

March 11, 2022

Comment Submitted Electronically via Comment Submittal Form

Cheryl Laskowski
Chief, Transportations Fuels Branch
California Air Resources Board
1001 I Street, Sacramento, CA 95814

Dr. Laskowski:

Thank you for the opportunity to comment on Kinnard Farms' application to join the Low Carbon Fuel Standard (LCFS) Tier 2 Pathways program. We write to encourage the California Air Resources Board (CARB) to deny Kinnard Farms' application.

For nearly a decade Midwest Environmental Advocates has worked with the people of Kewaunee County, Wisconsin, where Kinnard Farms ("Kinnard") is located, to reduce the negative impacts of concentrated animal feeding operations (CAFOs) in the county. A great deal of that work has focused specifically on Kinnard. During our years of working with the community, there have been multiple instances of Kinnard allegedly engaging in practices that have violated the conditions of its permit issued under Wisconsin's delegated Clean Water Act authority. Kinnard's history of failing to comply with requirements suggests that its participation in the LCFS Tier 2 Pathways program could result in increased harms to the environment and surrounding communities; communities which are already struggling to mitigate present harms to their air and water quality. We fear that the LCFS incentives would provide Kinnard with the motivation, finances, and opportunity to increase its herd size above its current capacity, resulting in greater environmental impacts and an overall increase in methane production—directly contradicting the intended goals of the program.

Kinnard Farm Has a History of Compliance Issues

Kinnard is one of the largest producers of animal manure in Kewaunee County, producing an estimated 99,748,335 gallons of liquid waste per year and 5,886 tons of solid waste per year as of January 2020.¹ As part of Kinnard's Wisconsin Pollutant Discharge Elimination System (WPDES) Permit, Kinnard is expected to comply with a number of regulations and management practices meant to reduce the likelihood that Kinnard contaminates water resources. For example, during the permitting process, Kinnard had to produce a nutrient management plan (NMP) to account for the animal waste produced. Kinnard is operating in an area where fields are already likely heavily

¹ James Salscheider, Permit Fact Sheet 1 (Oct 1, 2020) (on file with author, attached as part of Exhibit 1).

receiving nutrients.² Due to extensive groundwater contamination, the Wisconsin Supreme Court upheld a decision which required Kinnard to conduct off-site groundwater monitoring conditions to regulate its impact.³

Kinnard has a history of alleged non-compliance with manure spreading restrictions. In August 2021, the Wisconsin Department of Natural Resources (DNR) referred Kinnard's alleged violations to the Wisconsin Department of Justice (DOJ) as part of the DNR's stepped enforcement process.⁴ We urge you to reach out the DNR and DOJ for more information.

The DNR has observed multiple regulatory violations by Kinnard in its landspreading practices. In November 2018, DNR reported an observation that manure was ponding and had migrated away from the initial application area.⁵ The DNR conducted a manure hauling audit and required Kinnard to provide "field verification of permanent restrictive features and field conditions" for all fields within Kinnard's NMP.⁶ However, in June 2019, mere months after the audit, the DNR found evidence of manure being applied to a field that was described as a direct conduit to groundwater which Kinnard allegedly failed to mark as a restriction.⁷ In August 2019, Kinnard reported a spill where applied manure ran off a field onto another property, and the DNR found a second field where manure appeared to have run off the application site.⁸ In November 2019, the DNR once again observed manure applied by Kinnard running off the application site.⁹ In November 2019, Door County Soil & Water Conservation Department reported observing manure being applied too close to two separate private water systems.¹⁰ That same month DNR observed manure being spread on a slope too close to a direct conduit to groundwater.¹¹ The DNR conducted another manure hauling audit in October 2020 and once again observed manure being applied too close to a private well.¹² In the audit, DNR staff raised "serious concerns about the repetitive nature of Kinnard Farms' noncompliance with applicable land application regulations . . ."¹³

² See Environmental Work Group maps, available at <https://www.ewg.org/interactive-maps/2021-wisconsin-afo/map/manuremap.php> (last visited March 11, 2022).

³ *Clean Wisconsin v. DNR*, 2021 WI 71 at ¶¶ 38-39 (2021).

⁴ Notice of Referral Letter from DNR to Kinnard Farms (Aug. 30, 2021) (on file with author, attached as part of Exhibit 1).

⁵ Notice of Violation Letter from DNR to Kinnard Farms (Feb. 19, 2019) (on file with author, attached as part of Exhibit 1).

⁶ *Id.*

⁷ Notice of Violation Letter from DNR to Kinnard Farms (Aug. 6, 2019) (on file with author, attached as part of Exhibit 1).

⁸ Notice of Violation Letter from DNR to Kinnard Farms (Aug. 26, 2019) (on file with author, attached as part of Exhibit 1).

⁹ Notice of Violation Letter from DNR to Kinnard Farms (Feb. 6, 2020) (on file with author, attached as part of Exhibit 1).

¹⁰ *Id.*

¹¹ *Id.*

¹² Notice of Violation Letter from DNR to Kinnard Farms (Mar. 2, 2021) (on file with author, attached as part of Exhibit 1).

¹³ *Id.*

Additionally, DNR staff noted that “[r]epresentatives of Kinnard Farms have historically delayed department staff from performing manure hauling audits for several days, which can potentially prevent staff from making a compliance determination.”¹⁴

In addition to Kinnard’s historic record of landspreading practices, it also has several recent violations for its WPDES permit requirements. In June 2021, the DNR observed manure which was spread too close to a direct conduit to groundwater.¹⁵ In September 2021, during a manure hauling audit, the DNR observed manure being applied on soil that was too shallow in depth to bedrock, once again.¹⁶ In November 2021, the DNR inspected Kinnard for reissuance of the WPDES permit and determined that it was once again out of compliance with the terms of the permit.¹⁷

The new digesters at Kinnard likely will not substantially reduce the nutrients that are seeping into Kewaunee residents’ water supply and remain after the methane has been removed from the waste stream.¹⁸ The U.S. Department of Agriculture’s NRCS has concluded that nitrogen and phosphorous in digestate is even more hazardous to ground and surface waters than the undigested manure.¹⁹

CARB should consider Kinnard’s ongoing record of regulatory violations before providing it with the benefits of the LCFS program. It is not fair to the Kewaunee County community or the other participants in the LCFS program for Kinnard to be granted entry while it continues to fail to comply with Wisconsin law. The LCFS regulations provide a mechanism for an officer to invalidate credits if they were “generated in violation of any provision of this subarticle or in violation of other laws, statutes or regulations,”²⁰ which CARB has utilized in the past to invalidate Wisconsin CAFOs’ credits.²¹ Even if Kinnard is granted entry into the program, every credit produced while Kinnard is operating in violation of its WPDES permit or other violation of law

¹⁴ *Id.*

¹⁵ Notice of Violation Letter from DNR to Kinnard Farms (July 13, 2021) (on file with author, attached as part of Exhibit 1).

¹⁶ Notice of Violation Letter from DNR to Kinnard Farms (Nov. 10, 2021) (on file with author, attached as part of Exhibit 1).

¹⁷ Letter from DNR to Kinnard Farms (Jan. 12, 2022) (on file with author, attached as part of Exhibit 1).

¹⁸ Scott Gordon, *What Manure Digesters Can and Can’t Do*, WISCONTEXT (Nov. 30, 2016) <https://www.wiscontext.org/what-manure-digesters-can-and-cant-do>.

¹⁹ See NRCS Conservation Practice Standard No 366, pg 6.

²⁰ CAL. CODE REGS. tit. 17, § 95495(b)(1)(E) (2020).

²¹ See e.g., CARB, Final Determination: California Air Resources Board Compliance, Livestock Methane Reduction Offset Investigation (May 26, 2021) (available at: https://ww2.arb.ca.gov/sites/default/files/2021-05/nc-Final_Determination_Dairyland_Farm_Offset_Investigation.pdf); CARB, Final Determination: California Air Resources Board Compliance, Livestock Methane Reduction Offset Investigation (Sept. 2020) (available at: https://ww2.arb.ca.gov/sites/default/files/2020-09/Final_Determination_Central_Sands_Dairy_Offset_Investigation.pdf).

should be an invalidated credit. This could require significant administrative effort to review given Kinnard's repeated alleged violations. Withholding entry into the LCFS program until Kinnard has consistently complied with the law and has established a safe method to dispose of its waste legally is the best way for CARB to both utilize limited administrative resources and protect the integrity of the LCFS program.

How LCFS Could Fund a Kinnard Farm Expansion

Kinnard is currently permitted to house 11,369 animal units.²² A proposed amendment to its WPDES permit would set an animal unit limit of 21,450.²³ In order to expand above current farm capacity, Kinnard would have to show it has capacity to safely store and to spread any additional manure in compliance with an approved nutrient management plan.²⁴ Currently, Kinnard has a record of alleged non-compliance with manure spreading restrictions related to the manure produced by its current herd. However, if Kinnard is approved under the LCFS Tier 2 program, there would be a significant financial incentive for it to produce more manure to intentionally generate more methane and thus cash-in on the LCFS “manure gold rush.”²⁵ Even if a large percentage of the manure is processed in a digester, a large increase in herd size may result in a net-gain in methane emissions from Kinnard, not a reduction. If the proceeds from LCFS incentives assist Kinnard in expanding its operation, the LCFS may result in bringing about the very antithesis of its program: an increase in methane emissions that are intentionally created when they would not have been otherwise.²⁶

Kinnard has been steadily expanding its herd size the past decade—more than doubling the size of its herd since 2012. As a result of that expansion, Kinnard produces an estimated 99,748,335 gallons of liquid waste and 5,886 tons of solid waste per year as of January 2020.²⁷ Kinnard built four digesters in 2020;²⁸ each digester has a usable capacity of 1,381,849 gallons—5,527,396 gallons total.²⁹ During that same year, Kinnard received \$963,700 from the Paycheck Protection

²² KINNARD FARMS INC WPDES PERMIT, NO. WI-0059536-04-2, WISCONSIN DEPT. OF NAT'L RESOURCES 1 (Feb 1, 2022) (on file with author, attached as part of Exhibit 1).

²³ *Id.*

²⁴ Chris Hubbuch, 'Missed Opportunity': Empowered to Limit Farm Size, DNR to OK Expansion of Large Kewaunee County Dairy, WIS. STATE J. (Jan 11, 2022) https://madison.com/wsj/news/local/environment/missed-opportunity-empowered-to-limit-farm-size-dnr-to-ok-expansion-of-large-kewaunee-county/article_731099b3-10e5-58aa-9402-2713f24dded3.html.

²⁵ Phred Dvorak, *California's Green-Energy Subsidies Spur a Gold Rush in Cow Manure*, WALL STREET JOURNAL (Feb. 19, 2022) <https://www.wsj.com/articles/californias-green-energy-subsidies-spur-a-gold-rush-in-cow-manure-11645279200>.

²⁶ Emily Grubert, *At scale, Renewable Natural Gas Systems Could be Climate Intensive: the Influence of Methane Feedstock and Leakage Rates*, 15 ENVIRONMENTAL RESEARCH LETTERS 1, 4 (2020) (available at: <https://iopscience.iop.org/article/10.1088/1748-9326/ab9335/pdf>.)

²⁷ James Salscheider, Permit Fact Sheet 1 (Oct 1, 2020) (on file with author, attached as part of Exhibit 1).

²⁸ *Id.*

²⁹ Bernie Michaud, Conditional Approval of Plans & Specifications for Four Anaerobic Digesters (Sept. 19, 2019) (on file with author, attached as part of Exhibit 1).

Program.³⁰ Kinnard received an additional \$339,816 in subsidies from the USDA’s Environmental Quality Incentives Program from 2017 to 2019.³¹

Kinnard stated that it did not have plans for expansion when it applied for an amendment to its WPDES permit to add sampling points for its digesters.³² However, incentives from the LCFS program may make the prospect of expansion financially enticing. Kinnard has almost twice the required manure storage capacity requirements for its current herd size, so it likely would not need to invest in new storage to expand. Rather, Kinnard would only need to find new areas to spread manure to show the DNR that it could manage an expansion. However, given the current record of alleged non-compliance with manure spreading restrictions, it seems unlikely that expanding that operation would happen safely.

In general, making manure profitable can cushion a farm’s profits through low milk prices and subsidize an otherwise unprofitable expansion. As Greg Bethard, the general manager of a Kansas dairy farm, stated, “if you take today’s value [of the credits] and extrapolate it out, yes, there’s profits to be made . . . [b]ut I still think, long term, our primary business is still going to be milk.”³³ An analysis published in 2021 found that, excluding the capital costs of installing a digester, a farmer would pay an average of \$294 per cow to operate a digester to farm about \$68 worth of gas; however, after incentives, that same amount of gas is worth \$1,935.³⁴ Considering that a typical dairy cow produces \$3,800 worth of milk per year, the incentives make the manure worth over half as much as the milk.³⁵ With such a large potential earning, the LCFS incentives can fund the expansion of a herd, doubling the amount of milk and manure produced—as well as its impact. In fact, there are concerns that as the use of digesters grows, the industry may begin making financial decisions with more focus on how much manure powered energy—rather than milk—farms can produce.³⁶

³⁰ *Tracking PPP: Kinnard Farms, Inc.*, PROPUBLICA (last visited Mar. 11, 2021) <https://projects.propublica.org/coronavirus/bailouts/loans/kinnard-farms-inc-4459497003>.

³¹ *Other Financial Assistance: Kinnard Farms, Inc.*, USASPENDING (last visited Mar. 11, 2022) https://www.usaspending.gov/award/ASST_NON_00000745F4817196_12C3.

³² James Salscheider, Permit Fact Sheet 1 (Oct 1, 2020).

³³ Dan Charles, *How Dairy Farmers are Cashing in on California’s Push for Cleaner Fuel*, NPR (Feb. 10, 2022) <https://www.npr.org/2022/02/10/1077235578/how-dairy-farmers-are-cashing-in-on-californias-push-for-cleaner-fuel> (quoting Greg Bethard, the general manager of a Kansas dairy).

³⁴ Aaron Smith, *What’s Worth More: A Cow’s Milk or its Poop?*, UCDAVIS (Feb 3, 2021) <https://asmith.ucdavis.edu/news/cow-power-rising>.

³⁵ *Id.*

³⁶ Michael McCully, *Energy Revenue Could be a Game Changer for Dairy Farms*, HOARD’S DAIRYMAN (Sept. 23, 2021) <https://hoards.com/article-30925-energy-revenue-could-be-a-game-changer-for-dairy-farms.html>.

The trend toward digester-driven expansion is not sustainable. Kinnard, along with several other CAFOs have partnered with DTE Biomass to create and sell the biogas from manure.³⁷ DTE Biomass has stated that, to be profitable, farms would likely need at least 5,000 milking cows.³⁸ However, by 2017, less than six percent of Wisconsin dairy farms had more than 500 cows, and 65 percent had fewer than 100 cows.³⁹ Lee Kinnard, the owner of Kinnard Farms, suggested that the industry could be trending towards utilizing more digesters.⁴⁰ In order for Wisconsin dairy farms to trend towards using digesters, most would have to expand their operations fifty-fold. Most of the available fields in Kewaunee County are already being used for manure spreading, so any expansion would require a facility to spread manure farther away, affecting additional communities. Existing facilities in Kewaunee County and in many other areas of concentrated farming around the state have likely already exceeded the capacity of the land to absorb additional nutrients.⁴¹

Conclusion

Kinnard Farms is not a qualified applicant for the LCFS program. Its long history of compliance issues regarding handling manure would increase the administrative burden of the LCFS program while potentially damaging the program's reputation. Admittance into the LCFS program would likely provide it with the means and incentive to expand its operation. This expansion could result in intentionally created methane and a net increase in harmful impact. For these reasons, we encourage CARB to deny Kinnard Farm's application for entry into the LCFS Tier 2 Pathways program.

Respectfully Submitted,

/s/

Jacob Dalton, *Law Clerk*

Adam Voskuil, *Staff Attorney*

Midwest Environmental Advocates, Inc.

612 W. Main St., Ste 302

Madison, WI 53703

avoskuil@midwestadvocates.org

³⁷ *DTE Biomass Energy Opens First Renewable Natural Gas Processing and Interstate Injection Site in Wisconsin*, DTE ENERGY (Sept. 12, 2019) <https://ir.dteenergy.com/news/press-release-details/2019/DTE-Biomass-Energy-opens-first-renewable-natural-gas-processing-and-interstate-injection-site-in-Wisconsin/default.aspx>.

³⁸ Lynn Grooms, *Dairies Can Lead Way to Future*, AGRI-VIEW (Jul 16, 2020) https://www.agupdate.com/agriview/news/business/dairies-can-lead-way-to-future/article_e36ffe1-096f-55b7-a9aa-bcaf1c5a6623.html.

³⁹ USDA/NASS, 2017 Census of Agriculture, [Wisconsin Dairy Farm Share by Herd Size](#).

⁴⁰ Tim Kowols, *Digester Project Keeps Pace*, DOOR CNTY. DAILY NEWS <https://doorcountydailynews.com/news/479477>.

⁴¹ See Environmental Work Group maps, available at <https://www.ewg.org/interactive-maps/2021-wisconsin-afo/map/manuremap.php> (last visited March 11, 2022).