



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of a Conditional High Capacity Well Approval for Two Potable Wells to be Located in the Town of Richfield, Adams County Issued to Milk Source Holdings, LLC, and Conditional Approval Modification of Plans and Specifications for Richfield Dairy Located in Adams County

Case No. IH-12-04

In the Matter of the Wisconsin Pollutant Discharge Elimination System Permit No. WI-0064815-01-0 (WPDES Permit) Issued to Richfield Dairy, Town of Richfield, Adams County

Case No. IH-12-08

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice, hearing was held at Madison, Wisconsin on August 19-23, 2013, Jeffrey D. Boldt, Administrative Law Judge (ALJ) presiding.

On June 9, 2014, the Department of Natural Resources (DNR) filed a Motion to Stay Issuance of Decision. The parties addressed the issue through written briefs. Subsequently the parties agreed to the following resolution of the Motion for a Stay, suggested in the DNR's June 30, 2014 brief.

"DNR respectfully suggests that the ALJ's decision could include a finding under s. NR 2.155(1), Wis. Adm. Code, that DNR complied with the procedural requirements of WEPA, but that substantive compliance with WEPA is being litigated in separate court proceedings. If the ALJ were to include such a finding, the record would not need to be reopened to receive evidence of DNR's additional work in response to the Supplemental Remand Order. However, DNR respectfully requests that the ALJ decision also include a finding that any future challenges to DNR's compliance with WEPA be heard by the courts, in accordance with the North Lake decision, and be confined to the record, as provided in s. 227.57(1), Wis. Stats. Otherwise, if Petitioners are allowed to bring a new contested case hearing petition on DNR's additional environmental analysis, this would defeat the goals of judicial economy and efficiency, which dictate that such a challenge should be heard as part of the current proceedings." (DNR brief, pp. 7-8)

Further, on July 1, 2014, the Petitioners Friends of the Central Sands, Family Farm Defenders, Pleasant lake Management District and Jean MacCubbin, all of whom had vigorously

opposed the pending Motion to Stay Issuance of the Decision, indicated that they did not object to this proposal.

On July 3, 2014, the ALJ issued a Ruling and Order Denying the Request for a Stay, and advised the parties that the record was closed and a final decision would be issued within 60 days. Pursuant to Wis. Stat. § 283.63(1)(d), this decision is issued within 90 days of the final submission closing the hearing record.

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

Richfield Dairy, LLC
Milk Source Holdings, LLC, by

Attorney Jordan J. Hemaïdan
Attorney Anna J. Wildeman
Michael, Best & Friedrich, LLP
One South Pinckney Street, Suite 700
PO Box 1806
Madison WI 53701-1806

Family Farm Defenders, Friends of Central Sands and Individual Petitioners, by

Attorney Christa Westerberg
Attorney James N. Saul
McGillivray, Westerberg & Bender, LLC
211 South Paterson Street, Suite 320
Madison, WI 53703-4504

Department of Natural Resources, by

Attorney Judith M. Ohm
Attorney Jane Landretti
DNR – Legal Services
101 South Webster Street
P O Box 7921
Madison, WI 53707-7921

WPDES Permit Application Background and Procedural History

1. Richfield Dairy, LLC (Richfield Dairy) has proposed to construct a concentrated animal feeding operation (CAFO) at the intersection of 1st Drive and Cypress Avenue in the Town of Richfield, Adams County.

2. Richfield Dairy filed an application for a Water Pollutant Discharge Elimination System (WPDES) permit with the Wisconsin Department of Natural Resources (DNR or Department) in February 2011.

3. As part of the WPDES permit application process, Richfield Dairy submitted a request for approval of the plans and specifications for its facility to the DNR in February 2011. The plans and specifications were approved by operation of statute on June 24, 2011, and DNR issued a conditional approval modification of plans and specification on November 3, 2011. (Exs. 20 & 21)

4. As part of the WPDES permit application process, Richfield Dairy submitted a nutrient management plan (NMP), which was preliminarily approved by the DNR on approximately June 2, 2011, subject to completion of the WPDES process. (Ex. 16)

5. The DNR released a draft environmental assessment (EA) for the project on May 11, 2011, and certified the EA on November 1, 2011. (Exs. 5 & 7)

6. The DNR issued the Richfield Dairy WPDES Permit on November 3, 2011, and issued the conditional approval of plans and specifications and a high-capacity well approval to the Dairy, also on November 3, 2011. (Exs. 2 & 18)

7. Petitions for judicial review and the instant contested case hearing were subsequently filed, and were granted in part by the DNR. (Letters from DNR to Christa Westerberg, dated 12/20/11 and 1/31/12)

8. The Division received pre-filed testimony from the parties, and a contested case hearing was held June 28, 2013, and August 19-22, 2013.

9. Richfield Dairy is located in an area of the state generally referred to as the Central Sands area, which is generally understood to contain porous soil materials. This is demonstrated by the fact that about 85 percent of the fields in Richfield Dairy's nutrient management plan contain permeable sand soils. (Transcript (TR) Vol. IX p. 2504 (Craig); Wade Pre-filed p. 4; Ex. 355)

Groundwater Quality Monitoring at the Production Area

10. Section 1.1 of the Permit requires the permittee to comply with all groundwater and surface water quality standards. (Jt. Ex. 17)

11. DNR required a two-part groundwater monitoring work plan at the Richfield Dairy production area, with the initial phase used to determine groundwater flow and elevation and the second phase designed to monitor groundwater quality. DNR concluded that requiring a minimal number of wells for the first phase was a reasonable way to balance the goals of determining groundwater flow while minimizing costs and limiting the number of direct conduits to groundwater in the production area where spills could occur (Jt. Ex. 17; Chern Pre-filed at 9:197-206).

12. Wisconsin Admin. Code ch. NR 243 does not list specific substances for groundwater monitoring at CAFOs.

13. DNR required groundwater monitoring for those contaminants that are typically found in manure or agricultural wastewater or that serve as an indicator of possible failure or excessive leakage from a given structure. (Bauman Pre-filed at 11:256 – 12:268) The parameters included in the Richfield Dairy Permit were also based on research and DNR history with groundwater monitoring indicating that chloride, total dissolved solids, nitrate, and chemical oxygen demand are good indicators of leakage. (Chern Pre-filed at 13:287-300)

14. DNR staff concluded groundwater monitoring was needed at the Richfield Dairy production area due to the “porous nature of the sandy soils at the Richfield Dairy site and the potential for groundwater impacts associated with potential leakage from manure and process wastewater handling structures/systems at the site.” (Ex. 19 at 6 (DNR Resp. to WPDES Cmts.))

15. The production area presents a number of risks for groundwater contamination, including failure of structures over time, leakage through weak spots in liners, construction defects that compromise the liners, the large size of the facilities, concrete cracking, seepage through the concrete and clay liners, and the mobility of the contaminants. (TR, 8/19/13, at 1580:14-1581:18 (Wade); Ex. 15, O&M plan (identifying design life of facilities as between 10-25 years); TR, 8/19/13, at 1580:14-1581:18, 1585:24-1586:23, 1588:12-24 (Wade); TR, 8/22/13, at 2615:8-2620:4 (Wade); Krieder Pre-filed at 10:224 (“cracks occur in concrete for a variety of reasons”); seepage through the concrete and clay liners, *see* Kreider Pre-filed at 11:245-257 (noting applicable regulations allow up to 500 gallons of exfiltration per acre per day); TR at 1592:13-21 (Wade))

16. Also, some waste-bearing structures on-site are designed to infiltrate groundwater, like the vegetated treatment area, although their performance has not been evaluated through groundwater monitoring. (TR, 6/28/13, at 1333:19-25 (Bauman discussing VTA), TR, 8/20/13, at 2012:13-24 (Trainor); TR, 6/28/13, at 1332:1-4 (Bauman))

17. DNR staff presented Richfield Dairy with three monitoring options: install leak detection devices underneath each on-site structure (as the dairy had already proposed for two structures), install monitoring wells around each structure, or install a simplified groundwater monitoring system of wells ringing the entire site. (Ex. 844 (email fr. Bauman with proposed conditions)) After discussions and an exchange of draft permit conditions, the Dairy elected the simplified groundwater monitoring system for the site, along with the preexisting leak detection system for two specified structures, which were the requirements included in the permit. (Bauman Pre-filed at 14:329-334; 16:360-379; *see also* Ex. 359 (email with marked up conditions); Ex. 18 § 2.1 (WPDES Permit))

18. The WPDES permit requires a two-step groundwater monitoring approach for the simplified site-wide system. First, it requires Richfield Dairy to install three wells, one upgradient and two downgradient to determine groundwater flow and establish background

levels of contaminants. (Ex. 18 § 2.1.) The permit does not specify when these three initial monitoring wells must be installed relative to construction and operation of the Dairy. (*Id.*)

19. Second, the WPDES permit requires the installation of additional groundwater monitoring wells at the production area, for a total of at least two upgradient and six downgradient wells. (Ex. 18 § 2.1). Richfield Dairy has proposed, and DNR has approved, a monitoring plan that involves the placement of an additional 5 wells (for a total of 8 wells) around the perimeter of the production area. (Exs. 22, 23 (DNR approvals); Ex. 362 (map of site and approved wells).)

20. Flow at the site is complicated due to variances in horizontal and vertical gradient, nearby and on-site high-capacity wells, and planned infiltration basins. (Wade Pre-filed at 18:1-19:22) Standard hydrogeological practice would involve a thorough site investigation prior to design and permitting of a new facility. (Chern Pre-filed at 15:326-328) Allowing construction prior to developing a complete water quality and flow data set jeopardizes knowing what baseline conditions actually are, due to the potential for groundwater impacts during facility construction and operation. (Wade Pre-filed at 19:23-20:12)

21. The second phase of the groundwater monitoring work plan, which will establish the initial number of wells for groundwater quality monitoring, well placement in relation to potential sources, timing and frequency of groundwater sampling, well construction and development in compliance with NR 141, among other monitoring requirements, has not yet been submitted by the Dairy or approved by DNR. (Chern Pre-filed at 10:232; 11: 242)

22. No regulatory provision applicable to the Richfield Dairy Permit requires monitoring to determine baseline concentrations of substances or background groundwater quality before approving plans and specifications for a CAFO facility or before issuing a WPDES Permit to a CAFO. (Chern Pre-filed at 15:335-41 & 345-47; 16:350-356)

23. DNR has never required groundwater monitoring to determine baseline concentrations of substances or background groundwater quality before approving plans and specifications for a CAFO facility or before issuing a WPDES Permit to a CAFO. (Bauman Pre-filed at 21: 473-476; 22: 501-507)

24. All of Richfield Dairy's reviewable facilities meet or exceed the design requirements in the promulgated rules and incorporated technical standards, and DNR's decision to require side-wide groundwater monitoring is consistent with ch. NR 140 and exceeds the standard requirements for Wisconsin CAFOs. (Kreider Pre-filed pp. 7-8, 11; Pofahl Pre-filed pp. 2, 5-6, 9, 11-12; Keunig Pre-filed p. 10; Ex. 7, p. 5)

25. Both the feed storage areas and the manure storage basin liners were designed with thickness exceeding those required by ch. NR 243, were made watertight with water stop joints, and include secondary clay liners beneath the concrete that are not expressly required by ch. NR 243. (Pofahl Pre-filed pp. 5-6; TR Vol. 8 pp. 2266-69 (Pofahl))

26. Wisconsin Admin. Code ch. NR 243 references the NRCS Agricultural Waste Management Field Handbook, which provides a recommended maximum allowable seepage limit for waste storage basins of 924 gallons per acre per day. (Wis. Admin. Code NR 243.07(2)(a)(1); Gilani Pre-filed p. 3)

Alternative Concentration Limits

27. DNR denied a hearing on the issue of whether the Permit provides for adequate public notice and comment for potential future actions under the Permit regarding establishing alternative concentration limits (ACLs) for groundwater because the issue was not ripe for review.

28. Petitioners appealed the denial of this issue to the Dane County Circuit Court, but the Court did not remand this issue to DNR.

29. The parties nevertheless provided testimony on the issue of whether the Permit provides for adequate public notice and comment for potential future actions under the Permit (establishing ACLs for groundwater).

30. Groundwater quality monitoring has not yet begun at the Richfield Dairy facility and DNR has not yet considered whether to establish ACLs for the facility.

31. If ACLs are established at some point during the current Permit term, the ACLs would be included in any Permit modification done for other reasons and would be included at the time the Permit is reissued. If an ACL is included in a subsequent Permit for the Dairy, public participation procedures for the ACL would apply at that time. (Bauman Pre-filed at 23:521-531)

Animal Units

32. No applicable rule or statute requires nor prohibits a WPDES CAFO Permit from specifying a maximum number of animal units (AUs) at a CAFO facility.

33. "Animal units" are a common regulatory device used in the WPDES permitting of CAFOs. The number of AUs determines the need to obtain a WPDES permit and eligibility for the CAFO general permit. It is also used to communicate to the public about individual CAFO size. (TR, 6/28/13, at 1374:22-1375:18; Ex. 441 (email fr. Tom Bauman, DNR to Lee Bergquist, Milw. Journal Sentinel).)

34. The number of AUs directly corresponds to the amount of waste generated at and discharged by a CAFO; the more animal units housed on site, the more manure is generated, which must then be land-applied. (Stevenson Pre-filed at 26:1; Ex. 374 (RD Proposed Manure Quality Summary, excerpt of Ex. 15).)

35. Richfield Dairy's WPDES Permit application states it will house 6,270 AU, and that one milking or dry cow is expected to produce 31.6 gallons per day of manure liquid, and

one steer will produce 13 gallons per day. (*Id.* at 26:1-4; Ex. 374 (RD Proposed Manure Quality Summary)) For each additional milking or dry cow, the facility will produce 11,534 gallons of untreated manure liquid per year that will require storage and landspreading. (*See* Ex. 374) It based its projected 60 million gallons of liquid waste annually on 6,270 AU. (*Id.*)

36. Although Richfield Dairy is required to report its number of animal units annually as part of its Nutrient Management Plan update, the number of animal units present at the site can vary monthly or even weekly throughout the year, and the number does not operate as a cap. (TR, 8/22/13, at 2455:4-2456:11 (Schaumberg))

37. The Richfield Dairy WPDES permit does not specify a cap on the number of animal units permitted at the Dairy. (*See* Ex. 18)

38. Section 1.3.3 of the Permit, regarding the 180-day storage requirement, is vague, and requires a baseline from which expansion of 20% or 1,000 AU allowed in that section can be measured.

39. DNR has in the past imposed a cap on the animal units at another CAFO: Rosendale Dairy, also operated by Milk Source (the parent company of Richfield Dairy, LLC). The DNR's General WPDES Permit for CAFOs also has a cap because it is limited to CAFOs of up to 5,720 animal units. (Bauman Pre-filed at 30:690-31:709; Stevenson Pre-filed at 26:11-19)

40. Including a cap on the number of animal units at the site would specify the maximum level of discharge, allow DNR and the public to better monitor compliance with applicable rules and permit conditions, ensure that the Dairy has adequate storage and land base to handle the waste generated at the site, deter risky storage and handling practices, and would provide the public with notice of proposed expansions of the Dairy. (Stevenson Pre-filed at 26:20-28:7, 29:14-30:6)

Nutrient Management / Groundwater Monitoring at Land Application Sites

41. Nutrient management plans (NMPs) are a requirement of a WPDES permit and § NR 243.14 performance standards for CAFO permitted farms. Best Management Practices are included in the NMP to protect groundwater quality and reduce the risk for manure and process wastewater applications to contaminate groundwater. (Andrew Craig Pre-filed at 3:79-80 & 6:128-132)

42. In lieu of groundwater monitoring at land application sites, nutrient management plans rely on the implementation of best management practices to protect groundwater quality. (Andrew Craig 14:307-319)

43. The Richfield Dairy NMP accounts for the properties associated with manure, the timing and method of manure application, crop selection and root depth; land application requirements for fields with high potential for N leaching to groundwater; UW crop recommendations, manure and soil testing, nutrient crediting requirements to prevent application of nutrients above crop need. (Andrew Craig Pre-filed at 6:128—10:125)

44. Richfield Dairy must meet higher standards via its NMP than other, non-permitted growers in the area. Accordingly, the Department expects that fewer nutrients will enter groundwater or surface waters than under current agricultural land use practices. (Andrew Craig Pre-filed 10:218)

45. Groundwater quality monitoring at land application sites can be complex and difficult and may be ineffective, for many reasons, including the following: fields are not dedicated land application sites; crop rotation and associated land application practices on fields with monitoring wells may change; the Dairy could apply on fields that are not monitored or could adjust the timing of applications on monitored fields to get positive results; it would be difficult to discern whether contamination is because of manure applications or commercial fertilizer; unusual environmental conditions may contribute to the release of applied nutrients; the Dairy cannot control the application of commercial fertilizer to fields not owned by them; and monitoring may not accurately characterize groundwater because of potential contamination caused by fields not owned by the Dairy. (Andrew Craig Pre-filed 10: 226-13:306)

46. It was reasonable for the Permit not to limit manure and wastewater applications to spring and summer months because the NMP contained a field specific schedule providing that liquid manure or process wastewater would only be applied to highly permeable soils during those months and the Dairy is required to get DNR approval before amending that schedule. (Craig Pre-filed at 21:475 – 22:491)

47. If the Dairy requests approval to amend their NMP to allow fall applications of manure and wastewater, the Dairy is required to demonstrate that all applications will be consistent with applicable requirements for highly permeable soils within NRCS 590 standards. (Craig Pre-filed at 23:507-516)

48. Fall applications of manure and wastewater may be necessary and helpful in some cases, so long as they comply with the standards for fall land applications designed to protect groundwater quality. (Craig Pre-filed at TR, 8/22/13 at 2504:9 – 2507:5)

Tile Lines

49. Section 1.6.3 of the Permit requires Richfield Dairy to identify, to the maximum extent practicable, the presence of subsurface drainage systems in fields where manure or process wastewater is applied.

50. The approved Richfield Dairy NMP contains approximately 8,000 more acres than will be required for land application. (Andrew Craig Pre-filed 26:571-573) The Dairy may not have yet identified which fields they intend to use for land application.

51. There are few, if any drain tile lines for the type of soil contained in the Dairy's NMP (Craig Pre-filed at 25:549-551)

Plans and Specifications

52. No applicable standard requires the DNR to specify a type of cement or concrete permeability. (Kreider Pre-filed 12:277-280)

53. Section 1.1 of the Permit requires that the Dairy must design and operate its structures in a way that will achieve compliance with groundwater and surface water quality standards (Ex. 17). DNR relies on the inspection engineers for the Dairy to certify that poured concrete meets the expectations of NRCS specification 4. (Kreider Pre-filed 13:286-287)

54. NRCS 313 Table 5 sets forth standards that apply to the design of composite concrete liners. (TR, 8/21/13 at 2298:19-25)

55. Due to the sandy soils present at the site, the DNR used its site-specific authority to require a concrete composite liner to protect against seepage in the site's sandy soils. (Kreider Pre-filed 11:238-240) Richfield Dairy's waste storage facility proposed liner is a composite liner that includes both a concrete and clay lining. (Kreider Pre-filed 11:247-248)

56. DNR concluded that the composite design that includes both concrete and clay lining yields an exfiltration rate that is substantially more protective than the rate set forth in Wis. Admin. Code § NR 213.10(2)(a). (Kreider Pre-filed 11:246-249) The exfiltration rate for the waste storage facility would be 2.2 gallons per acre per day, compared to the 500 gallons per acre per day allowed in § NR 213.10(2)(a). (Kreider Pre-filed 11:250-255)

DISCUSSION

Many of the issues raised by the petitioners represented a detailed critique of both the plans and specifications and the WPDES permit and suggested "additional measures" that might be undertaken in conjunction with construction and operation of the facility. However, while constructive and relevant, most of these arguments were about what the petitioners might prefer the law to be rather than the current legal obligations of the Department or the permit applicant.

For example, the petitioners would prefer that the DNR require a specific permeability standard for the concrete used for construction of dairy facilities even though such a requirement is not in the code. But the record established that several of Richfield Dairy's facilities, including the manure storage basins, not only met all existing legal specifications under NR 243 and also went beyond those requirements by including a clay liner in addition to concrete. Rather than analyzing the resulting composite liner as an integrated system, the petitioner's expert offered opinions as though each of those components were stand-alone systems. (See: Martin TR Vol. V pp.1468-69) This makes no engineering sense. Rather, a clear preponderance of the evidence established that the DNR reasonably concluded that Richfield Dairy's Plans and Specifications did not need to identify a specific permeability standard for the concrete used at the dairy facilities in order to satisfy any applicable legal standard. The DNR also reasonably concluded that it is not necessary or appropriate to require Richfield Dairy to use Type II cement

or any other sulfate-resistant cement in its dairy facilities given the other design provisions in the plans and specifications.

Richfield Dairy has designed a state-of-the art dairy facility and the plans and specifications and WPDES permit are approved with just one modified condition. The petitioners did establish by a preponderance of the credible evidence that it would add transparency and facilitate compliance to include a cap on the number of animal units at the facility. The Department should establish a sustainable cap on animal units in conjunction with the revised permit reducing the maximum annual pumping in the companion high-capacity well cases. The existing provisions relating to a 180 storage requirement is too vague and confusing to be an enforceable permit condition.

The groundwater monitoring provisions of the permit are reasonable, necessary and enforceable. While it is possible to imagine a case where monitoring of off-site land application sites to protect groundwater quality, the petitioners have not carried their burden of demonstrating that it is reasonable and necessary in the instant permit.

Similarly, the on-site monitoring plan including the placement of wells, frequency of sampling and sampling parameters were not shown to be unreasonable. There is no regulatory basis or standard for monitoring for phosphorous. The petitioners did not rebut Ms. Chern's testimony that e coli monitoring was more appropriate as a follow up to high total coliform results rather as an ongoing sampling parameter. The permit requires monthly monitoring for a year and then indefinite quarterly monitoring and the Department retains authority to increase the frequency of monitoring if there are specific groundwater issues that require follow-up.

Petitioners originally contended that "Section 1.6.1 of the Permit [is] unreasonable because it does not limit landspreading to the spring and summer months." (Statement of Issue 3.b) Through testimony and briefing, they no longer assert that an absolute prohibition on fall manure spreading is necessary; rather, they now contend that the permit is unreasonable because it is not conditioned on implementation of the following three specific fall manure application strategies:

1. a prohibition on fall applications of manure on high-permeability soil when temperatures exceed 50° F;
2. for fall applications [that] do occur on high-permeability soil, fall crops should already be established and nitrogen rates limited to 30 lbs/acre;³³ and
3. prohibiting the application of 20% excess nitrogen on high-permeability soil under certain circumstances.

The petitioners' proposed strategies for fall land application were not rejected out of hand by the Dairy. (See: Richfield Dairy brief at p. 100) However, it must be noted that Richfield is not currently planning to undertake fall land applications. Mr. Craig of the DNR testified that the permittee would have to amend its NMP to undertake fall landspreading activities. (Craig

Pre-filed at p. 23) Both the Department and the Dairy should consider the suggestions of the petitioners proposed objective criteria as a way of providing clarity for all sides with respect to when fall applications might be undertaken if the Dairy's NMP changes. However, there is not a sufficient basis for changing the permit condition at this time because no fall land applications are currently allowed under the NMP.

The DNR's decision to insert into Richfield Dairy's WPDES Permit a reference to the procedure it is likely to follow in the event background monitoring well concentrations exceed a PAL or ES was not even an issue for which hearing was granted, though the parties took it up in their briefs. The record the parties made it clear that the provision is not contrary to the plain language of applicable statutes or regulations, contrary to the intent of the applicable statutes or regulations, or without a rational basis.

All other provisions of the permit are reasonable, necessary and enforceable.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority to hear contested cases and issue necessary orders in this matter pursuant to Wis. Stat. §§ 227.43(1)(b) and 283.63.
2. Wisconsin Admin. Code ch. NR 140 provides guidelines and procedures for the exercise of regulatory authority which is established elsewhere in the statutes and administrative rules and does not create independent regulatory authority. (Wis. Admin. Code § NR 140.02(1))
3. Wisconsin Admin. Code ch. NR 243 is the administrative code that applies to CAFO WPDES Permit and plan approval actions. Neither the CAFO permit application process in § NR 243.12 nor the CAFO plan approval process in § NR 243.15 requires nor precludes installation of background wells and collection of ground water quality monitoring data prior to construction or permit issuance or reissuance.
4. Sections 1.1 and 2.1 of the Permit are reasonable because they ensure groundwater quality standards will be achieved and that groundwater quality will be adequately monitored to detect any exceedances of groundwater quality standards in the production area. The Department has express authority to require groundwater monitoring pursuant to Wis. Admin. Code § NR 243.15(7).
5. Section 2.1 of the Permit is reasonable because it was not necessary to establish groundwater flow or background groundwater quality levels before DNR approved the conditional approval of plans and specification for the facility and issued the Permit.
6. The challenge to DNR's procedures of public noticing of ACLs is not an issue that was granted by DNR nor remanded by the circuit court, and is therefore not an issue to be decided at this hearing before the Division.

7. No applicable provision requires nor precludes that the Permit specify the number of animal units at the facility. (Section 1.3.3 of the Permit) The petitioners have established by a preponderance of the credible evidence that the permit should incorporate a transparent and enforceable maximum limitation on the number of animal units at the facility. The previous permit condition was too vague to provide for either transparency or enforceability.

8. The Permit complies with applicable anti-degradation requirements of Wis. Admin. Code ch. NR 207.

9. In lieu of groundwater monitoring at land application sites, § NR 243 uses the implementation of best management practices to govern nutrient management.

10. Groundwater monitoring is not always required at land application sites and is not reasonable at Richfield Dairy.

11. Section 1.6.1 of the Permit is reasonable because it is not necessary to limit land application of manure and process wastewater to the spring and summer months, for Richfield Dairy because the Dairy's Nutrient Management Plan does not anticipate fall land applications.

12. Under certain circumstances, it would be reasonable for the Permit to allow fall applications of manure, as long as the Permit is modified to provide the necessary conditions to protect water quality.

13. Wisconsin Admin. Code ch. NR 243 requires the identification of drain tile lines to the maximum extent practicable specifically where manure is land applied. (Wis. Admin. Code § NR 243.14(2)(e))

14. The Nutrient Management Plan for the facility complies with § NR 243.14(2)(e) by requiring the identification, to the maximum extent practicable, of the presence of subsurface drainage systems in fields where manure or process wastewater may be applied.

15. Drain tiles are not defined as "direct conduits to groundwater" under ch. NR 243.

16. The conditional approval of plans and specifications and underlying plans and specifications meet the applicable requirements of Wis. Stat. § 281.41 and Wis. Admin. Code § NR 243.15, and contain adequate measures to protect groundwater.

17. It is not reasonable or necessary for the Permit to specify the permeability of the concrete to be used at the facility.

18. The concrete composite liner in the plans and specifications will protect groundwater because it is much more protective than the applicable exfiltration standard.

19. The conditional approval of plans and specifications is not affected by the natural gas pipeline present at the site.

20. The parties stipulated to the following Conclusion of Law. The DNR complied with the procedural requirements of WEPA under Wis. Admin. Code § NR 2.155(1). However, substantive compliance with WEPA is being litigated in separate court proceedings. Further, any future challenges to DNR's compliance with WEPA will be heard by the circuit courts, in accordance with the *North Lake* decision, and be confined to the record, as provided in Wis. Stat. § 227.57(1).

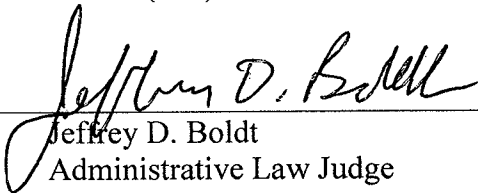
ORDER

WHEREFORE IT IS HEREBY ORDERED that the WPDES permit be modified to establish a cap on the number of animal units which can sustainably be accommodated at the site in conjunction with the high capacity well conditional approval modification.

WHEREFORE IT IS FURTHER ORDERED, that all other provisions of the Department's decision to approve the Richfield Dairy WPDES Permit Application and the conditional approval and the underlying plans and specifications is upheld and the petition for review is dismissed.

Dated at Madison, Wisconsin on September 3, 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.