JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

September 17, 2015

Timothy A. Andryk, Chief Legal Counsel
Department of Natural Resources
Office of Legal Services
PO Box 7921
Madison, WI 53707-7921

Re: 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

Dear Mr. Andryk:

I am in receipt of the Department of Natural Resources' (DNR) Order dated September 11, 2015, in the above-captioned matter.

While the DNR accepted the legal basis of the DHA condition relating to onsite groundwater monitoring, the DNR concluded that: "The Off-Site Monitoring Condition is not explicitly required or explicitly permitted by statute or by a rule." This statement appears to conflict with longstanding legal precedent apparently not considered by the Department of Justice. There is no reference to any review of case law in Mr. Lennigton's August 18th, 2015 correspondence.

In *Maple Leaf Farms v. DNR*, 2001 Wis. App. 170, the Wisconsin Court of Appeals held that the Wisconsin legislature has "clearly and unambiguously" given the DNR specific authority to regulate off-site landspreading activities from a CAFO that impacts groundwater. The court held:

> Therefore, because a CAFO's overapplication of manure to fields can be a discharge to groundwater under the statute, we determine that the DNR has authority to issue permits regulating Maple Leaf's off-site landspreading operations. Under our analysis of WIS. STAT. §§ 283.001 and 283.31, we conclude that the legislature has conferred authority on the DNR to regulate discharges, in the form of over application of manure, by CAFOs regardless of whether the discharge occurs on land owned by the CAFO. Id. ¶ 26

Further, the decision specifically holds that a CAFO includes the off-site landspreading areas.

> [A] CAFO includes not only the ground where the animals are confined, but also the equipment that distributes and/or applies the animal waste produced at the

> confinement area to fields outside the confinement area. Any overapplication of manure by Maple Leaf through its landspreading activities would then be a discharge, either because of runoff to surface waters or percolation of pollutants to groundwater. Because the off-site croplands are used by Maple Leaf to dispose of waste produced at its on-site facility, the permit conditions imposed on Maple Leaf to enforce groundwater protection standards are as applicable to Maple Leaf's off-site landspreading operation as they are on-site. Therefore, because a CAFO's overapplication of manure to fields can be a discharge to groundwater under the statute, we determine that the DNR has authority to issue permits regulating Maple Leaf's off-site landspreading operations. Id. ¶ 26

As the *Maple Leaf Farms* court concluded:

> The WPDES statutory prohibition on discharges of pollutants from CAFOs would be of little value if the owners of the CAFOs could avoid responsibility merely by placing those pollutants onto the ground of third parties without regard to rates and quantities so that the pollutants would predictably leach into groundwater or runoff to surface waters. Id. ¶ 35
> http://www.wicourts.gov/ca/opinions/00/pdf/00-1389.pdf

The *Maple Leaf Farms* case was well known to the parties. *Maple Leaf Farms* is even cited several times in the bound version of the Wisconsin statutes. Further, the underlying DHA decision in that case was even cited by Kinnard Farms in its June 10, 2014, Proposed Conclusions of Law, at p. 16. I regret not including it in my Order as a Conclusion of Law, but no party made the argument now relied upon by the DNR. While Kinnard cited *Maple Leaf Farms* in its Proposed Conclusions of Law, it did not cite § 227.10(2m). Id.

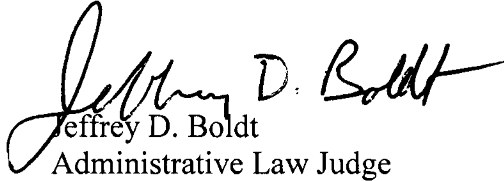
The more general provisions of Act 21 relating to Chapter 227 cited by the Department of Justice have not specifically addressed the longstanding Wisconsin precedent that "groundwater protection standards are as applicable to..." a CAFO's "off-site landspreading operation as they are on-site." There thus appears to be no conflict between Act 21 and the off-site monitoring condition in the DHA Order. Rather, the same legal basis that applies to onsite monitoring, which the Department accepted as not in conflict with Act 21, applies to off-site landspreading areas as well.

While there appears to be no legal basis to distinguish between on-site and off-site monitoring, there may well be some practical differences. The DHA Order therefore anticipated any problems with the consent of off-site landowners by making their participation voluntary and also specifically giving the DNR discretion to determine if such a regimen was practicable.

Because I am aware of no such precedent relating to the other disputed condition, relating to establishing a maximum number of animal units, I will let my decision speak for itself on that issue. That would have been my strong preference on both issues.

I am writing this letter not to advocate for my decision but solely to fulfill any ethical obligation I may have as an adjudicator to make a tribunal aware of precedent necessary for a fair resolution of a case. I also speak only for myself and not for the Division of Hearings and Appeals (DHA).

Sincerely,



Jeffrey D. Boldt
Administrative Law Judge

c: Attorney Daniel P. Lennington, Department of Justice
Secretary Cathy Stepp, Department of Natural Resources
Attorney Sarah Williams, Midwest Environmental advocates
Attorney Jordan Hemaidan, Michael Best & Friedrich
Attorney Jane Landretti, Department of Natural Resources
Administrator Brian Hayes, Division of Hearings and Appeals