

Midwest Environmental ADVOCATES

pro bono publico

VIA ELECTRONIC MAIL

November 11, 2005

BOARD OF DIRECTORS

Carol Brown, Vice President
Partner
Brown & LaCounte
Madison

Arlen Christenson, President
Emeritus Professor of Law
and Environmental Studies
University of Wisconsin Law School
Madison

Dennis Grzezinski
Law Office of Dennis Grzezinski
Milwaukee

Mark A. Kastel
Co-Founder
The Cornucopia Institute
La Farge

Paula Oeler, Secretary
Brice Prairie

Larry Wawronowicz
Deputy Administrator of
Natural Resources
Lac du Flambeau Band of Lake
Superior Chippewa Indians
Arbor Vitae

Beth Anne Yeager, Treasurer
Attorney
Madison

STAFF

Melissa K. Scanlan, Attorney
Founder & Executive Director

Andrew C. Hanson
Staff Attorney

Brent O. Denzin, Attorney
Equal Justice Works Fellow

Florence A. Edwards
Legal Assistant

OF COUNSEL

Jodi Habush Sinykin
5630 N. Lake Drive
Milwaukee, WI 53217
414.961.8944
hslaw@bizwi.rr.com

Duane Poppo
Wisconsin Department of Natural Resources
1300 W. Clairemont Ave.
Eau Claire, WI 54702

Re: Comments on WPDES Permit No WI-0063045-01, Burnside Dairy.

Dear Mr. Poppo:

Midwest Environmental Advocates, Inc. (MEA) is writing to comment on the DNR's proposed Wisconsin Pollutant Discharge Elimination System ("WPDES") Permit No. WI 0063045-01 ("Proposed Permit") for Burnside Dairy, Inc., located in the Bear Creek Watershed. We are submitting these comments on behalf of Wisconsin Environmental Law Advocates.

As an initial matter, we note that Burnside Dairy caused what appears to be a significant fishkill in Weisenbeck Creek and Little Bear Creek in July of 2005. Both streams are classified as trout waters.

The DNR file is replete with documentation of this fishkill. Burnside Dairy apparently caused at least 20,000 gallons of liquid manure to discharge to Weisenbeck Creek, which caused the fishkill. We understand the discharge was caused by a buried valve that had been previously used to transfer manure to a storage facility that no longer existed. During construction of new facilities, a valve control for the pipe was severed and opened the valve to the former manure structure. The discharge of manure to Weisenbeck Creek resulted. One DNR official has estimated that up to 555 trout were killed as a result of this apparently accidental spill.

We are concerned that the WPDES permit will not adequately mitigate the damage already done to Weisenbeck Creek and Little Bear Creek, particularly as it relates to the chronic delivery of pollutants from liquid and solid manure applications during winter. The public resource has been seriously harmed, and the DNR must ensure that WPDES permit conditions are adequate to restore those waters and minimize any future harm.

Our specific comments follow:



COMMENT: Section 1.1 of the Proposed Permit must be rewritten to remove the exception for discharges of manure during chronic rainfall events.

The Proposed Permit, in Section 1.1, prohibits MLD from discharging pollutants to navigable waters from the animal production area except in the event a 25-year, 24-hour rainfall event, or “a chronic rainfall event,” causes a discharge of pollutants from a storage or containment structure to navigable waters and Burnside Dairy meets certain conditions under the Proposed Permit.

The Clean Water Act, 33 U.S.C. § 1251 *et seq.*, through federal regulations adopted by the U.S. Environmental Protection Agency (“USEPA”) at 40 C.F.R. §§ 412.33 and 412.31(a), does not allow discharges of manure from a storage or containment structure from the animal production area to navigable waters during a “chronic rainfall event.” Wisconsin law requires that all effluent limitations for point sources, including CAFOs, be consistent with effluent limitations under the Clean Water Act. Wis. Stat. § 283.11.

The Proposed Permit and DNR regulations in § NR 243.13(1)(b) allow what the Clean Water Act otherwise prohibits: discharges of manure from Burnside Dairy to navigable waters during a “chronic rainfall event.” Because the Proposed Permit allows Burnside Dairy to discharge pollutants to navigable waters during a chronic rainfall event, the Proposed Permit is inconsistent with and violates effluent limitation guidelines in 40 C.F.R. §§ 412.31(a) and 412.33. As a result, Section 1.1 must be rewritten to remove the exception for chronic rainfall events to ensure compliance with the Clean Water Act.

COMMENT: Section 1.1 should prohibit solid manure applications in addition to liquid manure applications on frozen and snow-covered ground.

It has been shown through the DNR experience, as well MEA’s experience in enforcing WPDES permits, that solid manure can discharge from a land application area as easily as liquid manure during snow melt conditions. The justification for differentiating between solid and liquid manure applications is dwindling, given the recent solid manure runoff problems that have occurred at other WPDES permitted CAFOs around Wisconsin. As a result, Section 1.1 should prohibit application of both solid and liquid manure applications on frozen and snow-covered ground.

COMMENT: Section 1.1 of the Proposed Permit should prohibit all solid and liquid manure applications from February 1 to March 31, regardless of whether the ground is frozen or snow-covered.

The DNR recently proposed revisions to Section NR 243.14 that would ultimately prohibit all surface applications of liquid manure from February 1 to March 31 of each year, identifying that time of year as the “high risk runoff period.” The DNR’s reasons for proposing this manure spreading prohibition are sound: there have been 52 manure runoff events between July 2004 and July 2005, many of which occurred when the ground was frozen or covered with snow.

However, those spills also occurred when snow was actively melting and the ground was saturated, which are normal conditions during February and March. Burnside Dairy could easily meet a requirement to refrain from spreading manure during this high risk time because it proposed to have 287 days of manure storage. Such a requirement would help prevent chronic and acute delivery of manure pollutants to nearby waters. The DNR's current prohibition in Section 1.1 of the Proposed Permit are not stringent enough given that solid and liquid manure can just as easily runoff during a snow melt as it can when the ground is frozen or completely snow covered. Therefore, in the Proposed Permit DNR should entirely prohibit applications of solid and liquid manure during February and March.

COMMENT: Section 1.1 of the Proposed Permit should prohibit all applications of liquid and solid manure on saturated ground and where snow is actively melting.

In addition to prohibiting all solid and liquid manure applications between February 1 and March 31, the DNR should prohibit all applications of liquid and solid manure on ground that is saturated (either with melting snow or rainfall), and where snow is actively melting. Again, Burnside Dairy will have 287 days of manure storage, and as a result, this requirement can easily be met.

COMMENT: Section 1.1. should be amended to remove the "incorporation" exception for winter manure spreading.

Section 1.1 still allows Burnside to apply liquid manure on frozen or snow-covered ground when the manure is "properly incorporated." This is problematic for three reasons. First, frozen ground, by definition, does not permit incorporation. Second, while incorporation may help prevent acute manure runoff events, it may not necessarily prevent chronic delivery of pollutants during snow-melt events or early spring rainfall. Third, Section 1.1 does not state when the manure must be incorporated. As a result, Burnside Dairy should not be allowed to spread solid or liquid manure at all when the ground is frozen or snow covered, regardless of whether it intends to incorporate the manure.

COMMENT: Even if the DNR allows winter manure applications on frozen and snow covered ground in Section 1.1, the DNR should require immediate incorporation.

Section 1.1 allows liquid manure applications on frozen and snow-covered ground when properly incorporated. However, Section 1.1 does not state when the manure must be incorporated after it is applied. The DNR should clarify that, if allowed at all, liquid or solid manure applied on snow-covered ground must be immediately incorporated. Further, the DNR should make clear that it is impossible to incorporate solid or liquid manure where the ground is covered with more than four inches of snow, thereby prohibiting solid and liquid manure applications under such conditions.

COMMENT: The DNR should more clearly define winter spreading restrictions in Section 3.2.1.5.

Section 3.2.1.5 requires a winter landspreading section in the manure management plan. However, many of the requirements for the section are vague. For example, what does it mean for a field to be "far removed from surface waters" and "have few conduits...for manure to runoff the intended site." How far is "far removed"? How many conduits are "a few," and how many do you need to render a site unacceptable for winter landspreading of manure? What practices are to be used when winter spreading manure? The DNR should more clearly define these terms by incorporating the proposed revisions to NR 243 relevant to winter landspreading into Section 3.2.1.5.

Thank you for the opportunity to comment on the Proposed Permit. We look forward to your written response.

Sincerely,

MIDWEST ENVIRONMENTAL ADVOCATES, INC.



Andrew C. Hanson

cc: Caryl Terrell, Sierra Club – John Muir Chapter
Harold Fosmo, Izaak Walton League of America
Duke Welter, Trout Unlimited
Erin Chalmers, Wisconsin Environmental Law Advocates