

## Wisconsin Water Court Cases in Progress

The following three court cases currently moving through the Wisconsin courts have particular interest to CSWAC members:

### ***Clean Wisconsin & Pleasant Lake Management District v. Wisconsin DNR*** ***CSWAC has joined this case as an amicus***

**Issue:** This case addresses the Wisconsin DNR's failure to carry out its duties and authority under the Public Trust Doctrine to protect navigable waters. October, 2016 Clean Wisconsin challenged DNR's permitting of 7 (originally 8) High Capacity Wells that DNR had given permits to pump groundwater. DNR had determined each of these wells would have a negative environmental impact on the state's water resources, but following the Schimel opinion taking away DNR authority the DNR permitted the wells.

**Status:** On October 11, 2017 Dane County Circuit Court Judge Bailey-Rihn ruled to nullified seven of the high-capacity well permits, the eighth permit was sent back to DNR for further review. Judge Bailey-Rihn action, voiding the permits, required the DNR to fulfill their constitutional duty to protect Wisconsin's waters.

January 5, 2018 DNR along with their interveners (Wisconsin Manufacturing and Commerce, Dairy Business Association, Wisconsin Potato & Vegetable Growers, and others) appealed the October 11, 2017 Circuit Court decision sending it to the District 2 Court of Appeals (Waukesha).

The Court of Appeals declined to decide this case along with the Kinnard CAFO case (described below) as they felt the issue at hand would have statewide implications and asked the Wisconsin Supreme Court to make the decision. That decision hangs on Act 21 – 2011 a law passed by the legislature and signed by Governor Walked that limits the actions of state agencies (DNR, DOT, DPI, etc.) to only those activities currently written into a state law, thus giving the legislature power over state agencies, not the governor. For example, if the Department of Transportation wanted to use a new method for mapping roads and it was not currently included in statutes, it could not unless and until it asked and was granted permission to do so from the legislature.

April 9, 2019 the Supreme Court agreed to take the case. The issue before them is, does the DNR have the authority to protect the waters of the state using cumulative impact analysis or other measures not currently mentioned in the state's statutes to protect Wisconsin's waters. It is expected that the Supreme Court ruling will come in the fall of 2019.

### ***Kinnard Farms Case: Lynda Cochart, et al. v. Wisconsin DNR***

**Issue:** Does Act 21 limit DNR's authority to impose Wisconsin Pollutant Discharge Elimination System (WPDES) permit conditions? Specifically, is the DNR able to impose an animal unit cap and require the operator of a Confined Animal Feeding Operation (CAFO) to install groundwater monitoring wells to ensure groundwater nitrates (and other contaminants) do not exceed state and EPA health standards.

**Status:** July 14, 2016, Dane County Circuit Court Judge Markson affirmed the petitioners' (Clean Wisconsin and others at this point) argument that the Wisconsin DNR improperly rejected Administrative Law Judge Boldt's order to include an animal unit limit and off-site groundwater monitoring as part of Kinnard Farms, Inc.'s WPDES permit. Judge Markson concluded that that Wisconsin statutes do empower the DNR to require animal unit limits and monitoring of water pollution to ensure permittees comply with state clean water laws.

The Wisconsin DNR appealed Judge Markson's decision to the District 2 Court of Appeals (Waukesha). While waiting for the decision, DNR issued a new WPDES permit that has been constructed without the permit conditions imposed by Judge Boldt and upheld by Judge Markson.

As noted above, this CAFO case has been united with the CleanWisconsin-PLMD high capacity well case and set up to the Wisconsin Supreme Court. This means the two cases together will become an Act 21- 2011 case. This is troubling because the two cases deal with different issues. The high capacity well case is based on the Wisconsin's Constitution's Wisconsin's Public Trust Doctrine – the waters of the state belong to the people of the state; the CAFO case addresses DNR's authority to include conditions in a WPDES permits.

<https://www.greenbaypressgazette.com/story/news/local/kewaunee-county/2019/04/15/wisconsin-supreme-court-hear-appeal-kinnard-farms-cafo-regulation/3475634002/>

### ***Pleasant Lake Management District v. Richfield Dairy***

Issue: Wisconsin Pollution Discharge Elimination System (WPDES) permits must be reevaluated and renewed every 5 years. February 10, 2017 the DNR issued the Richfield CAFO a new WPDES permit. The permit not only lacks an animal unit cap, but also includes language that will allow Richfield Dairy to obtain an Alternate Concentration Limit (ACL) for nitrate pollution, and it does not include a requirement for off-site groundwater monitoring wells. Richfield is asking for an ACL because the Burr Oaks CAFO next door to the proposed Richfield site has already polluted the groundwater in the area. Groundwater Nitrate values in the area exceed the state and national limit of 10 mg/liter.

May 25, 2017, the DNR granted PLMD a contested case hearing challenging the WPDES permit because:

1. The WPDES permit issued on October 29, 2015 does not comply with Judge Boldt's September 3, 2014 directive that DNR include in the Richfield WPDES permit a condition "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 condition approval modification", a cap of 52.5 million gallons of water, which will support approximately 3,500 milking cows (4,000 animal units).
2. The WPDES permit does not address the discharge of wastewater in excess of allowable public health standards.
3. The DNR has not required in the WPDES permit monitoring wells to assess the quality of groundwater at manure spreading sites.
4. The permit does not address whether Richfield Dairy is eligible for an alternate concentration limit and if so, what the level of pollution allowed would be.

Two of these points, numbers 1 and 3, are the same points being deliberated before the Wisconsin Supreme Court in the Kinnard case. Wis. DNR, PLMD and Richfield Dairy have all asked Judge DeFort (CCH Administrative Law Judge, ALJ) to postpone this CCH until after the Supreme Court decision on Kinnard. Judge DeFort has declined to do so and is requiring the *PLMD-Richfield* case to go to hearing in July, i.e. before the Supreme Court decision is made. This is a most unfortunate and unusual situation, as two of the four points in the Richfield case align with Kinnard. To hold the Richfield CCH before the Supreme Court decides the Kinnard case is problematic, as whatever the outcome may be, the Supreme Court decision may reverse it.

Status: PLMD is preparing for a July 2019 CCH.