

FRANK D. REMINGTON
CIRCUIT COURT, BR. 8

STATE OF WISCONSIN

CIRCUIT COURT
Branch ____

DANE COUNTY

CLEAN WISCONSIN, INC.
634 W. Main Street, Suite 300
Madison, WI 53703

FILED

OCT. 12 2015

DANE COUNTY CIRCUIT COURT

Case No. 15CV2633

Case Code: 30607

Administrative Agency Review

Petitioner,

v.

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES,
101 S. Webster Street
Madison, WI 53707,

Respondent.

PETITION FOR JUDICIAL REVIEW

Clean Wisconsin hereby petitions the Court pursuant to Wis. Stat. §§ 227.52 and 227.53, for judicial review of a decision by the Wisconsin Department of Natural Resources, (“WDNR”), dated September 11, 2015, to issue a final permit to Kinnard Farms (“the Decision”). A copy of the Decision is attached hereto as Exhibit A. Petitioner further shows to the Court as follows:

CHALLENGED DECISION

1. WDNR’s Decision granted a Wisconsin Pollutant Discharge Elimination System (“WPDES”) permit (Permit No. WI-0059536-03-0, hereinafter “the Permit”) to Kinnard Farms, located in Kewaunee County. The permit, issued pursuant to Wis. Stat. §283.31, lacked necessary conditions described in more detail below to ensure compliance with water quality

standards, in violation of WDNR's own regulations and in violation of an order by an Administrative Law Judge.

PARTIES

2. Petitioner Clean Wisconsin, Inc. is an environmental advocacy organization that works to protect and preserve Wisconsin's air and water and to create a cleaner environment by being the leading voice for environmental protection. Clean Wisconsin was founded in 1970 as Wisconsin's Environmental Decade and is an incorporated nonprofit organization under the laws of Wisconsin and section 501(c)(3) of the Internal Revenue Code. Clean Wisconsin's principal place of business is 634 W. Main Street, Suite 300, City of Madison, Dane County, Wisconsin. Clean Wisconsin has over 20,000 members and supporters statewide, including 9 individual members in Kewaunee County, and additional members in Door County. Clean Wisconsin also has members who reside outside of Kewaunee and Door County but travel to that area of the state specifically for the unique recreational opportunities that those counties provide. Clean Wisconsin and its members have a direct interest in the physical environment that is adversely affected by the Decision. As described below, runoff pollution from Kinnard Farms and its associated landspreading of manure in Kewaunee and Door Counties contributes to surface water and groundwater contamination.

3. The Wisconsin Department of Natural Resources is an agency of the State of Wisconsin, as that term is defined by Wis. Stat. § 227.01(1) and as that term is used throughout Wis. Stat. Ch. 227. WDNR's principal office is located at 101 S. Webster Street, Madison, Wisconsin.

4. WDNR is responsible for administering the WPDES permit program pursuant to relevant statutes and regulations found in Wis. Stat. ch. 283 and Wis. Admin. Code ch. NR 243.

JURISDICTION AND VENUE

5. Petitioner Clean Wisconsin's principal place of business is in Dane County and Clean Wisconsin is therefore a "resident" of Dane County. Dane County Circuit Court is therefore the proper venue for this action as specified in Wis. Stat. §227.53(1)(a)3.

6. The Decision is a final agency decision subject to judicial review under Wis. Stat. 227.52 and 227.53.

7. This petition is timely filed.

BACKGROUND

8. Kinnard Farms, Inc. (Kinnard) filed an application for a reissuance of its WPDES permit with the WDNR on March 21, 2012. Findings of Fact, Conclusions of Law and Order, *In the Matter of the Wisconsin Pollutant Discharge Elimination System Permit No. WI-0059536-03-0 (WPDES Permit) Issued to Kinnard Farms, Inc., Town of Lincoln, Kewaunee County*, DHA Case No. IH-12-071, p, 3 (hereinafter "DHA Order"). (Attached as Exhibit B.)

9. As part of the WPDES permit reissuance, Kinnard sought approval of plans and specifications for an expansion of its facility. DHA Order, p. 3.

10. On August 16, 2012, WDNR reissued coverage to Kinnard Farms under the WPDES Permit, and on November 30, 2012 WDNR conditionally approved the plans and specifications for the facility expansion. *Id.*

11. Due to concerns generally about the release of pollutants from the facility, and specifically its potential to impact groundwater quality in Kewaunee County, five petitioners requested, and WDNR granted, a contested case hearing over the reissuance of the Permit. DHA Order, p. 4.

12. A contested case hearing was held, at which all parties presented evidence regarding 6 distinct issues, including:

“Whether Sections 1.1, 1.7, and 1.8 of the WPDES Permit are unreasonable because they do not require that the Department evaluate background groundwater quality, they do not require sampling or monitoring of groundwater, and they do not require that discharges from the production area authorized by the Permit comply with groundwater quality standards.

Whether Sections 1.3.1, 1.3.3, 2, and 3.1.12 of the WPDES Permit are unreasonable because they do not include a limit on the current and proposed number of animal units allowed at the facility.”

DHA Order, p. 2-3.

13. After the hearing, on October 29, 2014, Administrative Law Judge Boldt issued a final order that included the following requirements:

“IT IS FURTHER ORDERED, that Sections 1.3, 1.3.3, 2 and 3.1.12 be modified to reflect a maximum number of animal units at the facility in addition to current storage requirements.

IT IS FURTHER ORDERED, that the Department should review and approve a plan for groundwater monitoring for pollutants of concern at or near the site because it has been demonstrated to be “susceptible to groundwater contamination” within the meaning of Wis. Admin. Code § NR 243.15(3)(2)(a). The plan should be submitted to the Department with 90 days of this Order, and shall include no less than six groundwater monitoring wells, and if practicable, at least two of which monitor groundwater quality impacts from off-site landspreading.”

DHA Order, p. 18. (“the animal unit condition” and the “the off-site groundwater monitoring condition” respectively)

14. On November 18, 2014, Kinnard filed a Petition for Review by the Secretary of the DHA Order under Wis. Admin. Code § NR 2.20, requesting reconsideration of the animal unit condition and the off-site monitoring condition. Decision, p. 2.

15. On November 25, 2014, WDNR Secretary Stepp denied the petition for reconsideration. Id.

16. Kinnard filed review of the DHA Order in Circuit Court, which case was subsequently dismissed. Kinnard has filed an appeal of that decision, which is currently pending in the Wisconsin Court of Appeals (Case No. 2015AP1283). Id.

DECISION

17. On September 11, 2015, WDNR Secretary Stepp issued a “Final Order” on the Kinnard WPDES Permit, issuing a final permit to Kinnard without the animal unit condition or the off-site groundwater monitoring condition. Decision, p. 3.

18. The stated basis for the Decision is that the Secretary received a letter from the Wisconsin Department of Justice, describing its position that the WDNR is without authority to impose the animal unit condition and the off-site groundwater monitoring condition.

INTEREST OF THE PETITIONER

19. Petitioner’s interest is directly injured by the Decision because the animal unit condition and off-site groundwater monitoring condition were properly imposed on Kinnard in order to ensure that the permit contained enforceable conditions to limit runoff pollution from the facility and to ensure that the facility was meeting groundwater quality standards:

“Given the proliferation of contaminated wells in the vicinity of Kinnard Farms, and the likely presence of karst features including fractured bedrock under the standard conservative geological assumptions, the DNR should exercise its clear regulatory authority to require groundwater monitoring near or at the site because it is “susceptible to groundwater contamination” within the meaning of § NR 243.15(3)(2)(a).”

DHA Order, p. 11.

“an enforceable maximum cap on animal units does provide a longer-term management tool for knowing when problems are likely to occur because both generation and the discharge of manure is directly related to the number of animal units on site. (Shaw, Polenske)

DHA Order, p. 12.

20. Thus, the DHA Order imposed reasonable, scientifically based, and appropriate conditions on the WPDES permit, necessary to ensure that the facility is in compliance with the applicable water quality standards and limitations within its permit. Clean Wisconsin and its members rely on reasonable and appropriate, enforceable permit terms to afford adequate environmental and public health protections from facilities that release pollutants into our environment.

21. The Kinnard facility landspreads millions of gallons of manure on fields in Kewaunee and Door Counties each year. Landspread manure, if applied at an improper rate, an improper time, or on an improper location, can contaminate groundwater aquifers and can cause polluted runoff to surface waters. Polluted runoff from landspreading contains phosphorus and nitrogen, which contribute to the proliferation of blue-green algae growth, dead zones, and fish kills. Groundwater contamination from manure spreading includes, among other things, nitrate contamination and bacteria contamination. These pollutants can enter the drinking water supply and contaminate private drinking water wells, causing adverse health impacts including methemoglobinemia (from nitrate pollution) or various gastroenterological diseases (from bacterial contamination).

22. Kewaunee County has documented problems with private well water contamination due to the area's karst geology, which is particularly susceptible to contamination. At hearing, "many public witnesses testified under oath credibly and forcefully about the hardship and financial ruin that this local groundwater contamination crisis has had on their businesses, homes and daily life." DHA Order, p. 13.

23. Clean Wisconsin and its members have a direct interest in the aesthetic and scenic value of Kewaunee County, its water quality and the surrounding environment that will be directly harmed by the Decision of the WDNR Secretary in this case.

24. Clean Wisconsin and its members have a direct interest in protecting groundwater quality from impacts of excessive or improper manure spreading practices.

25. The animal unit condition and the off site groundwater monitoring condition were found to be reasonable and necessary conditions to protect surface and groundwater from contamination from this facility. The Decision to issue the permit without these important conditions was thus arbitrary, capricious, unreasonable and unlawful.

26. Further, Clean Wisconsin has members across the state of Wisconsin who have a substantial interest in the protection of water resources from similar facilities with similar conditions imposed on WPDES permits. Thus, the outcome of this case will affect the substantial interest of our members as it will determine whether WDNR has the authority to exercise its duty to protect surface water and groundwater resources.

27. Similarly, Clean Wisconsin's members statewide have an interest in ensuring that final decisions of the WDNR, including decisions of an administrative law judge that have been adopted by the WDNR, remain final.

GROUND FOR REVERSAL

28. The procedure used by the WDNR Secretary in this proceeding is unlawful because it is not prescribed in statute or administrative code. Further, the Decision itself was arbitrary, capricious, unreasonable, and unlawful as it abrogated a final order of the Administrative Law Judge where the Secretary had no authority to do so and was based on an

erroneous interpretation of the law. The Secretary's order and final decision violated the rule of law and procedural due process and must be overturned.

RELIEF REQUESTED

WHEREFORE, Petitioner Clean Wisconsin requests judgment in its favor as follows:

1. Declaring that WDNR's decision is reversed, set aside, or vacated with regard to the contested conditions and remanded to DNR for further action;
2. Declaring that WDNR has the authority to impose the animal unit condition and the off-site groundwater monitoring condition;
3. Ordering such interlocutory or final relief as is necessary to preserve the interests of Petitioner and other members of the public; and
4. Other relief as the Court may deem just and equitable.

Dated this 12th day of October, 2015.

CLEAN WISCONSIN



Elizabeth A. Wheeler

Senior Staff Attorney

SBN: 1056625

634 W. Main Street, Suite 300
Madison, WI 53703
608-251-7020 x 21
ewheeler@cleanwisconsin.org

Exhibit A

**BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES**

In the Matter of the Wisconsin Pollutant Discharge
Elimination System Permit No. WI-0059536-03-0
(WPDES Permit) Issued To Kinnard Farms, Inc.,
Town of Lincoln, Kewaunee County

DHA Case No. 1H-12-071

FINDINGS OF FACT

1. On August 16, 2012, the Department re-issued the WPDES Permit to Kinnard Farms, Inc. to cover a proposed expansion of the dairy's operation.
2. On October 15, 2012, several individuals filed a petition with the Department for a contest-case hearing under Wis. Stat. § 283.63.
3. The Department granted the petition and referred the case to the Department of Administration, Division of Hearings and Appeals ("DHA"), for hearing as permitted by Wis. Stat. § 227.43(1)(b).
4. During February 11-14, 2014, DHA presided over a hearing in this matter.
5. On October 29, 2014, DHA issued a decision under Wis. Admin. Code § NR 2.155(1). This decision ordered that the Department modify the WPDES Permit as follows:
 - a. Modifying "Sections 1.3, 1.3.3, 2 and 3.1.12 . . . to reflect a maximum number of animal units at the facility in addition to current storage requirements." (For purposes of this order, the "Animal Unit Condition.")
 - b. Modifying the WPDES Permit to require a Department-approved plan for groundwater monitoring, which would include "six groundwater monitoring wells, and if practicable, at least two of which monitor groundwater quality impacts from off-site landspreading. (For purposes of this order, the off-site aspects of this monitoring requirement are referred to as the "Off-Site Monitoring Condition.")
6. The DHA decision also amended the WPDES Permit to include certain undisputed provisions, including Sections 1.1 (relating to compliance with water quality standards) and 2.4 (relating to submission of breach analysis for a waste storage impoundment).

7. On November 18, 2014, Kinnard properly served and timely filed a valid Petition for Review by the Secretary ("the Petition") of the DHA decision as permitted by Wis. Admin. Code § NR 2.20. The Petition alleged that the Animal Unit Condition and the Off-Site Monitoring Condition were both unlawful conditions under Wis. Stat. § 227.10(2m).
8. On November 25, 2014, I denied the Petition because I determined that the issues raised in the Petition would most appropriately be decided by the courts of this state in proceedings for judicial review. I did not determine at that time whether the Animal Unit Condition and the Off-Site Monitoring Condition were unlawful under Wis. Stat. § 227.10(2m).
9. On November 26, 2014, Kinnard filed a petition for judicial review in the Kewaunee Circuit Court (Case No. 14-cv-73).
10. On April 28, 2015, the circuit court dismissed Kinnard's petition and decided that DHA's decision was a non-final agency action and therefore inappropriate for judicial review. The circuit court explained that the Department needed to take further steps before the matter could be reviewed under ch. 227 of the Wisconsin Statutes. According to the court, until the Department decided the issue of the Animal Unit Condition and the Off-Site Monitoring Condition, the rights of the parties would remain undetermined and therefore unripe for judicial review.
11. On June 9, 2015, the circuit court issued its final order dismissing the case. The circuit court has not retained jurisdiction over the matter.
12. Kinnard filed an appeal, which is pending in the Wisconsin Court of Appeals (Case No. 2015AP1283).
13. Following this judicial decision determining that the Department had not yet issued a final agency action with regard to the WPDES Permit, and that more work was required to finalize the Department's decision, I consulted with the Wisconsin Department of Justice ("DOJ") concerning the scope of the Department's authority to implement DHA's October 29, 2014, decision.
14. On August 17, 2015, the Department's Chief Legal Counsel wrote to DOJ seeking answers to specific questions concerning the Department's authority in this matter. (Attachment 1.)
15. On August 18, 2015, the Department received correspondence from DOJ explaining that it was DOJ's position that it would be unlawful for the Department to modify the WPDES to include the Animal Unit Condition and the Off-Site Monitoring Condition. (Attachment 2.)

16. On August 27, 2015, the Department received further correspondence from DOJ outlining the Department's authority and identifying the procedure for the Department to finalize its decision in this case that would ultimately provide a path for judicial review, as I indicated was my desire in my November 25, 2014, order. (Attachment 3.)

CONCLUSIONS OF LAW

1. The Petition was filed within the time required by Wis. Admin. Code § NR 2.20(1) and served upon the Department in compliance with Wis. Admin. Code § NR 2.03.
2. Based on new information, legal analysis, and subsequent court proceedings, I have the authority to re-consider my decision dated November 25, 2014.
3. As permitted by Wis. Stat. § 227.46(3), the Department may determine whether DHA may issue the final agency action in a particular case.
4. The Department may not amend the WPDES Permit to include conditions unless those conditions are explicitly required or explicitly permitted by statute or by rule. Wis. Stat. § 227.10(2m).
5. The Animal Unit Condition is not explicitly required or explicitly permitted by statute or by a rule.
6. The Off-Site Monitoring Condition is not explicitly required or explicitly permitted by statute or by a rule.
7. The Department does not have the authority to impose the Animal Unit Condition or the Off-Site Monitoring Condition upon Kinnard in this Permit.

FINAL ORDER

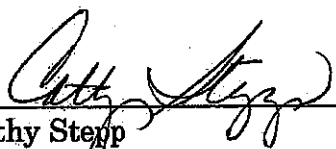
Upon re-consideration of my decision dated November 25, 2014, I am granting the Petition. I have determined that in this particular case DHA will not make the final agency decision, Wis. Stat. § 227.46(3), and that this final order will constitute the final agency action for all purposes under ch. 227 in this case. Wis. Stat. § 227.52. I incorporate by reference the legal reasoning in Attachment 2 and 3.

Neither the Animal Unit Condition nor the Off-Site Monitoring Condition may be imposed upon Kinnard in this case, and therefore, these conditions will not be added to or modified into the WPDES Permit. To the extent the DHA decision is contrary to this order, that decision is reversed. I adopt the non-reversed portions of the DHA decision as the Department's final decision in this matter.

This is the final order and closes the case for all purposes. DHA retains no jurisdiction for any purpose in this case. Because of this decision, the petitioners in this case may not be considered prevailing parties for purposes of Wis. Stat. § 227.485.

By separate letter, I will determine whether to approve the proposed groundwater monitoring plans submitted by Kinnard for the production site pursuant to the October 29, 2014, DHA decision.

In accordance with Wis. Stat. §§ 227.42 and 227.53(1)(c), the parties to this proceeding are certified as provided in my previous order dated November 25, 2014.



Cathy Stepp
Secretary

Dated and mailed: 9-11-15

NOTICE OF APPEAL RIGHTS

This is the final agency action in this matter. If you believe you have a right to challenge this final agency action, then you should know that the Wisconsin Statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

For judicial review of a decision under sections 227.52 and 227.53, you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review shall name the Department of Natural Resources as the respondent.

This notice is provided under Wis. Stat. § 227.48(2).



August 17, 2015

Deputy Attorney General Andrew Cook
Wisconsin Department of Justice
Room 114 East State Capitol
Madison WI 53702

Subject: Authority For Permit Conditions In WPDES Permit For Kinnard Farms

Dear Deputy Attorney General Cook:

The Department of Natural Resources (Department) requests the assistance of the Department of Justice to aid DNR in properly exercising its authority under s. 227.10(2m), Stats., which requires that any requirement in a condition of a license or permit be "explicitly required or explicitly permitted by a statute or by an administrative rule".

A contested case hearing on the Department permit to Kinnard Farms in Keewaunee County, under the Water Pollutant Discharge Elimination System (WPDES) was held February 11 – 14, 2014 in front of Administrative Law Judge (ALJ), Jeffrey D. Boldt. On October 29, 2014, the ALJ issued his decision which upheld the permit and added as conditions of the permit amended language on the production area discharge limitations, a waste storage impoundment breach analysis, and construction of any improvements required by the breach analysis as approved by the Department. In addition, the ALJ ordered that sections 1.3, 1.3.3, and 3.1.12 of the permit be modified to reflect a maximum number of animal units at the facility. The ALJ further ordered that the Department should review and approve a plan for groundwater monitoring for pollutants of concern at or near the site. Additionally, he required that the plan "shall include no less than six groundwater monitoring wells and if practicable, at least two of which monitor groundwater quality impacts from off-site landspreading."

The ALJ's decision requires the Department to adopt permit conditions that were not included in the initial approval by the Department. Further complicating this issue is the overarching legal question: are the permit conditions imposed by ALJ Boldt's decision "explicitly required or explicitly permitted by a statute or by an administrative rule" as is required under s. 227.10(2m), Stats., or is ALJ Boldt requiring the Department of Natural Resources to exceed its authority that is expressly granted by state statute and administrative code?

The Department of Natural Resources requests an interpretation from the Department of Justice on the questions below relating to the authority for the conditions imposed by the ALJ and guidance on proceeding in response to the October 29, 2014 ALJ decision.

1. Does the Department of Natural Resources have explicit authority, as is required under s. 227.10(2m), Stats., to place a limit on the number of animal units in a WPDES permit as ALJ Boldt's decision required?
2. Does the Department of Natural Resources have explicit authority, as is required under s. 227.10(2m), Stats., to require a WPDES permittee to provide a groundwater monitoring plan that includes "if practical, at least two wells that monitor off-site landspreading," as ALJ Boldt's decision required?

Your opinion on these questions and guidance on how to proceed in this situation would be much appreciated.

Sincerely,

A handwritten signature in black ink that reads "Tim Andryk". The signature is written in a cursive style with a large, sweeping initial "T".

Timothy A. Andryk
Chief Legal Counsel
Wisconsin Department of Natural Resources

Attachment 2



STATE OF WISCONSIN DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Andrew C. Cook
Deputy Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Daniel P. Lennington
Assistant Attorney General
lenningtondp@doj.state.wi.us
608/267-8901
FAX 608/267-2223

August 18, 2015

Mr. Timothy A. Andryk
Chief Legal Counsel
Wisconsin Department of
Natural Resources
Post Office Box 7921
Madison, WI 53707-7921

Re: *Authority for Permit Conditions in
WPDES Permit for Kinnard Farms*

Dear Tim:

In your letter dated August 17, 2015, you ask for assistance concerning a permit issued to Kinnard Farms under the Wisconsin Pollutant Discharge Elimination System ("WPDES") program. As you know, the WPDES program grants DNR the authority to permit certain discharges of pollutants into the waters of the state.

In August 2012, DNR permitted Kinnard Farms to discharge pollutants from livestock operations to cropland within the Kewanee River Watershed and to the groundwaters of the state. The permit also includes certain conditions as explicitly permitted by law. Several interested parties opposed the permit and filed a contested case under Wis. Stat. § 283.63.

Following the receipt of a contested-case petition under Wis. Stat. § 283.63, DNR is required to hold a public hearing. DNR declined, and instead referred the matter to the Department of Administration, Division of Hearings and Appeals, as permitted by Wis. Stat. § 227.43(1)(b), for the assignment of an Administrative Law Judge ("ALJ") to preside over the hearing. Final decisions in cases such as this are governed by Wis. Stat. § 227.46(3), which DNR has implemented by rule under Wis. Admin. Code ch. NR 2.

Mr. Timothy A. Andryk
August 18, 2015
Page 2

Following the contested-case hearing, ALJ Jeff Boldt issued a decision which, among other things, purportedly requires DNR to impose the following additional conditions upon Kinnard's permit: (1) a limitation of the number of animal units in the WPDES permit, and (2) a requirement for at least two wells to monitor the off-site land application of animal waste.

You request assistance concerning these two additional conditions ordered by ALJ Boldt; specifically, you ask whether these additional conditions are lawful in light of 2011 Wisconsin Act 21 ("Act 21"). Among other things, Act 21 imposes the following requirements on agencies, including DNR:

No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter The governor, by executive order, may prescribe guidelines to ensure that rules are promulgated in compliance with this subchapter.

Wis. Stat. § 227.10(2m).

Act 21 implicates the two additional conditions ordered by ALJ Boldt because they each constitute a "condition of any license issued by the agency." *Id.* Clearly, a WPDES permit is a license. *See* Wis. Stat. § 227.01(5) (defining "license" to include "all or any part of an agency permit").

Because Act 21 is implicated, the question is whether these two conditions are "explicitly required or explicitly permitted by statute or by a rule." Wis. Stat. § 227.10(2m). I conclude they are not.

In reaching this conclusion, I have reviewed Wis. Stat. ch. 283, which establishes the WPDES program, and specifically Subchapter IV, which governs permits issued under the program. Furthermore, I have reviewed Wis. Admin. Code ch. NR 243, which governs animal feeding operations, and specifically Subchapter II, which imposes requirements on large concentrated animal feeding operations ("CAFOs"), like Kinnard Farms. Nowhere in any of these statutes or rules is DNR explicitly permitted to impose animal-unit maximums or off-site groundwater monitoring wells as a condition of Kinnard's permit.

Mr. Timothy A. Andryk
August 18, 2015
Page 3

In Wis. Stat. § 283.31(3) and (4), DNR is authorized to issue permits with conditions, but none of the authorized conditions explicitly allow DNR to impose animal-unit maximums or off-site groundwater monitoring wells. Furthermore, Wis. Admin. Code §§ NR 243.13, 243.14, and 243.15 impose certain permit requirements and related requirements for nutrient management plans and CAFO facilities, yet these rules do not explicitly permit DNR to impose animal-unit maximums or off-site groundwater monitoring wells. Wisconsin Stat. § 283.31 and Wis. Admin. Code ch. NR 243 must be read consistent with Act 21 to mean that only permit conditions otherwise explicitly permitted or required by statute or by rule are authorized by law. To read these statutes more broadly, and to impose conditions that are not explicitly authorized by statute, would in fact be an improper attempt at promulgating a rule outside of the rulemaking process under Wis. Stat. ch. 227.

Therefore, it is my conclusion that it would be unlawful for DNR to impose the two additional permit conditions discussed above, notwithstanding ALJ Boldt's decision.

Sincerely,

A handwritten signature in black ink, appearing to read 'D.P. Lennington', written in a cursive style.

Daniel P. Lennington
Assistant Attorney General

DPL:ajw

Attachment 3



STATE OF WISCONSIN DEPARTMENT OF JUSTICE

BRAD D. SCHIMEL
ATTORNEY GENERAL

Andrew C. Cook
Deputy Attorney General

17 W. Main Street
P.O. Box 7857
Madison, WI 53707-7857
www.doj.state.wi.us

Daniel P. Lenington
Assistant Attorney General
leningtondp@doj.state.wi.us
608/267-8901
FAX 608/267-2223

August 27, 2015

Mr. Timothy A. Andryk
Chief Legal Counsel
Wisconsin Department of
Natural Resources
Post Office Box 7921
Madison, WI 53707-7921

Re: Options for Kinnard Farms Pending Contested Case

Dear Tim:

On August 18, 2015, I wrote you a letter explaining that it would be unlawful for DNR to impose certain conditions upon a Wisconsin Pollution Discharge Elimination System permit issued to Kinnard Farms (the "Permit," for purposes of this letter). Subsequent to that letter, you asked for my recommendation concerning the procedural disposition of the pending contested case; specifically, you asked how DNR could proceed towards a lawful disposition of the Permit, the pending contested case, and the pending appeal.

Below is my recommendation.

I. *Factual and Legal Background.*

Since 1948, Kinnard has operated a family-owned dairy and crop farm in north central Kewaunee County. In March 2012, Kinnard sought permission to expand its dairy operations by asking DNR to re-issue the Permit to cover a proposed expansion.

On August 16, 2012, DNR agreed with Kinnard's request and re-issued the Permit to cover the dairy's proposed expansion. In response to this decision, on October 15, 2012, several individuals filed a petition with DNR for a contested-case hearing of the Permit under Wis. Stat. § 283.63.

Mr. Timothy A. Andryk
August 27, 2015
Page 2

DNR granted the petition for a contested case on December 14, 2012. This decision triggered the procedural requirements in Wis. Stat. § 283.63, which provide as follows:

(b) The department shall hold a public hearing at the time and place designated in the notice of hearing. At the beginning of each such hearing the petitioner shall present evidence to the department which is in support of the allegation made in the petition. All interested persons or their representative shall be afforded an opportunity to present facts, views or arguments relevant to the issues raised by the petitioners, and cross-examination shall be allowed. The department shall consider anew all matters concerning the permit denial, modification, termination, or revocation and reissuance. No person may be required to appear by attorney at any hearing under this section.

(c) Any duly authorized representative of the department may administer oaths or affirmations, compel the attendance of witnesses and the production of information by subpoena and continue or postpone the hearing to such time and place as the department determines.

(d) The department shall issue its decision on the issues raised by the petitioner within 90 days after the close of the hearing.

Wis. Stat. § 283.63(1)(b)-(d).

Instead of conducting the hearing as contemplated in Wis. Stat. § 283.63, however, DNR referred the contested case to the Department of Administration, Division of Hearings and Appeals ("DHA"). This procedure is contemplated by Wis. Stat. § 227.43(1)(b), which provides that a DHA hearing examiner may "preside over any hearing of a contested case which is required to be conducted by the department of natural resources and which is not conducted by the secretary of natural resources." This provision, however, only provides for the hearing examiner to "preside," and vests no authority in this hearing examiner to render a final decision.

Mr. Timothy A. Andryk
August 27, 2015
Page 3

The hearing examiner, Administrative Law Judge Jeff Boldt ("ALJ Boldt"), presided over an evidentiary hearing in Green Bay, Wisconsin on February 11-14, 2014. A portion of the hearing was designated as a public hearing for any person to testify or share opinions about the proposed Kinnard expansion. The parties submitted post-hearing briefs on the issues, together with proposed findings of fact and conclusions of law.

In a case such as this, which is referred to DHA for a hearing, the Wisconsin Statutes also provide for a method of reaching a final decision. While the ultimate final decision rests with DNR in a contest-case hearing, Wis. Stat. § 227.46(3) explains that "by rule or in a particular case," DNR has the discretion to allow DHA to render the final decision of DNR.

DNR has exercised this discretion by rule through the promulgation of Wis. Admin. Code ch. NR 2. The rules in ch. NR 2 provide, among other things, that DHA may prepare the decision in a contested case. Wis. Admin. Code § 2.155. DHA's decision is final, subject to a few important exceptions. For example, § NR 2.20 provides that the Secretary may review decisions of DHA in contested cases and make the final agency decision.

According to Wis. Admin. Code § NR 2.155(1), ALJ Boldt issued his decision on October 29, 2014. In the decision, ALJ Boldt ordered that the Permit be modified as follows:

1. Modifying "Sections 1.3, 1.3.3, 2 and 3.1.12 . . . to reflect a maximum number of animal units at the facility in addition to current storage requirements."
2. Modifying the Permit to require a DNR-approved plan for groundwater monitoring, which would include "six groundwater monitoring wells, and if practicable, at least two of which monitor groundwater quality impacts from off-site landspreading."¹

¹ALJ Boldt also ordered DNR to amend Sections 1.1 (relating to compliance with water quality standards) and 2.4 (relating to submission of breach analysis for a waste storage impoundment), but these modifications were not disputed by any party in the contested-case hearing.

Mr. Timothy A. Andryk
August 27, 2015
Page 4

On November 18, 2014, Kinnard petitioned the Secretary for review under Wis. Admin. Code § NR 2.20. Kinnard sought reversal of the animal-unit limit and the off-site groundwater monitoring on the grounds that the imposition of those requirements violated Wis. Stat. § 227.10(2m). On November 25, 2014, the Secretary denied Kinnard's petition, indicating that "that the issues raised in the [Kinnard] petition would most appropriately [be] decided by the courts of this state in proceedings for judicial review." The Secretary's decision did not reference Wis. Stat. § 227.10(2m) and did not reach the merits of Kinnard's claims.

On November 26, 2014, Kinnard filed a petition for judicial review in the Circuit Court for Kewaunee County (Case No. 14-CV-73) in which Kinnard again challenged the animal-unit limit and the off-site groundwater monitoring as unlawful conditions under Wis. Stat. § 227.10(2m). The court dismissed Kinnard's petition as a non-final order and therefore not subject to judicial review. The court decided that ALJ Boldt's decision was not final because DNR had yet to take the additional steps required by that order, including modification of the Permit. Until DNR takes final action in response to ALJ Boldt's order, the decision is not final.

Kinnard filed an appeal in the Wisconsin Court of Appeals (Appeal No. 2015AP1283) and seeks reversal of the circuit court's decision that ALJ Boldt's decision is non-final. This appeals case is still pending.

In August 2015, Kinnard completed construction of its proposed expansion and is operating under the Permit, which has not been stayed.

II. Options and Recommendation.

As explained in my letter of August 18, 2015, it is DOJ's position that it would be unlawful for DNR to amend or modify the Permit as ordered by ALJ Boldt. The pending procedural question is, therefore, how to finalize DNR's agency action in this case in a lawful way. There are a few options at this point, but only one option would lead to an efficient, reasonable, and lawful outcome.

First, DNR could file a motion for reconsideration with ALJ Boldt explaining that the two conditions are unlawful, as outlined in my letter of August 18, 2015. The motion could request that ALJ Boldt amend his decision and re-issue a final decision.

Mr. Timothy A. Andryk
August 27, 2015
Page 5

This is unlikely to succeed, however, given the injudicious tone of ALJ Boldt's decision and his failure to respect (or even to define) his limited authority in this matter. Seeking relief from ALJ Boldt would only serve to make matters worse, confuse the procedural posture of this case, and frustrate DNR's objectives of a lawful and timely resolution of the Permit.

Furthermore, seeking reconsideration from ALJ Boldt, along with a subsequent denial from ALJ Boldt, would not allow DNR to appeal that decision to circuit court. In his April 28, 2015, decision, Circuit Court Judge Ehlers explained that ALJ Boldt's decision was not final because DNR still had to prepare a groundwater monitoring plan, calculate and determine the maximum animal-unit cap, and amend the Permit to include those conditions. According to Judge Ehlers, there is no final agency action until these actions are completed. If there is no final agency action, then there can be no petition for review under Wis. Stat. ch. 227. ALJ Boldt's denial of a future DNR motion for reconsideration would do nothing to "finalize" the agency action, and so appealing a denial of a reconsideration motion would reach the same result and put DNR in the same position that it is in now.

It is DOJ's position, therefore, that the first option is unlikely to succeed. Additionally, because it would be unlawful for DNR to amend the Permit as required by ALJ Boldt, the first option will do nothing to get DNR relief in the circuit court.

Second, Kinnard could withdraw its application and re-apply for coverage under the Permit. This option would effectively re-start the clock and allow DNR to make a decision without participation of ALJ Boldt (or DHA more generally), as permitted by Wis. Stat. § 227.46(3) and Wis. Admin. Code § NR 2.155(2).

This second option would result in significant delays, however. Re-issuance of the Permit would trigger a new public hearing, additional EPA review, and a new contested case. Significant delays would frustrate DNR's desire to resolve this pending matter in a reasonably expeditious manner. Furthermore, applicants for permits to DNR, as customers and taxpayers, at the very least deserve timely *and* final decisions from the agency.

The third option, and by far the most reasonable option, is for the Secretary to re-consider her decision of November 25, 2014, denying Kinnard's petition under Wis. Admin. Code § NR 2.20. Since the Secretary is now in possession of new information and knowledge of a manifest legal error in ALJ Boldt's decision, as

Mr. Timothy A. Andryk

August 27, 2015

Page 6

indicated by my letter dated August 18, 2015. Therefore, the Secretary has good cause to re-consider her earlier decision. The Secretary did not have the benefit of DOJ's legal analysis on November 25, 2014.

In courts of law, motions for reconsideration are granted when there has been newly discovered evidence or a manifest error of law or fact. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶ 44, 275 Wis. 2d 397, 685 N.W.2d 853. As an analogy to the pending contested case, this standard has been met. Furthermore, and perhaps more importantly, no rule or law prohibits the Secretary from reconsidering her order of November 25, 2014.

Despite the earlier procedures in this case, DNR still maintains the authority to make the final decision in this case. In addition to reconsidering her decision as provided by Wis. Admin. Code § NR 2.20, DNR retains the authority to designate the final decisionmaker "in a particular case." Wis. Stat. § 227.46(3). Using DHA for the purpose of presiding over a particular case is simply an option and a particular method for DNR to arrive at a final decision. See Wis. Stat. § 227.43(1)(b). DHA is not a mandated final decisionmaker in this case, or in more general terms, in all cases under Wis. Stat. § 283.63. If the Legislature wanted DHA to be the final decisionmaker in all cases under Wis. Stat. § 283.63, then the Legislature would have said so. The Legislature did not, however. In fact, the Legislature expressly stated its preference that DNR, not DHA, make the final decision in cases brought under Wis. Stat. § 283.63(1)(d) ("The department shall issue its decision on the issues raised by the petitioner . . ."). Therefore, under Wis. Stat. § 227.46(3), it is my opinion that DNR has authority to exercise its option to be the final decisionmaker "in a particular case," which in this case may be Kinnard's pending contested case.

It is not logical to argue that DNR does not have the ability to make a final decision in this case for the following reason: if DNR acquiesces in ALJ Bodlt's decision by modifying the Permit has he ordered, then DNR is, in fact, making the final decision. So either way—going along with ALJ Boldt or exercising her authority under Wis. Admin. Code § NR 2.20—the Secretary *will* be making the final decision in this case.

Yet one of these options is foreclosed: as the head of DNR, the Secretary is obligated to faithfully discharge the duties of her office, including a duty to faithfully enforce to the rule of law. See Wis. Const. art. IV, § 28; Wis. Stat. §§ 15.04 and 15.05. She therefore cannot acquiesce to such an unlawful action as decided by ALJ Boldt, or allow her staff to take such an unlawful action. Doing what ALJ Bodlt

Mr. Timothy A. Andryk
August 27, 2015
Page 7

decided—modifying the Permit to include unlawful conditions—would be an unlawful act by DNR, its employees, and management.

The only option, therefore, is to re-consider the November 25, 2014, decision denying the Wis. Admin. Code § NR 2.20 petition and to grant the relief requested by Kinnard. This would result in a final agency action subject to judicial review, which would be defended by DOJ in court.

I am happy to discuss these options with you in more detail or to help you craft the final agency action. I would note, however, that this decision should be made by Friday, September 4, 2015. The court of appeals has entered a scheduling order and briefing is set to begin at the end of September. I will need to take a number of actions after your final decision in order to insure that the court of appeals case is properly dismissed before briefing starts.

III. *Final Matters.*

Finally, you have asked about the status of attorney fees. There is a fee petition pending in front of ALJ Boldt. He has indicated that he does not intend to act upon the petition until DNR takes final action. If DNR pursues the third option described above, however, ALJ Boldt would have no basis to award attorney fees because the petitioners would no longer be the prevailing party. *See* Wis. Stat. § 227.485. Attorney fees are only possible if DNR acquiesces in ALJ Boldt's decision and decides to impose unlawful conditions—only then could ALJ Boldt determine that the petitioners prevailed and were entitled to attorney fees.

In conclusion, although I have laid out options as you have requested, I want to be perfectly clear as to DOJ's position in this matter: the third option is the only lawful option in this case. DNR must not impose the conditions required by ALJ Boldt and doing so would violate Wisconsin law and the Secretary's duty to faithfully execute the laws. If DNR fails to follow this advice and ratifies ALJ Boldt's decision through the imposition of illegal conditions, DOJ would not defend DNR, its Secretary, management, or employees in any future lawsuit arising from

Mr. Timothy A. Andryk
August 27, 2015
Page 8

such an unlawful action. The Legislature passed and the Governor signed 2011 Wisconsin Act 21 and DNR and its employees must abide by its provisions.

Sincerely,

A handwritten signature in black ink, appearing to read "D.P. Lenington". The signature is stylized and cursive.

Daniel P. Lenington
Assistant Attorney General

DPL:ajw



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Wisconsin Pollutant Discharge
Elimination System Permit No. WI-0059536-03-0
(WPDES Permit) Issued to Kinnard Farms, Inc.,
Town of Lincoln, Kewaunee County

Case No.: IH-12-071

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Green Bay, Wisconsin on February 11-14, 2014, Jeffrey D. Boldt, Administrative Law Judge (ALJ) presiding. The parties requested an opportunity to submit written closing arguments, and the last was received on June 27, 2014. On September 24, 2014, the ALJ advised the parties that the decision would be issued prior to October 29, 2014.

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

Kinnard Farms, Inc., by

Attorney Jordan J. Hemaïdan
Attorney Michael P. Screnock
Michael, Best & Friedrich, LLP
P. O. Box 1806
Madison, WI 53701-1806

Petitioners:

1. Lynda Cochart
2. Amy Cochart
3. Roger D. DeJardin
4. Sandra Winnemuller
5. Chad Cochart, by

Attorney Sarah Williams
Midwest Environmental Advocates
612 West Main Street, Suite 302
Madison, WI 53703

Wisconsin Department of Natural Resources (Department or DNR), by

Attorney Jane R. Landretti
Department of Natural Resources
P. O. Box 7921
Madison, WI 53707-7921

ISSUES FOR HEARING AND SUMMARY OF RULING

Prior to the hearing, the parties agreed to a slight modification of the issues and agreed that the issues for hearing are as follows:

1. Whether Sections 1.1, 1.7, and 1.8 of the WPDES Permit are unreasonable because the Permit was issued before the Department receipt and approval of plans and specifications for the facility.

Holding: No statute or code requires the procedure preferred by the petitioners. The Petitioners have not demonstrated that this procedural approach has specifically led to the need for any substantive changes in either the NMP or the Permit.

2. Whether Section 1.1 of the WPDES Permit is unreasonable because it fails to ensure that all discharges authorized by the Permit comply with surface water quality standards.

Holding: This issue included several sub-parts. First, the petitioners did not establish that discharges from the VTA into the culvert were a discreet conveyance subject to discharge monitoring under the WPDES program. Second, at or after the hearing, both the DNR and the dairy agreed to some changes in the permit language relating to surface water discharges suggested by the petitioners. The permit has been modified to include the following provision relating to Outstanding and Exceptional Resource Waters: "For all new or increased discharges to an ORW or ERW, any pollutant discharged shall not exceed existing levels of the pollutants immediately up stream of the discharge site." The permit has been further modified as follows: "Production area discharges to waters of the state authorized under this permit shall comply with water quality standards, groundwater standards and may not impair wetland functional values."

3. Whether Sections 1.1, 1.7, and 1.8 of the WPDES Permit are unreasonable because they do not require that the Department evaluate background groundwater quality, they do not require sampling or monitoring of groundwater, and they do not require that discharges from the production area authorized by the Permit comply with groundwater quality standards.

Holding: The petitioners and members of the public have carried their burden of proof in establishing that groundwater monitoring is feasible and appropriate because the "facilities are located on or near areas that are susceptible to groundwater contamination such as direct conduits to groundwater, sandy soils, and sites with minimal separations between bedrock and high water tables". (§ NR 243.15(3)(2)(a))

The Permit should be modified by the Department to establish a plan acceptable to the Department for groundwater monitoring "at or near" Site 2.

4. Whether Sections 1.3.1, 1.3.3, 2 and 3.1.12 of the WPDES Permit are unreasonable because they do not include a limit on the current and proposed number of animal units allowed at the facility.

Holding: The Permit should be modified by the Department to include a limit on the number of animal units to better provide for long term operational planning and to avoid prior problems with manure storage limits. Existing storage requirements should also be maintained.

5. Whether Sections 1.6 and 2 of the WPDES Permit are unreasonable because they do not require that Kinnard Farms maintain adequate manure storage.

Holding: The Petitioners have not carried their burden of proof on this issue, other than the overlap with issue four above.

6. Whether Section 1.6 of the WPDES Permit and the Nutrient Management Plan are unreasonable because they include unattainable yield goals.

Holding: The Petitioners have not carried their burden of proof on this issue.

FINDINGS OF FACT

1. Kinnard Farms, Inc. (Kinnard Farms) has proposed to construct a concentrated animal feeding operation (CAFO) production area (Site 2) north of County Road S and in between Spruce Road and Tamarack Drive in the Town of Lincoln in Kewaunee County.

2. Kinnard Farms filed an application for reissuance of a Water Pollutant Discharge Elimination System (WPDES) permit with the Wisconsin Department of Natural Resources (DNR) on March 21, 2012.

3. As part of the WPDES permit reissuance application process, Kinnard Farms submitted a request for approval of the plans and specifications for its facility to the DNR on March 19, 2012. DNR issued a conditional approval of plans and specifications for the waste storage facility on November 30, 2012. (Ex. 9) DNR issued a conditional approval of plans and specifications for the feed storage pad and runoff control system on August 20, 2012. (Ex. 7)

4. As part of the WPDES permit reissuance application process, Kinnard Farms submitted a nutrient management plan (NMP) on March 21, 2012. The NMP was preliminarily approved on April 18, 2012.

5. On August 16, 2012, the DNR reissued coverage to Kinnard Farms under WPDES Permit No. WI-0059536-03-0. (Ex. 301)

6. On November 30, 2012, the DNR issued its conditional approval of the plans and specifications for Site 2. (Ex. 9)

7. On October 15, 2012, the DNR received a petition for a contested case hearing on behalf of petitioners (Petitioners) from Midwest Environmental Advocates. The DNR (by letter from Matt Moroney to Sarah Williams) granted a contested case hearing on seven issues. The parties later agreed on a new statement of issues for hearing submitted by Petitioners, intentionally omitted Issue Seven on which a hearing had been granted. Specifically, that issue challenged whether Section 1.6 of the Permit and the NMP are unreasonable because they do not require identification of drain tile lines to the maximum extent practicable.

8. The contested case hearing on the remaining six issues was held February 11-14, 2014.

9. A CAFO WPDES permit prohibits discharges of manure and process wastewater from the production area to navigable waters, except under certain circumstances, including for dairies that a 25-year, 24-hour storm event must have occurred. (Wis. Admin. Code § NR 243.13(2)) This basic framework is called the "no discharge" effluent limitation. (Bauman Pre-filed, p. 7, lines 146-147)

10. There are some practical limitations to using Water Quality Based Effluent Limits at CAFOs, including identifying a proper flow and discharge location for diffuse discharges and applying QBELs to very intermittent discharges that may occur as a result of a 25-year, 24-hour storm event. (Bauman Pre-filed, p. 15, lines 327-330) In the absence of a defined pipe with exclusive discharges, the DNR conducts engineering review of plans for the production area, narrative water quality based restrictions (or TBELs) and identifies best management practices that a CAFO must implement. (Bauman Pre-filed, p. 19, lines 421-424) The parties disagree about whether there is a discreet conveyance in the proposed project. The dairy and the DNR note that water entering Culvert 9 will also include off-site stormwater. (Id) The Petitioners argue that drainage ditches four and five and stormwater ditches eight and five will discreetly discharge stormwater from Site 2 into Culvert 9. (Martin Pre-filed, p. 26)

11. The DNR has authority to review and approve design plans for manure and process wastewater handling and storage systems at CAFOs under Wis. Stat. § 281.41. Plan reviews conducted under s. 281.41, Wis. Stats., help to ensure that structures are designed in a manner that complies with applicable technical standards and permit requirements. Wisconsin Stat. § 281.41 requires that the DNR must approve or reject the plan within 90 days once they are complete. (Wheat Pre-filed, p. 10, 194-204)

12. DNR witness testified that a plans and specifications review provides one level of review and that WPDES permits issued under Wis. Stat. ch. 283 establish operational requirements and practices a CAFO must follow in order to protect water quality. (Bauman Pre-filed, p. 5, lines 102-110)

13. The permittee may not commence construction until the DNR approves its plans and specifications. (Wheat Pre-filed, p. 11, lines 209-210)

14. Ms. Wheat testified that from a technical perspective, she does not believe the chronological order of the plan approval and permit issuance to be important. (Wheat Pre-filed, p. 11, lines 207-209) The WPDES permit may be modified at any time to reflect changes in the plans and specifications. (Wheat Pre-filed, p. 11, lines 215-223)

15. Even after permit is issued, NR 243.15(1)(a) precludes the permittee from commencing construction until the DNR approves its plans and specifications. Even after the plan approval is issued, §§ NR 243.11(3) and 243.12(1) precludes the permittee from bringing animals onto the site. (Wheat Pre-filed, p. 11, lines 209-212)

16. Petitioners requested no remedy pursuant to their challenge of the chronological order of the plans and specifications, and the Petitioners have not demonstrated that this procedural approach has specifically led to the need for any substantive changes in either the NMP or the Permit.

17. The Waste Storage Facility design proposes a composite and water-tight concrete liner combination. (Wheat Pre-filed, p. 28, lines 541-542; Ex. 102)

18. Kinnard Farms' WPDES Permit implements DNR's "no discharge" requirement for the production area. (Bauman Pre-filed, pp. 6-7; TR Vol. 4, pp. 990-92, 1013 (Bauman))

19. Section 1.1 of the Kinnard Farms WPDES Permit provides that Kinnard Farms "may not discharge manure or process wastewater pollutants to navigable waters from the production area ...unless all of the following apply:

- Precipitation causes an overflow of manure or process wastewater from a containment or storage structure.
- The containment or storage structure is properly designed, constructed and maintained to contain all manure and process wastewater from the operation, including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event for this location (Kewaunee County — 4.2 inches).
- The production area is operated in accordance with the inspection, maintenance and record keeping requirements in s. NR 243.19.
- The discharge complies with groundwater and surface water quality standards."

(Ex. 301, p. 1)

20. All manure generated at the Kinnard Farms Site 2 production area will be collected and transported to the manure storage facility and eventually land-applied in accordance with the Kinnard Farms NMP. (Williams Pre-filed, pp. 12, 14)

21. With one exception, all process wastewater from the Site 2 production area is transported to the manure storage facility and eventually land-applied in accordance with the NMP. The exception is that highly diluted runoff from the feed storage area generated after the runoff from the first 1/4 inch of precipitation from every rain event is collected and transported to the vegetated treatment area (VTA). (Williams Pre-filed, pp. 12, 26) Expert witnesses for both DNR and Kinnard Farms provided substantial testimony demonstrating the effectiveness of the design of the feed storage pad, leachate collection system and VTA.

22. The feed storage pad consists of a four-inch thick asphalt surface. Below the asphalt surface is a drainage layer of stone, which is lined with a geo-membrane lining. Any seepage collected by a four-inch drain within the drainage layer will be conveyed to the leachate lift station and then to the manure storage facility. The asphalt surface of the feed storage pad slopes from west to east to direct any stormwater and silage leachate towards a reinforced concrete collection channel, which diverts the runoff to a lift station. (Williams Pre-filed, p. 28) Kinnard Farms designed the concrete collection channel adjacent to the feed storage pad to handle precipitation from a 100-year, 24-hour storm. This exceeds the applicable regulatory standard, which requires the design to accommodate a 25-year, 24-hour storm, and it minimizes the potential for overtopping of the collection channel directly onto the VTA. (Wheat Pre-filed, p, 24)

23. The feed storage pad leachate runoff that is directed to the lift station is pumped to the manure storage facility. The lift station is designed to pump the initial 1/4 inch of every rainfall event during each 24-hour period. Once the design volume has been pumped to storage, the pumps will shut off and the remaining runoff is directed to the VTA. (Williams Pre-filed, p. 28) This design of collecting the initial runoff from each precipitation event is called the "first flush" collection.

24. The collection channel beyond the lift station has 25 slot weirs, which meter and spread the flow of the feed pad runoff water onto the VTA. The VTA is a designed and constructed earthen area 300 feet (100 yards) wide and 1200 feet (400 yards) long with grassy vegetation. The top 24 inches of the VTA soil profile is constructed with topsoil from the site, and the VTA is graded with a 0.5 percent downward slope to the north, in the direction of Culvert 9. The VTA has gravel spreader pads that run the entire width of the VTA located every 200 feet. The gravel spreader pads redistribute any channelized flow so that the flow down the VTA continues as sheet flow. The VTA is designed to infiltrate stormwater from rainfall events greater than 1/4 inch that originates from the feed storage area, and only after the first 1/4 inch of runoff have been collected and disposed of via the feed pad leachate collection system. (Williams Pre-filed, pp. 28-29; Ex. 102, Sheet Nos. C109, C116)

25. At the base of the VTA is a 35-foot grassed filter strip onto which any water that exits the VTA will flow. (Williams Pre-filed, p. 30) This filter strip or vegetated buffer is an additional safeguard not required by any regulation. (Wheat Pre-filed, p. 17; TR Vol. 4, p. 1156 (Wheat)) During normal conditions, there will be very little, if any, flow from the VTA onto the filter strip. (Williams Pre-filed, p. 41) Beyond the filter strip is the convergence of the two storm water diversion ditches, Ditch 5 and Ditch 8, in the vicinity of Culvert 9. (TR Vol. 2, p. 366 (Williams); TR Vol. 4, p. 1130-31 (Wheat); Ex. 102, Sheet Nos. C109, C116)

26. DNR concluded it would be difficult to establish a reliable discharge monitoring system at the base of the VTA. It based this conclusion on the intermittent nature of any flow off the VTA, the diffuse nature of any such flow, which would be spread out along the 300 feet width of the VTA, and the potential for other environmental contaminant sources unrelated to the Kinnard Farms production area that could influence the monitoring data. (Bauman Pre-filed, p. 13; TR Vol. 2, pp. 387-92 (Williams); TR Vol. 4, pp. 994-95, 1039-40 (Bauman); TR Vol. 4; p. 1166 (Wheat))

27. DNR considered each of the design features of the VTA in concluding that no additional WPDES permit conditions were necessary to address potential pollutant discharges to surface waters from the feed storage area. (TR Vol. 4, pp. 1102-OS (Wheat))

28. The size of the first flush that Kinnard Farms will collect and transport to the manure storage facility directly reduces impacts from the concentration of nutrients that will be directed to the VTA for treatment. By collecting the first ¼ quarter inch of every rain event, Kinnard Farms will be collecting the largest amount of first flush of any VTA approved in Wisconsin. (TR Vol. 1, p. 261 (Shaw); TR Vol. 4, p. 1101 (Wheat))

29. Recent research at three VTA sites at Discovery Farms indicates that during rain events, at least 75 percent of all pollutants are being captured by systems that collect far less than the first 1/4 inch of rain. (TR Vol. 4, p. 1134 (Wheat))

30. The current NRCS standard is based on research that shows collection of 0.05 (1/20) inch of the first flush collects the vast majority of nutrients from a feed storage pad. That research also demonstrated that collection of the first 1/4 inch is the highest amount of first flush to be collected, because there is no demonstrable increase of nutrients that will be collected by a first flush collection that exceeds 1/4 inch. (TR Vol. 2, pp. 309-11 (Williams))

31. Kinnard Farms' VTA was designed to provide the highest possible infiltration rate and to minimize discharges at the base of the VTA. To accomplish this, the VTA was designed with the maximum length to width ratio (4:1), which provides for the longest possible flow length for the size of the VTA. It also was designed with the flattest slope allowed by DNR's guidance. The result is that the highly diluted runoff directed to the VTA will have the slowest flow velocity and longest residence time possible. (Williams Pre-filed, p. 32)

32. DNR and Kinnard Farms specifically addressed the proximity of the VTA to the wetland beyond Culvert 9 by establishing a very high first flush collection and by designing and approving a VTA that was quite large compared to criteria in the NRCS Standard that was in effect at the time. (Wheat Pre-filed, p. 17)

33. The draft DNR guidance in place at the time Kinnard Farms designed the VTA was more restrictive than the then-current NRCS standard. (Pofahl Pre-filed, p. 11; TR Vol. 4, pp. 1102-04 (Wheat)) The design of Kinnard Farms' feed storage pad, leachate collection system and VTA exceeded the requirements of the applicable NRCS standard and DNR's draft guidance. (TR Vol. 4, pp. 1110-11 (Wheat))

34. Subsequent to DNR's approval of Kinnard Farms' feed storage pad and VTA, the applicable NRCS standard (NRCS Standard 635 (Sept. 2012)) was updated and DNR anticipates its draft guidance will no longer be necessary. (TR Vol. 4, pp. 1137-38 (Wheat))

35. The dimensions of the Kinnard Farms VTA exceed by nearly a factor of two the dimensions that are required by the latest NRCS standard. (TR Vol. 2, pp. 396-400 (Pofahl); TR Vol. 4, pp. 1138-39 (Wheat); Ex. 14, Table 2 & § V.D.I.)

36. The efficacy of VTAs has been established by ongoing scientific research and they have been demonstrated to work well at attenuating any concentrations of pollutants which

may remain in the stormwater that is sent to the VTA. (Wheat Pre-filed, p. 21; TR Vol. 2, p. 341 (Williams); TR Vol. 4, pp. 1157-58 (Wheat))

37. Under normal conditions, the concentration of pollutants entering the VTA will be negligible owing to the first flush design of the leachate collection system. (Williams Pre-filed, p. 26; Wheat Pre-filed, p. 17; TR Vol. 4, pp. 1133-35 (Wheat)) DNR concluded that the design of the VTA is more than adequate to attenuate the minute concentrations that remain. (Wheat Pre-filed, p. 21; TR Vol. 4, pp. 1134-35 (Wheat))

38. Based on the design features of the VTA, DNR was not unreasonable when it declined to require Kinnard Farms to monitor the surface water flow at the base of the VTA. Outflow for the VTA is not a discreet conveyance within the meaning of the WPDES program. The size of the vegetated treatment area (VTA) complied with NRCS Standard 635 that applied at the time of approval, and considering the (minimal) slope and distances to saturation and bedrock, Ms. Wheat testified that it substantively meets the current NRCS Standard 635. (Wheat Pre-filed, pp. 22-23, lines 422-441)

39. The feed storage design provides for a high first flush collection of rain (0.25 inch) to be collected. (Wheat Pre-filed, p. 17, lines 322-329) Ms. Wheat expects very low concentrations of pollutants in the remaining rainfall that is routed to the VTA. (Wheat Pre-filed, p. 17, lines 322-329)

40. DNR and Chapter NR 243 contemplate a technology-based approach to CAFO effluent limits. Due to the lack of discrete conveyances at CAFOs, the monitoring of which would have regulatory value, most CAFO effluent limitations are technology based. (Bauman Pre-filed, pp.6-7, 120-148) The TBEL approach replaces the water-quality based effluent limit applicable to most other point sources regulated under the WPDES program. In lieu of chemical specific monitoring, the WPDES permit program relies on proper design, construction, and operation of reviewable structures. (Bauman Pre-filed, p. 13, lines 286-287)

41. DNR testimony established that Culvert 9 is not a discrete conveyance solely from Kinnard Farms' production area. (Bauman and Wheat live testimony, February 14) DNR witnesses testified that other sources of pollutants not related to Kinnard Farms contribute to the flow that reaches Culvert 9. (Wheat and Bauman live testimony, February 14)

42. The Kinnard WPDES Permit does not require any monitoring that would establish "the volume of effluent discharges and the amount of each pollutant discharge." See Wis. Stat. § 283.55(1)(a)

43. Wastewater from the VTA and on-site stormwater are comingled into a ditch before entering Culvert 9.

44. For sampling to have regulatory meaning, it must account for background levels. CAFOs' "no discharge" standard is a high bar. DNR witness Tom Bauman testified that at Site 2, open-air conditions and run-on to the site present potential interference from unregulated farms and other CAFOs in the area, from farm fields spread with nutrients, septic systems, decaying vegetation, and wildlife. (Bauman Live testimony, February 14, morning)

45. The permit as a whole and § NR 243.13(1) require that all surface water discharges from Kinnard Farms must comply with the surface water quality standards in chs. NR 102 to 105, and 207. (Bauman Pre-filed, p. 14, lines 301-302; Ex. 301)

46. Antidegradation review applies to a person proposing to create an increase of an existing discharge or create a new discharge to surface waters of the state. (§ NR 207.01(2)) The Permit's reissuance to Kinnard Farms does not afford it an increased discharge or a new discharge to surface water, and so does not trigger antidegradation review. (Ex. 301, s. 1.1)

47. DNR witnesses testified that technology-based effluent limits are enforceable. The DNR has pursued enforcement against CAFOs even though it applies technology based effluent limits to most CAFOs rather than water quality-based effluent limits. (Bauman Pre-filed, p. 15, lines 337-341; Ex. 203)

48. Gretchen Wheat's testimony during the hearing indicated the Dairy had advised her that it would agree to conducting a breach analysis. (Wheat live testimony, February 14, afternoon)

49. The WPDES permit as a whole requires that the permittee comply with all groundwater quality standards. (Ex. 301)

50. Groundwater monitoring is not a standard requirement for WPDES permits or plans and specifications approval. (Bauman Pre-filed, p. 16, lines 360-361) Tom Bauman testified that an applicant is not required to gather background groundwater quality data before the DNR approves construction plans or issues a CAFO WPDES permit. (Bauman Pre-filed, p. 16, line 357) Neither the CAFO permit application process in § NR 243.12 nor the CAFO plan approval process in s. NR 243.15 requires installation of background wells and collection of groundwater quality monitoring data prior to construction or permit issuance or reissuance. In Mr. Bauman's 15 years with the Agricultural Runoff Program, he is not aware of any CAFO that has been required by the WPDES permit program to install background wells and collect groundwater data prior to site development or WPDES permit issuance. (*Id.* at p. 17, lines 366-373) However, the level of groundwater contamination including E Coli bacteria in the area at or near the project site is also very unusual, as is the proliferation of CAFO's in Kewaunee County. (Sagrillo, Mindak, et al)

51. Members of the public described what could fairly be called a groundwater contamination crisis in areas near the site. (Mindak, Cocharts, Weinewmueller, Rothieux, Trem1, Jerabek, Sagrillo, Dr. Iwen, Wautlet, Rybski) Several witnesses testified that up to 50 percent of private wells in the Town of Lincoln are contaminated and that as many as 30 percent of wells had tested positive for E.coli bacteria. No witness for the dairy or the DNR disputed these numbers. Mike Sagrillo, has lived in the Town of Lincoln for 36 years and is the former chair of its planning commission. Sagrillo testified under oath about numerous unusable, contaminated wells in the Town of Lincoln. Many public comment witnesses suggested a plausible and even likely connection between the large numbers of CAFO's in the County and area and well-known problems with groundwater contamination. Numerous witnesses testified credibly and forcefully about the hardship and financial ruin that well water contamination has had on their businesses, homes and daily life.

52. Nearby neighbors Mr. David Mindak, Ms. Lynda and Ms. Amy Cochart, and Ms. Sandra Weinmueller all testified about how difficult life was contaminated well water. Mr. Mindak testified memorably to eating anti- diarrhea medicine "like it was candy" after being

sickened by e-coli contaminated well water that was under 100 feet from a Kinnard landspreading field. Ms. Winemueller, a registered nurse, testified that her property is on low ground near a swamp approximately 4.5 miles from Site 2 and that her well water is contaminated with e-coli. Her family does not have a septic system with a drain field, so that could not be the source of her contamination. She believes Kinnard Farms is the only likely source of the cloudy and contaminated water that comes through her tap and made her family sick with diarrhea and stomach cramps. Despite her family having invested in an expensive holding tank to treat its own waste, her family suffers the daily stress, embarrassment, and financial cost of e-coli contamination in its well. Ms. Erica Routhieaux lives just fifty feet from the proposed expansion and is concerned that she will now be forced to conduct regular expensive testing of her well water to ensure her family's safety. Similarly, Mr. Jessie Jerabek lives ¾ of a mile from the Kinnard farm and has regularly inspected and kept his septic system in good repair. However, his well water has tested with high nitrate concentrations. Jerabek has fears for his family's safety and has been testing his water recently on an almost daily basis. He testified memorably about his concerns for the safety of his three year old daughter, who sometimes consumes small amounts of bathwater.

53. Undisputed testimony on the record established that a particularly complex geology is present at Site 2. DNR witnesses testified that complex geology makes it difficult to link a positive sampling result with a particular source. (Wheat live testimony, February 14, afternoon) The ability to identify the source groundwater quality exceedances is fundamental to the value of groundwater monitoring as an effective enforcement tool. However, given the proliferation of contaminated wells at or near the project site, it is essential that the Department utilize its clear regulatory authority as set forth below to ensure that Kinnard Farms meet its legal obligation under Wis. Admin. Code NR 243.14(2)(b)(3) not to contaminate well water with fecal bacteria from manure or process wastewater.

54. Groundwater monitoring can be required in cases where "facilities are located on or near areas that are susceptible to groundwater contamination such as direct conduits to groundwater, sandy soils, and sites with minimal separations between bedrock and high water tables". (Wis. Admin. Code § NR 243.15(3)(2)(a))

55. During the plans and specifications approval process, the DNR required Kinnard Farms to conduct a site assessment regarding perched groundwater saturation, regional groundwater, and bedrock in order to determine if groundwater monitoring would be necessary. (Ex. 5)

56. Site assessment information, the design of structures, and the condition of structures inform DNR staff as to whether groundwater quality monitoring is necessary. (Wheat Pre-filed, p. 14, lines 265-267) She concluded that Site 2 to be among the most protective designs in the state.

57. Kinnard Farms performed 40 soil borings and 32 test pits to evaluate the soil conditions and depth-to-bedrock in the vicinity of the manure storage facility at Site 2, which is nearly twice as many as the applicable NRCS 313 practice standard requires. (Williams Pre-filed, p. 21)

58. The experts disagreed as to the proper interpretation of the data yielded during the soil probe and test pit excavations. Mr. Williams opined that the standard conservative assumptions are not useful for interpreting the data at Site 2 east of Spruce Road. First, the boring equipment used could not extend beyond a rock fragment or large stone in excess of six inches in diameter, and the soil in the area contains numerous large stones. Second, many borings of shallower depths were in

close proximity of other borings that did not terminate at shallow depths, supporting an interpretation that the shallower borings encountered large stones and not bedrock. Finally, none of the test pits that were dug in the vicinity of the manure storage facility with excavation equipment encountered any bedrock, including those test pits that were dug to a depth of 34 feet. (Williams Pre-filed, pp. 16-17)

59. The most conservative interpretation of the data is to assume that any encounter of rock or refusal is evidence of bedrock, and to assume bedrock lies just beyond the lowest recorded depth where refusal was not encountered. (Muldoon Pre-filed, p. 16; Williams Pre-filed, p. 16) Dr. Muldoon based her analysis on these conservative assumptions. (Muldoon Pre-filed, pp. 16-17)

60. Dr. Maureen Muldoon, a geology professor at nearby UW-Oshkosh, has extensive experience in this region investigating fractured carbonate bedrock aquifers like that present at Site 2. She testified persuasively that the area around Kinnard Farms is very vulnerable to groundwater contamination. (Muldoon Pre-filed, pp. 9-11, 12; Hr'g Test., at 04:25, 07:22; 57:34, 01:49:13-30) Any pollution at the surface can travel rapidly through the shallow, glacial till soils and fractured carbonate bedrock. (Hr'g Test., at 02:32 (Muldoon)) There is little opportunity for attenuation and dispersion given the rapid transport through groundwater. (Hr'g Test., at 02:44 (Muldoon); Muldoon Pre-filed, p. 8) The closest downstream private well is a half mile to the east of Site 2. (Hr'g Test., at 02:10:27 (Trainor)) In karst areas such as those beneath Site 2, pollution at the surface can travel rapidly through groundwater into down gradient wells. (Muldoon Pre-filed, pp. 9-11) In Dr. Muldoon's research and experience, she has observed pollutants transport over a half mile in 24 hours in similar hydro geologic conditions."

61. It is feasible and reasonably cost-effective to install a groundwater monitoring system in the fractured carbonate bedrock aquifer beneath Site 2. (Hr'g Test., at 08:20-08:45 (Muldoon)) A site characterization could be completed to identify fracture pathways and develop an effective groundwater monitoring system. (Muldoon Pre-filed, pp. 27-30) There are groundwater sampling devices that would be ideal for this type of groundwater monitoring because they have small, self-contained data-loggers that can record variations in water level as well as variations in fluid temperature and electrical conductivity, or a measure of the total dissolved solids in the water, at pre-programmed time intervals. (Muldoon Pre-filed, p. 28) Dr. Muldoon testified that she had installed a groundwater sampling system in similar hydrogeologic conditions for approximately \$30,000. (Hr'g Test., at 01:04:33, 01:00:44-01:01:22 (Muldoon))

62. Given the proliferation of contaminated wells in the vicinity of Kinnard Farms, and the likely presence of karst features including fractured bedrock under the standard conservative geological assumptions, the DNR should exercise its clear regulatory authority to require groundwater monitoring near or at the site because it is "susceptible to groundwater contamination" within the meaning of § NR 243.15(3)(2)(a). The Department should review a plan for groundwater monitoring to include no less than six wells, preferably with no less than two that monitor areas subject to intensive landspreading by Kinnard Farms. Accordingly, the WPDES permit must be modified to include a groundwater monitoring plan which includes no less than six monitoring wells. If practicable, the permit-holder shall include at least two monitoring wells which are located off-site on voluntarily willing neighboring properties with water contamination issues or risks.

63. No applicable rule or statute requires a WPDES permit to specify a number of animal units at a CAFO facility. (Bauman Pre-filed, p. 25, lines 545-546) However, the Department has instituted this measure in other CAFO permits.

64. The number of animal units is not an effective sole method by which the DNR determines WPDES permit compliance. (Bauman Pre-filed, p. 23, lines 510-511) The measure of compliance with a discharge permit is how waste is managed, not to what extent it is generated. (Bauman Pre-filed, p. 24, lines 527-536) A practical short-term measure to determine whether a facility is exceeding the amount of waste it is able to store and land apply by looking at amount of manure in a pit. (Bauman Live Testimony, February 14, morning)

65. However, an enforceable maximum cap on animal units does provide a useful longer-term management tool for knowing when problems are likely to occur because both generation and the discharge of manure is directly related to the number of animal units on site. (Shaw, Polenske) Further, in 2009 and 2010 Kinnard failed to have permanent markers installed to allow a ready indication of when it had reached the 180-day limit of manure and wastewater storage. (Exs. 58-59) Under these circumstances, Sections 1.3, 1.3.3, 2 and 3.1.12 of the Permit should be modified to require that the permit articulate a maximum number of animal units allowed at the facility in addition to current storage requirements.

66. Section 1.3.2 of the Kinnard Farms WPDES permit requires the Dairy to maintain adequate manure storage. (Ex. 301) Requirements to maintain adequate manure storage are not included in other portions of the WPDES permit in order to minimize duplicate permit language. (Bauman Pre-filed, p. 25, lines 557-558)

67. Yield goals help calculate how much phosphorus growing crops remove from the soil. (Craig Pre-filed, p. 10, line 214) DNR calculations show that Kinnard Farms will produce approximately 300,000 lbs. of phosphorus and the crops selected will remove approximately 326,000 lbs. of phosphorus from the soil. (Craig Pre-filed, p. 10, lines 218-223)

68. The yield goals set within the NMP are considerably higher than county averages for the same crops in Kewaunee County. (Shaw) However, the yield goals set within the NMP reflect the average yield goals Kinnard Farms has achieved and documented on fields where it has recently completed yield monitoring. (Craig Pre-filed, p. 10, lines 215-216)

69. The Dairy selected the hand check and stem count method to calculate yield goals. (Craig Live Testimony, February 13, afternoon) The yield goal methods selected by the Dairy are reliable methods, and are generally more accurate than county averages. (Craig Live Testimony, February 13, afternoon)

DISCUSSION

There was something of a "disconnect" between the evidentiary portion of the hearing on the WPDES permit review and the testimony from members of the public that stretched until late in the evening. While there was some support for the Kinnard Farms and the quality of their farming operations, many members of the public were deeply upset about what could only be described as a

crisis with respect to groundwater quality in the area.¹ The proliferation of contaminated wells represents a massive regulatory failure to protect groundwater in the Town of Lincoln. The Department needs to utilize its clear regulatory authority to require groundwater monitoring to enhance its ability to prevent further groundwater contamination.

Many public witnesses testified under oath credibly and forcefully about the hardship and financial ruin that this local groundwater contamination crisis has had on their businesses, homes and daily life. Numerous people echoed comments from Mike Sagrillo, who has lived in the Town of Lincoln for 36 years and has served as chair of its planning commission. Sagrillo testified about numerous unusable, contaminated wells in the Town of Lincoln. Several witnesses asserted that in the Town of Lincoln 50 percent of private wells are contaminated and as many as 30 percent of wells had tested positive for E.coli bacteria. It is not unreasonable for residents to see a link to large farming practices in the area. It is more likely than not that some portion of this contamination is from CAFO landspreading in a County where, according to un rebutted public testimony, there are more than a dozen permitted CAFO's and vast areas of its farmland subject to landspreading contracts.

The closest any of the members of the public came to directly linking groundwater contamination to the Kinnard Farms was the case of Kinnard neighbor David Mindak. Mr. Mindak testified that his contaminated well had to be replaced because of bacterial contamination that the DNR determined came from cow manure. (Ex. 400) The DNR's subsequent investigation was unable to determine the precise source of contamination of Mr. Mindak's well contamination because of the difficulties of tracing bacteria contamination back to the source without expensive DNA testing.²

Dr. Muldoon—who has extensive experience in this region investigating fractured carbonate bedrock aquifers like that present at Site 2—testified that the area around Kinnard Farms is very vulnerable to groundwater contamination. (Muldoon Pre-filed, pp. 9-11, 12; Hr'g Test., at 04:25, 07:22; 57:34, 01:49:13-30) Any pollution at the surface can travel rapidly through the shallow, glacial till soils and fractured carbonate bedrock. (Hr'g Test., at 02:32 (Muldoon)) There is little opportunity for attenuation and dispersion given the rapid transport through groundwater. (Hr'g Test., at 02:44 (Muldoon); Muldoon Pre-filed, p. 8) The closest downstream private well is a half mile to the east of Site 2. (Hr'g Test., at 02:10:27 (Trainor)) In karst such areas such as those beneath Site 2, pollution at the surface can travel rapidly through groundwater into down gradient wells. (Muldoon Pre-filed, pp. 9-11) In Dr. Muldoon's research and experience, she has observed pollutants transport over a half mile in 24 hours in similar hydro geologic conditions.”

The petitioners argue forcefully that, “Without groundwater monitoring at Site 2, the only way for the DNR or citizens to detect that Site 2 is causing groundwater contamination is for a neighbor's well to become contaminated.” Unfortunately, this has been the all too common state of affairs in the Town of Lincoln and Kewaunee County over the past years. This WPDES permit must be modified to do what is reasonably necessary to protect the drinking water of the residents and further groundwater contamination. While the Department has not previously required groundwater

¹It is also striking that none of this important context was included in the Department's Environmental Assessment (EA). However, the sufficiency of the EA is not an issue for this contested case proceeding and the EA met the procedural requirements of WEPA.

²In fairness, it must be noted that Mindak replaced his old well and has not had further problems. It must also be noted that the cost of this replacement well was incurred by Wisconsin taxpayers, rather than by the most likely source of the cow manure caused contamination.

monitoring, it has clear regulatory authority to do so in the context of a CAFO WPDES permit. See Wis. Stat. § 283.31(3), (4); *see also* Wis. Admin. Code §§ NR 243.13(1), (5), 243.15(3)(c)2., (7). It is also abundantly clear that the area is “susceptible to groundwater contamination” within the meaning of Wis. Admin. Code § NR 243.15(3)(2)(a).

Further, as DNR permit engineer Ms. Wheat opined, groundwater contamination from Site 2 itself could be “the least of the concerns” of the petitioners. It seems even more likely that further groundwater contamination could come from landspreading. For one thing, due to soil excavations undertaken by the Kinnards, more is known about the geology of the area under Site 2 than about many other off-site locations where Kinnard Farms manure will be land spread. The experts disagreed about the geology at Site 2, although using standard conservative assumptions Site 2 is susceptible to groundwater contamination. But it seems even more likely that groundwater contamination could result from landspreading than from Site 2 itself, which does have some portion of clay that may be more protective of groundwater than many off-site areas.

Nonetheless, given the dispute in the interpretation of the soil excavation results at Site 2, it is essential to undertake some groundwater monitoring on-site in areas close to neighbors who have experienced well water contamination. While it will be difficult to establish a reliable system of groundwater monitoring under these geologic circumstances, Dr. Muldoon was convincing that an effective groundwater monitoring system could be initiated for as little as \$50,000. The fact that groundwater monitoring might be difficult—because of the very karst geological features that make the area particularly susceptible to groundwater contamination—must not be used as an excuse not to exercise the DNR’s clear regulatory authority and duty to do so. Rather, such an effort must be undertaken to ensure that there is not further contamination of groundwater under these deplorable background conditions.

The permit must be amended to include a plan acceptable to the DNR for groundwater monitoring for all pollutants of concern at no less than six wells on and around site 2. It would be better and more likely to yield results that identified problem areas if this could also include two or three representative off-site landspreading fields. Obviously, this would require the voluntary participation of off-site property owners. However, no witness testified as to how such a system could be practically undertaken, and the petitioners have not offered such a plan as part of their request for relief. It was not their burden to do so. They have carried their burden of demonstrating that a groundwater monitoring plan is essential given that the area is “susceptible to groundwater contamination” within the meaning of Wis. Admin. Code § NR 243.15(3)(2)(a)

The permit has been further modified, and both the DNR and the Dairy agreed to some of the modified language. Petitioners requested a modification to Section 1.1 of Kinnard Farms’ WPDES permit to incorporate two provisions of the corollary Production Area Discharge Limitations section of the state’s Large Dairy CAFO General Permit (WPDES Permit No. WI-0063274-01) (excerpted in Ex. 201) First, they request inclusion of the following provision relating to Outstanding and Exceptional Resource Waters: “For all new or increased discharges to an ORW or ERW, any pollutant discharged shall not exceed existing levels of the pollutants immediately up stream of the discharge site.” Mr. Bauman testified that DNR does not believe the inclusion of this language is necessary, but “for the sake of clarity [DNR] would be amenable to including” this language in Section 1.1 of the permit. (Bauman Pre-filed, p. 12)

Second, Petitioners requested inclusion of the following provision to foreclose any argument that the production area discharge limitations are inapplicable to non-navigable waters of the state:

“Production area discharges to waters of the state authorized under this permit shall comply with water quality standards, groundwater standards and may not impair wetland functional values.” Again, Mr. Bauman testified that he does not believe the inclusion of this language is necessary, but he would not have a problem with including that language in Section 1.1 for clarification. (TR Vol. 4, pp. 1014-15 (Bauman))

Further, the Petitioners have established that the WPDES permit is unreasonable because it does not specify the number of animal units allowed at the facility. In support of that contention, Petitioners established that animal units are a common regulatory device in WPDES permitting, that the number of animal units corresponds directly to the amount of waste generated by a CAFO, and that imposition of a cap on animal units is a good idea in this particular case because of concerns over Kinnard Farms’ ability to comply with regulatory requirements directly related to the current permit requirements for 180 day storage capacity. (Exs. 58-59) It is not a question of either/or—the 180 day storage requirement represents a good short term measure to detect an impending problem, but the maximum animal unit number represents a useful longer-term management tool that will ensure that there is not suddenly a mad rush to achieve permit compliance and get under the 180 day capacity threshold. Establishing a cap on the maximum number of animal units will provide clarity and transparency for all sides as to the limits that are necessary to protect groundwater and surface waters. The permit should accordingly be modified by the Department to reflect this *additional* requirement.

All of these modifications are necessary to ensure that the permit holder meets its legal obligations, but with these modifications, the permit is approved.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals (the Division) by its ALJ, has authority to hear contested cases and issue necessary orders in cases relating to WPDES permits referred to the Division by the Department. (Wis. Stat. §§ 227.43(1)(b) and 283.63)

2. Pursuant to Wis. Stat. § 283.63 a permittee or petitioner may secure review of the reasonableness or necessity for any term or condition of any issued, reissued or modified permit by filing a verified petition with the DNR Secretary. The petitioner has the burden of proof on allegations made in such a petition. The Department shall, “consider anew all matters concerning the permit denial, modification, suspension or revocation.”

3. Kinnard Farms is a “large animal feeding operation” within the meaning of § NR 243.04(13). Kinnard Farms’ Site 2 is a “point source” subject to the WPDES program, specifically “a concentrated animal feeding operation” within the meaning of Wis. Stat. § 283.01(12)(a).

4. Wisconsin Admin. Code Chapter NR 243 is the administrative code that applies to CAFO WPDES Permit and plan approval actions. Chapter NR 243 does not require the calculation of water quality based effluent limits for CAFO WPDES permits. (Bauman Pre-filed, p.15, lines 326) A CAFO WPDES permit prohibits discharges of manure and process wastewater from the production area to navigable waters, except under certain circumstances, including for dairies that a 25-year, 24-hour storm event must have occurred. (§ NR 243.13(2))

5. For a CAFO, WPDES effluent limitations are based on proper manure and process wastewater storage and/or containment and land application practices. (Bauman Pre-filed, p. 19, lines 417-419) In the absence of a defined pipe with exclusive discharges, the DNR conducts engineering review of plans for the production area, narrative water quality based restrictions (or TBELs) and identifies best management practices that a CAFO must implement. (Bauman Pre-filed, p. 19, lines 421-424) The discharge from the VTA and or into the ditches or Culvert Nine is not a defined pipe or discreet conveyance because water from other sources is mixed with on-site discharges.

6. Neither the CAFO permit application process in § NR 243.12 nor the CAFO plan approval process in § NR 243.15 requires that plan and specification approvals precede permit issuance chronologically.

7. The Permit may be issued before the DNR approves the plans and specifications for the facility because no Wisconsin law requires chronologically that the DNR approve plans and specifications before issuance of the permit.

8. Section 1.1 of the Permit is reasonable as amended in that it specifically requires that discharges authorized by the Permit comply with surface water quality standards.

9. Sections 1.1, 1.7 and 1.8 of the Permit are reasonable as modified because they require that authorized discharges from the production area comply with groundwater quality standards.

10. The DNR's obligation to include conditions in a WPDES permit that assure compliance with groundwater protection standards may be met through its authority to require groundwater monitoring in a WPDES permit, when necessary. See Wis. Stat. § 283.31(3), (4); *see also* Wis. Admin. Code §§ NR 243.13(1), (5), 243.15(3)(c)2., (7).

11. The DNR administrative code for CAFO's requires the installation of groundwater monitoring wells at a facility if it determines that groundwater monitoring "is necessary to evaluate impacts to groundwater and geologic or construction conditions warrant monitoring." Wis. Admin. Code § NR 243.15(7) The petitioners and members of the public have carried their burden of proof in establishing that groundwater monitoring is necessary at or near Site 2.

12. The Petitioners and public witnesses have established that the area at or near Site 2 and subject to landspreading contracts is "susceptible to groundwater contamination within the meaning of Wis. Admin. Code § NR 243.15(3)(2)(a)

13. Groundwater monitoring is required to ensure that the permit holder meet the following affirmative legal obligations: that no landspreading may be undertaken with 100 feet of a direct conduit to groundwater, Wis. Admin. Code NR 243.14(2)(b)(8) and that the permit holder not cause fecal contamination of water in a well by either landspreading or management of process wastewater. Wis. Admin. Code NR 243.14(2)(b)(3)

14. Antidegradation review applies to surface water; it does not apply to groundwater. (§ NR 207.01(2))

15. The Permit is remanded to the DNR to be modified to require that the permit articulate the maximum number of animal units allowed at the facility. Section 1.3.3 of the Permit requiring the Dairy to maintain 180 day liquid manure storage shall remain in full force and effect.

16. Sections 1.6 of the Permit and the Nutrient Management Plan are reasonable and contain reasonable yield goals.

ORDER

WHEREFORE IT IS HEREBY ORDERED, the Permit issued by the DNR should be modified by this tribunal as follows:

Permit term 1.1 shall be amended to read:

Production Area Discharge Limitations

The permittee shall comply with the livestock performance standards and prohibitions in ch. NR 151. In accordance with § NR 243.13, the permittee may not discharge manure or process wastewater pollutants to navigable waters from the production area, including approved manure stacking sites, unless all of the following apply:

- Precipitation causes an overflow of manure or process wastewater from a containment or storage structure.
- The containment or storage structure is properly designed, constructed and maintained to contain all manure and process wastewater from the operation, including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event for this location (**Kewaunee County – 4.2 inches**).
- The production area is operated in accordance with the inspection, maintenance and record keeping requirements in s. NR 243.19.
- The discharge complies with ~~groundwater and~~ surface water quality standards. For all new or increased discharges to an ORW or ERW, any pollutant discharged shall not exceed existing levels of the pollutants immediately up stream of the discharge site. For any new or increased discharges to other fish and aquatic life waters, the discharge shall not cause a significant lowering of water quality under chapter 207, Wis. Adm. Code.

All structures shall be designed and operated in accordance with §§ NR 243.15 and NR 243.17 to control manure and process wastewater for the purpose of complying with discharge limitations established above and groundwater standards.

The permittee may not discharge pollutants to navigable waters under any circumstance or storm event from areas of the production area, including manure stacks on cropland, where manure or process wastewater is not properly stored or contained by a structure.

Production area discharges to waters of the state authorized under this permit shall comply with water quality standards, groundwater standards and may not impair wetland functional values.

NOTE: Wastewater treatment strips, grassed waterways or buffers are examples of facilities or systems that by themselves do not constitute a structure.

Permit term 2.4.1 shall be inserted as follows:

2.4.1 Breach Analysis (Waste Storage Impoundment Cell No. 3)

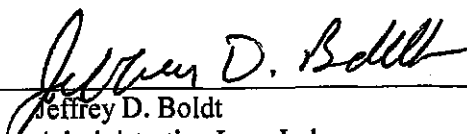
Required Action	Due Date
Submittal of Plans: Submit a Breach Analysis for Waste Storage Impoundment Cell No 3. For Department review and approval. The analysis shall be based on a complete loss of the maximum volume of stored wastewater. Propose construction of any appropriate permanent engineering improvements such as an emergency spillway or secondary containment and describe how these measures would reduce impacts to the area.	3 months following ALJ decision
Improvements and Post Construction Documentation: Complete construction of any structures required as part of the Breach Analysis consistent with and approval by the Department by the specified Date Due. Submit post construction documentation within 60 days of completion of the project.	3 months following DNR approval

IT IS FURTHER ORDERED, that Sections 1.3, 1.3.3, 2 and 3.1.12 be modified to reflect a maximum number of animal units at the facility in addition to current storage requirements.

IT IS FURTHER ORDERED, that the Department should review and approve a plan for groundwater monitoring for pollutants of concern at or near the site because it has been demonstrated to be "susceptible to groundwater contamination" within the meaning of Wis. Admin. Code § NR 243.15(3)(2)(a). The plan should be submitted to the Department with 90 days of this Order, and shall include no less than six groundwater monitoring wells, and if practicable, at least two of which monitor groundwater quality impacts from off-site landspreading.

Dated at Madison, Wisconsin on October 29, 2014.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705
Telephone: (608) 266-7709
FAX: (608) 264-9885

By: 
Jeffrey D. Boldt
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.

