



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

RULING ON MOTION FOR SUMMARY JUDGMENT

The PARTIES to this proceeding were previously certified on a preliminary basis as follows:

Kinnard Farms, Inc., by

Attorney Jordan J. Hemaidan
Attorney Michael P. Screnock
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P. O. Box 1806
Madison, WI 53701-1806

Petitioners:

1. Lynda Cochart
2. Amy Cochart
3. Roger D. DeJardin
4. Sandra Winnemueller
5. Chad Cochart (Requests to Be Admitted as a Petitioner), by

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

NOTE: The following prior Petitioners request to be withdrawn:

1. Troy Jandrin on March 6, 2013 (Granted at Prehearing)
2. Ericka and Dan Routhieaux on April 17, 2013

Wisconsin Department of Natural Resources (DNR), by

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Kinnard Farms, Inc. (Kinnard or Kinnard Farms) filed a Motion for Summary Judgment on May 3, 2013 the last brief was filed on June 14, 2013. There are two separate issues for which Kinnard Farms moves for summary judgment. First, it alleges that a putative lapse in the number of petitioners constitutes a jurisdictional defect requiring dismissal of the case. Second, Kinnard Farms asserts that there is no explicit statutory or administrative code authority for the DNR to include a maximum number of animal units in either the WPDES permit or the nutrient management plan.

Summary Judgment Methodology

The motion is subject to the standard summary judgment methodology as set forth in *Voss v. City of Middleton*, 162 Wis. 2d 737, 747-48, 470 N.W.2d 625 (1991):

There is a standard methodology which a trial court uses when faced with a motion for summary judgment. The first step of that methodology requires the court to examine the pleadings to determine whether a claim for relief has been stated and a material issue of fact presented. If a claim for relief has been stated, the inquiry then shifts to the moving party's affidavits or other proof to determine whether the moving party has made a *prima facie* case for summary judgment under sec. 802.08, Stats. . .

If the moving party has made a *prima facie* case for summary judgment, the court must examine the affidavits and other proof of the opposing party to determine whether there exist disputed material facts or undisputed material facts from which reasonable alternative inferences may be drawn sufficient to entitle the opposing party to a trial. . . .

[S]ummary judgment must be entered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. [citations omitted]

Whether a moving party has presented a “prima facie case” is a question of law. *Oneida County D.S.S. v. Therese S.*, 2008 WI App. 159, ¶7, 314 Wis. 2d 493, 762 N.W.2d 122.

Further, even if a *prima facie* case for summary judgment is made, the motion still must be denied if there exist disputed material facts or undisputed material facts from which reasonable alternative inferences may be drawn. *Voss*, p. 748.

Procedural History and Undisputed Facts

On August 6, 2012, the DNR issued Kinnard Farms Wisconsin Pollutant Discharge Elimination System (WPDES) permit no. WI-0059536-03-0 (the Permit). The Permit was issued pursuant to the authority granted the DNR in Wis. Stat. ch. 283 and Wis. Admin. Code ch. NR 243. On October 15, 2012, Amy Cochart, Lynda Cochart, Roger DeJardin, Troy Jandrin, Dan Routhieaux, Ericka Routhieaux and Sandy Winnemueller (collective, Petitioners) filed a verified petition (the Petition) seeking review of certain Permit terms pursuant to Wis. Stat. § 283.63(1), raising seven issues for review.

By letter dated December 14, 2012, the Department “granted” a contested case hearing on all seven issues, limiting them to the extent those issues address the limited scope of department review allowed by § 283.63. That statute provides for review of the “reasonableness of or necessity for any term or condition” of a WPDES permit. The Department specifically limited the scope of its departmental review as follows:

To the extent Petitioners seek to challenge the timing of the permit issuance, the timing of the plans and specifications review, or seek review of the decision to reissue the permit, that challenge is denied as beyond the scope of s. 283.63, Stats., review.

To the extent the Petition seeks review of a lack of public participation procedure for plans and specifications procedures, such review is denied.

To the extent Petitioners have challenged the permit’s requirement to comply with water quality standards on the basis of the timing of the Department’s plans and specifications review, such review is beyond the scope of s. 283.63, Stats., and is denied. Likewise, several of the Petition’s headings claim that the referenced permit sections fail to ensure compliance with water quality standards. Where such headings are either not supported by corresponding arguments of the Petition or are supported only by a challenge based on the timing of the Department’s plans and specifications review, such review is denied.

(Ltr. from Matt Moroney, Deputy Sec’y, WDNR to Sarah Williams (December 14, 2012), p. 2).

On February 21, 2013, the DNR referred the case to the Division of Hearings and Appeals for a hearing. On February 27, 2013, the Division of Hearings and Appeals provided notice that a telephone prehearing conference would take place on Thursday, April 18, 2013.

As of March 6, 2013, Troy Jandrin had withdrawn from the Petition. *See* Prehearing Conference Report and Scheduling Order (Apr. 18, 2013) (hereafter, “Prehr’g Conf. Rpt.”). On April 17, 2013, counsel for Petitioners represented that Ericka and Dan Routhieaux had withdrawn from the Petition, and further represented that Chad Cochart requested to be admitted as a co-petitioner. (Letter from Sarah Williams to Administrative Law Judge (ALJ) Jeffrey Boldt (Apr. 17, 2013) (hereafter “Williams Ltr.”); see also Prehr’g Conf. Rpt.). On April 18, 2013, the ALJ established the date and time for the hearing related to the Petition and provided notice of the hearing in the form of the Prehearing Conference Report.

A few days before the prehearing conference, Rod Kinnard, one of the owners of Kinnard Farms, informed Dan and Ericka Routhieaux that he would no longer consider potentially purchasing their home at some unspecified future date, if they did not withdraw as petitioners. (Routhieaux Aff., ¶¶5-6) Dan and Ericka Routhieaux live approximately 200 feet from Site 2 of Kinnard’s operation. (Petition, at 7) On April 17, 2013, Dan and Ericka Routhieaux requested to withdraw from participation in the contested case hearing, and Chad Cochart asked to be admitted as a petitioner in this matter. (Williams Ltr.)

The Routhieauxes sought to withdraw from the contested case hearing as a result of what they perceived of as pressure from one of the owners of Kinnard Farms that a good faith offer to purchase the Routhieaux home in the future would be taken off of the table if they failed to withdraw before the April 18, 2013, scheduling conference. (Routhieaux Aff., ¶7) In his own sworn affidavit, Mr. Ron Kinnard confirms that he suggested that “it would be better to negotiate (a fair price for the Routhieaux property) without the added weight of the litigation” but that this suggestion “was made honestly and in good faith” (Kinnard Aff., ¶10) rather than “as an ultimatum to the effect that if they did not withdraw from the litigation by a certain date Kinnard Farms would never agree to purchase their house.” (Kinnard Aff., ¶12)

The remaining Petitioners—Amy Cochart, Lynda Cochart, Roger DeJardin, Sandra Winnemueller, and Chad Cochart—live near Kinnard’s proposed Site 2. (Petition, at 3-8; Cochart Aff.) All of the Petitioners drink water from private wells on their property and are concerned about groundwater contamination from Kinnard Farms’ Site 2. (Petition, at 3-8; Cochart Aff.) Further, they are concerned about the impact of pollution from Kinnard’s Site 2 on the surface waters surrounding Site 2 and on downstream waters. (Petition, at 3-8; Cochart Aff.)

Ruling on Petitioners’ Motion for Summary Judgment Relating to Alleged Jurisdictional Defects in the Number of Petitioners

The first step of that methodology requires an examination of the pleadings to determine whether a claim for relief has been stated and a material issue of fact presented. Claims and interests for which relief could be granted were presented and the Department granted the hearing request as described and limited above.

The statutory right to a contested case hearing on a WPDES Permit is set forth Wis. Stat. § 283.63. Subsection (1) provides that “Any ... 5 or more persons may secure a review by the department of ... the reasonableness of or necessity for any term or condition of any issued, reissued or modified permit.” Wis. Stat. § 283.63(1). “A verified petition shall be filed with the

secretary setting forth specifically the issue sought to be reviewed by the department.” Wis. Stat. § 283.63(1)(a). The verified petition “shall indicate the interest of the petitioners and the reasons why a hearing is warranted.” Wis. Stat. § 283.63(1)(a). The statute also provides a deadline for requesting a hearing, requiring that a proper verified petition “be filed within 60 days after notice of any action which is reviewable under this section.” Wis. Stat. § 283.63(1)(a).

The remaining procedural requirements outlined in Wis. Stat. § 283.63 require the DNR to take action on a properly filed petition for a contested case hearing. Specifically, the DNR must provide public notice of the hearing at least 10 days before the hearing. Wis. Stat. § 283.63(1)(a). The DNR must also allow any member of the public to be admitted as a party and to participate in the contested case hearing. Wis. Stat. § 283.63(1)(b) (“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.”); Wis. Admin. Code § NR 2.08 (“In addition to the parties, any member of the public may participate in any department contested case hearing.”); *see also* Wis. Stat. § 227.44(2m).

Other than the requirements outlined above, there are no statutory prerequisites in Wis. Stat. § 283.63 or elsewhere to obtain a contested case hearing on a WPDES permit. Once 5 or more petitioners file a proper, verified petition for review, the petitioners are entitled to a hearing on the issues raised in the petition.

Kinnard Farms cites a 19th Century case, *LaLonde v. Board of Supervisors*, 80 Wis. 380, 386, 49 N.W. 920 (1891), for the proposition that individuals may withdraw their names and that this can in fact lead to a deficient petition where a specified number of petitioners is required. (*Id.* at 385-386)

However, unlike *LaLonde*, the DNR had “already acted” upon the petition and forwarded it to the Division for hearing well before the time some of the petitioners decided to opt out. The Department determined that all statutory standards for a hearing under § 283.63, including the five person requirement, had been met by the petitioners and “acted” upon the petition by forwarding it to the Division for hearing.

Subsequently, and well prior to the scheduled October 2013 hearing date, several petitioners were persuaded that it was in their best interest to withdraw. Mr. Routhieaux requested that he be allowed to withdraw on April 17, 2013. However, on the same date, another interested person, Mr. Chad Cochart, requested to be considered a named petitioner and a formal request was made by the petitioners’ counsel, Ms. Williams to allow the same. Chad Cochart quickly submitted a sworn affidavit dated April 22, 2013 asserting his direct and substantial interests in property and a nearby private drinking well and use of both ground and surface waters.

The permit holder seizes on the fact that the formal granting of the request to allow Chad Cochart be admitted in as a party had not been granted prior to Mr. Routhieaux’s request to withdraw. As it happens, the withdrawal request had not been formally granted prior to the request for Mr. Cochart to be admitted. But neither point is significant. Chad Cochart’s request to

be included as a petitioner is hereby granted. There was never a statutory jurisdictional defect with respect to the number of named petitioners.

The statute requires that to obtain a hearing five interested persons are stating objections at the time the petition for a hearing request is considered. This requirement was met. Similarly, five are required at the time of hearing. In this matter, Chad Cochart promptly and formally requested to be included as a named petitioner. At no time was there ever a jurisdictional defect sufficient to eliminate the due process rights of the other originally named petitioners, who like Chad Cochert, have asserted that they have substantial interests in the outcome of this proceeding.

The view of the law suggested by Kinnard Farms, Inc. simply does not give sufficient weight to the due process rights of the remaining petitioners. A petitioner might want to withdraw for health reasons, moving away from the state and thus the area impacted by a permit, or other reasons that should not immediately eliminate the ability of four other persons to have a federally required hearing under the Clean Water Act. So long as the DNR has "already acted" upon the petition by evaluating the petition, granting the request for hearing, and forwarded the matter to the Division some reasonable period of time to allow the petitioners to maintain the statutory requirement would be necessary to ensure the due process of the remaining petitioners.

At its worst, the permit holders' view could set up a potential for abuse of the process, since a permit holder might be induced to engage in sharp practices, such as embedding a confederate among the initial petitioners, or endeavoring to persuade one person from among the original five to withdraw at some point after the hearing request has been granted but prior to the hearing, and the matter would be dismissed with prejudice. This would certainly not give due process to the other four persons seeking a hearing for a permit review. Rather, it could invite both direct and indirect forms of pressure on petitioners and/or induce petitioners to name well more than the statutorily required five to preserve the right to a hearing. Neither potential development would be welcome.

It must be noted that there is no basis to conclude that any undue influence or sharp practices have been demonstrated in the instant matter. Rather, the Routhieauxes voluntarily withdrew based upon their concerns about selling their property.

The Petitioners met all statutory requirements at the time the hearing request was granted and continue to meet them now. The Motion for Summary Judgment must be denied on the basis of the alleged defect in the number of petitioners.

The Legal Authority to Include a Maximum Number of Animal Units

Issue No. 4 asks "[w]hether Sections 1.3.1, 1.3.3, 2 and 3.1.12 of the Permit are unreasonable because they do not include the current and proposed maximum number of animal units allowed at the facility." The Department granted the request for a contested case on this issue.

While the permit holder makes legal arguments noting that there is no specific legal authority to include such a provision, it is also true that there is no specific legal authority

preventing the inclusion of such a condition if it is “necessary to meet federal or state water quality standards” within the meaning of Wis. Stat. § 283.31. None of the affidavits submitted by the permit holder directly addressed the issue of whether or not a maximum number of animal units would or would not be required to meet water quality standards. Nor did the Department of Natural Resources submit any affidavits on this point.

The permit holder has not made out a prima facie case for summary judgment on this issue. Accordingly, there remain disputed issues of fact as to whether such a condition is appropriate and the Motions for Summary Judgment on this issue must be denied.

Maximum Identification on Drain Tiles

Issue No. 7 asks “[w]hether 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.” Again, the Petitioners fail to state a claim for which any relief is available, because contrary to Petitioners’ assertions, Section 1.6 of the Permit explicitly requires identification of drain tiles to the maximum extent practicable. Section 1.6.3 states:

The permittee shall identify, to the maximum extent practicable, the presence of subsurface drainage systems in fields where its manure or process wastewater is applied as part of the nutrient management plan.

(Emphasis added).

This permit section appears to be reasonable *per se* because it is taken verbatim from Wis. Admin. Code § NR 243.14(2)(e), which provides that “[a] permittee shall 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.”

While the DNR granted the hearing request on this issue, the petitioners intentionally left it out of their May 10, 2013 restatement of the issues and therefore Issue No.7 has effectively been withdrawn. Kinnard Farms counsel Mr. Hemaïdan confirmed that Kinnard had no objection to withdrawal of the issue by letter dated May 10, 2013. Ms. Williams, the petitioners counsel, confirmed that this issue had been withdrawn prior to the Motion for Summary Judgment. (06/03/13 Brief at p. 29)

ORDER

WHEREFORE, IT IS HEREBY ORDERED, that the Motion for Summary Judgment be DENIED, in all respects other than that as set forth below;

IT IS FURTHER ORDERED that Issue Seven be Withdrawn because the petitioners have previously withdrawn this issue as described above.

Dated at Madison, Wisconsin on August 30, 2013.

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By: 

Jeffrey D. Boldt,
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