

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

Case No.: IH-12-071

PETITIONERS' REPLY BRIEF

I. INTRODUCTION

Kinnard and the Wisconsin Department of Natural Resources (“DNR”) repeatedly characterize the Kinnard Wisconsin Pollutant Discharge Elimination System (“WPDES”) permit (“Kinnard Permit”) as a “no discharge” permit. (Kinnard Br., p. 1; DNR Br., pp. 10, 17, 18, 22-24.) They favor this false shorthand over the actual permit language, which does not limit discharges to non-navigable surface waters, wetlands, and groundwater. This is but one example of the legal and factual realities that DNR and Kinnard ignore in favor of maintaining the status quo.

II. STANDARD OF REVIEW

The Division of Hearings and Appeals’ (“Division”) review is de novo and the Petitioners have the burden of proof. Wis. Stat. § 283.63(1)(b); *Anderson v. DNR*, 2010 WI App. 64, ¶ 14, 324 Wis. 2d 828, 783 N.W.2d 877. While the Division may certainly consider DNR’s experience issuing WPDES permits, it need not defer to DNR’s findings or its permitting decision in this case—a critical distinction.

III. PLANS AND SPECIFICATIONS (Issue 1)

DNR’s failure to obtain all information regarding Site 2 and the design of proposed facilities prior to permit issuance undermines the rational basis for the permit terms and

conditions challenged in issues 2 and 3. Said otherwise, the substance of issue 1 calls into question the factual basis for DNR's decision that general permit terms and conditions and no water sampling and monitoring were adequate to ensure compliance with water quality standards. Kinnard's attempt to make hay from the fact that the Petitioners do not seek any separate relief regarding issue 1 is a distraction from the substantive arguments raised.

Kinnard and DNR rely heavily on the fact that NR 243 does not explicitly mandate plans and specifications be submitted and approved prior to WPDES permit issuance. (DNR Br., p. 13, Kinnard Br., p. 12.) While the explicit language in NR 243 allows DNR to issue a WPDES permit and approve plans and specifications in any chronological order, it is not reasonable to do so in every case. It certainly was not reasonable for the DNR to do so in this case, where the design and site-specific features triggered the need for additional permit terms and monitoring.¹ For example, NR 243 envisions that DNR will have to make a site-specific determination regarding whether groundwater monitoring is necessary. Wis. Admin. Code § NR 243.15(7). DNR did not have sufficient information at the time of permit issuance to make a reasoned determination regarding the need for groundwater monitoring. (Exh. 5.) Without adequate information, DNR was unable to perform the "sifting and winnowing" necessary to develop defensible permit terms. *Hilton ex rel. v. DNR*, 2006 WI 84, ¶ 38, n. 15, 293 Wis. 2d 1, 717 N.W. 2d 166.

DNR dismisses its failure to gather all necessary information before permit issuance by relying on the fact that DNR essentially issues the same "standard" WPDES permit to all large

¹ Kinnard argues Petitioners concede that plans and specifications need not be approved prior to permit issuance. (Kinnard Br., p. 12.) This is a gross misrepresentation of Petitioners' Initial Brief. Kinnard quoted only a portion of Petitioners' Initial Brief—ignoring their contextual argument based on chapter 283 and other sections of NR 243—and urged the Division to deny Petitioners' claims on this basis. In favor of misdirection, Kinnard fails to address .

CAFOs. (DNR Br., p. 14.) DNR's standardized permitting approach does not negate its responsibility to include conditions in a permit that assure compliance with water quality standards. Wis. Admin. Code § NR 243.13(1); *see also* Wis. Stats. § 283.31(4). In one breath, DNR asserts that it does not need facility-specific information to determine whether narrative conditions are sufficient to assure compliance with water quality standards. In the next, DNR defends its decision not to include other conditions or monitoring on the basis that "DNR found the plan design to be protective of surface waters." (DNR Br., pp. 21, 24-25.) The problem is DNR did not have the information necessary to make this finding when it issued the permit.

IV. SURFACE WATER QUALITY STANDARDS (Issue 2)

Kinnard and DNR have agreed to add the general permit language for CAFOs into Section 1.1. This is necessary, at a minimum, but general narrative language does not, in this case, satisfy DNR's obligation to include permit limits and monitoring that assure compliance with surface water quality standards.² *See* 33 U.S.C. § 1342(a)(2); Wis. Stat. § 283.31; Wis. Admin. Code § NR 243.13(1). Where, as here, a CAFO is designed to discharge to a wetland

² DNR claims that Petitioners misread the WPDES permit when they assert that the permit authorizes discharges to non-navigable surface waters and wetlands, but does not require compliance with surface water quality standards. (DNR Br., p. 17.) DNR cannot identify language that actually requires *all* discharges to *all* waters of the state comply with surface water quality standards. DNR asserts that a condition requiring facilities be operated "to prevent overflows and discharges to waters of the state" is the same as requiring that discharges actually comply with water quality standards. *See* Exh. 301 at 2, § 1.3.2. DNR correctly notes that the Kinnard Permit requires that discharges from "ancillary service and storage areas"—including those storm water channels that Kinnard would like to be exempt from permitting requirements—are permitted only if they comply with surface water quality standards. *See* Exh. 301 at 3, § 1.5. But that provision does not apply to process wastewater. DNR also relies on the monitoring and sampling section of the permit that refers back to the deficient discharge limitations in section 1.1. This also fails to actually prohibit discharges to non-navigable waters and wetlands unless those discharges comply with water quality standards. Exh. 301 at 9, § 1.8.2. The Petitioners want to avoid a situation in which the permittee is making these very same arguments, based on inadequate permit language, to avoid being held accountable for unlawful discharges.

with channelized flow that leads directly to a stream, general narrative conditions are not sufficient to assure compliance with surface water quality standards (Hr’g Test., at 15:35, 1:36:45 (Shaw); 1:28:35-133:25 (Bauman).) Mr. Bauman acknowledges that it may be necessary to include additional conditions in a WPDES permit if the general, narrative conditions are insufficient. (Hr’g Test., at 1:28:35-1:33:25 (Bauman).)

A. CAFOs are Point Sources

Large CAFOs, such as Kinnard, are subject to the same requirements as other industrial point sources, even if DNR regulates them differently. Wis. Stat. §§ 283.01(12); 283.31; Wis. Admin. Code § NR 243.11. The statutory and regulatory provisions relied upon by the Petitioners—including the requirement that a WPDES permit include conditions that “assure compliance with” effluent limitations and standards and any more stringent limitations necessary to meet federal or state water quality standards—apply equally to all point sources. *See* Wis. Stat. §§ 283.001(1), 283.01(12), 283.11(1), 283.31. CAFOs are not exempt.

1. This is not a “no discharge” permit.

DNR relies heavily on its characterization of the Kinnard Permit as a “no discharge” permit. (*See e.g.*, DNR Br., pp. 17-18, 22-24.) While DNR and industry often use this shorthand for CAFO permits, the reality is very different. As DNR acknowledges, CAFO permits prohibit a discharge to navigable waters *except* following a large storm event. (DNR Br., p. 22.) The law allows CAFOs unlimited discharges of process wastewater to other waters of the state if those discharges comply with water quality standards. *See* Wis. Admin. Code § NR 243.13(2), (5). The permit allows unlimited discharges of contaminated storm water if they comply with water quality standards. (Exh. 301, at 3, § 1.5.)

These are quite significant holes in the “no discharge” limit. Especially in this case where process wastewater discharges to non-navigable waters and a wetland. (Shaw pre-filed, pp. 17-18; Martin pre-filed, pp. 12-14, 17-20.)

2. Kinnard will discharge through a discrete conveyance.

Process wastewater will discharge from the VTA when vegetation is inactive and when soils are frozen or already saturated. (Shaw pre-filed, pp. 17 & 27; Martin pre-filed, pp. 22-23.) Culvert 9 is a discrete conveyance as that term is defined by Wis. Stat. § 283.01(12)(a). (Hr’g Test., at 1:37:34 (Shaw); 1:31:10-29 (Bauman).) And it is feasible to sample discharges from Site 2 before the wastewater enters Culvert 9. (Hr’g Test., at 1:27:20, 2:50:00-2:51:20 (Shaw); Exs. 83, 84.) Where the filter strip at the bottom of the VTA enters the storm water ditches, the storm water ditches themselves and Culvert 9 through where those sources of water flow, are all discrete conveyances. (Shaw pre-filed, p. 17; Martin pre-filed, p. 26; Hr’g Test., at 1:41:32-1:42:37 (Williams); Hr’g Test., at 1:00:15-1:00:48 (Wheat) (testifying the “flow goes through Culvert 9” and is “somewhat concentrated”).).

3. Point sources are not absolved from compliance with permit limits if they mix their effluent with other sources of polluted water.

Kinnard argues that the Kinnard Permit only regulates some discharges—those from the production area—but does not regulate other storm water discharges. (Kinnard Br., pp. 16-20.) To the contrary, storm water discharges from what are referred to as ancillary service and storage areas—i.e., “CAFO outdoor vegetated areas, access roads, sites used for the handling or storage of material or refuse other than manure, bedding, feed or process wastewater, areas for storage or maintenance of material handling equipment, areas for shipping and receiving, and other sources of contamination that are not identified as part of the production area”—are permitted only if

those discharges comply with surface water and groundwater quality standards. Wis. Admin. Code § NR 243.13(7); (Exh. 301 at 3, § 1.5.)

DNR did not assert that storm water from Site 2 is not regulated by the Kinnard Permit. In fact, DNR referenced section 1.5—providing that storm water discharges from ancillary service and storage areas must comply with water quality standards—in its brief assuring the Division that the permit complied with the law. (DNR Br. at 21.) Kinnard distorts Ms. Wheat’s testimony when it asserts that her testimony provides otherwise. (*See* Kinnard Br. at 18-19; *see also* Wheat Prefiled p. 16 (explaining her belief that DNR lacks the authority to regulate storm water *volume*)).

As clarified in DNR’s brief, DNR seems to argue that if a permittee mixes storm water from other sources with its effluent from Site 2—such as in storm water ditches—Kinnard is not responsible for the quality of that water when it leaves Site 2. (DNR Br. at 19.) Kinnard’s storm water ditches are certainly part of Site 2. (*See* Exh. 4 App. F p. C109.) Storm water from Site 2 that enters those ditches is regulated and must comply with water quality standards when discharged. *See* Wis. Admin. Code § NR 243.13(7); (Exh. 301 at 3, § 1.5.) DNR has not provided any legal basis for its assertion to the contrary. It strains credulity to argue that an operator could escape accountability by designing a site that allows other sources of pollution to mix with its polluted wastewater. It is clear that the CWA regulates as wastewater any combination of storm water and wastewater when those are mixed. *See Residents Against Ind. Landfill Expansion v. Diversified Sys., Inc.*, 804 F. Supp. 1036, 1038 (E.D. Tenn. 1992).

V. GROUNDWATER QUALITY STANDARDS AND MONITORING (Issue 3)

WPDES permits must include provisions ensuring that discharges meet groundwater protection standards. Wis. Stat. § 283.31(3)(f), (4); *see also*, Wis. Admin. Code § NR 243.13(1).

Certainly, at a minimum, the Kinnard Permit must require that all discharges comply with groundwater protection standards, so the general, narrative condition that DNR and Kinnard now concede may be included in the Kinnard Permit must be included. (DNR Br., pp. 39-40; Kinnard Br., pp. 15-16, 26-27.) However, that narrative condition is not enough to meet legal requirements in this case.

The DNR may require groundwater monitoring, as a WPDES permit condition, after considering geologic conditions, whether the facility is located in an area susceptible to groundwater contamination, the size of the facility, characteristics of the waste being stored and other potential impacts to waters of the state. Wis. Admin. Code § NR 243.15(3)(c)2.a.-e. The DNR must do so where necessary to ensure compliance with groundwater protection standards. Wis. Admin. Code § NR 243.13(1).

A. Site 2 is Highly Susceptible to Groundwater Contamination.

Site 2 is highly susceptible to groundwater contamination in geologic conditions that warrant monitoring. (Hr'g Test., at 51:59 (Wheat); Ex. 302; Muldoon pre-filed, p. 9-11; Hr'g Test., at 04:25; 07:22; 57:34; 01:49:13-30 (Muldoon).) Groundwater discharges will travel quickly through the fractured carbonate bedrock aquifer. Dr. Muldoon reviewed site-specific data, including soil borings, test pits, and the surficial geology, and concluded that Site 2 is located above a fractured carbonate aquifer, characterized by rapid downward flow and little attenuation, and the depth to bedrock indicates a high vulnerability to contamination. (Muldoon pre-filed, pp. 4-7, 9-11; Ex. 29; Hr'g Test., at 04:25, 07:22, 57:34, 01:49:13-30 (Muldoon).)

Dr. Muldoon's review revealed that depth to bedrock at Site 2 varies from 10 to 35 feet and generally is in the range of 14 to 15 feet. (Muldoon pre-filed, p. 6.) Depth to bedrock of 15 feet or less is highly susceptible to contamination, (Muldoon pre-filed, p. 17.), and in fractured

carbonate aquifers like Site 2, with 50 feet or less of surficial material are “particularly vulnerable to groundwater contamination,” (Muldoon pre-filed, p. 18; Ex. 24.). Kinnard attempts to minimize these very real issues as “based on regional concerns” rather than characteristics specific to Site 2. (Kinnard Resp. Br., p. 27.) Kinnard completely mischaracterizes the testimony, which was based on characteristics of Site 2 as testified to by Dr. Muldoon and numerous citizens.

B. DNR Errs in Relying on Design Features of Site 2.

Kinnard and DNR defend DNR’s decision not to require groundwater monitoring on the basis that the manure storage facility is sufficiently protective. (Kinnard Br., p. 29; DNR Br., pp. 27, 29-30.) First, this is a post-hoc rationalization of DNR’s decision not to require groundwater monitoring—a decision it was required to make before permit issuance. (Hr’g Test., at 3:00-3:10, 3:50-4:10 (Martin).) At the time of permit issuance, DNR still did not have sufficient information regarding regional groundwater and bedrock, soil investigation, saturation below the waste storage facility, and hydrostatic loads and forces. (Ex. 5.)

Second, even well-designed facilities can leak and leach pollutants to groundwater. (Martin pre-filed, pp. 25, 36; Hr’g Test., at 1:09:33-1:09:56 (Williams).) DNR recognizes that CAFOs discharge to groundwater. Wis. Admin. Code § NR 243.12 note. There are numerous locations at Site 2 that will discharge to groundwater, including the VTA, which is designed to infiltrate process wastewater—i.e., allow it to discharge to groundwater. (Martin pre-filed, p. 22; Hr’g Test., at 1:34:06 (Williams).) Without groundwater monitoring, DNR and Kinnard may be unaware of discharges in excess of groundwater quality standards until a neighbor discovers contamination in their well.

C. Groundwater Monitoring is Feasible.

Despite DNR's contention that groundwater sampling is impractical, it is feasible and reasonably cost effective. (Hr'g Test., at 08:20-08:45; 01:04:33 (Muldoon); Muldoon pre-filed, pp. 27-30.) Ms. Wheat's testimony suggested she made up her mind not to require groundwater monitoring at Site 2 primarily based on her opinion that groundwater monitoring would be too difficult, not because Site 2 was not susceptible to groundwater contamination. (Hr'g Test., at 39:23-40:43 (Wheat).) Dr. Muldoon testified that she has designed and implemented an effective groundwater monitoring system in similar hydrogeologic conditions. (Muldoon pre-filed, pp. 25-28; Hr'g Test., at 1:00:44-1:01:22, 1:04:33 (Muldoon).) Testimony that a more complicated and expensive groundwater monitoring system is necessary was not based on actual experience designing or installing any such system. (Hr'g Test., at 1:30:20-1:30:35 (Wheat); Hr'g Test., at 1:54:18-1:54:32 (Trainor).)

VI. ANIMAL UNIT LIMIT (Issue 4 and 5)

DNR has the authority and obligation to include an animal unit limit in a WPDES permit if such a condition is "necessary to meet federal or state water quality standards" or to ensure compliance with effluent limits and water quality standards. Wis. Stat. § 283.31; Wis. Admin. Code § NR 243.13(1); (Ruling on Mot. For Summ. J. at 7.) Without a cap on animal units, the Kinnard Permit fails to ensure compliance with effluent limits and water quality standards. The key effluent limit is what DNR often refers to as the "no discharge" limitation—that a CAFO may not discharge to navigable waters unless precipitation causes an overflow from a properly operated and maintained storage structure. Wis. Admin. Code § NR 243.13(2)(a); Exh. 301 at 1, § 1.1. Other permit requirements are meant to ensure compliance with this effluent limit, such as the requirement that the facility maintain adequate storage and adequate land base in its NMP.

(Exh. 301 at 2-3, §§ 1.3.3, 1.6.) But without an animal unit limit, these requirements for “adequate” storage and an “adequate” land base are meaningless.

Kinnard argues for less regulatory oversight because fluctuations in herd size are “fundamental” to dairy farming. (Kinnard Resp. Br., p. 35.) Nothing about an animal unit cap prevents fluctuating herd size. What it does is set a maximum number of animals allowed on a site in any 180-day period, for which the operation must have adequate storage. Under that limit, the number of animals at a CAFO may fluctuate as much as a CAFO needs.

Petitioners do not argue that NR 243 explicitly mandates an animal unit cap, but it is unreasonable to not impose an animal unit cap in the Kinnard Permit. Kinnard has a history of violations based on manure and herd management issues. (Exs. 58-59, 61.)

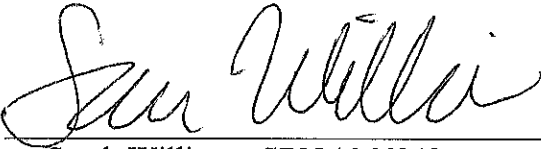
VII. UNREASONABLE YIELD GOALS (Issue 6)

Kinnard fails to squarely address Petitioners’ argument that Kinnard’s yield goals are only achievable through over-application. (Hr’g Test., at 54:00, 55:10 (Shaw); Shaw pre-filed, p. 32.) Unreasonably high yield goals will allow pollutants in manure to enter waters of the state. (Shaw pre-filed, p. 33; Hr’g Test., at 55:30 (Shaw).) Increasing nutrients to achieve higher yield goals and maximize profits has negative environmental consequences. (Hr’g Test., at 54:15, 55:10 (Shaw); Shaw pre-filed, p. 32.)

Dated this 27th day of June, 2014

Respectfully submitted,

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