BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF NATURAL RESOURCES

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

DHA Case No. 1H-12-071

FINDINGS OF FACT

1. On August 16, 2012, the Department re-issued the WPDES Permit to Kinnard Farms, Inc. to cover a proposed expansion of the dairy's operation.

2. On October 15, 2012, several individuals filed a petition with the Department for a contest-case hearing under Wis. Stat. § 283.63.

3. The Department granted the petition and referred the case to the Department of Administration, Division of Hearings and Appeals ("DHA"), for hearing as permitted by Wis. Stat. § 227.43(1)(b).

4. During February 11-14, 2014, DHA presided over a hearing in this matter.

5. On October 29, 2014, DHA issued a decision under Wis. Admin. Code § NR 2.155(1). This decision ordered that the Department modify the WPDES Permit as follows:

    a. Modifying "Sections 1.3, 1.3.3, 2 and 3.1.12 . . . to reflect a maximum number of animal units at the facility in addition to current storage requirements." (For purposes of this order, the "Animal Unit Condition.")

    b. Modifying the WPDES Permit to require a Department-approved plan for groundwater monitoring, which would include "six groundwater monitoring wells, and if practicable, at least two of which monitor groundwater quality impacts from off-site landspreading. (For purposes of this order, the off-site aspects of this monitoring requirement are referred to as the "Off-Site Monitoring Condition.")

6. The DHA decision also amended the WPDES Permit to include certain undisputed provisions, including Sections 1.1 (relating to compliance with water quality standards) and 2.4 (relating to submission of breach analysis for a waste storage impoundment).

7. On November 18, 2014, Kinnard properly served and timely filed a valid Petition for Review by the Secretary ("the Petition") of the DHA decision as permitted by Wis. Admin. Code § NR 2.20. The Petition alleged that the Animal Unit Condition and the Off-Site Monitoring Condition were both unlawful conditions under Wis. Stat. § 227.10(2m).

8. On November 25, 2014, I denied the Petition because I determined that the issued raised in the Petition would most appropriately be decided by the courts of this state in proceedings for judicial review. I did not determine at that time whether the Animal Unit Condition and the Off-Site Monitoring Condition were unlawful under Wis. Stat. § 227.10(2m).

9. On November 26, 2014, Kinnard filed a petition for judicial review in the Kewaunee Circuit Court (Case No. 14-cv-73).

10. On April 28, 2015, the circuit court dismissed Kinnard's petition and decided that DHA's decision was a non-final agency action and therefore inappropriate for judicial review. The circuit court explained that the Department needed to take further steps before the matter could be reviewed under ch. 227 of the Wisconsin Statutes. According to the court, until the Department decided the issue of the Animal Unit Condition and the Off-Site Monitoring Condition, the rights of the parties would remain undetermined and therefore unripe for judicial review.

11. On June 9, 2015, the circuit court issued its final order dismissing the case. The circuit court has not retained jurisdiction over the matter.

12. Kinnard filed an appeal, which is pending in the Wisconsin Court of Appeals (Case No. 2015AP1283).

13. Following this judicial decision determining that the Department had not yet issued a final agency action with regard to the WPDES Permit, and that more work was required to finalize the Department's decision, I consulted with the Wisconsin Department of Justice ("DOJ") concerning the scope of the Department's authority to implement DHA's October 29, 2014, decision.

14. On August 17, 2015, the Department's Chief Legal Counsel wrote to DOJ seeking answers to specific questions concerning the Department's authority in this matter. (**Attachment 1.**)

15. On August 18, 2015, the Department received correspondence from DOJ explaining that it was DOJ's position that it would be unlawful for the Department to modify the WPDES to include the Animal Unit Condition and the Off-Site Monitoring Condition. (**Attachment 2.**)

16. On August 27, 2015, the Department received further correspondence from DOJ outlining the Department's authority and identifying the procedure for the Department to finalize its decision in this case that would ultimately provide a path for judicial review, as I indicated was my desire in my November 25, 2014, order. (**Attachment 3.**)

CONCLUSIONS OF LAW

1. The Petition was filed within the time required by Wis. Admin. Code § NR 2.20(1) and served upon the Department in compliance with Wis. Admin. Code § NR 2.03.

2. Based on new information, legal analysis, and subsequent court proceedings, I have the authority to re-consider my decision dated November 25, 2014.

3. As permitted by Wis. Stat. § 227.46(3), the Department may determine whether DHA may issue the final agency action in a particular case.

4. The Department may not amend the WPDES Permit to include conditions unless those conditions are explicitly required or explicitly permitted by statute or by rule. Wis. Stat. § 227.10(2m).

5. The Animal Unit Condition is not explicitly required or explicitly permitted by statute or by a rule.

6. The Off-Site Monitoring Condition is not explicitly required or explicitly permitted by statute or by a rule.

7. The Department does not have the authority to impose the Animal Unit Condition or the Off-Site Monitoring Condition upon Kinnard in this Permit.

FINAL ORDER

Upon re-consideration of my decision dated November 25, 2014, I am granting the Petition. I have determined that in this particular case DHA will not make the final agency decision, Wis. Stat. § 227.46(3), and that this final order will constitute the final agency action for all purposes under ch. 227 in this case. Wis. Stat. § 227.52. I incorporate by reference the legal reasoning in Attachment 2 and 3.

Neither the Animal Unit Condition nor the Off-Site Monitoring Condition may be imposed upon Kinnard in this case, and therefore, these conditions will not be added to or modified into the WPDES Permit. To the extent the DHA decision is contrary to this order, that decision is reversed. I adopt the non-reversed portions of the DHA decision as the Department's final decision in this matter.

This is the final order and closes the case for all purposes. DHA retains no jurisdiction for any purpose in this case. Because of this decision, the petitioners in this case may not be considered prevailing parties for purposes of Wis. Stat. § 227.485.

By separate letter, I will determine whether to approve the proposed groundwater monitoring plans submitted by Kinnard for the production site pursuant to the October 29, 2014, DHA decision.

In accordance with Wis. Stat. §§ 227.42 and 227.53(1)(c), the parties to this proceeding are certified as provided in my previous order dated November 25, 2014.

Cathy Stepp
Secretary

Dated and mailed: 9-11-15

NOTICE OF APPEAL RIGHTS

This is the final agency action in this matter. If you believe you have a right to challenge this final agency action, then you should know that the Wisconsin Statutes and administrative rules establish time periods within which requests to review Department decisions must be filed.

For judicial review of a decision under sections 227.52 and 227.53, you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. Such a petition for judicial review shall name the Department of Natural Resources as the respondent.

This notice is provided under Wis. Stat. § 227.48(2).

State of Wisconsin
DEPARTMENT OF NATURAL RESOURCES
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Attachment 1

Scott Walker, Governor
Cathy Stepp, Secretary
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August 17, 2015

Deputy Attorney General Andrew Cook
Wisconsin Department of Justice
Room 114 East State Capitol
Madison WI 53702

Subject: Authority For Permit Conditions In WPDES Permit For Kinnard Farms

Dear Deputy Attorney General Cook:

The Department of Natural Resources (Department) requests the assistance of the Department of Justice to aid DNR in properly exercising its authority under s. 227.10(2m), Stats., which requires that any requirement in a condition of a license or permit be "explicitly required or explicitly permitted by a statute or by an administrative rule".

A contested case hearing on the Department permit to Kinnard Farms in Keewaunee County, under the Water Pollutant Discharge Elimination System (WPDES) was held February 11 – 14, 2014 in front of Administrative Law Judge (ALJ), Jeffrey D. Boldt. On October 29, 2014, the ALJ issued his decision which upheld the permit and added as conditions of the permit amended language on the production area discharge limitations, a waste storage impoundment breach analysis, and construction of any improvements required by the breach analysis as approved by the Department. In addition, the ALJ ordered that sections 1.3, 1.3.3. and 3.1.12 of the permit be modified to reflect a maximum number of animal units at the facility. The ALJ further ordered that the Department should review and approve a plan for groundwater monitoring for pollutants of concern at or near the site. Additionally, he required that the plan "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 ALJ's decision requires the Department to adopt permit conditions that were not included in the initial approval by the Department. Further complicating this issue is the overarching legal question: are the permit conditions imposed by ALJ Boldt's decision "explicitly required or explicitly permitted by a statute or by an administrative rule" as is required under s. 227.10(2m), Stats., or is ALJ Boldt requiring the Department of Natural Resources to exceed its authority that is expressly granted by state statute and administrative code?

The Department of Natural Resources requests an interpretation from the Department of Justice on the questions below relating to the authority for the conditions imposed by the ALJ and guidance on proceeding in response to the October 29, 2014 ALJ decision.

1. Does the Department of Natural Resources have explicit authority, as is required under s. 227.10(2m), Stats., to place a limit on the number of animal units in a WPDES permit as ALJ Boldt's decision required?

2. Does the Department of Natural Resources have explicit authority, as is required under s. 227.10(2m), Stats., to require a WPDES permittee to provide a groundwater monitoring plan that includes "if practical, at least two wells that monitor off-site landspreading,", as ALJ Boldt's decision required?

Your opinion on these questions and guidance on how to proceed in this situation would be much appreciated.

Sincerely,

Tim Andryk

Timothy A. Andryk
Chief Legal Counsel
Wisconsin Department of Natural Resources

Attachment 2

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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August 18, 2015

Mr. Timothy A. Andryk
Chief Legal Counsel
Wisconsin Department of
Natural Resources
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Madison, WI 53707-7921

Re: *Authority for Permit Conditions in WPDES Permit for Kinnard Farms*

Dear Tim:

In your letter dated August 17, 2015, you ask for assistance concerning a permit issued to Kinnard Farms under the Wisconsin Pollutant Discharge Elimination System ("WPDES") program. As you know, the WPDES program grants DNR the authority to permit certain discharges of pollutants into the waters of the state.

In August 2012, DNR permitted Kinnard Farms to discharge pollutants from livestock operations to cropland within the Kewanee River Watershed and to the groundwaters of the state. The permit also includes certain conditions as explicitly permitted by law. Several interested parties opposed the permit and filed a contested case under Wis. Stat. § 283.63.

Following the receipt of a contested-case petition under Wis. Stat. § 283.63, DNR is required to hold a public hearing. DNR declined, and instead referred the matter to the Department of Administration, Division of Hearings and Appeals, as permitted by Wis. Stat. § 227.43(1)(b), for the assignment of an Administrative Law Judge ("ALJ") to preside over the hearing. Final decisions in cases such as this are governed by Wis. Stat. § 227.46(3), which DNR has implemented by rule under Wis. Admin. Code ch. NR 2.

Following the contested-case hearing, ALJ Jeff Boldt issued a decision which, among other things, purportedly requires DNR to impose the following additional conditions upon Kinnard's permit: (1) a limitation of the number of animal units in the WPDES permit, and (2) a requirement for at least two wells to monitor the off-site land application of animal waste.

You request assistance concerning these two additional conditions ordered by ALJ Boldt; specifically, you ask whether these additional conditions are lawful in light of 2011 Wisconsin Act 21 ("Act 21"). Among other things, Act 21 imposes the following requirements on agencies, including DNR:

> No agency may implement or enforce any standard, requirement, or threshold, including as a term or condition of any license issued by the agency, unless that standard, requirement, or threshold is explicitly required or explicitly permitted by statute or by a rule that has been promulgated in accordance with this subchapter . . . . The governor, by executive order, may prescribe guidelines to ensure that rules are promulgated in compliance with this subchapter.

Wis. Stat. § 227.10(2m).

Act 21 implicates the two additional conditions ordered by ALJ Boldt because they each constitute a "condition of any license issued by the agency." *Id.* Clearly, a WPDES permit is a license. *See* Wis. Stat. § 227.01(5) (defining "license" to include "all or any part of an agency permit").

Because Act 21 is implicated, the question is whether these two conditions are "explicitly required or explicitly permitted by statute or by a rule." Wis. Stat. § 227.10(2m). I conclude they are not.

In reaching this conclusion, I have reviewed Wis. Stat. ch. 283, which establishes the WPDES program, and specifically Subchapter IV, which governs permits issued under the program. Furthermore, I have reviewed Wis. Admin. Code ch. NR 243, which governs animal feeding operations, and specifically Subchapter II, which imposes requirements on large concentrated animal feeding operations ("CAFOs"), like Kinnard Farms. Nowhere in any of these statutes or rules is DNR explicitly permitted to impose animal-unit maximums or off-site groundwater monitoring wells as a condition of Kinnard's permit.

In Wis. Stat. § 283.31(3) and (4), DNR is authorized to issue permits with conditions, but none of the authorized conditions explicitly allow DNR to impose animal-unit maximums or off-site groundwater monitoring wells. Furthermore, Wis. Admin. Code §§ NR 243.13, 243.14, and 243.15 impose certain permit requirements and related requirements for nutrient management plans and CAFO facilities, yet these rules do not explicitly permit DNR to impose animal-unit maximums or off-site groundwater monitoring wells. Wisconsin Stat. § 283.31 and Wis. Admin. Code ch. NR 243 must be read consistent with Act 21 to mean that only permit conditions otherwise explicitly permitted or required by statute or by rule are authorized by law. To read these statutes more broadly, and to impose conditions that are not explicitly authorized by statute, would in fact be an improper attempt at promulgating a rule outside of the rulemaking process under Wis. Stat. ch. 227.

Therefore, it is my conclusion that it would be unlawful for DNR to impose the two additional permit conditions discussed above, notwithstanding ALJ Boldt's decision.

Sincerely,

Daniel P. Lennington
Assistant Attorney General

DPL:ajw

Attachment 3

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

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August 27, 2015

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Re: Options for Kinnard Farms Pending Contested Case

Dear Tim:

On August 18, 2015, I wrote you a letter explaining that it would be unlawful for DNR to impose certain conditions upon a Wisconsin Pollution Discharge Elimination System permit issued to Kinnard Farms (the "Permit," for purposes of this letter). Subsequent to that letter, you asked for my recommendation concerning the procedural disposition of the pending contested case; specifically, you asked how DNR could proceed towards a lawful disposition of the Permit, the pending contested case, and the pending appeal.

Below is my recommendation.

I. *Factual and Legal Background.*

Since 1948, Kinnard has operated a family-owned dairy and crop farm in north central Kewaunee County. In March 2012, Kinnard sought permission to expand its dairy operations by asking DNR to re-issue the Permit to cover a proposed expansion.

On August 16, 2012, DNR agreed with Kinnard's request and re-issued the Permit to cover the dairy's proposed expansion. In response to this decision, on October 15, 2012, several individuals filed a petition with DNR for a contested-case hearing of the Permit under Wis. Stat. § 283.63.

DNR granted the petition for a contested case on December 14, 2012. This decision triggered the procedural requirements in Wis. Stat. § 283.63, which provide as follows:

> (b) The department shall hold a public hearing at the time and place designated in the notice of hearing. At the beginning of each such hearing the petitioner shall present evidence to the department which is in support of the allegation made in the petition. 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, and cross-examination shall be allowed. The department shall consider anew all matters concerning the permit denial, modification, termination, or revocation and reissuance. No person may be required to appear by attorney at any hearing under this section.
>
> (c) Any duly authorized representative of the department may administer oaths or affirmations, compel the attendance of witnesses and the production of information by subpoena and continue or postpone the hearing to such time and place as the department determines.
>
> (d) The department shall issue its decision on the issues raised by the petitioner within 90 days after the close of the hearing.

Wis. Stat. § 283.63(1)(b)-(d).

Instead of conducting the hearing as contemplated in Wis. Stat. § 283.63, however, DNR referred the contested case to the Department of Administration, Division of Hearings and Appeals ("DHA"). This procedure is contemplated by Wis. Stat. § 227.43(1)(b), which provides that a DHA hearing examiner may "preside over any hearing of a contested case which is required to be conducted by the department of natural resources and which is not conducted by the secretary of natural resources." This provision, however, only provides for the hearing examiner to "preside," and vests no authority in this hearing examiner to render a final decision.

The hearing examiner, Administrative Law Judge Jeff Boldt ("ALJ Boldt"), presided over an evidentiary hearing in Green Bay, Wisconsin on February 11-14, 2014. A portion of the hearing was designated as a public hearing for any person to testify or share opinions about the proposed Kinnard expansion. The parties submitted post-hearing briefs on the issues, together with proposed findings of fact and conclusions of law.

In a case such as this, which is referred to DHA for a hearing, the Wisconsin Statutes also provide for a method of reaching a final decision. While the ultimate final decision rests with DNR in a contest-case hearing, Wis. Stat. § 227.46(3) explains that "by rule or in a particular case," DNR has the discretion to allow DHA to render the final decision of DNR.

DNR has exercised this discretion by rule through the promulgation of Wis. Admin. Code ch. NR 2. The rules in ch. NR 2 provide, among other things, that DHA may prepare the decision in a contested case. Wis. Admin. Code § 2.155. DHA's decision is final, subject to a few important exceptions. For example, § NR 2.20 provides that the Secretary may review decisions of DHA in contested cases and make the final agency decision.

According to Wis. Admin. Code § NR 2.155(1), ALJ Boldt issued his decision on October 29, 2014. In the decision, ALJ Boldt ordered that the Permit be modified as follows:

1. Modifying "Sections 1.3, 1.3.3, 2 and 3.1.12 . . . to reflect a maximum number of animal units at the facility in addition to current storage requirements."

2. Modifying the Permit to require a DNR-approved plan for groundwater monitoring, which would include "six groundwater monitoring wells, and if practicable, at least two of which monitor groundwater quality impacts from off-site landspreading."[1]

[1]ALJ Boldt also ordered DNR to amend Sections 1.1 (relating to compliance with water quality standards) and 2.4 (relating to submission of breach analysis for a waste storage impoundment), but these modifications were not disputed by any party in the contested-case hearing.

On November 18, 2014, Kinnard petitioned the Secretary for review under Wis. Admin. Code § NR 2.20. Kinnard sought reversal of the animal-unit limit and the off-site groundwater monitoring on the grounds that the imposition of those requirements violated Wis. Stat. § 227.10(2m). On November 25, 2014, the Secretary denied Kinnard's petition, indicating that "that the issues raised in the [Kinnard] petition would most appropriately [be] decided by the courts of this state in proceedings for judicial review." The Secretary's decision did not reference Wis. Stat. § 227.10(2m) and did not reach the merits of Kinnard's claims.

On November 26, 2014, Kinnard filed a petition for judicial review in the Circuit Court for Kewaunee County (Case No. 14-CV-73) in which Kinnard again challenged the animal-unit limit and the off-site groundwater monitoring as unlawful conditions under Wis. Stat. § 227.10(2m). The court dismissed Kinnard's petition as a non-final order and therefore not subject to judicial review. The court decided that ALJ Boldt's decision was not final because DNR had yet to take the additional steps required by that order, including modification of the Permit. Until DNR takes final action in response to ALJ Boldt's order, the decision is not final.

Kinnard filed an appeal in the Wisconsin Court of Appeals (Appeal No. 2015AP1283) and seeks reversal of the circuit court's decision that ALJ Boldt's decision is non-final. This appeals case is still pending.

In August 2015, Kinnard completed construction of its proposed expansion and is operating under the Permit, which has not been stayed.

II. *Options and Recommendation.*

As explained in my letter of August 18, 2015, it is DOJ's position that it would be unlawful for DNR to amend or modify the Permit as ordered by ALJ Boldt. The pending procedural question is, therefore, how to finalize DNR's agency action in this case in a lawful way. There are a few options at this point, but only one option would lead to an efficient, reasonable, and lawful outcome.

First, DNR could file a motion for reconsideration with ALJ Boldt explaining that the two conditions are unlawful, as outlined in my letter of August 18, 2015. The motion could request that ALJ Boldt amend his decision and re-issue a final decision.

This is unlikely to succeed, however, given the injudicious tone of ALJ Boldt's decision and his failure to respect (or even to define) his limited authority in this matter. Seeking relief from ALJ Boldt would only serve to make matters worse, confuse the procedural posture of this case, and frustrate DNR's objectives of a lawful and timely resolution of the Permit.

Furthermore, seeking reconsideration from ALJ Boldt, along with a subsequent denial from ALJ Boldt, would not allow DNR to appeal that decision to circuit court. In his April 28, 2015, decision, Circuit Court Judge Ehlers explained that ALJ Boldt's decision was not final because DNR still had to prepare a groundwater monitoring plan, calculate and determine the maximum animal-unit cap, and amend the Permit to include those conditions. According to Judge Ehlers, there is no final agency action until these actions are completed. If there is no final agency action, then there can be no petition for review under Wis. Stat. ch. 227. ALJ Boldt's denial of a future DNR motion for reconsideration would do nothing to "finalize" the agency action, and so appealing a denial of a reconsideration motion would reach the same result and put DNR in the same position that it is in now.

It is DOJ's position, therefore, that the first option is unlikely to succeed. Additionally, because it would be unlawful for DNR to amend the Permit as required by ALJ Boldt, the first option will do nothing to get DNR relief in the circuit court.

Second, Kinnard could withdraw its application and re-apply for coverage under the Permit. This option would effectively re-start the clock and allow DNR to make a decision without participation of ALJ Boldt (or DHA more generally), as permitted by Wis. Stat. § 227.46(3) and Wis. Admin. Code § NR 2.155(2).

This second option would result in significant delays, however. Re-issuance of the Permit would trigger a new public hearing, additional EPA review, and a new contested case. Significant delays would frustrate DNR's desire to resolve this pending matter in a reasonably expeditious manner. Furthermore, applicants for permits to DNR, as customers and taxpayers, at the very least deserve timely *and* final decisions from the agency.

The third option, and by far the most reasonable option, is for the Secretary to re-consider her decision of November 25, 2014, denying Kinnard's petition under Wis. Admin. Code § NR 2.20. Since the Secretary is now in possession of new information and knowledge of a manifest legal error in ALJ Boldt's decision, as

indicated by my letter dated August 18, 2015. Therefore, the Secretary has good cause to re-consider her earlier decision. The Secretary did not have the benefit of DOJ's legal analysis on November 25, 2014.

In courts of law, motions for reconsideration are granted when there has been newly discovered evidence or a manifest error of law or fact. *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶ 44, 275 Wis. 2d 397, 685 N.W.2d 853. As an analogy to the pending contested case, this standard has been met. Furthermore, and perhaps more importantly, no rule or law prohibits the Secretary from reconsidering her order of November 25, 2014.

Despite the earlier procedures in this case, DNR still maintains the authority to make the final decision in this case. In addition to reconsidering her decision as provided by Wis. Admin. Code § NR 2.20, DNR retains the authority to designate the final decisionmaker "in a particular case." Wis. Stat. § 227.46(3). Using DHA for the purpose of presiding over a particular case is simply an option and a particular method for DNR to arrive at a final decision. *See* Wis. Stat. § 227.43(1)(b). DHA is not a mandated final decisionmaker in this case, or in more general terms, in all cases under Wis. Stat. § 283.63. If the Legislature wanted DHA to be the final decisionmaker in all cases under Wis. Stat. § 283.63, then the Legislature would have said so. The Legislature did not, however. In fact, the Legislature expressly stated its preference that DNR, not DHA, make the final decision in cases brought under Wis. Stat. § 283.63(1)(d) ("The department shall issue its decision on the issues raised by the petitioner . . ."). Therefore, under Wis. Stat. § 227.46(3), it is my opinion that DNR has authority to exercise its option to be the final decisionmaker "in a particular case," which in this case may be Kinnard's pending contested case.

It is not logical to argue that DNR does not have the ability to make a final decision in this case for the following reason: if DNR acquiesces in ALJ Bodlt's decision by modifying the Permit has he ordered, then DNR is, in fact, making the final decision. So either way—going along with ALJ Boldt or exercising her authority under Wis. Admin. Code § NR 2.20—the Secretary *will* be making the final decision in this case.

Yet one of these options is foreclosed: as the head of DNR, the Secretary is obligated to faithfully discharge the duties of her office, including a duty to faithfully enforce to the rule of law. *See* Wis. Const. art. IV, § 28; Wis. Stat. §§ 15.04 and 15.05. She therefore cannot acquiesce to such an unlawful action as decided by ALJ Boldt, or allow her staff to take such an unlawful action. Doing what ALJ Bodlt

decided—modifying the Permit to include unlawful conditions—would be an unlawful act by DNR, its employees, and management.

The only option, therefore, is to re-consider the November 25, 2014, decision denying the Wis. Admin. Code § NR 2.20 petition and to grant the relief requested by Kinnard. This would result in a final agency action subject to judicial review, which would be defended by DOJ in court.

I am happy to discuss these options with you in more detail or to help you craft the final agency action. I would note, however, that this decision should be made by Friday, September 4, 2015. The court of appeals has entered a scheduling order and briefing is set to begin at the end of September. I will need to take a number of actions after your final decision in order to insure that the court of appeals case is properly dismissed before briefing starts.

III. *Final Matters.*

Finally, you have asked about the status of attorney fees. There is a fee petition pending in front of ALJ Boldt. He has indicated that he does not intend to act upon the petition until DNR takes final action. If DNR pursues the third option described above, however, ALJ Boldt would have no basis to award attorney fees because the petitioners would no longer be the prevailing party. *See* Wis. Stat. § 227.485. Attorney fees are only possible if DNR acquiesces in ALJ Boldt's decision and decides to impose unlawful conditions—only then could ALJ Boldt determine that the petitioners prevailed and were entitled to attorney fees.

In conclusion, although I have laid out options as you have requested, I want to be perfectly clear as to DOJ's position in this matter: the third option is the only lawful option in this case. DNR must not impose the conditions required by ALJ Boldt and doing so would violate Wisconsin law and the Secretary's duty to faithfully execute the laws. If DNR fails to follow this advice and ratifies ALJ Boldt's decision through the imposition of illegal conditions, DOJ would not defend DNR, its Secretary, management, or employees in any future lawsuit arising from

such an unlawful action. The Legislature passed and the Governor signed 2011 Wisconsin Act 21 and DNR and its employees must abide by its provisions.

Sincerely,

Daniel P. Lennington
Assistant Attorney General

DPL:ajw