

STATE OF INDIANA )  
 ) BEFORE THE INDIANA OFFICE OF  
 ) ENVIRONMENTAL ADJUDICATION  
COUNTY OF MARION )

IN THE MATTER OF:

OBJECTION TO THE ISSUANCE OF CONFINED )  
FEEDING OPERATION APPROVAL )  
FARM ID#6980 / ANIMAL WASTE AW#6812 )  
NATURAL PRAIRIE INDIANA FARMLAND )  
HOLDINGS, LLC, LAKE VILLAGE, NEWTON )  
COUNTY, INDIANA ) CAUSE NO.  
 )  
PROTECT OUR KANKAKEE RIVER BASIN, )  
ROY BARNES, THOMAS CUTTS, DEBRA CUTTS, )  
STEVEN COWLEY, KIM STARKEY, and PAT )  
STARKEY, )  
Petitioners, )  
 )  
Natural Prairie Indiana Farmland Holdings, LLC )  
Permittee/Respondent )  
 )  
Indiana Department of Environmental Management )  
Respondent. )

**PETITION FOR ADMINISTRATIVE REVIEW AND STAY OF EFFECTIVENESS**

Petitioners, Protect our Kankakee River Basin (“PKRB”), Roy Barnes, Thomas Cutts, Debra Cutts, Steven Cowley, Kim Starkey, and Pat Starkey (collectively, “Petitioners”), by counsel, hereby submit their Petition for Administrative Review and Stay of Effectiveness of the Confined Feeding Operation Approval, Farm ID No. 6980 (the “CFO Approval”) issued to Natural Prairie Indiana Farmland Holdings, LLC, (“Respondent” or “Natural Prairie Indiana”) by the Indiana Department of Environmental Management (“IDEM”) on January 10, 2019<sup>1</sup> to construct and operate a new concentrated animal feeding operation with 4,350 dairy cows in three production buildings, an outside waste lagoon with the capacity to hold in excess of 30 million gallons of

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<sup>1</sup> This is the second CFO Approval IDEM has issued to Natural Prairie Indiana. The first one was issued on October 11, 2017 and following an administrative appeal to this Court was withdrawn by Natural Prairie Indiana on May 7, 2018.

animal waste, process waste and contaminated storm water, among other structures, on property located at County Road 400 West and 400 North, Lake Village, Indiana (the "CAFO"). A copy of IDEM's CFO Approval is attached hereto as Exhibit A. Petitioners timely file this Petition for Administrative Review and Stay of Effectiveness pursuant to Indiana Code § 13-15-6, *et seq.*, Ind. Code § 4-21.5-3-7, and Ind. Code § 4-21.5-3-4(e), and in support thereof, state as follows:

### **The CAFO Site**

1. The CFO Rule defines a "sensitive area" as "a site where conditions exist that pose a specific water quality threat to . . . aquifers used as a source of drinking water [or] areas requiring special protection such, as wetlands, . . . critical habitat of an endangered species; or natural areas, including parks, nature preserves, . . . historic sites, . . . and public lands." 327 IAC 19-2-39. Such conditions exist at the CAFO Site bringing it squarely within this definition. Yet, IDEM is allowing Natural Prairie Indiana to construct and operate a CAFO that will cause chronic and catastrophic contamination to surface waters, wetlands, and groundwater used as drinking water, and threaten critical habitat, in this sensitive area.

2. The CAFO's buildings and waste lagoon approved by IDEM will be in sections 7 and 8 of T30N, R9W north of CR 400N between CR 600W to the west and CR 400W to the east. Sections 5 and 6 are also owned by Natural Prairie Indiana and, according to the CFO Approval, are the intended locations where Natural Prairie Indiana will both: (a) spread the millions of gallons of livestock waste and process wastewater generated at

the CAFO; and (b) use as “pasture areas” for its 4,000+ cattle to graze (and defecate on) for at least 120 days of the year as required by federal organic standards.<sup>2</sup>

3. This four square-mile area is almost entirely within the lakebed of the former former Beaver Lake, which was once the largest natural lake in Indiana until it was drained in the late 1800’s by constructing Beaver Lake Ditch and tributary ditches draining to the Kankakee River. Until that time, the Kankakee River and Beaver Lake were part of the country’s largest inland marsh, referred to as the “Grand Kankakee Marsh” and the “Everglades of the North” due to its once “untamed wetlands . . . which saturated nearly a million acres in Northern Indiana and part of Illinois.”<sup>3</sup> The Nature Conservancy now owns more than 7,000 of these acres which surround the CAFO Site on its southern and eastern borders. These areas are being restored to their former native prairie and wetland status and are now home to “over 100 rare, threatened or endangered species . . . , including several important bird species” and provide habitat for migratory birds.<sup>4</sup> Further south of the CAFO Site is the DNR’s Willow Slough Indiana Fish and Wildlife Area which encompasses nearly 10,000 acres of protected land and includes native prairie, wetlands and a 1,200 acre lake all home to a variety of rare and endangered species, and provide migratory bird habitat.<sup>5</sup> Also nearby are the Beaver Lake Nature Preserve, Conrad Station Savanna Nature Preserve, Conrad Nature Preserve and the LaSalle Fish and Wildlife Area.

4. Given this setting, the former lakebed soils at the CAFO Site are not surprisingly hydric (wetland) types that are seasonally inundated in the root zone and where ponding and flooding frequently occur. These conditions and available data indicate the presence of wetlands

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<sup>2</sup> Natural Prairie Indiana claims that it will be a “certified organic dairy” and is, therefore, subject to federal organic standards including 7 CFR § 205.237(c)(1).

<sup>3</sup> <http://lakeshorepublicmedia.org/programs/everglades-of-the-north-the-story-of-the-grand-kankakee-marsh/>

<sup>4</sup> <https://www.nature.org/en-us/get-involved/how-to-help/places-we-protect/kankakee-sands/>.

<sup>5</sup> <https://www.audubon.org/important-bird-areas/willow-slough-fish-and-wildlife-area>.

and farmed wetlands throughout the Site which will be unlawfully destroyed by construction of the IDEM-approved CAFO in violation of Section 404 of the Clean Water Act and the “Swampbuster” provisions of the Food Security Act of 1985. These conditions also expose the underlying unconsolidated, sand aquifer to certain surface contamination from the IDEM-approved CAFO—an aquifer on which hundreds of area residents rely, including Petitioners, for their drinking water—thereby posing a substantial endangerment to human health and the environment.

5. The CAFO Site in sections 7 and 8 also contains two major drainage ditches constructed to drain Beaver Lake—Lawler Ditch and Bogus Island Ditch. Lawler Ditch conveys water from and across the CAFO property in a northward direction to Beaver Lake Ditch which flows to the Kankakee River and its adjacent wetlands. Bogus Island Ditch, in the eastern part of the property, conveys water from the CAFO Site eastward and northward to Beaver Lake Ditch and then to the Kankakee River and its wetlands. As discussed more fully below, Natural Prairie Indiana unlawfully filled 2,350 feet of this drainage ditch to build the CAFO in violation of Section 404 of the Clean Water Act.

6. The waste application sites in Sections 5, 6 and 7 contain numerous unnamed tributaries that drain to Redden, Lawler and Bogus Island ditches. Yet the CFO Approval does not account for, or place any controls on any of the waste that will be generated and deposited by the 4,000+ cattle when grazing on these designated waste application areas. Combined with the presence of a network of subsurface drainage tiles, hydric soils, wetlands, a shallow sand aquifer, and frequent ponding and flooding, there is a high potential for chronic waste contamination of these large drainage ditches from the CAFO and waste application areas approved by IDEM.

### **Interests of Petitioners**

7. Protect Our Kankakee River Basin (“PKRB”) is a northwest Indiana group based in Newton County formed by area residents who are concerned about Natural Prairie Indiana’s plan to build a CAFO in such an environmentally sensitive and historically significant location. PKRB represents more than 500 concerned citizens, including Petitioners, who live near the CAFO Site, rely on drinking water wells that draw on the shallow, sand aquifer threatened by the CAFO, and/or recreate in and around the natural areas, wildlife habitat, and waterways that will be adversely affected by the CAFO. During the public comment period, PKRB submitted written comments to IDEM detailing many of the technical and legal deficiencies with Natural Prairie Indiana’s application for CFO Approval, which IDEM disregarded. Accordingly, PKRB is aggrieved and adversely affected by IDEM’s decision to approve the CAFO and has associational standing to bring this administrative appeal on behalf of its members.

8. Roy Barnes is a long-time resident of Newton County having resided at 5584 N U.S. Highway 41, Lake Village, Indiana for more than thirty (30) years. Mr. Barnes’ home and property are within one mile, due east of the CAFO approved by IDEM, less than a half mile from Bogus Island Ditch which flows toward his property from the CAFO Site and within the Kankakee River watershed which includes the shallow, sand aquifer on which he and his wife rely for their drinking water. The CAFO, its massive waste lagoon, and waste disposal sites approved by IDEM are all within the aquifer boundary and upgradient of Mr. Barnes’ property, thereby exposing his drinking water well to contamination. The CAFO’s noxious air emissions which are wholly uncontrolled by the IDEM CFO Approval will also impact air quality in the area, diminish Roy Barnes’ quality of life, limit his ability to enjoy the outdoors, and reduce his property value. As

such, Roy Barnes is aggrieved and adversely affected by IDEM's decision to approve the CAFO and its operations.

9. Steven Cowley, a resident of Newton County since 2009, built his home on 10.8 acres at 5764 W. 800 N, in Lake Village, Indiana. Steven Cowley's home and property are approximately two miles due north of the CAFO approved by IDEM and within the Kankakee River watershed which includes the shallow, sand aquifer on which he relies for drinking water. The CAFO, its massive waste lagoon, and waste disposal sites approved by IDEM are all within the aquifer boundary and upgradient of Mr. Cowley's property, thereby exposing his drinking water well to contamination. The CAFO's noxious air emissions which are wholly uncontrolled by the IDEM CFO Approval will also impact air quality in the area, diminish Steven Cowley's quality of life, limit his ability to enjoy the outdoors, and reduce his property value. As such, Steven Cowley is aggrieved and adversely affected by IDEM's decision to approve the CAFO and its operations.

10. Thomas and Debra Cutts ("the Cutts"), residents of Newton County since 2013, live on 7.8 acres at 8757 N. 384 W., Lake Village Indiana. The Cutts' home and property are approximately 2.75 miles north-northeast of the CAFO approved by IDEM and within the Kankakee River watershed which includes the shallow, sand aquifer on which they rely for drinking water. The CAFO, its massive waste lagoon, and waste disposal sites approved by IDEM are all within the aquifer boundary and upgradient of the Cutts' property thereby exposing their drinking water well to contamination. In addition, Lawler Ditch which flows north from the CAFO Site, also runs through the Cutts' property and within 175 feet of their residential well. The CAFO's noxious air emissions which are wholly uncontrolled by the IDEM CFO Approval will also impact air quality in the area,

diminish the Cutts' quality of life, limit their ability to enjoy the outdoors, and reduce their property value. As such, the Cutts are aggrieved and adversely affected by IDEM's decision to approve the CAFO and its operations.

11. Kim Starkey and Pat Starkey ("the Starkeys") are residents and farmers in Newton County since November 2013, who live on 5 acres at 6964 W. CR 800 N., in Lake Village, Indiana. Their home, small farm, and property are approximately two miles north-northwest of the CAFO approved by IDEM and within the Kankakee River watershed which includes the shallow, sand aquifer on which they rely for drinking water and to water their livestock. The CAFO, its massive waste lagoon, and waste disposal sites approved by IDEM are all within the aquifer boundary and upgradient of their property thereby exposing their drinking water well to contamination. The CAFO's noxious air emissions which are wholly uncontrolled by the IDEM CFO Approval will also impact air quality in the area, diminish the Starkeys' quality of life, limit their ability to enjoy the outdoors, and reduce their property value. As such, the Starkeys' are aggrieved and adversely affected by IDEM's decision to approve the CAFO and its operations.

### **Respondents**

12. Respondent IDEM is an administrative agency of the State of Indiana charged with implementation and enforcement of federal and state environmental laws for protection of public health and the environment including the regulation and permitting of CFOs that meet the definition of a concentrated animal feeding operation (CAFO) under 40 CFR 122.23. IDEM's permitting decisions, including the CFO Approval at issue here, are subject to appeal to the Office of Environmental Adjudication (OEA).

13. On January 10, 2019, IDEM issued the CFO Approval to Respondent, Natural Prairie Indiana Farmland Holdings, LLC ("Natural Prairie Indiana"). Natural Prairie Indiana's

“sole member” is Natural Prairie Dairy Farms, LLC (“Natural Prairie Dairy”), a Texas-based company that is “part of AgriVision Farm Management,” (“AgriVision”) also a Texas-based company that owns and/or operates various out-of-state CAFOs and CAFO-related businesses. All three companies are owned, managed, operated and/or controlled by the De Jong family, including but not limited to Donald, Cheri and Will De Jong.<sup>6</sup> However, Natural Prairie Indiana did not disclose AgriVision or all of its related businesses so that IDEM could conduct the necessary investigation as required by Ind. Code § 13-18-10-1.4 and 2.1(a)(2) and (e).

### **OEA Jurisdiction**

14. The OEA has jurisdiction to decide this appeal according to IC § 13-15-6-3 and to revoke or modify the CFO Approval pursuant IC § 13-15-7-1. The OEA has *de novo* review of IDEM’s issuance of the CFO Approval. The OEA also has authority to issue a stay of effectiveness of the CFO Approval pursuant to Ind. Code § 4-21.5-3-4(e) and 315 IAC 1-3-2.1.

15. As will be discussed, the CFO Approval issued to Natural Prairie Indiana is inconsistent with federal and state requirements applicable to the permitting, construction and operation of new CFOs that meet the definition of a CAFO.

16. In addition, if a stay of effectiveness is not issued, Petitioners will suffer irreparable harm pending resolution of the case on the merits, of which they are likely to prevail. The threatened injury to Petitioners outweighs the threatened harm that granting the stay may inflict on Natural Prairie and IDEM. And, the public interest will be served by granting a stay. Accordingly, Petitioners respectfully request a stay of effectiveness

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<sup>6</sup> See websites for Natural Prairie Dairy and AgriVision Farm Management at <http://naturalprairiedairy.com/our-story/> and <http://agrivision.farm/what-we-do/>

pending a final adjudicatory hearing and decision by the OEA denying or rescinding the CFO Approval issued to Natural Prairie Indiana.

**Environmental, Technical and Procedural Deficiencies of the Permit**

17. Any IDEM approval to construct and operate a new CFO must be made in accordance with Ind. Code § 13-18-10, *et. seq.*, and 327 IAC 19, *et. seq.* (“the CFO Rule”)—the purpose of which is to “protect human health and the environment from threats to water quality” and ensure compliance with all “water pollution control laws” and rules adopted thereunder. *See* 327 IAC 19-1-1(2); Ind. Code § 13-18-10-2(e); and Ind. Code § 13-18-10-2.1(d) and (i). The CFO Approval that IDEM issued to Natural Prairie Indiana fails to meet these requirements and the express purpose of the CFO Rule in several respects as set forth below:

**I. The CFO Approval Allows a Continuing Violating of Section 404 of the Clean Water Act**

18. Section 404 of the Clean Water Act requires a permit “for the discharge of dredged or fill material” into waters of the United States. 33 U.S.C. § 1344(a). Such waters include: intrastate lakes, rivers, streams (including intermittent streams); wetlands, the use, degradation or destruction of which could effect interstate or foreign commerce; tributaries of U.S. waters; “wetlands adjacent to U.S. waters (other than U.S. waters that are themselves wetlands)”; and ditches that flow directly or indirectly into a water of the U.S, among other water bodies. 33 CFR § 328.3.

19. Excluded from this definition are ditches with “intermittent flow” that do not drain wetlands. 40 CFR §230.3; 33 C.F.R. § 328.3.

20. Furthermore, a Section 404 permit is not required for the discharge of dredged or fill material “from normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber, and forest products, or

upland soil and water conservation practices" or for the purpose of maintaining drainage ditches. 33 U.S.C. § 1344(f)(1).

21. However, the “normal farming activity” exemption is not available when “the discharge of dredged or fill material . . . is incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject.” 33 U.S.C. § 1344(f)(2) (commonly referred to as the “Recapture Provision” of the CWA). That is the situation here.

22. As previously discussed, the CAFO Site is within the former lakebed of Beaver Lake. In other words, it used to be entirely underwater until it was drained for farming. Indeed, according to historical records:

Beaver Lake covered between 14,000 and 25,000 acres at a water level between 665 MSL and 670 MSL elevations. Originally, it included portions of sections 1-24 in T30N R9W; sections 33-35 in T31 R9W; and sections 7, 18, and 19 in T30N R8W. In 1853, the first crude ditch was cut from the northwest corner of the lake to the Kankakee River in order to drain Beaver Lake. At this time, approximately 8,000 acres were drained causing the shoreline to recede about 100 yards. By 1876, local farmers had drained Beaver Lake to only 1/10th its size. Historic materials conflict regarding the final dates of Beaver Lake’s existence. However, it was not until after 1900 that Beaver Lake was completely gone.

The draining of Beaver Lake resulted in the cultivation of the former lake bed and establishment of fertile farms. Sand ridges and sandy loams with intermediate alluvial lake basins comprised the north area of former Beaver Lake. This formation coupled with alternate ridges and valleys provided an ideal farming environment. Much of the former bed of Beaver Lake is now owned by The Nature Conservancy. Of these areas, different parts of the project units are in pasture, row crops of corn or soybeans, or woods.<sup>7</sup>

23. In 2016, Natural Prairie Indiana purchased the CAFO Site for the sole purpose of building and operating a dairy CAFO, not to continue the historical use of

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<sup>7</sup> USACE, Phase I Archaeological Investigations on the Proposed Efroymsen Ecosystem Restoration Project Near Enos, Newton County, Indiana (2005), p. 9 available at [http://www.arch-res.com/pdf\\_files/Final%20Report%20Efroymsen%20Ecosystem%20Restoration.pdf](http://www.arch-res.com/pdf_files/Final%20Report%20Efroymsen%20Ecosystem%20Restoration.pdf).

growing crops on the property. Indeed, in August of 2016, Natural Prairie Indiana sought zoning approval to build the CAFO, a request that was eventually granted by the Newton County BZA on March 28, 2017. Thereafter, on May 16, 2017, Natural Prairie Indiana submitted its first application for CFO Approval to IDEM, which was granted on October 11, 2017, and subsequently withdrawn by Natural Prairie Indiana on May 7, 2018.

24. During this time, Natural Prairie Indiana went ahead and filled numerous ditches at the CAFO site so that it could build the CAFO—including 2,350 feet of Bogus Island Ditch—without obtaining a Section 404 permit or even inquiring if one was necessary.

25. It was not until after this issue was raised by Petitioners in a May 25, 2018 filing with the Newton County BZA, did Natural Prairie Indiana even consult, after-the-fact, with the U.S. Army Corps of Engineers (“USACE”) about its ditch-filling activities. And even then, Natural Prairie provided false and/or misleading information to avoid regulation and penalties.

26. Specifically, to avoid regulation under the “Recapture Provision” of 33 U.S.C. § 1344(f)(2), Natural Prairie Indiana falsely represented to USACE that it filled Bogus Island Ditch for “crop reasons” and had only recently decided “to place part of a dairy farm building over the top of a portion of the closed ditch.”<sup>8</sup> And, wholly contrary to the well-known and well-documented, historical purpose of Bogus Island ditch as well as evidence that a wetland currently exists at the upstream end of the (now filled) Bogus Island Ditch, USACE agreed with Natural Prairie Indiana that the ditch is somehow an “irrigation canal” that was “excavated out of uplands and not wetland areas” and, therefore, not a jurisdictional water under 33 C.F.R. § 328.3.<sup>9</sup>

27. USACE made this patently wrong determination based on a misleading wetland delineation report provided by Natural Prairie Indiana as well as limited historical data and maps

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<sup>8</sup> Email of Sept. 17, 2018 from Natural Prairie to USACE, a communication also provided to IDEM.

<sup>9</sup> USACE, Approved Jurisdictional Determination for Lawler Ditch and Bogus Island Ditch, p. 12 (Aug. 28, 2018)

going back only to 1939, well after Beaver Lake and its wetlands were drained and crop farming was underway.

28. There is no question that Bogus Island Ditch was constructed before 1939 to drain an entire lake, not “upland areas,” and is considered a relatively permanent water that flows to the Kankakee River, a navigable water of the U.S.<sup>10</sup> Bogus Island Ditch is, therefore, a jurisdictional water. And, filling more than 2,000 feet of it to construct CAFO buildings and waste structures—an activity incidental to transforming vacant cropland to “a use to which it was not previously subject”—requires a Section 404 permit. 33 U.S.C. § 1344(f)(2).

29. By granting CFO Approval, IDEM has approved construction of buildings on top of this unlawfully filled ditch thereby preventing its restoration and allowing Natural Prairie to evade Section 404 and the CFO Rule’s setback distance requirements from surface waters set forth in 327 IAC 19-12-3.

## II. The CFO Approval Allows Unlawful Filling and Conversion of Wetlands in Violation of Section 404 of the Clean Water Act and the “Swampbuster Provisions” of the Food Security Act

30. As discussed above, Section 404 of the Clean Water Act prohibits the discharge of dredge or fill material into waters of the U.S. without a permit.

31. Excluded from the definition of “waters of the US” are wetlands converted to farming prior to December 23, 1985, referred to as “prior converted cropland.” 40 CFR §230.3; 33 C.F.R. § 328.3; 7 CFR §12.2.

32. Such “farmed wetlands” can be filled due to “normal farming activities” which notably do not include, “the redistribution of surface materials by blading, *grading*, or other means to fill in wetland areas.” 33 C.F.R. § 323.4(a)(1); 40 C.F.R. § 232.3(d)(4)

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<sup>10</sup> *Id.* at 10.

(emphasis added). In addition, such “farmed wetlands” can lose their designation as prior converted cropland if normal farming activities are abandoned. 33 CFR § 323.4(a); 40 CFR § 232.3(c).

33. Similarly, the “Swampbuster” provisions of the Food Security Act of 1985 (“the Swampbuster law”) prohibit the conversion of wetlands. 16 U.S.C. § 3821.

34. A “wetland” under the Swampbuster law is land that has “a predominance of hydric soils,” is “inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions,” and “under normal circumstances, support a prevalence of such vegetation.” 16 U.S.C.S. § 3822(e); 7 CFR § 12.2; 7 CFR § 12.31.

35. A wetland is deemed “converted” if it is filled, drained, dredged, leveled, or otherwise manipulated for the purpose of producing an agricultural commodity. 16 U.S.C. § 3801(a)(7)(A); 7 CFR § 12.2. And, a person who unlawfully converts a wetland after November 28, 1990, is ineligible for USDA farm benefits until the person “has fully restored the characteristics of the converted wetland to its prior wetland state or has otherwise mitigated for the loss of wetland values . . . through the restoration, enhancement, or creation of wetland values in the same general area of the local watershed as the converted wetland.” 16 USCS § 3822(i).

36. However, wetlands that were altered or manipulated prior to December 23, 1985 are grandfathered in as “farmed wetlands” that may continue to be farmed without penalty provided: (a) the farmed wetland is not altered or manipulated beyond the scope and effect of the original, pre-1985 alteration; and (b) does “not alter the hydrology of nearby wetlands” including “any natural wetland, farmed wetland, farmed-wetland pasture, or any converted wetland that is not exempt.” *See* 7 CFR §§ 12.32(b)(2), 12.33(a), (b) and (d).

37. To side-step these requirements, Natural Prairie Indiana submitted a misleading wetland survey report to both IDEM and USACE purporting to provide evidence that the CAFO Site contains no wetlands (“the Cardno Report”).<sup>11</sup> What the Cardno Report actually says is that only “two upland data points”—identified as “5 feet” on a “shoulder”—were surveyed at the request of Natural Prairie Indiana and those specific areas were found to contain hydric (wetland) soils but no wetland plants. Nothing in the Cardno Report provides any evidence to support the conclusion that there are no wetlands on the entire CAFO Site. Indeed, Natural Prairie Indiana selected these two, specific “upland” areas for survey while avoiding surveying the vast low-lying, depressional areas at the CAFO Site, the non-agricultural locations near drainage ditches, and the property boundaries that are surrounded by extensive wetlands, that contain hydrophyte plants and would confirm the existence of wetlands at the CAFO Site.

38. And, contrary to the Cardno Report’s unsupported conclusion, information about wetlands and soils at the CAFO Site that is available to both IDEM and USACE, and was actually made available to but ignored by IDEM, indicates the presence of wetlands on the CAFO Site and extensive wetland areas immediately adjacent to the Site that will be significantly altered and/or destroyed by construction of the CAFO in violation of Section 404 and Swampbuster.

39. This unlawful conversion and destruction of wetlands authorized by the CFO Approval also allows Natural Prairie Indiana to evade the setback distance requirements from wetlands set forth in 327 IAC 19-12-3.

### III. IDEM Unlawfully Approved the Janicki System

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<sup>11</sup> See Natural Prairie’s CFO Approval Application at pages 226-240 containing the Cardno Wetland Report.

40. The CFO Rule, defines a CAFO's "waste management system" to include "any approved method of managing manure or process wastewater" including "manure storage facilities, manure transfer systems, manure treatment systems such as a . . . wastewater treatment system under a valid [NPDES] permit" or "waste liquid handling, storage and treatment systems." 327 IAC 19-2-48.

41. Before approving a CAFO's waste management system, IDEM must confirm that its construction and operation will comply with all existing state and federal environmental rules and laws. 327 IAC 19-5-1(a)(1), 327 IAC 19-7-4, 327 IAC 19-12 and 327 IAC 19-13-1(b)(3). In addition, IDEM must include enforceable construction and operational requirements for a CAFO's waste management system as part of the CFO Approval to ensure compliance with state and federal laws. 327 IAC 19-5-1(a)(2) and 327 IAC 19-13-1(b)(3). And, if a CAFO's waste management system includes an energy recovery system that receives biomass, it also must meet the requirements of Ind. Code § 13-20-10.5. *See* 327 IAC 19-13-2.

42. In violation of these requirements, IDEM has approved the use of a manure processing and treatment technology at the CAFO known as the "Janicki Bioenergy advanced vapor recompression unit" (the "Janicki System")—a technology that is still in the in the early "proof of concept" stage,<sup>12</sup> and has not been proven effective for use at a CAFO of the size and scale approved by IDEM.

43. IDEM did not and could not have reviewed the details, design, or efficacy of this unproven technology or confirm that it will comply with all existing environmental rules and laws in violation of 327 IAC 19-5-1(a)(1), 327 IAC 19-7-4, 327 IAC 19-12 and 327 IAC 19-13-1(b)(3).

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<sup>12</sup><https://www.janickibioenergy.com/wp-content/uploads/2017/02/VRD-One-Pager-PDF-20170125.pdf>

44. Nor did IDEM impose any requirement that Natural Prairie Indiana actually use the Janicki System during the active life of the CAFO in violation of 327 IAC 19-5-1(a)(2) and 327 IAC 19-13-2. Rather, the CFO Approval expressly allows Natural Prairie Indiana to operate the CAFO without the Janicki System, and regardless of whether the Janicki System is ever built.<sup>13</sup>

45. IDEM's failure in this regard is particularly problematic given the repeated, public claims Natural Prairie Indiana made about its intent to use this technology over the last two years. Specifically, Natural Prairie Indiana claimed that it would use this "innovative" and "revolutionary" manure treatment technology to "convert cow manure into clean water" thereby eliminating the need for a manure lagoon and any concern for contamination of nearby surface waters and drinking water wells. Natural Prairie made these claims under oath during local government proceedings to obtain zoning approval, at public meetings to allay community opposition and concern, and repeatedly in the news media to gain public approval of its plans.<sup>14</sup>

46. IDEM should have denied CFO Approval until Natural Prairie demonstrates that the Janicki System actually works and will comply with federal and state environmental laws. IDEM's failure in this regard not only violates the CFO Rule, but also effectively makes IDEM complicit in Natural Prairie Indiana's effort to mislead the public

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<sup>13</sup> Natural Prairie Indiana claims that it plans to first "install and test the technology at its facility in Texas *before* using it in Newton County." See *Controversial Large-Scale Dairy Proposal Back on the Table in Newton County*, Northwest Indiana Times (Oct. 14, 2018). Aside from the fact that Natural Prairie has now had at least two years to undertake that "testing" in Texas, it never gets around to explaining what will happen if the Janicki System is proven not to work.

<sup>14</sup> See PKRB's technical comments submitted to IDEM on November 30, 2018 attached hereto as Exhibit B at 1-4 which detail with citation to sources the many public statements Natural Prairie made in this regard.

and present its CAFO as something other than what it asked IDEM to permit—effectively “greenwashing” its CAFO with IDEM’s stamp of approval.

#### IV. The CFO Approval Violates Groundwater Monitoring Requirements

47. IDEM has rightly determined that groundwater monitoring is required at the CAFO due to threats to human health and the environment. When such a determination is made, the CFO Rule mandates that the required *monitoring* must comply with 327 IAC 19-10-1 and “must be conducted throughout the *active life* of the [manure] storage facility.” 327 IAC 19-10-1(c), (g) (emphasis added). This required monitoring includes, among other things, regular *sampling* during the “active life” of the facility for “statistically significant increase[s] over background levels” of “field pH, field specific conductance, nitrates, chloride, fecal coliform bacteria, sulfate, total dissolved solids.” 327 IAC 19-10-1(d), (e), (g).

48. Despite this clear directive, the CFO Approval allows Natural Prairie Indiana to begin operating its CAFO, including use of the waste lagoon—i.e., beginning the CAFO’s “active life”—*before* completing a “Water Table Elevation Study” to determine groundwater flow, baseline groundwater quality, i.e., background levels, and appropriate locations for groundwater monitoring wells.<sup>15</sup> In fact, the CFO Approval gives Natural Prairie Indiana more than a year after starting operations just to determine the level and flow of the underlying aquifer, and then another two years, to determine background water quality levels. Put another way, the CFO Approval allows Natural Prairie Indiana to operate for at least three years before it would even be possible to monitor for “statistically significant increases over background levels.” During that time, the CAFO could contaminate the underlying aquifer without detection and set an artificial, “contaminated baseline” for comparison.

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<sup>15</sup> CFO Approval at pp. 6, 255-277

49. Allowing Natural Prairie Indiana to put the cart before the horse in this way is not only a direct violation of the CFO Rule, but also incredibly risky and an irresponsible abrogation of IDEM's duty to protect an aquifer that currently provides safe drinking water for hundreds of families in the area including Petitioners.

#### V. The CFO Approval Violates Land Application Requirements

50. Natural Prairie Indiana claims that the CAFO will be a "certified organic" dairy.<sup>16</sup> That means, the CAFO's 4,000+ cows must be allowed to graze in pasture, "during the entire grazing season for the geographical region, which shall not be less than 120 days per calendar year." *See* 7 CFR § 205.237(c)(1). Nevertheless, Natural Prairie Indiana did not provide any information about the location of these cow grazing areas nor does the CFO Approval require that they be separate from the designated waste application areas in violation of several provisions of the CFO Rule.

51. The CFO Rule requires an applicant for CFO Approval to submit "plot maps," including soil survey maps and topographical maps, showing the location of both manure application sites (demonstrating available acreage after calculation of setbacks) and "production areas." 327 IAC 19-7-2. A "production area" includes "open lots, . . . cowyards, barnyards, . . . [and] animal walkways." 327 IAC 19-2-34. In violation of this requirement, Natural Prairie Indiana submitted plot maps for the waste application sites but did not submit plot maps for the "open lots" or "cowyards" where the cattle will be required to graze or the "animal walkways" that provide access. Instead, the CFO Approval considers the waste application sites and these production areas to be one in the same.

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<sup>16</sup> See PKRB's technical comments submitted to IDEM attached as Exh. B detailing with citation to sources the public statements Natural Prairie made in this regard.

52. The waste production calculations submitted by Natural Prairie Indiana and approved by IDEM for determining the amount of acreage needed for waste application does not account for the raw manure that will be deposited when 4,000+ cows are grazing on these designated waste application sites at least 120 days per year. Accordingly, Natural Prairie Indiana has not demonstrated that it has the minimum number of acres needed for waste application at agronomic rates in violation of 327 IAC 19-14-2.

53. The CFO Approval does not impose an enforceable requirement for Natural Prairie Indiana to conduct soil and manure testing before allowing the cows to graze on designated waste application sites in violation of 327 IAC 19-14-3(a). As a result, there is nothing to prevent Natural Prairie Indiana from applying lagoon waste at appropriate rates and then allowing cattle to defecate on those same fields in excess of agronomic rates, effectively evading the land application restrictions set forth in 327 IAC 19-14-3(b).

54. The CFO Approval does not require maintenance, inspection, cleaning or the use of storm water controls on the “animal walkways” that will be used by and defecated on by the cattle to access the combined pasture/waste application sites in violation of 327 IAC 19-11-1.

(e)DNR’s flood plain maps indicate that at least one of the waste application sites contains a flood plain area. NRCS soil survey data and the soil testing conducted by Natural Prairie Indiana indicate that the CAFO site and the IDEM approved waste application sites have hydric soils, overlay the shallow sand aquifer, and are prone to frequent ponding and flooding.<sup>17</sup> And, there are surface waters within the designated land application areas. Nevertheless, the CFO Approval contains no enforceable provisions to ensure compliance with the setback distances and restrictions of 327 IAC

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<sup>17</sup> Flooding is also confirmed by photographs submitted to IDEM and has been observed for years by residents who live nearby—information that IDEM disregarded.

19-14-4 and 327 IAC 19-14-6 when 4,000+ cows are defecating on these waste application sites at least 120 days per year. As a result, The CFO Approval allows unpermitted discharges and manure releases from the waste application sites in violation of 327 IAC 19-3-1 and 40 CFR 122.23(e).

#### VI. The CFO Approval Allows a Substantial Endangerment to Human Health and the Environment

55. Even absent the foregoing legal deficiencies, the unique hydrogeological and ecological conditions present at the CAFO site, should have been reason enough for IDEM to deny CFO Approval to Natural Prairie Indiana.

56. Assuming full compliance with the CFO Rule's seepage rate for lagoon liners ( $1/16 \text{ in}^3/\text{in}^2/\text{day}$  ( $1.8 \times 10^{-6} \text{ cm}^3/\text{cm}^2/\text{sec}$ )), the CAFO's almost 9-acre waste lagoon, alone, will be legally allowed to discharge as much as 15,246 gallons of leachate per day into the ground which is more than 5 million gallons every year. While that amount will likely be reduced to roughly 2,700 gallons per day due to the approved synthetic liner, presuming the liner does not rip, tear or otherwise fail, the seepage rate will still amount to nearly a million gallons of contaminated leachate being legally released into the ground every year.

57. And, even removing the concern for the unaccounted for and uncontrolled waste that will be deposited without regard for setbacks and other restrictions at least 120 days per year by 4,000+ grazing cattle, more than 30 million gallons of animal waste and process wastewater collected in the lagoon will be sprayed on the waste application sites every 180 days.

58. All of this otherwise legal activity is particularly concerning given the available data and information about the CAFO Site and its waste application sites which

clearly demonstrate the hydrologic connection of the underlying aquifer with the land surface. And, available well data confirms that there are at least 160 residential wells, including Petitioners' wells, that draw from this unconsolidated aquifer within the down-gradient area to the north and east of the CAFO site, toward the aquifer discharge areas, following the surface water drainage. As such, allowing a CAFO of this size and scale to be built and operated at this location will result in certain chronic contamination of these residential wells, and likely catastrophic contamination should an accident occur. Accordingly, IDEM should have denied CFO Approval due to the dangerous, unreasonable, and irresponsible risk the CAFO poses to the safety of drinking water, human health and the environment—even if constructed and operated in full compliance with the CFO Rule.

59. The CFO Rule requires that: (i) a CFO be “constructed and operated in a manner that minimizes nonpoint source pollution;” (ii) “all reasonable steps” are taken to “prevent manure releases, spills or discharges of manure;” (iii) “all waste management systems” are “designed, constructed maintained . . . to prevent manure releases or spills, as well as ensure compliance with water quality standards;” and (iv) manure is handled in such a way so as “not to threaten or enter waters of the state” or cause “runoff, manure releases or spills.” 327 IAC 19-3-1. Given site conditions and the nature, size and scale of the CAFO, IDEM should have denied CFO Approval on the basis that these performance standards simply cannot be met. IDEM’s failure to do so violates the express purpose of the CFO Rule to “protect human health and the environment from threats to water quality” 327 IAC 19-1-1, and IDEM’s duty to take steps that are “necessary to protect human health and the environment.” 327 IAC 19-4-1.

### **Request for Stay of Effectiveness of the CFO Approval**

60. The OEA has authority to grant a stay of effectiveness when the party requesting the stay demonstrates that: (a) the “person will suffer irreparable harm pending the resolution of the case on the merits because [his or her] remedies at law are inadequate[;]” (b) the “person is likely to prevail on the merits[;]” (c) the “threatened injury to the person requesting the stay outweighs the threatened harm that the grant of the stay may inflict on the other party[;]” and (d) the “public interest will be served by the grant of the stay.” 315 IAC 1-3-2.1(b). Each of these elements are met here warranting a stay of the CFO Approval issued to Natural Prairie Indiana.

61. An "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable.” *Amoco Prod. Co. v Village of Gambell*, 480 U.S. 531, 545 (1987). “If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.” *Id.*

62. The express purpose of Indiana's CFO Rule is to “protect human health and the environment from threats to water quality.” 327 IAC 19-1-1. Indiana courts recognize that "where protection of the public welfare is involved, injunctive relief is allowed without proof or findings that an adequate remedy at law exists. *National Salvage & Service Corp. v. Commissioner of Indiana Dept. of Environmental Management*, 571 N.E.2d 548, 559 (Ind. App. 1991) (relying on *State ex rel Indiana State Board of Dental Examiners v. Boston System Dentists*, 215 Ind. 485, 19 N.E.2d 949 (1939)).

63. Indiana courts also recognize the "per se rule" which is well articulated by the Indiana Appellate Court in *Department of Financial Institutions v. Mega Net Services*:

It is well settled [in Indiana] that where the action to be enjoined is unlawful, the unlawful act constitutes *per se 'irreparable harm'* for purposes of the preliminary

injunction analysis. When the *per se* rule is invoked, the trial court has determined that the defendant's actions have *violated a statute and, thus, that the public interest is so great that the injunction should issue regardless of whether the plaintiff has actually incurred irreparable harm* or whether the plaintiff will suffer greater injury than the defendant.

833 N.E.2d 477, 485 (Ind. App. 2005) (emphasis added); *see also Sadler v. State ex rel. Sanders*, 811 N.E.2d 936, 953 (Ind.App.,2004) (noting that "when the acts sought to be enjoined are unlawful, the plaintiff need not make a showing of irreparable harm or a balance of the hardship in his favor").

64. As discussed above, the CFO Approval will allow construction and operation of a CAFO over an unlawfully filled ditch, in a highly sensitive ecological area overlaying a shallow, sand aquifer that is highly susceptible to surface contamination and on which Petitioners' rely for their drinking water. IDEM issued the CFO Approval without ensuring compliance with the CFO Rule and all water pollution control laws, and without taking all necessary steps to protect human health and the environment. If the CFO Approval is not stayed, wetlands and critical habitat will be destroyed and the safety of Petitioners' drinking water will be substantially endangered, injuries for which money damages would be inadequate. Therefore, Petitioners have demonstrated an irreparable harm *per se* and in fact that outweighs any hardship on IDEM or Natural Prairie Dairy if a stay is issued.

65. To show a reasonable likelihood of success on the merits of their claims does not require Petitioners to establish that they are entitled to relief as a matter of law, only that the likelihood of success is probable. *Avemco Ins. Co. v. State ex rel. McCarty*, 812 N.E.2d 108, 118 (Ind. App. 2004). While Petitioners request full opportunity to conduct discovery before a final adjudicatory hearing on their claims, as well as an opportunity to fully brief and present currently

available evidence in support of the required elements for a stay, that evidence as discussed above demonstrates that Petitioners have a reasonable likelihood of success on the merits of their claims.

66. Finally, issuing a stay of the CFO Approval will serve the public interest because it will prevent Natural Prairie Indiana from violating environmental mandates that were enacted expressly to protect the public interest. Moreover, preventing Natural Prairie Indiana from destroying wetlands and contaminating an aquifer that provides drinking water for hundreds of families is certainly within the public interest. For all the foregoing reasons, a stay of effectiveness is warranted in this case.

### **Conclusion**

Based on the foregoing deficiencies and violations of law, IDEM wrongfully issued the CFO Approval to Natural Prairie Indiana. And, if the CFO Approval is not stayed pending a final adjudicatory hearing on the merits, Petitioners will be irreparably harmed.

WHEREFORE, Petitioners respectfully request that the OEA grant their request for a stay of the CFO Approval issued to Natural Prairie Indiana following briefing and a stay hearing, vacate the CFO Approval following a final adjudicatory hearing, and order all additional relief as the OEA deems appropriate and allowed by law.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Petition for Administrative Review and Stay of Effectiveness has been served upon the following individuals and parties via Certified Mail, Return Receipt Requested on the 25<sup>th</sup> day of January, 2019.

/s/ Kim E. Ferraro  
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Kim E. Ferraro

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