STATE OF WISCONSIN
WISCONSIN DEPARTMENT OF NATURAL RESOURCES

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In Re: Kinnard Farms, Inc.
WPDES Permit No. WI-0059536-04-2

VERIFIED PETITION FOR REVIEW OF THE REASONABLENESS OF OR NECESSITY FOR CERTAIN WPDES PERMIT CONDITIONS PURSUANT TO WIS. STAT. § 283.63

TO THE DEPARTMENT OF NATURAL RESOURCES:

Pursuant to Wis. Stat. § 283.63 and Section 6 of the Settlement Agreement, as defined herein, the undersigned petitioner Kinnard Farms, Inc. ("Petitioner"), by and through its attorneys Michael Best and Friedrich LLP, hereby petitions for review by the Wisconsin Department of Natural Resources (the "Department" or "DNR") of the reasonableness of or necessity for the terms and conditions contained in Sections 1.1.1, 2.1.2, and 3.10 of WPDES Permit No. WI-0059536-04-2 dated March 25, 2022 (the "Modified Permit"), attached hereto as Exhibit A.

I. INTEREST OF THE PETITIONER

1. Petitioner is a Wisconsin corporation with its principal office located at E2675 County Road S, Casco, WI 54205-9462.

2. Petitioner is the permittee under the Modified Permit and will be negatively impacted by Section 1.1.1, 2.1.2, and 3.10 of the Modified Permit. Specifically, Petitioner will be subject to an animal unit limit established at a level that is unreasonable, arbitrary and capricious, and not sufficiently supported in fact. Petitioner will also be required to expend significant sums of money to design and install impracticable groundwater monitoring at land application sites upon terms and conditions which are unreasonable, unnecessary, arbitrary and capricious, and

not supported by an adequate factual basis.

II. BACKGROUND

3. Petitioner applied for reissuance of, and was granted reissuance of, WPDES Permit No. WI-0059536-04-0 on January 29, 2018 (the "Original Permit").

4. Subsequently, Laura Hammer, Jodi Parins, Erik Sundqvist, Susie Vania, and Sandra Winnemueller ("Challengers") petitioned for review of the Original Permit, and DNR granted a contested case hearing (the "Contested Case") to address two questions: (i) whether the Permit is unreasonable because it does not include a limit on the maximum number of animal units; and (ii) whether the Permit is unreasonable because it does not require sampling or groundwater monitoring of groundwater at land application sites. Groundwater monitoring at land application sites is sometimes referred to as "off-site groundwater monitoring."

5. Petitioner, DNR, and the Challengers entered into a settlement agreement dated July 11, 2019 to resolve the Contested Case (the "Settlement Agreement"). In the Settlement Agreement, the parties agreed to resolve the Contested Case because certain issues concerning the legal authority of the Department were pending before the Wisconsin Supreme Court in *Clean Wisconsin, Inc. et al. v. Wisconsin Department of Natural Resources, et al.*, Case No. 2016-AP-1688 (the "Kinnard Case").

6. The Settlement Agreement contained the following provisions relevant to the animal unit maximum issue and the off-site groundwater monitoring issue:

> 2. If the Court decides in the Kinnard Case that DNR is not precluded by law from including an animal unit limit in a CAFO WPDES Permit, then DNR shall modify the Permit to include an animal unit limit. In determining the appropriate animal unit limit, DNR will consider, unless precluded by the Court: (i) the Kinnard Farms' capacity to store manure in compliance with the 180 day requirement in §§ NR 243.14(9), .15(3) & .17(3) Wis. Admin. Code; (ii) the Kinnard Farms' capacity to landspread manure in compliance

with § NR 243.14 Wis. Admin. Code including, but not limited to, the requirement to prevent exceedances of groundwater quality standards at § NR 243.14(2)(b)6 Wis. Admin. Code; and (iii) any other factors DNR is authorized to consider by statute, rule or the decision in the Kinnard Case.

3. If the Court decides in the Kinnard Case that DNR is not precluded by law from including in a CAFO WPDES permit terms requiring groundwater monitoring at landspreading sites, then DNR shall determine whether it is practicable to require monitoring wells at one or more of Kinnard Farms' proposed landspreading sites in compliance with the Administrative Law Judge's Findings of Fact, Conclusions of Law and Order in Division of Hearings and Appeals Case No.: IH-12-071 dated October 29, 2014. In determining the practicability of groundwater monitoring at Kinnard Farms' landspreading sites DNR will consider, unless precluded by the Court: (i) the site-specific conditions at the proposed Kinnard Farms' landspreading locations regarding soil make up, nutrient uptake, groundwater quality, and potential for groundwater contamination; (ii) the extent of Kinnard Farms land ownership or control in relation to potential receptors; (iii) the extent of voluntarily willing neighboring properties with water contamination issues or risks in relation to potential receptors; (iv) any input provided by Kinnard Farms or Petitioners; and (v) any other factors DNR is authorized to consider by statute, rule or the decision in the Kinnard Case. If DNR determines groundwater monitoring is practicable at one or more landspreading sites, DNR will modify the Permit to include terms necessary to require such groundwater monitoring.

. . .

6. Any Party may seek a contested case hearing on a modification of the Permit undertaken pursuant to this Agreement, provided however, that in accordance with § NR 203.135(5)(b) Wis. Admin. Code a challenging Party may seek a hearing only on whether (i) DNR complied with the requirements of Sections 2 and/or 3 of this Agreement in modifying the Permit, and; (ii) DNR's determinations underlying modification of the Permit, or a decision not to modify the Permit to implement Sections 2 and/or 3 of this Agreement, are reasonable and sufficiently grounded in fact, and not arbitrary and capricious.

Settlement Agreement, §§ 2-3, 6

7. In July 2021, the Wisconsin Supreme Court issued an opinion in the Kinnard Case,

holding that DNR "had the explicit authority to impose both [an] animal unit maximum and off-site groundwater monitoring conditions" in the Original Permit. *See Clean Wisconsin v. DNR*, 2021 WI 71, ¶ 2.

8. On December 3, 2022, DNR issued a draft permit modification pursuant to the terms of the Settlement Agreement (the "Draft Modified Permit"). A copy of the Permit Fact Sheet for the Draft Modified Permit containing proposed terms and conditions of such modification is attached as Exhibit B.

9. On January 25, 2022, Petitioner filed comments on the Draft Modified Permit.

10. On March 25, 2022, DNR issued the Modified Permit. A copy of the Department's Notice of Final Determination ("NOFD") and Permit Fact Sheet are attached hereto as Exhibit C and Exhibit D, respectively.

11. In response to comments filed by the public, DNR changed the terms and conditions of the Draft Modified Permit by adding specific terms and conditions that were not included in the Draft Modified Permit and with respect to which Petitioner had no opportunity to provide comments prior to the issuance of the Modified Permit.

III. PETITIONER REQUESTS REVIEW OF THE FOLLOWING SPECIFIC ISSUES:

A. The animal unit maximum of 11,369 animal units was not established in accordance with Section 2 of the Settlement Agreement and is unreasonable, arbitrary and capricious, and not supported by an adequate factual basis.

12. Section 1.1.1 of the Modified Permit establishes an animal unit maximum of 11,369 animal units.

13. An animal unit maximum of 11,369 equates to 7,950 dairy cows, which is Petitioner's current herd size. Therefore, under the Modified Permit, Petitioner has no ability to increase its herd size above 7,950 dairy cows.

14. Section 2 of the Settlement Agreement states, in relevant part:

> In determining the appropriate animal unit limit, DNR will consider, unless precluded by the Court: (i) the Kinnard Farms' capacity to store manure in compliance with the 180 day requirement in §§ NR 243.14(9), .15(3) & .17(3) Wis. Admin. Code; (ii) the Kinnard Farms' capacity to landspread manure in compliance with § NR 243.14 Wis. Admin. Code including, but not limited to, the requirement to prevent exceedances of groundwater quality standards at § NR 243.14(2)(b)6 Wis. Admin. Code; and (iii) any other factors DNR is authorized to consider by statute, rule or the decision in the Kinnard Case.

15. Petitioner submitted to the Department a projected number of animal units which represents its "foreseeable maximum level of discharge" in accordance with s. 283.31(5). The Petitioner's proposed animal unit maximum of 21,450 of animal units was included in the Draft Modified Permit. *See* Exhibit B at 1-2.

16. In response to Section 2 of the Settlement Agreement, Petitioner determined its proposed animal unit maximum based on the two enumerated factors—namely, its capacity to store and land spread manure in compliance with ch. NR 243, Wis. Admin. Code.

17. More specifically, based on its current storage capacity, Petitioner determined that it could store manure and process wastewater from 21,450 animal units and remain in compliance with the 180-day storage requirement. Petitioner submitted calculations supporting this conclusion, and the same were included in the attachments to the Permit Fact Sheet for the Draft Modified Permit. *See* Exhibit B.

18. During the public comment period, Petitioner commented in support of the proposed animal unit maximum of 21,450 animal units.

19. DNR issued the Modified Permit with an animal unit maximum of 11,369 units, stating that "[m]anure and process wastewater volume generated by 11,369 animal units is the permittee's foreseeable maximum level of discharge in accordance with s. 283.31(5)."

20. An animal unit maximum of 11,369 animal units provides Petitioner with no

flexibility to accommodate seasonal or temporary fluctuations in herd size that are a normal and expected consequence of dairy farming.

21. An animal unit maximum of 11,369 animal units bears no relationship to the storage and landspreading capacity of Petitioner.

22. The animal unit maximum of 11,369 animal units was not established in accordance with Section 2 of the Settlement Agreement and is unreasonable, arbitrary and capricious.

B. DNR's determination that groundwater monitoring of land application sites is practicable is unreasonable, arbitrary and capricious, and not supported by an adequate factual basis.

23. Sections 2.1.2 and 3.10 require Petitioner to propose a groundwater monitoring plan and, upon Department approval of the same, implement groundwater monitoring at two land application sites.

24. Section 3 of the Settlement Agreement requires DNR to "determine whether it is practicable to require monitoring wells at one or more of Kinnard Farms' proposed landspreading sites" if the Court in the Kinnard Case concludes that DNR has the legal authority to require such monitoring.

25. As noted above, the Wisconsin Supreme Court held in the Kinnard Case that DNR has legal authority to require groundwater monitoring at land application sites in WPDES permits, thereby requiring DNR to determine the practicability of such monitoring pursuant to the Settlement Agreement.

26. Groundwater monitoring at Petitioners' land application sites is impracticable because it will not produce reliable, probative, or actionable data that will assure Petitioners' land application activities comply with effluent limitations contained in the Modified Permit and

Chapter NR 140 groundwater standards.

27. Petitioner submitted "input" on the Department's decision on this issue pursuant to Section 3 of the Settlement Agreement and comments during the public comment period. Petitioner's input and comments opposed groundwater monitoring at land application sites argued that such monitoring is impracticable.

28. The Department's determination that monitoring of land application sites is practicable is unreasonable and arbitrary and capricious, and not supported by an adequate factual basis.

C. <u>If groundwater monitoring of land application sites is required, a default monthly sampling frequency in Phase 2 is unreasonable, arbitrary and capricious, unnecessary, and not supported by an adequate factual basis.</u>

29. Section 2.1.2 specifies a monthly sampling frequency for most groundwater parameters in Phase 1. That section further specifies that "[m]onthly samples shall be collected for all wells, unless a different frequency is agreed upon in the Phase 2 Groundwater Monitoring Plan."

30. Accordingly, the Modified Permit presumes that monthly monitoring will continue to be necessary in Phase 2, with the burden placed on the permittee to demonstrate to the Department's satisfaction that this heightened frequency of monitoring is no longer necessary in Phase 2.

31. Petitioner submitted comments during the public comment period arguing that a presumption of monthly sampling was inappropriate, and that only quarterly sampling should be required in Phase 2.

32. The Modified Permit's presumption in favor of monthly monitoring in the absence of Phase 1 data suggesting that monitoring at such a frequency is necessary is

unreasonable, arbitrary and capricious, and not supported by an adequate factual basis.

D. <u>If groundwater monitoring of land application sites is required, requiring "recharge-triggered" sampling is unreasonable, arbitrary and capricious, unnecessary, and not supported by an adequate factual basis.</u>

33. Section 2.1.2 of the Modified Permit specifies that sampling of groundwater monitoring wells shall be conducted within 24 hours of a "recharge event," if a recharge event actually occurs during the month. If no recharge event occurs in a particular month, sampling for the month is still required.

34. Section 3.10 of the Modified Permit requires the Phase 1 groundwater monitoring plan to "include a procedure for identifying recharge events to initiate recharge-triggered sampling."

35. These permit requirements were not included in the Draft Modified Permit so Petitioner has had no opportunity to be heard on the practicability, reasonableness, or necessity of the "recharge-triggered" monitoring requirements.

36. The stated purpose of Phase 1 groundwater monitoring is to "establish site groundwater quality and groundwater flow direction." Likewise, the Modified Permit requires Petitioner to include in the Phase 2 groundwater monitoring plan "detailed site characterization based on data collected during Phase 1, a summary of groundwater flow direction and seasonal variability . . . ."

37. Recharge-triggered sampling is not necessary to achieve these ends and could distort sampling data based on variability in recharge-triggered sampling frequency. For example, if a recharge event triggers sampling at the beginning of one month, but not until the end of the following month, there could be a potential eight-week gap in sampling results.

38. For these reasons, requiring recharge-triggered sampling in Phase 1 is unreasonable, arbitrary and capricious, unnecessary, and not supported by an adequate factual basis.

E. If groundwater monitoring of land application sites is required, requiring "recharge-initiated" sampling to be completed within 24 hours of a designated "recharge event" is unreasonable, unnecessary, and not supported by an adequate factual basis.

39. Section 2.1.2 of the Modified Permit specifies that sampling of groundwater monitoring wells shall be conducted within 24 hours of a "recharge event," if a recharge event actually occurs during the month. If no recharge event occurs in a particular month, sampling for the month is still required.

40. Requiring sampling of groundwater monitoring wells within 24 hours of a recharge event is unreasonable and unnecessary because it is infeasible.

41. In the case of its current production area (on-site) groundwater monitoring wells, Petitioner must arrange for qualified personnel and sampling equipment to be available to it several days or even weeks in advance of the proposed actual sampling. The same would be true of any additional groundwater monitoring wells.

42. Contracted personnel who complete groundwater monitoring may not be available on 24 hours' notice to conduct sampling. Consider, for example, a recharge event that is triggered on the eve of a holiday or weekend. Qualified personnel would need to be available for dispatch on the day of the holiday or weekend in order to complete sampling in a timely manner under the permit. This is infeasible and unreasonable.

43. Consider also, for example, the potential that no designated recharge event occurs within the first 30 days of a 31-day month. Under the terms of the Modified Permit, Petitioner must be prepared to conduct sampling on the final day of the month—even if the final day of the month falls on a weekend or holiday—in order to avoid violating the terms of the Modified Permit by failing to conduct required sampling during that month. This is also infeasible and unreasonable.

44. Even if personnel could be made available on 24 hours' notice, there is no guarantee that equipment needed for personnel to complete sampling would be available for use within the same timeframe. In certain cases, personnel who complete groundwater sampling for Petitioner rent equipment. This equipment must be reserved in advance of the date on which it is needed.

45. Even if sampling can be feasibly completed on a weekend or holiday, accredited laboratories may not be open and available to process samples. This could lead to a delay that ultimately causes the groundwater samples to exceed allowable holding times, thus invalidating sampling results and potentially subjecting the permittee to noncompliance for failure to complete sampling in accordance with the Modified Permit.

46. The Department has offered no explanation for why recharge-triggered sampling, if it is required, cannot be completed on a less restrictive basis, such as within 7 days of a recharge event.

47. The restrictive and infeasible 24-hour timeline for completing recharge-triggered sampling in the Modified Permit subjects Petitioner to permit noncompliance if it cannot arrange for sampling of several off-site groundwater monitoring wells to take place within 24 hours of a recharge-triggered sampling event. The 24-hour timeline for recharge-triggered sampling is therefore arbitrary, capricious, not reasonable, necessary, or supported by an adequate factual basis.

F. <u>If groundwater monitoring of land application sites is required, monitoring two sites (instead of one) at the outset is unreasonable, arbitrary and capricious, unnecessary, and not supported by an adequate factual basis.</u>

48. Section 3.10 of the Modified Permit requires the permittee to submit a Phase 1 groundwater monitoring plan that "outlines the permittee's design for monitoring at least two land application sites" with well installation to occur within 90 days of the Department's approval of such groundwater monitoring plan.

49. Section 3 of the Settlement Agreement requires DNR to "determine whether it is practicable to require monitoring wells at one or more of Kinnard Farms' proposed landspreading sites" if the Court in the Kinnard Case concludes that DNR has the legal authority to require such monitoring.

50. As noted above, the Wisconsin Supreme Court held in the Kinnard Case that DNR has legal authority to require groundwater monitoring at land application sites in WPDES permits, thereby requiring DNR to determine the practicability of such monitoring pursuant to the Settlement Agreement.

51. The Draft Modified Permit proposed monitoring at one land application site.

52. Groundwater monitoring at Petitioners' land application sites is impracticable because it will not produce reliable, probative, or actionable data that can assure Petitioners' land

application activities comply with effluent limitations contained in the Modified Permit and Chapter NR 140 groundwater standards.

53. In light of such impracticability, monitoring of two land application sites at the outset of any monitoring (if it is to be required in the first instance) is unreasonable, arbitrary and capricious, unnecessary, and not supported by an adequate factual basis.

54. Petitioner submitted input pursuant to Section 3 of the Settlement Agreement and comments during the public comment period opposing groundwater monitoring at land application sites and arguing that such monitoring is impracticable. Because monitoring two land application sites was not proposed in the Draft Modified Permit, Petitioner has had no opportunity to be heard on the practicability, reasonableness, or necessity of monitoring two sites, instead of one, at the outset of any required off-site groundwater monitoring.

G. <u>The Department imposed unreasonable, arbitrary and capricious deadlines for submission of Phase 1 and Phase 2 groundwater monitoring plans.</u>

55. Section 3.10 requires Petitioner to submit a Phase 1 groundwater monitoring plan by May 25, 2022, merely 60 days after the Modified Permit was issued.

56. Among other things, the Phase 1 plan must outline the permittee's design for monitoring at least two land application sites with shallow depth to bedrock, be appropriate for the geology and hydrogeology of the site, contain a procedure for identifying recharge events to initiate recharge-triggered sampling, and include plans and specifications for installation of Chapter NR 141-compliant groundwater monitoring wells. Development of such a plan is a complex and significant undertaking.

57. Section 3.10 further requires that a Phase 2 groundwater monitoring plan be submitted to the Department within 60 days of collecting the eighth monthly sample resulting from monitoring under the Phase 1 groundwater monitoring plan.

58. Among other things, the Phase 2 groundwater monitoring must include a detailed site characterization based on data collected during Phase 1, summarize groundwater flow direction and seasonal variability, and make recommendations concerning future monitoring.

59. These deadlines are unreasonable, arbitrary and capricious because they do not provide Petitioner with adequate time to develop the relevant groundwater monitoring plan and, in the case of the Phase 2 groundwater monitoring plan, to receive laboratory results, evaluate the data, and formulate conclusions to meet the requirements for a Phase 2 groundwater monitoring plan.

60. Petitioner submitted comments during the public comment period requesting that additional time be provided for the development of both the Phase 1 and Phase 2 groundwater monitoring plans.

IV. A HEARING IS WARRANTED ON THE SPECIFIC ISSUES RAISED IN THIS PETITION FOR REVIEW

A. Petitioner commented on all issues prior to the Department's issuance of the Modified Permit or has had no opportunity to do so because the specific issue was not presented in the Draft Modified Permit.

61. As outlined above, Petitioner adequately raised its concerns to DNR regarding the specific issues presented herein in Sections III.A, III.B, III.C, and III.G. The Department's response to public comments included in the NOFD either did not address the Petitioner's specific comments (in some cases providing only a conclusory response) and/or did not adequately address Petitioner's concerns.

62. Petitioner was provided no opportunity to comment on the specific issues presented herein in Sections III.D-F, inclusive, as the permit terms and conditions at issue in those sections were not presented for public comment in the Draft Modified Permit.

63. A hearing is warranted (i) to review the terms and conditions upon which Petitioner commented but did not receive an adequate response and (ii) to provide Petitioner an opportunity to be heard on those specific issues that were not presented for public comment in the Draft Modified Permit.

B. The Department failed to comply with Section 2 of the Settlement Agreement.

64. As set forth in greater detail in Section III.A, the Department failed to utilize the enumerated factors in Section 2 of the Settlement Agreement to determine the animal unit maximum to be included in the Modified Permit.

65. In accordance with Section 6 of the Settlement Agreement, a hearing is warranted to review the Department's failure to comply with Section 2 of the Settlement Agreement.

C. The Department included terms and conditions which are unreasonable, unnecessary, arbitrary and capricious, or not supported by an adequate factual basis in the Modified Permit.

66. As set forth in greater detail in Sections III.A-G, inclusive, the Department included terms and conditions which are unreasonable, unnecessary, arbitrary and capricious, and/or not supported by an adequate factual basis in the Modified Permit.

67. In accordance with Section 6 of the Settlement Agreement and Wis. Stat. § 283.63, a hearing is warranted to review whether the provisions of Sections 1.1.1, 2.1.2, and 3.10 are reasonable, necessary, not arbitrary and capricious, and supported by an adequate factual basis.

III. RELIEF REQUESTED

WHEREFORE, on the basis of the foregoing, Petitioner respectfully requests, pursuant to Wis. Stat. § 283.63 and Section 6 of the Settlement Agreement, *de novo* review of the Permit conditions contained in Section 1.1.1, 2.1.2, and 3.10 of the Modified Permit.

Dated this 22nd day of April, 2022.

Respectfully submitted,

MICHAEL BEST & FRIEDRICH LLP

By: _____

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Attorneys for Petitioner

VERIFICATION

STATE OF WISCONSIN)
) ss.
COUNTY OF Kewaunee)

I, Lee Kinnard, being first duly sworn, on oath state that I am the president of Kinnard Farms, Inc., that I have read the above Verified Petition and that the statements therein are true and correct to the best of my knowledge and belief.

MICHELLE M. KINNARD NOTARY PUBLIC STATE OF WISCONSIN

Lee H Kinnard
Lee H. Kinnard

Signed and sworn to before me this
22 day of April, 2022 by Lee H. Kinnard.

Michelle M Kinnard
Notary Public, State of Wisconsin
My Commission: 3-20-2024