



**Circuit Court
Door County, Wisconsin**

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April 28, 2015

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**RE: Kinnard Farms, Inc. v. Wisconsin Dept. of Natural Resources
Kewaunee County Case No.: 2014-CV-73**

Dear Counsel:

Enclosed to each of you is a copy of my Decision on Respondent-Wisconsin Department of Natural Resources' Motion to Dismiss in regard to the above entitled matter.

By a copy of this letter I am this date forwarding the original Decision to the Kewaunee County Clerk of Court for filing in the Court file.

Yours truly,

A handwritten signature in black ink, appearing to read "D. Ehlers", with a long horizontal flourish extending to the right.

D. Todd Ehlers
Acting Circuit Court Judge for
Kewaunee County

DTE/sar

cc: Rebecca Deterville
Kewaunee County Clerk of Court

KINNARD FARMS, INC.,

Petitioner,

v.

WISCONSIN DEPARTMENT
OF NATURAL RESOURCES,

Respondent,

and

LYNDA COCHART, AMY COCHART,
CHAD COCHART, ROGER DEJARDIN
and SANDRA WINNEMUELLER,

Intervening Respondents.

**DECISION ON RESPONDENT-
WISCONSIN DEPARTMENT OF
NATURAL RESOURCES'
MOTION TO DISMISS**

Case No.: 14-CV-73

The Petitioner-Kinnard Farms, Inc. (hereinafter referred to as Petitioner) on November 26, 2014, filed its Petition for Judicial Review. That Petition was pursuant to Wisconsin Statutes Sections 227.52 and 227.53. That Petition seeks this Court's review of the October 29, 2014, Findings of Fact, Conclusions of Law and Order of 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.

On December 22, 2014, the Respondent-Wisconsin Department of Natural Resources (hereinafter referred to as WDNR) filed its Motion to Dismiss the Petitioner's Petition for Review. That Motion to Dismiss alleges that the Petitioner's Petition for Review seeks review of a non-final decision.

The parties have submitted briefs and affidavits in support of their respective positions regarding this Motion to Dismiss by WDNR. Those pleadings include WDNR's Brief in Support of Motion to Dismiss filed on December 22, 2014, and WDNR's Reply Brief in Support of Motion to Dismiss filed on March 27, 2015. The Petitioner on January 15, 2015, filed Petitioner Kinnard Farm, Inc.'s Brief in Opposition to DNR's Motion to Dismiss. The Intervening Respondents- Lynda Cochart, Amy Cochart, Chad Cochart, Roger Dejardin and Sandra Winnemueller (hereinafter referred to as Intervening Respondents) on December 29, 2014, filed Cochart's Brief in Support of Wisconsin Department of Natural Resources' Motion to Dismiss and on March 27, 2015, filed Cochart's Reply Brief in Support of Wisconsin Department of Natural Resources' Motion to Dismiss.

An oral argument on all pending motions was scheduled in this matter on April 23, 2015. In a letter to myself and the Kewaunee County Clerk of Court dated April 15, 2015, Attorney Williams advised me that counsel for all of the parties agreed that this oral argument was no longer necessary and agreed this matter should be submitted to the Court for my written decision on all the pending motions in this case.

I have now had an opportunity to review the above referenced pleadings along with the entire file in this matter. The first motion which must be addressed by me is WDNR's Motion to Dismiss the Petitioner's Petition for Review.

Wisconsin Statute Chapter 227 lays out the administrative procedure and review of the rules and actions of administrative agencies in the State of Wisconsin. That statutory chapter also lays out the procedure for judicial review of those administrative rules and actions. As I have already noted in this Decision, the Petitioner in its November 26th Petition for Judicial

Review in this matter in the first line specifically indicates it is pursuant to Wisconsin Statutes Sections 227.52 and 227.53.

It is well established law in Wisconsin that only final agency decisions are subject to judicial review under Wisconsin Statutes Section 227.53. The State of Wisconsin Court of Appeals in the case of *Sierra Club v. Wisconsin Dep't of Natural Resources*, 304 Wis.2d 614, 736 N.W.2d 918 (2007) exhaustively reviewed and summarized the law in the State of Wisconsin regarding what is a final administrative order or decision which may be subject to judicial review. The following are quotes from the *Sierra Club* case which address the issue of whether an administrative action is final and subject to judicial review:

WISCONSIN STAT. § 227.52 provides that “[a]dministrative decisions which adversely affect the substantial interest of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter” Although this statute does not require that an administrative decision be “final” in order to be subject to judicial review, case law has established that the legislative intent was to limit judicial review to “final orders of the agency.” ...

In determining whether an agency order is final for purposes of judicial review, we focus on its substance and not its form or label. ...

A final administrative order for purposes of judicial review has been described as one that “directly affects the legal rights, duties, or privileges of a person”; one aspect of this standard is whether the person would have another opportunity for judicial review. ... In contrast to a final order, an interlocutory order is one whether “the substantial rights of the parties involved in the action remain undetermined and ... the cause is retained for further action.” ...

The fact that an earlier judicial review might avoid the expense and inconvenience of further administrative proceedings is not a basis for concluding that an order is subject to judicial review. ... Such a consideration is “outweighed by the resultant delay that would accompany review of these agency determinations and the disruption of the agency’s orderly process of adjudication in reaching its ultimate determination.” ... Rather than separate judicial reviews of a hearing officer’s decisions, “the better practice” is to have the hearing examiner’s determination “reviewed in its entirety if review is necessary.” ...

We are convinced the legislature did not intend that the term “decision” in WIS. STATS. § 227.52 means a decision on each particular substantive issue. Such a construction would result in more than one appeal in many administrative proceedings concerning a challenge to a permit. This is inconsistent with the principle that judicial review should be of the agency action “in its entirety.” ... Even if DNR does not consider separate appeals on discrete issues disruptive to the administrative process,

separate appeals add to the burden on the reviewing courts. There is no doubt that it is more efficient for circuit courts and the court of appeals to address all the issues in one petition for judicial review. ...

An additional-and-critical-consideration in deciding whether an order is final is whether the party objecting to it will have a later opportunity for review of the order. ...

We make further comment on the finality issue. As the parties recognize, the difficulty in analyzing finality in this case arises because the ALJ did not retain jurisdiction of the matter until DNR modified the permit as ordered. In such an alternative scenario, the ALJ would then issue an order approving a modified permit after considering any objections the parties had to the modifications DNR made. The parties agree that, had the ALJ done this, there would be no question that the order to DNR to make the modifications would not be a final order and that the order approving the issuance of the permit with modifications would be. We do not resolve the issue of whether the ALJ had the authority to use the procedure it did, because a resolution of that issue is not necessary to decide if the order is final and because the arguments on this point are not fully developed. However, even if the ALJ could properly employ the procedure it did, it may be that, in future cases presenting a similar need for further DNR action, issuing an interim order and retaining jurisdiction will be a more efficient administrative procedure and better facilitate judicial review. (304 Wis.2d pages 623 through 631.)

The Petitioner in its November 26th Petition for Review seeks this Court's review of the following provisions of Administrative Law Judge Boldt's October 29, 2014, decision at page 18:

IT IS FURTHER ORDERED, that Sections 1.3, 1.3.3, 2 and 3.1.12 be modified to reflect a maximum number of animal units at the facility in addition to current storage requirements.

IT IS FURTHER ORDERED, that the Department should review and approve a plan for groundwater monitoring for pollutants of concern at or near the site because it has been demonstrated to be "susceptible to groundwater contamination" within the meaning of Wis. Admin. Code § NR 243.15(3)(2)(a). The plan should be submitted to the Department within 90 days of this Order, and shall include no less than six groundwater monitoring wells, and if practicable, at least two of which monitor groundwater quality impacts from off-site landspreading.

The Petitioner objects to the Administrative Law Judge's directive that its Wisconsin Pollutant Discharge Elimination System Permit be modified to reflect a maximum number of animal units at the Petitioner's facility and that the WDNR should review and approve a plan for groundwater monitoring for pollutants of concern at the Petitioner's off-site landspreading locations.

Clearly the Administrative Law Judge's Decision which the Petitioner in this action seeks to have reviewed by this Court at this time is a non-final decision. In the first paragraph at page 17 of that Decision the Administrative Law Judge provides as follows: "The permit is remanded to the DNR to be modified to require that the permit articulate the maximum number of animal units allowed at the facility." As I have already recited in this Decision, at page 18 of the Administrative Law Judge's Decision he orders that the WDNR should review and approve a plan for ground water monitoring for pollutants of concern at certain landspreading sites. These directives to the WDNR by the Administrative Law Judge require the WDNR to exercise its discretion and to revise the Petitioner's permit. The substantial rights of the parties to this action remain undetermined and, until they are, this matter is not ripe for judicial review.

When deciding whether this is a non-final or final decision, the convenience of the Petitioner who is seeking to have this matter judicially reviewed now is not the issue. The interest of judicial efficiency rather than a party's inconvenience require that any judicial review proceeding wait until a decision is final and the party's substantial rights have been determined.

Under the Administrative Law Judge's Decision, the WDNR will be amending the Petitioner's permit to establish the maximum number of animal units at the Petitioner's facility. That maximum number is yet to be determined. The Petitioner may or may not have an objection to what that ultimate number is. The Intervening Respondents may or may not have an objection to what that ultimate number is. The same could be said regarding the ground water monitoring plan for off-site landspreading sites the WDNR may establish. It is for those specific reasons that this matter is not yet ripe for judicial review.

The WDNR in its March 27th Reply Brief suggests a stay of these proceedings and remand back to the Division of Hearings and Appeals to preserve the Petitioner's arguments and

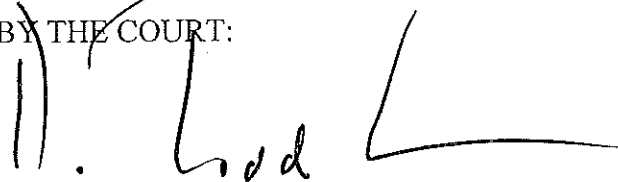
objections while allowing the Administrative Law Judge to supervise the modifications to the Petitioner's permit required by his October 29, 2014, Decision. I concur that this represents a reasonable and appropriate course of action in this matter at this juncture. It ensures that the areas of remand and modifications that the Administrative Law Judge ordered in his Decision are effectuated which will establish the parties' substantive rights. This matter will then be at a juncture for appropriate judicial review if any of the parties consider themselves to be aggrieved at that juncture.

Based on the findings and conclusions I have reached in this Decision, the other pending motions of the parties at this time will be held in abeyance. Those include the Petitioner's Motion for a Stay of certain permit conditions imposed by the Administrative Law Judge's Decision. That Motion was filed by the Petitioner on December 19, 2014. My staying of the proceedings at this point and remand further make the WDNR's Motion to Stay Production of the Record filed on December 22, 2014, moot at this point.

I would direct that counsel for the WDNR prepare an order for my review and signature consistent with my findings and conclusions in this Decision.

Dated this 28 day of April, 2015.

BY THE COURT:

A handwritten signature in black ink, appearing to read "D. Todd Ehlers", with a long horizontal flourish extending to the right.

Honorable D. Todd Ehlers
Acting Circuit Court Judge for
Kewaunee County.