November 24, 2014

Cathy L. Stepp (or her designee)
Secretary
Wisconsin Department of Natural Resources
PO Box 7921
Madison WI 53707-7921

RE: *Petitioners' response to Kinnard Farms, Inc.'s Petition for Review by the Secretary or the Secretary's Designee of the decision of the Administrative Law Judge in Case No. IH-12-071.*

Dear Secretary Stepp or her designee:

This letter is in response to the petition submitted by Kinnard Farms, Inc. (Kinnard) to the Secretary of the Wisconsin Department of Natural Resources (DNR) on November 18, 2014. The Petitioners in the underlying matter were compelled to respond to Kinnard's unusual and extraordinary request before the Secretary makes her decision.

This petition, invoking the process provided in Wis. Admin. Code § NR 2.20, requests action by the Secretary that far exceeds her authority under the governing statutes. Essentially, Kinnard asks the Secretary to overturn a well-reasoned final agency decision issued by Judge Jeffrey D. Boldt, the administrative law judge in this matter, which is supported by legal and factual conclusions that he made following four (4) full days of expert testimony, hours of public testimony, and extensive legal briefing by all parties. To Petitioners' knowledge, Secretary Stepp was not present for that hearing. Even more outrageous is Kinnard's additional request that the Secretary direct her employees to defy orders of the Division of Hearings and Appeals in what amounts to a collateral attack on orders that are not at issue in this case.

Given the very short timeline for the Secretary's review of Kinnard's NR 2.20 petition, this letter will be brief and will lack much of the legal and factual explanation that the Secretary must consider if she decides to review Judge Boldt's decision. In this letter, the Petitioners highlight our central objections to Kinnard's request—that the relief requested goes far beyond the

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Secretary's authority, undermines the integrity of the contested case hearing process, ignores the role of the administrative law judge as an independent decision maker, and invokes a reading of NR 2.20 that would render it an illegal rule. The Petitioners reserve all of their rights to more fully develop legal and factual arguments in subsequent briefing, and respectfully request that, if the Secretary does grant review, that she provide an opportunity for further briefing by all parties and consult with Judge Boldt before modifying the decision.

Kinnard asks the Secretary to take an extraordinary action: to immediately suspend and reverse Judge Boldt's decision. In support of its petition, Kinnard simply rehashes the arguments that did not prevail before Judge Boldt and laments the difficulty and cost of making the changes he ordered. Kinnard Farms does not offer any compelling reason, such as new facts or law, to support an action as dramatic as one party to a years-long contested case hearing overruling the decision of the impartial decision maker. After losing its arguments before Judge Boldt, Kinnard would like the Secretary to swiftly change the decision, even though she has not had any direct involvement in the case, to the Petitioners' knowledge, and was not present for the live testimony presented at the hearing. Kinnard's complaints about the time and expense of complying with the administrative law judge's order do not provide a legal basis for the Secretary to defy it. Kinnard can certainly present its arguments upon review in circuit court pursuant to Wis. Stat. § 227.52.

Not only would a decision by the Secretary be unjust as well as factually and legally unsound, it is based on an incorrect interpretation of NR 2.20. The only way to reconcile section NR 2.20 with the surrounding regulations and Chapter 227 is to interpret section NR 2.20 as providing the Secretary with only limited review authority, and not the authority to overturn an administrative law judge's decision. If the Secretary had this authority, it would have to be conferred by statute, not administrative rule.

In the only published decision in which this provision was used by the DNR, the public intervenor challenged the rule and the court of appeals concluded that it was invalid in excess of the DNR's statutory authority. *State Public Intervenor v. Dep't of Natural Res.*, 177 Wis. 2d 666, 670, 503 N.W.2d 305 (Wis. Ct. App. 1993), overruled on other grounds by 184 Wis. 2d 407, 515 N.W.2d 897 (1994).[1] While that case was overruled because the Supreme Court concluded that the public intervenor lacked standing, the Supreme Court also noted that the Secretary's review under NR 2.20 was very limited and deferential to the decision of the hearing examiner.

> Further, when the DNR secretary reviewed the decision of the hearing examiner, he met with the hearing examiner to discuss in a detailed fashion the reported findings of fact and conclusions of law. In several instances, the DNR secretary made what he termed "minor amendments" for the purpose of clarifying the hearing examiner's findings. If any of those amendments had

[1] The only other published case in which NR 2.20 was used was a case in which a petition under that provision was denied by the Secretary. *Sierra Club v. Wisconsin Dep't of Natural Res.*, 2007 WI App 181, ¶6 n.5, 304 Wis. 2d 614, 621, 736 N.W.2d 918.

> the effect of varying from the hearing examiner's findings of fact and conclusions of law, the DNR secretary was statutorily bound to include in his decision an explanation regarding the basis for each variance. Section 227.46(2), Stats.

State Public Intervenor v. Dep't of Natural Res., 184 Wis. 2d 407, 417-18, 515 N.W.2d 897 (1994).

In another case discussing section NR 2.20, the DNR took the position that the Secretary "is reluctant to exercise [her] power [under Wis. Admin. Code § NR 2.20] since the intent of the legislature was that the independent hearing examiner make the final decision in the case." *Town of Two Rivers v. State Dep't of Natural Res.*, 105 Wis. 2d 721, 737-38, 315 N.W.2d 377, 385 (Ct. App. 1981) overruled by *Milwaukee Metro. Sewerage Dist. v. Wisconsin Dep't of Natural Res.*, 126 Wis. 2d 63, 375 N.W.2d 648 (1985). The DNR's position in that case could be considered a tacit admission that the Secretary does not have statutory authority to overrule the final decision of the hearing examiner.

A limited interpretation of the Secretary's review authority is consistent with related DNR regulations, such as Wis. Admin. Code § NR 2.155(1), which provides "Unless the department petitions for judicial review as provided in s. 227.46 (8), Stats., the decision shall be the *final decision of the department*, but may be reviewed in the manner described in s. NR 2.20." (Emphasis added.) There is only one logical way to reconcile these two regulatory provisions. Section NR 2.20 provides the Secretary with limited review authority to order further briefing or the presentation of additional evidence. If the DNR, or any other party, wants to seek reversal of the final decision of the administrative law judge, it may seek judicial review, just as any other party, pursuant to Wis. Stat. § 227.46(8) and § 227.52. The legislature would not have provided an explicit method for the DNR to seek judicial review, in Wis. Stat. § 227.46(8), if the Secretary could simply overturn a decision of a hearing examiner. And the DNR would not have made the hearing examiner decision the final decision of the DNR, pursuant to section NR 2.155, if the Secretary could simply set aside the decision.

And on the merits of Kinnard's argument, there is no policy, legal or factual reason to grant Kinnard review. Kinnard does not make any valid objections to the hearing process nor can Kinnard assert it didn't have a full opportunity to be heard on these issues before the independent decision maker. Kinnard has fully briefed these issues before Judge Boldt, who with significant experience made an impartial and reasoned decision, based on all the legal and factual arguments presented.

Judge Boldt was well within his authority to require groundwater monitoring at both the production area and landspreading sites. Kinnard's complaints about inadequate notice ignore the extensive prefiled and live testimony about the risks of groundwater contamination from landspreading sites. (*See e.g.*, Prefiled and Hr'g Test. Byron Shaw.) The DNR's own expert, Gretchen Wheat, opined that contamination "is much more likely to be from the land application sites," than from the production area. (Kinnard WPDES Hr'g Test. Gretchen Wheat, at 45:20; *see also* Hr'g Test. Tom Bauman, at 21:20 (suggesting in karst

regions groundwater contamination issues are associated with the land application of manure)). Given this testimony, and the ample legal support provided in Judge Boldt's opinion, there is no reason that Judge Boldt was limited to providing only the specific relief requested by the Petitioners.

As far as the legal authority for this condition, in upholding the DNR's authority to regulate off-site manure landspreading, the Wisconsin Court of Appeals has concluded that Wis. Admin. Code § NR 243 is meant to regulate and control all discharge to all waters of the state, which includes groundwater. "There is nothing in Wis. Admin. Code ch. NR 243 which distinguishes between on-site and off-site landspreading activities. In either case, the purpose of the code is to prevent the discharge of pollutants to waters of the state." *Maple Leaf Farms, Inc. v. State, Dep't of Natural Res.*, 2001 WI App 170, ¶35, 247 Wis. 2d 96, 633 N.W.2d 720.

Further, another Concentrated Animal Feeding Operation (CAFO), Richfield Dairy (Richfield), which was represented by the very same attorneys who represent Kinnard in this case, fully briefed and argued their position that the DNR lacks the legal authority to require groundwater monitoring of landspreading sites. In Richfield, Judge Boldt implicitly rejected that argument, stating "While it is possible to imagine a case where monitoring of off-site land application sites [is necessary] to protect groundwater quality, the petitioners have not carried their burden of demonstrating that it is reasonable and necessary in the [Richfield] permit." *Richfield*, Case No. IH-12-08, at 10.

Kinnard also complains about the weight Judge Boldt gave to public testimony in this case, and is dismissive of those who testified about their direct, first-hand knowledge of the deplorable water quality conditions in their area. Kinnard laments that the citizens who testified did not bring "documentary evidence to the hearing to substantiate their woes. No well test reports, no specific testimony that would tie well contamination to any activity attributable to Kinnard Farms or to any of its contemplated operations." *Kinnard Farms, Inc.'s Petition for Review by the Secretary or the Secretary's Designee*, DHA Case No. IH-12-071 at 9 (Nov. 18, 2014).

This argument is off base for several reasons. First, Kinnard raised these objections at the hearing and Judge Boldt concluded that, based on the relaxed evidentiary standards, it was entirely appropriate to accept this type of testimony from citizens who have information that is very relevant to the issues at hand. Second, Judge Boldt had the opportunity to hear directly from individuals who live near Kinnard Farms, and he was in the best position to make credibility determinations. The Secretary should reject Kinnard's request that she usurp the role of the independent decision maker who was in the best position to evaluate and weigh the evidence, and determine what evidence is relevant to his legal conclusions. Third, Judge Boldt's reliance on public testimony was not to establish that Kinnard was the sole party responsible for causing the groundwater contamination in Kewaunee County. Rather, Judge Boldt required Kinnard to monitor so the groundwater quality crisis does not continue to worsen without any way to establish whether CAFOs are, in fact, causing or contributing to it.

Thus, Kinnard's request that the Secretary immediately "suspend and reverse" the hearing examiner's decision lacks a solid legal and factual foundation. Kinnard reaches even further when it asks the Secretary to "immediately issue instructions to the Administrator of the Division of Water and the Director of the Legal Services Bureau to not enforce either the Animal Unit Maximum or the Off-site Monitoring Requirement until further instructions issue from the Office of the Secretary." Essentially, Kinnard asks the Secretary to direct her employees to ignore an administrative law judge's order in another case—which was not appealed or otherwise challenged—involving a Wisconsin Pollutant Discharge Elimination System (WPDES) permit issued to Richfield Dairy.

This request amounts to a collateral attack on the Richfield decision and any DNR-issued final permits that contain the requirements that Kinnard finds so offensive. In the Richfield case, the hearing examiner recently ordered the DNR to modify the CAFO WPDES permit to include a limit on the number of animal units at that facility. In that case, the judge noted that an animal unit limit in a CAFO WPDES permit is not unprecedented because the "DNR has in the past imposed a cap on the animal units at another CAFO: Rosendale Dairy," and "[t]he DNR's General WPDES Permit for CAFOs also has a cap because it is limited to CAFOs of up to 5,720 animal units." *In the Matter of the Wisconsin Pollutant Discharge Elimination System Permit No. WI-0064815-01-0 (WPDES Permit) Issued to Richfield Dairy, Town of Richfield, Adams County (hereinafter Richfield)*, Case No. IH-12-08, Finding of Fact 39 (Sept. 3, 2014). In light of the Richfield case, Kinnard's argument that the imposition of an animal unit cap is so extreme and novel as to warrant NR 2.20 review by the DNR Secretary is baseless at best, if not misleading.

For the above reasons, the Petitioners respectfully request that the Secretary deny Kinnard's request for review pursuant to NR 2.20. If the Secretary disagrees with the final decision of the independent decision maker in this case, she may use the judicial review procedures explicitly provided by statute.

Sincerely,

/s/

Sarah Williams
MIDWEST ENVIRONMENTAL ADVOCATES, INC.

Attorney for Petitioners

Cc:
Jane Landretti, attorney for the Wisconsin Department of Natural Resources (by email and mail)
Jordan Hemaidan and Michael Screnock, attorneys for Kinnard Farms, Inc. (by email and mail)
Jeffrey D. Boldt, administrative law judge, Wisconsin Division of Hearings and Appeals (by email and mail)