

**State of North Dakota
County of Traill**

**In District Court
East Central Judicial District**

Dakota Resource Council,

Appellant,

v.

North Dakota Department of
Environmental Quality and
Riverview ND, LLP,

Appellees.

Case No. _____

**NOTICE OF APPEAL AND
SPECIFICATION OF ERRORS**

Appellant Dakota Resource Council (“DRC”), by and through its undersigned attorneys, hereby appeals the final decision of Appellee North Dakota Department of Environmental Quality (“DEQ”) to issue State Animal Feeding Operation Permit NDAFO-0908 (“the AFO Permit”) to Appellee Riverview ND, LLP (“Riverview”). This appeal is filed pursuant to N.D. Century Code §§ 23.1-01-11 and 28-32-42. Appellant alleges and pleads as follows:

INTRODUCTION

1. On September 24, 2025, DEQ issued the AFO Permit authorizing Riverview to construct and operate Herberg Dairy, a massive 25,000-head animal feeding operation (“AFO”) that would more than double the number of dairy cows in North Dakota.

2. Dairies the size of Riverview’s Herberg Dairy create enormous amounts of wastes that contain pollutants such as nitrogen, phosphorus, bacteria, pathogens, sediments, pesticides, pharmaceuticals, salts, and metals. When discharged to waters, these pollutants pose serious threats to the health and wellbeing of nearby communities and ecosystems.

3. Riverview plans to construct Herberg Dairy just a mile and a half west of the Red River of the North—an international waterway of critical importance as a drinking water source, tribal cultural resource, wildlife habitat, recreational hub, and the source of water for Canada’s Lake Winnipeg.

4. Water quality sampling conducted on the Red River at the U.S.-Canada border shows levels of harmful pollutants known to be discharged by dairy AFOs that already exceed or nearly exceed international objectives. Indeed, the International Joint Commission¹ recently directed its International Red River Watershed Board to review information and permits related to Riverview’s North Dakota dairy operations.²

5. The Herberg Dairy site is also within two miles of fifteen residences, two of which are just a mile away. Numerous other homes are near land application fields designated to receive waste from Herberg Dairy under the AFO Permit.

6. When considering Riverview’s application for the AFO Permit, DEQ held a public comment period to gather feedback on the draft version of the AFO Permit. During that comment period, DEQ received extensive comments explaining how Riverview’s plans to construct and operate Herberg Dairy under the AFO Permit will lead to widespread pollution, particularly in the Red River and its tributaries.

7. Nevertheless, DEQ issued the AFO Permit with minimal changes, failing to alleviate the likelihood of pollution and degraded water quality. To rectify this error, Appellant

¹ The International Joint Commission is a bi-national organization established by the United States and Canada under the Boundary Waters Treaty of 1909 to cooperatively manage lakes and rivers along those countries’ shared border. *Role of the IJC*, <https://ijc.org/en/who/role> (accessed Oct. 22, 2025).

² *Manitoba Government Welcomes Review of North Dakota Dairy Projects Near Red River*, <https://news.gov.mb.ca/news/index.html?item=71097&posted=2025-10-09> (Oct. 9, 2025).

DRC appeals DEQ's issuance of the AFO Permit pursuant to the provisions of the Administrative Agencies Practice Act.

THE PARTIES

8. Appellant DRC is a nonprofit membership organization with an office in Bismarck, North Dakota. DRC's mission is to promote sustainable use of North Dakota's natural resources and family-owned and operated agriculture by building member-led local groups that empower people to influence the decision-making processes that affect their lives and communities.

9. DRC submitted comments during DEQ's public comment period on the draft AFO Permit detailing its concerns about Herberg Dairy and the proposed AFO Permit's inadequacy to protect DRC's members from adverse environmental impacts that will affect their health and wellbeing.

10. DRC now brings this appeal on its own behalf and on behalf of its members who reside in the vicinity of the proposed Herberg Dairy and its land application sites. These members use, enjoy, and rely upon the natural resources (including but not limited to surface waters, groundwater, and air) that will be adversely affected by Herberg Dairy's operation as authorized by the AFO Permit.

11. Several of DRC's members are uniquely aggrieved by DEQ's decision to issue the AFO Permit as they have specific and cognizable legal interests in the water resources that will be harmed by pollution from Herberg Dairy. These members live near, regularly use, and plan to continue using the Red River for canoeing, fishing, and other recreational activities. Some also live near and have family members who work on farmlands leased by Riverview to apply waste from Herberg Dairy. One DRC member is also an enrolled member of the Turtle Mountain Band of Chippewa who has deep tribal and personal connections to the Red River and surrounding treaty

lands. These concrete interests set DRC's members apart from the public at large and put them at special risk of exposure to poor water quality and diminished recreational and cultural activities.

12. Appellee DEQ is the agency of the State of North Dakota charged with protecting air and water quality. One way in which DEQ is authorized to achieve this goal is by issuing pollution control permits to facilities like Herberg Dairy.

13. Appellee Riverview is a domestic limited liability partnership organized under the laws of North Dakota (though none of Riverview's partners reside in state), with a principal address of 26406 470th Avenue, Morris, Minnesota, 56267. Riverview is the developer, owner, and would-be operator of Herberg Dairy, and the applicant and recipient of the AFO Permit at issue in this case.

JURISDICTION AND VENUE

14. N.D. Century Code § 23.1-01-11 provides that “any person who is aggrieved by” a decision of DEQ to issue a permit under, *inter alia*, N.D. Century Code Chapter 61-28 may appeal that decision, “provided that person participated in or provided comments during the hearing process for the permit application, modification, or revocation.” *See also* N.D. Cent. Code § 61-28-07 (“Any person claiming to be aggrieved or adversely affected by actions taken, or by any rule or order issued under this chapter may request a hearing by the department. There is a right of appeal to the district court from any adverse ruling by the department.”).

15. DEQ’s decision to issue the AFO Permit was made under N.D. Century Code Chapter 61-28, which provides for the “Control, Prevention, and Abatement of Pollution Surface Waters.” Specifically, the AFO Permit was issued pursuant to N.D. Administrative Code Chapter 33.1-16-03.1 which provides for the “Control of Pollution from Animal Feeding Operations” and

was promulgated by DEQ under the authority of N.D. Century Code § 61-28-04. N.D. Admin. § Code 33.1-16-03.1-01.

16. This Notice of Appeal is timely because it is filed “within thirty days after the final permit application determination,” which was issued on September 24, 2025. N.D. Cent. Code § 23.1-01-11.

17. Venue is proper in this Court because on May 20, 2025, DEQ held a hearing on the proposed Herberg Dairy AFO Permit in Hillsboro, North Dakota, in Traill County. *See* N.D. Cent. Code § 28-32-42(3)(a) (“The appeal of an order may be taken to . . . the district court of the county in which the hearing or a part thereof was held.”).³

STANDARD AND SCOPE OF REVIEW

16. Under N.D. Century Code § 23.1-01-11, the Court’s review of this final permit determination is governed by N.D. Century Code §§ 28-32-40, 28-32-42, 28-32-44, 28-32-46, and 28-32-49.

17. On review of an agency decision, courts must affirm the agency’s order unless it finds:

- a. The order is not in accordance with the law;
- b. The order violates the appellant’s constitutional rights;

³ DRC believes venue is proper in the Traill County East Central Judicial District. However, DRC has contemporaneously filed a protective appeal in Burleigh County South Central Judicial District to preserve its right to challenge the Permit in the event the public hearing in Hillsboro is not the type of hearing indicated by N.D. Century Code § 28-32-42(3)(a). *See* N.D. Cent. Code § 28-32-42(3)(a) (“If the administrative proceeding was disposed of informally, or for some other reason no hearing was held, an appeal may be taken to the district court of Burleigh County.”). Assuming venue is proper in this Court, DRC will move to voluntarily dismiss the Burleigh County appeal or consolidate it with the appeal before this Court.

- c. Proceedings before the agency did not comply with the provisions of N.D. Century Code Chapter 28;
- d. The agency’s rules or procedures did not afford the appellant a fair hearing;
- e. The agency’s findings of fact are not supported by a preponderance of the evidence;
- f. The agency’s conclusions of law are not supported by its findings of fact;
- g. The agency’s findings of fact did not sufficiently address evidence raised by the appellant; or
- h. The agency’s conclusions of law do not sufficiently explain the agency’s decision not to adopt contrary recommendations by a hearing officer or administrative law judge.

N.D. Cent. Code § 28-32-46.

18. North Dakota courts equate this standard to arbitrary and capricious review. *Nat'l Parks Conservation Ass'n v. N.D. DEQ*, 2020 ND 145, ¶15, 945 N.W.2d 318, 324. Under arbitrary and capricious review, courts must overturn an agency’s decision if it is “not the product of a rational mental process by which the facts and the law relied upon are considered together for the purpose of achieving a reasoned and reasonable interpretation.” *Id.*; *Coon v. N.D. Dep't of Health*, 2017 ND 215, ¶7, 901 N.W.2d 718; *People to Save the Sheyenne River v. N.D. Dep't of Health*, 2005 ND 104, ¶24, 697 N.W.2d 319.

19. If the agency’s order or decision “is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court.” N.D. Cent. Code § 28-32-46.

20. A court’s review of a permitting decision is ordinarily based upon the record as certified by the agency and filed with the Court. *Id.* §§ 28-32-44, 28-32-46.

LEGAL BACKGROUND

North Dakota State Law

21. North Dakota state law obligates DEQ to (1) “act in the public interest to protect, maintain, and improve the quality of waters in the state;” (2) “to require necessary and reasonable treatment of sewage, industrial, or other wastes;” and (3) to cooperate with the federal government in accomplishing these goals. *Id.* §§ 61-28-01, 61-28-04.

22. “Waters of the state” are statutorily defined to include “all [] bodies or accumulations of water on or under the surface of the earth, natural or artificial, public or private, situated wholly or partly within or bordering upon the state, except those private waters which do not combine or effect a junction with natural surface or underground waters.” *Id.* § 61-28-02.

23. North Dakota law states that it is unlawful to “cause to be placed any wastes in a location where they are likely to cause pollution of any waters of the state.” *Id.* § 61-28-06.

24. DEQ’s regulations state that “[a]ll known and reasonable methods to control and prevent pollution of the waters of this state are required, including improvement in quality of these waters, when feasible.” N.D. Admin. Code § 33.1-16-02.1-02(2). “In allowing the lowering of existing quality, the department shall assure that existing uses are fully protected and that the highest statutory and regulatory requirements for all point sources and cost-effective and reasonable best management practices for nonpoint sources are achieved.” *Id.*

25. DEQ regulations also establish “procedures governing the application for, and the issuance, denial, modification, and revocation of, permits for animal feeding operations to maintain beneficial uses of and prevent degradation of quality of the waters of the state.” *Id.* § 33.1-16-03.1-02.

26. DEQ may only issue an AFO permit if the agency “determines that the animal feeding operation will not cause nor likely cause pollution of waters of the state, either after upgrades are made or at its current status.” N.D. Admin. Code § 33.1-16-03.1-07(4).

27. Facilities subject to an AFO permit “must be located, designed, built, maintained, and operated to limit or prevent pollution of or the discharge of pollutants into waters of the state consistent with the North Dakota Livestock Program Design Manual (“Design Manual”),⁴ best professional judgment, best management practices, and pursuant to the requirements of [state law].” *Id.* § 33.1-16-03.1-08(1).

28. As the agency tasked with safeguarding North Dakota’s waters, DEQ holds broad authority to impose any conditions or limitations necessary to protect groundwater and surface water quality. *Id.* § 33.1-16-03.1-07(3). This includes the power to require that CAFOs “install, use, and maintain monitoring equipment or methods” to detect and characterize discharges of pollutants, and the power to require reporting of such monitoring data. N.D. Cent. Code § 61-28-04(10), (26); N.D. Admin. Code § 33.1-16-03.1-07(3).

29. All manure storage structures at permitted AFOs “must be designed and maintained to withstand natural forces, to prevent impacts to waters of the state, and minimize seepage.” *Id.* § 33.1-16-03.1-08(5)(c). Further, earthen storage ponds must have “a properly designed and constructed liner to minimize seepage, unless the department has determined a liner is not necessary based on site conditions.” *Id.* § 33.1-16-03.1-08(5)(d). DEQ regulations also explicitly require that all manure storage structures meet the requirements specified in the Design Manual. *Id.* § 33.1-16-03.1-08(5)(e).

⁴ DEQ, *AFO/CAFO Permits*, https://deq.nd.gov/WQ/2_NDPDES_Permits/1_AFO_CAFO/AC.aspx (accessed Oct. 19, 2025) (follow link to “Design Manual”).

30. Permitted AFOs must develop and implement a Nutrient Management Plan (“NMP”) that describes the process, methods, timing, and volume of the facility’s proposed application of manure and wastewater to crop fields. *Id.* § 33.1-16-03.1-08(2). To satisfy this requirement, the Livestock Manual sets forth mandatory contents for NMPs, including:

- a. “Fields where manure will be applied during frozen conditions;”
- b. “Current and/or planned plant production sequence or crop rotation,” including “alternative crops that may be planted;”
- c. A “complete nutrient budget for nitrogen and phosphorus for the rotation or crop sequence that considers all potential sources of these nutrients;”
- d. A quantification of “all nitrogen and phosphorus sources;”
- e. “Recommended nitrogen and phosphorous rates, timing, method of application and incorporation;”
- f. “The form of manure (liquid or solid) and the expected frequency of land application. Maximum application rates of manure, litter, and process wastewater for each year, for each crop identified in the NMP with rates expressed in chemical form and pounds per acre for each field used for land application;” and
- g. “A field-specific assessment of the potential for nitrogen and phosphorous transport from the field to surface waters.”

Design Manual at 51-52.

31. NMPs must also describe the precautions that will be taken to “[p]revent manure and process wastewater from reaching waters of the state or areas where they have the potential to impact waters of the state” and to minimize odors. N.D. Admin. Code § 33.1-16-03.1-08(2).

Federal Law

32. North Dakota law designates DEQ as the state water pollution control agency for purposes of implementing the Federal Water Pollution Control Act (“the Clean Water Act”). N.D. Cent. Code § 61-28-04(12). Therefore, DEQ must implement its AFO regulatory program in accordance with that Act. 33 U.S.C. § 1342(b); *see also* N.D. Cent. Code § 61-28-04(12) (instructing DEQ to “take all action necessary or appropriate to secure to this state the benefits of that act and similar federal acts”); N.D. Admin. Code § 33.1-16-01-01.1 (incorporating by reference, *inter alia*, 40 C.F.R. § 122.23).

33. The Clean Water Act prohibits discharges of pollution from point sources to waters of the United States unless in accordance with a valid National Pollutant Discharge Elimination System (“NPDES”) permit. 33 U.S.C. §§ 1311(a), 1342. DEQ implements this portion of the Clean Water Act by issuing North Dakota Pollutant Discharge Elimination System permits. *See* N.D. Admin. Code § 33.1-16-01 *et seq.*

34. The Clean Water Act expressly designates Concentrated Animal Feeding Operations (“CAFO”) as point sources. 33 U.S.C. § 1362(14); 40 C.F.R. § 122.23(a), (b). Under federal regulations, an AFO that confines 700 or more mature dairy cows is a Large CAFO and therefore subject to NPDES permitting requirements. 40 C.F.R. § 122.23(d)(1).

35. Discharges that result from a CAFO applying manure or wastewater to land under its control must be authorized by an NPDES permit unless the discharge qualifies as agricultural stormwater. *Id.* § 122.23(e). Federal law defines agricultural stormwater as “a precipitation-related discharge of manure, litter, or process wastewater” applied in accordance with a site specific NMP that complies with 40 C.F.R. § 122.42(e)(1)(vi)–(ix). *Id.* Among other requirements, an NMP must

“ensure appropriate agricultural utilization of the nutrients in manure, litter or process wastewater” applied to fields. *Id.* § 122.23(e)(1).

36. A CAFO stormwater discharge that does not meet the definition of agricultural stormwater is a “discharge associated with industrial activity,” and therefore not exempt from the NPDES permitting requirement. 33 U.S.C. § 1342(p)(2)(B); *see also* 40 C.F.R. § 122.26(b)(14)(i) (defining facilities engaged in industrial activity as those subject to effluent limitations); 40 C.F.R. pt. 412 *et seq.* (effluent limitations for the CAFO point source category).

37. The Clean Water Act requires that all NPDES permits include provisions requiring representative discharge monitoring that “assure[s] compliance with permit limitations,” as well as reporting of such monitoring data. 33 U.S.C. §§ 1318(a), 1342(a)(2); 40 C.F.R. §§ 122.44(i)(1)–(2), 122.48(b).

FACTUAL BACKGROUND

Administrative Processes

38. On or about September 16, 2024, Riverview filed its Application to Obtain a State Permit Associated with Animal Feeding Operations to construct and operate Herberg Dairy.

39. On April 18, 2025, DEQ published Public Notice Number ND-2025-013, announcing its intent to issue an AFO permit to Riverview for Herberg Dairy. Along with the notice, DEQ published a draft version of State Animal Feeding Operation Permit NDAFO-0908 and a fact sheet for State AFO Permit NDAFO-0908. The public notice invited members of the public to submit written comments on the draft AFO Permit. Page 11 of the fact sheet concluded that the Application met “all statutory requirements for the department to authorize a State Animal Feeding Operation” and asserted that the draft AFO Permit “includes conditions to protect human health and aquatic life, and the beneficial uses of waters of the State of North Dakota.”

40. On May 20, 2025, DEQ held a public hearing on the draft AFO Permit at the Hillsboro High School in Hillsboro, North Dakota, which is located in Traill County. DEQ characterized the event as a “public hearing” and directed members of the public to “[a]ddress your comments to the Hearing Officer.”

41. On June 2, 2025, DRC and its allies Save Lake Winnipeg Project, Manitoba Eco-Network, Food & Water Watch, and Environmental Law & Policy Center submitted extensive written comments to DEQ concerning the draft AFO Permit. In support of its comments, DRC also submitted nine exhibits, including materials Riverview submitted with its application that DRC had to obtain through a public records request as they were not provided to the public during the public comment period.

42. Two of the exhibits to DRC’s comments were technical reports: (1) a groundwater risk assessment for Herberg Dairy prepared by David J. Erickson, CPG PG, the Principal Hydrogeologist of Water & Environmental Technologies (Exhibit 1 to DRC’s comments, “Erickson Report”), and (2) a review of Herberg Dairy’s proposed Nutrient Management Plan prepared by Caroline D’Huyvetter, Nutrient Management TSP # 18-22299 (Exhibit 9 to DRC’s comments, “D’Huyvetter Report”).

43. On or about June 19, 2025, after the comment period closed but before DEQ made a final decision on Riverview’s AFO permit application, Riverview submitted an application to the North Dakota Department of Water Resources (“DWR”) to construct a surface drain. According to that surface drain application and Riverview’s construction plans, Riverview plans to discharge 6,800 gallons per minute of stormwater from Herberg Dairy to Nelson Drain No. 28, a conduit to the Red River of the North.

44. Separately, on July 16, 2025, Riverview notified the Traill County Water Resource District that it intended to install a “subsurface water management system” underneath Herberg Dairy.

45. On or about August 5, 2025, DWR notified Riverview that its proposed drain did not require a drain permit.⁵

46. On or about August 11, 2025, Riverview submitted a Construction Permit Application for Dams (manure storage ponds) to DWR. In this application, Riverview submitted design plans for constructing manure storage ponds at Herberg Dairy. These plans describe a perforated pipe that will be installed in a trench abutting Herberg Dairy’s manure storage ponds to collect and direct additional precipitation (and any wastewater, effluent, or potentially polluted groundwater that enter the trench) to the facility’s stormwater basin.

47. On or about September 24, 2025, DEQ issued its final decision on Riverview’s Application for an AFO permit, posting to its website a 641-page document that included the final AFO Permit, final fact sheet, responses to public comments, and “additional support documentation” (collectively, “the Permit Package”).

48. On October 9, 2025, DRC filed a petition asking DEQ to reconsider its decision to issue the AFO Permit to Herberg Dairy and providing legal, scientific, and logical support in favor of reconsideration (“the Petition for Reconsideration”). One of the primary rationales DRC provided in this petition was DEQ’s failure to consider Riverview’s plans to install a stormwater drain and subsurface drainage system prior to issuing the AFO Permit. Those and additional grounds for relief are restated and further justified below.

⁵ DRC does not agree with this determination, which is currently the subject of a separate administrative appeal.

Herberg Dairy Operations & the Permit

49. Although the AFO Permit does not limit the amount of pollutant-laden waste Herberg Dairy is allowed to generate, a revised fact sheet DEQ received from Riverview's engineer during the public comment period indicates the facility will generate 27,381,108 cubic feet (204,824,911 gallons) of liquid manure and wastewater every year. DEQ incorporated this number into its final fact sheet.

50. Elsewhere in the revised fact sheet submitted during the public comment period, Riverview's engineer estimated Herberg Dairy's expected annual wastewater generation to be 31,446,717 cubic feet (235,237,792 gallons) per year. DEQ did not incorporate this change into the final fact sheet because doing so would "add leachate to the total generation."

51. Riverview plans to store liquid manure and wastewater generated on-site at the Herberg Dairy in four clay-lined manure "ponds." Evidence submitted to DEQ during the comment period demonstrates that these ponds will leach pollutants into the subsurface where they can contaminate groundwater, including groundwater that is hydrologically connected to surface water.

52. A portion of Herberg Dairy's ponds are located within the Red River's floodplain, where the ground is at foreseeable risk of saturation with flood waters. *See* Fig. 1, below. While the tops of the manure ponds are above historic flood levels, the bottoms are not.

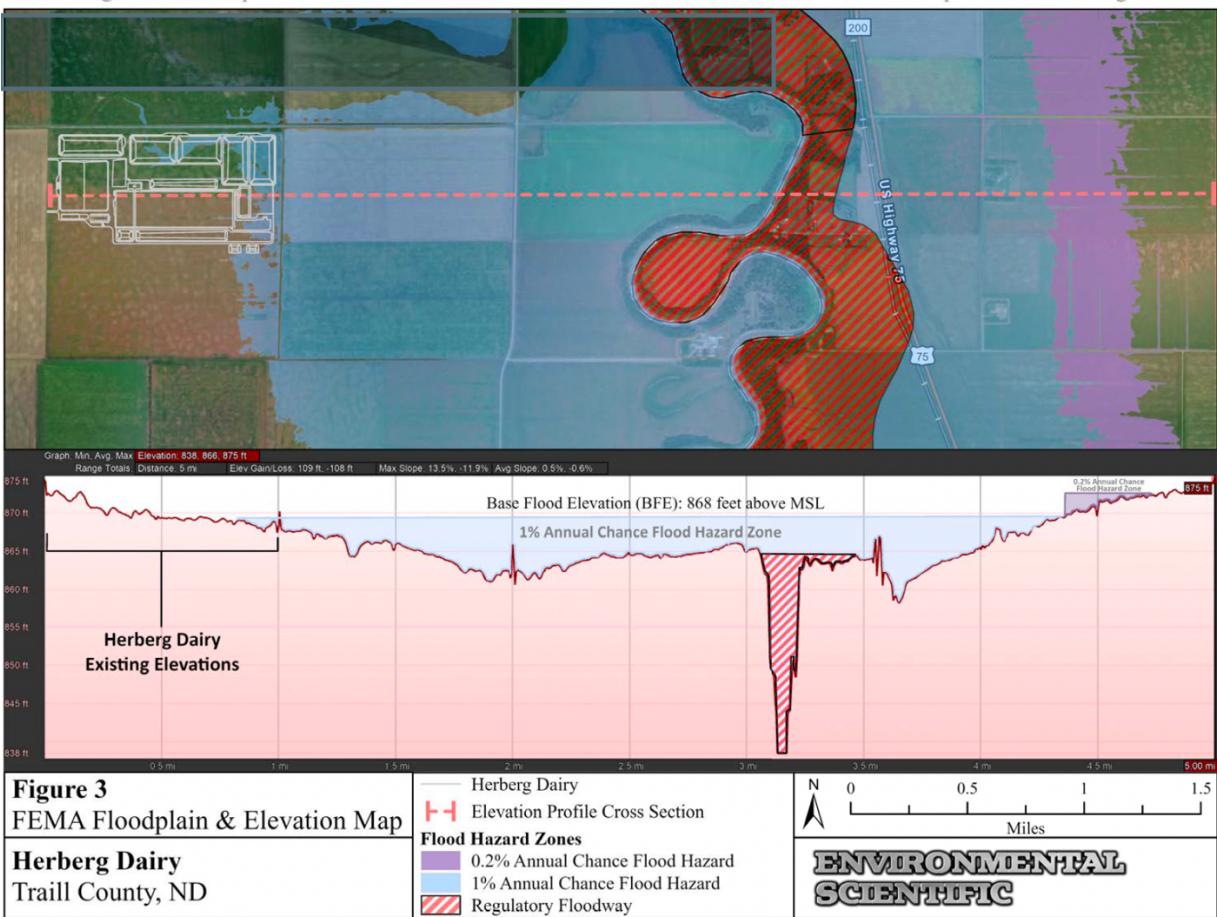


Fig. 1. Floodplain map from DEQ's Permit Package showing portions of four of Herberg Dairy's manure ponds lie within the one percent annual flood risk zone.

53. The facility will store feed for its cows and manure solids on two open-air pads respectively called the feed pad and manure stacking pad. According to Riverview's application materials, leachate and runoff from these pads will be routed to a fifth pond known as the leachate pond.

54. While the feed pad, stacking pad, and leachate pond are just outside the Federal Emergency Management Agency floodplain, the feed pad's lowest point is just two feet above historic flood levels on other parts of the Herberg Dairy and, like the manure pond bottoms, the leachate pond bottom extends below these historic flood levels as well.

55. Numerous comments submitted during the draft AFO Permit public comment period raised concerns about the risk of pollution resulting from future extreme rainfall and flood events, including storms exacerbated by climate change. Nevertheless, DEQ evaluated flood risks by relying on NOAA Atlas 14 Volume 8—a 12-year-old document that does not include precipitation trends that extend throughout the expected life of Herberg Dairy.⁶

56. Ultimately, Riverview plans to apply the liquid waste produced at Herberg Dairy to approximately 30,175 acres of North Dakota and Minnesota farmland within an approximately 15-mile radius of the Herberg Dairy. *See* Fig. 2, below. Approximately 12,643 of these acres are tile-drained, meaning that those fields have an underground network of pipes that collect water and divert it to a ditch, stream, river, or other conduit to surface water).



57. Pollutant-laden runoff from the fields draining to these conduits ultimately discharges to the Red River or its tributaries.

58. The AFO Permit requires Riverview to land apply waste in accordance with its Nutrient Management Plan. This plan authorizes the application of manure at rates that are known to cause water pollution.

59. According to Riverview's design plans, stormwater that falls or runs onto the Herberg Dairy will be contained and diverted into one of four stormwater basins.

SPECIFICATIONS OF ERROR

Specification of Error #1:

DEQ failed to issue an NPDES permit as required by state and federal law.

60. Each of the allegations set forth in the preceding paragraphs are incorporated herein by reference.

61. DEQ's regulation establishing “[a]dditional point sources subject to regulation” expressly incorporates the federal Clean Water Act regulation defining AFOs with more than 700 dairy cows as point sources subject to NPDES permitting requirements. N.D. Admin. Code § 33.1-16-01-01.1 (incorporating by reference, *inter alia*, 40 C.F.R. § 122.23, entitled “Concentrated animal feeding operations (applicable to State NPDES programs)”).

62. Nevertheless, in the Permit Package, DEQ avers the Herberg Dairy is “not a point source subject to a NPDES permit.”

63. This conclusion is unsupported by state or federal law.

64. Riverview's applications for a surface drain permit and for its dams (manure storage ponds) show that Herberg Dairy will discharge from its stormwater basin to Nelson Drain No. 28, a conduit to the Red River.

65. Thus, not only is Herberg Dairy a point source, it is a point source that, if allowed to operate according to the AFO Permit and as described in Riverview's AFO Permit application, will discharge via at least one conduit to the Red River, which is both a water of the state and a water of the United States.

66. The final AFO Permit is not protective enough to ensure Herberg Dairy's stormwater basins will not be contaminated with pollution from flooding and manure storage pond seepage. However, even if the AFO permit ensured the stormwater basins contained only diverted precipitation, industrial stormwater discharges must be authorized by a valid NPDES permit. 33 U.S.C. § 1342(p)(2)(B).

67. DEQ declined to issue Riverview an NPDES permit.

68. As the agency tasked with implementing the Clean Water Act, DEQ must issue Herberg Dairy an NPDES permit pursuant to North Dakota Administrative Code Article 33.1-16, Chapter 1; a state animal feeding operation permit under North Dakota Administrative Code Article 33.1-16, Chapter 3.1 is not sufficient.

69. DEQ's issuance of a state AFO permit instead of an NPDES permit is not in accordance with law. The AFO Permit must therefore be set aside and the matter remanded to DEQ. N.D. Cent. Code § 28-32-46.

Specification of Error #2:

DEQ's approval of the Herberg Dairy NMP will cause waste to be placed in locations likely to cause pollution.

70. Each of the allegations set forth in the preceding paragraphs are incorporated herein by reference.

71. North Dakota law prohibits “caus[ing] to be placed any wastes in a location where they are likely to cause pollution of any waters of the state.” N.D. Cent. Code § 61-28-06. State

law also requires that NMPs include precautions to prevent pollution from entering state waters. N.D. Admin. Code § 33.1-16-03.1-08(2).

72. During the public comment period on the Draft AFO Permit, DRC submitted comments supported by extensive scientific evidence that shows land applying CAFO dairy waste causes water pollution, even when applied at so-called agronomic rates like those in Riverview's NMP. DRC's evidence shows that CAFO dairy waste applied at these rates seeps into groundwater beneath fields and discharges to surface water via tile drains and other conduits.

73. The D'Huyvettter Report also raised numerous deficiencies in the Herberg Dairy NMP, explaining the ways in which the NMP does not comply with the Design Manual as required by DEQ regulations. N.D. Admin. Code § 33.1-16-03.1-08(1).

74. DEQ's final AFO Permit and NMP did not correct these deficiencies. For instance, DEQ did not require Riverview to identify fields where manure will be applied during frozen conditions,⁷ did not require Riverview to provide sufficient detail about the expected frequency and timing of land application, and did not require Riverview to account for erosion transport or nutrients from commercial fertilizer.

75. DEQ offered no scientific analysis to contradict DRC's comments nor did DEQ provide any scientific analysis to support the agency's conclusion that Herberg Dairy's land application activities will not cause pollution. The preponderance of the evidence on the record supports the conclusion that DEQ's issuance of the AFO Permit will lead to pollution.

⁷ In its response to public comments on the draft AFO Permit, DEQ mistakenly stated that the AFO Permit prohibits Herberg Dairy from applying waste to frozen fields. Despite scientific consensus that this practice contributes to pollution, neither the Permit nor the Design Manual actually prohibit manure application to frozen ground.

76. Nevertheless, the AFO Permit issued by DEQ authorizes land application without any monitoring or regular reporting requirements to ensure seepage and discharges do not cause or contribute to pollution of state waters.

77. For instance, the AFO Permit does not require Riverview to monitor tile drains or other conduits from land application sites to ensure non-precipitation related runoff does not enter waterways. Neither does the AFO Permit require Riverview to regularly submit records of actual land application rates to confirm compliance with the NMP.

78. The AFO Permit's lack of monitoring and reporting provisions capable of ensuring compliance is especially problematic given evidence submitted by DRC during the comment period showing that CAFOs frequently do not comply with their NMPs.

79. When CAFOs fail to employ best management practices—for instance by applying manure and wastewater in excess of specified rates, applying on frozen ground or at under other conditions with increased runoff risk, or failing to properly credit all sources of nitrogen—pollution enters state waters.

80. Without confirmation of NMP compliance, DEQ has no basis to determine whether inevitable discharges from land application activities qualify as agricultural stormwater and no way to intervene in time to prevent pollution when discharges occur.

81. DEQ's approval of the AFO Permit and Herberg Dairy's NMP without adequate monitoring or reporting provisions is not in accordance with state and federal law, is based on findings of fact not supported by a preponderance of the evidence and is unsupported by evidence that sufficiently addresses comments raised by DRC and others. Accordingly, the Permit must be set aside and remanded to DEQ to remedy these deficiencies. N.D. Cent. Code § 28-32-46.

Specification of Error #3:

DEQ's determination that the Permit will not cause or likely cause pollution is arbitrary and capricious.

82. Each of the allegations set forth in the preceding paragraphs are incorporated herein by reference.

83. DEQ is authorized to issue an animal feeding operation permit only upon a determination that the operation “will not cause nor likely cause pollution of waters of the state.” N.D. Admin. Code § 33.1-16-03.1-07. To the extent DEQ made this determination at all, that determination is “not the product of a rational mental process.” *See Nat'l Parks Conservation Ass'n*, 945 N.W.2d at 324.

84. First, DEQ failed to consider that Riverview’s planned stormwater surface drain system and its subsurface tile drain system will have adverse impacts on the Red River and other state waters.

85. DEQ’s failure to consider this important feature of Herberg Dairy’s operation renders the agency’s pollution determination arbitrary and capricious.

86. Second, DEQ ignored updated wastewater generation projections from Riverview’s engineer submitted during the public comment period, despite the agency’s acknowledgment that such changes would add leachate to the total wastewater generation.

87. DEQ’s failure to consider this important feature of Herberg Dairy’s operation renders DEQ’s pollution determination arbitrary and capricious.

88. Third, both DEQ’s failure to ensure Riverview’s Herberg Dairy NMP complies with the Design Manual and DEQ’s failure to sufficiently address NMP deficiencies raised in the D’Huyvett report render the DEQ’s pollution determination arbitrary and capricious.

89. Fourth, DEQ's decision to allow Herberg Dairy to store its waste in clay-lined ponds renders DEQ's pollution determination arbitrary and capricious because that decision is based on unrealistic estimations of the amount of waste the ponds will discharge to the subsurface and faulty assumptions about the presence of groundwater. The pollution determination is also arbitrary and capricious because DEQ did not sufficiently address concerns raised in DRC's comments.

90. DEQ acknowledges that Herberg's clay-lined ponds will allow more than 200,000 gallons of waste per acre per year to seep through the ponds' floors and sides.

91. Importantly, this is a best-case scenario that does not account for diminished pond integrity from floodwater inundation or freeze-thaw cycles that create cracks in the ponds' clay liners through which additional pollution can (and is likely to) escape.

92. As explained in comments and exhibits submitted by DRC during the comment period on the Draft AFO Permit, manure pond seepage endangers groundwater quality⁸ and threatens to pollute the Red River during flood events.

93. As explained in comments and exhibits submitted by DRC during the comment period on the Draft AFO Permit, manure storage ponds with double synthetic liners and leak detection systems are a cost-effective method to protect groundwater and hydraulically connected surface water.

94. Riverview has even agreed to install this pollution control technology at its nearby Abercrombie Dairy.

⁸ DEQ denies the existence of a water table at Herberg Dairy, ignoring Riverview's engineer's conclusion that groundwater at the project site "could be quite near the ground surface during periods of significant precipitation." DEQ did not address this point in its response to public comments.

95. DEQ's failure to require double synthetic liners with leak detection at Herberg Dairy's manure storage ponds is arbitrary and capricious because it does not align with state policy to "require necessary and reasonable treatment of sewage, industrial, or other wastes." N.D. Cent. Code § 61-28-01.

96. DEQ's approval of the AFO Permit without adequate monitoring or reporting provisions is not in accordance with state and federal law, is based on findings of fact not supported by a preponderance of the evidence, and is unsupported by evidence that sufficiently addresses comments raised by DRC and others. Accordingly, the AFO Permit must be set aside and remanded to DEQ to remedy these deficiencies. *Id.* § 28-32-46.

REQUEST FOR RELIEF

For the reasons set forth above, appellant DRC asks the Court to grant the following relief:

- a. Reverse DEQ's decision to issue the Permit and remand the Permit back to DEQ pursuant to N.D. Cent. Code § 28-32-46;
- b. Award DRC its reasonable attorney fees and costs pursuant to N.D. Cent. Code Ann. § 28-32-50; and
- c. Award DRC any other relief to which it may be entitled under the law and equitable powers of this Court.

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