



Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS

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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

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Case No.: IH-12-071

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Green Bay, Wisconsin on February 11-14, 2014, Jeffrey D. Boldt, Administrative Law Judge (ALJ) presiding. The parties requested an opportunity to submit written closing arguments, and the last was received on June 27, 2014. On September 24, 2014, the ALJ advised the parties that the decision would be issued prior to October 29, 2014.

In accordance with Wis. Stat. §§ 227.47 and 227.53(1)(c), the PARTIES to this proceeding are certified as follows:

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Petitioners:

1. Lynda Cochart
2. Amy Cochart
3. Roger D. DeJardin
4. Sandra Winnemuller
5. Chad Cochart, by

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### ISSUES FOR HEARING AND SUMMARY OF RULING

Prior to the hearing, the parties agreed to a slight modification of the issues and agreed that the issues for hearing are as follows:

1. Whether Sections 1.1, 1.7, and 1.8 of the WPDES Permit are unreasonable because the Permit was issued before the Department receipt and approval of plans and specifications for the facility.

Holding: No statute or code requires the procedure preferred by the petitioners. The Petitioners have not demonstrated that this procedural approach has specifically led to the need for any substantive changes in either the NMP or the Permit.

2. Whether Section 1.1 of the WPDES Permit is unreasonable because it fails to ensure that all discharges authorized by the Permit comply with surface water quality standards.

Holding: This issue included several sub-parts. First, the petitioners did not establish that discharges from the VTA into the culvert were a discreet conveyance subject to discharge monitoring under the WPDES program. Second, at or after the hearing, both the DNR and the dairy agreed to some changes in the permit language relating to surface water discharges suggested by the petitioners. The permit has been modified to include the following provision relating to Outstanding and Exceptional Resource Waters: "For all new or increased discharges to an ORW or ERW, any pollutant discharged shall not exceed existing levels of the pollutants immediately up stream of the discharge site." The permit has been further modified as follows: "Production area discharges to waters of the state authorized under this permit shall comply with water quality standards, groundwater standards and may not impair wetland functional values."

3. Whether Sections 1.1, 1.7, and 1.8 of the WPDES Permit are unreasonable because they do not require that the Department evaluate background groundwater quality, they do not require sampling or monitoring of groundwater, and they do not require that discharges from the production area authorized by the Permit comply with groundwater quality standards.

Holding: The petitioners and members of the public have carried their burden of proof in establishing that groundwater monitoring is feasible and appropriate because the "facilities are located on or near areas that are susceptible to groundwater contamination such as direct conduits to groundwater, sandy soils, and sites with minimal separations between bedrock and high water tables". (§ NR 243.15(3)(2)(a))

The Permit should be modified by the Department to establish a plan acceptable to the Department for groundwater monitoring “at or near” Site 2.

4. Whether Sections 1.3.1, 1.3.3, 2 and 3.1.12 of the WPDES Permit are unreasonable because they do not include a limit on the current and proposed number of animal units allowed at the facility.

Holding: The Permit should be modified by the Department to include a limit on the number of animal units to better provide for long term operational planning and to avoid prior problems with manure storage limits. Existing storage requirements should also be maintained.

5. Whether Sections 1.6 and 2 of the WPDES Permit are unreasonable because they do not require that Kinnard Farms maintain adequate manure storage.

Holding: The Petitioners have not carried their burden of proof on this issue, other than the overlap with issue four above.

6. Whether Section 1.6 of the WPDES Permit and the Nutrient Management Plan are unreasonable because they include unattainable yield goals.

Holding: The Petitioners have not carried their burden of proof on this issue.

#### FINDINGS OF FACT

1. Kinnard Farms, Inc. (Kinnard Farms) has proposed to construct a concentrated animal feeding operation (CAFO) production area (Site 2) north of County Road S and in between Spruce Road and Tamarack Drive in the Town of Lincoln in Kewaunee County.

2. Kinnard Farms filed an application for reissuance of a Water Pollutant Discharge Elimination System (WPDES) permit with the Wisconsin Department of Natural Resources (DNR) on March 21, 2012.

3. As part of the WPDES permit reissuance application process, Kinnard Farms submitted a request for approval of the plans and specifications for its facility to the DNR on March 19, 2012. DNR issued a conditional approval of plans and specifications for the waste storage facility on November 30, 2012. (Ex. 9) DNR issued a conditional approval of plans and specifications for the feed storage pad and runoff control system on August 20, 2012. (Ex. 7)

4. As part of the WPDES permit reissuance application process, Kinnard Farms submitted a nutrient management plan (NMP) on March 21, 2012. The NMP was preliminarily approved on April 18, 2012.

5. On August 16, 2012, the DNR reissued coverage to Kinnard Farms under WPDES Permit No. WI-0059536-03-0. (Ex. 301)

6. On November 30, 2012, the DNR issued its conditional approval of the plans and specifications for Site 2. (Ex. 9)

7. On October 15, 2012, the DNR received a petition for a contested case hearing on behalf of petitioners (Petitioners) from Midwest Environmental Advocates. The DNR (by letter from Matt Moroney to Sarah Williams) granted a contested case hearing on seven issues. The parties later agreed on a new statement of issues for hearing submitted by Petitioners, intentionally omitted Issue Seven on which a hearing had been granted. Specifically, that issue challenged whether Section 1.6 of the Permit and the NMP are unreasonable because they do not require identification of drain tile lines to the maximum extent practicable.

8. The contested case hearing on the remaining six issues was held February 11-14, 2014.

9. A CAFO WPDES permit prohibits discharges of manure and process wastewater from the production area to navigable waters, except under certain circumstances, including for dairies that a 25-year, 24-hour storm event must have occurred. (Wis. Admin. Code § NR 243.13(2)) This basic framework is called the “no discharge” effluent limitation. (Bauman Pre-filed, p. 7, lines 146-147)

10. There are some practical limitations to using Water Quality Based Effluent Limits at CAFOs, including identifying a proper flow and discharge location for diffuse discharges and applying WQBELs to very intermittent discharges that may occur as a result of a 25-year, 24-hour storm event. (Bauman Pre-filed, p. 15, lines 327-330) In the absence of a defined pipe with exclusive discharges, the DNR conducts engineering review of plans for the production area, narrative water quality based restrictions (or TBELs) and identifies best management practices that a CAFO must implement. (Bauman Pre-filed, p. 19, lines 421-424) The parties disagree about whether there is a discreet conveyance in the proposed project. The dairy and the DNR note that water entering Culvert 9 will also include off-site stormwater. (Id) The Petitioners argue that drainage ditches four and five and stormwater ditches eight and five will discreetly discharge stormwater from Site 2 into Culvert 9. (Martin Pre-filed, p. 26)

11. The DNR has authority to review and approve design plans for manure and process wastewater handling and storage systems at CAFOs under Wis. Stat. § 281.41. Plan reviews conducted under s. 281.41, Wis. Stats., help to ensure that structures are designed in a manner that complies with applicable technical standards and permit requirements. Wisconsin Stat. § 281.41 requires that the DNR must approve or reject the plan within 90 days once they are complete. (Wheat Pre-filed, p. 10, 194-204)

12. DNR witness testified that a plans and specifications review provides one level of review and that WPDES permits issued under Wis. Stat. ch. 283 establish operational requirements and practices a CAFO must follow in order to protect water quality. (Bauman Pre-filed, p. 5, lines 102-110)

13. The permittee may not commence construction until the DNR approves its plans and specifications. (Wheat Pre-filed, p. 11, lines 209-210)

14. Ms. Wheat testified that from a technical perspective, she does not believe the chronological order of the plan approval and permit issuance to be important. (Wheat Pre-filed, p. 11, lines 207-209) The WPDES permit may be modified at any time to reflect changes in the plans and specifications. (Wheat Pre-filed, p. 11, lines 215-223)

15. Even after permit is issued, NR 243.15(1)(a) precludes the permittee from commencing construction until the DNR approves its plans and specifications. Even after the plan approval is issued, §§ NR 243.11(3) and 243.12(1) precludes the permittee from bringing animals onto the site. (Wheat Pre-filed, p. 11, lines 209-212)

16. Petitioners requested no remedy pursuant to their challenge of the chronological order of the plans and specifications, and the Petitioners have not demonstrated that this procedural approach has specifically led to the need for any substantive changes in either the NMP or the Permit.

17. The Waste Storage Facility design proposes a composite and water-tight concrete liner combination. (Wheat Pre-filed, p. 28, lines 541-542; Ex. 102)

18. Kinnard Farms' WPDES Permit implements DNR's "no discharge" requirement for the production area. (Bauman Pre-filed, pp. 6-7; TR Vol. 4, pp. 990-92, 1013 (Bauman))

19. Section 1.1 of the Kinnard Farms WPDES Permit provides that Kinnard Farms "may not discharge manure or process wastewater pollutants to navigable waters from the production area ...unless all of the following apply:

- Precipitation causes an overflow of manure or process wastewater from a containment or storage structure.
- The containment or storage structure is properly designed, constructed and maintained to contain all manure and process wastewater from the operation, including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event for this location (Kewaunee County — 4.2 inches).
- The production area is operated in accordance with the inspection, maintenance and record keeping requirements in s. NR 243.19.
- The discharge complies with groundwater and surface water quality standards."

(Ex. 301, p. 1)

20. All manure generated at the Kinnard Farms Site 2 production area will be collected and transported to the manure storage facility and eventually land-applied in accordance with the Kinnard Farms NMP. (Williams Pre-filed, pp. 12, 14)

21. With one exception, all process wastewater from the Site 2 production area is transported to the manure storage facility and eventually land-applied in accordance with the NMP. The exception is that highly diluted runoff from the feed storage area generated after the runoff from the first 1/4 inch of precipitation from every rain event is collected and transported to the vegetated treatment area (VTA). (Williams Pre-filed, pp. 12, 26) Expert witnesses for both DNR and Kinnard Farms provided substantial testimony demonstrating the effectiveness of the design of the feed storage pad, leachate collection system and VTA.

22. The feed storage pad consists of a four-inch thick asphalt surface. Below the asphalt surface is a drainage layer of stone, which is lined with a geo-membrane lining. Any seepage collected by a four-inch drain within the drainage layer will be conveyed to the leachate lift station and then to the manure storage facility. The asphalt surface of the feed storage pad slopes from west to east to direct any stormwater and silage leachate towards a reinforced concrete collection channel, which diverts the runoff to a lift station. (Williams Pre-filed, p. 28) Kinnard Farms designed the concrete collection channel adjacent to the feed storage pad to handle precipitation from a 100-year, 24-hour storm. This exceeds the applicable regulatory standard, which requires the design to accommodate a 25-year, 24-hour storm, and it minimizes the potential for overtopping of the collection channel directly onto the VTA. (Wheat Pre-filed, p, 24)

23. The feed storage pad leachate runoff that is directed to the lift station is pumped to the manure storage facility. The lift station is designed to pump the initial 1/4 inch of every rainfall event during each 24-hour period. Once the design volume has been pumped to storage, the pumps will shut off and the remaining runoff is directed to the VTA. (Williams Pre-filed, p. 28) This design of collecting the initial runoff from each precipitation event is called the "first flush" collection.

24. The collection channel beyond the lift station has 25 slot weirs, which meter and spread the flow of the feed pad runoff water onto the VTA. The VTA is a designed and constructed earthen area 300 feet (100 yards) wide and 1200 feet (400 yards) long with grassy vegetation. The top 24 inches of the VTA soil profile is constructed with topsoil from the site, and the VTA is graded with a 0.5 percent downward slope to the north, in the direction of Culvert 9. The VTA has gravel spreader pads that run the entire width of the VTA located every 200 feet. The gravel spreader pads redistribute any channelized flow so that the flow down the VTA continues as sheet flow. The VTA is designed to infiltrate stormwater from rainfall events greater than 1/4 inch that originates from the feed storage area, and only after the first 1/4 inch of runoff have been collected and disposed of via the feed pad leachate collection system. (Williams Pre-filed, pp. 28-29; Ex. 102, Sheet Nos. C109, C116)

25. At the base of the VTA is a 35-foot grassed filter strip onto which any water that exits the VTA will flow. (Williams Pre-filed, p. 30) This filter strip or vegetated buffer is an additional safeguard not required by any regulation. (Wheat Pre-filed, p. 17; TR Vol. 4, p. 1156 (Wheat)) During normal conditions, there will be very little, if any, flow from the VTA onto the filter strip. (Williams Pre-filed, p. 41) Beyond the filter strip is the convergence of the two storm water diversion ditches, Ditch 5 and Ditch 8, in the vicinity of Culvert 9. (TR Vol. 2, p. 366 (Williams); TR Vol. 4, p. 1130-31 (Wheat); Ex. 102, Sheet Nos. C109, C116)

26. DNR concluded it would be difficult to establish a reliable discharge monitoring system at the base of the VTA. It based this conclusion on the intermittent nature of any flow off the VTA, the diffuse nature of any such flow, which would be spread out along the 300 feet width of the VTA, and the potential for other environmental contaminant sources unrelated to the Kinnard Farms production area that could influence the monitoring data. (Bauman Pre-filed, p. 13; TR Vol. 2, pp. 387-92 (Williams); TR Vol. 4, pp. 994-95, 1039-40 (Bauman); TR Vol. 4; p. 1166 (Wheat))

27. DNR considered each of the design features of the VTA in concluding that no additional WPDES permit conditions were necessary to address potential pollutant discharges to surface waters from the feed storage area. (TR Vol. 4, pp. 1102-OS (Wheat))

28. The size of the first flush that Kinnard Farms will collect and transport to the manure storage facility directly reduces impacts from the concentration of nutrients that will be directed to the VTA for treatment. By collecting the first ¼ quarter inch of every rain event, Kinnard Farms will be collecting the largest amount of first flush of any VTA approved in Wisconsin. (TR Vol. 1, p. 261 (Shaw); TR Vol. 4, p. 1101 (Wheat))

29. Recent research at three VTA sites at Discovery Farms indicates that during rain events, at least 75 percent of all pollutants are being captured by systems that collect far less than the first 1/4 inch of rain. (TR Vol. 4, p. 1134 (Wheat))

30. The current NRCS standard is based on research that shows collection of 0.05 (1/20) inch of the first flush collects the vast majority of nutrients from a feed storage pad. That research also demonstrated that collection of the first 1/4 inch is the highest amount of first flush to be collected, because there is no demonstrable increase of nutrients that will be collected by a first flush collection that exceeds 1/4 inch. (TR Vol. 2, pp. 309-11 (Williams))

31. Kinnard Farms' VTA was designed to provide the highest possible infiltration rate and to minimize discharges at the base of the VTA. To accomplish this, the VTA was designed with the maximum length to width ratio (4:1), which provides for the longest possible flow length for the size of the VTA. It also was designed with the flattest slope allowed by DNR's guidance. The result is that the highly diluted runoff directed to the VTA will have the slowest flow velocity and longest resonance time possible. (Williams Pre-filed, p. 32)

32. DNR and Kinnard Farms specifically addressed the proximity of the VTA to the wetland beyond Culvert 9 by establishing a very high first flush collection and by designing and approving a VTA that was quite large compared to criteria in the NRCS Standard that was in effect at the time. (Wheat Pre-filed, p. 17)

33. The draft DNR guidance in place at the time Kinnard Farms designed the VTA was more restrictive than the then-current NRCS standard. (Pofahl Pre-filed, p. 11; TR Vol. 4, pp. 1102-04 (Wheat)) The design of Kinnard Farms' feed storage pad, leachate collection system and VTA exceeded the requirements of the applicable NRCS standard and DNR's draft guidance. (TR Vol. 4, pp. 1110-11 (Wheat))

34. Subsequent to DNR's approval of Kinnard Farms' feed storage pad and VTA, the applicable NRCS standard (NRCS Standard 635 (Sept. 2012)) was updated and DNR anticipates its draft guidance will no longer be necessary. (TR Vol. 4, pp. 1137-38 (Wheat))

35. The dimensions of the Kinnard Farms VTA exceed by nearly a factor of two the dimensions that are required by the latest NRCS standard. (TR Vol. 2, pp. 396-400 (Pofahl); TR Vol. 4, pp. 1138-39 (Wheat); Ex. 14, Table 2 & § V.D.I.)

36. The efficacy of VTAs has been established by ongoing scientific research and they have been demonstrated to work well at attenuating any concentrations of pollutants which

may remain in the stormwater that is sent to the VTA. (Wheat Pre-filed, p. 21; TR Vol. 2, p. 341 (Williams); TR Vol. 4, pp. 1157-58 (Wheat))

37. Under normal conditions, the concentration of pollutants entering the VTA will be negligible owing to the first flush design of the leachate collection system. (Williams Pre-filed, p. 26; Wheat Pre-filed, p. 17; TR Vol. 4, pp. 1133-35 (Wheat)) DNR concluded that the design of the VTA is more than adequate to attenuate the minute concentrations that remain. (Wheat Pre-filed, p. 21; TR Vol. 4, pp. 1134-35 (Wheat))

38. Based on the design features of the VTA, DNR was not unreasonable when it declined to require Kinnard Farms to monitor the surface water flow at the base of the VTA. Outflow for the VTA is not a discreet conveyance within the meaning of the WPDES program. The size of the vegetated treatment area (VTA) complied with NRCS Standard 635 that applied at the time of approval, and considering the (minimal) slope and distances to saturation and bedrock, Ms. Wheat testified that it substantively meets the current NRCS Standard 635. (Wheat Pre-filed, pp. 22-23, lines 422-441)

39. The feed storage design provides for a high first flush collection of rain (0.25 inch) to be collected. (Wheat Pre-filed, p. 17, lines 322-329) Ms. Wheat expects very low concentrations of pollutants in the remaining rainfall that is routed to the VTA. (Wheat Pre-filed, p. 17, lines 322-329)

40. DNR and Chapter NR 243 contemplate a technology-based approach to CAFO effluent limits. Due to the lack of discrete conveyances at CAFOs, the monitoring of which would have regulatory value, most CAFO effluent limitations are technology based. (Bauman Pre-filed, pp.6-7, 120-148) The TBEL approach replaces the water-quality based effluent limit applicable to most other point sources regulated under the WPDES program. In lieu of chemical specific monitoring, the WPDES permit program relies on proper design, construction, and operation of reviewable structures. (Bauman Pre-filed, p. 13, lines 286-287)

41. DNR testimony established that Culvert 9 is not a discrete conveyance solely from Kinnard Farms' production area. (Bauman and Wheat live testimony, February 14) DNR witnesses testified that other sources of pollutants not related to Kinnard Farms contribute to the flow that reaches Culvert 9. (Wheat and Bauman live testimony, February 14)

42. The Kinnard WPDES Permit does not require any monitoring that would establish "the volume of effluent discharges and the amount of each pollutant discharge." See Wis. Stat. § 283.55(1)(a)

43. Wastewater from the VTA and on-site stormwater are comingled into a ditch before entering Culvert 9.

44. For sampling to have regulatory meaning, it must account for background levels. CAFOs' "no discharge" standard is a high bar. DNR witness Tom Bauman testified that at Site 2, open-air conditions and run-on to the site present potential interference from unregulated farms and other CAFOs in the area, from farm fields spread with nutrients, septic systems, decaying vegetation, and wildlife. (Bauman Live testimony, February 14, morning)



45. The permit as a whole and § NR 243.13(1) require that all surface water discharges from Kinnard Farms must comply with the surface water quality standards in chs. NR 102 to 105, and 207. (Bauman Pre-filed, p. 14, lines 301-302; Ex. 301)

46. Antidegradation review applies to a person proposing to create an increase of an existing discharge or create a new discharge to surface waters of the state. (§ NR 207.01(2)) The Permit's reissuance to Kinnard Farms does not afford it an increased discharge or a new discharge to surface water, and so does not trigger antidegradation review. (Ex. 301, s. 1.1)

47. DNR witnesses testified that technology-based effluent limits are enforceable. The DNR has pursued enforcement against CAFOs even though it applies technology based effluent limits to most CAFOs rather than water quality-based effluent limits. (Bauman Pre-filed, p. 15, lines 337-341; Ex. 203)

48. Gretchen Wheat's testimony during the hearing indicated the Dairy had advised her that it would agree to conducting a breach analysis. (Wheat live testimony, February 14, afternoon)

49. The WPDES permit as a whole requires that the permittee comply with all groundwater quality standards. (Ex. 301)

50. Groundwater monitoring is not a standard requirement for WPDES permits or plans and specifications approval. (Bauman Pre-filed, p. 16, lines 360-361) Tom Bauman testified that an applicant is not required to gather background groundwater quality data before the DNR approves construction plans or issues a CAFO WPDES permit. (Bauman Pre-filed, p. 16, line 357) Neither the CAFO permit application process in § NR 243.12 nor the CAFO plan approval process in s. NR 243.15 requires installation of background wells and collection of groundwater quality monitoring data prior to construction or permit issuance or reissuance. In Mr. Bauman's 15 years with the Agricultural Runoff Program, he is not aware of any CAFO that has been required by the WPDES permit program to install background wells and collect groundwater data prior to site development or WPDES permit issuance. (*Id.* at p. 17, lines 366-373) However, the level of groundwater contamination including E Coli bacteria in the area at or near the project site is also very unusual, as is the proliferation of CAFO's in Kewaunee County. (Sagrillo, Mindak, et al)

51. Members of the public described what could fairly be called a groundwater contamination crisis in areas near the site. (Mindak, Cocharts, Weinewmueller, Rothieaux, Trem1, Jerabek, Sagrillo, Dr. Iwen, Wautlet, Rybski) Several witnesses testified that up to 50 percent of private wells in the Town of Lincoln are contaminated and that as many as 30 percent of wells had tested positive for E.coli bacteria. No witness for the dairy or the DNR disputed these numbers. Mike Sagrillo, has lived in the Town of Lincoln for 36 years and is the former chair of its planning commission. Sagrillo testified under oath about numerous unusable, contaminated wells in the Town of Lincoln. Many public comment witnesses suggested a plausible and even likely connection between the large numbers of CAFO's in the County and area and well-known problems with groundwater contamination. Numerous witnesses testified credibly and forcefully about the hardship and financial ruin that well water contamination has had on their businesses, homes and daily life.

52. Nearby neighbors Mr. David Mindak, Ms. Lynda and Ms. Amy Cochart, and Ms. Sandra Weinnemueller all testified about how difficult life was contaminated well water. Mr. Mindak testified memorably to eating anti- diarrhea medicine "like it was candy" after being

sickened by e-coli contaminated well water that was under 100 feet from a Kinnard landspreading field. Ms. Winemueller, a registered nurse, testified that her property is on low ground near a swamp approximately 4.5 miles from Site 2 and that her well water is contaminated with e-coli. Her family does not have a septic system with a drain field, so that could not be the source of her contamination. She believes Kinnard Farms is the only likely source of the cloudy and contaminated water that comes through her tap and made her family sick with diarrhea and stomach cramps. Despite her family having invested in an expensive holding tank to treat its own waste, her family suffers the daily stress, embarrassment, and financial cost of e-coli contamination in its well. Ms. Erica Routhieux lives just fifty feet from the proposed expansion and is concerned that she will now be forced to conduct regular expensive testing of her well water to ensure her family's safety. Similarly, Mr. Jessie Jerabek lives  $\frac{3}{4}$  of a mile from the Kinnard farm and has regularly inspected and kept his septic system in good repair. However, his well water has tested with high nitrate concentrations. Jerabek has fears for his family's safety and has been testing his water recently on an almost daily basis. He testified memorably about his concerns for the safety of his three year old daughter, who sometimes consumes small amounts of bathwater.

53. Undisputed testimony on the record established that a particularly complex geology is present at Site 2. DNR witnesses testified that complex geology makes it difficult to link a positive sampling result with a particular source. (Wheat live testimony, February 14, afternoon) The ability to identify the source groundwater quality exceedances is fundamental to the value of groundwater monitoring as an effective enforcement tool. However, given the proliferation of contaminated wells at or near the project site, it is essential that the Department utilize its clear regulatory authority as set forth below to ensure that Kinnard Farms meet its legal obligation under Wis. Admin. Code NR 243.14(2)(b)(3) not to contaminate well water with fecal bacteria from manure or process wastewater.

54. Groundwater monitoring can be required in cases where "facilities are located on or near areas that are susceptible to groundwater contamination such as direct conduits to groundwater, sandy soils, and sites with minimal separations between bedrock and high water tables". (Wis. Admin. Code § NR 243.15(3)(2)(a))

55. During the plans and specifications approval process, the DNR required Kinnard Farms to conduct a site assessment regarding perched groundwater saturation, regional groundwater, and bedrock in order to determine if groundwater monitoring would be necessary. (Ex. 5)

56. Site assessment information, the design of structures, and the condition of structures inform DNR staff as to whether groundwater quality monitoring is necessary. (Wheat Pre-filed, p. 14, lines 265-267) She concluded that Site 2 to be among the most protective designs in the state.

57. Kinnard Farms performed 40 soil borings and 32 test pits to evaluate the soil conditions and depth-to-bedrock in the vicinity of the manure storage facility at Site 2, which is nearly twice as many as the applicable NRCS 313 practice standard requires. (Williams Pre-filed, p. 21)

58. The experts disagreed as to the proper interpretation of the data yielded during the soil probe and test pit excavations. Mr. Williams opined that the standard conservative assumptions are not useful for interpreting the data at Site 2 east of Spruce Road. First, the boring equipment used could not extend beyond a rock fragment or large stone in excess of six inches in diameter, and the soil in the area contains numerous large stones. Second, many borings of shallower depths were in

close proximity of other borings that did not terminate at shallow depths, supporting an interpretation that the shallower borings encountered large stones and not bedrock. Finally, none of the test pits that were dug in the vicinity of the manure storage facility with excavation equipment encountered any bedrock, including those test pits that were dug to a depth of 34 feet. (Williams Pre-filed, pp. 16-17)

59. The most conservative interpretation of the data is to assume that any encounter of rock or refusal is evidence of bedrock, and to assume bedrock lies just beyond the lowest recorded depth where refusal was not encountered. (Muldoon Pre-filed, p. 16; Williams Pre-filed, p. 16) Dr. Muldoon based her analysis on these conservative assumptions. (Muldoon Pre-filed, pp. 16-17)

60. Dr. Maureen Muldoon, a geology professor at nearby UW-Oshkosh, has extensive experience in this region investigating fractured carbonate bedrock aquifers like that present at Site 2. She testified persuasively that the area around Kinnard Farms is very vulnerable to groundwater contamination. (Muldoon Pre-filed, pp. 9-11, 12; Hr'g Test., at 04:25, 07:22; 57:34, 01:49:13-30) Any pollution at the surface can travel rapidly through the shallow, glacial till soils and fractured carbonate bedrock. (Hr'g Test., at 02:32 (Muldoon)) There is little opportunity for attenuation and dispersion given the rapid transport through groundwater. (Hr'g Test., at 02:44 (Muldoon); Muldoon Pre-filed, p. 8) The closest downstream private well is a half mile to the east of Site 2. (Hr'g Test., at 02:10:27 (Trainor)) In karst areas such as those beneath Site 2, pollution at the surface can travel rapidly through groundwater into down gradient wells. (Muldoon Pre-filed, pp. 9-11) In Dr. Muldoon's research and experience, she has observed pollutants transport over a half mile in 24 hours in similar hydro geologic conditions."

61. It is feasible and reasonably cost-effective to install a groundwater monitoring system in the fractured carbonate bedrock aquifer beneath Site 2. (Hr'g Test., at 08:20-08:45 (Muldoon)) A site characterization could be completed to identify fracture pathways and develop an effective groundwater monitoring system. (Muldoon Pre-filed, pp. 27-30) There are groundwater sampling devices that would be ideal for this type of groundwater monitoring because they have small, self-contained data-loggers that can record variations in water level as well as variations in fluid temperature and electrical conductivity, or a measure of the total dissolved solids in the water, at pre-programmed time intervals. (Muldoon Pre-filed, p. 28) Dr. Muldoon testified that she had installed a groundwater sampling system in similar hydrogeologic conditions for approximately \$30,000. (Hr'g Test., at 01:04:33, 01:00:44-01:01:22 (Muldoon))

62. Given the proliferation of contaminated wells in the vicinity of Kinnard Farms, and the likely presence of karst features including fractured bedrock under the standard conservative geological assumptions, the DNR should exercise its clear regulatory authority to require groundwater monitoring near or at the site because it is "susceptible to groundwater contamination" within the meaning of § NR 243.15(3)(2)(a). The Department should review a plan for groundwater monitoring to include no less than six wells, preferably with no less than two that monitor areas subject to intensive landspreading by Kinnard Farms. Accordingly, the WPDES permit must be modified to include a groundwater monitoring plan which includes no less than six monitoring wells. If practicable, the permit-holder shall include at least two monitoring wells which are located off-site on voluntarily willing neighboring properties with water contamination issues or risks.

63. No applicable rule or statute requires a WPDES permit to specify a number of animal units at a CAFO facility. (Bauman Pre-filed, p. 25, lines 545-546) However, the Department has instituted this measure in other CAFO permits.

64. The number of animal units is not an effective sole method by which the DNR determines WPDES permit compliance. (Bauman Pre-filed, p. 23, lines 510-511) The measure of compliance with a discharge permit is how waste is managed, not to what extent it is generated. (Bauman Pre-filed, p. 24, lines 527-536) A practical short-term measure to determine whether a facility is exceeding the amount of waste it is able to store and land apply by looking at amount of manure in a pit. (Bauman Live Testimony, February 14, morning)

65. However, an enforceable maximum cap on animal units does provide a useful longer-term management tool for knowing when problems are likely to occur because both generation and the discharge of manure is directly related to the number of animal units on site. (Shaw, Polenske) Further, in 2009 and 2010 Kinnard failed to have permanent markers installed to allow a ready indication of when it had reached the 180-day limit of manure and wastewater storage. (Exs. 58-59) Under these circumstances, Sections 1.3, 1.3.3, 2 and 3.1.12 of the Permit should be modified to require that the permit articulate a maximum number of animal units allowed at the facility in addition to current storage requirements.

66. Section 1.3.2 of the Kinnard Farms WPDES permit requires the Dairy to maintain adequate manure storage. (Ex. 301) Requirements to maintain adequate manure storage are not included in other portions of the WPDES permit in order to minimize duplicate permit language. (Bauman Pre-filed, p. 25, lines 557-558)

67. Yield goals help calculate how much phosphorus growing crops remove from the soil. (Craig Pre-filed, p. 10, line 214) DNR calculations show that Kinnard Farms will produce approximately 300,000 lbs. of phosphorus and the crops selected will remove approximately 326,000 lbs. of phosphorus from the soil. (Craig Pre-filed, p. 10, lines 218-223)

68. The yield goals set within the NMP are considerably higher than county averages for the same crops in Kewaunee County. (Shaw) However, the yield goals set within the NMP reflect the average yield goals Kinnard Farms has achieved and documented on fields where it has recently completed yield monitoring. (Craig Pre-filed, p. 10, lines 215-216)

69. The Dairy selected the hand check and stem count method to calculate yield goals. (Craig Live Testimony, February 13, afternoon) The yield goal methods selected by the Dairy are reliable methods, and are generally more accurate than county averages. (Craig Live Testimony, February 13, afternoon)

## **DISCUSSION**

There was something of a “disconnect” between the evidentiary portion of the hearing on the WPDES permit review and the testimony from members of the public that stretched until late in the evening. While there was some support for the Kinnard Farms and the quality of their farming operations, many members of the public were deeply upset about what could only be described as a

crisis with respect to groundwater quality in the area.<sup>1</sup> The proliferation of contaminated wells represents a massive regulatory failure to protect groundwater in the Town of Lincoln. The Department needs to utilize its clear regulatory authority to require groundwater monitoring to enhance its ability to prevent further groundwater contamination.

Many public witnesses testified under oath credibly and forcefully about the hardship and financial ruin that this local groundwater contamination crisis has had on their businesses, homes and daily life. Numerous people echoed comments from Mike Sagrillo, who has lived in the Town of Lincoln for 36 years and has served as chair of its planning commission. Sagrillo testified about numerous unusable, contaminated wells in the Town of Lincoln. Several witnesses asserted that in the Town of Lincoln 50 percent of private wells are contaminated and as many as 30 percent of wells had tested positive for E.coli bacteria. It is not unreasonable for residents to see a link to large farming practices in the area. It is more likely than not that some portion of this contamination is from CAFO landspreading in a County where, according to un rebutted public testimony, there are more than a dozen permitted CAFO's and vast areas of its farmland subject to landspreading contracts.

The closest any of the members of the public came to directly linking groundwater contamination to the Kinnard Farms was the case of Kinnard neighbor David Mindak. Mr. Mindak testified that his contaminated well had to be replaced because of bacterial contamination that the DNR determined came from cow manure. (Ex. 400) The DNR's subsequent investigation was unable to determine the precise source of contamination of Mr. Mindak's well contamination because of the difficulties of tracing bacteria contamination back to the source without expensive DNA testing.<sup>2</sup>

Dr. Muldoon—who has extensive experience in this region investigating fractured carbonate bedrock aquifers like that present at Site 2—testified that the area around Kinnard Farms is very vulnerable to groundwater contamination. (Muldoon Pre-filed, pp. 9-11, 12; Hr'g Test., at 04:25, 07:22; 57:34, 01:49:13-30) Any pollution at the surface can travel rapidly through the shallow, glacial till soils and fractured carbonate bedrock. (Hr'g Test., at 02:32 (Muldoon)) There is little opportunity for attenuation and dispersion given the rapid transport through groundwater. (Hr'g Test., at 02:44 (Muldoon); Muldoon Pre-filed, p. 8) The closest downstream private well is a half mile to the east of Site 2. (Hr'g Test., at 02:10:27 (Trainor)) In karst such areas such as those beneath Site 2, pollution at the surface can travel rapidly through groundwater into down gradient wells. (Muldoon Pre-filed, pp. 9-11) In Dr. Muldoon's research and experience, she has observed pollutants transport over a half mile in 24 hours in similar hydro geologic conditions.”

The petitioners argue forcefully that, “Without groundwater monitoring at Site 2, the only way for the DNR or citizens to detect that Site 2 is causing groundwater contamination is for a neighbor's well to become contaminated.” Unfortunately, this has been the all too common state of affairs in the Town of Lincoln and Kewaunee County over the past years. This WPDES permit must be modified to do what is reasonably necessary to protect the drinking water of the residents and further groundwater contamination. While the Department has not previously required groundwater

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<sup>1</sup>It is also striking that none of this important context was included in the Department's Environmental Assessment (EA). However, the sufficiency of the EA is not an issue for this contested case proceeding and the EA met the procedural requirements of WEPA.

<sup>2</sup>In fairness, it must be noted that Mindak replaced his old well and has not had further problems. It must also be noted that the cost of this replacement well was incurred by Wisconsin taxpayers, rather than by the most likely source of the cow manure caused contamination.

monitoring, it has clear regulatory authority to do so in the context of a CAFO WPDES permit. See Wis. Stat. § 283.31(3), (4); *see also* Wis. Admin. Code §§ NR 243.13(1), (5), 243.15(3)(c)2., (7). It is also abundantly clear that the area is “susceptible to groundwater contamination” within the meaning of Wis. Admin. Code § NR 243.15(3)(2)(a).

Further, as DNR permit engineer Ms. Wheat opined, groundwater contamination from Site 2 itself could be “the least of the concerns” of the petitioners. It seems even more likely that further groundwater contamination could come from landspreading. For one thing, due to soil excavations undertaken by the Kinnards, more is known about the geology of the area under Site 2 than about many other off-site locations where Kinnard Farms manure will be land spread. The experts disagreed about the geology at Site 2, although using standard conservative assumptions Site 2 is susceptible to groundwater contamination. But it seems even more likely that groundwater contamination could result from landspreading than from Site 2 itself, which does have some portion of clay that may be more protective of groundwater than many off-site areas.

Nonetheless, given the dispute in the interpretation of the soil excavation results at Site 2, it is essential to undertake some groundwater monitoring on-site in areas close to neighbors who have experienced well water contamination. While it will be difficult to establish a reliable system of groundwater monitoring under these geologic circumstances, Dr. Muldoon was convincing that an effective groundwater monitoring system could be initiated for as little as \$50,000. The fact that groundwater monitoring might be difficult—because of the very karst geological features that make the area particularly susceptible to groundwater contamination—must not be used as an excuse not to exercise the DNR’s clear regulatory authority and duty to do so. Rather, such an effort must be undertaken to ensure that there is not further contamination of groundwater under these deplorable background conditions.

The permit must be amended to include a plan acceptable to the DNR for groundwater monitoring for all pollutants of concern at no less than six wells on and around site 2. It would be better and more likely to yield results that identified problem areas if this could also include two or three representative off-site landspreading fields. Obviously, this would require the voluntary participation of off-site property owners. However, no witness testified as to how such a system could be practically undertaken, and the petitioners have not offered such a plan as part of their request for relief. It was not their burden to do so. They have carried their burden of demonstrating that a groundwater monitoring plan is essential given that the area is “susceptible to groundwater contamination” within the meaning of Wis. Admin. Code § NR 243.15(3)(2)(a)

The permit has been further modified, and both the DNR and the Dairy agreed to some of the modified language. Petitioners requested a modification to Section 1.1 of Kinnard Farms’ WPDES permit to incorporate two provisions of the corollary Production Area Discharge Limitations section of the state’s Large Dairy CAFO General Permit (WPDES Permit No. WI-0063274-01) (excerpted in Ex. 201) First, they request inclusion of the following provision relating to Outstanding and Exceptional Resource Waters: “For all new or increased discharges to an ORW or ERW, any pollutant discharged shall not exceed existing levels of the pollutants immediately up stream of the discharge site.” Mr. Bauman testified that DNR does not believe the inclusion of this language is necessary, but “for the sake of clarity [DNR] would be amenable to including” this language in Section 1.1 of the permit. (Bauman Pre-filed, p. 12)

Second, Petitioners requested inclusion of the following provision to foreclose any argument that the production area discharge limitations are inapplicable to non-navigable waters of the state:



“Production area discharges to waters of the state authorized under this permit shall comply with water quality standards, groundwater standards and may not impair wetland functional values.” Again, Mr. Bauman testified that he does not believe the inclusion of this language is necessary, but he would not have a problem with including that language in Section 1.1 for clarification. (TR Vol. 4, pp. 1014-15 (Bauman))

Further, the Petitioners have established that the WPDES permit is unreasonable because it does not specify the number of animal units allowed at the facility. In support of that contention, Petitioners established that animal units are a common regulatory device in WPDES permitting, that the number of animal units corresponds directly to the amount of waste generated by a CAFO, and that imposition of a cap on animal units is a good idea in this particular case because of concerns over Kinnard Farms’ ability to comply with regulatory requirements directly related to the current permit requirements for 180 day storage capacity. (Exs. 58-59) It is not a question of either/or—the 180 day storage requirement represents a good short term measure to detect an impending problem, but the maximum animal unit number represents a useful longer-term management tool that will ensure that there is not suddenly a mad rush to achieve permit compliance and get under the 180 day capacity threshold. Establishing a cap on the maximum number of animal units will provide clarity and transparency for all sides as to the limits that are necessary to protect groundwater and surface waters. The permit should accordingly be modified by the Department to reflect this *additional* requirement.

All of these modifications are necessary to ensure that the permit holder meets its legal obligations, but with these modifications, the permit is approved.

### CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals (the Division) by its ALJ, has authority to hear contested cases and issue necessary orders in cases relating to WPDES permits referred to the Division by the Department. (Wis. Stat. §§ 227.43(1)(b) and 283.63)
2. Pursuant to Wis. Stat. § 283.63 a permittee or petitioner may secure review of the reasonableness or necessity for any term or condition of any issued, reissued or modified permit by filing a verified petition with the DNR Secretary. The petitioner has the burden of proof on allegations made in such a petition. The Department shall, “consider anew all matters concerning the permit denial, modification, suspension or revocation.”
3. Kinnard Farms is a “large animal feeding operation” within the meaning of § NR 243.04(13). Kinnard Farms’ Site 2 is a “point source” subject to the WPDES program, specifically “a concentrated animal feeding operation” within the meaning of Wis. Stat. § 283.01(12)(a).
4. Wisconsin Admin. Code Chapter NR 243 is the administrative code that applies to CAFO WPDES Permit and plan approval actions. Chapter NR 243 does not require the calculation of water quality based effluent limits for CAFO WPDES permits. (Bauman Pre-filed, p.15, lines 326) A CAFO WPDES permit prohibits discharges of manure and process wastewater from the production area to navigable waters, except under certain circumstances, including for dairies that a 25-year, 24-hour storm event must have occurred. (§ NR 243.13(2))

5. For a CAFO, WPDES effluent limitations are based on proper manure and process wastewater storage and/or containment and land application practices. (Bauman Pre-filed, p. 19, lines 417-419) In the absence of a defined pipe with exclusive discharges, the DNR conducts engineering review of plans for the production area, narrative water quality based restrictions (or TBELs) and identifies best management practices that a CAFO must implement. (Bauman Pre-filed, p. 19, lines 421-424) The discharge from the VTA and or into the ditches or Culvert Nine is not a defined pipe or discreet conveyance because water from other sources is mixed with on-site discharges.

6. Neither the CAFO permit application process in § NR 243.12 nor the CAFO plan approval process in § NR 243.15 requires that plan and specification approvals precede permit issuance chronologically.

7. The Permit may be issued before the DNR approves the plans and specifications for the facility because no Wisconsin law requires chronologically that the DNR approve plans and specifications before issuance of the permit.

8. Section 1.1 of the Permit is reasonable as amended in that it specifically requires that discharges authorized by the Permit comply with surface water quality standards.

9. Sections 1.1, 1.7 and 1.8 of the Permit are reasonable as modified because they require that authorized discharges from the production area comply with groundwater quality standards.

10. The DNR's obligation to include conditions in a WPDES permit that assure compliance with groundwater protection standards may be met through its authority to require groundwater monitoring in a WPDES permit, when necessary. See Wis. Stat. § 283.31(3), (4); *see also* Wis. Admin. Code §§ NR 243.13(1), (5), 243.15(3)(c)2., (7).

11. The DNR administrative code for CAFO's requires the installation of groundwater monitoring wells at a facility if it determines that groundwater monitoring "is necessary to evaluate impacts to groundwater and geologic or construction conditions warrant monitoring." Wis. Admin. Code § NR 243.15(7) The petitioners and members of the public have carried their burden of proof in establishing that groundwater monitoring is necessary at or near Site 2.

12. The Petitioners and public witnesses have established that the area at or near Site 2 and subject to landspreading contracts is "susceptible to groundwater contamination within the meaning of Wis. Admin. Code § NR 243.15(3)(2)(a)

13. Groundwater monitoring is required to ensure that the permit holder meet the following affirmative legal obligations: that no landspreading may be undertaken with 100 feet of a direct conduit to groundwater, Wis. Admin. Code NR 243.14(2)(b)(8) and that the permit holder not cause fecal contamination of water in a well by either landspreading or management of process wastewater. Wis. Admin. Code NR 243.14(2)(b)(3)

14. Antidegradation review applies to surface water; it does not apply to groundwater. (§ NR 207.01(2))



15. The Permit is remanded to the DNR to be modified to require that the permit articulate the maximum number of animal units allowed at the facility. Section 1.3.3 of the Permit requiring the Dairy to maintain 180 day liquid manure storage shall remain in full force and effect.

16. Sections 1.6 of the Permit and the Nutrient Management Plan are reasonable and contain reasonable yield goals.

## ORDER

WHEREFORE IT IS HEREBY ORDERED, the Permit issued by the DNR should be modified by this tribunal as follows:

Permit term 1.1 shall be amended to read:

### **Production Area Discharge Limitations**

The permittee shall comply with the livestock performance standards and prohibitions in ch. NR 151. In accordance with § NR 243.13, the permittee may not discharge manure or process wastewater pollutants to navigable waters from the production area, including approved manure stacking sites, unless all of the following apply:

- Precipitation causes an overflow of manure or process wastewater from a containment or storage structure.
- The containment or storage structure is properly designed, constructed and maintained to contain all manure and process wastewater from the operation, including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event for this location (**Kewaunee County – 4.2 inches**).
- The production area is operated in accordance with the inspection, maintenance and record keeping requirements in s. NR 243.19.
- The discharge complies with ~~groundwater and~~ surface water quality standards. For all new or increased discharges to an ORW or ERW, any pollutant discharged shall not exceed existing levels of the pollutants immediately up stream of the discharge site. For any new or increased discharges to other fish and aquatic life waters, the discharge shall not cause a significant lowering of water quality under chapter 207, Wis. Adm. Code.

All structures shall be designed and operated in accordance with §§ NR 243.15 and NR 243.17 to control manure and process wastewater for the purpose of complying with discharge limitations established above and groundwater standards.

The permittee may not discharge pollutants to navigable waters under any circumstance or storm event from areas of the production area, including manure stacks on cropland, where manure or process wastewater is not properly stored or contained by a structure.

Production area discharges to waters of the state authorized under this permit shall comply with water quality standards, groundwater standards and may not impair wetland functional values.

NOTE: Wastewater treatment strips, grassed waterways or buffers are examples of facilities or systems that by themselves do not constitute a structure.

Permit term 2.4.1 shall be inserted as follows:

**2.4.1 Breach Analysis (Waste Storage Impoundment Cell No. 3)**

Required Action	Due Date
<b>Submittal of Plans:</b> Submit a Breach Analysis for Waste Storage Impoundment Cell No 3. For Department review and approval. The analysis shall be based on a complete loss of the maximum volume of stored wastewater. Propose construction of any appropriate permanent engineering improvements such as an emergency spillway or secondary containment and describe how these measures would reduce impacts to the area.	3 months following ALJ decision
<b>Improvements and Post Construction Documentation:</b> Complete construction of any structures required as part of the Breach Analysis consistent with and approval by the Department by the specified Date Due. Submit post construction documentation within 60 days of completion of the project.	3 months following DNR approval

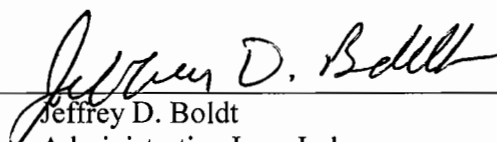
IT IS FURTHER ORDERED, that Sections 1.3, 1.3.3, 2 and 3.1.12 be modified to reflect a maximum number of animal units at the facility in addition to current storage requirements.

IT IS FURTHER ORDERED, that the Department should review and approve a plan for groundwater monitoring for pollutants of concern at or near the site because it has been demonstrated to be "susceptible to groundwater contamination" within the meaning of Wis. Admin. Code § NR 243.15(3)(2)(a). The plan should be submitted to the Department with 90 days of this Order, and shall include no less than six groundwater monitoring wells, and if practicable, at least two of which monitor groundwater quality impacts from off-site landspreading.

Dated at Madison, Wisconsin on October 29, 2014.

STATE OF WISCONSIN  
 DIVISION OF HEARINGS AND APPEALS  
 5005 University Avenue, Suite 201  
 Madison, Wisconsin 53705  
 Telephone: (608) 266-7709  
 FAX: (608) 264-9885

By: \_\_\_\_\_

  
 Jeffrey D. Boldt  
 Administrative Law Judge

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with Wis. Stat. § 227.48 and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Division of Hearings and Appeals a written petition for rehearing pursuant to Wis. Stat. § 227.49. Rehearing may only be granted for those reasons set out in Wis. Stat. § 227.49(3). A petition under this section is not a prerequisite for judicial review under Wis. Stat. §§ 227.52 and 227.53.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefore in accordance with the provisions of Wis. Stat. §§ 227.52 and 227.53. Said petition must be served and filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent and shall be served upon the Secretary of the Department either personally or by certified mail at: 101 South Webster Street, P. O. Box 7921, Madison, WI 53707-7921. Persons desiring to file for judicial review are advised to closely examine all provisions of Wis. Stat. §§ 227.52 and 227.53, to insure strict compliance with all its requirements.