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Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

In the Matter of the Petitions of Maple Leaf Farms
for Review of WPDES Permit Nos. WI-0001694-4
and WI-0053376-5

Case No. IH-98-03

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Pursuant to due notice hearing was held on October 5 and 6, and November 24, 1998, at Racine, Wisconsin, before Jeffrey D. Boldt, administrative law judge (ALJ). The parties requested an opportunity to submit written briefs and the last brief was received on February 16, 1999.

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

Maple Leaf Farms (Maple Leaf), by

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FINDINGS OF FACT

1. Maple Leaf Farms is a corporation which operates two duck growing operations in Racine County, Wisconsin.

2. The two Wisconsin operations are known as the Main Farm and Downy Duck. The Main Farm also slaughters ducks.

3. On June 25, 1997, the Department of Natural Resources (DNR) issued WPDES Permit No. WI-0001694-4 to Maple Leaf Farms – Main Farm. Said permit regulates the discharge from Petitioner's facility located at 2319 Raymond Avenue, Franksville, Wisconsin to the west branch of the Root River Canal and the groundwaters of the State of Wisconsin.

On June 25, 1997, the DNR also issued WPDES Permit No. WI-0053376-5 to Maple Leaf Farms – Downy Duck. The permit states that the Petitioner is permitted to manage and utilize manure, litter, sludges, litter leachate and compost leachate, and discharge noncontact cooling water from a livestock facility located at 28430 Washington Avenue, Kansasville, Wisconsin to the east branch of the Dover Ditch, tributary to the Wind Lake Canal, in Racine County and to the groundwaters of the State of Wisconsin.

4. On August 12, 1997, the DNR received two petitions for review objecting to certain terms in each of the above-described WPDES Permits.

5. On March 9, 1998, the DNR granted the request for contested case hearings on each of the above-described petitions and limited the issue for hearing to issues specified in the DNR correspondence of that date. The parties have subsequently further narrowed the issues for Hearing, by stipulations that are a part of the record in this proceeding dated September 23, 1998 and November 18, 1998. The parties further narrowed the issues at the hearing.

6. At the first day of the Hearing, October 5, 1998 Maple Leaf Farms narrowed the issues further. The Petitioner first characterized major issues being contested as: 1) the provisions in both permits regarding the off-site spreading of manure; 2) provisions of the WPDES Permit No. WI-0001694-4 regarding weekly hydraulic application limits for spray irrigation; 3) the provisions in WPDES Permit No. WI-0016994-4 regarding the surface impoundments at the Main Farm CL-1, CL-2, CL-3 and CL-6; 4) issues relating to WET testing.

7. After characterizing the major issues being contested the Petitioner then waived any further objection to the following:

- a. With respect to WPDES Permit WI-0053376-5 issues #2 and #4 with respect to DL-7.
- b. The provisions on page 1, paragraph A(1) with the exception of a continuing objection to the Department's authority as it relates to the "for approval language" in that section relative to off-site land spreading and spray irrigation. The Permittee defined off-site land spreading as the spreading of manure on un-owned, unleased fields being cropped by other parties.

8. During the course of the proceeding as it relates to the Downy Duck Permit No. WI-0053376-5 the Permittee waived all objection to the permit with the exception of how that permit applied to off-site spreading of manure, specifically objecting to the following issues:

- a. Page one A.(1) manure management plan as it related to the submitting of a plan for approval prior to spreading of manure on off-site crop lands.
- b. The Permittee objected to the language on page 7 F.(1) to the extent any documentation was required as a condition precedent to spreading of manure on off-site locations. The Permittee also objected to weekly hydraulic application rates for all spray irrigation fields which are included in a subsurface drain tile system. Although no such fields exist at this time.
- c. On page 8 the Permittee objected to F.(2), F.(3) and F.(4) as they related to off-site spreading of manure.
- d. On page 9 the Permittee objected to F.(8), (a) - (d) as they related to off-site spreading of manure.

9. The Downy Duck farm houses over 100,000 ducks, which generate a massive quantity of waste in the form of liquid manure and manure in shavings (litter manure). Liquid manure is generated by areas near the duck feeders where water is spilled and mixed with duck excrement. At Downy Duck, liquid waste goes through a series of lagoons beginning with a settling lagoon. Water from the last lagoon is spray irrigated onto fields. Approximately 34,000 tons per year of duck manure is generated at Downy Duck and landspread at various locations. (Ex. 101) Such landspreading includes both on-site and off-site lands owned and operated by third-parties. Said manure has nutrient value for crops.

The Downy Duck operation is a "large animal feeding operation" within the meaning of NR 243.04(13), Wis. Admin. Code.

10. The Main Farm houses over 250,200 ducks, which generate a massive quantity of waste in the form of liquid and dry manure. Some 57,000 tons a year of manure generated at the Main Farm are landspread at locations on the Main Farm site and at various off-site locations. (Ex. 102) Said manure has nutrient value for crops

Liquid manure is collected in holding tanks at Main Farm. Some of this waste is field-injected with a terregator or husky. During winter months and in wet conditions the liquid manure is collected and stored. Settled portions are also field-injected. Liquid waste is clarified, "digested" and then conveyed into storage lagoons CL3 and CL4. Said effluent is spray irrigated on site. The Main Farm operation is a "large animal feeding operation" within the meaning of sec. NR 243.04(13), Wis. Admin. Code.

11. The Main Farm operation results in the "discharge of pollutants" into the waters of the state within the meaning of sec. 283.01(5), Stats. The Main Farm operation is a "point source" subject to the WPDES program, specifically a "concentrated animal feeding operation" (CAFO) within the meaning of sec. 283.01(12)(a), Stats.

12. The Downy Duck operation results in the "discharge of pollutants" into the waters of the state within the meaning of sec. 283.01(5), Stats. The Downy Duck operation is a "point source" subject to the WPDES program, specifically a "concentrated animal feeding operation" within the meaning of sec. 283.01(12)(a), Stats.

13. The permit-holder argues that the Department lacks authority to regulate the terms and conditions of off-site landspreading of waste generated at both Main Farm and Downy Duck. Specifically, the permit-holder cites a United States Environmental Protection Agency (USEPA) guidance document relating to feedlot operations subject to National Pollution Discharge Elimination System (NPDES) permits.

2.8.3. Permit Terms Relating to Land Application of Manure

In general, the Clean Water Act does not regulate manure spreading operations, only manure spreading for CAFOs. As explained previously, CAFOs are the only feedlots subject to regulation under the point source permit program (NPDES). When a NPDES permit contains conditions for appropriate land application practices, and the permittee complies with those conditions, the permit will provide compliance with the CWA and act as a "shield against enforcement" for any additions of pollutants to Waters of the United States that may occur. If a feedlot is determined not to be a CAFO, then it is not a point source (Appendix E). In addition, the CWA does not regulate manure spreading once the manure leaves the property where it was generated. The CAFO owner/operator is only responsible for complying with NPDES permit requirements relative to any manure spreading on-site. (Ex. 27)

While the Guidance Document does not have the force and effect of law, there is no question that it would be highly persuasive on this issue if this were a permit issued under NPDES.

However, the Clean Water Act provides that implementation and enforcement can be delegated to individual states if they enact legislation comparable in scope to the Federal act 37 U.S.C. § 1342(b). With the enactment of then Ch. 147, Wis. Stats., now Ch. 283, Wisconsin was delegated authority to administer its own WPDES program in 1974. Accordingly, the question is whether regulation of off-site landspreading is permissible under Wisconsin law.

14. As noted, the USEPA Guidance Document does not have the force and effect of law. Nevertheless, the petitioner argues that it would exceed Federal CWA to regulate off-site landspreading operations. There is no question that the WPDES program goes further than the NPDES program in several significant respects. Wisconsin law applies to "groundwater" as a relevant "water of the state", under sec. 283.01(20), Stats. This is consistent with state law generally, and it has long been the practice of the WDNR to regulate industrial liquid wastes discharged under land or landspread pursuant to Ch. NR 214, Wis. Admin. Code (Witt/Thiele). Ch. NR 243 incorporates the statutory definition of "waters of the state", which includes the regulation of groundwater.

15. The WPDES program specifically allows the WDNR to impose limitations "more stringent" than under the Federal CWA when it is "necessary to meet applicable water quality standards, treatment standards, schedules of compliance or any other state or federal law, rule or regulation." Sec. 283.13(5), Stats. (Witt/Thiele) Further, the protection of groundwater from excessive landspreading from large animal feeding operations is a central purpose of Ch. NR 243, Wis. Admin. Code.

Section NR 243.01(1) defines the purpose of the chapter ". . . to establish design standards and accepted animal waste management practices for the large animal feeding operations category of point sources. This chapter also establishes the criteria under which the department may issue a permit to other animal feeding operations which discharge pollutants to a water of the state. . . .when it can be demonstrated that an operation discharges a significant amount of pollutants to waters of the state." (emphasis added) Section NR 243.01(2) adds that: "Only those animal feeding operations which improperly manage their wastes and as a result cause ground or surface water pollution, or those subject to the requirements for large animal feeding operations will be regulated under this code. It is not the intent of the department to require that all animal feeding operations obtain a permit." Under Ch. NR 243 the department has clear authority to regulate both Downy Duck and the Main Farm, large animal feeding operations, as a "point source" to protect both the surface water and groundwater. (Witt)

On its face, there is nothing in Chapter NR 243 which distinguishes between on- and off-site landspreading activities. In either case, the purpose of the code is to prevent the discharge of pollutants to waters of the state. Further, it would defeat the purpose of Ch. NR 243, if regulation of large animal feeding operations did not apply to off-site landspreading operations. Large animal feeding operations could simply transfer wastes to third-parties, who would be free to dispose of the waste in any manner they saw fit. The plain language of § NR 243.14(2) requires that the DNR consider the "potential impacts on waters of the state from over-application of animal wastes," and does not distinguish between on- and off-site activities.

A clear preponderance of the credible evidence supports the DNR's interpretation of its statutory authority to regulate off-site landspreading activities. (Witt/Thiele) It should be noted that because the DNR has been charged by the legislature with the duty of applying Ch. 283, Stats., and Ch. 243, Wis. Admin. Code, the Department's interpretation of the statute, concluding that it does have regulatory authority over off-site landspreading, is entitled to great weight. CBS, Inc. v. LIRC, 219 Wis. 2d 563, 574, _____ N.W.2d _____ (1998).

16. The DNR has authority to regulate off-site landspreading of wastes generated by Maple Leaf Farms. Accordingly, the next issue is the reasonableness of the conditions imposed relating to such landspreading.

As to off-site spreading of manure which involved the Downy Duck Permit previously mentioned and the Main Farm Permit WI-0001694-4, the Permittee takes issue with the following:

DOWNY DUCK

page 1, paragraph A(1)
 page 7, paragraph F(1)
 page 8, paragraph F(2)
 page 8, paragraph F(3)
 page 8, paragraph F(4)
 page 9, paragraph F(8) (a-d)

MAIN FARM

page 9, paragraph C(1)
 page 21, paragraph J(1)
 page 22, paragraph J(2)
 page 22, paragraph J(3)
 page 22, paragraph J(4)
 page 23, paragraph J(8) (a-d)

The Permittee indicates an objection to providing the documentation requested in the aforesaid paragraphs and waiting seven days before field spreading on off-site locations. The Permittee has indicated no objection to notifying the Department but has indicated that due to the nature of the requests and the timing of the requests there is a very short window of opportunity and the documentation requested by the Department and the seven-day waiting period will frustrate their efforts in disbursing manure.

17. Any application of manure, litter, sludges or leachate to the land through landspreading is likely to discharge pollutants to surface water, if applied near a stream or on a slope which facilitates runoff, or if it reaches a field tile system connecting to a waterway. Further, over-application of said manure is likely to contaminate groundwater if it is over applied. The above Findings apply to on-site and off-site locations.

18. Paragraph F.(1) requires the submittal of a manure management plan and identifies the content of the plan. The provisions are reasonable because they all contribute to the overall management of acceptable loadings to the sites and the calculation of acceptable loadings. This information, as noted in the permit, is similar to the specifications found in NRCS Standard No. 590. Paragraph F.(2) and F.(3) for Department approval of and oversight over the manure management plan and to changes to the plan.

Paragraph F.(4) requires the permittee to submit requests for additional spreading sites not mentioned in the manure management plan to the Department for approval, and specifies the information that must accompany each request. The last sentence of the paragraph allows the permittee to use a site seven days after the Department has received a request pertaining to it, if the Department has not responded within that seven day time frame; this sentence responds to the petitioner's desire to have a quick turnaround time on Department site approvals.

In many other permits, the Department requires approval of a site before it can be used by a permittee. (Witt) Department staff testified that the seven day site approval requirement was a concession by the WDNR to the time-sensitive nature of manure application and that no such specific turn-around time was on similar permits issued by the Department. Further, there is no question that Department staff have numerous other responsibilities and that it would be difficult to review and approve new site locations immediately upon request.

Gerald Cummings testified that the terregator and Husky could only apply manure to dry ground because of the size and weight of the vehicles. Mr. Cummings testified that if he had to wait seven-days for approval by the WDNR it would seriously impair his ability to disburse

manure to non-owned, non-controlled farm fields where the farmers were going to be applying manure regardless of the source they received it from. Gerald Cummings and Lawrence Pfeil both testified that there is a "window of opportunity" concerning the types of soil involved in the Southeastern Wisconsin region where the farmer can get into his fields because they are dry enough and that many times this has to be accomplished quickly because of the potential for rain that would interfere. Lawrence Pfeil indicated that Maple Leaf Farms followed the practices of 590 and 633 in the Technical Guide. He also testified that the control of non-owned, non-leased fields by Maple Leaf Farms did not exist and that the crop production manager or owner had the duty and responsibility to determine the nutrient needs of the crop. Lawrence Pfeil testified that in many instances, in actual practice the yields in the Technical Guide 590 and Guidance Documents are exceeded.

Dr. Massie testified that a 48 hour waiting period would have no practical impact on the ability of the permit holder to sell and spread manure. Balancing the practical needs of the permittee and the demands upon WDNR staff resources, a three-day turn-around time has been placed in the permit in place of the seven-day period. This will allow the permittee to have access to weather-forecast information relating to the same week in which the application request is made.

While this period will place significant demands on staff resources, it is hoped that the permittee and WDNR staff will work out a practical practice that will make this time period workable. The permittee should be advised of red-lined areas close to water resources or otherwise likely to cause concerns about surface or groundwater contamination.

19. The DNR has specific authority to include nutrient loading rate limitations in WPDES permits involving Large Animal Feeding Operations. NR 243.14(2)(b), Wis. Admin. Code. Further, the Department has authority to apply such permit conditions to off-site as well as on-site "discharges" of animal wastes as set forth in Finding #15 above.

The Department is required by law to consider the "... (p)otential impacts on waters of the state due to over-application of animal wastes" and the "... (n)utrient requirements of the crop or crops to be grown on the fields utilizing the animal wastes." Sec. 243.14(2)(a)(1) and (5), Wis. Admin. Code.

The DNR liaison with the USDA Natural Resources Conservation Service (NRCS), Patrick Murphy testified that the DNR needs to be able to regulate the quantity and type of animal wastes spread off-site. Specifically, Murphy opined, if nutrients are over-applied, drinking water standards for nitrate can be exceeded in the groundwater; and soluble and fixed phosphorus can be carried away by surface water runoff and discharged into nearby surface waters. Further, increases in dissolved phosphorus in surface waters can lead to eutrophication, where dissolved nutrients stimulate plant growths that lead to oxygen deficiency and harm to the fishery and other public interests in public waters.

In seeking to prevent such damage to ground and surface waters, the DNR developed permit conditions that are very similar to those found in NRCS Standard 590. (Murphy, p. 3; Ex.

117) Both the permit and NRCS Standard 590 specifically seek to prevent over-application of animal wastes by developing field by field nutrient budgets.

Mr. Cummings, Environmental Manager for Maple Leaf Farms, indicated that Maple Leaf Farms would prefer to rely on individual farmers not to over-apply animal wastes. However, Murphy was persuasive that farmers are often overly-optimistic in terms of crop yields and that this can lead to over-application of manure that can have "potential impacts on waters of the state" within the meaning of sec. NR 243.14(2)(a)(1), Wis. Admin. Code. Even Dr. Massie conceded that relying on the economic market in the hope that farmers would not apply more manure than then needed would be misplaced.

20. Paragraph F.(8) requires that soil sampling analyses be done on field spreading sites on a regular basis to provide the information needed to calculate the appropriate loadings of the nutrients and heavy metals from the wastes being applied. The provisions are reasonable because the soil characteristics change over time as these waters are being applied, and this provision seeks to ensure loadings.

21. The permittee objects to the proposed language relating to the provision in the Main Farm Permit, at page 11, (C)(6), that requires the permittee to undertake a comprehensive investigation of all spray irrigation fields to locate subsurface drainage tiles. A clear preponderance of the credible evidence demonstrates that there is a substantial likelihood that there are such field drainage tiles located in the vicinity of spray irrigation fields utilized by the permittee. (Ex. 118) The evidence also demonstrated that such tiles likely discharge into the West branch of the Root River canal. (Id. Thiele) The permittee demonstrated that it is unlikely that the "greenish discharge" observed by DNR staff in May, 1996, was directly related to its spray irrigation practices, which began several months after observance of the discharge. (Ex. 58) The record was less clear with respect to a discharge observed in June, 1996. Nevertheless, the Department's rationale for requiring the permittee to make reasonable efforts to identify drain tiles that discharge into waters of the state is reasonable under these circumstances. Accordingly, it is prudent of the Department and necessary to protect the waters of the state to require that the permittee identify drain tiles on fields to be spray irrigated.

However, the record was also clear that finding such field drainage tiles is a difficult task and that records of placement of such tile are hard to obtain. (Massie) Further, the permittee presented credible testimony that it had made efforts to locate such field tiles and related records and had been unable to do so. Accordingly, the permit requirement relating to the "comprehensive investigation" shall be amended to require that representatives of the DNR, NRCS and the permittee jointly inspect the property to identify any such tile, and that spray irrigation be modified to the satisfaction of the Department if such tile are located. It is further amended to require that the DNR make available aerial photos that might be helpful in locating such tiles. (Murphy)

22. The provisions of the Main Farm permit relating to weekly hydraulic limitations for spray irrigation are cited at page 11, sec. C(6). A clear preponderance of the evidence supports the necessity for and reasonableness of such weekly limitations. Dr. Massie testified that the goal of protection of groundwater could be accomplished equally well by either the

imposition of a good irrigation schedule or weekly hydraulic limits. However, Mr. Murphy was persuasive that the weekly hydraulic limits were preferable because they could protect against over-application of nitrogen without the extensive record-keeping relating to plant growth and weather conditions that would be necessary in a spray irrigation scheduling regimen. (See: Ex. 143)

The permit-holder's principal objection to the weekly application limitation, is that it could lead to over-application under certain rainfall conditions. However, it is hoped that the permit-holder will use common sense and see the weekly application limitation as a maximum amount and will factor in appropriate weather, soil and crop conditions. Further, the weekly application maximums should factor in this possibility.

23. The provisions on pages 7 - 8, part B of the Main Farm permit require the permittee to conduct monitoring for whole effluent toxicity. There was some confusion on the part of the permit-holder with respect to Whole Effluent Toxicity Testing (WET). While the permit does require such testing, as authorized by sec. NR 106, Wis. Admin. Code, the permit does not involve specific limitations on the results of such tests. (Searle) DNR Environmental Toxicologist Greg Searle was persuasive that only WET monitoring has been placed in the Main Farm permit and that the provisions are consistent with the Department's authority pursuant to sec. NR 106.08(4) and with DNR policy as expressed in the WET program guidance document. (Ex. 146)

The permit-holder made much of the fact that there were no fish-kills in the area, and that the Department mistakenly believed there were prior to imposing WET monitoring at the Main Farm. However, DNR Water Resources Engineer Diane Figiel was persuasive that the conditions at Main Farm warranted imposition of WET monitoring whether or not fish-kills were considered under a very specific checklist used by the DNR to evaluate the need for both acute and chronic testing. (Ex. 146, Ex. 147) Figiel properly relied on the guidance checklist to conclude that annual acute testing and three chronic tests over the five year term of the permit were appropriate. This reflects less testing than a strict reading of the guidance factors would have suggested. (Figiel)

The provisions for WET monitoring are reasonable and necessary under these circumstances. However, Mr. Bills was persuasive that the appropriate instream waste calculation should be 52.3 rather than 67 percent. The Department states in its brief that it now has no objection to amending the permit to reflect the lower figure.

24. Section NR 106.09(1) specifies that data evaluation procedures are specified in the "State of Wisconsin Aquatic Life Toxicity Testing Methods Manual, 1st Edition", which is incorporated by reference.

In addition to sec. NR 106.09(1), both sec. NR 219.04, Table A (parameters 9 and 10 and footnote 8) and sec. NR 149.22 now reference the Methods Manual.

Page 3 of the Methods Manual states in part that the use of WET testing is necessary, in addition to chemical-specific testing, due to several factors, including: 1) the limitations

presented by chemical analysis methods, 2) inadequate chemical-specific aquatic toxicity data, and 3) the inability to predict the toxicity of chemicals when combined in an effluent.

25. The provisions of the Main Farm on pages 7 - 8, part B are reasonable and consistent with what is being required of other permittees in similar circumstances.

While there may not be any toxicity related problems associated with ammonia or chlorine, the purpose of the WET testing is to evaluate the toxicity potential of the effluent as a whole.

26. As clearly stated in the third paragraph on page 3 of the Methods Manual (exhibit 141), U.S.EPA's national policy recommends an integrated approach for controlling toxic pollutants that uses whole effluent toxicity (WET) testing to complement chemical-specific analyses as a means to protect both aquatic life and human health.

27. Diane Figiel testified that Maple Leaf Farms has not tested for many of the substances that are typically found in similar discharges. Given the age of the permit application, many of the Department's current requirements for permit reissuance were not imposed on Maple Leaf Farms. A current application for reissuance would typically include testing for heavy metals and a priority pollutant scan.

28. Greg Searle testified that the settlement agreement reflected in exhibits 62 and 145 will not impact the WET test requirements in Maple Leaf Farms' WPDES permit or the current approach to WET testing in WPDES permits. Three of the four testing recommendations that are proposed to be implemented in the federal program via the settlement agreement are currently being implemented in Wisconsin. (Ex. 145, paragraphs 3, 5 & 6) The fourth testing recommendation proposed to be implemented in the federal program via the settlement agreement involves long-term testing and subsequent evaluation and the results of that testing are speculative at this point. (Ex. 145, paragraph 4)

29. The Main Farm Permit requires the reevaluation of existing storage structures. This reevaluation is set out on page 24 J(13) as general conditions and as specific conditions on page 12 D as it relates to CL-1 and CL-2.

CL-1 and CL-2 structures are used as equalization ponds for process waste, and are properly considered industrial wastes. The depth of the waste is substantially different depending on the time of the week. The property had formerly been owned by C&D Duck Farm who sold it to Joseph Schlitz. Maple Leaf acquired it afterward when Schlitz sold to Heidelman. There are several methods available to determine structural integrity of the lagoons. The Department sent out a letter in September of 1990 and Maple Leaf timely responded by providing a report dated June 25, 1991. (Ex. 30) The report concluded that there was no environmental concern in that the lagoons were structurally sound. The report was filed with the Department on June 25, 1991. (Ex. 30) That report contained information concerning CL-1, CL-2, CL-3, CL-4 and CL-6. Approximately five years later the report submitted was unearthed by Doris Thiele and submitted to Nichol Kosewski. The reports originally were submitted to Gordon Stephenson at the Department of Natural Resources who was the contact person for

Maple Leaf Farms. Gordon Stephenson never voiced any dissatisfaction with the reports and Maple Leaf Farms assumed this to be a closed issue. After Ms. Thiele and Ms. Kosewski collaborated, some five years later, it was decided that the reports were unsatisfactory and therefore, they instituted a permit condition by which Maple Leaf Farms would have to reevaluate CL-1 and CL-2.

30. Dr. Singh, in his testimony referred to Exhibit "35" which was presented to the Department at the time of this hearing. Even if Exhibit "35" does not constitute every piece of post construction data it establishes that post construction documentation was done and provides circumstantial evidence that the Department obtained some post-construction documentation back in the early 80's when the pond was constructed. Certainly, had the Department timely responded it would have been much easier to attempt to locate individuals or persons who could have obtained the information on the complete post construction documentation.

31. The provisions on page 12, paragraph D(1) of the Main Farm Permit require the permittee to submit a plan of action for both earthen lagoons (identified as CL- I and CL-2) operated by the permittee, for Department review and approval. The plan of action may include plans and specifications for any needed upgrading of the earthen lagoons or further study. The provisions also require the permittee to correct any adverse storage conditions and submit post construction documentation for these projects within 60 days of completion

Nichol Kosewski, DNR Hydrogeologist, testified that the Department has broad statutory and rule authority for requiring a plan of action for the two earthen lagoons. The Department has statutory authority under secs. 281.11, 281.12 and 283.001, Stats., to protect, maintain and improve the quality of the waters of the state, both surface water and groundwater. CL-1 and CL-2 store process wastewater and the parties agree that they are industrial lagoons regulated under NR 213. Accordingly, the exclusionary language of sec. NR 213.02(2)(d), making Ch. NR 213 not applicable to lagoons and storage structures designed, constructed and used solely for the storage of animal wastes, does not apply to CL- I and CL-2.

With respect to provisions of Ch. NR 213 particularly applicable to CL- I and CL-2, sec. NR 213.03, entitled "Existing lagoons, storage structures and treatment structures" was revised, effective July 1, 1990 to reflect the state's concern with existing lagoons and structures and the need to ensure that they were not adversely affecting the waters of the state. The section essentially required Maple Leaf Farms to demonstrate that CL- I and CL-2 were not adversely affecting the waters of the state.

In September, 1990, the Department sent a letter to all facilities with wastewater lagoons explaining the recently enacted industrial lagoon and storage structure requirements specified in Ch. NR 213. On April 2, 1991, the Department sent a packet of information to all those facilities. (Ex. 124) The packet of information mentioned several options available to evaluate a lagoon to see if it was adversely affecting the waters of the state.

Page I of the cover letter of exhibit 124 describes three distinct methods to demonstrate compliance with the requirements of Ch. NR 213. Method I involves demonstrating compliance with the groundwater standards of Ch. NR 140, accomplished by installing groundwater

monitoring wells. Method 2 involves demonstrating compliance with the liner standards of Ch. NR 213 by giving the Department details of the lagoon construction, including liner post-construction documentation. (secs. NR 213.10 and NR 213.11) Method 3 involves demonstrating compliance with the groundwater and liner standards by showing that the site conditions and waste types will not adversely affect waters of the state. The cover letter attaches a basic information questionnaire to be completed by each facility. The remaining pages attached are checklists for each of the three methods identified in the cover letter. Page 2 of the cover letter advises the facility that if either method 1 or 3 are chosen, plans and specifications must be submitted to the Department for approval under sec. 144.04, Stats. (now sec. 281.41, Stats.) and Ch. NR 108, Wis. Admin. Code.

Maple Leaf Farms responded on May 20, 1991, attaching the basic information questionnaire for 17 impoundments located at four farms operated in Racine County. (Ex. 125) Table I of exhibit 125, entitled "Summary of Structure ID Numbers and Proposed Dispositions", reflects that with respect to CL- I (the north anaerobic lagoon) and CL-2 (the south anaerobic lagoon) at C & D (now the Main Farm), Maple Leaf Farms chose to use method 2 to demonstrate compliance with the requirements of Ch. NR 213. Method 2 involves demonstrating compliance with the liner standards of Ch. NR 213 by giving the Department details of the construction of the two wastewater lagoons, including liner post-construction documentation. (secs. NR 213.10 and NR 213.11)

Section IV, table 2 of exhibit 125 identifies the waste type in both CL-1 and CL-2 as being "duck processing plant waste water". Such a description of waste type confirms the applicability of Ch. NR 213 rather than Ch. NR 243. Section V reflects Maple Leaf Farms' intent to use method 2 for both CL- I and CL-2 to demonstrate compliance with the liner standards of Ch. NR 213.

Exhibit 136 is the Department's earlier October 14, 1980 conditional approval of plans and specifications for the construction of CL- I and CL-2, given pursuant to sec. 144.04, Stats (now sec. 281.41, Stats.). The second paragraph of exhibit 136 mentions the two new anaerobic lagoons to be constructed, now called CL- I and CL-2. The first condition of the approval requires the following:

1. That the new anaerobic lagoons be sealed to have a minimum compacted thickness of twelve inches over the entire area of the lagoon and that a permeability of not greater than 1×10^{-10} cm/sec. be attained. The permeability and thickness specifications shall be checked by taking four (4) samples of the compacted lagoon seal and performing a laboratory permeability test. Results from these tests shall be submitted to the Department.

The third and eighth conditions of the above approval require the following:

3. That a complete set of final as-built drawings stamped by a registered engineer be submitted to the Department.

8. That the proposed treatment facilities be installed in accordance with the plans and specifications and the above conditions.

Exhibit 137 is a portion of the Ch. NR 213 compliance evaluation for CL- I and CL-2 dated June 25, 1991, and received by the Department on July 1, 1991. While prepared theoretically under method 2 for both CL- I and CL-2 to demonstrate compliance with the liner standards of Ch. NR 213 (secs. NR 213.10 and NR 213.11), the document refers only to the originally proposed specifications for the construction of the lagoons, rather than post-construction documentation, which would verify that the lagoons were constructed as proposed and approved.

Exhibit 137 essentially relies on the plans for construction of CL- I and CL-2 and the Department's conditional approval of such plans and specifications rather than any post construction data. (Ex. 136) Kosewski's prefiled testimony on page 19 details how exhibit 137 repeatedly relies on design specifications rather than post construction data.

The Department failed to respond to the submittal made by the permit-holder in June, 1991. When Thiele was assigned as the permit drafter in 1995, she completed a preliminary review of the report. Due to conflicting information, in December 1995, she requested an update from Maple Leaf Farms. After receiving the information in February 1996, she requested the assistance of Kosewski in reviewing the report. Kosewski summarized her comments in a memorandum addressed to Thiele and dated March 21, 1996. (Ex. 138)

On page 1, section I of exhibit 138, Kosewski concludes that the information provided in exhibit 137 relies solely on plan specifications. She mentions in this memorandum that while exhibit 136 required post construction tests (see I condition I of exhibit 136), exhibit 137 merely states that "these tests were reportedly submitted to WDNR without including the results of the tests. Kosewski's note on page 1, section I adds that the Department's files and microfilm should be checked to see if the results of any permeability tests can be found and Maple Leaf Farms should be asked to provide the information and any other post construction documentation. After sending Doris her March 21, 1996, memorandum (exhibit 138), Nichol personally searched the Department's files and microfilm but was unable to find any post construction permeability tests submitted by Maple Leaf Farms to comply with condition I of exhibit 136. As Thiele's prefiled testimony reflects, on April 8, 1996, Maple Leaf Farms was advised that its June 25, 1991, reports were incomplete due to the lack of post construction documentation.

Kosewski's "items of concern" on page 1, section I of exhibit 138 are the following:

1. If the lagoons were constructed with a 12 inch liner pursuant to condition I of exhibit 136, their 14 foot depths (see exhibit 125, the second table 1, entitled "Lagoon/Storage Structure General Information") would require a clay liner thickness of 29 inches (sec. NR 213.10(1)(b)2. Table I -assuming 2 feet of freeboard and a resulting wastewater depth of 12 feet). Consequently the liners would not meet the thickness criteria of sec. NR 213. 1 0;

2. Since the soils for the liners were obtained on-site, the presence of sand seams and glacial till justifies the need for more detailed documentation regarding liner characteristics; and
3. Exhibit 137 does not provide details on the depth to groundwater.

Kosewski concludes on page 2, section III of exhibit 138 that Maple Leaf Farms' compliance evaluation report is incomplete. (Ex. 137) To pursue method 2 the information that is identified in the pink sheets of exhibit 124 must be provided.

The significance of the Department not having any such post construction documentation is that the Department is unable to determine whether the lagoons have ever been constructed as proposed and approved. Consequently references to plan specifications are insufficient to verify that the lagoons meet the requirements of Ch. NR 213.

The significance of the liners for CL- I and CL-2 not meeting the thickness criteria is that the lagoon liners are not thick enough, and therefore do not pass the Method 2 approach for demonstrating compliance with the liner standards of Ch. NR 213. However, Ch. NR 213 was written with the realization that there would be lagoons constructed prior to the enactment of the code that don't meet the code design standards and/or material specifications. The language of the code states that even if such lagoons don't meet the code design standards, the owner/operator could still attempt to demonstrate that the lagoons are not adversely impacting the environment (including waters of the state). If such a demonstration is successfully made, the lagoons could continue to be operable. In this type of situation, which is the situation that CL- I and CL-2 are in, it might be more appropriate for Maple Leaf Farms to try a different method, such as Method 1, to attempt to determine whether the lagoons are adversely impacting the environment. (Kosewski)

The significance of the Department not having any detailed information regarding depth to groundwater from the bottom of CL- I and CL-2 is that the Department is unable to determine whether the lagoons comply with sec. NR 213.08(2)(c), which requires that:

A minimum separation of 5 feet shall be maintained between the bottom of the lagoon liner or subbase of a storage structure and either bedrock or the groundwater level, whichever is higher.

The significance of the Department not having the information identified in the pink sheets of exhibit 124 is that Maple Leaf Farms has known since 1990 that for it to continue using CL- I and CL-2, it would need to select a method for determining compliance with the requirements of Ch. NR 213 and then provide the relevant information identified in exhibit 124 for the method selected. (Ex. 124) Maple Leaf Farms has not provided any post construction data and instead has merely recited design specifications back to the Department. (Ex. 137) Consequently the Department needs more information from Maple Leaf Farms to ensure compliance with the requirements of Ch. NR 213.

Kosewski advised Thiele that in light of Maple Leaf Farms' failure to comply with the conditional approval of its plans and specifications for the construction of CL- I and CL-2 and its failure to provide the relevant information identified in exhibit 124 for method 2, the Department needed more information regarding CL- I and CL-2. (Ex. 136) Thiele then drafted page 12, paragraph D(l) of the Main Farm permit to require a plan of action for CL- I and CL-2 for any needed upgrading or further study.

Maple Leaf Farms - Main Farm has failed to make the demonstration required by sec. NR 213.03(2)(a) that the design standards, materials specifications and performance criteria of Ch. NR 213 have been met. Section NR 213.03(l) requires the owner or operator to demonstrate, to the satisfaction of the Department, that all existing lagoons meet the purpose of Ch. NR 213. That section also requires the owner or operator to meet the purpose of Ch. NR 213 as soon as possible but no later than July 1, 1995 or as specified by a WPDES permit, as is being done here. In this instance, any delay by the Department in reviewing the 1991 reports has only given Maple Leaf Farms - Main Farm more time to comply with the requirements of Ch. NR 213.

The provisions are reasonable, consistent with what is being required of other permittees in similar circumstances, and are within the Department's authority. The language deals with the possible need to upgrade the earthen wastewater lagoons. Any plan of action needs review and approval by the Department to ensure that the work is being done appropriately. The requirement to submit a plan of action is reasonable under the facts surrounding the use of CL- I and CL-2, the two earthen wastewater lagoons. (Kosewski)

Approximately 200 facilities were required to evaluate their industrial lagoons and storage structures per the requirements of Ch. NR 213. The approach taken with Maple Leaf Farms is consistent with what other permittees have been required to do. (Kosewski)

The Department is not using the permit to require abandonment of the old lagoons but is instead allowing them to be evaluated to ensure that they are not causing an adverse impact to waters of the state. The permittee itself has been provided with three suggested methods to attempt to demonstrate that the lagoons are not adversely impacting the environment, or it can use a proposal of its own. Under the specific circumstances relating to CL-1 and CL-2, there are reasons to be concerned. First, there are high groundwater levels nearby; there are also some sand seams and glacial till nearby; there is a lack of permeability data; and there is the potential that the liner will not meet the thickness criteria of sec. NR 213.10. (Kosewski) Accordingly, the permit language is reasonable.

32. Unlike CL-1 and CL-2, lagoon CL-3 contains solely animal waste. There are additional reasons why CL-3 should not be the subject of reevaluation. The classification for the lagoon should be based on its use. The record indicates that in 1988 a request was approved to redesign the lagoon for animal waste. At that time it was approved and the new lagoon was created. Its use has never changed. Use determines the appropriate regulation. The Department ultimately granted regulation of the operations under Ch. NR 243. NR 213.02(2)(d) specifically excludes lagoons and storage designed, constructed and used solely for the storage of animal waste. Therefore, the upgrade requirements in NR 213.03 requiring the reports which were submitted to the Department in 1991 should not have included CL-3. The mere fact that they

were previously regulated as an industrial site and the waste was regulated as an industrial discharge does not change the appropriate regulation. The appropriate regulation is based on the use. Therefore, the legal authority relating to CL-3 is contained in NR 243.14(1) and (1)(a). Those sections provide construction standards. There is a provision for post construction evaluation, but that would follow construction under certain circumstances. There has never been a requirement to re-certify existing animal waste storage lagoons. Therefore, any requirement at this time to reevaluate CL-3 goes beyond the requirements of NR 243 and NR 213.

Further, under the requirements of Standard No. 425, Jeanne Tarvin testified that based on the review of the Wisconsin Testing Laboratory report the separation to groundwater was sufficient to meet the standard. (Ex. 57) Under these circumstances, the provisions with respect to CL-3 are not warranted. Accordingly, the provisions relating to CL-3 have been stricken.

33. The situation is different with respect to Main Farm lagoon CL-6, an existing 15-acre holding pond, which was closed some time prior to October, 1988. There were concerns that contaminants might leak from the lagoon to ground or surface water. K. Singh & Associates were employed. The investigation commenced with an October 25, 1988 groundwater assessment. (Ex. 37) March 2, 1989 a hydrological investigation took place. (Ex. 38) April 7, 1989 a report of remedial alternatives was submitted by K. Singh & Associates. (Ex. 39) Exhibit "40" consists of a May 12, 1989 letter containing remedial design plans attached, dated August 30, 1989. The stipulation was entered into by and between the parties. (Ex. 56) The Exhibits had certain time limits for a Phase I, Phase II, Phase III and Phase IV report. Maple Leaf Farms requested the Department of Natural Resources to grant extension for failure to review. The language in the stipulation requiring an extension equal to the delay of review time was only intended to apply during those phases. The referenced extension on page four of the stipulation (Ex. 56) which states: "To the extent DNR fails to comply with the deadline or modification deadlines in accordance with this agreement all subsequent deadlines for Maple Leaf shall be extended by an equal number of days..." applies to prevent a situation in which Maple Leaf Farms would be found in violation with a forfeiture of \$1,000.00 a day for failure to comply within a set deadline date. Since there is no set deadline date for Maple Leaf Farms after December 31, 1992 that language does not apply to the Department's determination of December 31, 1992. From that point on all that was required was continued testing to see that the bio-remediation was functioning.

34. With respect to CL-6, there is no question that there are still significant exceedances of Preventive Action Limits and that continued evaluation is warranted. Dr. Singh was called by Maple Leaf Farms to testify in part on CL-6. On page 3 of his prefiled testimony, Mr. Singh concludes that further monitoring of ground water quality is not warranted. In rebuttal Thiele responded that Ch. NR 140 requires permittees to respond to significant exceedances of a groundwater monitoring parameter, and that exhibit 45 reflects data ten times over the preventive action limit. Even Dr. Singh testified that there was an impact to groundwater in the proximity of monitoring well B-5.

Further, Dr. Singh found that the data from monitoring well B-7 "appears to indicate that there has been a slight increase in the concentration of ammonia since 1990". Dr. Singh testified

that the groundwater quality in monitoring well B-5 "has either stabilized or are showing a sign of improvement." In rebuttal, Thiele testified that exhibit 45 reflects exceedances of ammonia nitrogen and COD at monitoring well B-5 on what is labeled as page (B-5)-6. The page reflects, for ammonia nitrogen, a 1994 average of 61.33 mg/l and a 1995 average of 53.25 mg/l. While those numbers reflect a decrease, both numbers are well above the Preventive Action Limit of 5.4 mg/l. That same page also reflects, for COD, a 1994 average of 94.75 mg/l and a 1995 average of 91.75 mg/l. One again, while these numbers reflect a decrease, both numbers are well above the Preventive Action Limit of 62 mg/l. Exhibit 45 also reflects exceedances of ammonia nitrogen and COD at monitoring well B-7 on what is labeled as page (B-7)-3. The page reflects, for ammonia nitrogen, a 1994 average of 89.35 mg/l and a 1995 average of 84 mg/l. While those numbers reflect a decrease, both numbers are well above the Preventive Action Limit of 5.4 mg/l. That same page reflects, for COD, a 1994 average of 136.50 mg/l and a 1995 average of 119.50 mg/l. One again, while those numbers reflect a decrease, both numbers are well above the Preventive Action Limit of 62 mg/l.

Accordingly, Dr. Singh concluded that monitoring well B-5 "continues to exceed the enforcement standard" for ammonia nitrogen.

At the hearing Mr. Singh admitted that complete dewatering of CL-6 would be difficult. In rebuttal, Doris Thiel testified to the significance of that admission. CL-6 is a recharge point for the groundwater, which means that the bottom of CL-6 is below the groundwater table and groundwater is flowing into CL-6. This fact is significant because it means that CL-6 is a direct conduit to the groundwater and can negatively impact it.

35. All of the provisions on page 18 and 19 of the Main Farm Permit found at Section H, relating to Continued Evaluation of CL-6, are reasonable and necessary to protect soil and groundwater contamination. The permit-holder argued that CL-6 now meets the closure requirements set forth in Chapter NR 700. However, NR 700 is inapposite because the site does not involve "hazardous substances" nor a "solid waster facility" nor "soil contamination" within the meaning of § NR 700.02, Wis. Admin. Code. (Kosewski)

DISCUSSION AND SUMMARY

The DNR has authority under Wisconsin law to require the manure management plans as described in the Downy Duck [p. 1, paragraph A(1)] and Main Farm permits [p. 9 C(1)]. Said provisions of the permits are reasonable and necessary, as modified below. Wisconsin law specifically defines a "concentrated animal feeding operation" (CAFO) as a "point source" subject to the WPDES program. Section 283.01(12)(a), Stats. While EPA Guidance suggests limiting CAFO manure spreading regulation under NPDES to on-site activities, no such limitation is applicable under the State of Wisconsin WPDES program. Rather, the WPDES program specifically defines "groundwater" as a "water of the state". Further, the protection of groundwater from excessive landspreading from large animal feeding operations is a central purpose of Chapter NR 243 relating to Animal Waste Management. Nothing in Chapter NR 243 limits manure management regulation to on-site activities. The DNR's interpretation of Chapter 283, Stats., and Chapter NR 243, in applying them on and off-site landspreading activities

undertaken by large animal feeding operations, is reasonable and entitled to considerable deference.

To allow the permittee to more quickly respond to the landspreading market and weather conditions, the time for Department staff to respond to a request for approval of a new landspreading site has been reduced to three days.

With respect to the provisions requiring a comprehensive investigation of all spray irrigation fields to locate subsurface drainage tiles, the permit-holder demonstrated that it would be difficult to locate the same with any certainty. The language relating to the location of field drainage tile has been amended to provide for a joint inspection by DNR and NRCS staff and employees of the permit-holder. Further, the Department shall make available any aerial photos which aid in the location of such tiles. A clear preponderance of the credible evidence supports the related requirement of weekly hydraulic limitations on spray irrigation if in fact such field tiles are located. Dr. Massie somewhat vaguely advocated for "good irrigation scheduling" in lieu of weekly application limitations. However, Mr. Murphy was persuasive that a regimen of spray irrigation, to be equally protective would require far more detailed record-keeping relating to plant growth and weather conditions.

The provisions relating to surface water impoundments CL-1, CL-2 and CL-6 have been found to be reasonable and necessary. The permit-holder is understandably baffled by the DNR's failure to advise it that its June 25, 1991, submittal relating to CL-1 and CL-2 were not deemed to be inadequate until April 8, 1996. The 5-year delay in responding is simply inexcusable. The DNR argues that the delay gave the permit-holder more time to submit information but the opposite is true. As Dr. Singh noted, if the DNR had responded in a timely manner, it would have been far less burdensome to obtain post-construction documentation. Nonetheless, the Department has authority to require Maple Leaf Farms to evaluate these old earthen lagoons to ensure that they are not causing an adverse impact to the waters of the state. NR 213, Wis. Admin. Code. The Department's requirements with respect to CL-1 and CL-2 are consistent with the actions taken with other industrial lagoons and storage structures around the state. However, CL-3 is not an industrial lagoon and is not subject to NR 213 requirements. The provisions relating to CL-3 have, accordingly, been stricken. Further, the difficulty of reconstructing post-construction documentation years later is simply not justified in the case of CL-3. Ms. Tarvin was convincing that there is likely a proper separation to groundwater at CL-3.

With respect to CL-6, there are still significant exceedances of Preventive Action Limits. Continued evaluation and testing is clearly lawful and warranted under these circumstances.

Further, the WET testing provisions of the permit are reasonable and necessary and consistent with longstanding DNR policy and practice. The only change reflects the change on the dilution percentages as suggested by Mr. Bills and agreed to by the DNR.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals (the Division) by its administrative law judge, has authority to hear contested cases and issue necessary orders in cases relating to WPDES permits referred to the Division by the Department of Natural Resources. Section 227.43(1)(b), Stats.

2. Pursuant to sec. 283.63(1)(b), Stats., a permittee 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. The Downy Duck and Main Farm operations of Maple Leaf result in the "discharge of pollutants" into the waters of the state within the meaning of sec. 283.01(5), Stats. The Main Farm and Downy Duck operations are "point sources" subject to the WPDES program, specifically "a concentrated animal feeding operation" within the meaning of sec. 283.01(12)(a), Stats.

4. The Downy Duck and Main Farm operations of Maple Leaf Farm are "large animal feeding operations" within the meaning of sec. NR 243.04(13).

5. The Wisconsin Pollution Discharge Elimination System (WPDES) goes farther than the NPDES program in several significant respects. First, Wisconsin law applies to ground water as a relevant water of the state within the meaning of sec. 283.01(20), Stats. Further, the WPDES program specifically allows the WDNR to impose limitations "more stringent" than the Federal CWA when it is "necessary to meet applicable water quality standards, treatment standards, schedules of compliance or any other state or federal law, rule or regulation." Sec. 283.13(5), Stats.

6. The WDNR has legal authority under Wisconsin law to regulate landspreading from large animal feeding operations including off-site landspreading relating to disposal of discharges produced by such large animal feeding operations. Ch. NR 243, Wis. Admin. Code and Ch. 283, Stats.

7. Section NR 243.14(2)(b) provides specific authority for implementing an approved management plan in accordance with special conditions contained in the WPDES permit, which may specify such considerations as the need for incorporation of the waste material into the soil, winter spreading limitations, distribution schedules and nutrient loading rates.

Section 283.13(5), Stats., allows the imposition of water quality based effluent limitations more stringent than categorical standards (whether federal or state) when necessary to meet applicable water quality standards.

8. Section NR 243.21(2)(b) specifically recognizes that the overapplication of animal wastes is a type of unacceptable practice which may result in the discharge of a significant amount of pollutants to waters of the state. Section 281.11, Stats., extends the Department's authority to the prevention as well as to the remediation of conditions which lead to water pollution. Section NR 243.14(2) is the authority for requiring a manure management plan.

9. Section NR 243.14(2) specifies that the Department shall consider, among other factors, soil limitations such as permeability, infiltration rate, drainage class and flooding hazard when reviewing and approving a manure management plan. Section NR 243.14(2)(b) specifies that the special conditions contained in the WPDES permit may specify such considerations as the need for distribution schedules and nutrient loading rates.

10. The Department has broad statutory authority to protect, maintain and improve the quality of the waters of the state, both surface water and groundwater. Section NR 243.14 provides authority for the Department to regulate the storage of animal wastes. Section NR 243.14(1)(c) specifically mentions the Department's authority to require the installation of groundwater monitoring wells. The requirements to do a sludge/solids analysis and a pond water analysis are consistent with all of the authority cited above, as well as chapter 160, Stats.

11. Section NR 140.24(3) gives the Department a range of responses it may take or may require if a preventive action limit for an indicator parameter identified in table 3 has been attained or exceeded. Those responses include the authority to require the installation and sampling of groundwater monitoring wells, require increased monitoring, and require an investigation of the extent of groundwater contamination. The provisions relating to CL-6 are reasonable and necessary and authorized pursuant to the above authority.

12. CL-1 and CL-2 store process wastes and are industrial lagoons subject to the upgrade requirements of sec. NR 213.03, Wis. Admin. Code. CL-3 stores solely animal wastes and is excluded from said upgrade requirements by sec. NR 213.02(2)(d), Wis. Admin. Code.

13. A number of administrative rules have been promulgated relating to whole effluent toxicity (WET) testing. Chapters NR 102, NR 103 and NR 105 constitute the water quality standards for the surface waters of Wisconsin, as recognized in secs. NR 102.01(1), NR 103.01(1) and NR 105.01. Section NR 102.05(2) recognizes that Ch. NR 106 is controlling with respect to the determination of water quality based effluent limitations or other management practices for whole effluent toxicity.

14. Section NR 105.02(2)(b) recognizes that the Department may promulgate a more stringent water quality criterion when it determines that the previously promulgated criterion is inadequate for the protection of humans, fish and other aquatic life or wild and domestic animal life. Sections NR 105.05 and NR 105.06 give the Department authority to establish both acute and chronic toxicity criteria for fish and other aquatic life.

15. Section NR 106.08 gives the Department authority to establish whole effluent toxicity testing requirements and limitations whenever necessary to meet applicable water

quality standards as specified in Chs. NR 102 to NR 105 as measured by exposure of aquatic organisms to an effluent and specified effluent dilutions.

16. Section NR 106.08(5) provides that whole effluent toxicity limits are established in a permit according to sec. NR 106.09 whenever representative, facility-specific whole effluent toxicity data demonstrate that the effluent is or may be discharged at a level that will cause, have the potential to cause, or contribute to an excursion of a water quality standard.

17. The provisions in the permit relating to WET testing are reasonable and necessary and authorized by the above authority.

18. The WDNR has been charged by the legislature with the duty of applying Ch 283, Stats., and Chapter NR 243, Wis. Admin. Code. Accordingly, the Department's interpretation of the statute is entitled to "great weight." CBS, Inc. v. LIRC, 219 Wis. 2d 563, 574, _____ N.W.2d _____ (1998).

19. The record in this matter closed on February 16, 1999. This decision is timely within the requirements of sec. 283.63(1)(d), Stats.

ORDER

WHEREFORE, IN ACCORDANCE WITH THE ABOVE FINDINGS, IT IS HEREBY ORDERED that the challenged provisions of WPDES Permit Nos. WI-0053376-5 and WI-0001694-4 are AFFIRMED, subject to the new dates calculated in Exhibit 142, and with the exception of the following provisions, WHICH ARE HEREBY AMENDED:

Downy Ducks Farm Permit, WI-0053376-5, at page 8(F)(4), the last sentence is amended to read as follows:

The permittee shall wait a minimum of three business days following request receipt by the Department prior to use of a new landspreading site.

Maple Leaf Farms Main Farm Permit, WI-0001694-4, at p. 11(C)(6), shall be amended as follows:

The permittee shall make a good faith effort to locate all subsurface drainage tiles. For purposes of this section, a good faith effort shall consist of making the property available for a joint inspection by employees of the permittee, the Department and the NRCS to jointly identify any such drainage tiles. The Department shall determine the time for such an inspection. The Department shall make available any aerial photographs which aid in the location of such tiles. If drainage tiles are located, the permittee shall prepare a report acceptable to the Department that shall include the size, location, depth and outlet of all subsurface drainage tiles. In the event that the results of the joint inspection reveal the existence of such tiles, the Manure Management Plan shall be modified to include specific weekly hydraulic application limitations, or a proposal to abandon the tile lines or the spray irrigation field.

The Main Farm permit shall be further amended as follows:

Page 13, paragraph E(1) Manual Storage Structure:

The permittee shall complete the following schedule for earthen manure storage structures, (identified as CL-4, as well as the emergency pond) operated by the permittee.

Page 13, paragraph E(2) shall be amended to read:

All existing manure storage structures, including CL-3, shall be inspected annually for cracks and corrosion.

Page 24, paragraph J(13) shall be revised to read:

The following information shall be included in the written report evaluating the existing storage structures except CL-3:

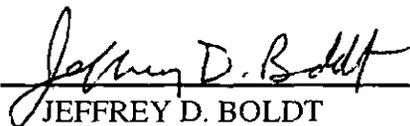
IT IS FURTHER ORDERED, that the permit modifications contained in the September 23, 1998 and November 18, 1998 Stipulations, be incorporated into the permits as specified therein.

IT IS FURTHER ORDERED, that the Department revise all compliance schedules in the permit to reflect the date of this decision.

Dated at Madison, Wisconsin on March 31, 1999.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
5005 University Avenue, Suite 201
Madison, Wisconsin 53705-5400
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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 sec. 227.48, Stats., 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 secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

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 therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be 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. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.