



2. WDNR is an agency of the State of Wisconsin, as that term is defined by Wis. Stat. § 227.01(1) and as that term is used throughout Wis. Stat. ch. 227. WDNR's principal office is located at 101 South Webster Street, Madison, Wisconsin. WDNR is responsible for administration of Wis. Stat. ch. 283, including those provisions of chapter 283 relating to the issuance and enforcement of permits for the discharge of pollutants to waters of the state.

## **II. JURISDICTION AND VENUE**

3. Kinnard's principal place of business is within Kewaunee County, making Kinnard a "resident" of such county. Kewaunee County Circuit Court is therefore the proper venue for this action as specified in Wis. Stat. § 227.53(1)(a)(3).

4. The Decision is a final agency decision subject to judicial review under Wis. Stat. § 227.52 *et seq.*

5. This Petition for Judicial Review is timely filed.

## **III. BACKGROUND**

6. Kinnard owns and operates a large concentrated animal feeding operation ("CAFO") with a production area located in the Town of Lincoln, Kewaunee County, Wisconsin (the "Dairy").

7. WDNR regulates discharges of pollutants to waters of the state, including ground waters of the state, pursuant to Wis. Stat. ch. 283, administrative rules promulgated thereunder, and the WPDES permit program.

8. By law, WPDES permits may not be issued for a term of greater than five years, and as such, WPDES permits are generally reissued every five years to permittees.

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

10. Subsequently, Laura Hammer, Jodi Parins, Erik Sundqvist, Susie Vania, and Sandra Winnemueller (“Challengers”) petitioned for review of the Original Permit, and WDNR 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.”

11. Kinnard, WDNR, 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”).

12. The Settlement Agreement contained the following provisions relevant to the question of animal unit maximums and off-site groundwater monitoring:

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

13. In July 2021, the Wisconsin Supreme Court issued an opinion in the Kinnard Case, holding that WDNR "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.

14. Based on the Wisconsin Supreme Court's opinion in the Kinnard Case, WDNR

was required to (i) modify Kinnard's WPDES permit to include an animal unit limit, consistent with Section 2 of the Settlement Agreement, and (ii) to determine whether it is practicable to require monitoring wells at one or more of Kinnard's land application sites.

15. On December 3, 2022, WDNR issued a draft permit modification pursuant to the terms of the Settlement Agreement (the "Draft Modified Permit").

16. On January 25, 2022, Kinnard filed comments with WDNR on the Draft Modified Permit.

17. On March 25, 2022, WDNR issued its Decision. The Modified Permit is designated WPDES Permit No. WI-0059536-04-2.

18. The Modified Permit included additional terms and conditions that were that were not included in the Draft Modified Permit and with respect to which Kinnard had no opportunity to provide comment prior to the issuance of the Modified Permit.

19. Specifically, the Decision adds three sections (Sections 1.1.1, 2.1.2, and 3.10) to Kinnard's WPDES permit.

20. Section 1.1.1 imposes an animal unit maximum condition upon Kinnard's operation. The animal unit maximum limits Kinnard's operation to 11,369 animal units. An animal unit maximum of 11,369 equates to 7,950 dairy cows, which is Kinnard's current herd size. Therefore, under the Modified Permit, Kinnard has no ability to increase its current herd size.

21. Working in tandem, Sections 2.1.2 and 3.10 impose a requirement to conduct groundwater monitoring of two of Kinnard's land application sites, subject to specific terms and conditions in the Modified Permit.

#### **IV. GROUNDS FOR RELIEF**

22. The Decision is improper and unlawful, and should be reversed, vacated, modified, or remanded back to WDNR pursuant to Wis. Stat. § 227.57(5), (7) and (8) because:

- 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, outside the range of discretion conferred upon WDNR, and/or lacks an adequate factual basis.
- b. WDNR's determination that groundwater monitoring of land application sites is practicable, as that term is used in Section 3 of the Settlement Agreement, is unreasonable, outside the range of discretion conferred upon WDNR, and/or lacks an adequate factual basis.
- c. Even if groundwater monitoring of land application sites is practicable, as that term is used in Section 3 of the Settlement Agreement, the permit term establishing a default assumption in favor of a monthly sampling frequency in Phase 2 is unreasonable, outside the range of discretion conferred upon WDNR, and/or lacks an adequate factual basis.
- d. Even if groundwater monitoring of land application sites is practicable, as that term is used in Section 3 of the Settlement Agreement, the permit terms requiring "recharge-triggered" sampling are unreasonable, outside the range of discretion conferred upon WDNR, and/or lack an adequate factual basis.
- e. Even if groundwater monitoring of land application sites is practicable, as that term is used in Section 3 of the Settlement Agreement, the permit term requiring "recharge-triggered" sampling to be completed within 24 hours of a designated "recharge event" is unreasonable, outside the range of discretion conferred upon WDNR, and/or lacks an adequate factual basis.

- f. Even if groundwater monitoring of land application sites is practicable, as that term is used in Section 3 of the Settlement Agreement, the permit terms requiring monitoring of two land application sites (instead of one) at the outset of such monitoring is unreasonable, outside the range of discretion conferred upon WDNR, and/or lacks an adequate factual basis.
- g. Even if groundwater monitoring of land application sites is practicable, as that term is used in Section 3 of the Settlement Agreement, the deadlines for submitting Phase 1 and Phase 2 groundwater monitoring plans are unreasonable, outside the range of discretion conferred upon WDNR, and/or lack an adequate factual basis.

**V. PETITIONER IS AGGRIEVED BY THE DECISION**

23. Unless the Decision is reviewed and overturned by the court on judicial review, Kinnard will be required to operate its Dairy pursuant to the provisions of the Permit. Specifically, the Decision aggrieves and/or threatens to injure Kinnard because it (i) limits Kinnard's ability to expand its herd size beyond 11,369 animal units and (ii) requires Kinnard to expend significant amounts of money to design, install, and monitor a groundwater monitoring system for two land application sites without adequate justification.

24. Kinnard will be responsible for all costs associated with the operation of the Dairy, including any costs of complying with the requirements of its Permit.

25. An unreasonably low animal unit maximum of 11,369 animal units will prohibit Kinnard from expanding or even temporarily maintaining its herd size beyond its current level, with a loss of competitive flexibility. If Kinnard is restricted from increasing its herd size, Kinnard may lose revenue associated with the sale of milk from additional dairy cows.

Moreover, because fluctuations in herd size are a normal and expected consequence of dairy farming, the animal unit maximum will limit Kinnard's operational flexibility and cause it to incur higher costs.

26. The initial design, approval, and installation process of the groundwater monitoring system will cost Kinnard tens of thousands of dollars to install, monitor and maintain. After the initial installation, Kinnard will be required to indefinitely pay experts to regularly sample, analyze, and interpret the data from the wells. Each round of sampling typically costs thousands of dollars for the sampling, laboratory analysis and expert data analysis and reporting. As the system ages, wells will need to be maintained or replaced due to wear and tear.

27. Therefore, unless the challenged provisions of the Permit are reversed or modified as requested in this petition, Kinnard will be directly and negatively impacted by the WDNR's decision described above.

## **VI. RELIEF REQUESTED**

WHEREFORE, Petitioner respectfully requests that the Court:

- A. Remand the case to WDNR with instructions to vacate WDNR's March 25, 2022 Decision pursuant to Wis. Stat. § 227.57(1), (4), (5), (6), (7), (8) and (9) by invalidating Sections 1.1.1, 2.1.2, and 3.10 of the Modified Permit; and
- B. Grant Petitioner such other relief as the Court deems appropriate.



Dated this 22nd day of April, 2022.

Respectfully submitted,

**MICHAEL BEST & FRIEDRICH LLP**

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