

**BEFORE THE
WISCONSIN DEPARTMENT OF NATURAL RESOURCES**

**In the matter of Kinnard Farms
Permit No. WI-0059536-03-0 to Discharge Under
the Wisconsin Pollutant Discharge Elimination
System (“WPDES”) dated August 16, 2012.**

**VERIFIED PETITION FOR REVIEW UNDER
WIS. STAT. § 283.63**

To the Department of Natural Resources:

In accordance with Wis. Stat. § 283.63 the undersigned individuals (Petitioners) hereby petition for review of the final decision of the Wisconsin Department of Natural Resources (DNR) to reissue Wisconsin Pollutant Discharge Elimination System (WPDES) Permit No. WI-0059536-03-0 to Kinnard Farms Inc. (Kinnard Farms).

Kinnard Farms has operated a large confined animal feeding operation (CAFO) for dairy cows under previous WPDES permits. Kinnard Farms proposed to expand from 5,627 animal units to approximately 8,710 animal units in its application for WPDES permit reissuance. Its current operation, referred to as site 1 in its WPDES permit, is located near Casco in the Town of Lincoln, Kewaunee County, Wisconsin. Kinnard Farms plans to build a new site, site 2, approximately a quarter mile to the northeast of the existing dairy facility to accommodate the expansion. In addition, Kinnard Farms requested approval for two high capacity wells at site 2, and also submitted plans and specifications for the production area facilities at site 2.

Site 2 is located less than 500 feet from the headwaters of Casco Creek, a downstream portion of which is designated an exceptional resource water. The production area of site 2 is also located less than 100 feet from wetlands that are adjacent to Casco Creek. Three of the

Petitioners also live within 300 feet of site 2. Underlying Kewaunee County, and specifically at both site 1 and site 2, is karst geology, characterized by shallow soils, fractured bedrock and sinkholes, which increase the risk of groundwater contamination from surface activities.

As required by Wisconsin's statutes and regulations, the DNR conducted an environmental assessment of the potential environmental impacts of Kinnard Farms' expanded operation including the impacts of the high capacity wells and the design of the production area facilities. The DNR issued public notice on April 19, 2012 of its intent to reissue Kinnard Farms WPDES permit for its expanded operation, its conditional approval of Kinnard Farms' nutrient management plan (NMP), and its preliminary decision that an environmental impact statement would not be required for this expansion. On April 26, 2012, during the public comment period, the DNR rejected the plans and specifications that Kinnard Farms submitted for the facilities at site 2.

Kinnard Farms did not resubmit revised plans and specifications until July 30, 2012, after the public comment period, beginning April 19, 2012 and ending on May 30, 2012, had closed. The DNR did not provide any additional opportunity for public comment on the revised plans and specifications that Kinnard Farms resubmitted on July 30, 2012. The revised plans and specifications significantly changed the design of the facilities at site 2 from the original plans. Specifically, the revised plans and specifications increased the number of manure storage pits from 2 to 3, reduced the total capacity of manure storage at site 2, and authorized the use of a concrete liner for the manure storage pits, instead of a clay and geomembrane liner. The DNR reissued a final WPDES permit to Kinnard Farms on August 16, 2012, that incorporated some of the changes to the revised plans and specifications. At the time the permit was reissued, the DNR had requested, but had not yet received revisions to Kinnard Farms' plans to double line

the manure storage lagoons at site 2, to conduct a karst analysis and a manure storage lagoon breach analysis, and to determine whether additional monitoring may be necessary. The DNR lacked sufficient information regarding the design plans and specifications for the production area at site 2 when it reissued Kinnard Farms' WPDES permit.

Section 283.63(1) of the Wisconsin Statutes allows five or more persons to secure a review by the DNR of the reasonableness of or necessity for any term or condition of any issued, reissued or modified permit by filing a verified petition setting forth the issues sought to be reviewed and the interest of the petitioners with the DNR Secretary within 60 days after the DNR provides notice of permit reissuance.

In support of their petition, Petitioners state:

I. INTEREST OF THE PETITIONERS AND NATURE OF THEIR INJURIES.

1. The Petitioners' actual and threatened injuries are different in kind or degree from the injury to the public caused by the agency actions because:

- a. The Petitioners live near Kinnard Farms' proposed dairy expansion at site 2. They all have private drinking wells and are concerned about groundwater contamination from Kinnard Farms' expanded dairy. The Petitioners are concerned that Kinnard Farms' operation, as approved by the DNR, will affect their health and the health of their families.
- b. Many of the Petitioners use and enjoy the land and water on their properties and are concerned about how the farm will affect their health and quality of life. Many of the Petitioners and their families are concerned that Kinnard Farms' dairy, which is very close to their homes, will limit their ability to enjoy their

property. The Petitioners are also concerned that Kinnard Farms' dairy will cause odor, noise, pollution and traffic problems and will affect their property values.

2. Petitioner Amy Cochart is a resident of Kewaunee County, Wisconsin residing at N8793 Spruce Road, Casco, WI 54205. Mrs. Cochart and her family live 2-3 miles away from Kinnard Farms' site 1 and live about 1 mile away from the planned site 2. She enjoys walking through the woods on her neighbor's property and observing wildlife, including ducks, cranes and herons, in a pond to the north of proposed site 2. Amy Cochart is concerned that the wildlife will leave the area once site 2 is constructed. She also enjoys swimming in Lake Michigan at the public beach in Algoma, Wisconsin and is concerned that increased nutrient and bacteria pollution from Kinnard Farms' expanded dairy will cause beach closures and diminish the water quality in Lake Michigan. Amy Cochart is aware of karst geological features near her property and has observed rock piles on her property, which have often been used in that area to fill in sinkholes. This raises concerns about the risk of groundwater contamination and the pollution of her drinking water from Kinnard Farms' expanded dairy operation. Further, Amy Cochart is concerned about how Kinnard Farms' expanded dairy will affect her health and the health of her family. Her husband and children suffer from asthma, which she believes will be aggravated by Kinnard Farms' large dairy located 1 mile away from her home. Amy Cochart uses drinking water from a well on her property that already has high levels of nitrates and is unsafe for infants to drink. She is concerned that Kinnard Farms' expanded dairy will cause nitrate and bacteria contamination of her well and health problems. Amy Cochart is adversely affected by the DNR's reissuance of a WPDES permit to Kinnard Farms because she is concerned about how the expansion of Kinnard Farms' dairy, including the construction of site 2 closer to her home, will affect the health of her and her family through groundwater contamination and air pollution,

her ability to enjoy the wildlife, woods and waterways around her property, and her property value.

3. Lynda Cochart is a resident of Kewaunee County, Wisconsin, residing at N8824 Spruce Road, Casco, Wisconsin 54205. She has lived on Spruce Road for 36 years, which is 1 mile from her birth home, both of which are in the Town of Lincoln. This is very close to site 2 of Kinnard Farms' dairy, which will be located on the west side of Spruce Road, where it meets with her property line. Lynda Cochart is aware of karst features, including exposed bedrock, on her property. She is very concerned about the increased risk of groundwater contamination from the expanded dairy given the number of wells that are already contaminated in the Town of Lincoln and the increased risk of groundwater contamination from site 2 and the associated increased land application of manure. She is concerned for her health and the health of her family and her grandchildren who live nearby and spend time at her home. Lynda Cochart also enjoys spending time outside in the land and water on her property. She is concerned about how the risk of surface water and groundwater pollution and odors from the large dairy operation at site 2 will affect her property value. Lynda Cochart is adversely affected by the DNR's decision to reissue Kinnard Farms' WPDES permit to allow it to expand its dairy operation near her home because she is concerned about the risk of surface water and groundwater contamination, the pollution of her drinking water, the health effects from air and water pollution, and the impact on her property value.

4. Roger DeJardin is a resident of Kewaunee County, Wisconsin residing at N8208 County Highway C, Casco, Wisconsin 54205. Mr. DeJardin has lived here all of his life. His home is 0.7 miles to the east of Kinnard Farms' planned site 2. He is concerned about increased land application of manure around his home from Kinnard Farms' dairy operation because he

believes that the amount of liquid manure being land applied is already contributing to surface water contamination. Casco Creek, the headwaters of which are around 300 feet to the north of site 2, runs through the southwest corner of his farm and is surrounded by wetlands on his property. Mr. DeJardin is concerned that Casco Creek's water quality is already being impacted by agriculture in the area and that the expanded dairy will further degrade water quality and affect aquatic life and wildlife that live in the creek. He also has chronic obstructive pulmonary disease, which makes it hard for him to breathe, and he is concerned that Kinnard Farms' expanded dairy will affect air quality and his health. He is also concerned about increased noise and traffic from the expanded operation at site 2. Mr. DeJardin is adversely affected by the DNR's decision to reissue Kinnard Farms' WPDES permit to allow it to expand its dairy operation near his home because he is concerned about contamination of the creek that runs through his property, about how that will affect aquatic life and wildlife, and about increased noise and traffic around his home.

5. Troy Jandrin is a resident of Kewaunee County, Wisconsin and resides at E2918 Robin Lane, Casco, Wisconsin 54205. His home is approximately 300 feet to the north of Kinnard Farms' planned site 2. Mr. Jandrin and his family use drinking water from their private well, which is very close to Kinnard Farms' proposed site 2. He and his family are concerned about the risk of groundwater contamination and contamination of their well from Kinnard Farm's expanded dairy. Additionally, a pond and the headwaters of Casco Creek are on Mr. Jandrin's property behind his house and he is concerned that Kinnard Farms' dairy will cause contamination of these surface waters. Mr. Jandrin is also concerned about how the expanded dairy will affect air quality and the quality of life for him and his family. Mr. Jandrin is adversely affected by the DNR's decision to reissue Kinnard Farms' WPDES permit to allow it

to expand its dairy operation near his home because of his concerns regarding the risk of surface water and groundwater contamination, including contamination of his drinking water, and worsening air quality and how that contamination will affect his family's health. Further, he is adversely affected because of the likelihood that a large dairy this close to his home will affect his quality of life, property value and the desirability of the area.

6. Dan and Ericka Routhieaux are residents of Kewaunee County, Wisconsin and reside at E3005 Robin Lane, Casco, Wisconsin 54205. Their home is approximately 200 feet from the proposed site 2 of Kinnard Farms' expanded dairy. They are concerned about contamination of surface and groundwater from Kinnard Farms' operation because they have observed a creek that is fed by a spring running right through the proposed site 2. The Routhieauxs are concerned that this surface water connection to the groundwater right on site 2 will lead to contamination of their drinking water. They are very concerned about the risk of groundwater contamination and not finding out about that contamination until someone in their family gets sick. The Routhieauxs also hunt in the area around their home and the planned site 2. Their children also ride snowmobiles, all-terrain vehicles and dirt bikes around their property. The Routhieauxs are concerned that they may be forced to move to protect their health and quality of life, but that their property value will be greatly diminished because it is so close to this planned facility. The Routhieauxs are adversely affected by the DNR's decision to reissue Kinnard Farms' WPDES permit to allow it to expand its dairy operation near their home because their health, quality of life and property value will be affected by Kinnard Farms' planned dairy expansion, which will be located 200 feet from their home. They are concerned that the permit fails to protect surface water and groundwater quality and fails to protect them and their family from pollution from Kinnard Farm's expanded dairy.

7. Sandy Winnemueller is a resident of Kewaunee County, Wisconsin and resides at N8308 Black Ash Road, Algoma, WI 54201. Ms. Winnemueller lives near Kinnard Farms and is surrounded by farm fields on which Kinnard Farms plans to land apply manure. She is concerned about groundwater and surface water contamination by nitrates and bacteria. Ms. Winnemueller enjoys fishing, canoeing and hiking in the area and is concerned about how Kinnard Farms' expanded dairy will affect her use and enjoyment of the land and water. Ms. Winnemueller is adversely affected by the DNR's decision to reissue Kinnard Farms' WPDES permit to allow it to expand its dairy operation because it will affect her use and enjoyment of the land and water resources in the area, including her enjoyment of her hiking, canoeing and fishing activities, and she is also concerned about impacts to her health if groundwater is contaminated.

II. PETITIONERS' RIGHT TO ADMINISTRATIVE REVIEW.

8. Section 283.63 of the Wisconsin Statutes accords petitioners a right to administrative review.

III. SPECIFIC ISSUES REQUESTED TO BE REVIEWED.

Petitioners seek review of the following issues related to the reasonableness of the terms and conditions in Kinnard Farms' WPDES permit:

A. Issue One: Sections 1.1, 1.2, 1.3, 1.3.1, 1.3.2, 1.5, 1.7, and 1.8 of Kinnard Farms' Reissued WPDES Permit Regarding Production Area Discharge Conditions and Monitoring Conditions Are Unreasonable Because They Fail to Ensure Compliance With State Water Quality Standards.

9. The DNR reissued Kinnard Farms' WPDES permit without all of the information it needed to approve the plans and specifications for the production area facilities at site 2. As a result, the DNR reissued Kinnard Farms' WPDES permit with conditions that fail to ensure

compliance with state water quality standards as required by statute and rule. The conditions in the permit fail to ensure compliance with state water quality standards because the DNR did not have complete and sufficient information in Kinnard Farms' plans and specifications for its facilities at site 2 to demonstrate that those facilities will adequately protect surface water quality or to allow the DNR to determine whether additional conditions or monitoring are necessary.

10. The DNR may issue a WPDES permit authorizing discharges to waters of the state only if the WPDES permit includes conditions assuring the discharges will meet effluent limitations and standards, and any more stringent limitations necessary to meet state water quality standards. Wis. Stat. § 283.31(3), (4); *see also* Wis. Admin. Code § NR 243.13(1). At a minimum, the DNR must include conditions that ensure “the discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by the permit shall constitute a violation of the terms and conditions of the permit.” Wis. Stat. § 283.31(4)(a).

11. “[A] large CAFO may not discharge manure or process wastewater pollutants to navigable waters from the production area, unless” precipitation causes an overflow from a “containment or storage structure [that] is properly designed, construed and maintained to contain all manure or process wastewater from the operation, including the runoff and the direct precipitation from a 25-year, 24-hour applicable rainfall event” and that is properly operated. Wis. Admin. Code § NR 243.13(2). As explained above, the DNR is required to include conditions in a WPDES permit that ensure compliance with this effluent limitation. In order for the DNR to make a reasoned decision regarding what conditions are necessary to comply with this effluent limitations and water quality standards, WPDES permit applications must include complete plans and specifications for reviewable facilities sufficient to allow the DNR to approve those plans and specifications. *See* Wis. Admin. Code § NR 243.15(1).

12. Therefore, contrary to the DNR's response to comments, the DNR may allow a permittee to submit plans and specifications for changes to reviewable facilities proposed during the permit term only where the changes do not amount to a substantial change to the production area. The DNR may not reissue a WPDES permit to a facility to authorize the facility to expand to a new production site a quarter mile away from its current operation without first obtaining complete plans and specifications for the reviewable facilities and approving that those plans meet statutory and regulatory requirements and technical standards. The terms and conditions of a WPDES permit needed to ensure compliance with water quality standards are necessarily unreasonable, i.e., without a reasonable factual basis, when the DNR reissues a WPDES permit for an entirely new production area without complete, approved plans and specifications.

13. Allowing a facility to submit plans and specification for a substantial change to the production area—or to submit additional information needed in order to approve the facilities—during the permit term violates Wis. Stat. § 283.31, Wis. Admin. Code §§ NR 243.13, 243.14(9), 243.15(3)(i), (7), the public participation requirements in Wis. Stat. §§ 283.39-.49, and the environmental review requirements in Wis. Stat. § 1.11 and Wis. Admin. Code ch. NR 150. Absent a review of this relevant information, the DNR simply cannot make a reasoned decision regarding what conditions, including monitoring and recordkeeping conditions, must be included in the WPDES permit to ensure compliance with surface water and groundwater quality standards. Wisconsin Admin. Code § NR 243.15(1) does not allow the DNR to issue a WPDES permit that authorizes a large CAFO to increase in size significantly without first obtaining adequate plans and specifications and finalizing its review of the production area for the expanded facility.

14. For these reasons, petitioners request review of the reasonableness of sections 1.1, 1.2, 1.3, 1.3.1, 1.3.2, 1.5, 1.7, and 1.8. Petitioners assert that sections 1.1, 1.2, 1.3, 1.3.1, 1.3.2, and 1.5 are unreasonable because the conditions fail to ensure compliance with state water quality standards. The DNR lacked sufficient information about the design of the proposed production area for site 2 to make a reasoned determination that these conditions “ensure that clean water is diverted, as appropriate, from the production area and that are necessary to achieve compliance with surface water and groundwater quality standards,” or whether additional conditions would be needed to do so. *See* Wis. Admin. Code § NR 243.13(1). Petitioners further assert that sections 1.7 and 1.8 are unreasonable because they fail to ensure compliance with state water quality standards. The DNR lacked sufficient information to determine whether the groundwater and surface water monitoring conditions adequately allow the DNR “to determine compliance with permit conditions.” The DNR also lacked sufficient information “to evaluate impacts to groundwater” or whether “geologic or construction conditions warrant monitoring” necessary to ensure compliance with water quality standards. *See* Wis. Admin. Code § NR 243.15(7), 243.19(1).

B. Issue Two: Section 1.1 Is Unreasonable Because It Fails to Ensure That Discharges Authorized By the WPDES Permit Comply With Surface Water Quality Standards.

15. Section 1.1 of Kinnard Farms’ reissued WPDES permit fails to ensure that discharges authorized by the permit will comply with surface water quality standards. The DNR may issue a WPDES permit that authorizes discharges to waters of the state only if the discharges allowed under the permit meet effluent limitations and standards, and any more stringent limitations necessary to meet state water quality standards. Wis. Stat. § 283.31(3). The DNR is required to include conditions in WPDES permits “to assure compliance with the

requirements of sub. (3).” Wis. Stat. § 283.31(4); *see also* Wis. Admin. Code § NR 243.13(1).

At a minimum, the DNR must include conditions that ensure “the discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by the permit shall constitute a violation of the terms and conditions of the permit.” Wis. Stat. § 283.31(4)(a).

16. Specifically for large CAFOs, the DNR is required to “include conditions in a WPDES permit for the production area and ancillary service and storage areas ... that are necessary to achieve compliance with surface water and groundwater quality standards contained in chs. NR 102 to 105, 140 and 207, and the livestock performance standards and prohibitions prescribed in NR 151.” Wis. Admin. Code NR § 243.13(1).

17. Additionally, all large CAFO WPDES permits must include conditions that ensure that “[i]f a discharge of manure or process wastewater pollutants to waters of the state occurs, including a discharge allowed under [the WPDES permit], the discharge shall comply with groundwater and surface water quality standards.” Wis. Admin. Code § NR 243.13(5).

18. Section 1.1 of Kinnard Farms’ WPDES permit is unreasonable because it fails to ensure that any authorized discharges to *waters of the state* comply with surface water quality standards. Wisconsin Stat. § 281.31 requires WPDES permits to include conditions that limit the discharge of pollutants to all waters of the state. Kinnard Farms’ WPDES Permit § 1.1 is unreasonable because it establishes limitations only on discharges to *navigable waters* from the production area, but fails to establish limitations on discharges to *waters of the state*, which include all “surface water or groundwater, natural or artificial, public or private within the state.” Wis. Stat. § 283.01(20).

19. In violation of the statutory and regulatory requirements described above, the conditions in section 1.1 of the reissued permit fail to ensure that any discharges to waters of the

state, as authorized under the WPDES permit, comply with water quality standards and do not impair wetland functional values, specifically the wetlands to the north and east of site 2 of Kinnard Farms dairy operation, including a persistent, emergent wet meadow wetland type that appears to be less than 100 feet to the north of site 2.

20. Additionally, the conditions in section 1.1 of the Kinnard Farms WPDES permit fail to ensure compliance with Wis. Admin. Code § NR 102.11 and ch. NR 207. Specifically, despite the proximity of site 2 to Casco Creek, a downstream segment of which is designated an Exceptional Resource Water (ERW), the conditions in the permit authorize new or increased discharges of pollutants to an outstanding or exceptional resource water in excess of existing levels of the pollutants immediately upstream of the discharge site.

21. For these reasons, petitioners request review of the reasonableness of section 1.1 of Kinnard Farms' WPDES permit, which allows discharges to navigable waters from the production area under certain circumstances if the discharge complies with groundwater and surface water quality standards. Petitioners assert that section 1.1 of Kinnard Farms' WPDES permit is unreasonable because it (1) cannot ensure that any discharges to *waters of the state*, which includes all groundwater and surface water, Wis. Stat. § 283.01(20), comply with surface water and groundwater quality standards, (2) cannot ensure that any production area discharges to waters of the state authorized under Kinnard Farms' WPDES permit comply with water quality standards and will not impair wetland functional values, and (3) cannot ensure that all new or increased discharges of pollutants to an outstanding or exceptional resource water will not exceed existing levels of the pollutant immediately upstream of the discharge site.

C. Issue Three: Sections 1.1, 1.7 and 1.8 Are Unreasonable Because They Fail to Ensure That Discharges Authorized By the WPDES Permit Comply With Groundwater

Quality Standards and Do Not Allow the DNR to Determine Compliance With Permit Conditions.

22. The DNR may issue a WPDES permit that authorizes discharges to waters of the state only if the discharges allowed under the permit meet groundwater protections standards established under ch. 160 of the Wisconsin Statutes. Wis. Stat. § 283.31(3)(f). The DNR is required to include conditions in WPDES permits “to assure compliance with” groundwater protection standards. Wis. Stat. § 283.31(3), (4); *see also* Wis. Admin. Code § NR 243.13(1). At a minimum, the DNR must include conditions that ensure “the discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by the permit shall constitute a violation of the terms and conditions of the permit.” Wis. Stat. § 283.31(4)(a). Further, the DNR is required to include a monitoring and inspection program in the WPDES permit that will determine compliance with permit conditions. Wis. Admin. Code § NR 243.19(1). The DNR is also required to make a determination regarding whether “monitoring is necessary to evaluate impacts to groundwater” and whether “geologic or construction conditions warrant monitoring,” and if so the DNR may require the installation of a groundwater monitoring system. Wis. Admin. Code § NR 243.15(7).

23. The primary pollutants of concern associated with large CAFOs are total coliform bacteria and nitrate. The DNR has established enforcement standards (ESs) and preventative action limits (PALs) in Wis. Admin. Code § NR 140.10, which constitute groundwater quality standards. However, in order for the DNR to determine whether either standard has been exceeded and to authorize it to respond, the DNR must determine background levels of groundwater quality at the site and conduct monitoring. *See* Wis. Admin. Code § NR 140.20 (providing methods to establish background water quality), 140.22(2) (providing locations where

compliance with groundwater quality standards may be evaluated), 140.24 (providing the DNR's response when a PAL is exceeded based on monitoring at a facility), 140.26 (providing the DNR's response when an ES is exceeded based on monitoring at a facility), 140.28 (allowing the DNR to grant exemptions to facilities where background concentrations of pollutants exceed the PAL or ES).

24. The terms and conditions in Kinnard Farms' WPDES permit are unreasonable because they fail to ensure compliance with groundwater quality standards. It was unreasonable for the DNR to reissue Kinnard Farms' WPDES permit without evaluating background concentrations of pollutants or requiring groundwater monitoring. In the Town of Lincoln, where site 2 will be constructed, 24 percent of private wells exceed the groundwater quality standard for nitrate and 42 percent of private wells tested positive for fecal coliform bacteria. Karst geology, which is associated with an increased risk of groundwater contamination from surface activities, is present throughout Kewaunee County. Three of the petitioners have private drinking water wells within 300 feet of site 2. As explained above, the DNR was unable to evaluate the risk of groundwater contamination because it did not have all of the information about the site 2 production area facilities when it reissued Kinnard Farms' WPDES permit. The design of the facilities had not been finalized to DNR's satisfaction when the DNR reissued the WPDES permit.

25. For these reasons, petitioners seek review of the reasonableness of sections 1.1, 1.7 and 1.8 of Kinnard Farms' WPDES permit. Petitioners assert that the terms and conditions in section 1.1 of Kinnard Farms' WPDES permit are unreasonable because this section (1) cannot ensure that any discharges to *waters of the state*, which includes all groundwater and surface water, Wis. Stat. § 283.01(20), comply with surface water and groundwater quality

standards, (2) cannot ensure that the DNR can collect background groundwater quality information that is necessary to determine what groundwater quality standards apply to this facility. Petitioners further assert that sections 1.7 and 1.8 are unreasonable because they do not provide for any sampling or monitoring to assess background groundwater flow and to establish background levels of contaminants, and because they fail to require monitoring to evaluate impacts to groundwater and determine compliance with permit conditions. *See Wis. Admin. Code §§ NR 243.15(7), 243.19(1).*

D. Issue Four: Sections 1.3.1, 1.3.3, 2 and 3.1.12 Regarding the Minimum Manure Storage Required and a Construction Schedule Are Unreasonable Because They Fail To Include the Current and Proposed Maximum Number of Animal Units Necessary To Ensure Compliance With Manure Storage Requirements.

26. Sections 1.3.1, 1.3.3, 2 and 3.1.12 are unreasonable because the DNR has not included any maximum number of animal units, which is required in order to comply with Wis. Stat. 281.31(4)(a), (5) and Wis. Admin. Code § NR 243.17(3)(c). These regulatory and statutory requirements in the WPDES program are predicated on the number of animal units that a CAFO proposes to obtain. Wisconsin Stat. § 283.31(4)(a) requires that WPDES permits include a condition “[t]hat the discharge of any pollutant more frequently than or at a level in excess of that identified and authorized by the permit shall constitute a violation of the terms and conditions of the permit.” Wisconsin Stat. § 283.31(5) requires that all WPDES permits specify maximum levels of discharges. Further, Wis. Admin. Code § NR 243.17(3)(c) requires a permit applicant to demonstrate compliance with the 180-day-manure-storage requirement at certain times including whenever a facility proposes a 20% expansion in animal units.

27. Kinnard Farms' WPDES permit includes a standard condition requiring Kinnard Farms to "report to the [DNR] any facility or operation expansion, production increase or process modifications which will result in new, different or increased amount of manure or process wastewater produced or handled by the permittee or which will result in new, different or increased discharges of pollutants to water of the state." Kinnard Farms' WPDES Permit § 3.1.12. This condition, without including the current and proposed maximum number of animal units fails to satisfy the requirements in Wis. Stat. § 281.31(4)(a), (5) because it fails to establish a maximum level of discharge and fails to comply with Wis. Admin. Code § NR 243.17(3)(c) because it does not include an established threshold beyond which a permittee must report changes to the DNR.

28. The standard reporting requirement fails to satisfy the requirement that a WPDES permit contain the maximum number of animal units in order to comply with the above statutory and regulatory requirements. Kinnard Farms' WPDES permit, like others for large dairy CAFOs, prohibits the discharge of manure or process wastewater from the production area unless precipitation causes an overflow of a manure storage structure that is properly designed, constructed, maintained and operated, and the discharge complies with groundwater and surface water quality standards. The only limit on the quantity of manure discharged as authorized by the permit is a limit on the quantity of manure being stored, which directly correlates to the number of animal units at the facility. Consistent with the DNR's position that it may review and approve plans and specifications for manure storage facilities during the permit term, outside of the WPDES permitting process, there is nothing to stop a permittee from constructing additional manure storage facilities and expanding the number of animal units at the facility, thus increasing the amount of manure discharged. The only way to set a maximum level of discharge

in the WPDES permit and to provide some threshold to trigger the requirement in Wis. Admin. Code § NR 243.17(3)(c) is to set a maximum number of animal units in the WPDES permit. The standard reporting requirement fails to satisfy these requirements.

29. Similarly, the requirement that a CAFO operator maintain manure storage facilities with the capacity to store 180 days of manure depends upon the number of animal units, i.e., the amount of manure produced per day, at the facility. All CAFOs must “have liquid manure storage or containment facilities that are properly designed to provide a minimum of 180 days of storage in accordance with par. (k).” Wis. Admin. Code § NR 234.15(3)(j). Design volume is calculated “based on the maximum animals present at an operation for the period of time liquid manure and other wastes mixed with the liquid manure are to be stored during any 180-day period and other design considerations.” Wis. Admin. Code § NR 243.15(3)(k). Kinnard Farms’ WPDES permit includes conditions that require Kinnard Farms to demonstrate that it has the capacity for 180 days of manure storage in the design and operation of its manure storage facilities and at other times during the WPDES application process and permit term. *See* Kinnard Farms’ WPDES Permit §§ 1.3.1, 1.3.3. These conditions are meaningless and the permit fails to comply with the regulations unless the WPDES permit provides the current, proposed and maximum number of animal units allowed.

30. For these reasons, petitioners seek review of the reasonableness of sections 1.3.1, 1.3.3, 2 and 3.1.12 of Kinnard Farms’ WPDES permit. Petitioners assert that the terms and conditions in section 2 are unreasonable because this section, and the rest of Kinnard Farms’ WPDES permit, fails to include the maximum number of animal units that Kinnard Farms may maintain. Petitioners further assert that sections 1.3.1 and 1.3.3 are unreasonable because they require Kinnard Farms to maintain 180 days of manure storage, but fail to include the number of

animal units at the facility which corresponds to the amount of manure storage capacity necessary to meet this requirement. Finally, section 3.1.12 is unreasonable and meaningless because the WPDES permit does not contain the current and proposed maximum number of animal units so the permit lacks an established threshold beyond which Kinnard Farms must report changes to the DNR

E. Issue Five: Sections 1.6 and 2 Are Unreasonable Because They Fail to Ensure That Kinnard Farms Will Maintain Adequate Manure Storage.

31. The terms and conditions in Kinnard Farms' WPDES permit area unreasonable because they fail to establish that Kinnard Farms will maintain adequate manure storage. Wis. Admin. Code § NR 243.14(9); 234.15(3)(j), (k). The terms and conditions in a WPDES permit, including the terms and conditions of the NMP, must demonstrate adequate manure storage. A NMP is an integral component of a large CAFO WPDES permit because it provides the best management practices that constitute the effluent limitations for a CAFO's land application of manure and process wastewater. *Waterkeeper Alliance, Inc. v. United States Env'tl. Protection Agency*, 399 F.3d 486, 499 (2nd Cir. 2005). Permit applicants are required to develop and submit for DNR review and approval a NMP that complies with statutory and regulatory requirements and the technical standards incorporated by reference. Wis. Admin. Code §§ NR 243.14(1); 243.07. Permit applicants are required to "have and maintain adequate storage for all manure and process wastewater generated and land applied in compliance with the conditions and timing restrictions of the permit, nutrient management plan and this chapter. As part of the NMP, the permittee shall provide the department with documentation that it has adequate storage and methods of maintaining adequate storage for liquid manure, adequate storage means a minimum of 180 days of storage designed and maintained in accordance with ss. NR

243.15(3)(i) to (k) and 243.17(3) and (4).” Wis. Admin. Code § NR 243.14(9). All CAFOs must “have liquid manure storage or containment facilities that are properly designed to provide a minimum of 180 days of storage in accordance with par. (k).” Wis. Admin. Code § NR 234.15(3)(j). Design volume must be calculated “based on the maximum animals present at an operation for the period of time liquid manure and other wastes mixed with the liquid manure are to be stored during any 180-day period and other design considerations.” Wis. Admin. Code § NR 243.15(3)(k).

32. The manure storage capacity required to store all manure and process wastewater produced over a 180-day period depends upon the number of animal units at a facility. As explained above, because the WPDES permit fails to include the current and proposed maximum number of animal units at Kinnard Farms, it is unclear what quantity of manure storage Kinnard Farms is required to have now and in the future. There is also no construction schedule for site 2 to ensure that Kinnard Farms will have adequate manure storage as it expands its operation over the next three to four years. In section 2.5 of the WPDES permit, which provides for the installation of the manure storage facilities, the due date for this action provides “Construction shall start once plans are approved.” This condition fails to demonstrate compliance with the above regulations that require Kinnard Farms to maintain adequate manure storage.

33. Additionally, Kinnard Farms NMP fails to demonstrate that it currently has sufficient manure storage to comply with the 180-day storage requirement in Wis. Admin. Code § NR 243.14(9). The NMP provides the following to establish “180 days storage and methods for maintaining storage” to comply with NR 243.14(9) and NR 243.17(3):

Please refer to the summary below for manure storage capacity calculations.
Please refer to Section 3.0 of plan for land application schedules for specific fields
– this schedule demonstrates how Kinnard Farms Inc. will maintain 180 days
storage capacity over time. Waste storage facilities have a total 21,000,000

gallons of liquid capacity and 500 tons of solids capacity. Manure production is 34,000,000 gallons this gives the dairy 222 days of liquid capacity.”

34. The information Kinnard Farms provided in section 3 of its NMP regarding manure production for 2012 indicates that Kinnard Farms estimated that it would produce 43,153,266 gallons of liquid manure in 2012. Based on that figure, Kinnard Farms has estimated that it will produce 21,281,062 gallons of manure in a 180 day period. Kinnard Farms’ current manure storage capacity is only 21,000,000 gallons. Based on Kinnard Farms’ own estimates, it does not have adequate manure storage for 2012.

35. For these reasons, Petitioners seek review of the reasonableness of sections 1.6 and 2 of Kinnard Farms’ WPDES permit including the terms and conditions of the incorporated NMP. Petitioners assert that Kinnard Farms has failed to demonstrate at the time it applied for permit reissuance and in its NMP that it had 180 days of manure storage capacity in violation of Wis. Admin. Code §§ NR 243.14(9), 243.15(j), 243.17(3)(c). Further, Petitioners assert that the construction schedule in Kinnard Farms’ permit is unreasonable because it fails to ensure that construction of the manure storage facilities will be constructed by a particular date to ensure adequate manure storage.

F. Issue Six: Section 1.6 and the NMP Are Unreasonable Because These Conditions Fail to Ensure Compliance With State Water Quality Standards and Include Unattainable Yield Goals.

36. Section 1.6 and the NMP fail to ensure compliance with best management practices because the yield goals are not attainable and do not comply with NRCS Standard 590. As explained above, an approved NMP that complies with statutory and regulatory requirements and incorporated technical standards is a required component of a WPDES permit for a large CAFO. Some of the technical standards with which a NMP must comply are provided in NRCS

Standard 590. *Id.* In regard to the yield goals that determine the rate at which a CAFO may land apply manure and process wastewater, NRCS Standard 590 provides that the NMP “shall be based on yield goals that are attainable under average growing conditions and established using soil productivity, local climate information, multi-year documented yields, and/or local research on yields for similar soils and crop management systems. Yield goals should not be higher than 15% above the previous 3-5 year average.” NRCS Standard 590 V.A.1.b.

37. The yield goals in Kinnard Farms’ NMP are higher than 15% above the previous 3-5 year average for Kewaunee County. There is no documentation in the NMP explaining or justifying this violation of the NRCS standard.

38. For these reasons, Petitioners seek review of the reasonableness of section 1.6 of Kinnard Farms’ WPDES permit and the terms and conditions of the incorporated NMP. Petitioners assert that the terms and conditions in section 1.6 and Kinnard Farms’ NMP are unreasonable because the yield goals do not comply with NR 243 and NRCS Standard 590 and lack a documented basis.

G. Issue Seven: Section 1.6 and the NMP are Unreasonable Because They Fail to Ensure Compliance With State Water Quality Standards By Identifying Drain Tile Lines to the Maximum Extent Practicable.

39. As explained above, an approved NMP that complies with statutory and regulatory requirements and incorporated technical standards is a required component of a WPDES permit for a large CAFO. Wisconsin Admin. Code § NR 2434.14(2)(c) requires a permit applicant to “identify as part of its nutrient management plan, to the maximum extent practicable, the presence of subsurface drainage systems in fields where its manure or process wastewater is applied.”

40. Kinnard Farms' NMP identifies several fields with known drain tiles, but does not document any measures that Kinnard Farms took to identify, to the maximum extent practicable, whether other fields have drain tiles. The NMP provides which fields have known drain tiles, provides maps for those fields and provides that "[b]efore manure is applied on these or any fields the tile outlets will be located to the best ability possible." The NMP also outlines what steps Kinnard Farms will take to identify known drain tile locations in its approved fields, including reviewing information on how to identify drain tiles. This conflicts with Wis. Admin. Code § NR 243.14(2)(c), which require a permit applicant to identify "as part of its nutrient management plan" the presence of drain tiles in its fields.

41. For these reasons, petitioners seek review of the reasonableness of section 1.6 of Kinnard Farms' WPDES permit and the terms and conditions of the incorporated NMP. Petitioners assert that the terms and conditions in section 1.6 and Kinnard Farms' NMP are unreasonable because the NMP does not identify, "to the maximum extent practicable, the presence of subsurface drainage systems in fields where its manure or process wastewater is applied" as required by Wis. Admin. Code § NR 243.14(2)(c).

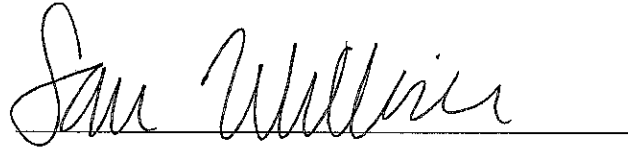
IV. REASONS WHY A HEARING IS WARRANTED.

For the foregoing reasons a hearing is warranted to resolve the above material disputes of fact and to determine the reasonableness of sections 1.1, 1.2, 1.3, 1.3.1, 1.3.2, 1.3.3, 1.5, 1.6, 1.7, 1.8, 2, and 3.1.12 of Kinnard Farms' WPDES permit.

Dated this _____ day of October, 2012

Respectfully submitted,

MIDWEST ENVIRONMENTAL ADVOCATES, INC.

A handwritten signature in cursive script, appearing to read "Sarah Williams", is written over a horizontal line.

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