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January 17, 2017

Casey Jones
DNR Oshkosh Service Center
625 E. County Road Y
Oshkosh, WI 54901
Casey.Jones@Wisconsin.gov

VIA ELECTRONIC MAIL

RE: Comment on Richfield Dairy, LLC
WPDES Permit No. WI-0064815-02-0

Ms. Jones:

Midwest Environmental Advocates, Inc. ("MEA") respectfully submits the following comments regarding the Wisconsin Department of Natural Resources' ("DNR") proposed reissuance of Richfield Dairy, LLC's ("Richfield Dairy") Wisconsin Pollutant Discharge Elimination System ("WPDES") Permit ("Reissued Permit"). MEA is a non-profit environmental law center that provides legal and technical assistance to communities and families working for clean air, clean water, and clean government.

We are writing to urge the DNR to include an animal unit cap in the Reissued Permit, as authorized by statute and directed by Administrative Law Judge (ALJ) Boldt's Order dated September 3, 2014. The following comments first address our concern regarding the omission of an animal unit cap in the Reissued Permit, and then describe the DNR's authority to require an animal unit cap in this WPDES permit.

1. The DNR failed to justify the lack of an animal unit cap in the Reissued Permit.

The DNR modified the current Richfield Dairy WPDES Permit (No. WI-0064815-01-1) on October 27, 2015, to include an animal unit cap of 6,270 animal units. The Department explicitly stated that it issued the modification to comply with ALJ Boldt's September 3, 2014, Order, which directed the department to establish an animal unit cap.

The DNR's draft for the Reissued Permit (No. WI-0064815-02-0) does not contain an animal unit cap. Nor does the Department explain why the animal

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unit cap is omitted from the expiring permit. Instead, the Reissued Permit Fact Sheet states as follows: “This proposed WPDES permit to be reissued to Richfield Dairy, WI-0064815-02-0, does not contain an animal unit permit modification threshold number. Richfield Dairy’s reissuance application materials indicate a planned herd size of 6270 animal units.”

Wisconsin Admin. Code NR Ch. 203 states that the multiple purposes of WPDES permit public notice requirements include the intent to inform members of the public of their right to obtain additional information, submit written comments, or request a public hearing.¹ The public requires clear and transparent draft permits in order to assert these rights. The Reissued Permit’s lack of reasoning for omitting the cap denies the public adequate information to comprehend or contest this aspect of the Reissued Permit.

MEA respectfully requests that the DNR revise the Reissued Permit to include an animal unit cap in accordance with the current permit and ALJ Boldt’s Order.

2. The Reissued Permit should contain an animal unit cap.

Though MEA is not aware of the DNR’s reasoning for striking the animal unit cap from the Reissued Permit, we will address one potential reason behind DNR’s actions: that the DNR does not believe it has authority to create and enforce such a cap. If this is the case, MEA asserts that multiple sources give DNR authority to do so.

Two separate judicial opinions, both published after enactment of Act 21 in 2011, found that the DNR has the power to impose an animal unit cap as a permit condition. The first, ALJ Boldt’s 2014 Order, found that an animal unit cap would help ensure permit compliance:

Including a cap on the number of animal units at the site would specify the maximum level of discharge, allow DNR and the public to better monitor compliance with applicable rules and permit conditions, ensure that the Dairy has adequate storage and land base to handle the waste generated at the site, deter risky storage and handling practices, and would provide the public with notice of proposed expansions of the Dairy.²

More recently, the DNR submitted a letter to Kinnard Farms, Inc., iterating that following ALJ Boldt’s decision and judicial review the Farm needed to provide “[a]nimal unit information that reflects . . . current landspreading acreage availability and manure process wastewater storage capacity.”³ The DNR’s reasoning that a permittee must implement an ordered animal unit cap pending the outcome of an appeal must extend to the Reissued Permit for Richfield.

¹ Wis. Admin. Code NR § 203.02(1).

² DHA Case Nos. IH-12-04 and IH-12-08, ¶ 40, Sept. 3, 2014 (copy attached as ATTACHMENT 1).

³ Letter from Jane Landretti, Staff Attorney, Wisconsin Department of Natural Resources, to Lee Kinnard, Kinnard Farms, Inc. (Nov. 14, 2016) (copy attached as ATTACHMENT 2).

The second source of authority is a Dane County Circuit Court decision in *Clean Wisconsin, Inc. v. Wisconsin Dep't of Natural Resources*, issued in July of 2016.⁴ In that decision, Judge Markson addressed whether Act 21 conflicted with an animal unit cap and found that it did not, given the multiple statutory and regulatory provisions conferring this authority on DNR. MEA will not restate Judge Markson's reasoning here, except to say that we support the decision's finding that Wis. Stat. Ch. 283 and Wis. Admin. Code NR Ch. 243, which grant DNR authority to issue WPDES permits, also grant authority to limit animal units within those permits. Judge Markson's decision is attached hereto for reference.

Returning to the history of Richfield's WPDES permitting history, ALJ Boldt issued a final decision on this matter in September of 2014. The order remains a statement of the law that the DNR must follow. The DNR's potential disagreement with the Order is not a reason to ignore its mandates. For this reason and the reasons stated above, MEA requests that the DNR reconsider its decision to omit an animal unit cap from Richfield Dairy's permit.

Thank you for your consideration and response to Midwest Environmental Advocates' comments on the Reissued Permit.

Sincerely,

/s/

Kate Hanson
Law Clerk
MIDWEST ENVIRONMENTAL ADVOCATES, INC.

/s/

Tressie Kamp
Staff Attorney

⁴ *Clean Wisconsin, Inc., v. Wisconsin Dep't of Natural Resources*, No. 2015-CV-2633 (Wis. Cir. Ct. Dane Cty. July 14, 2016) (copy attached as ATTACHMENT 3).