STATE OF WISCONSIN | CIRCUIT COURT BRANCH 1 | DANE COUNTY

CLEAN WISCONSIN, INC.
634 W. Main St., Ste. 300
Madison, WI 53703,

and

LYNDA A. COCHART
N8824 Spruce Rd.
Casco, WI 54205, et al.,

Petitioners,

vs.

WISCONSIN DEPARTMENT OF NATURAL RESOURCES
101 South Webster St.
P.O. Box 7921
Madison, WI 53707-792,

Respondent,

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

Intervenor.

Case No. 2015CV002633

DECISION AND ORDER ON JUDICIAL REVIEW

BACKGROUND

This extraordinary case began in the ordinary way of most administrative appeals. In March 2012, Kinnard Farms, Inc., a large confined animal feeding operation (CAFO), requested the Wisconsin Department of Natural Resources (DNR) reissue its Wisconsin Pollutant Discharge Elimination System (WPDES) permit in light of new construction. (R. 0664 ¶¶ 1-2.) DNR held a public notice and comment period, as required by law, and reissued the WPDES permit. (R. 3786-3787.) Five individuals challenged the reissuance (R. 0033), and they now comprise the Petitioners along with an environmental advocacy group, Clean Wisconsin. They exercised their right to challenge the permit under § 283.63(1), Stat., triggering a contested case hearing. As per §§ NR 2.055 and 2.07, Wis. Adm. Code, DNR referred the issue to the Division of Hearings and Appeals. (R. 0040.)

Administrative Law Judge Jeffrey Boldt presided over a four-day contested case hearing in February 2014. The record reflects a thorough and highly technical hearing, with the parties submitting over 4,000 pages of reports and written testimony from experts and citizens alike. ALJ Boldt issued his decision eight months later. (R. 0662-0680.) Finding that the situation "could only be described as a crisis with respect to groundwater quality," he concluded, "the Department needs to utilize its clear regulatory authority to require groundwater monitoring to enhance its ability to prevent further groundwater contamination." (R. 0673-4.) He

then ordered DNR add the following two conditions to Kinnard's WPDES permit, which are the Permit Conditions at issue in this case:

> 3. 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.
> ...
> 4. 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.

(R. 0663-64.) The groundwater monitoring requirement included "two or three representative off-site landspreading fields." (R. 0675.)

Kinnard immediately petitioned the DNR Secretary for § NR 2.20 review of the off-site monitoring requirement and the animal unit cap (R. 0682), which the Secretary denied on November 25, 2014 (R. 0718). Kinnard then filed for judicial review (R. 6419), which a Kewaunee County Circuit Court judge dismissed without prejudice (R. 0619).[1]

In the meantime, DNR began work to implement the Permit Conditions and was still doing so as late as June 2015, when a DNR attorney last requested

[1] Discussed in Part II below.

Kinnard submit further information required for the Permit Conditions. (*See* Exhs. A and B of Pet. Reply Br., accepted into the record June 17, 2016.) During this period, DNR declined its opportunity to request judicial review[2] of the Permit Conditions.

At this point, the ordinary became the extraordinary. For reasons that remain obscure, DNR requested the Attorney General reexamine the application of a law that the Department of Justice had already argued to a court in the course of this litigation was entirely consistent with the Permit Conditions. (R. 0729.) By letter of August 17, 2015, DNR's counsel asked the Attorney General whether 2011 Wisconsin Act 21[3], which had been in effect nearly three years before the Kinnard contested case hearing, should be read to foreclose DNR's authority to implement the Permit Conditions. Just one day later, and contrary to its earlier defense of the Permit Conditions as lawful under Act 21,[4] the DOJ concluded that Act 21 now prohibited them. (R. 0731.) The DOJ response provided no explanation why it had

---

[2] Discussed in Part I below.

[3] Codified at Wisconsin chapter 227.

[4] In DNR's January 16, 2015 Brief in Opposition to Kinnard Farms Inc.'s Motion for Stay, filed in the Kewaunee Circuit Court following Kinnard's request for judicial review, the DOJ devoted five pages to describing exactly how the DNR maintained authority to impose the Permit Conditions post-Act 21:

> "Since 2011 Act 21 was enacted, the Wisconsin Supreme Court affirmed DNR's authority to exercise its discretion in crafting permit conditions based on general standards. Lake Beulah Mgmt. Dist. v. Dep't of Natural Res., 2011 WI 54, ¶ 43, 335 Wis. 2d 47, 799 N. W.2d 73. How explicit agency authority needs to be remains an open question. This Court need not address the question now, because DNR has explicit authority to impose the conditions at issue." (R. 6686) (emphasis added).

not raised this interpretation earlier, and as recently as at the oral argument in our case, there remains no explanation. (*See* June 17, 2016 Transcript at 52-53.)

Regardless, DNR adopted the DOJ's new interpretation. Citing "new information, legal analysis, and subsequent court proceedings," the Secretary issued a second decision on September 11, 2015, that eliminated the Permit Conditions from Kinnard's WPDES permit. (R. 0727.) Framing it as a "reconsideration," the Secretary stated:

> 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. ...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.

Petitioners filed two petitions for judicial review of DNR's September 11 decision, which were consolidated into the case before me now.

For the reasons stated below, I conclude that the ALJ decision was final when the DNR Secretary declined review and could not be reconsidered ten months later, and that the statues and rules do provide DNR explicit authority to impose the Permit Conditions on Kinnard Farms.

STANDARD OF REVIEW

Judicial review is limited in scope. Wis. Stat. § 227.57. A court must reverse or remand an agency decision that is based on an erroneous interpretation of law, an erroneous use of discretion, or factual findings that are not supported by substantial evidence in the record. *Id.* It is confined to the administrative record. § 227.57(1).

Courts apply degrees of deference to an agency's interpretation of statutes and rules according to the agency's experience interpreting them. *Harnischfeger Corp. v. Labor & Indus. Review Comm'n*, 196 Wis. 2d 650, 659, 539 N.W.2d 98, 102 (1995). No deference, or de novo review, is due where the agency is asked to interpret a statute or rule determining the scope of its own power. *Amsoil Inc. v. Labor & Indus. Review Comm'n*, 173 Wis. 2d 154, 165, 496 N.W.2d 150, 154 (Ct. App. 1992).

This is such a case. The questions before me are whether DNR has authority to reconsider and reverse its decision here and to impose the Permit Conditions. DNR itself has presented two opposing interpretations during the course of the litigation over these Permit Conditions. There can be no reason to defer to one of DNR's interpretations over the other, and so de novo review is appropriate.

ANALYSIS

This case requires me to determine (1) whether DNR had authority to reverse its decision under these circumstances, and (2) whether DNR has authority to impose the Permit Conditions.

I. The ALJ's decision became DNR's decision when the DNR Secretary denied Kinnard's § NR 2.20 Petition for Review.

Underlying this permit dispute is an unusual procedural history. DNR initially imposed and began implementing the Permit Conditions and later reversed itself, claiming it lacked authority to do so in the first place. DNR argues it appropriately reconsidered its decision based on a legal interpretation provided by the Department of Justice. (Res. Br. 10.) Petitioners argue DNR contravened its statutory authority and its own rules in doing so. (Pet. Br. 6.) Central to that disagreement is whether the ALJ's October 29, 2015 decision became the final decision of DNR.

Chapter 227 of the Wisconsin Statutes establishes the administrative process for contested case hearings. Section 227.43(1)(b) requires the Division of Hearing and Appeals to assign an administrative law judge (ALJ) when DNR submits a contested case. Section 227.46(3) reads:

> With respect to contested cases except a hearing or review assigned to a hearing examiner under s. 227.43(1)(bg), an agency may by rule or in a particular case may by order:
>
> (a) Direct that the hearing examiner's decision be the final decision of the agency;

> (b) Except as provided in sub. (2) or (4), direct that the record be certified to it without an intervening proposed decision; or
>
> (c) Direct that the procedure in sub. (2) be followed, except that in a class 1 proceeding both written and oral argument may be limited.

The statute is clear that in contested case hearings, an agency has three options. The ALJ's decision is final under subsection (a) unless the agency chooses alternative (b) or (c). Choosing to adopt subsection (a), DNR promulgated rules for contested cases under Wisconsin Administrative Code chapter NR 2, "Procedure and Practice." Section NR 2.155 speaks to contested case hearings, providing in relevant part:

> (1) ADMINISTRATIVE LAW JUDGE DECISION. The administrative law judge shall prepare findings of fact, conclusions of law and decision subsequent to each contested case heard. 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...
>
> (2) SECRETARY DECISION.
>
> > (a) Notwithstanding sub. (1), the secretary, prior to hearing, may direct that the record be certified to the secretary or secretary's designee for decision in accordance with the provisions of s. 227.46 (3) (b), Stats., without an intervening decision by the administrative law judge.
> >
> > (b) Notwithstanding sub. (1), the secretary, prior to hearing, may direct that the decision be made in accordance with the provisions of s. 227.46 (2) or (4), Stats.

(Emphasis added.) Section NR 2.20(1) further provides that "[a]ny party to a contested case who is adversely affected by a final decision rendered after a contested case hearing on the matter may, within 20 days after issuance of the

decision, file a written petition for review by the secretary or the secretary's designee."

Here, DNR first argues there is no evidence in the record that it adopted the ALJ decision. (Res. Br. 31-32.) That is flatly refuted by § NR 2.155, quoted above; the ALJ's decision is final unless DNR petitions for judicial review under chapter 227. The Secretary may, however, review the decision, following the procedure set forth in § NR 2.20.

Following the ALJ decision, Kinnard petitioned for review under § NR 2.20, arguing DNR lacked authority to impose the Permit Conditions. (R. 682.) DNR denied that Petition, stating the issue was appropriate for judicial review. (R. 718.) And so, Kinnard sought judicial review.

DNR argues now that it had not adopted the ALJ's decision. But it did, as a matter of operation of the administrative rules; and it did, as a matter of fact. Chapter 227 provides ample opportunity for aggrieved parties, including the agency itself, to challenge an ALJ decision before it becomes the department's. Though it now insists it could not legally impose the Permit Conditions, DNR declined clear opportunities to take up that point and, in fact, took just the opposite position.

DNR notes that the Kewaunee County Circuit Court dismissed Kinnard's petition on the grounds that the order from which it appealed was a non-final order.

That observation confuses the issue. The order as it relates to Kinnard Farms was indeed non-final because DNR still had to make discretionary determinations that would affect Kinnard's interests. DNR had to fix a maximum number of animal units. It had to take input from Kinnard Farms and come up with groundwater monitoring requirements. DNR argued this point effectively to the Kewaunee County Circuit Court:

> The condition set forth in the decision which involved discretionary action by the DNR render the substantial rights of the parties undetermined, and both other parties [Kinnard and intervening neighbors] will have the opportunity to seek judicial review of the final decision. Depending on how the DNR exercises its discretion, either Kinnard Farms or the intervening respondents may seek judicial review, and this fact underscores the interlocutory nature of the decision. Consider, for example, the animal unit maximum. If the DNR were to set the maximum as a number of animals twice as large as Kinnard Farms ever expects to house, Kinnard Farms would be hard pressed to argue it is aggrieved by that maximum. The intervening neighbors, on the other hand, may seek to challenge a high number. Likewise, if Kinnard Farms proposed a groundwater monitoring plan that contained mow rows designed to measure impacts from off-site land spreading and if the DNR incorporated such a plan into the final WPDES permit, Kinnard Farms could not say it is aggrieved but the neighbors may seek judicial review.

(DNR Br. Support Mot. Dismiss, Kewaunee County Circuit Court case no. 14-CV-73, at 6.)

That paragraph explains why the DNR decision was non-final as to Kinnard and as to the neighbors, who are included in the Petitioners in our case. It also explains why the decision was, in fact, final as to DNR. The ALJ's decision

required DNR to modify the permit. The DNR Secretary declined to change the order and DNR went about complying with the order and requiring Kinnard to submit necessary information. From DNR's perspective, the ALJ's decision established just what DNR had to do. And, DNR set out to do it. From the two other parties' perspectives, they did not know what they would need to do until DNR established the criteria and amended the permit. Those things were well underway when DNR abruptly changed course.

DNR's argument that the ALJ's decision should not be regarded as its own because it was a non-final order from which DNR could not seek judicial review, rings false. The reality is exactly as DNR, through its counsel, the Department of Justice, represented to the Kewaunee Court: "The [ALJ's] Decision became the DNR's decision pursuant to Wis. Stats. § 227.46(3) and Wisconsin Administrative Code § NR 2.155(1)." (DNR Br. Support Mot. Dismiss, Kewaunee County Circuit Court case no. 14-CV-73, at 6.)

That unequivocal statement, made by the Department of Justice on behalf of DNR, definitively concludes the issue. Petitioners do not argue the doctrines of judicial estoppel or judicial admission, and there is no need to discuss those doctrines here. The commonsense fact of the matter is that a party should not be able to come to court and assert a different proposition than one it has asserted before in the same matter absent any good explanation. One would think this

should apply with particular force to the Department of Justice, upon whom we should be able to rely for consistency and fair play. Here, nothing of consequence changed between the time DNR told the Kewaunee court the ALJ's decision was in fact its own, and our case, in which it says just the opposite. The ALJ's decision became DNR's. That was the simple truth of the matter then, and it remains the simple truth of the matter now.

II. The DNR Secretary's attempt to reverse its denial of Kinnard's § NR 2.20 Petition was untimely and beyond her authority.

Ten months after it declined to review the ALJ's decision, DNR reversed its own decision. (R. 725.) The Secretary stated simply:

> 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.

(R. 727, ¶¶ 2-3.) The abbreviated order wholly withdrew the Permit Conditions at stake in this case.

The Secretary cited § 227.46(3), Stats., as authority for her determining whether DHA may issue a final decision. That section has no application here. As discussed above, DNR did in fact promulgate rules according to § 227.46(3)(a)—specifically § NR 2.155—and that rule rendered the ALJ's decision final once the

Secretary denied § NR 2.20 review. Section NR 2.155(2) does establish instances when the Secretary can opt to be the decision-maker instead of an ALJ, but that window had passed in this case: she would have had to do so prior to hearing.

The sole explanation for DNR's reversal was a second review by the Department of Justice, which cited no new facts or law to support an alternate interpretation of DNR's authority. Instead, the analysis cited Act 21, which had been in effect before the ALJ issued his decision, before the Secretary had declined to review it, before DNR chose not to pursue judicial review or a rehearing of the contested case, and before DNR—through the Department of Justice—represented to the Kewaunee County Circuit Court that the ALJ's decision was, in fact, DNR's decision. By this stage, the Petitioners had no reason to believe DNR could lawfully revisit its earlier decision; the only remaining obstacle should have been Kinnard's petition for judicial review.

DNR argues *Schoen v. Bd. of Fire & Police Comm'rs of Milwaukee*, 2015 WI App 95, 366 Wis.2d 279, 873 N.W.2d 232, grants broad authority for a quasi-judicial body such as DNR to reconsider its decision. (Res. Br. 28.) In *Schoen*, the Board of Fire and Police Commissioners suspended a police officer following a full evidentiary hearing and then reconsidered eight days later after realizing it had based its decision on an incomplete copy of the applicable police rule. *Id.* at ¶¶ 5-8. The relevant statutes were silent on reconsideration. *Id.* at ¶ 17. The court held the

Board's reconsideration was lawful because it was based on a manifest error of law—an incomplete rule—and upon considering the rule in full, the Board permissibly altered its decision. *Id.* at ¶ 22.

Schoen hardly stands for the broad reconsideration authority DNR claims. The *Schoen* court's decision hinged on a manifest and significant omission in the law applied at the initial hearing. The Board simply had not received an accurate copy of the rule. In our case, the ALJ applied the correct and complete rule from the outset. DNR contemplated Act 21 in its entirety from the beginning, and determined the ALJ's decision complied with it. It argued that position to the Kewaunee court. It attempted to reverse course only by advancing an alternate interpretation of that same law many months later, unprompted by a change in facts or other law.

Moreover, in *Schoen* the statutes were silent on reconsideration. By contrast, chapter 227 and NR 2 provide clear, explicit procedures for seeking review or reconsideration of the decision of an ALJ. Section 227.46(3), Stats., gives the agency authority to direct, by rule, that the examiner's decision constitute the agency's decision. As seen above, DNR has done that in § NR 2.155(1), building in opportunities for timely review. The ALJ's decision becomes DNR's decision unless: (1) DNR timely petitions for judicial review, or (2) the Secretary grants a petition for review under § NR 2.20. In addition to those opportunities for review,

§ 227.49(1) authorizes a request for rehearing of a contested case where the ALJ has made a manifest error of law or fact.

Each of these alternatives comes with a deadline. DNR had 30 days to request judicial review. §§ 227.46(8), 227.52, Stats. The Secretary did in fact deny Kinnard's petition for Secretary review, which was required to be brought within 20 days of the decision. § NR 2.20. DNR did not ask the ALJ to reconsider his decision within the 20-day deadline set in § 227.49(1).

While there may be authority for the proposition that quasi-judicial bodies have general authority to reconsider prior decisions, see *Schoen*, that unremarkable proposition is not helpful here. The legislature and the agency have carefully prescribed mechanisms to seek review and reconsideration of a decision, and each mechanism is accompanied by a time limit. This specific, considered set of procedures preempts the general proposition that an agency is entitled to reconsider its decision; surely it is, but it has to do so within the means prescribed by statute and rule and the corresponding time limits.

Two other points.

First, surely any general right to reconsider must be qualified as to time. As the statutes and administrative provision cited above exemplify, the time to seek review or reconsideration is generally measured in days. In *Schoen*, it was eight

days. Ten months is beyond the pale. DNR cannot cite any case that approved reconsideration as much as ten months later. (Transcript of Oral Argument at 41.)

Second, there must be a good reason to reconsider. The classic formulation is set forth in *Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶ 44, 275 Wis. 2d 397, 416, 685 N.W.2d 853, 862: "To prevail on a motion for reconsideration the movant must present either newly discovered evidence or establish a manifest error of law or fact." A manifest error is the "wholesale disregard, misapplication, or failure to recognize controlling precedent." (Internal quotation marks omitted.)

Similar criteria are established by statute for reconsideration in administrative hearings. Section 227.49(3), Stats., limits rehearing in a contested case to a situation where there has been a material error of law or fact or the discovery of evidence "sufficiently strong to reverse or modify the order, which could not have been previously discovered by due diligence." None of these criteria apply here.

The Secretary's order stated that she based her changed decision on "new information, legal analysis, and subsequent court proceedings." As conceded by DNR, there were no new facts. It seems a different assistant attorney general than the one assigned to argue the case in the Kewaunee County Circuit Court, came to a different opinion, but that was not based on any new legal development. It was

simply a different view of Act 21 than that taken by DNR and its counsel, the Department of Justice, in the judicial review action in Kewaunee County. In short, there has been no manifest error of law or fact; nothing changed except an in-house interpretation of a law that had been on the books for several years at the time DNR made its decision. That is hardly enough to constitute grounds for reconsideration.

The laws that provide structure and predictability to our administrative process do not allow an agency to change its mind on a whim or for political purposes. The people of Wisconsin reasonably expect consistency, uniformity, and predictability from their administrative agencies and from the Department of Justice. Having decided not to seek judicial review and denying Kinnard's request for Secretary review, DNR had no authority to reverse the ALJ decision. Its attempt to do so is without any basis in law, and it is void.

III. The Permit Conditions are within DNR's authority under Act 21.

DNR argues that, ultimately, it simply cannot implement its first decision because it would be unlawful. It says that the Permit Conditions are not explicitly found in statute or administrative rule, and thus may not be enforced.

a. Interpretation of Act 21.

DNR now maintains that, following 2011 Wisconsin Act 21, it has no authority to impose off-site groundwater monitoring or an animal unit cap as conditions to a WPDES permit.[5] Act 21, which became law May 23, 2011, before Kinnard applied to renew its WPDES permit, reads in relevant part:

> § 227.10(2m). 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...
>
> § 227.11(2)(a)(1). A statutory or nonstatutory provision containing a statement or declaration of legislative intent, purpose, findings, or policy does not confer rule-making authority on the agency or augment the agency's rule-making authority beyond the rule-making authority that is explicitly conferred on the agency by the legislature.

This broad language applies to administrative agencies across the board. It must be read in conjunction with other statutes, and in particular, those of more specific application.

Section 283.31, Stats., addresses the "Water pollutant discharge elimination system; permits, terms and conditions." Subsection (1) requires DNR to

[5] At the June 17 hearing, Kinnard Farms argued DNR's interpretation of Act 21 here is consistent with that of the Attorney General, set forth in May 10, 2016 opinion number AG-01-16. I express no opinion here about the potential concerns where an Attorney General issues an opinion on an issue involved in ongoing litigation in which the Department of Justice is involved. I find the opinion of no weight with respect to the issue before me and I therefore do not consider it. That opinion, which was issued well after the facts of this case developed, analyzes Act 21 in the context of high capacity well permits. To her credit, AAG Vandermeuse has disclaimed any reliance on that opinion here. (Oral Argument Transcript at 51.)

administer a system of lawful WPDES permits to anyone who discharges a pollutant into any waters of the state, and § 283.31(3) enumerates the explicit requirements for WPDES permits (discussed below). The legislature explicitly stated its concern for water pollution when it formulated chapter 283:

> Unabated pollution of the waters of this state continues to arouse widespread public concern. It continues to endanger public health; to threaten fish and aquatic life, scenic and ecological values; and to limit the domestic, municipal, recreational, industrial, agricultural and other uses of water. It is the policy of this state to restore and maintain the chemical, physical, and biological integrity of its waters to protect public health, safeguard fish and aquatic life and scenic and ecological values, and to enhance the domestic, municipal, recreational, industrial, agricultural, and other uses of water.

§ 283.001(1). Accordingly, the legislature granted DNR "all authority necessary to establish, administer and maintain a state pollutant discharge elimination system to effectuate th[at] policy." § 283.001(2). These two sections directly precede § 283.31. I must consider Act 21 within the greater context of chapter 283.[6]

With that in mind, I analyze each Permit Condition individually.

b. Maximum animal units

The ALJ decision required DNR to include in Kinnard's WPDES permit a maximum number of animal units permissible at the farm, stating:

[6] The greater context also includes Wisconsin's responsibilities under federal law. The WPDES program is a responsibility delegated to Wisconsin by the Environmental Protection Agency under the Federal Clean Water Act (CWA). As the parties briefly addressed at oral argument, *see* Transcript at 55-58, DNR *must* issue WPDES permits with specifications that ensure compliance with the federal CWA.

> ... Petitioners have established that the WPDES permit is unreasonable because it does not specify the number of animal units allowed at the facility. In support of that contention, Petitioners established that animal units are a common regulatory device in WPDES permitting, that the number of animal units corresponds directly to the amount of waste generated by a CAFO, and that imposition of a cap on animal units is a good idea in this particular case because of concerns over Kinnard Farms' ability to comply with regulatory requirements directly related to the current permit requirements for 180 day storage capacity. (Exhs. 58-59) It is not a question of either/or—the 180 day storage requirement represents a good short term measure to detect an impending problem, but the maximum animal unit number represents a useful longer-term management tool that will ensure that there is not suddenly a mad rush to achieve permit compliance and get under the 180 day capacity threshold. Establishing a cap on the maximum number of animal units will provide clarity and transparency for all sides as to the limits that are necessary to protect groundwater and surface waters. The permit should accordingly be modified by the Department to reflect this additional requirement.

(R. 0676.) After taking steps to fulfill that decision, DNR now argues that, following Act 21, an animal unit maximum is not a permit condition explicitly permitted by statute. (Res. Br. 16.) Petitioners in turn point to multiple statutory and regulatory sources of authority. I conclude that the statutes and DNR rules provide ample authority to impose an animal unit maximum.

Wisconsin Statutes chapter 283 establishes the standards for WPDES permits, which point source dischargers like Kinnard must obtain from DNR in order to be in operation. DNR may not issue a WPDES permit unless the discharger meets:

> (a) Effluent limitations.

[...]
(c) Effluent standards, effluents prohibitions and pretreatment standards.
(d) Any more stringent limitations, including those:
1. Necessary to meet federal or state water quality standards, or schedules of compliance established by the department; or
2. Necessary to comply with any applicable federal law or regulation; or
3. Necessary to avoid exceeding total maximum daily loads established pursuant to a continuing planning process developed under s. 283.83.
[...]
(f) Groundwater protection standards established under ch. 160.

§ 283.31(3).

In each permit, DNR must include conditions that "assure compliance" with that section. § 283.31(4). An effluent limitation is "any restriction established by the department, including schedules of compliance, on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into waters of this state." § 283.01(6).

An animal unit maximum is just that—a limit on the quantity of effluent from a point source, to assure compliance, and so it is directly authorized by §§ 283.32(3) and (4). Moreover, subsection (5) goes on to state, "[e]ach permit issued by the department under this section shall, in addition to those criteria provided in subs. (3) and (4), specify maximum levels of discharges." This is explicit authority.

The Administrative Code also provides explicit direction on permit conditions that assure compliance with effluent limitations. One such regulation is

a nutrient management plan (NMP), which large CAFOs like Kinnard must submit. § NR 243.13. An NMP includes "amounts, timing, locations, methods and other aspects regarding the land application of manure and process wastewater" in order to determine how an operation will comply with its WPDES permit. § NR 243.14(1)(a),(b). The number of animal units, directly linked to the amount of effluent generated, is one variable in the NMP's long and highly technical equation. DNR has explicit authority to approve or reject an NMP. § NR 243.14(1)(a). It must therefore have authority to control a significant variable in it.

Sections NR 243.15(3)(j) and (k) also authorize an animal unit maximum. Those rules require a CAFO like Kinnard to maintain 180 days of storage or containment for liquid manure at all times. Subsection (k) directly links the number of animal units to the amount of storage when it provides "[d]esign volume for providing 180 days of storage for liquid manure shall be calculated based on the maximum animals present." The number of animals present determines how big the storage unit must be, and so a cap on animal units is a direct way to enforce the 180-day storage requirement.

This was particularly important in Kinnard's case because of its history of non-compliance. In his decision, ALJ Boldt cited Kinnard's repeated failure to install markers to indicate when 180-day capacity had been reached. (R. 0673, ¶ 65.) He found the animal unit maximum to be a practical, tailored way to address

this past non-compliance and the resulting concern for Kinnard's likelihood to comply going forward. (R. 0676.)

In conclusion, I reject DNR's argument that a permit condition capping Kinnard's animal units violates Act 21. There is ample explicit authority in the statutes and rules that gives DNR the power—and the duty—to impose such a condition where it is deemed necessary to assure compliance with WPDES requirements.

c. Off-site groundwater monitoring

Similarly, the condition that Kinnard install off-site groundwater monitoring devices is well within the explicit statutory and regulatory framework. Section 283.31(4), Stats., requires DNR to establish permit conditions that assure compliance with the effluent limitations of § 283.31(3). DNR has specified, through § NR 243.14, that CAFOs must submit a nutrient management plan in order to receive a permit. NMPs incorporate both on-site and off-site requirements. *Maple Leaf Farms, Inc. v. State, Dep't of Nat. Res.*, 2001 WI App 170, 247 Wis. 2d 96, 633 N.W.2d 720. Without exception, an NMP must ensure that the CAFO's manure and process wastewater landspreading operation will avoid 13 specific outcomes, including:

> 3. Manure or process wastewater may not cause the fecal contamination of water in a well.
> [...]

> 8. Manure or process wastewater may not be applied within 100 feet of a direct conduit to groundwater.

§ NR 243.14(2)(b). Of course, these two rules set out prohibited outcomes. An individual permit cannot ensure specific outcomes without fashioning site- and operation-specific conditions calculated to lead to the outcome. Hence the § 283.31(4) mandate that each permit contain individualized conditions that "assure compliance" with the standards.

DNR used the statutes and regulations I have cited here to explain why it had authority to impose off-site groundwater monitoring in this very case (*see* WDNR Br. Opp. Kinnard Mot. Stay at 6-9), as did ALJ Boldt earlier. (R. 0671, "...[I]t is essential that the Department utilize its clear regulatory authority....to ensure that Kinnard Farms meets its legal obligation under Wis. Admin. Code NR 243.14(2)(b)(3).") Furthermore, it is difficult to contemplate a permit condition that would more directly mean "assuring compliance" with a statute or rule than monitoring for compliance. In fact, if monitoring was not sufficiently explicit in "assuring compliance" following the enactment of Act 21, then Act 21 would render the words meaningless.

DNR argues that off-site regulations are merely implied by the statutes. (Res. Br. 21-22.) The Wisconsin Supreme Court addressed this in *Maple Leaf Farms, Inc. v. State, Dep't of Nat. Res.*, 2001 WI App 170, 247 Wis. 2d 96, 633 N.W.2d 720, where a CAFO challenged DNR's authority to include WPDES

permit conditions for off-site landspreading areas the farm did not own. The court held DNR did have authority, pointing to the enabling language of § 283.31 ("The plain language of the statute does not distinguish between discharges that occur off-site or on-site," ¶ 23) and the implementing language of chapter NR 243 ("There is nothing in Wis. Admin. Code ch. 243 which distinguishes between on-site and off-site landspreading activities," ¶ 35). The court read that plain language, which said neither "on-site" nor "off-site," harmonized it with the explicit statutory and regulatory purposes, and concluded that because "on-site" and "off-site" were not both excluded, they were both included. I do not understand that analysis to mean the statutes and regulations were not explicit.

Neither did DNR. Again, it previously argued in this case that the *Maple Leaf* logic still applied after Act 21: "Since 2011 Act 21 was enacted, the Wisconsin Supreme Court affirmed DNR's authority to exercise its discretion in crafting permit conditions based on general standards. *Lake Beulah Mgmt. Dist. V. Dep't of Natural Res.*, 2011 WI 54, ¶ 43, 335 Wis.2d 47, 799 N.W.2d 73." (WDNR Br. Opp. Kinnard Mot. Stay 5.)

In short, DNR has explicit, straightforward authority to impose off-site groundwater monitoring. There is no violation of the Act 21 mandate.

CONCLUSION

For these reasons, DNR's September 11, 2015 decision is reversed and the case remanded to DNR with direction to implement the October 29, 2014 ALJ decision requiring off-site groundwater monitoring and an animal unit maximum as conditions of the permit.

It is so ordered, and this order is final for purposes of appeal.

Dated this 14th day of July, 2016.

BY THE COURT:

John Markson

John W. Markson
Dane County Circuit Court – Branch 1