



December 14, 2012

Attorney Sarah Williams
Midwest Environmental Advocates, Inc.
612 W. Main Street, Suite 302
Madison, WI 53703

Subject: Request for Contested Case Hearing under s. 283.63, Wis. Stats.; Kinnard Farms Permit No. WI-0059536-03-0

Dear Attorney Williams:

You submitted a request for contested case hearing under s. 283.63, Wis. Stats., on behalf of five individuals (Petitioners) challenging the final decision of the Wisconsin Department of Natural Resources (Department) to reissue Kinnard Farms Permit No. WI-0059536-03-0 (Permit).

Your request for a hearing is granted with respect to, and the hearing will be limited to, the following issues relating to the Permit, based on applicable state law:

Issue One: Whether Sections 1.1, 1.2, 1.3, 1.3.1, 1.3.2, 1.5, 1.7, and 1.8 of the Permit are unreasonable because the Permit was issued before Department receipt and approval of plans and specifications for the facility.

Issue Two: Whether Section 1.1 of the Permit is unreasonable because it does not require that discharges authorized by the Permit comply with surface water quality standards.

Issue Three: Whether Sections 1.1, 1.7, and 1.8 of the Permit are unreasonable because they do not require that the Department evaluate background groundwater quality and they do not require sampling or monitoring of groundwater.

Issue Four: Whether Sections 1.3.1, 1.3.3, 2 and 3.1.12 of the Permit are unreasonable because they do not include the current and proposed maximum number of animal units allowed at the facility.

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

Issue Six: Whether Section 1.6 of the Permit and the Nutrient Management Plan (NMP) are unreasonable because they include unattainable yield goals.

Issue Seven: 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.

Scope of Review:

Section 283.63, Stats., sets out a specialized review procedure. Under s. 283.63(1), Stats., five or more persons may secure a review by the Department of “the reasonableness of or necessity for any term or condition of any issued...permit.” The statute is narrow in the scope of review that it affords. Only the reasonableness of or the necessity for a term or condition contained in the permit may be reviewed.

Section NR 243.15(1), Wis. Adm. Code, clearly recognizes that a permittee may submit its plans and specifications during the term of the permit. The Petition argues that the permit terms are unreasonable because the Department may not issue a WPDES permit that authorizes a large CAFO to increase in size significantly without first obtaining Department approval of plans and specifications and approval of storage facilities in the production area for the expanded facility. Section 283.63, Stats., does not allow for a review of the decision to reissue the permit itself nor the timing thereof. To the extent Petitioners seek to challenge the timing of the permit issuance, the timing of the plans and specifications review, or seek a review of the decision to reissue the permit, that challenge is denied as beyond the scope of s. 283.63, Stats., review.

The Petition appears to confuse challenges to plans and specifications review with challenges to permit terms. The plans and specifications review procedures are established under s. 281.41, Stats. If Petitioners have concerns with the Department’s approval, conditional approval, or denial of the plans and specifications, they may challenge such decisions under s. 227.42, Stats., or s. 227.52, Stats., but not s. 283.63, Stats.

In contrast to the public participation procedures prescribed for WPDES permits, no such procedures apply to plans and specifications procedures in rule or statute. To the extent the Petition seeks review of a lack of public participation procedure for plans and specifications procedures, such review is denied.

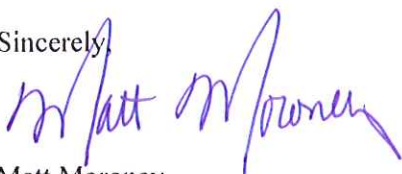
To the extent Petitioners have challenged the permit’s requirement to comply with water quality standards on the basis of the timing of the Department’s plans and specifications review, such review is beyond the scope of s. 283.63, Stats., and is denied. Likewise, several of the Petition’s headings claim that the referenced permit sections fail to ensure compliance with water quality standards. Where such headings are either not supported by corresponding arguments of the Petition or are supported only by a challenge based on the timing of the Department’s plans and specifications review, such review is denied.

Determination:

With the foregoing limitations, the Petitioners’ request for review is granted. To the extent Petitioners seek to raise any challenge not articulated above, the request is denied. A portion of Petitioners’ claims have been found by the Department to exceed the scope of a s. 283.63, Stats., review. Petitioners are afforded a forum for challenges to the validity of rules in declaratory judgment proceedings, set forth in s. 227.40, Wis. Stats. Petitioners are afforded a forum for challenges to Department actions or inactions in s. 227.42, Wis. Stats.

When the Department has completed processing the file, we will transmit it to the Division of Hearings and Appeals of the Department of Administration where it will be assigned to an administrative law judge. Attorney Jane Landretti of the Department’s Bureau of Legal Services will represent the Department in this matter.

Sincerely,



Matt Moroney
Deputy Secretary

cc: Thomas Bauman -- WT/3
Casey Jones—NER Oshkosh

NOTICE OF APPEAL RIGHTS

If you believe that you have a right to challenge this decision, you should know that the Wisconsin statutes and administrative rules establish time periods within which requests to review Department decisions must be filed. For judicial review of a decision pursuant to sections 227.52 and 227.53, Wis. Stats., you have 30 days after the decision is mailed, or otherwise served by the Department, to file your petition with the appropriate circuit court and serve the petition on the Department. All requests shall be served on the Department either by delivery to the Office of the Secretary of the Department, at 101 S. Webster Street, Madison, Wisconsin, or by certified mail addressed to the Office of the Secretary, Department of Natural Resources, P.O. Box 7921, Madison, Wisconsin 53707. Such a petition for judicial review must name the Department of Natural Resources as the respondent.