



IOWA CHAPTER

January 11, 2011

Mr. Gene Tinker
Iowa Department of Natural Resources
Wallace State Office Building
502 E. 9th St.
Des Moines, Iowa 50319

VIA E-MAIL

Re: New AFO rules

Dear Gene:

The following comments are submitted on behalf of the Iowa Chapter of the Sierra Club and its more than 5,000 members. Our members have been concerned about the environmental impacts of animal feeding operations for several years. We believe good regulations are the only way to effectively control the environmental consequences of animal factories. With that in mind, we have reviewed the proposed rules that were published for comment on December 15, and we offer the following suggestions for improvement.

1. The proposed rules appropriately track the EPA rule and require an NPDES permit for any CAFO that discharges pollutants or proposes to discharge to waters of the United States. The focus here is on confinement operations since open feedlots are required to have NPDES permits, but confinements have thus far been exempt. Since confinement operators will continue to assert that they do not discharge or propose to discharge, the Iowa rule needs to have a good definition or guidelines to determine when a CAFO proposes to discharge, in spite of what the operator says.

The new rules simply use the general statement from the EPA rule that a CAFO proposes to discharge if “it is designed, constructed, operated, or maintained such that a discharge will occur.” DNR staff admit that this vague definition is not very helpful. EPA issued guidance on May 28, 2010, to help define the concept of proposing to discharge. As the result of a settlement between EPA and the Sierra Club and other organizations, EPA adopted this guidance for determining when a CAFO proposes to discharge. According to that guidance, determination of whether a CAFO is designed, constructed, operated, or maintained such that a discharge will occur should take into account climatic, hydrologic, topographic, and other characteristics beyond the operator’s control. Possible sources of pollutants at the CAFO should also be considered, such as animal confinement areas; feed storage areas; manure, litter, and process wastewater storage areas; confinement house ventilation fan exhaust; land-applied manure, litter, or process wastewater; and other site specific sources of pollutants, as well as pathways for

pollutants from the CAFO to reach waters of the U.S. The guidance then sets out a non-exhaustive list of factors that are relevant to determining when a CAFO proposes to discharge:

- Proximity of the CAFO to waters of the United States, and if the CAFO is upslope from waters of the U.S.;
- Climatic conditions, including whether precipitation exceeds evaporation;
- Discharge history;
- Type of waste storage system, and the capacity, quality of construction and presence and extent of built-in safeguards of the storage system;
- Management of mortalities;
- Standard operating procedures and quality of maintenance protocols, e.g., for equipment, infrastructure, etc.;
- Drainage of production area;
- Exposure of animal waste and feed to precipitation or other water; and
- If the CAFO land applies, method for nutrient planning and source of technical standards (e.g., technical standards established by the DNR).

The guidance document then goes into more detail in discussing all of these considerations. This document should be specifically incorporated by reference into the Iowa rules. This will assist the DNR, CAFO operators, and the public in determining whether a CAFO needs an NPDES permit.

There is no reason not to incorporate this guidance document. Since it simply clarifies the EPA rule, it would not make the Iowa rule more stringent than the federal rule. The guidance would help CAFO operators, DNR, and the public better determine if a CAFO proposes to discharge and would therefore need an NPDES permit.

2. Amended rule 64.3(1) requires any operator of a disposal system to have an operation permit, but animal feeding operations are specifically exempt from that requirement. Rule 60.2, in defining operation permits, states that an operator of a disposal system must have an operation permit unless that operation is required to have an NPDES permit. Thus, an animal feeding operation that is not required to have an NPDES permit would be required to have an operation permit, but for the exemption in rule 64.3(1). There is no logical, legal or factual basis for exempting animal feeding operations from the operation permit requirement.

Animal feeding operations certainly operate a waste disposal system. A disposal system is defined in rule 60.2 as a system for disposing of sewage, industrial waste, or other wastes. It is likely that many animal feeding operations will not be required to have NPDES permits because

DNR will determine that they do not discharge or propose to discharge. Therefore, animal feeding operations that are not required to have NPDES permits must be required to have operation permits.

DNR staff has responded to this argument by saying that for animal feeding operations, NPDES permits are operation permits. Does that mean that all animal feeding operations, since they operate disposal systems, will be required to have NPDES permits? Of course not. This creates a total and inexplicable exemption from permitting for animal feeding operations. We challenge DNR to rationally and logically explain why animal feeding operations should be treated differently than any other operator of a disposal system. Such an explanation has not been made to date. The failure to do so clearly shows that this rule is arbitrary and capricious, an abuse of discretion and unreasonable.

Nor would applying the requirement for operation permits to animal feeding operations be more stringent than the federal rule. The federal rule simply says that an animal feeding operation that is a CAFO and that discharges or proposes to discharge to waters of the United States must have an NPDES permit. The Iowa rules adopt that requirement. The requirement for an operation permit is separate and apart from the EPA rule. It applies to waste disposal operators who are not subject to the NPDES permit requirement and it applies to waters of the State, not waters of the United States. Furthermore, the stringency clause in S.F. 2248 applies only to CAFOs that are required to have NPDES permits, so this clause does not apply to operation permits and does not preclude a requirement for operation permits if the animal feeding operation does not need an NPDES permit.

DNR staff has also implied that Chapter 459 of the Iowa Code is the exclusive law regulating animal feeding operations and that since there is no reference to operation permits in Chapter 459, animal feeding operations cannot be required to have operation permits. But this is not actually the case. The general powers of the EPC and the DNR are set forth in Chapter 455B. Specifically, § 455B.173(3) says the EPC shall establish rules for the location, construction, operation, and maintenance of disposal systems. Section 455B.173(12) says the EPC shall adopt rules for the construction and operation of animal feeding operations as set out in Chapter 459. So Chapters 455B and 459 are to be read and applied together. Moreover, there is nothing in Chapter 459 that makes that chapter the exclusive law regulating animal feeding operations. Therefore it is entirely legal and proper to require operation permits for animal feeding operations.

3. The proposed rules authorize the voluntary certification procedure allowed by the EPA rule. A state does not have to authorize this procedure. DNR staff initially said that they did not want the certification procedure in the Iowa rules and that it would not be in them. Environmental organizations said they agreed and did not want certification included in the rules, either. Then, when the rules were presented to the EPC for consideration, the certification procedure was included. When asked about this, DNR said that the livestock industry wanted the certification option in the rules, so DNR staff included it. Therefore, it was political pressure, not a reasonable exercise of discretion and judgment, that caused the certification procedure to be included in the rules.

4. The proposed rules allow CAFOs to use either the linear or narrative approach for nutrient management plans. Again, when the environmental groups met with DNR staff, the staff said they preferred the linear approach and would adopt that in the rules. In fact, the linear approach has been used for open feedlots that have NPDES permits. So there is no logical reason not to use it for confinement operations.

The narrative approach was apparently added after discussion among the EPC commissioners at the November EPC meeting. It appears from the notes of that meeting that there was concern that the linear approach does not provide enough flexibility for the operator to change terms such as the fields being used for application, the crop rotation or application rates. But the linear approach does not prevent an operator from changing the terms of the plan. It only means that the terms of the plan are terms of the permit and any change is subject to public notice and comment. This is the point of requiring NPDES permits and making the NMP a part of the permit. As the court said in the Waterkeeper case:

Congress clearly intended to guarantee the public a meaningful role in the implementation of the Clean Water Act. The Act unequivocally and broadly declares, for example, that “[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States.

Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 503 (2d Cir. 2005).

Furthermore, 40 C.F.R. § 122.42(e)(6), which is incorporated by reference into the Iowa rules, requires public notice and comment for significant changes to the NMP and does not appear to make any distinction between NMPs that have used the linear approach or the narrative approach. So the alleged flexibility of the narrative approach over the linear approach is a myth.

It is also significant that for several years open feedlots in Iowa have been required to have NPDES permits and NMPs. Those NMPs have used the linear approach and that has apparently worked well with no problems. Therefore, there is no reason not to use the linear approach for all NMPs.

Based on the foregoing, inclusion of the narrative approach for NMPs is arbitrary and capricious, unreasonable and an abuse of discretion.

5. DNR staff has said that it is strictly the CAFO operator who determines if the CAFO discharges or proposes to discharge and therefore has a duty to apply for an NPDES permit. You reaffirmed this in your statements at the public hearing in Washington, Iowa, on January 7, 2011. There is nothing in the EPA rules to justify this interpretation. And likewise, there is nothing in the Iowa rules to justify such an interpretation since rule 65.6 simply adopts the federal rule by reference. The preamble to the EPA rule clarifies that determination of the duty to apply is the same for CAFOs as it is for any other entity that must have an NPDES permit pursuant to 40 C.F.R. § 122.21(a)(1).

Our concern is that DNR's incorrect interpretation will give CAFO operators a sense of power and control that they don't legally have and will provide DNR with an excuse to abdicate its responsibility to ensure that CAFOs that discharge or propose to discharge will have NPDES permits.

Therefore, the Iowa rules should make it clear that the determination of whether the CAFO discharges or proposes to discharge is an objective standard and that the DNR will make that determination for each CAFO.

6. At the public hearing in Washington you said that the goal of the DNR staff working on these rules was to give something to those on both sides of the issue and to just get the rules done, right or wrong. We can understand the frustration you and your colleagues must feel, but the purpose of this rulemaking process is to comply with the EPA rule and to effectively regulate discharges of pollutants from animal feeding operations. To simply focus on striking a political compromise to try to please all interests and on just getting the rules done is arbitrary and capricious, unreasonable and an abuse of discretion.

The Iowa Chapter of the Sierra Club submits these comments in the hope that the final rules that are adopted by the EPC will be improved and will effectively control discharges of pollutants from animal feeding operations. There is no question that Iowans care about clean water and want their water resources protected. Adequate protection requires effective regulation. If livestock operators are voluntarily taking the right steps to prevent discharges, they should have nothing to fear from effective regulations. If they are not taking the right steps, they should. All Iowans share a responsibility to protect our environment.

Very truly yours,

/s/ *Wallace L. Taylor*

Wallace L. Taylor
Legal Chair
Sierra Club Iowa Chapter