, which would require CWA to install and employ a loading rack flare to limit the emissions. Exh. 131 at 1. However, the DNR noted that CWA had not proposed any emission controls within the application to decrease the emissions level of benzene to the lowest achievable emission rate (LAER) required by Wis. Admin. Code § NR 445. Exh. 131 at 1.
51. On November 17, 2011, the DNR found that CWA “has not provided sufficient information to confirm that hazardous Lowest Achievable Emission Rate (HLAER) should not be applied to control benzene emissions from product loadout.” Exh. 136 at 28.
52. On December 13, 2011, CWA provided comments in response to the Department’s preliminary determination to deny the application. Exh. 139. In the letter, Mr. Hinner claims that CWA will use a 4-inch buckeye fitting to transfer displaced gas vapors to a 4-inch PVC stack vent at 25 feet in elevation.
53. On February 16, 2012, and on March 20, 2012, the Department issued letters notifying CWA of the DNR’s final decision to deny the CWA permit application for construction permit 10-DCF-007. Exh. 140, Exh. 143.
54. Along with its February 16, 2012, correspondence letter, the DNR included a memorandum of its responses to CWA’s comments. Exh. 141. In its memorandum, the DNR noted that it

is concerned that the method described by CWA does not indicate whether there is an interlock to physically connect the truck vent pipe to the vent stack. Exh. 141 at 2. Also, the DNR noted that it is unclear that the 4 inch PVC stack can reliably function without a support frame. Exh. 141 at 2.

55. At the contested case hearing, Mr. Hinner testified that he believed that the DNR was using the wrong calculation regarding the benzene emissions. While being cross-examined, he revealed that his own consultant was relying on a calculation that is used in the State of Nebraska. However, Mr. Hinner testified that he does not know if the Nebraska calculation complies with the federal standards.
56. At the contested case hearing, DNR Air Permit Engineer, Don C. Faith, testified that he had never heard of the Nebraska method, that it is not a method approved by the Environmental Protection Agency (EPA), and is not a method used by the DNR.

*Dispersion modeling of anticipated plant emissions predicted violations of the
PM_{2.5}, PM₁₀, and the NO_x standards*

57. The DNR conducted an Air Dispersion Analysis of CWA and issued a memorandum of the analysis on October 13, 2011. Exh. 134. The analysis concluded that the allowable Significant Impact Levels (SIL) would be exceeded for particulate matter of 2.5 micrometers or less (PM_{2.5}), particulate matter of 10 micrometers or less (PM₁₀), and Nitrogen Dioxide (NO₂). Exh. 134. The analysis concluded that there would be a violation of the National Ambient Air Quality Standards (NAAQS) for PM_{2.5}. Exh. 134. Furthermore, the analysis concluded that there would be a violation of the Increment Consumption criteria (INC) for PM₁₀ and NO₂. Exh. 134.
58. At the contested case hearing, DNR Analyst J.R. Sims testified that he conducted and authored the Air Dispersion Analysis.
59. Mr. Sims testified that the analysis assumed that the relevant smoke stack would have a height of 5.49 meters. Additionally, the analysis includes a description of a smoke stack with a height of 5.49 meters. Exh. 134.
60. On November 17, 2011, the DNR found that CWA “will cause or exacerbate a violation of an air quality standard or ambient air increment.” Exh. 136 at 28 (emphasis in original). Furthermore, the DNR found that CWA “is predicted to cause an exceedance of the PM_{2.5} NAAQS, and thus cannot be approved.” Exh. 136 at 28. Additionally, the DNR found that CWA “also violates” the PM₁₀ increment standard and the annual average Nitrogen Oxides standards. Exh. 136 at 28.
61. On December 13, 2011, CWA provided comments in response to the Department’s preliminary determination to deny the application. Exh. 139. In the letter, Mr. Hinner claims that CWA will increase the boiler stack to 25 feet above ground to comply with the PM_{2.5} and NO_x standards.

62. On February 16, 2012, and on March 20, 2012, the Department issued letters notifying CWA of the DNR's final decision to deny the CWA permit application for construction permit 10-DCF-007. Exh. 140, Exh. 143.
63. Along with its February 16, 2012, correspondence letter, the DNR included a memorandum of its responses to CWA's comments. Exh. 141. In its memorandum, the DNR noted that it anticipates that the proposed 25-foot stack height will not be sufficient to significantly change the outcome of the modeling evaluation. Exh. 141 at 2.
64. On May 3, 2012, the DNR Air Dispersion Analyst concluded that a 25-foot boiler stack would not change the outcome for PM_{2.5}, PM₁₀, and the NO₂ standards. Exh. 151.
65. At the contested case hearing, Mr. Hinner testified that he proposed adding a higher smoke stack to comply with the requirements. While being cross-examined, Mr. Hinner admitted that he did not suggest a taller smoke stack (65-feet) until after the DNR had already denied the permit application.

Water Quality

66. At the contested case hearing, the DNR noted that the water quality issue was not a basis for the decision to deny the permit application.

DISCUSSION

In Wisconsin, no person may commence construction, reconstruction, replacement, or modification of a stationary source unless the person has a construction permit from the DNR. Wis. Stat. § 285.60(a)(1). A person who is required to obtain or who seeks a construction permit shall apply to the DNR for a permit to construct, reconstruct, replace or modify the stationary source. Wis. Stat. § 285.61(1). The DNR shall prepare a preliminary determination on the approvability of the application. Wis. Stat. § 285.61(3).

The DNR may approve an application for a permit if the DNR finds:

(a) *Source will meet requirements.* The stationary source will meet all applicable emission limitations and other requirements promulgated under this chapter, standards of performance for new stationary sources under § 285.27(1) and emission standards for hazardous air contaminants under § 285.27(2);

(b) *Source will not violate or exacerbate violation of air quality standard or ambient air increment.* The source will not cause or exacerbate a violation of any ambient air quality standard or ambient air increment under § 285.21(1) or (2);

(c) *Other permits approvable if source is operating under an emission reduction option.* If the source is operating or seeks to operate under an emission reduction option, the required permit applications for other sources participating in that emission reduction option are approvable; and

(d) *Source will not preclude construction or operation of other source.* The stationary source will not degrade the air quality in an area sufficiently to prevent the construction, reconstruction, replacement, modification or operation of another stationary source if the department received plans, specifications and other information under § 285.61(2)(a) for the other stationary source prior to commencing its analysis under § 285.61(3) for the former stationary source. This paragraph does not apply to an existing source required to have an operation permit.

Wis. Stat. § 285.63(1).

As to the first issue presented, CWA failed to provide the DNR with a fugitive dust control plan until after the denial of the permit application. Submission of the plan was necessary because, under Wisconsin law, “[n]o person may cause, allow or permit any materials to be handled, transported or stored without taking precautions to prevent particulate matter from becoming airborne. Nor may a person allow a structure, a parking lot, or a road to be used, constructed, altered, repaired, sand blasted or demolished without taking such precautions.” Wis. Admin. Code § NR 415.04. Wisconsin Administrative Code Chapter NR 415 was promulgated pursuant to Wisconsin Statutes Chapter 285. *See* Wis. Admin. Code § NR 415.01(2). Therefore, the failure to submit the plan made it impossible for the DNR to find that CWA would “meet all applicable emission limitations and other requirements promulgated under” Wisconsin Statute Chapter 285. *See* Wis. Stat. § 285.63(1)(a).

As to the second issue presented, the DNR asked Mr. Hinner to outline how CWA would implement the state and federal leak detection and repair requirements of Wis. Admin. Code § NR 440.62 and 40 CFR § 60, Subpart VV. However, Mr. Hinner persisted in claiming that CWA was exempt from the requirements. Indeed, Mr. Hinner claimed at the contested case hearing that CWA is exempt from the leak detection requirement, if under vacuum. However, he went on to admit that he did not actually know if the system is under vacuum. This is significant because equipment that is “in-vacuum service” is excluded from several of the requirements. *See* Wis. Admin. Code § NR 440.62(3)(a)4. “In-vacuum service” means that equipment is operating at an internal pressure which is at least 5 kilopascals (kPa) (0.7 psia) below ambient pressure. Wis. Admin. Code § NR 440.62(2)(km). However, the current record lacks sufficient evidence to demonstrate that the equipment is “in-vacuum service.” Wisconsin Administrative Code Chapter NR 440 was promulgated pursuant to Wisconsin Statutes Chapter 285. *See* Wis. Admin. Code § NR 440.01(2). Under the circumstances, the DNR could not reasonably find that CWA would “meet all applicable emission limitations and other requirements promulgated under” Wisconsin Statute Chapter 285. *See* Wis. Stat. § 285.63(1)(a).

As to the third issue presented, the DNR notified Mr. Hinner that CWA needed to be more specific about the amount of process contact water containing volatile organic compounds (VOC) that CWA would be storing and that the DNR needed this information to comply with Wis. Admin. Code. § NR 419.03. Section NR 419.03(1) prohibits any person from causing, allowing or permitting organic compound emissions into the ambient air which substantially contribute to the exceedance of an air standard or cause air pollution. Section NR 419.03(2) prohibits any person from causing, allowing or permitting organic compounds to be used or handled without using good operating practices and taking reasonable precautions to prevent the spillage, escape or emission of organic compounds, solvents or mixtures. CWA indicated that it would store VOC wastewater in an open top tank and later claimed some of this wastewater

would be land-spread onto surrounding farm fields. The storage of VOC wastewater in an open top tank would potentially violate section NR 419.03. Wisconsin Administrative Code Chapter NR 419 was promulgated pursuant to Wisconsin Statutes Chapter 285. *See* Wis. Admin. Code § NR 419.01(2). Therefore, the DNR could not find that CWA would “meet all applicable emission limitations and other requirements promulgated under” Wisconsin Statute Chapter 285. *See* Wis. Stat. § 285.63(1)(a).

As to the fourth issue presented, the DNR notified Mr. Hinner that CWA’s application omitted the expected VOC emissions associated with loading ethanol into tanker trucks when gasoline vapors are displaced. These VOCs normally include hazardous air pollutants such as benzene, toluene, xylene, and hexane. Mr. Hinner sent the DNR a ‘materials safety data sheet’ that revealed that there would be between 1 and 5% of benzene, by volume, in gasoline received at CWA. As a result, the DNR calculated that, at the expected emissions potential from loading 5 million gallons of ethanol product, the quantity of benzene from displaced gasoline vapors could be as much as 300 to 600 pounds of benzene per year, which would require CWA to install and employ a loading rack flare to limit the emissions, pursuant to Wis. Admin. Code § NR 445. However, in the absence of a permit or order, CWA had not proposed any emission controls to decrease the emissions level of benzene to the lowest achievable emission rate (LAER) for benzene, made applicable by Wis. Admin. Code § NR 445.08(1) and NR 445.07, Table A. CWA did, ultimately, propose the use of a 4-inch buckeye fitting to transfer displaced gas vapors to a 4-inch PVC stack vent at 25 feet in elevation. However, as noted by the DNR, CWA’s proposed solution did not indicate whether there would be an interlock to physically connect the truck vent pipe to the vent stack and failed to clarify how the 4-inch PVC stack could reliably function without a support frame. At the contested case hearing, Mr. Hinner seemingly abandoned the proposed solution and, instead, testified that he believed that the DNR was using an incorrect calculation to arrive at the benzene emission estimates. While being cross-examined, he revealed that CWA’s consultant relied on a calculation that is used in the State of Nebraska. Notably, Mr. Hinner testified that he does not know if the Nebraska calculation complies with the federal standards. A DNR Air Permit Engineer, Don C. Faith, testified that he had never heard of the Nebraska method, that it is not a method approved by the Environmental Protection Agency (EPA), and it is not a method used by the DNR. Wisconsin Administrative Code Chapter NR 445 was promulgated pursuant to Wisconsin Statutes Chapter 285. *See* Wis. Admin. Code § NR 445.01(2). Under the circumstances, the DNR could not find that CWA would “meet all applicable emission limitations and other requirements promulgated under” Wisconsin Statute Chapter 285. *See* Wis. Stat. § 285.63(1)(a).

As to the fifth issue presented, the DNR conducted an Air Dispersion Analysis of CWA and concluded that the allowable Significant Impact Levels (SIL) would be exceeded for particulate matter of 2.5 micrometers or less (PM_{2.5}), particulate matter of 10 micrometers or less (PM₁₀), and Nitrogen Dioxide (NO₂). Exh. 134. The analysis concluded that there would be a violation of the National Ambient Air Quality Standards (NAAQS) for PM_{2.5}. Exh. 134. Furthermore, the analysis concluded that there would be a violation of the Increment Consumption criteria (INC) for PM₁₀ and NO₂. Exh. 134. The analysis assumed that the relevant smoke stack would have a height of 5.49 meters. Mr. Hinner then proposed a 25 foot stack. However, the DNR concluded that this would not change the outcome for PM_{2.5}, PM₁₀, and the NO₂ standards. Exh. 151. At the contested case hearing, Mr. Hinner testified that he proposed adding a taller smoke stack to comply with the requirements, but that he did not do so until after the DNR had already denied the permit application. Mr. Hinner does not challenge the accuracy of the DNR’s Air Dispersion Analysis. The National Ambient Air Quality Standards are set out in 40 C.F.R. § 50.

Wisconsin's ambient air quality standards and ambient air increments are set out in Wis. Admin Code §§ NR 404.04 and 404.05, respectively. Under the circumstances, the DNR could not reasonably find that CWA "will not cause or exacerbate a violation of any ambient air quality standard or ambient air increment under § 285.21(1) or (2)." Wis. Stat. § 285.63(1)(b).

As to the sixth issue presented, the DNR claims that water quality issues were not a basis for the denial. Thus, it appears that this issue should not have been certified as an issue for hearing.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has the authority to hear contested cases and issue decisions on behalf of the DNR. Wis. Stat. § 227.43(1)(b), Wis. Admin. Code § NR 2.155.
2. Air pollution control construction permits are governed by Wis. Stat. § 285.60 and, pursuant to Wis. Stat. § 285.61(8)(a), the approval of the construction permit application is governed by the criteria established under Wis. Stat. § 285.63.
3. Any permit decision or determination by the DNR under § 285.63 shall become effective unless the permit applicant seeks a hearing challenging the action. *See* Wis. Stat. § 285.81(1).
4. In proceedings in which a person has been granted a review hearing under Wis. Stat. § 285.81, those persons shall proceed first with the presentation of evidence and shall have the burden of proof. Wis. Admin. Code § NR 2.13(3)(b).
5. The burden of proof, also known as the quantum of evidence, for the hearing decision shall be by the preponderance of the evidence. Wis. Admin. Code § HA 1.17(2).
6. Following the hearing, the DNR's action may be "affirmed, modified or withdrawn." Wis. Stat. § 285.81(1)(b).
7. The DNR complied with Wis. Stat. § 285.63(1) in denying the air pollution control construction permit to CWA at issue in this case.
8. The DNR properly determined that CWA had not demonstrated its ability to comply with the requirements for fugitive dust control provided in Wis. Admin. Code § NR 415.04.
9. The DNR properly determined that CWA had not demonstrated its ability to comply with the requirements to institute a leak detection and repair program under 40 CFR Part 60 Subpart VV and Wis. Admin. Code § NR 440.62.
10. The DNR properly determined that CWA had not demonstrated that its proposed waste storage stillage tank would comply with Wis. Admin. Code § NR 419.03.
11. The DNR properly determined that CWA had not demonstrated its ability to meet the requirements of Wis. Admin. Code Chapter NR 445 regarding benzene emissions from ethanol tanker truck loading.

12. The DNR properly determined that CWA would cause or exacerbate a violation of ambient air quality standards and ambient air increments, based on dispersion modeling of anticipated plant emissions that predicted violations of the PM_{2.5} standard, the PM₁₀ increment, and the NO_x ambient standard.
13. The DNR did not deny the permit based on water quality issues.
14. The DNR properly determined that the application did not meet the criteria for permit approval, pursuant to Wis. Stat. § 285.63(1), because it did not meet all of the applicable requirements under Wis. Admin. Code Chapters NR 400 to 499.
15. The permit applicant, CWA, failed to meet its burden, by a preponderance of the evidence, of demonstrating that the DNR improperly denied the permit application for 10-DCF-007.

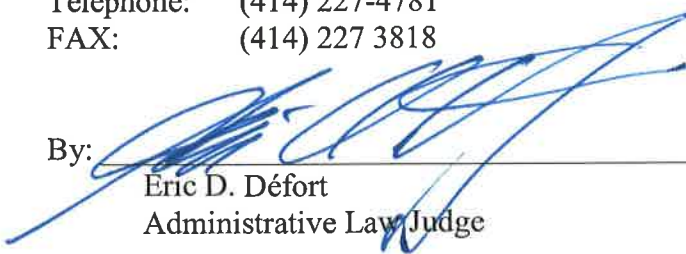
ORDER

WHEREFORE IT IS HEREBY ORDERED, that the decision to deny the permit application for 10-DCF-007 is AFFIRMED.

Dated at Milwaukee, Wisconsin, on May ____, 2016.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
819 N 6th Street, Room 92
Milwaukee, WI 53203-1685
Telephone: (414) 227-4781
FAX: (414) 227 3818

By: _____


Eric D. Défort
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.