

## **Wisconsin Pollutant Discharge Elimination System (WPDES) Concentrated Animal Feeding Operation (CAFO) Permit Program Affirmed by Administrative Decision**

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As originally described in a previous client alert, available [here](#), an Administrative Law Judge (ALJ) issued two decisions on September 4, 2014 in companion contested cases concerning permits and approvals issued by the **Wisconsin Department of Natural Resources (WDNR)** for the construction and operation of the proposed **Richfield Dairy in Adams County, Wisconsin**. One case focused on the WDNR's authority to regulate groundwater withdrawals via high capacity well permits, and is described in greater detail [here](#). In the other case that is the focus of this alert, the ALJ considered arguments by opponents that the engineered facility designs were deficient for several reasons and that several provisions of the Wisconsin Pollutant Discharge Elimination System (WPDES) permit WDNR issued to Richfield Dairy were unreasonable. The ALJ determined that the engineered facility designs meet and exceed all applicable standards and will be protective of groundwater, and with a single exception, the WPDES permit issued to Richfield Dairy is reasonable.

Not only is the ALJ's decision excellent news for the Richfield Dairy, but it overwhelmingly reaffirms the adequacy of the WDNR's WPDES Concentrated Animal Feeding Operation (CAFO) permit program, and the individual permits that are issued to farmers across Wisconsin. This decision also creates some regulatory certainty that WPDES CAFO permits that contain conditions consistent with Wis. Admin. Code ch. NR 243 (the CAFO Rule) will be upheld when challenged at the administrative level. This decision also allows WPDES-permitted farmers to rely on the promulgated rules and associated NRCS technical design standards when developing engineered facility designs and nutrient management plans. Michael Best represented Richfield Dairy throughout these proceedings.

The petitioners had argued that, even though the WPDES permit was issued consistent with the CAFO Rule in every respect (often including language from the rule verbatim), that the permit was deficient for a number of reasons, including that it would not be protective of surface and groundwater quality standards, that WDNR had not required enough groundwater monitoring at the production area or at land application sites, that the WPDES permit needed to contain a cap on the number of animals that could be housed at the facility, and that Richfield Dairy should have inspected every field in its nutrient management plan for tile lines before the nutrient management plan could be approved. Petitioners further argued that, even though the engineered facility designs meet and exceed all applicable technical

standards, they were nevertheless inadequate and would not protect groundwater.

The ALJ identified petitioners' arguments for what they were: an effort not to modify the Richfield Dairy WPDES permit, but rather to substantially undermine and force changes to the WDNR's WPDES CAFO permit program. Indeed, the ALJ aptly observed,

*"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."*

The ALJ offered as an example that,

*"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."*

The ALJ also recognized that "Richfield Dairy has designed a state-of-the-art dairy facility" and concluded that the facility design approval was proper and that, with one exception, the WPDES permit is reasonable.

The ALJ did order the WDNR to revise Richfield Dairy's WPDES permit to include a "sustainable cap on animal units." The ALJ explained that a cap on animal units in WPDES permits will increase transparency within the WPDES CAFO permit program and help WDNR and the public to monitor WPDES permit compliance.

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