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April 14, 2015

Nancy Larson

Agency Spokesperson, Badgerwood CAFO
State of Wisconsin Department of Natural Resources
Ashland Service Center
2501 Golf Course Road
Ashland, Wisconsin 54806
NancyJ.Larson@Wisconsin.gov

Re: Environmental Impact Statement Request for Proposed Reicks View Farms/Badgerwood LLC Swine Operation

Dear Ms. Larson:

Midwest Environmental Advocates (MEA) is writing to reiterate the concerns expressed by Bayfield County residents and elected officials regarding the concentrated animal feeding operation (CAFO) proposed by Reicks View Farms/Badgerwood LLC (Badgerwood). Specifically, MEA requests that the Department of Natural Resources (DNR) prepare an environmental impact statement (EIS) before issuing a water discharge permit to Badgerwood.

I appreciate that you are already well-versed in the specifics of Badgerwood's proposal and the ecological sensitivity of the watershed and environment in which Badgerwood would construct Bayfield County's first CAFO. The following letter will therefore emphasize the legal reasons that DNR must prepare an EIS before issuing a Wisconsin Pollutant Discharge Elimination System (WPDES) permit to Badgerwood.

The DNR must prepare an EIS prior to issuing the Badgerwood WPDES permit in order to comply with WEPA.

Wis. Stat. § 1.11(2)(c) requires state agencies to consider the environmental impact of "major actions significantly affecting the quality of the human environment." This statutory provision is part of the Wisconsin Environmental Policy Act (WEPA), with which all state agencies must comply. Wis. Admin. Code § NR 150 *et seq.* outlines four types of actions that DNR can take in compliance with WEPA: minor actions, equivalent analysis actions, prior compliance actions, and actions that require an EIS.

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The revised NR 150 categorizes the issuance of an individualⁱ CAFO permit as an equivalent analysis action. See Wis. Admin. Code § NR 150.20(2)(a)(19). Equivalent analysis actions are actions where “detailed environmental analysis and public disclosure are conducted as part of the department programmatic procedure.” Wis. Admin. Code § NR 150.20(2)(a).

DNR’s response to public comments on the revised NR 150 implies that equivalent analysis actions will include the same or a similar level of environmental analysis and disclosure through the permitting process as that provided in environmental assessments (EAs) for similar projects under the previous version of this rule.ⁱⁱ In order to comply with WEPA, DNR must therefore analyze the full range of impacts from the proposed Badgerwood CAFO that it examined in past CAFO EAs for projects of similar scale and potential impacts. The EA document for Rosendale Dairy,ⁱⁱⁱ referred to as an example, evaluates the following environmental impacts in detail:

- Physical effects, including but not limited to storm water runoff, air pollution, and water usage;
- Biological effects, including but not limited to phosphorous and nitrogen in runoff, impact upon endangered species and potential impact of manure pathogens upon human health; and
- Cultural effects, including but not limited to property values and impact upon the economy.

The cursory analysis in the final Badgerwood WPDES application^{iv} does not match the level of detail provided in CAFO EAs that were prepared under the previous NR 150. The DNR indicated in its response to public comments on the revised NR 150 that WPDES CAFO permit process would provide an adequate environmental analysis even absent an EA because “[t]he WPDES CAFO permit process considers: alternatives, air quality, groundwater, surface water quality, detailed facility design and impacts from traffic noise, etc.”^v The DNR has the authority to require the applicant to submit information required to comply with WEPA.^{vi} Much more is needed for an environmental analysis that complies with WEPA.

A sufficiently detailed environmental analysis of the above-listed factors will make clear that permitting of the proposed Badgerwood CAFO constitutes a major agency action with potential to significantly affect the quality of the human environment. ***Once the DNR makes such a finding, the Department must conduct an EIS in order to comply with WEPA.***^{vii}

To blindly define permitting of Badgerwood as an “equivalent analysis action” without conducting a sufficiently detailed environmental analysis contravenes WEPA. Such a categorical decision without an accompanying analysis that complies with WEPA does not provide an adequate record and disclosure of the DNR’s exercise of discretion to determine that it is not a major action significantly affecting the quality of the human environment. It is important to note that DNR has never had opportunity to analyze the impacts of a CAFO of the type and scope proposed by Badgerwood. DNR’s revised NR 150, including the

creation of equivalent analysis actions, does not modify WEPA or the case law interpreting that requirement, which requires public disclosure and a sufficiently detailed environmental analysis.

Finally, if the WPDES permitting process for the Badgerwood CAFO does not include an EIS, DNR will fail to satisfy the purpose of WEPA and corresponding regulations at NR 150. The purpose of WEPA “is to insure that agencies consider environmental impacts during decision making.” *Clean Wis. v. Pub. Service Comm.*, 2005 WI 93, ¶ 188, 282 Wis. 2d 250, 700 N.W. 2d 768 (quoting *State ex rel. Boehm v. Dep’t of Natural Res.*, 174 Wis. 2d 657, 665, 497 N.W.2d 445 (1993)). Consideration of environmental impacts cannot be conclusory—rather, DNR must take a “hard look” at potential impacts of decisions such as permitting the proposed Badgerwood CAFO. *Wis. Env’tl. Decade v. Dep’t of Natural Res.*, 79 Wis. 2d 409, 420, 256 N.W.2d 149 (1977). Because Bayfield County has never been home to a CAFO, and because DNR has never permitted a swine CAFO of the size proposed by Badgerwood, the only means by which DNR can take a “hard look” at the potential impacts of the Badgerwood CAFO is to prepare an EIS.

The DNR has explicit regulatory discretion to prepare an EIS for a project of the magnitude and complexity as the proposed Badgerwood CAFO.

Regardless of DNR’s agreement with the above analysis, the Department should exercise its authority pursuant to NR 150.20(4)(b) and prepare an EIS prior to issuance of a WPDES permit to Badgerwood. DNR has discretion to prepare an EIS “for projects of such magnitude and complexity that one or more of the following apply: (1) “The project involves multiple department actions”; (2) “The project may be in conflict with local, state or federal environmental policies”; (3) “The project may set precedent for reducing or limiting environmental protection”; (4) “The project may result in deleterious effects over large geographic areas”; (5) “The project may result in long-term deleterious effects that are prohibitively difficult or expensive to reverse”; (6) “The project may result in deleterious effects on especially important, critical, or sensitive environmental resources”; (7) “The project involves broad public controversy”; (8) “The project may result in substantial risk to human life, health, or safety.” Wis. Admin. Code § NR 150.20(4)(b)1-8.

Even before issuance of a draft permit, DNR has already received an overwhelming number of comments arguing that one or more of the above factors apply to the proposed Badgerwood CAFO. MEA reiterates these comments and wishes to highlight three important arguments that demonstrate an EIS is warranted in this instance.

First, the Badgerwood proposal is likely to result in deleterious effects to the 32 miles of outstanding (ORW) and/or exceptional resource waters (ERW) located within the Fish Creek Watershed.^{viii} DNR has authority per NR 150.20(4) to prepare an EIS that analyzes the Badgerwood CAFO’s potential impact upon these “especially important, critical, [and] sensitive environmental resources.” Preparation of an EIS would also reflect DNR’s definition of ORWs and ERWs as “waters that the State of Wisconsin has determined warrant additional protection from the effects of pollution.”^{ix}

Second, in February 2015 the Bayfield County Board of Supervisors enacted a one-year moratorium on siting of CAFOs. The moratorium is meant to afford time to determine whether local government should enact local regulation to “protect public health or safety in Bayfield County in light of the unique environment and key concerns identified in the Bayfield County Comprehensive Plan Update 2010.”^x DNR issuance of a WPDES permit to Badgerwood without consideration of this local moratorium could result in a state permit that allows the CAFO to act in a manner that is inconsistent with local regulation. DNR staff should respect local government priorities and prepare an EIS in acknowledgement of this possibility for conflict.

Permitting a CAFO within Bayfield County would also conflict with the state and federal funding that the government has allocated to protect the unique natural resources in that area. It is a fact that as permitted a CAFO is allowed to discharge pollutants from animal manure spread on surrounding fields as long as that discharge fits into the “agricultural stormwater” exception. Authorized discharges from landspreading fields could affect the Apostle Islands National Lakeshore, Chequamegon-Nicolet National Forest, Iron River National Fish Hatchery, North Country National Scenic Trail, St. Croix National Scenic Riverway and Whittlesey Creek National Wildlife Refuge.^{xi} The DNR should further investigate through an EIS whether permitting this CAFO is consistent with state and federal agency decisions to fund the protection of nearby natural gems.

Finally, local public hearings and the volume of comments received by DNR demonstrate that the Badgerwood project has spurred broad public controversy. This level of controversy reflects understandable concern about DNR’s willingness to issue a WPDES permit for the proposed CAFO without thorough consideration of the environmental impacts from a facility of a size and type that is novel to our state.

The DNR’s preparation of an EIS for Badgerwood would be consistent with permitting procedures followed for other similarly-sized CAFOs.

Preparing an EIS for Badgerwood is consistent with past practice for similar facilities, namely the Richfield and Golden Sands Dairy CAFOs.^{xii} All three operations generated a high level of public controversy and have or will have between 6,100 and 6,300 animal units.^{xiii} Richfield and Golden Sands Dairies required a high capacity well permit, whereas Badgerwood did not apply for such a permit. However, Badgerwood’s final WPDES permit application states that “expected peak water demand for this operation is 65 gallons per minute.” The Badgerwood application also indicates a proposed expansion in June 2015, which justifies concern as to whether the operation will actually maintain peak demand below the high capacity well threshold of 70 gallons per minute.^{xiv} Badgerwood indicates that “this will not be a high capacity well site,” but it bases peak demand on a water use schedule without confirming that planned well *capacity* would prevent the CAFO from operating a high capacity well after future expansion. In sum, all three CAFOs cause similar groundwater quantity and quality concerns.

In further support of the need for an EIS, the proposed Badgerwood CAFO presents at least two additional issues that were not necessarily concerns for the Richfield and Golden Sands

Dairies. Firstly, Badgerwood proposes to construct a CAFO in a pristine environment and in a County that has never housed such an operation. Furthermore, whereas DNR is practiced in environmental analysis of large dairies, the Department does not have such experience with respect to large swine CAFOs.

Thank you for your consideration of MEA's position that DNR is legally bound to prepare an EIS prior to issuance of a WPDES permit to Badgerwood.

Sincerely,

/s/

Tressie K. Kamp
Staff Attorney
MIDWEST ENVIRONMENTAL ADVOCATES, INC.

cc: Duane Popple, DNR Wastewater Specialist

ⁱ MEA assumes that the Badgerwood CAFO, if permitted, would receive an individual rather than a general permit because the general permit is intended only for dairy CAFOs with more than 5,720 animal units. The general permit is not appropriate for the swine CAFO with more than 6,000 animal units that is proposed by Badgerwood. *See, e.g.*, <http://dnr.wi.gov/topic/AgBusiness/CAFO/PermitTypes.html>.

ⁱⁱ *See* Order of the State of Wisconsin Natural Resources Board Repealing, Amending, and Repealing and Recreating Rules, CR 13-022.

ⁱⁱⁱ *See* DOC ID EA0080, *available at* <http://dnr.wi.gov/topic/EIA/ArchiveDate.html>.

^{iv} For example, Badgerwood includes one sentence in its final application statement regarding property value, stating only that "[n]o impacts on property values are expected as a result of this project." *See* ftp://dnrftp01.wi.gov/geodata/water_division/cafo/badgerwood/application_forms/Final_WPDES_Permit_Application_02-12-2015.pdf

^v Wis. Dep't of Natural Res., NR 150 Revision Comments and Responses, Natural Res. Bd. Order No. OE-46-10, at 13 (Aug. 28, 2013).

^{vi} Wis. Admin. Code § NR 243.12(2)(a)7.

^{vii} *See State ex rel. Boehm v. Dep't of Natural Res.*, 174 Wis. 2d 657, 665, 497 N.W.2d 445 (1993).

^{viii} *See* Fish Creek Watershed "At-A-Glance," <http://dnr.wi.gov/water/watershedDetail.aspx?key=924672> (last visited Jan. 22, 2015).

^{ix} *See* <http://dnr.wi.gov/topic/surfacewater/orwerw.html> (last visited Jan. 22, 2015).

^x *See* <http://www.bayfieldcounty.org/DocumentCenter/View/2847> (last visited April 13, 2015).

^{xi} *See, e.g.*, http://www.ashlandwi.com/opinion/letters/a-tale-of-two-counties/article_b09b3518-9c52-11e4-90a5-bffddbb13fc4.html (last visited Jan. 22, 2015).

^{xii} *See* <http://dnr.wi.gov/topic/EIA/Issues.html> (last visited April 1, 2015); *see also* <http://thebaywave.us/?p=565> (last visited April 1, 2015).

^{xiii} *See* <http://dnr.wi.gov/topic/AgBusiness/documents/RichfieldDairy/RichfieldDairyNOFD.pdf>; <http://dnr.wi.gov/topic/AgBusiness/documents/GoldenSands/WPDESApplicationForm.pdf>; ftp://dnrftp01.wi.gov/geodata/water_division/cafo/badgerwood/application_forms/Final_WPDES_Permit_Application_02-12-2015.pdf.

^{xiv} *See* Wis. Admin. Code § NR 812.07(53).