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VIA ELECTRONIC MAIL

Tuesday, December 5, 2017

Casey Jones
Wisconsin Department of Natural Resources
Oshkosh Service Center 625 W. County Road Y
Oshkosh, WI, 54901
Casey.Jones@wi.gov

Re: Department of Natural Resources Hearing on Wisconsin Pollution Discharge Elimination System Permits for Five Concentrated Animal Feeding Operations in Kewaunee County

Ms. Jones:

Midwest Environmental Advocates is Wisconsin's only nonprofit environmental law center. We work to ensure clean air, water, land, and government for this generation and the next.

For more than five years, we've worked with area residents concerned about the water quality impacts of concentrated animal feeding operations (CAFOs) in Kewaunee County. We represent five Kewaunee residents in an appeal of Kinnard Farms' permit, which is one of the permits at issue here. We also represent four conservation and environmental organizations in a challenge to a settlement agreement between the Department of Natural Resources (DNR) and the Dairy Business Association (DBA). I submit these comments on behalf of Midwest Environmental Advocates to highlight concerns with each of the five Kewaunee County CAFO permits on public notice.

- 1. DNR's policy regarding calf hutch area runoff and the use of vegetated treatment areas to treat feed storage runoff fails to ensure compliance with a "zero-discharge" standard.**

Each of the five draft permits on public notice use vegetated treatment areas (VTAs) for some portion of feed storage runoff, or have calf hutch areas, or both. Despite evidence that these practices, as currently permitted, cause water pollution, DNR is proposing to issue or reissue permits to these CAFOs without necessary protections.

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VTAs for Feed Storage Runoff Control: the U.S. Environmental Protection Agency (EPA) informed DNR that if CAFOs use VTAs for feed storage area runoff, “the VTAs need to be designed, constructed, operated and maintained to achieve compliance with the ‘no discharge’ performance standard requirement” in federal law. (See [EPA letter to DNR, March 4, 2016](#)). EPA explained that DNR’s current practice, to review VTAs for compliance with the Natural Resources Conservation Service (NRCS) Standard 635, was not enough to ensure compliance with the “no discharge” standard. EPA specifically wrote as follows:

Region 5 is finding that CAFOs in Wisconsin are designing VTAs to meet design standards established by NRCS. Based on inspections and field observations, it does not appear to Region 5 that VTAs or the NRCS design standards for VTAs ensure that the required ‘no discharge’ level of performance established in the federal ELG is being achieved. (See [EPA letter to DNR, March 4, 2016](#)).

Calf Hutch Areas: At least three of the permits on public notice— Dairy Dreams LLC, Sandway Farms LLC, and Kinnard Farms, Inc.—are for CAFOs with calf hutch areas. Compliance inspection reports within the past permit term at two of these CAFOs detail surface water runoff from calf hutch areas, see [DNR Compliance Report for Dairy Dreams](#), and [EPA Compliance Evaluation for Sandway Farms LLC](#).

DNR and EPA have also documented evidence of surface water and groundwater discharges from calf hutch areas at CAFOs generally, which is summarized in a DNR memo, [Calf Hutch Lots](#). DNR rescinded this memorandum as part of the settlement agreement between DBA and DNR.

The DBA and DNR settlement does not and cannot legally change regulatory requirements, including the requirement that DNR include conditions in permits “that are necessary to achieve compliance with surface water and groundwater quality standards.” Wis. Admin. Code § NR 243.13(1). Additionally, Wisconsin law requires that DNR may issue a Water Pollution Discharge Elimination System (WPDES) permit only if the discharge will meet effluent limits included in the permit. Wis. Stat. § 283.31(3)(a). For CAFO WPDES permits, the core effluent limit is the “no discharge” limit that applies to process wastewater discharges from the CAFO production area. Wis. Admin. Code § NR243.13.

Over the past couple of years, DNR was moving in the right direction to regulate these aspects of CAFO production areas as significant sources of surface water and groundwater pollution. Now, following a settlement with DBA, DNR is moving backward.

At a minimum, we ask that DNR explain whether these CAFOs have conducted modeling to demonstrate that these vegetated treatment areas and calf hutch areas will achieve the “no discharge” permit standard. DNR explanation is particularly necessary given that no other states in this region allow vegetated treatment areas to be used to treat polluted CAFO runoff. Wisconsin is no different from other states that must update their federally-delegated Clean Water Act permitting program in order to comply with the most current, science-based law and policy directed by the EPA.

Further, consistent with DNR’s implementation plan for the DBA – DNR settlement, these CAFOs may need an alternative discharge limitation based on facility design. This is the approach that DNR suggested to address the fact that VTAs do not reliably ensure compliance with the “no discharge” standard.

2. **Investigations at several of these CAFOs demonstrate that calf hutch areas and vegetated treatment areas used to treat feed storage runoff do not meet permit conditions, and are not designed to comply with state and federal law.**

Dairy Dreams: Two site inspections of Dairy Dreams' operation by DNR in 2014 showed polluted process wastewater being discharged from the production area. ([DNR Compliance Report for Dairy Dreams; Dairy Dreams – Site Visit – Discharge Complaint from Kewaunee County](#).) DNR sampled runoff from these areas, which showed high levels of fecal coliform bacteria, BOD, nitrates, and phosphorus. ([DNR Compliance Report for Dairy Dreams](#).) DNR should explain whether and how these discharges have been addressed, and the effectiveness of any improvements.

Sandway Farm, LLC: An EPA inspection on April 18, 2013, found numerous discharges from this facility to area surface waters. ([EPA Compliance Evaluation Sampling Inspection of Sandway](#).) Feed storage runoff and calf hutch area runoff were among other areas of concern. EPA took samples of surface water discharges from the production area, and those samples contained high levels of fecal coliform, BOD, nitrates, phosphorus, and total suspended solids.

We request that DNR explain whether the compliance issues have been addressed, and whether these CAFOs will meet the "no discharge" permit standard at the time of permit issuance or reissuance. If DNR employs a compliance schedule, DNR should employ alternative discharge limitations until these facilities can achieve compliance with the standard "no discharge" limit.

3. **Given the history of compliance issues at these CAFOs' production areas, DNR should require groundwater monitoring at each of these CAFOs.**

DNR has extensive evidence that the area in which these CAFOs are located is extremely sensitive to groundwater contamination. Further, as addressed above, each of these CAFOs has one or more design features that presents an unresolved risk of groundwater contamination that the DNR has refused to address in these draft permits.

DNR has authority to require groundwater monitoring wells "in the vicinity of manure storage facilities, runoff control systems, . . . and other treatment systems where the department determines monitoring is necessary to evaluate impacts to groundwater and geologic or construction conditions warrant monitoring." Wis. Admin. Code § NR 243.15(7). In other words, DNR can require a CAFO to install groundwater monitoring wells for any of the following reasons:

1. Geologic conditions warrant monitoring (such as sensitive karst areas);
2. Construction conditions warrant monitoring (such as where a facility hasn't yet designed or built runoff control or treatment systems to prevent groundwater discharges); **or**
3. DNR determines monitoring is necessary to evaluate groundwater impacts.

Currently, Kinnard Farms, Inc. is the only draft permit out of the five on public notice that requires on-site groundwater monitoring. It is appropriate and necessary for the DNR to exercise its clear authority and require the other four CAFOs to install on-site groundwater monitoring.

4. **The draft permit for Kinnard Farms, Inc. violates a circuit court order requiring an animal unit limit and off-site groundwater monitoring.**

The draft permit for Kinnard Farms, Inc., does not contain an animal unit limit or off-site groundwater monitoring, both of which were ordered by an administrative law judge in 2014, and affirmed by a circuit court judge in 2016. Even though there is an appeal, DNR is legally obligated to follow that circuit court order because no party has obtained a stay of that decision. DNR's position that it may start over every permit term with a clean slate is not legal. That legal argument has already been rejected by Administrative Law Judge Eric Defort in a similar case involving Richfield Dairy. ([Richfield Dairy - ALJ Order DNR to Follow Circuit Court Order](#))

Beyond these legal problems, it is outrageous that DNR would try to do through this permit process what it has been unable to do through legal appeals. The Kewaunee County residents who fought for water quality protections, and won, deserve more than to be dismissed after five years as DNR hits the figurative reset button on the Kinnard permit. DNR's position does not respect these petitioners or the rule of law, and it will not hold up in court.

Thank you for the opportunity to comment on DNR's proposal to issue permits to these CAFOs. Please contact me if you have any questions or would like to discuss these matters further.

Sincerely,

Sarah Geers
Staff Attorney
Midwest Environmental Advocates