

KINNARD FARMS, INC.
E2675 County Road S
Casco, WI 54205

Petitioner,

Case No. _____

Code No.: 30607

v.

Administrative Agency Review

WISCONSIN DEPARTMENT OF
NATURAL RESOURCES
101 South Webster Street
P.O. Box 7921
Madison, WI 53707-7921

Respondent.

PETITION FOR JUDICIAL REVIEW

Pursuant to Wis. Stat. §§ 227.52 and 227.53, Kinnard Farms, Inc. ("Kinnard Farms"), by its attorneys Michael Best & Friedrich LLP, hereby petitions this Court for review of the October 29, 2014 final decision of Respondent Wisconsin Department of Natural Resources ("DNR") regarding the Wisconsin Pollutant Discharge Elimination System Permit issued to Kinnard Farms (the "Decision"). A copy of the Decision is attached as Exhibit 1.

As grounds for this Petition, Petitioner alleges as follows:

PARTIES

1. Petitioner Kinnard Farms, Inc. is a Wisconsin corporation with its principal office located at E2675 County Road S, Casco, Wisconsin 54205

2. The Wisconsin Department of Natural Resources is an agency of the State of Wisconsin, as that term is defined by Wis. Stat. § 227.01(1) and as that term is used throughout

Wis. Stat. ch. 227. DNR's principal office is located at 101 South Webster Street, Madison, Wisconsin.

3. DNR is responsible for administration of Wis. Stat. ch. 283 relating to the Wisconsin Pollutant Discharge Elimination System ("WPDES") permit program, including as that program relates to Concentrated Animal Feeding Operations ("CAFOs"). DNR is similarly responsible for administration of Wis. Admin. Code NR ch. 243, including as it relates to the WPDES Permit program for CAFOs.

JURISDICTION AND VENUE

4. Kinnard Farms' principal place of business is within Kewaunee County, making Kinnard Farms a "resident" of such county. Kewaunee County Circuit Court is therefore the proper venue for this action as specified in Wis. Stat. § 227.53(1)(a)3.

5. The Decision is a final agency decision subject to judicial review under Wis. Stat. § 227.52 et. seq.

6. This Petition for review is timely filed.

BACKGROUND

7. Kinnard Farms is expanding an existing CAFO located in the Town of Lincoln, Kewaunee County, Wisconsin. The expansion includes ongoing construction of new facilities at a site ("Site 2"), approximately ¼ mile from Kinnard Farms' existing facility.

8. The facilities at Site 2 will include, among other facilities, a ten-row, mechanically ventilated barn, a milking parlor and associated holding area, feed storage facilities with leachate collection and storm water runoff treatment facilities, and a waste storage facility. In March 2012, Kinnard Farms applied to DNR for reissuance of its WPDES permit, and for review and approval of its engineering design plans and specifications for Site 2.

9. On August 16, 2012, DNR reissued Kinnard Farms Permit No. WI-0059536-03-0 (the "WPDES Permit") and issued a notice of final determination to issue the permit. On August 20, 2012, DNR issued Kinnard Farms a conditional approval of plans and specifications for a feed storage pad and runoff control system at Site 2. On November 30, 2012, DNR issued to Kinnard Farms a conditional approval of plans and specifications for a waste storage facility, transfer system and sand separation at Site 2.

10. On October 15, 2012, five individual petitioners requested a contested case hearing to challenge several aspects of the WPDES Permit. In response to that petition, DNR granted the petitioners a contested case hearing on seven specific issues. One of those issues was whether DNR was unreasonable when it did not impose an animal unit maximum in the WPDES permit. The petition did not include any demand that Kinnard Farms be required to monitor groundwater quality at land spreading sites. As a result, a contested case hearing was not granted on that issue nor was it identified at any point as an issue for the contested case hearing.

11. During the contested case pre-hearing period, Kinnard Farms sought summary judgment from the Administrative Law Judge (ALJ) that DNR was without legal authority to impose an animal unit maximum on Kinnard Farms' project. The ALJ denied Kinnard Farms' motion for summary judgment on this issue.

12. The ALJ held an evidentiary hearing in Green Bay, Wisconsin on February 11-14, 2014. A portion of the hearing was designated the public hearing for any person of interest to testify about their views of the issues (the "Public Hearing"). The parties submitted post-hearing briefs on the issues, together with proposed findings of fact and proposed conclusions of law. Neither party briefed nor offered proposed findings of facts or conclusions of law on the issue of groundwater monitoring at off-site fields.

13. The ALJ issued the Decision on October 29, 2014. A true and correct copy of the Decision is attached to this Petition as Exhibit 1.

THE DECISION

14. In the Decision, at pages 2-3, DNR summarized its holdings on each of the six issues that remained unresolved. This petition for review arises from Holdings 3 and 4. Holding 3 requires Kinnard Farms to undertake groundwater quality monitoring not only at Site 2, but takes the extra significant step of purporting to require Kinnard to monitor groundwater quality at landspreading fields. Holding 4 requires DNR to modify the Kinnard Farms WPDES permit to include an animal unit maximum. For reference, holdings 3 and 4 are repeated here in their entirety:

Issue 3. Whether Sections 1.1, 1.7, and 1.8 of the WPDES Permit are unreasonable because they do not require that the Department evaluate background groundwater quality, they do not require sampling or monitoring of groundwater, and they do not require that discharges from the production area authorized by the Permit comply with groundwater quality standards.

Holding: The petitioners and members of the public have carried their burden of proof in establishing that groundwater monitoring is feasible and appropriate because the “facilities are located on or near areas that are susceptible to groundwater contamination such as direct conduits to groundwater, sandy soils, and sites with minimal separations between bedrock and high water tables”. (§ NR 243.15(3)(2)(a)). The Permit should be modified by the Department to establish a plan acceptable to the Department for groundwater monitoring “at or near” Site 2.

Issue 4: Whether Sections 1.3.1, 1.3.3, 2 and 3.1.12 of the WPDES Permit are unreasonable because they do not include a limit on the current and proposed number of animal units allowed at the facility.

Holding: The Permit should be modified by the Department to include a limit on the number of animal units to better provide for long term operational planning and to avoid prior problems with manure storage limits. Existing storage requirements should also be maintained.

(Decision, pp. 2-3.)

15. The DNR reduced its holdings on these issues to order points on pages 17 and 18 of the Decision. For Holding 4, the DNR ordered “that Sections 1.3, 1.3.3, 2 and 3.1.12 [of the WPDES Permit] be modified to reflect a maximum number of animal units at the facility in addition to current [manure] storage requirements.” (Decision, p. 18, the “Animal Unit Maximum”.)

16. For Holding 3, the Division 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 with (sic) 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.” (Decision, p. 18. (the “Off-site Monitoring Requirement”).

KINNARD FARMS IS AGGRIEVED BY THE DECISION.

17. Kinnard Farms is aggrieved by the Animal Unit Maximum because it is a requirement, condition and term of the WPDES Permit that is not required or explicitly permitted by any statute or DNR rule promulgated in accordance with the Wisconsin Administrative Procedure Act, and is therefore unlawful under the plain language of Wis. Stat. § 227.10(2m).

18. Kinnard Farms is aggrieved by the Animal Unit Maximum because it unnecessarily, inefficiently and unreasonably duplicates the requirement in Wis. Admin. Code § NR 243.17(3) that Kinnard Farms maintain a minimum of 180 days of manure storage, and the requirement in § NR 243.14 that it operate pursuant to a DNR-approved Nutrient Management Plan.

19. Kinnard Farms is aggrieved by the Animal Unit Maximum because it unreasonably fails to account for the lack of a reasonable quantitative relationship between animal units and the amount of manure produced at Site 2.

20. Kinnard Farms is aggrieved by the Animal Unit Maximum because it unreasonably restricts Kinnard Farms' flexibility in conducting its business so long as it maintains 180 days of manure storage.

21. Kinnard Farms is aggrieved by the Animal Unit Maximum because it is not uniformly applied to Kinnard Farms' competitors, which puts Kinnard Farms at a competitive disadvantage.

22. Kinnard Farms is aggrieved by the Off-site Monitoring Requirement because it is a requirement, condition and term of the WPDES Permit that is not required or explicitly permitted by any statute or DNR rule promulgated in accordance with the Wisconsin Administrative Procedure Act. Very simply, Kinnard Farms is adversely affected because the government is forcing the Off-site Monitoring Requirement on Kinnard Farms without following the law.

23. Kinnard Farms is aggrieved by the Off-site Monitoring Requirement because it was imposed without adequate notice for hearing and without due process of law.

24. Kinnard Farms is aggrieved by the Off-site Monitoring Requirement because there is insufficient evidence in the hearing record to show that such monitoring is capable of determining whether detected pollutants are attributable to Kinnard Farms' landspreading.

25. Kinnard Farms is aggrieved by the Off-site Monitoring Requirement because it may require monitoring of landspreading sites on which Kinnard rarely or ever conducts landspreading.

26. Kinnard Farms is aggrieved by the Off-site Monitoring Requirement because it is not uniformly applied to Kinnard Farms' competitors, which puts Kinnard Farms at a competitive disadvantage.

GROUND FOR REVERSAL OF DECISION

27. No administrative agency, including DNR, is allowed to impose conditions or terms or requirements on a permit "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 [the Wisconsin Administrative Procedure Act]." Wis. Stat. § 227.10(2m), created by 2011 Wisconsin Act 21 ("Act 21").

28. All administrative agency decisions must be supported by substantial evidence in the record.

Grounds for Reversal of Animal Unit Maximum

29. There is no mention in any of the provisions of ch. 283 or ch. NR 243 of any maximum number of animal units allowed at a facility. DNR therefore does not have the authority under any of the relevant statutes or administrative rules to impose a maximum limit on the number of animals to be housed at a single permitted dairy facility.

30. The WPDES CAFO permit program is structured so the permittee is obligated to maintain 180 days of manure storage and is obligated to maintain adequate land base to manage its nutrients. If Kinnard Farms fails to comply with either of those requirements, it will be in violation of its WPDES permit and chapter NR 243 and it may be subject to enforcement action. It was therefore unreasonable for DNR to add the Animal Unit Maximum as a separate additional requirement.

31. Even if DNR had the authority to impose the Animal Unit Maximum, DNR has insufficient evidence in the record to conclude that the WPDES Permit was unreasonable without it.

Grounds for Reversal of Off-Site Monitoring Condition

32. Kinnard Farms will be required to manage the nutrients produced at Site 2 in part by landspreading manure in accordance with Kinnard Farms' DNR-approved Nutrient Management Plan.

33. DNR imposed the Off-site Monitoring Requirement pursuant to Wis. Admin. Code NR § 243.15. The Department promulgated Wis. Admin. Code ch. NR 243 pursuant to its authority under Wis. Stat. ch. 283 for the explicit purpose of “implement[ing] design standards and accepted management practices and to establish permit requirements and the basis for issuing permits to CAFOs.” Wis. Admin. Code § NR 243.01(1).

34. Wisconsin Admin. Code § NR 243.15(3)(c)2.a. authorizes the Department to require the installation of a groundwater monitoring system if it determines such a system is “necessary to prevent discharges of manure and process wastewater to groundwater” from a “storage or containment facilit[y],” and only then if that facility is “located on or near areas that are susceptible to groundwater contamination.”

35. Crop fields that are landspreading sites are not “storage or containment facilities.” Rather, the application of manure on crop fields is regulated under the detailed technical standards set forth in § NR 243.14, and nothing in that provision or any other in § NR 243 authorizes the imposition of a requirement to monitor groundwater to determine the impacts of landspreading.

36. The Off-site Monitoring Requirement is also directly contrary to previous DNR interpretations of ch. NR 243.

37. The petitioners in this contested case never requested, much less suggested, that the DNR require off-site groundwater monitoring at land application sites. Nor was that issue explored in any detail during the four-day contested case hearing. Nor did any of the parties address the issue in any of the post-hearing briefs. Kinnard Farms, as a party to this contested case proceeding, had a right to notice of the issues to be adjudicated and to be heard on issues that are the subject of the Decision. To satisfy this right, DNR was required to provide pre-hearing notice that the issue of off-site monitoring was going to be addressed in the hearing and a meaningful opportunity for Kinnard Farms to present evidence and make arguments related to the issue. Kinnard Farms received neither of those protections.

38. DNR's imposition of Off-site Monitoring Requirement is also unsupported by substantial evidence in the record.

RELIEF REQUESTED

For all of the reasons articulated above, Kinnard Farms requests that the Court, pursuant to Wis. Stat. § 227.57(4), (5), (6), (8) and (9), provide the following relief:

- a. Reverse that aspect of the Order by which DNR 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." (Decision, p. 18.); and
- b. Reverse any aspect of the Decision that would require Kinnard Farms to monitor groundwater to detect impacts of off-site activity. In particular, the Court should reverse that part of the Decision on p. 18 which requires Kinnard Farms "if practicable" to install at least two wells to "monitor groundwater quality impacts from off-site landspreading." (Decision, p. 18.), and clarify that DNR may not require Kinnard Farms to monitor groundwater at any landspreading sites.
- c. Provide such other relief as may be appropriate under Wis. Stat. § 227.57.

Dated this 25th day of November, 2014.

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