

23-2146

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

FOOD & WATER WATCH, *et al.*,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent

and

NATIONAL PORK PRODUCERS COUNCIL, AMERICAN FARM BUREAU
FEDERATION, U.S. POULTRY & EGG ASSOCIATION, and UNITED EGG
PRODUCERS

Intervenor-Respondents

On Petition for Review of a Final Action of the
Environmental Protection Agency

INTERVENOR-RESPONDENTS' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Intervenor-Respondents National Pork Producers Council, American Farm Bureau Federation, U.S. Poultry & Egg Association, and United Egg Producers respectfully submit the following Corporate Disclosure Statement:

National Pork Producers Council (“NPPC”) is a non-profit trade association that has no parent corporation, and no publicly held company has ten percent or greater ownership in NPPC.

American Farm Bureau Federation (“AFBF”) is a voluntary general farm organization that has no parent corporation, and no publicly held company has ten percent or greater ownership in AFBF.

U.S. Poultry & Egg Association (“USPOULTRY”) is a non-profit trade association that has no parent corporation, and no publicly held company has ten percent or greater ownership in USPOULTRY.

United Egg Producers (“UEP”) is a farmer cooperative that has no parent corporation, and no publicly held company has ten percent or greater ownership in UEP.

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INTRODUCTION

This Court should reject Petitioners’ attempt to turn a routine rulemaking-petition-denial challenge into a programmatic attack on the U.S. Environmental Protection Agency’s (“EPA’s”) Clean Water Act (“CWA” or “Act”) regulatory program for concentrated animal feeding operations (“CAFOs”).

The CWA prohibits the discharge of pollutants from any point source without a permit. As many courts have found, Congress gave EPA the authority to regulate actual discharges from point sources, not potential discharges and certainly not the point sources themselves. The Act’s definition of “point source” explicitly includes CAFOs, but it simultaneously *excludes* “agricultural stormwater discharges.” Other provisions of the CWA that address nonpoint source pollution through nonregulatory programs specifically reference runoff of animal waste from manure disposal areas.

Consistent with Congress’s intent, EPA has enacted stringent regulatory requirements for CAFOs: CAFOs must not discharge from production areas or land application areas. The only exceptions are certain precipitation-induced discharges either excluded from permitting by statute (such as agricultural stormwater) or authorized by permits.

Despite EPA’s robust CAFO regulations, backed by the CWA’s strict liability scheme applicable to permitted and unpermitted facilities alike, Petitioners’ core complaint in this case is that not enough CAFOs hold CWA permits. They propose

essentially two ways for EPA to update the CAFO program to try to change that: (1) rewrite the rules to require more CAFOs to obtain permits (whether or not they *actually* discharge), rather than rely on implementation and enforcement of existing rules; and (2) reinterpret the statutory definition of “point source” to categorically prohibit the application of the agricultural-stormwater exemption to CAFOs. Petitioners’ problem is that two other courts of appeals have rejected EPA’s prior attempts to do both, rendering EPA’s denial of their requests eminently reasonable. To avoid the same fate, Petitioners try to redirect this Court away from EPA’s actual decision and toward a litany of complaints that boil down to a policy disagreement with Congress and the statute Congress passed. Petitioners’ hyperbolic factual recitations and mischaracterizations of record evidence distract from the only question before the Court: whether EPA adequately explained why it declined to reopen its existing regulations—a question on which the Agency receives significant deference. As explained by EPA and in this brief, the answer to that question is yes, EPA did more than enough and therefore, Petitioners’ arguments fare no better the third time around.

Even if Petitioners’ approach was not foreclosed by precedent, EPA was well within its discretion to deny the petition and focus on implementing and enforcing the existing regulatory framework rather than overhaul the entire CAFO program.

EPA reasonably concluded it need not expend resources in the way Petitioners want, when Petitioners want.

STATEMENT OF JURISDICTION

Intervenors agree with EPA’s jurisdictional statement.

STATEMENT OF THE ISSUE

Intervenors agree with EPA’s statement of the Issue Presented for Review.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations not in Addendums to Petitioners’ and EPA’s briefs are included in the addendum to this brief.

STATEMENT OF THE CASE

A. Agricultural Livestock Production

Domestic agricultural livestock production is designed to make available pork, chicken, beef, egg, and dairy products that are affordable, safe, and nutritious. Since the 1950s, livestock and poultry production in the United States has more than doubled “to meet the demands for meat and animal products from a growing human population in the U.S. and abroad.” ER-75.

Animal feeding operations “are facilities that house, raise, and feed animals until they are ready for transport to processing facilities that prepare meat for shipment and, eventually, consumption.” *Nat’l Pork Producers Council v. EPA*, 635 F.3d 738, 741 (5th Cir. 2011) (“*NPPC*”). Modern animal feeding operations are

designed and engineered to produce healthy animals and minimize environmental impacts from manure.

The management of animal manure “involves the collection, storage, and eventual use of the manure’s nutrients as fertilizer.” *NPPC*, 635 F.3d at 742. Manure management practices vary depending on numerous factors, such as the type of animals involved, manure moisture content, type of housing, and available fertilization methods. “Following its collection, the manure is typically transported to an on-farm storage or treatment system.” *Id.* Depending on the type of operation, treatment could include solids separation (to remove excess water) or stabilization using anaerobic lagoons, aerobic lagoons, or composting. *E.g.*, SER-29–30; SER-31–33; SER-34–36 (discussing various waste management practices by animal type).

Effluent from human waste, which constitutes the majority of the volume of raw sewage that receives treatment, is generally discharged into waterways following treatment. By contrast, treated manure effluent or dry litter is typically applied to cropland as fertilizer. *See NPPC*, 635 F.3d at 742. “This fertilizing process is called land application.” *Id.* Manure is a valuable natural fertilizer, as it “can supply nutrients required by crops and replenish nutrients removed from soil by crop harvest.” SER-4 (Sawyer, *et al.*, *Using Manure Nutrients for Crop Production*, Iowa State Univ. Extension & Outreach Pubs. (May 2016)); *accord* U.S. EPA, *et al.*,

Beneficial Uses of Manure and Environmental Protection (Aug. 2015)¹ (describing value of manure and use of constituents “as a resource for crop production, improvement of soil quality, and other purposes, while leading to water quality improvements”).

Because modern livestock operations collect and store animal manure for use as fertilizer—and because discharges of animal manure from farms to waterways are unlawful, *see supra* Part C—farms are designed and managed *not* to discharge pollutants to our nation’s waterways. SER-15 (NPPC, *et al.* Internal Comment ID 0590.1.020). For example, at the time the current CAFO rule was developed and ultimately finalized, most egg-laying operations used dry manure handling and utilized “high rise” housing in which “birds are kept on the second floor and the manure drops to the first floor.” 66 Fed. Reg. 2960, 2993 (Jan. 12, 2001). Ventilation is drawn from the outside into the second story, and then down into the manure storage area, where it dries the manure. Manure can typically be stored in such housing for up to a year prior to removal for use as fertilizer. *Id.* When one of these systems is managed in accordance with usual industry and state regulatory design standards, rainfall never comes into contact with this manure while it is in storage. As a result, contaminated stormwater or manure itself does not leave the manure

¹ https://www.epa.gov/sites/default/files/2015-08/documents/beneficial_uses_of_manure_final_aug2015_1.pdf.

storage area. These are inherently “no-discharge” systems. SER-15 (NPPC, *et al.* Internal Comment ID 0590.1.020).

Most swine operations use “deep pit” systems where the animals are housed over a below-ground, steel-reinforced concrete manure storage structure. Such systems are used in the vast majority of new facilities that have been built in the Midwest over the last two decades. “Deep pit systems start with several inches of water” in the pit, and the manure is collected and “stored under the house until it is pumped out” for manure application, typically twice a year. 66 Fed. Reg. at 2991. The manure in a concrete “deep pit” managed according to ordinary standards should never come into contact with rainfall during the storage period, nor should the manure leak out of the concrete pit. SER-15 (NPPC, *et al.* Internal Comment ID 0590.1.020). Manure only leaves the operation when the producer pumps it out for application to cropland. Like the high-rise system in egg-laying operations, manure in a swine deep pit system does not come into contact with rainfall. Both are “no-discharge” systems. *Id.*

Finally, open manure management and storage systems at CAFOs (*e.g.*, open-air effluent lagoons and stormwater containment ponds) typically will not discharge when properly managed, even under extreme weather conditions. Open impoundments with the customary 25-year, 24-hour emergency storm storage capacity that can also maintain twelve inches of freeboard (the area between the top

of the water level and the top of the impoundment structure) can withstand even a storm event with a probable recurrence interval of one in one hundred years, *i.e.*, the 100-year storm. SER-17–18 (NPPC, *et al.* Internal Comment ID 0590.1.020); *see also* 73 Fed. Reg. 70,418, 70,459 (Nov. 20, 2008) (“2008 Rule”) (“The record for the 2003 [new source performance standard (“NSPS”) for certain large CAFOs] showed that new facilities routinely include systems and employ practices that result in no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. from the production areas.”).

When EPA amended its CAFO regulations in 2008, it found that site-specific practices are a key factor in a CAFO’s success in preventing any discharge from open manure management systems, as opposed to any particular capacity design standard. *See* 73 Fed. Reg. at 70,459-63 (explaining that permits for “new source” CAFOs with open containment systems may include a site-specific determination that the CAFO will meet the NSPS no discharge requirement, based on an evaluation of the CAFO’s design, operational practices, and localized climate, soil, and precipitation conditions). Rates of actual discharge or spill incidents from CAFOs reinforced EPA’s findings. Around *one percent or less* of swine and egg-layer CAFOs (including both “closed” and “open” waste management systems) experienced discharges or spills during a five-year period leading up to that rulemaking. SER-13–17 (NPPC, *et al.* Internal Comment ID 0590.1.020).

B. Statutory and Regulatory Framework

1. EPA and the States Cooperate to Regulate Discharges Under the CWA

The CWA provides, with certain exceptions, that “the discharge of any pollutant by any person shall be unlawful.” 33 U.S.C. § 1311(a). “Discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source.” *Id.* § 1362(12)(A); *see also id.* § 1362(16). “Point source” is in turn defined as a “discernible, confined and discrete conveyance, including ... any ... concentrated animal feeding operation [CAFO] ... from which pollutants are or may be discharged.” *Id.* § 1362(14). “This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.” *Id.*

Section 402 of the CWA establishes a National Pollutant Discharge Elimination System (“NPDES”) program, under which EPA or authorized states may allow point sources to discharge pollutants under conditions specified by the individual NPDES permits issued by EPA and the states. *Id.* § 1342. NPDES permits must include “effluent limitations,” which restrict the “quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters.” *Id.* §§ 1342(d)(2), 1362(11). Permits also include reporting and recordkeeping requirements to help ensure compliance with effluent limitations. *See, e.g.*, 40 C.F.R. §§ 122.41–122.42 (general

conditions and CAFO-specific requirements); *see also id.* § 123.25 (State NPDES program requirements).

All but four U.S. states are currently authorized to administer their own permitting programs, which allows those states to become the NPDES permitting agency in lieu of EPA. *See* 33 U.S.C. § 1342(b); U.S. EPA, *NPDES State Program Authority* (Apr. 22, 2024).² EPA retains oversight and veto authority over these state programs, as well as authority to enforce any violation of the CWA or of a state-issued discharge permit. *See* 33 U.S.C. § 1342(c)-(d), (i). This cooperative federalism scheme allows the states to adopt any restriction concerning the discharge of pollutants, including imposing more stringent requirements than the federal NPDES program—so long as states do not impose *less* stringent requirements. *See* 33 U.S.C. § 1370; 40 C.F.R. § 123.1(i).

Water pollution that does not come from a “point source,” such as statutorily-excluded “agricultural stormwater discharges” and other precipitation-induced runoff containing nutrients, is nonpoint source pollution.³ When Congress enacted the CWA, it drew a “clear and precise distinction between point sources, which [are]

² <https://www.epa.gov/npdes/npdes-state-program-authority>.

³ Although Congress did not define “nonpoint source” in the CWA, this Court has explained that “nonpoint source” generally refers to “pollution that does not result from the ‘discharge’ or ‘addition’ of pollutants from a point source.” *See Or. Nat. Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 849 n.9 (9th Cir. 1987).

subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments through the section 208 process,” S. Rep. No. 95-370, at 8 (1977), and section 319 nonpoint source management programs. *See* 33 U.S.C. §§ 1288, 1329; *see also Or. Nat. Desert Ass’n v. U.S. Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008) (explaining that nonpoint sources are “generally excluded from CWA regulations, except to the extent that states are encouraged to promote their own methods of tracking and targeting nonpoint source pollution”). The statute does not provide a “direct mechanism to control nonpoint source pollution but rather uses the ‘threat and promise’ of federal grants to the states to accomplish this task.” *Or. Nat. Desert Ass’n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998) (citation omitted). The statute further directs EPA to provide information to the states to aid in the control of nonpoint source pollution. *See* 33 U.S.C. § 1314(f).

Consistent with Congress’s stated policy to preserve the primary responsibility of States “to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority”, 33 U.S.C. § 1251(b), States have taken their regulatory responsibility over CAFOs seriously since at least the 1990s. *See, e.g.,* Terence J. Centner, *Issue in Environmental Law: Establishing a Rational Basis for Regulating Animal Feeding Operations: A View of the Evidence*, 27 Vt. L.

Rev. 115, 126-28 (2002) (“A study of state legislative efforts between 1994 and 1998 showed a trend of more stringent animal manure management legislation intended to reduce pollutants from this sector of agriculture.”). Indeed, many states impose more requirements on livestock operations than does the federal program; as early as 2002, EPA noted that “only a handful of states rely solely on their State NPDES regulations to address CAFOs. Rather, most use their NPDES regulations as one part of their CAFO program and supplement these requirements with additional provisions.” U.S. EPA, *State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations* at 3 (May 2002).⁴

Take, for instance, Iowa and North Carolina, two states Petitioners criticize (at 56) for having too few NPDES permits, among other alleged shortcomings. Iowa has a robust regulatory regime for animal feeding operations, embodied in both statute and regulations. *See generally* Iowa Code chapters 459, 459A, and 459B; Iowa Admin. Code r. 567-65.⁵ Iowa regulates construction of CAFOs exceeding 1,000 animals, including prescribing construction standards for manure storage. Iowa Admin. Code rr. 567-65.103 & 65.104; *see also id.* r. 567-65.7

⁴ <https://www3.epa.gov/npdes/pubs/statecom.pdf>.

⁵ The Iowa Administrative Code provisions were moved to the cited location as of May 15, 2024 and become effective on June 19, 2024. They are *available at* <https://www.legis.iowa.gov/law/administrativeRules/rules?agency=567&chapter=65&pubDate=05-29-2024>.

(establishing enhanced construction standards for formed manure storage structures located in karst terrain and prohibiting the construction of unformed manure storage structures in karst terrain); *id.* r. 567-65.9 (restricting and prohibiting construction of manure storage in the 100-year floodplain). Iowa also maintains setbacks and prohibitions related to water sources that apply to CAFO construction. *See, e.g.*, Iowa Code § 459.310 (structure setbacks from sinkholes, water sources, designated wetlands and prohibition in floodplains); *id.* § 459.311B (manure stockpile prohibitions and setbacks).

Iowa requires manure management plans for confinement feeding operations larger than 500 animals and nutrient management plans for open feedlots with over 1,000 animals. Unlike EPA's land application regulations, which only apply to land controlled by CAFOs, *see* 40 C.F.R. § 122.23(b), Iowa's regulations require these plans to account for all manure generated, including if the land application occurs on a neighbor's field. *See* Iowa Admin. Code rr. 567-65.110(1), 65.111(5) & (15), and 65.209(8)(c) & (f). Both types of plans cover nitrogen and phosphorus applications. *Id.* r. 567-65.111(3); *id.* r. 567-65.209(8).

To further protect water quality and to minimize impacts on neighbors, Iowa's land application regulations are more prescriptive than federal regulations. *See, e.g.*, *id.* rr. 567-65.100 & 65.200 (minimum controls and prohibitions for manure application); *id.* r. 567-65.101(3) (prohibiting most applications on frozen or snow-

covered ground); *id.* r. 567-65.101(1) and (2) (restrictions on spray irrigation of manure and manure application setback distances from neighboring occupied structures, designated wetlands, rivers, streams, lakes, sinkholes, drinking water wells); *see also* Iowa Code § 459.202 *et seq.* (setback distances for confinement feeding operation structures and dry manure stockpiles from residences, businesses, churches, schools, and public use areas).

North Carolina has one of the strongest permit programs for CAFOs in the nation and “is one of the only states that requires annual inspections of every facility.” N.C. Dep’t of Env’tl. Qual., “Program Summary”;⁶ *see also* N.C. Gen. Stat. § 143-215.10F. By statute, North Carolina requires swine farms that have more than 250 pigs to obtain an animal waste general permit to lawfully operate. N.C. Gen. Stat. §§ 143-215.10B(1); 143-215.10C(a). Thus, almost every swine farm in the State is regulated by an animal waste general permit. *See* N.C. Dep’t of Env’tl. Qual., “Animal Feeding Operations: Purpose and Function.”⁷ North Carolina also requires swine farms to be sited at least 500 feet from wells that supply public and private water sources. N.C. Gen. Stat. § 106-803(a)(4), (5). The outer perimeter of land

⁶ <https://www.deq.nc.gov/about/divisions/water-resources/water-quality-permitting/animal-feeding-operations/program-summary> (last visited June 5, 2024).

⁷ <https://www.deq.nc.gov/about/divisions/water-resources/permitting/animal-feeding-operations> (last visited June 5, 2024).

application sites must be at least 75 feet from residential property boundaries and perennial streams or rivers, and other animal waste management systems may not be constructed within the 100-year floodplain. N.C. Gen. Stat. § 106-803(a1), (a2).

In addition, North Carolina requires every animal operation having an animal waste management system to have a state-certified “operator in charge” who must satisfy specific training, examination, and continuing education requirements. *See id.* § 90A-47.2 & 90A-47.3. These requirements aim to “protect the public health and to conserve the quality of the State’s water resource,” while encouraging development and improvement of the State’s agricultural land for the production of food and other agricultural products. *Id.* § 90A-47. And significantly, any new or expanded swine farm must meet even more stringent wastewater and air quality performance standards to be allowed to operate. N.C. Gen. Stat. § 143-215.10I(b)(2); 15A N.C. Admin. Code 02T .1307.

To sum up, looking only at the number of CAFOs that have NPDES permits in these two states (or any other states) provides an incomplete snapshot of what water pollution prevention requirements actually apply to CAFOs.

2. EPA’s 2003 CAFO Rule

In 2003, EPA promulgated updated CAFO regulations that were upheld in part and vacated in part by the Second Circuit. *See* 66 Fed. Reg. 2960 (Jan. 12, 2001) (proposed rule); 68 Fed. Reg. 7176 (Feb. 12, 2003) (“2003 Rule”). Two aspects of

the 2003 Rule are particularly relevant here: (1) EPA’s interpretation of the statutory exclusion of “agricultural stormwater discharges” from the definition of “point source” in 33 U.S.C. § 1362(14); and (2) a rebuttable presumption that large CAFOs had a duty to apply for NPDES permits.

Agricultural Stormwater Exclusion. As described above, the CWA’s definition of “point source” expressly includes CAFOs while simultaneously excluding “agricultural stormwater discharges.” 33 U.S.C. § 1362(14). Congress did not define either of those terms and thus, the Act’s definition of “point source” is “self-evidently ambiguous” because it does not elucidate the overlap between agricultural stormwater discharges from CAFOs and discharges more broadly from CAFOs. *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 507 (2d Cir. 2005). In its 2003 Rule, EPA reconciled the ambiguity as follows: discharges of manure, litter, or process wastewater to navigable waters “as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. § 1362(14).” 40 C.F.R. § 122.23(e). Agricultural stormwater discharges in turn are “*precipitation-related* discharges” of manure, litter or process wastewater, but *only* “where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural

utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi) through (ix).” *Id.* § 122.23(e)(1).

Several environmental groups challenged the 2003 Rule, contending that the CWA’s definition of “point source” encompasses *all* CAFO discharges, including runoff from land application areas. The Second Circuit disagreed, upholding EPA’s interpretation as “a reasonable construction in light of the legislative purpose of the agricultural stormwater exemption[.]” *Waterkeeper*, 399 F.3d at 507. The court held it was “reasonable to conclude that when Congress added the agricultural stormwater exemption to the Clean Water Act, it was affirming the impropriety of imposing, on ‘any person,’ liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather—even when those discharges came from what would otherwise be point sources.” *Id.* Thus, whether a discharge from a CAFO land application area should be considered a regulated discharge or nonpoint source pollution (because it is an “agricultural stormwater discharge” that is excluded from the definition of “point source”) “turned . . . on the primary cause of the discharge.” *Id.* at 508.

The *Waterkeeper* court explained that EPA’s interpretation aligns with the CWA’s text: “like the [CWA] itself, the CAFO Rule seeks to remove liability for agriculture-related discharges primarily caused by nature, while maintaining liability for other discharges.” *Id.* at 508-09. And after considering the legislative history—

including the same excerpt that Petitioners rely on in this case, *see id.* at 508 n.23, the court concluded that none of it “comes close to casting doubt on the construction we permit here.” *Id.* at 508; *see also id.* at 507 (“There is no authoritative legislative history to the contrary [of EPA’s reasonable interpretation].”).

Duty to Apply. The 2003 Rule also included a requirement that “[a]ll CAFO owners or operators must . . . either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit.” 68 Fed. Reg. at 7266-67. This “‘duty to apply’ provision [was] based on the presumption that every CAFO has a *potential to discharge*.” *Id.* at 7202 (emphasis added). The Second Circuit vacated that provision after determining that EPA violated the plain text of the CWA by attempting to regulate *all* CAFOs through a blanket duty to apply. By its terms, the “Clean Water Act authorizes the EPA to regulate, through the NPDES permitting system, only the discharge of pollutants.” *Waterkeeper*, 399 F.3d at 504. It does not authorize the EPA to regulate point sources in and of themselves—without an actual discharge there is “no statutory obligation of point sources to comply with EPA regulations for point source discharges . . . [nor] to seek or obtain an NPDES permit in the first instance.” *Id.* at 505. As such, attempting to regulate all CAFOs based on a presumption of their *potential* to discharge exceeded EPA’s authority. About this, “Congress left little room for doubt[.]” *Id.* at 504.

3. EPA's 2008 CAFO Rule

In response to the Second Circuit's vacatur of the duty to apply provision in the 2003, EPA further revised the CAFO regulations in 2008. *See* 73 Fed. Reg. 70,418. The 2008 Rule attempted again to expand the universe of regulated CAFOs through a modified duty to apply provision. This time, rather than presuming that CAFOs have a "potential" to discharge, the 2008 Rule presumed that certain CAFOs "propose to discharge." *Id.* at 70,422. The 2008 Rule "clarifie[d] that a CAFO proposes to discharge if based on an objective assessment it is designed, constructed, operated, or maintained such that a discharge will occur, not simply such that it might occur." *Id.* at 70,423. In other words, "proposing" to discharge did not signal an intent or desire to discharge, but was based on an assessment of the characteristics of a CAFO itself, "regardless of whether the operator wants to discharge[.]" *NPPC*, 635 F.3d at 750.

EPA was well aware of the fact that the modified duty to apply provision in the 2008 Rule would not reach as many CAFOs as the blanket duty to apply provision in the 2003 Rule because CAFOs "with no discharges other than precipitation-related discharges from its land application areas" would not need permits. *See* 73 Fed. Reg. at 70,434-35. Consequently, EPA strengthened the requirements for runoff from CAFO land application areas to qualify for the

agricultural stormwater exclusion. *See id.* In the 2008 Rule, EPA added a new provision that clarifies:

(1) For unpermitted Large CAFOs, a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi) through (ix).

(2) Unpermitted Large CAFOs must maintain documentation specified in § 122.42(e)(1)(ix) either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

40 C.F.R. § 122.23(e).

The Fifth Circuit vacated the 2008 Rule’s duty to apply provision on the same grounds that the Second Circuit vacated the similar provision in the 2003 Rule.⁸ Emphasizing (as *Waterkeeper* did) that the scope of EPA’s authority under the CWA is “strictly limited to the discharge of pollutants”, the Fifth Circuit found no legal distinction between the “potential to discharge” presumption and the “propose to

⁸ Like *Waterkeeper*, the challenge to the 2008 Rule was consolidated by the Judicial Panel on Multi-District Litigation pursuant to 28 U.S.C. § 2112(a)(3), and the Fifth Circuit was randomly selected as the reviewing court. *See NPPC*, 635 F.3d at 741. Accordingly, the Second and Fifth Circuit decisions were nationally applicable holdings. *See Georgia v. President of the United States*, 46 F.4th 1283, 1304-05 (11th Cir. 2022) (explaining binding effect of consolidation process for certain lawsuits against federal agencies).

discharge” presumption. *NPPC*, 635 F.3d at 750-51. Under either presumption, EPA was impermissibly seeking to regulate a point source—CAFOs based on their characteristics—rather than regulating an *actual* discharge from a point source, as required by the CWA. *See id.* (citing *NRDC v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988) (CWA “does not empower the agency to regulate point sources themselves”); *Serv. Oil, Inc. v. EPA*, 590 F.3d 545, 550 (8th Cir. 2009) (“[b]efore any discharge, there is no point source”)). The Fifth Circuit left intact the 2008 Rule’s provisions governing agricultural stormwater discharges for CAFOs that do not have NPDES permits.

After *NPPC*, EPA revised its regulations in 2012 to remove the “propose to discharge” presumption. 77 Fed. Reg. 44,494 (July 30, 2012).

C. Current Regulatory Provisions Governing CAFOs

EPA’s Answering Brief (at 7-9) discusses the current permitting requirements and effluent limitations guidelines applicable to CAFOs as set forth in 40 C.F.R. parts 122 and 412. Intervenor write separately to highlight the stringency of the zero discharge provisions as well as the robust regulatory requirements applicable to runoff from land application areas.

Put simply, a “CAFO must not discharge unless the discharge is authorized by an NPDES permit.” 40 C.F.R. § 122.23(d)(1). EPA’s effluent limitations guidelines in 40 C.F.R. Part 412 generally impose a “zero discharge” requirement

for CAFOs. This means “no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. from the production area”⁹ except for precipitation-related overflow of process wastewater, but *only if* the permitted “production area is designed, constructed, operated and maintained to contain all manure, litter, and process wastewater including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event.” 40 C.F.R. §§ 412.31(a), 412.33(a), 412.46(a). But if a CAFO does not have a permit, any discharge from a production area, no matter the size of the storm event, violates the CWA.

To be clear, *all* CAFOs, whether permitted or unpermitted, must meet this zero-discharge standard. As EPA previously explained:

[t]he CWA is very clear that point source discharges from CAFOs are illegal unless the operator has applied for and obtained an NPDES permit. Thus, ‘zero discharge’ is the only standard to which EPA can hold unpermitted CAFOs under the CWA. Large storms and chronic rainfall events do occur and production areas built to the 25-year, 24-hour storm design standard can and do discharge during precipitation events. Under the CWA, as previously discussed, a violation of the prohibition against discharging without a permit occurs even if the discharge was not planned or intended. Conversely, in the event of a discharge from a permitted CAFO, the discharge will not violate the CWA if the CAFO is in compliance with its permit.

73 Fed. Reg. at 70,424-25.

⁹ The “production area” is defined broadly and “includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas.” 40 C.F.R. § 122.23(b)(8). The regulations further define what each of those areas encompass. *See id.*

For both permitted and large unpermitted CAFOs, EPA’s regulations state in the plainest of terms that “[t]he discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements[.]” 40 C.F.R. § 122.23(e). If and only if manure, litter, or process wastewater are applied as fertilizer for crop production in accordance with specified agricultural practices, precipitation-induced discharges from those land application areas are excluded from permitting as agricultural stormwater discharges. *See id.* The exclusion does *not* apply to dry weather discharges, discharges that result from over-application, or land-applied waste that is deposited directly into a navigable water. In those cases, discharges are unlawful and subject to CWA enforcement. In short, precipitation runoff from land application areas is excluded from permitting only if CAFO farmers apply manure, litter, or process wastewater using sound agricultural practices.

The director of an approved state NPDES permitting program—or an EPA Regional Administrator in States that do not have an approved permitting program—is responsible for establishing technical standards to ensure appropriate agricultural utilization of nutrients. *See* 73 Fed. Reg. at 70,435. Such standards “specify the method or methods for determining whether land application rates are to be based on nitrogen or phosphorus, or whether existing nutrient loads in the soil preclude

land application, and also address the form, source, amount, timing, and method of application on each field to achieve realistic production goals while minimizing movement of nitrogen and phosphorus to surface waters.” *Id.*

With an eye toward the requirement in 40 C.F.R. § 122.42(e)(1)(viii) to establish protocols to land apply manure in accordance with site-specific practices that ensure appropriate agricultural utilization of nutrients, EPA promulgated two alternative approaches for determining appropriate rates of application: (i) the linear approach, which expresses “field-specific maximum rates of application in terms of the amount of nitrogen and phosphorus from manure, litter, and process wastewater allowed to be applied;” and (ii) the narrative rate approach, which expresses “the field-specific rate of application as a narrative rate prescribing how to calculate the amount of manure, litter, and process wastewater allowed to be applied.” 73 Fed. Reg. at 70,444; *see also* 40 C.F.R. § 122.42(e)(5)(i)-(ii).

Under either approach, developing appropriate land application rates is a complex, field-specific endeavor. CAFOs “must identify the crops to be planted and the planned crop rotations, or other uses, and the nitrogen and phosphorus needs of these crops or other uses.” 73 Fed. Reg. at 70,445. Farmers must then “identify the realistic yield expected from the crop or crops planted in the field, in order to calculate the proper amount of nutrients to apply.” *Id.* Typically, state land grant universities provide recommendations on how to calculate the nutrient needs for a

given crop, as well as the per acre realistic yield goal for that crop. *See id.* And because a CAFO operator can often plant more than one crop on a particular field in a given year, “the plant available amount of nitrogen and phosphorus needs to be calculated with reference to the nutrient needs of all the crops to be planted on such field in a given year in order to be accurate,” and the operator must also account for other field uses, such as pasture or cover crops. *See id.*

The development of appropriate site-specific nutrient management practices also requires a field-specific assessment of the potential for nitrogen and phosphorus transport from each field. *See id.* The purpose of that assessment is to determine whether nitrogen or phosphorus is the “appropriate limiting nutrient for developing land application rates, *i.e.*, whether phosphorus or nitrogen limits the amount of manure, litter, or process wastewater that can be applied and the degree to which the limiting nutrient restricts land application, or whether land application is to be avoided altogether.” *Id.* In fields where phosphorus is the limiting nutrient, this requires consideration of the annual phosphorus removal rate for each crop or other field use. *See id.* In fields where nitrogen is the limiting nutrient, this requires consideration of the total amount of plant available nitrogen for each crop from residual nitrogen already in the field (from prior applications of manure or chemical fertilizer and from other sources such as crop residue or nitrogen-fixing legumes) and from further additions of nitrogen (from fertilizer, manure, or biosolids). *See id.*

EPA has characterized the site-specific nutrient management practices that a CAFO must develop as “preconditions for determining whether the agricultural stormwater exemption applies for discharges from land application areas under the CAFO’s control.” *Id.* at 70,437. Any CAFOs whose land application activities are not in compliance with these rigorous requirements are subject to enforcement by EPA, state regulators, and citizen plaintiffs. *See id.* at 70,437 & 70,457; *see also* 33 U.S.C. §§ 1319 & 1365.

The Clean Water Act’s remedial scheme imposes “substantial criminal and civil penalties for discharging any pollutant into waters covered by the Act without a permit[.]” *U.S. Army Corps of Eng’rs v. Hawkes Co.*, 578 U.S. 590, 594 (2016). Consequently, livestock operations carry the risk of criminal fines and imprisonment for even *negligent* violations of EPA’s current CAFO regulations. *See* 33 U.S.C. § 1319(c). Civil penalties can be as much as \$66,712 per day per violation. *See* 40 C.F.R. § 19.4; *see also* 88 Fed. Reg. 89,309, 89,312 (Dec. 27, 2023). “[T]he consequences [] even for inadvertent violations can be crushing.” *Hawkes Co.*, 578 U.S. at 602-03 (Kennedy, J., concurring) (citation omitted).

D. Petition for Rulemaking and EPA’s Denial

As detailed in EPA’s Brief, several organizations, including Petitioners, filed a petition for rulemaking regarding the CAFO regulations, which EPA denied. *See* EPA Br. 9-14.

SUMMARY OF THE ARGUMENT

Petitioners' request to upend EPA's CAFO regulatory program is meritless. The Court should deny their petition for review.

I. Rather than challenge EPA's denial of the specific requests in their petition for rulemaking, Petitioners levy a broadside attack on EPA's CAFO program generally. Longstanding precedent forecloses this sort of programmatic challenge. Furthermore, Petitioners' grievances stem from the very structure of the CWA itself, and thus requires appeal to Congress in the first instance.

II. Petitioners obscure the appropriate standard for reviewing EPA's denial of a petition for rulemaking. While Petitioners present this case as an ordinary arbitrary-and-capricious challenge, judicial review of petition denials is extremely limited and highly deferential, as agencies approach the height of their discretion when deciding whether to expend limited resources on regulatory change not compelled by statute. EPA exercised its discretion reasonably here and sufficiently explained its reasoning. Moreover, no radical change in factual circumstances lessens the deference that EPA's decision deserves.

III. Petitioners wrongly assert that EPA's CAFO program undermines its duties under the CWA and that EPA erred by focusing its limited resources on improving implementation and further study of the issues identified, instead of revising its regulations.

A. EPA's CAFO program aligns with the relevant CWA provisions governing discharges from point sources. EPA's regulations generally prohibit discharges from CAFO production areas, and any permitting exclusions for agricultural stormwater discharges from CAFOs flow directly from the statute.

B. Petitioners' principal request that EPA compel additional CAFOs to obtain permits through regulatory reform invites EPA to defy both precedent and the statute. EPA's petition denial rationally explains why the reform Petitioners seek does not differ meaningfully from prior attempts to expand the universe of permitted CAFOs that two courts of appeals rejected. Petitioners' mischaracterizations of the record transparently attempt to propel the Court into upending EPA's program, but not only are Petitioners' attacks misplaced, they cannot justify an attempt by EPA to exceed its statutory authority by regulating point sources divorced from discharges.

C. Petitioners' call for EPA to reverse its longstanding interpretation of the agricultural stormwater exclusion for CAFO land application runoff runs headlong into the statute, Congress's intent, and a prior court decision upholding EPA's interpretation. In denying the petition for rulemaking on this issue, EPA reasonably declined to revisit its interpretation and opted instead to focus on implementation and enforcement of its stringent CAFO regulations. Petitioners' claims that EPA has created a permitting loophole rely on speculation and factual

distortions. Nor can Petitioners point to any radical changes in EPA's factual assumptions that would require EPA to abandon its interpretation.

STANDARD OF REVIEW

Intervenors agree with EPA's statement of the Standard of Review.

ARGUMENT

I. This Court Should Reject Petitioners' Improper Programmatic Challenge to EPA's CAFO Program.

As EPA explained, Petitioners have forfeited all but one of their arguments related to their prior requests for EPA to revise specific provisions in the existing CAFO regulations by failing to explain why EPA's denials of those specific requests was arbitrary and capricious. *See* EPA Br. 20-22. Instead, Petitioners now focus on arguing generally that EPA has unlawfully declined to reform the CAFO program. In Petitioners' own words, they ask this Court to review EPA's refusals to "update the CAFO program," Pet. Br. 27, and they repeatedly attack EPA for avoiding "regulatory reform" without much specificity as to what those reforms should be. *Id.* at 22, 31-33, 38.

This Court should reject Petitioners' attempt to mount an impermissible programmatic attack on EPA's CAFO program dressed up as a challenge to the denial of a rulemaking petition. "It is axiomatic that . . . [the APA's] limitation on judicial review precludes broad programmatic attack[s], whether couched as a challenge to an agency's action or failure to act." *Whitewater Draw Nat. Res.*

Conservation Dist. v. Mayorkas, 5 F.4th 997, 1012 (9th Cir. 2021) (finding no judicial review available for challenge to “continuing operations” and list of actions taken to “implement these programs”) (internal quotation marks and citation omitted). Petitioners “cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.” *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 891 (1990).

Contrary to Petitioners’ claim, EPA’s CAFO program is no “regulatory failure”, nor has EPA “created a permitting loophole” allowing CAFOs that otherwise would be subject to NPDES permit requirements to operate unregulated. Pet. Br. 16 & 52. As in any other industry, the CWA regulates discharges of pollutants from point sources, *subject to certain statutory exclusions and exemptions*, including agricultural stormwater. And, as explained herein, the CWA is a cooperative federalism scheme that envisions a robust role for state regulators to determine any additional regulation that may be necessary given local circumstances. Petitioners’ dislike of the CWA’s broader scheme, or of the particular exclusion Congress created for agricultural stormwater, does not render it a “permitting loophole” of EPA’s creation. As both the *Waterkeeper* and *NPPC* courts recognized, “[t]o the extent that policy considerations do warrant changing the statutory scheme, such considerations address themselves to Congress, not to the

courts.” *Waterkeeper*, 399 F.3d at 505 (internal quotation marks and citation omitted); *NPPC*, 635 F.3d at 753 (quoting same).¹⁰

II. Petitioners Largely Ignore the Appropriate Standard of Review.

Petitioners gloss over the highly deferential standard by which courts review an agency’s decision not to initiate a rulemaking. *See* Pet. Br. 25-26. Petitioners’ reliance on garden-variety arbitrary and capricious case law outside of the petition-denial context is misguided.¹¹

As this Court previously clarified, “[w]hen an agency refuses to exercise its discretion to promulgate proposed regulations, the Court’s review ‘is extremely limited and highly deferential.’” *Compassion Over Killing v. FDA*, 849 F.3d 849, 854 (9th Cir. 2017) (quoting *Mass. v. EPA*, 549 U.S. 497, 527-28 (2007) (internal

¹⁰ For the same reason, the economic and market policy considerations raised by the amicus brief of Dr. John Ikerd, *et al.*, are also best directed at Congress.

¹¹ *See, e.g., Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 67 F.4th 1027 (9th Cir. 2023) (reviewing order approving mining project); *City & Cnty. of S.F. v. EPA*, 75 F.4th 1074 (9th Cir. 2023) (reviewing order denying review of NPDES permit); *Nat’l Wildlife Fed’n v. EPA*, 286 F.3d 554 (D.C. Cir. 2002) (reviewing proposed regulations); *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007) (reviewing establishment of NEPA categorical exclusion); *League of Wilderness Defs. / Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) (reviewing challenge to aerial pesticide spraying project); *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 57 (D.C. Cir. 2015) (reviewing methodology for setting fixed loss thresholds for outlier payments); *Butte Cnty., Ca. v. Hogen*, 613 F.3d 190 (D.C. Cir. 2010) (reviewing approval of tribal gaming ordinance).

quotation marks omitted)); *accord Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 921 (D.C. Cir. 2008) (an agency’s decision not to initiate rulemaking proceedings is *at the high end of the range of deference*, and only in the “rarest and most compelling” circumstances will a court overturn an agency’s judgment in this regard).

In conducting its extremely limited and highly deferential review, the only question before this Court is whether EPA reasonably explained and sufficiently grounded in the record its decision not to initiate a rulemaking to overhaul the CAFO program. *See Mass. v. EPA*, 549 U.S. at 533. EPA appropriately exercised its broad discretion to consider resource constraints, to balance competing statutory considerations, and to otherwise determine the “manner, timing, content, and coordination of its regulations[.]” *Id.*; *see also id.* at 527 (“an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities”).

The CWA authorizes the EPA Administrator to issue rules as “necessary to carry out his functions under this chapter.” 33 U.S.C. § 1361(a). This leaves EPA broad discretion to choose “between proceeding by general rule or by individual, ad hoc litigation.” *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). EPA’s decision to focus on enforcement rather than overhaul its CAFO program rules is well within EPA’s discretion and entitled to great deference. *See Compassion Over Killing*, 849 F.3d at 855-56 (“FTC also reasonably denied Plaintiffs’ rulemaking petition based

on its discretion to combat any potentially misleading egg labeling through ad hoc enforcement proceedings.”). Equally important, EPA acted reasonably by declining to pursue regulatory reforms that likely would exceed EPA’s authority to promulgate. *See id.* at 854 (not arbitrary and capricious for agency to deny rulemaking petition where proposed rule was for labeling of product outside agency’s labeling jurisdiction).

As explained in EPA’s denial, the current CAFO rules are plenty stringent. *See* ER-226–27 (citing 40 C.F.R. § 122.23(e), (h); *id.* § 122.42(e)). Any problems with implementation and enforcement are for EPA (or States and citizen plaintiffs) to tackle, and this Court owes a high level of deference to EPA’s reasonable explanations of why updating the CAFO program was neither appropriate nor necessary now. *See O’Keeffe’s, Inc. v. U.S. Consumer Prod. Safety Comm’n*, 92 F.3d 940, 944 (9th Cir. 1996) (agency did not act arbitrarily or capriciously in determining that an amendment to the regulations was not appropriate or necessary); *see also WildEarth Guardians v. EPA*, 751 F.3d 649, 655 (D.C. Cir. 2014) (deferring to agency’s determination of its priorities).

The few cases Petitioners cite that involve an agency’s refusal to promulgate rules are inapposite. One case involved an absence of any explanation by the agency. *See Am. Lung Ass’n v. EPA*, 134 F.3d 388, 392 (D.C. Cir. 1998) (insufficient record for judicial review because administrator gave no real explanation for conclusion

that peak SO₂ bursts present no health hazard). Another involved a clear statutory directive to promulgate standards after making certain findings. *See Mass v. EPA*, 549 U.S. at 533 (“Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”) (citing 42 U.S.C. § 7521(a)(1)). Neither situation exists here.

Similarly, Petitioners mistakenly rely on *American Horse Protection Association, Inc. v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987), claiming that EPA’s petition denial failed to account for a “radical change in its factual premises.” *See* Pet. Br. 60, 62. Not only is that untrue here for the reasons explained below in Part III.C.3, but also the court’s ultimate conclusion in *American Horse* turned on the agency’s cursory analysis. The court admonished the agency for providing only “two conclusory sentences” with “no articulation of the factual and policy bases for the decision.” 812 F.2d at 6 (cleaned up). By contrast, here, when EPA denied the petition for rulemaking, it provided a fulsome explanation for why it was neither legally nor factually compelled to change course. *See* EPA Br. 11-14.

Last, Petitioners discuss *In re A Community Voice*, 878 F.3d 779, 786 (9th Cir. 2017), at length (Pet. Br. 29-31), but that case arose out of the *grant* of a petition for rulemaking that EPA subsequently delayed acting on for eight years. It also

involved a clear statutory framework to prevent childhood lead poisoning on an ongoing basis, which included “Congress[’s] specific[] demand[] [for] the creation of a task force that would be instructed to advise EPA and HUD as to ‘revising ... regulations ... issued by [HUD] and other Federal agencies relating to lead-based paint poisoning prevention.’” *Id.* at 784 (citing 42 U.S.C. § 4852a(a), (c)(5)). Petitioners offer no equivalent statutory directive requiring that EPA regularly amend its CAFO rules. As noted above, the CWA authorizes the EPA Administrator to issue rules as “necessary to carry out his functions under this chapter,” 33 U.S.C. § 1361(a), leaving wide latitude to determine when issuing such a rule is necessary—as opposed to taking another approach, such as enforcement or implementation.

As detailed more fully in the following sections, Petitioners cannot overcome the highly deferential standard applicable to review of EPA’s petition denial. Thus, this Court should affirm EPA’s decision.

III. EPA Reasonably and Correctly Declined to Overhaul the Existing CAFO Program.

In arguing that EPA’s CAFO program undermines its statutory obligations and that EPA arbitrarily refused to update the program in favor of focusing on improving implementation and further study, Petitioners effectively fault EPA for failing to do two things: (i) revise the CAFO regulations to somehow compel additional CAFOs to obtain permits; and (ii) eliminate the agricultural stormwater exclusion for CAFO land application runoff. None of Petitioners’ arguments has

merit. For starters, EPA’s CAFO program is fully consistent with the CWA. Moreover, EPA’s refusal to revise its sufficiently stringent regulations and to instead focus on effective implementation and enforcement of those regulations is reasonable and consistent with nationally applicable rulings on virtually the same issues by the Second and Fifth Circuits. EPA was well within its authority to deny Petitioners’ requests to overhaul the CAFO regulations and, in doing so, satisfied the minimal requirements of rationality courts apply when reviewing an agency’s decision not to initiate a rulemaking.¹²

A. EPA’s CAFO Program and Petition Denial Align with the Statute.

Contrary to Petitioners’ characterizations, EPA has not deviated from its responsibility to administer the CWA, *see* Pet. Br. 27-30, or “neglect[ed] its statutory duty to regulate an entire point source category[.]” *Id.* at 31-32. Consistent with the CWA and this Court’s precedents interpreting the Act that Petitioners rely on, EPA *does* regulate actual discharges from CAFO production areas, and any CAFOs that do not have NPDES permits must be “zero discharge” facilities or risk “substantial criminal and civil penalties for discharging any pollutant into waters covered by the

¹² EPA’s brief thoroughly addresses Petitioners’ contentions and explains why the petition denial was not arbitrary and capricious. *See* EPA Br. at 19-49. Intervenor therefore support, and do not duplicate here, EPA’s arguments regarding such issues as the propriety of the CAFO detailed study (*id.* at 32-35), the Federal Advisory Committee Act and the Stakeholder Subcommittee (*id.* at 27-28 & 36-39), and environmental justice (*id.* at 45-49).

Act without a permit[.]” *Hawkes Co.*, 578 U.S. at 594. *See supra* Statement of the Case, Part C (discussing current CAFO regulations). Additionally, EPA has consistently interpreted the term “concentrated animal feeding operation” in 33 U.S.C. § 1362(14), which Congress left to EPA to define, *not* to encompass land application areas and thus, precipitation-related discharges from CAFO land application areas are excluded from permitting as “agricultural stormwater discharges” so long as CAFO farmers land apply manure, litter, and process wastewater using sound agricultural practices. *See supra* Statement of the Case, Part B.1-2 (discussing agricultural stormwater exclusion). And much like CAFOs that improperly discharge without a permit, CAFOs that incorrectly invoke the agricultural stormwater exclusion run could be subject to “crushing” penalties even for “inadvertent violations[.]” *Hawkes Co.*, 578 U.S. at 602 (Kennedy, J., concurring).

Petitioners’ reliance on *Northern Plains Resource Council* is particularly misplaced, as EPA has not created any permitting exemptions for CAFOs that are unmoored from the statute. *See* Pet. Br. 28 (quoting *N. Plains Res. Council v. Fid. Expl. & Dev. Co.*, 325 F.3d 1155, 1164 (9th Cir. 2003)). Unlike the failed attempt in that case to exempt discharges of produced water pumped from coal bed methane extraction sites from permitting, the only exclusion from permitting in EPA’s CAFO

program (for “agricultural stormwater discharges”) comes straight from the statute. *See infra* Part III.C.1.

To be sure, EPA’s CAFO program has, at times, deviated from the statute, but not how Petitioners suggest. Of particular relevance here, EPA has twice attempted to enact the sort of “reform” that Petitioners effectively advocate here: revisions to the CAFO regulations to mandate somehow that all (or most) CAFOs obtain CWA permits. In both instances, courts of appeals had little difficulty concluding that EPA’s regulations were contrary to the CWA’s plain text. *See infra* Part III.B.

B. Courts of Appeals Have Twice Rejected Prior Attempts to Expand the Universe of Permitted CAFOs Based on Presumptions and Estimates.

Petitioners contend that one of the “critical flaws in the Agency’s CAFO program” is that “the majority of CAFOs discharge yet evade permit coverage[.]” Pet. Br. 16-17. Petitioners further claim that EPA unlawfully declined to “make lasting improvements through the regulatory process” despite having been “provided with a roadmap for how to do so[.]” *Id.* at 31. Although Petitioners’ brief fails to explain precisely what improvements EPA should have made, their underlying petition for rulemaking purported to address their belief that most CAFOs are improperly discharging without permits by asking EPA to “[e]stablish an evidentiary presumption that CAFOs with certain characteristics discharge.” *Id.* at 20-21.

The “roadmap” that Petitioners propose is not viable, which is why EPA appropriately rejected it. As EPA’s denial explained, Petitioners’ proposed solution is substantively indistinguishable from what two different Courts of Appeals rejected when vacating prior EPA attempts to force more CAFOs to obtain permits. The Second Circuit rejected EPA’s original “duty to apply” provision in 2005, and the Fifth Circuit rejected a modified “duty to apply” provision in 2011. Because both decisions were consolidated by the Judicial Panel on Multi-District Litigation, they had and continue to have a nationwide effect. *See* 28 U.S.C. § 2112(a)(3); *Georgia*, 46 F.4th at 1304-05.

There is no legally significant daylight between these nationally applicable decisions and Petitioners’ proposed regulatory reform. Mindful of those cases, EPA’s petition denial provided an adequate and reasonable explanation that its resources were best focused on implementing and enforcing its existing CWA obligations—which generally mandate zero discharges from CAFO production areas—rather than on fashioning and defending another rule that would eventually be found *ultra vires* by the courts.

1. The CWA Does Not Authorize a Presumption Based on the Potential to Discharge.

The Second Circuit already addressed EPA’s attempt to regulate CAFOs by imposing a “duty to apply” in *Waterkeeper*, 399 F.3d at 505. In 2003, EPA promulgated a rule on CAFOs that included, among other things, a requirement that

“[a]ll CAFO owners or operators must . . . either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit.” 68 Fed. Reg. at 7266-67. This “‘duty to apply’ provision [was] based on the presumption that every CAFO has a potential to discharge.” *Id.* at 7202. On a challenge to that aspect of the rule, the Second Circuit agreed that this attempt to regulate CAFOs through a blanket duty violated the CWA’s plain text.

By its terms, the “Clean Water Act authorizes the EPA to regulate, through the NPDES permitting system, *only the discharge of pollutants.*” *Waterkeeper*, 399 F.3d at 504 (emphasis added). It does not authorize the EPA to regulate point sources in and of themselves; unless there is an actual discharge there is “no statutory obligation of point sources to comply with EPA regulations for point source discharges . . . [nor] to seek or obtain an NPDES permit in the first instance.” *Id.* at 505. As such, the *potential* to discharge is no basis to require a CAFO to obtain a permit. About this, “Congress left little room for doubt[.]” *Id.* at 504.

2. The CWA Does Not Authorize a Presumption Based on a CAFO’s Design or Operational Profile.

Petitioners’ brief cites only obliquely to *NPPC* without addressing its holding, and there is no mystery why: that case squarely forecloses Petitioners’ argument that EPA can establish a presumption of discharge under circumstances like the case at bar. In *NPPC*, the Fifth Circuit built upon the foundation laid by the Second Circuit

in *Waterkeeper* to conclude that EPA’s second attempt to expand the universe of permitted CAFOs fared no better.

The rule at issue in *NPPC* was EPA’s response to *Waterkeeper*. In the 2008 CAFO Rule, EPA merely changed its “duty to apply” requirement from a “potential to discharge” scheme to a “propose to discharge” scheme. To be clear, “propose to discharge” in the 2008 Rule did not mean an *intent* or desire to actually discharge, but was based on the characteristics of a CAFO itself: “the EPA’s definition of a CAFO that ‘proposes’ to discharge is a CAFO designed, constructed, operated, and maintained in a manner such that the CAFO will discharge ... regardless of whether the operator wants to discharge[.]” *NPPC*, 635 F.3d at 750. Emphasizing, as the Second Circuit did in *Waterkeeper*, that the scope of EPA’s authority under the CWA is “strictly limited to the discharge of pollutants”, the Fifth Circuit found no legal distinction between the “potential to discharge” presumption and the “propose to discharge” presumption. *Id.* at 750-51. Under either presumption, the EPA was impermissibly seeking to regulate a point source (*i.e.*, a CAFO) in lieu of an actual discharge. *See id.*

3. EPA’s Petition Denial Reasonably Explains Why Any Effort to Revise Existing Regulations with a Presumption Would Be Legally Infirm.

To the extent Petitioners try to push for an evidentiary presumption here, such a rule would meet the same fate as the presumption that the *NPPC* court invalidated.

Both presumptions attempt to avoid the CWA’s unequivocal requirement of an “actual discharge” for a permit to be required; both fail under the plain text of the statute. As EPA explained in its petition denial: “It is difficult to distinguish between the petition’s request that EPA establish a rebuttable presumption that CAFOs with certain characteristics actually discharge . . . and the approach EPA used in the 2008 Rule, requiring facilities to obtain permits if they are designed, constructed, operated, and maintained such that a discharge will occur, which the Fifth Circuit Court of Appeals vacated.” ER-223.

Against the backdrop of two nationally applicable court decisions rejecting EPA’s prior attempts to widen the scope of its permitting by imposing a presumptive duty on certain CAFOs, EPA wisely concluded that its limited resources are better devoted not to another ill-fated rule revision but rather to addressing improper and unpermitted discharges—actual discharges—through enforcement. The CWA broadly prohibits the “discharge of any pollutant” from a point source unless in compliance with a permit, 33 U.S.C. § 1311(a), and that prohibition is enforceable by EPA, states, and citizen plaintiffs. *See, e.g.*, 33 U.S.C. §§ 1342(h), 1365. Accordingly, EPA’s conclusion that this would be a more effective direction is reasonable.

4. This Court Should Not Upend EPA’s Denial Based on Petitioners’ Mischaracterizations of Record Evidence.

Throughout Petitioners’ arguments concerning EPA’s “wholesale denial” and refusal to institute regulatory reforms, Petitioners claim that EPA has ignored extensive evidence, including the Agency’s own prior findings, concerning CAFO pollution and the need for reform. *See* Pet. Br. 27-35. In so doing, Petitioners repeatedly distort record evidence.

First, Petitioners insist that EPA “admits” thousands of CAFOs are illegally discharging without permits. *See id.* at 28. This assertion is based on Petitioners’ mischaracterization of the 2008 Rule that “EPA estimate[d] at least 75 percent of CAFOs discharge non-agricultural stormwater pollution.” *See id.* at 17 & 55 (quoting 73 Fed. Reg. at 70,469). What EPA actually did in that rule was estimate what percentage of CAFOs would need to apply for a permit under the extra-statutory “propose to discharge” standard that the *NPPC* court vacated because it was not the equivalent of an actual discharge. Thus, contrary to Petitioners’ repeated insistence, EPA has never “admitted” or quantified what percentage of CAFOs *actually discharge* pollutants into navigable waters improperly without a permit. Furthermore, as EPA explained, that estimate is based on “conservative categorical assumptions about the likelihood of a discharge based on broad operational profiles and do[es] not account for more subtle stratifications within specific operational categories.” 73 Fed. Reg. at 70,469. EPA arrived at that gross overestimate in the

face of record evidence that the vast majority of CAFOs do not discharge. *See* SER-13–18 (summarizing analysis of several years’ worth of state release and discharge reports for CAFOs and EPA’s own conclusions on the lack of a potential for discharges from closed animal production and waste management systems).

Second, Petitioners suggest that when EPA proposed an information collection rule in 2011, it was seeking the same information it now proposes to study “only to promptly withdraw it a year later, finding existing sources of information to be adequate.” Pet. Br. at 32. To the contrary, EPA sufficiently explained its need for additional information. Petitioners misstate the rationale for withdrawing the rule. The 2011 proposed rule also sought comment on three alternatives EPA was already considering: “Collecting data from existing sources, requiring states to submit the information to the EPA, and expanding the EPA’s network of compliance assistance and outreach tools.” 77 Fed. Reg. 42,679, 42,680 (July 20, 2012). The comments received from individuals, states, and state associations noted that “it would be too burdensome for CAFOs to comply with the proposed rule” and that “states already hav[e] the information the EPA was seeking by virtue of existing CAFO programs at the state and local level.” *Id.* at 42,681.

In the interim EPA had established another way of collecting information: “In July 2012, the EPA also established a Memorandum of Understanding (MOU) with the Association of the Clean Water Administrators (ACWA) that specifically will

assist the Agency in collecting information about CAFOs. ACWA is an independent, nonpartisan, non-profit corporation of state and interstate water program managers.” *Id.* Finally, Petitioners’ characterization of “existing sources of information” implies that EPA no longer sought new information. In fact, EPA opted to pursue the more efficient approach of collecting CAFO information from state authorities and ACWA to determine gaps in that information and determine next steps: “Collecting existing information, evaluating it, and compiling it in one format will better inform the Agency of what additional information may be needed and the best way to collect that information, if necessary.” *Id.* at 42,682. EPA also identified its other tools for gathering information that did not require promulgating a new rule: “To fill in information gaps, the Agency may use existing tools, such as site visits and individual information collection requests.” *Id.* In short, EPA did not abandon its prior efforts to study issues relating to regulation of CAFOs, and it is not simply rehashing those efforts now.¹³

¹³ For these reasons, Judge Millett’s (non-precedential) dissent in *Multicultural Media Telecom & Internet Council v. FCC*, 873 F.3d 932, 941 (D.C. Cir. 2017), finds no factual analogy here. EPA’s incremental and phased approach to gathering data before acting here is hardly the “blanket rejection” criticized there. *Contra id.* at 940.

Third, Petitioners claim that EPA admitted in 2022 that “‘many CAFOs are not regulated and continue to discharge without NPDES permits,’ in part because its ‘regulations ... make it difficult to compel permit coverage.’” Pet. Br. 29 (quoting ER-138). Note that the cited document fails to substantiate the claim that many CAFOs are improperly discharging. If discharges were indeed so rampant, EPA has all the tools it needs to enforce against violations, as do States and citizen plaintiffs. In any event, Petitioners omit critical context from that document explaining why EPA laments that it is difficult to compel permit coverage: it is “‘because successive court decisions have severely limited EPA’s ability to require CAFOs to obtain an NPDES permit.’” ER-138. The Agency wisely recognized that it would be perilous to promulgate any presumptions or duties to apply and that it should instead “‘explore its authority to improve the effectiveness of the CAFO regulations in a number of ways,’” ER-138, which in fact EPA is now doing in lieu of adopting Petitioners’ proposed reforms.

Finally, Petitioners contend that “‘EPA also concedes it has not required permitted CAFOs to use adequate pollution control technology,’” Pet. Br. 28, and that EPA “‘is further aware the primary land application control technology it has relied on for decades is ‘insufficient’ and outdated.’” *Id.* at 29 (citations omitted). The record belies these assertions. At most, EPA has acknowledged that it seeks “‘to make an informed, reasoned decision regarding the effectiveness of the existing ELG and

whether emerging alternatives to existing requirements may be technologically available and economically achievable and may better protect water quality.” ER-218.

C. EPA Reasonably Declined to Reinterpret the Scope of the Agricultural Stormwater Exclusion.

Petitioners’ other attempt to overhaul EPA’s CAFO program focuses on EPA’s longstanding interpretation of the statutory exclusion of “agricultural stormwater discharges” from the definition of “point source” in 33 U.S.C. § 1362(14). Petitioners assert that it was arbitrary and capricious for EPA to refuse to revisit that exclusion, and they claim that EPA’s current interpretation (codified at 40 C.F.R. § 122.23(e)): (i) undermines Congress’s intent and ignores relevant legislative and regulatory history, Pet. Br. 47-52; (ii) creates a permitting loophole, which no longer makes sense in the absence of a requirement for all large CAFOs to apply for permits, *id.* at 52-59; and (iii) relies on incorrect factual assumptions about the efficacy of nutrient management practices, *id.* at 59-62. None of these contentions withstands scrutiny. EPA correctly rejected the call to conclude “that no CAFO-related discharges can ever constitute agricultural stormwater.” *Id.* at 47.

1. EPA’s Interpretation Is Consistent with the Statute and Congress’s Intent.

EPA’s brief details how the Second Circuit affirmed the Agency’s interpretation of the agricultural stormwater exemption in the face of a challenge by

environmental organizations. *See* EPA Br. 50-52. That court analyzed the statute’s text, legislative history, and circuit precedent in concluding that EPA’s interpretation “comports [] with Congress’ intent in enacting the agricultural stormwater exemption.” *Waterkeeper*, 399 F.3d at 507-08. The *Waterkeeper* court underscored that, “like the *Clean Water Act* itself, the CAFO Rule seeks to remove liability for agriculture-related discharges primarily caused by nature, while maintaining liability for other discharges.” *Id.* at 508-09 (emphasis added). Thus, “where a CAFO has taken steps to ensure appropriate agricultural utilization of the nutrients in manure, litter, and process wastewater, it should not be held accountable for any discharge that is primarily the result of ‘precipitation.’” *Id.* at 509. Petitioners seek to evade that nationally applicable decision by insisting that the Second Circuit engaged in only a limited review of legislative history and that the “full history” shows that EPA’s interpretation is unreasonable and contrary to Congress’s intent. Petitioners are wrong on both counts.¹⁴

¹⁴ In evaluating Petitioners’ arguments concerning Congress’s intent, this Court can consider arguments concerning the Act’s structure and legislative history regardless of whether EPA invoked such grounds in its decision. *See Ry. Labor Execs. Ass’n v. ICC*, 784 F.2d 959, 969 (9th Cir. 1986) (“Generally, a reviewing court may only judge the propriety of an agency decision on the grounds invoked by the agency. . . . However, the court is not so bound when, as here, the issue in dispute is the interpretation of a federal statute.”).

Petitioners' lone citation to legislative history is a statement by Senator Dole preceding the 1972 Act, which Petitioners believe demonstrates that Congress sought to control all precipitation runoff from CAFOs through permitting. Pet. Br. 48. As the Second Circuit explained in *Waterkeeper*, Petitioners' reliance on that statement is misplaced: "Senator Dole did not at all suggest that the Act aimed, in fact, to regulate precipitation runoff. His statement about precipitation runoff was merely part of a larger discussion about the general environmental threat posed by animal and poultry waste." 399 F.3d at 508 n.23. Nowhere in Senator Dole's discussion of animal waste did he espouse Petitioners' view that precipitation runoff from land application areas under the control of CAFOs requires a point source permit.

Next, nothing in EPA's regulatory history supports Petitioners' claim that, in 1987, Congress "ratified" an EPA interpretation of "agricultural stormwater discharge" that excludes "any CAFO-related discharges," presumably including runoff from land application areas associated with CAFOs. *See* Pet. Br. 49-51. Petitioners correctly note that throughout EPA's history of excluding agricultural runoff from point source permitting requirements, the Agency did not extend that exclusion to discharges from CAFOs, as defined elsewhere in EPA's regulations. *E.g.*, 45 Fed. Reg. 33,290, 33,442 (May 19, 1980). What Petitioners leave out, however, is that before 2003, EPA had not considered discharges from land

application areas to constitute discharges from CAFOs.¹⁵ Nothing in the regulatory history that Petitioners rely on suggests otherwise. Thus, to the extent Congress ratified anything in 1987, it ratified EPA’s omission of land application areas from CAFO point source permitting.

Regardless of whether the definition of a CAFO encompasses land application areas, *see* 40 C.F.R. § 122.23(b), EPA has not interpreted the CWA as categorically excluding land applications from CWA regulation. Quite the contrary, as EPA’s regulations make clear, the “discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control *is a discharge from that CAFO subject to NPDES permit requirements*, except where it is an agricultural storm water discharge[.]” 40 C.F.R. § 122.23(e) (emphasis added); *accord Waterkeeper*, 399 F.3d at 508 (“[W]hile the Rule holds CAFOs liable for most land application discharges, it prevents CAFOs from being held liable for

¹⁵ Although EPA had initially proposed in 2001 to depart from its longstanding interpretation by amending the definition of AFO to encompass land application areas, EPA made clear in that proposal that “it has not previously defined CAFOs to include the land application area.” 66 Fed. Reg. at 3008; *accord* EPA, Draft Guidance Manual and Example NPDES Permit for Concentrated Animal Feeding Operations, at 2-2 (1999) (“[L]and application areas, which are outside the area of confined animals, do not fall geographically within the regulatory definition of an AFO.”),

<https://nepis.epa.gov/Exe/ZyPDF.cgi/P10059U0.PDF?Dockey=P10059U0.PDF>.

‘precipitation-related discharge[s]’ where ‘manure, litter or process wastewater has [otherwise] been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization.’”) (citing 40 C.F.R. § 122.23(e)).

Other provisions of the statute further illustrate why Petitioners’ claim that a narrower interpretation of the agricultural stormwater exclusion would better conform to Congress’s intent is meritless. For instance, the text and legislative history of Section 208 list “runoff from manure disposal areas” among the “nonpoint sources of pollution” to be addressed by states and area-wide waste management agencies. 33 U.S.C. § 1288(b)(2)(F); S. Rep. No. 92-414, at 39 (1971); *see also* S. Rep. No. 95-370, at 37 (“Nonpoint source pollution from animal wastes, fertilizers, pesticides, and eroded soil is difficult to control because of the diffuse nature of the problem and is growing in magnitude.”). Congress repeatedly acknowledged the significance of agricultural nonpoint sources of pollution, including runoff carrying land applied animal wastes, but it generally intended for states to address these through nonpoint source pollution control plans, *not* point source permits.

Similarly, Congress added Section 319, 33 U.S.C. § 1329, to the CWA in 1987 to further direct and assist the State’s efforts to address nonpoint source pollution, and the legislative history for that provision lists among its objectives “controlling agricultural runoff” and “improved management of animal wastes and

feedlots.” S. Rep. No. 98-282, at 1 (1983). If, as Petitioners suggest, “the terms ‘agricultural stormwater’ and ‘concentrated animal feeding operation’ are most logically read as being mutually exclusive,” the provisions addressing such runoff in sections 208 and 319 would make little sense. EPA’s interpretation thus is the more sensible construction of the statute, as it comports with these provisions that reflect Congress’s intent that stormwater runoff from land application areas should be left to state control.

Finally, CWA Section 405 demonstrates that, where it intended to, Congress knew how to regulate land application of pollutants generated by a point source, to control runoff from the receiving lands into navigable waters. As enacted in 1972, that section prohibited, except in accordance with a permit from EPA, the “disposal of sewage sludge resulting from the operation of a treatment works . . . (including the removal of in-place sewage sludge from one location and its deposit at another location)” if it would “result in any pollutant from such sewage sludge entering the navigable waters[.]” 33 U.S.C. § 1345(a). Congress strengthened Section 405 in 1987 by mandating the development of technical requirements and standards for sewage sludge use and disposal, including land application, and it authorized EPA to implement those standards through the NPDES permit program. *See* 33 U.S.C. § 1345(d). Among other requirements, sewage sludge must be applied to agricultural

lands at a “rate that is equal to or less than the agronomic rate” as specified in an NPDES permit. 40 C.F.R. § 503.14(d).

The inclusion of specific language in Section 405 authorizing EPA to regulate the land disposal of domestic sewage sludge demonstrates that Congress knew how to authorize point source regulation of land application activities. The absence of a comparably clear provision for point source regulation of land application of CAFO manure is noteworthy. “Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Salinas v. U.S. R.R. Ret. Bd.*, 592 U.S. 188, 196 (2021) (internal quotation marks and citation omitted). EPA’s current interpretation of the agricultural stormwater exclusion fits neatly within Congress’s disparate treatment of land application activities.

Because EPA’s interpretation of the agricultural stormwater exclusion comports with Congress’s intent, EPA’s denial of Petitioners’ request to reinterpret the agricultural stormwater discharges exclusion was reasonable.

2. EPA’s Agricultural Stormwater Exclusion Does Not Allow CAFOs to Evade Regulation.

Petitioners advance three principal arguments in claiming that EPA’s interpretation of the agricultural stormwater exclusion allows CAFOs to evade regulation. *First*, Petitioners contend the exclusion cannot survive without a mandate

that all large CAFOs apply for permits, because EPA would not have promulgated a standalone exclusion based on its prior regulatory experience with CAFOs. *See* Pet. Br. 53-55. *Second*, Petitioners argue that the standalone exclusion has become a “permitting loophole.” *See id.* at 55-57. *Third*, Petitioners claim EPA’s existing regulations are too “minimal” and that it is too difficult to verify compliance. *See id.* at 57-58. None of these has any merit.

Petitioners’ first argument rests entirely on speculation that EPA would not have adopted a standalone agricultural stormwater exclusion without the now defunct “duty to apply” requirement in the 2003 Rule. *See* Pet. Br. 54-55. Based on that speculation, Petitioners assert that EPA has arbitrarily refused to revisit the exclusion. *See id.* at 55. But there is no point in speculating about what EPA would have done without universal permit coverage. On remand following *Waterkeeper*, EPA reasonably concluded that the agricultural stormwater exclusion *could* function on its own. Specifically, when EPA promulgated the CAFO Rule, it acknowledged that “the existing regulations could be construed as applying only to Large CAFOs with NPDES permits” and that “a CAFO with no discharges other than precipitation-related discharges from its land application areas would not be considered to ‘discharge’ if it applies manure, litter, or process wastewater to land under its control in accordance with nutrient management practices that ensure appropriate agricultural utilization of the nutrients[.]” 73 Fed. Reg. at 70,434-35. EPA thus

promulgated “new provisions [to] clarify how the agricultural stormwater exemption applies to Large CAFOs *that do not have an NPDES permit.*” *Id.* (emphasis added). Contrary to Petitioners’ claims, there is no reason to doubt that EPA would have promulgated the agricultural stormwater exclusion without a requirement that all Large CAFOs must apply for permits. EPA did exactly that in 2008.

Second, Petitioners claim the agricultural stormwater exclusion has become a “permitting loophole” because most CAFOs are exploiting it, but Petitioners distort the facts. *See* Pet. Br. 54-57. For instance, Petitioners claim that appropriate nutrient management practices are not followed for 92% of manured acres. *See id.* at 54 n.11 (citing ER-89); *see also* Br. of Amici Curiae Drs. Keeve Nachman, Silvia Secchi, and Jennifer Jay at 5. But that compares apples to oranges. The 92% estimate appears to come from a USDA report analyzing all cultivated cropland in a particular region, as opposed to CAFO land application areas. *Compare* ER-89 *with* ER-117 (citing USDA, 2012 *Assessment of the Effects of Conservation Practices on Cultivated Cropland in the Upper Mississippi River Basin*).¹⁶ More importantly, USDA was *not* evaluating whether CAFOs were land applying in accordance with the nutrient management requirements applicable to agricultural stormwater under EPA’s CAFO

¹⁶ This report is not cited in Petitioners’ 2017 petition nor is it in the administrative record, but it is *available at* <https://www.nrcs.usda.gov/publications/ceap-crop-2010-Upper-MRB-full.pdf>.

Rule, *see* 40 C.F.R. § 122.42(e); rather, USDA was analyzing what percentage of all farmers (not just CAFOs) land applying either commercial fertilizer or manure were achieving the highest USDA-defined conservation treatment levels for nitrogen and phosphorus. USDA Report at 31-33. Accordingly, USDA’s estimate proves nothing about whether CAFO farmers are “exploiting” the agricultural stormwater exclusion as Petitioners claim.

Similarly, Petitioners’ claim that even EPA estimates at least 75 percent of CAFOs are improperly discharging misses the mark. *See supra* Part III.B.4. EPA’s estimate was not focused on whether CAFOs were improperly invoking the agricultural stormwater exclusion, but instead focused on what percentage of CAFOs met the defunct “propose to discharge” from production areas standard that the Fifth Circuit invalidated as contrary to the CWA. *See* 73 Fed. Reg. at 70,469. And again, EPA arrived at that number after making overly conservative assumptions in the face of record evidence to the contrary. *Compare* Pet. Br. 55 with *supra* Part III.B.4 (refuting reliance on EPA’s estimate).

Finally, Petitioners claim that the requirements that CAFOs must satisfy to avail themselves of the agricultural stormwater exclusion are too “problematic to properly implement” and thus, it was arbitrary for EPA to deny their petition and focus on implementation and enforcement. *See* Pet. Br. 57-59 (quoting EPA’s characterization of the *pre-2003* regulations). As detailed in EPA’s denial,

Petitioners’ attempts to paint the current regulations as imposing “minimal requirements” for a CAFO to invoke the agricultural stormwater exclusion ignores just how extensive those requirements are for both permitted and unpermitted CAFOs. *See* ER-226-27 (detailing specified elements in 40 C.F.R. § 122.42(e) for demonstrating land application at appropriate rates). Consequently, Petitioners’ suggestion that CAFOs can simply “claim” the agricultural stormwater exclusion by “doing nothing” distorts reality. *See* Pet. Br. 57-58. Failure to comply with the requirements in 40 C.F.R. §§ 122.23(e) and 122.42(e) carries the risk of significant penalties of nearly \$67,000 per violation per day. *See* 33 U.S.C. § 1319; *see also* 88 Fed. Reg. at 89,312 (2024 civil monetary penalty inflation adjustment rule).

Petitioners’ fundamental criticism appears to be that EPA’s regulations give CAFOs too much discretion to determine whether runoff from land application areas meets the requirements for the agricultural stormwater exclusion or whether a permit is needed. But as EPA previously recognized, the owner or operator of *any* point source under the Clean Water Act has discretion “to determine whether or not to apply for a permit in the first instance,” *see* 73 Fed. Reg. at 70,425, and if the determination turns out to be incorrect, that owner or operator is subject to enforcement by EPA, state regulators, or citizen plaintiffs. Here, EPA’s CAFO regulations impose stringent requirements: generally, zero discharges from the production area, and discharges of nutrients from applied manure or process

wastewater from land application areas are generally subject to permitting *unless* they satisfy the detailed nutrient management requirements for the agricultural stormwater discharge exclusion to apply. 40 C.F.R. § 122.23(e). Any CAFO would be foolish to baselessly invoke the agricultural stormwater discharge exclusion given the substantial penalties in play.

3. Petitioners Have Not Demonstrated Any Radical Change in Facts Underpinning EPA’s Agricultural Stormwater Exclusion.

As EPA correctly explains, Petitioners’ claim that EPA’s current interpretation of the agricultural stormwater exclusion rests on incorrect facts lacks merit. *See* EPA Br. 57-59. Intervenors write separately to emphasize that EPA’s interpretation of the agricultural stormwater exclusion does not depend on improvements in water quality or minimizing pollution and that Petitioners’ record citations do not illustrate any radical change in the factual findings that EPA made in promulgating the current agricultural stormwater exclusion in 2003.

Petitioners claim that EPA’s petition denial runs contrary to record evidence demonstrating nutrient management plans are designed to “maximize crop growth rather than protect water quality[.]” *See* Pet. Br. 59 (citing ER-89, ER-115). But the applicability of the agricultural stormwater exclusion has never hinged on whether manure application rates are “water quality-based.” ER-115. Rather, the exclusion depends on whether manure has been applied “in accordance with site-specific

nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater[.]” 40 C.F.R. § 122.23(e)(1). In both the rule and its petition denial, EPA fully “recognize[d] that even when the manure, litter, or process wastewater is land applied in accordance with practices designed to ensure appropriate agricultural utilization of nutrients, *some runoff of nutrients may occur during rainfall events*[.]” 68 Fed. Reg. at 7197-98 (emphasis added); *accord* ER-225. EPA nevertheless decided the exclusion should apply.

Petitioners further claim that the record is “replete with evidence undermining EPA’s assumption regarding the efficacy of NMPs,” Pet. Br. 60, but Petitioners’ record citations do not undermine EPA’s current interpretation of the agricultural stormwater exclusion. Petitioners first quote from a study that posits that “just having a NMP does not reduce excess nutrient application, nor does it guarantee improvements in water quality.” *Id.* (quoting ER-277). Regarding the first finding, the author of that study was making the unremarkable point that farmers must actually *implement* their nutrient management plans, rather than merely having such plans. ER-277. That finding is fully consistent with the factual premises underpinning EPA’s current interpretation: under existing regulations, any CAFO that fails to follow site-specific nutrient management practices to ensure appropriate agricultural utilization of nutrients in land applied manure would *not* qualify for the agricultural stormwater exclusion. *See* 40 C.F.R. § 122.23(e). Nor does that author’s

second finding demonstrate any fundamental change in EPA’s factual assumptions. As noted above, the applicability of the agricultural stormwater exclusion has never depended on improving water quality.

Petitioners also claim that a passage from a different rulemaking petition provides numerous examples of studies showing that, “even at recommended rates, land application leads to the addition of more nutrients than plants can take up and soil can retain[.]” Pet. Br. 60-61 (quoting ER-184). But again, nothing in that passage—or the studies cited therein—undermines the factual foundation for EPA’s current interpretation of the agricultural stormwater exclusion. EPA has always recognized that *some* runoff of nutrients could occur following rain events even where nutrients are applied in compliance with 40 C.F.R. § 122.23(e); such runoff would still qualify as agricultural stormwater discharges. *See* 68 Fed. Reg. at 7197-98. Furthermore, to the extent that passage relies on studies that long pre-date EPA’s 2003 Rule, those studies shed no light on whether land application in accordance with the current requirements for invoking the agricultural stormwater exclusion minimizes runoff.

Additionally, Petitioners state (Pet. Br. 61) that EPA’s own studies have undercut factual assumptions underpinning the agricultural stormwater exclusion, but the only study that Petitioners cite to (at ER-282-87) “has not been subjected to Agency review and therefore does not necessarily reflect the views of the Agency,

and no official endorsement should be inferred.” SER-7 (emphasis added). Moreover, the goal of that study was to test a premise that the author mistakenly attributed to EPA’s regulations. Contrary to that author’s view, the agricultural stormwater exclusion does not rely on a “tacit assumption” that all nutrients are retained or taken up in the root zone. ER-282. Again, in promulgating the exclusion, EPA was fully aware that even when manure is land applied pursuant to practices designed to ensure appropriate agricultural utilization of nutrients, some runoff of nutrients derived from the manure following rain events would still occur. *See* 68 Fed. Reg. at 7197-98.

Finally, Petitioners’ reliance on cases concerning an agency’s refusal to update its regulations despite fundamental changes in factual premises previously considered by the agency is misplaced. As explained above (Part II), EPA’s thorough and well-reasoned petition denial here is readily distinguishable from the “two conclusory sentences” that lacked any “articulation of the factual and policy bases for the decision” that the D.C. Circuit found lacking in *American Horse*. 812 F.2d at 6 (internal quotation marks and citation omitted). *Environmental Health Trust v. FCC* is distinguishable on the same grounds, as the D.C. Circuit found the agency’s explanation there “practically identical” to that in *American Horse*. 9 F.4th 893, 905 (D.C. Cir. 2021). Nor does *Flyers Rights Education Fund, Inc. v. FAA* help Petitioners here. *See* 864 F.3d 738 (D.C. Cir. 2017). In that case, the D.C. Circuit

explained that an agency’s resort to “off-point studies and undisclosed tests using unknown parameters” failed to justify its decision. *Id.* at 741. Whatever the merits of the D.C. Circuit’s exhortation about “[a]gency reasoning ... adapt[ing] as the critical facts change,” *id.* at 745, an agency may only adapt so far as the law allows. And here, EPA well explained why Petitioners’ requests fall outside those bounds. In sum, these out-of-circuit cases do not undermine EPA’s decision here.

For these reasons, Petitioners have not shown that EPA’s current interpretation of the agricultural stormwater exclusion relies on incorrect facts or that EPA’s petition denial is arbitrary and capricious.

CONCLUSION

The Court should deny the Petition for Review.

Dated: June 7, 2024

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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23-2146

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

FOOD & WATER WATCH, *et al.*,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent

and

NATIONAL PORK PRODUCERS COUNCIL, AMERICAN FARM BUREAU
FEDERATION, U.S. POULTRY & EGG ASSOCIATION, and UNITED EGG
PRODUCERS

Intervenor-Respondents

On Petition for Review of a Final Action of the
Environmental Protection Agency

ADDENDUM OF STATUTES AND REGULATIONS OF INTERVENORS

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(Added May 24, 1949, ch. 139, § 110, 63 Stat. 105.)

HISTORICAL AND REVISION NOTES
 1949 ACT

Incorporates in title 28, U.S.C., as section 2111 thereof, the harmless error provisions of section 269 of the Judicial Code (now repealed), which applied to all courts of the United States and to all cases therein and therefore was superseded only in part by the Federal Procedural Rules, which apply only to the United States district courts.

§ 2112. Record on review and enforcement of agency orders

(a) The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply:

(1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order. In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency, board, commission, or officer concerned shall file the record in the court in which proceedings with respect to the order were first instituted.

(2) For purposes of paragraph (1) of this subsection, a copy of the petition or other pleading which institutes proceedings in a court of appeals and which is stamped by the court with the date of filing shall constitute the pe-

tion for review. Each agency, board, commission, or officer, as the case may be, shall designate by rule the office and the officer who must receive petitions for review under paragraph (1).

(3) If an agency, board, commission, or officer receives two or more petitions for review of an order in accordance with the first sentence of paragraph (1) of this subsection, the agency, board, commission, or officer shall, promptly after the expiration of the ten-day period specified in that sentence, so notify the judicial panel on multidistrict litigation authorized by section 1407 of this title, in such form as that panel shall prescribe. The judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period specified in the first sentence of paragraph (1), in which the record is to be filed, and shall issue an order consolidating the petitions for review in that court of appeals. The judicial panel on multidistrict litigation shall, after providing notice to the public and an opportunity for the submission of comments, prescribe rules with respect to the consolidation of proceedings under this paragraph. The agency, board, commission, or officer concerned shall file the record in the court of appeals designated pursuant to this paragraph.

(4) Any court of appeals in which proceedings with respect to an order of an agency, board, commission, or officer have been instituted may, to the extent authorized by law, stay the effective date of the order. Any such stay may thereafter be modified, revoked, or extended by a court of appeals designated pursuant to paragraph (3) with respect to that order or by any other court of appeals to which the proceedings are transferred.

(5) All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed. For the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.

(b) The record to be filed in the court of appeals in such a proceeding shall consist of the order sought to be reviewed or enforced, the findings or report upon which it is based, and the pleadings, evidence, and proceedings before the agency, board, commission, or officer concerned, or such portions thereof (1) as the rules prescribed under the authority of section 2072 of this title may require to be included therein, or (2) as the agency, board, commission, or officer concerned, the petitioner for review or respondent in enforcement, as the case may be, and any intervenor in the court proceeding by written stipulation filed with the agency, board, commission, or officer concerned or in the court in any such proceeding may consistently with the rules prescribed under the authority of section 2072 of this title designate to be included therein, or (3) as the court upon motion of a party or,

Sec.

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Editorial Notes

CODIFICATION

The Federal Water Pollution Control Act, comprising this chapter, was originally enacted by act June 30, 1948, ch. 758, 62 Stat. 1155, and amended by acts July 17, 1952, ch. 927, 66 Stat. 755; July 9, 1956, ch. 518, §§1, 2, 70 Stat. 498–507; June 25, 1959, Pub. L. 86–70, 73 Stat. 141; July 12, 1960, Pub. L. 86–624, 74 Stat. 411; July 20, 1961, Pub. L. 87–88, 75 Stat. 204; Oct. 2, 1965, Pub. L. 89–234, 79 Stat. 903; Nov. 3, 1966, Pub. L. 89–753, 80 Stat. 1246; Apr. 3, 1970, Pub. L. 91–224, 84 Stat. 91; Dec. 31, 1970, Pub. L. 91–611, 84 Stat. 1818; July 9, 1971, Pub. L. 92–50, 85 Stat. 124; Oct. 13, 1971, Pub. L. 92–137, 85 Stat. 379; Mar. 1, 1972, Pub. L. 92–240, 86 Stat. 47, and was formerly classified first to section 466 et seq. of this title and later to section 1151 et seq. of this title. The act is shown herein, however, as having been added by Pub. L. 92–500 without reference to such intervening amendments because of the extensive amendment, reorganization, and expansion of the act's provisions by Pub. L. 92–500.

SUBCHAPTER I—RESEARCH AND RELATED PROGRAMS

§ 1251. Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environ-

shall be available for reallocation, until expended, to other qualified projects under subsection (a) of such section 206. In no event, however, shall any payments exceed the Federal share of the cost of construction incurred to the date of the voucher covering such payment plus the Federal share of the value of the materials which have been stockpiled in the vicinity of such construction in conformity to plans and specifications for the project.”

§ 1287. Authorization of appropriations

There is authorized to be appropriated to carry out this subchapter, other than sections 1286(e), 1288 and 1289 of this title, for the fiscal year ending June 30, 1973, not to exceed \$5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed \$6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed \$7,000,000,000, and subject to such amounts as are provided in appropriation Acts, for the fiscal year ending September 30, 1977, \$1,000,000,000 for the fiscal year ending September 30, 1978, \$4,500,000,000 and for the fiscal years ending September 30, 1979, September 30, 1980, not to exceed \$5,000,000,000; for the fiscal year ending September 30, 1981, not to exceed \$2,548,837,000; and for the fiscal years ending September 30, 1982, September 30, 1983, September 30, 1984, and September 30, 1985, not to exceed \$2,400,000,000 per fiscal year; and for each of the fiscal years ending September 30, 1986, September 30, 1987, and September 30, 1988, not to exceed \$2,400,000,000; and for each of the fiscal years ending September 30, 1989, and September 30, 1990, not to exceed \$1,200,000,000.

(June 30, 1948, ch. 758, title II, §207, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 839; amended Pub. L. 93-207, §1(3), Dec. 28, 1973, 87 Stat. 906; Pub. L. 95-217, §30, Dec. 27, 1977, 91 Stat. 1576; Pub. L. 97-35, title XVIII, §1801(a), Aug. 13, 1981, 95 Stat. 764; Pub. L. 97-117, §17, Dec. 29, 1981, 95 Stat. 1630; Pub. L. 100-4, title II, §211, Feb. 4, 1987, 101 Stat. 21.)

Editorial Notes

AMENDMENTS

1987—Pub. L. 100-4 inserted “; and for each of the fiscal years ending September 30, 1986, September 30, 1987, and September 30, 1988, not to exceed \$2,400,000,000; and for each of the fiscal years ending September 30, 1989, and September 30, 1990, not to exceed \$1,200,000,000” before period at end.

1981—Pub. L. 97-117 substituted “and for the fiscal years ending September 30, 1982, September 30, 1983, September 30, 1984, and September 30, 1985, not to exceed \$2,400,000,000 per fiscal year” for “and for the fiscal year ending September 30, 1982, not to exceed \$0, unless there is enacted legislation establishing an allotment formula for fiscal year 1982 construction grant funds and otherwise reforming the municipal sewage treatment construction grant program under this subchapter, in which case the authorization for fiscal year 1982 shall be an amount not to exceed \$2,400,000,000”.

Pub. L. 97-35 substituted provisions authorizing not to exceed \$2,548,837,000 for fiscal year ending Sept. 30, 1981, and not to exceed \$0 for the fiscal year ending Sept. 30, 1982, unless an allotment formula is enacted, in which case the authorization is not to exceed \$2,400,000,000, for provisions authorizing not to exceed \$5,000,000,000 for fiscal years ending Sept. 30, 1981 and 1982.

1977—Pub. L. 95-217 inserted “and subject to such amounts as are provided in appropriation Acts, for the

fiscal year ending September 30, 1977, \$1,000,000,000 for the fiscal year ending September 30, 1978, \$4,500,000,000 and for the fiscal years ending September 30, 1979, September 30, 1980, September 30, 1981, and September 30, 1982, not to exceed \$5,000,000,000 per fiscal year”.

1973—Pub. L. 93-207 inserted reference to section 1286(e) of this title.

Statutory Notes and Related Subsidiaries

ADDITIONAL AUTHORIZATION OF APPROPRIATIONS

Pub. L. 94-369, title III, §301, July 22, 1976, 90 Stat. 1011, provided for authorization to carry out this subchapter, other than sections 1286, 1288, and 1289, for the fiscal year ending Sept. 30, 1977, not to exceed \$700,000,000, which sum (subject to amounts provided in appropriation Acts) was to be allotted to each State listed in column 1 of table IV contained in House Public Works and Transportation Committee Print numbered 94-25 in accordance with the percentages provided for such State (if any) in column 5 of such table, and such sum to be in addition to, and not in lieu of, any funds otherwise authorized and to be available until expended.

§ 1288. Areawide waste treatment management

(a) Identification and designation of areas having substantial water quality control problems

For the purpose of encouraging and facilitating the development and implementation of areawide waste treatment management plans—

(1) The Administrator, within ninety days after October 18, 1972, and after consultation with appropriate Federal, State, and local authorities, shall by regulation publish guidelines for the identification of those areas which, as a result of urban-industrial concentrations or other factors, have substantial water quality control problems.

(2) The Governor of each State, within sixty days after publication of the guidelines issued pursuant to paragraph (1) of this subsection, shall identify each area within the State which, as a result of urban-industrial concentrations or other factors, has substantial water quality control problems. Not later than one hundred and twenty days following such identification and after consultation with appropriate elected and other officials of local governments having jurisdiction in such areas, the Governor shall designate (A) the boundaries of each such area, and (B) a single representative organization, including elected officials from local governments or their designees, capable of developing effective areawide waste treatment management plans for such area. The Governor may in the same manner at any later time identify any additional area (or modify an existing area) for which he determines areawide waste treatment management to be appropriate, designate the boundaries of such area, and designate an organization capable of developing effective areawide waste treatment management plans for such area.

(3) With respect to any area which, pursuant to the guidelines published under paragraph (1) of this subsection, is located in two or more States, the Governors of the respective States shall consult and cooperate in carrying out the provisions of paragraph (2), with a view toward designating the boundaries of the inter-

state area having common water quality control problems and for which areawide waste treatment management plans would be most effective, and toward designating, within one hundred and eighty days after publication of guidelines issued pursuant to paragraph (1) of this subsection, of a single representative organization capable of developing effective areawide waste treatment management plans for such area.

(4) If a Governor does not act, either by designating or determining not to make a designation under paragraph (2) of this subsection, within the time required by such paragraph, or if, in the case of an interstate area, the Governors of the States involved do not designate a planning organization within the time required by paragraph (3) of this subsection, the chief elected officials of local governments within an area may by agreement designate (A) the boundaries for such an area, and (B) a single representative organization including elected officials from such local governments, or their designees, capable of developing an areawide waste treatment management plan for such area.

(5) Existing regional agencies may be designated under paragraphs (2), (3), and (4) of this subsection.

(6) The State shall act as a planning agency for all portions of such State which are not designated under paragraphs (2), (3), or (4) of this subsection.

(7) Designations under this subsection shall be subject to the approval of the Administrator.

(b) Planning process

(1)(A) Not later than one year after the date of designation of any organization under subsection (a) of this section such organization shall have in operation a continuing areawide waste treatment management planning process consistent with section 1281 of this title. Plans prepared in accordance with this process shall contain alternatives for waste treatment management, and be applicable to all wastes generated within the area involved. The initial plan prepared in accordance with such process shall be certified by the Governor and submitted to the Administrator not later than two years after the planning process is in operation.

(B) For any agency designated after 1975 under subsection (a) of this section and for all portions of a State for which the State is required to act as the planning agency in accordance with subsection (a)(6), the initial plan prepared in accordance with such process shall be certified by the Governor and submitted to the Administrator not later than three years after the receipt of the initial grant award authorized under subsection (f) of this section.

(2) Any plan prepared under such process shall include, but not be limited to—

(A) the identification of treatment works necessary to meet the anticipated municipal and industrial waste treatment needs of the area over a twenty-year period, annually updated (including an analysis of alternative waste treatment systems), including any requirements for the acquisition of land for

treatment purposes; the necessary waste water collection and urban storm water runoff systems; and a program to provide the necessary financial arrangements for the development of such treatment works, and an identification of open space and recreation opportunities that can be expected to result from improved water quality, including consideration of potential use of lands associated with treatment works and increased access to water-based recreation;

(B) the establishment of construction priorities for such treatment works and time schedules for the initiation and completion of all treatment works;

(C) the establishment of a regulatory program to—

(i) implement the waste treatment management requirements of section 1281(c) of this title,

(ii) regulate the location, modification, and construction of any facilities within such area which may result in any discharge in such area, and

(iii) assure that any industrial or commercial wastes discharged into any treatment works in such area meet applicable pretreatment requirements;

(D) the identification of those agencies necessary to construct, operate, and maintain all facilities required by the plan and otherwise to carry out the plan;

(E) the identification of the measures necessary to carry out the plan (including financing), the period of time necessary to carry out the plan, the costs of carrying out the plan within such time, and the economic, social, and environmental impact of carrying out the plan within such time;

(F) a process to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and their cumulative effects, runoff from manure disposal areas, and from land used for livestock and crop production, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

(G) a process to (i) identify, if appropriate, mine-related sources of pollution including new, current, and abandoned surface and underground mine runoff, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

(H) a process to (i) identify construction activity related sources of pollution, and (ii) set forth procedures and methods (including land use requirements) to control to the extent feasible such sources;

(I) a process to (i) identify, if appropriate, salt water intrusion into rivers, lakes, and estuaries resulting from reduction of fresh water flow from any cause, including irrigation, obstruction, ground water extraction, and diversion, and (ii) set forth procedures and methods to control such intrusion to the extent feasible where such procedures and methods are otherwise a part of the waste treatment management plan;

(J) a process to control the disposition of all residual waste generated in such area which could affect water quality; and

(K) a process to control the disposal of pollutants on land or in subsurface excavations within such area to protect ground and surface water quality.

(3) Areawide waste treatment management plans shall be certified annually by the Governor or his designee (or Governors or their designees, where more than one State is involved) as being consistent with applicable basin plans and such areawide waste treatment management plans shall be submitted to the Administrator for his approval.

(4)(A) Whenever the Governor of any State determines (and notifies the Administrator) that consistency with a statewide regulatory program under section 1313 of this title so requires, the requirements of clauses (F) through (K) of paragraph (2) of this subsection shall be developed and submitted by the Governor to the Administrator for approval for application to a class or category of activity throughout such State.

(B) Any program submitted under subparagraph (A) of this paragraph which, in whole or in part, is to control the discharge or other placement of dredged or fill material into the navigable waters shall include the following:

(i) A consultation process which includes the State agency with primary jurisdiction over fish and wildlife resources.

(ii) A process to identify and manage the discharge or other placement of dredged or fill material which adversely affects navigable waters, which shall complement and be coordinated with a State program under section 1344 of this title conducted pursuant to this chapter.

(iii) A process to assure that any activity conducted pursuant to a best management practice will comply with the guidelines established under section 1344(b)(1) of this title, and sections 1317 and 1343 of this title.

(iv) A process to assure that any activity conducted pursuant to a best management practice can be terminated or modified for cause including, but not limited to, the following:

(I) violation of any condition of the best management practice;

(II) change in any activity that requires either a temporary or permanent reduction or elimination of the discharge pursuant to the best management practice.

(v) A process to assure continued coordination with Federal and Federal-State water-related planning and reviewing processes, including the National Wetlands Inventory.

(C) If the Governor of a State obtains approval from the Administrator of a statewide regulatory program which meets the requirements of subparagraph (B) of this paragraph and if such State is administering a permit program under section 1344 of this title, no person shall be required to obtain an individual permit pursuant to such section, or to comply with a general permit issued pursuant to such section, with respect to any appropriate activity within such

State for which a best management practice has been approved by the Administrator under the program approved by the Administrator pursuant to this paragraph.

(D)(i) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with the requirements of this section, the Administrator shall so notify the State, and if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(ii) In the case of a State with a program submitted and approved under this paragraph, the Administrator shall withdraw approval of such program under this subparagraph only for a substantial failure of the State to administer its program in accordance with the requirements of this paragraph.

(c) Regional operating agencies

(1) The Governor of each State, in consultation with the planning agency designated under subsection (a) of this section, at the time a plan is submitted to the Administrator, shall designate one or more waste treatment management agencies (which may be an existing or newly created local, regional, or State agency or political subdivision) for each area designated under subsection (a) of this section and submit such designations to the Administrator.

(2) The Administrator shall accept any such designation, unless, within 120 days of such designation, he finds that the designated management agency (or agencies) does not have adequate authority—

(A) to carry out appropriate portions of an areawide waste treatment management plan developed under subsection (b) of this section;

(B) to manage effectively waste treatment works and related facilities serving such area in conformance with any plan required by subsection (b) of this section;

(C) directly or by contract, to design and construct new works, and to operate and maintain new and existing works as required by any plan developed pursuant to subsection (b) of this section;

(D) to accept and utilize grants, or other funds from any source, for waste treatment management purposes;

(E) to raise revenues, including the assessment of waste treatment charges;

(F) to incur short- and long-term indebtedness;

(G) to assure in implementation of an areawide waste treatment management plan that each participating community pays its proportionate share of treatment costs;

(H) to refuse to receive any wastes from any municipality or subdivision thereof, which does not comply with any provisions of an approved plan under this section applicable to such area; and

(I) to accept for treatment industrial wastes.

(d) Conformity of works with area plan

After a waste treatment management agency having the authority required by subsection (c)

1314(a)(9) of this title, each State having coastal recreation waters shall adopt and submit to the Administrator new or revised water quality standards for the coastal recreation waters of the State for all pathogens and pathogen indicators to which the new or revised water quality criteria are applicable.

(2) Failure of States to adopt

(A) In general

If a State fails to adopt water quality criteria and standards in accordance with paragraph (1)(A) that are as protective of human health as the criteria for pathogens and pathogen indicators for coastal recreation waters published by the Administrator, the Administrator shall promptly propose regulations for the State setting forth revised or new water quality standards for pathogens and pathogen indicators described in paragraph (1)(A) for coastal recreation waters of the State.

(B) Exception

If the Administrator proposes regulations for a State described in subparagraph (A) under subsection (c)(4)(B), the Administrator shall publish any revised or new standard under this subsection not later than 42 months after October 10, 2000.

(3) Applicability

Except as expressly provided by this subsection, the requirements and procedures of subsection (c) apply to this subsection, including the requirement in subsection (c)(2)(A) that the criteria protect public health and welfare.

(June 30, 1948, ch. 758, title III, § 303, as added Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 846; amended Pub. L. 100-4, title III, § 308(d), title IV, § 404(b), Feb. 4, 1987, 101 Stat. 39, 68; Pub. L. 106-284, § 2, Oct. 10, 2000, 114 Stat. 870.)

Editorial Notes

REFERENCES IN TEXT

This Act, referred to in subsecs. (a)(1), (2), (3)(B), (C) and (b)(1), means act June 30, 1948, ch. 758, 62 Stat. 1155, prior to the supersedure and reenactment of act June 30, 1948 by act Oct. 18, 1972, Pub. L. 92-500, 86 Stat. 816. Act June 30, 1948, ch. 758, as added by act Oct. 18, 1972, Pub. L. 92-500, 86 Stat. 816, enacted this chapter.

AMENDMENTS

2000—Subsec. (i). Pub. L. 106-284 added subsec. (i).
1987—Subsec. (c)(2). Pub. L. 100-4, § 308(d), designated existing provision as subpar. (A) and added subpar. (B).
Subsec. (d)(4). Pub. L. 100-4, § 404(b), added par. (4).

§ 1313a. Revised water quality standards

The review, revision, and adoption or promulgation of revised or new water quality standards pursuant to section 303(c) of the Federal Water Pollution Control Act [33 U.S.C. 1313(c)] shall be completed by the date three years after December 29, 1981. No grant shall be made under title II of the Federal Water Pollution Control Act [33 U.S.C. 1281 et seq.] after such date until water quality standards are reviewed and revised pursuant to section 303(c), except where the State

has in good faith submitted such revised water quality standards and the Administrator has not acted to approve or disapprove such submission within one hundred and twenty days of receipt. (Pub. L. 97-117, § 24, Dec. 29, 1981, 95 Stat. 1632.)

Editorial Notes

REFERENCES IN TEXT

The Federal Water Pollution Control Act, referred to in text, is act June 30, 1948, ch. 758, as amended generally by Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 816. Title II of the Act is classified generally to subchapter II (§1281 et seq.) of this chapter. For complete classification of this Act to the Code, see Short Title note set out under section 1251 of this title and Tables.

CODIFICATION

Section was enacted as part of the Municipal Wastewater Treatment Construction Grant Amendments of 1981, and not as part of the Federal Water Pollution Control Act which comprises this chapter.

§ 1314. Information and guidelines

(a) Criteria development and publication

(1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in any body of water, including ground water; (B) on the concentration and dispersal of pollutants, or their byproducts, through biological, physical, and chemical processes; and (C) on the effects of pollutants on biological community diversity, productivity, and stability, including information on the factors affecting rates of eutrophication and rates of organic and inorganic sedimentation for varying types of receiving waters.

(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) information (A) on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters, ground waters, waters of the contiguous zone, and the oceans; (B) on the factors necessary for the protection and propagation of shellfish, fish, and wildlife for classes and categories of receiving waters and to allow recreational activities in and on the water; and (C) on the measurement and classification of water quality; and (D) for the purpose of section 1313 of this title, on and the identification of pollutants suitable for maximum daily load measurement correlated with the achievement of water quality objectives.

(3) Such criteria and information and revisions thereof shall be issued to the States and shall be published in the Federal Register and otherwise made available to the public.

(4) The Administrator shall, within 90 days after December 27, 1977, and from time to time

sources, taking into account the cost of achieving such elimination of the discharge of pollutants; and

(4)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best conventional pollutant control technology (including measures and practices) for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best conventional pollutant control technology measures and practices to comply with section 1311(b)(2)(E) of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best conventional pollutant control technology (including measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

(c) Pollution discharge elimination procedures

The Administrator, after consultation, with appropriate Federal and State agencies and other interested persons, shall issue to the States and appropriate water pollution control agencies within 270 days after October 18, 1972 (and from time to time thereafter) information on the processes, procedures, or operating methods which result in the elimination or reduction of the discharge of pollutants to implement standards of performance under section 1316 of this title. Such information shall include technical and other data, including costs, as are available on alternative methods of elimination or reduction of the discharge of pollutants. Such information, and revisions thereof, shall be published in the Federal Register and otherwise shall be made available to the public.

(d) Secondary treatment information; alternative waste treatment management techniques; innovative and alternative wastewater treatment processes; facilities deemed equivalent of secondary treatment

(1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall publish within sixty days after October 18, 1972 (and from time to time thereafter) information, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, on the degree of effluent reduction attainable through the application of secondary treatment.

(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall publish within nine months after October 18, 1972 (and from time to time thereafter) information on alternative waste treatment management techniques and systems available to implement section 1281 of this title.

(3) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall promulgate within one hundred and eighty days after December 27, 1977, guidelines for identifying and evaluating innovative and alternative wastewater treatment processes and techniques referred to in section 1281(g)(5) of this title.

(4) For the purposes of this subsection, such biological treatment facilities as oxidation ponds, lagoons, and ditches and trickling filters shall be deemed the equivalent of secondary treatment. The Administrator shall provide guidance under paragraph (1) of this subsection on design criteria for such facilities, taking into account pollutant removal efficiencies and, consistent with the objectives of this chapter, assuring that water quality will not be adversely affected by deeming such facilities as the equivalent of secondary treatment.

(e) Best management practices for industry

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, may publish regulations, supplemental to any effluent limitations specified under subsections (b) and (c) of this section for a class or category of point sources, for any specific pollutant which the Administrator is charged with a duty to regulate as a toxic or hazardous pollutant under section 1317(a)(1) or 1321 of this title, to control plant site runoff, spillage or leaks, sludge or waste disposal, and drainage from raw material storage which the Administrator determines are associated with or ancillary to the industrial manufacturing or treatment process within such class or category of point sources and may contribute significant amounts of such pollutants to navigable waters. Any applicable controls established under this subsection shall be included as a requirement for the purposes of section 1311, 1312, 1316, 1317, or 1343 of this title, as the case may be, in any permit issued to a point source pursuant to section 1342 of this title.

(f) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from—

(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;

(B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;

(C) all construction activity, including runoff from the facilities resulting from such construction;

(D) the disposal of pollutants in wells or in subsurface excavations;

(E) salt water intrusion resulting from reductions of fresh water flow from any cause, including extraction of ground water, irrigation, obstruction, and diversion; and

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Such information and revisions thereof shall be published in the Federal Register and otherwise made available to the public.

(g) Guidelines for pretreatment of pollutants

(1) For the purpose of assisting States in carrying out programs under section 1342 of this title, the Administrator shall publish, within one hundred and twenty days after October 18, 1972, and review at least annually thereafter and, if appropriate, revise guidelines for pretreatment of pollutants which he determines are not susceptible to treatment by publicly owned treatment works. Guidelines under this subsection shall be established to control and prevent the discharge into the navigable waters, the contiguous zone, or the ocean (either directly or through publicly owned treatment works) of any pollutant which interferes with, passes through, or otherwise is incompatible with such works.

(2) When publishing guidelines under this subsection, the Administrator shall designate the category or categories of treatment works to which the guidelines shall apply.

(h) Test procedures guidelines

The Administrator shall, within one hundred and eighty days from October 18, 1972, promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section 1341 of this title or permit application pursuant to section 1342 of this title.

(i) Guidelines for monitoring, reporting, enforcement, funding, personnel, and manpower

The Administrator shall (1) within sixty days after October 18, 1972, promulgate guidelines for the purpose of establishing uniform application forms and other minimum requirements for the acquisition of information from owners and operators of point-sources of discharge subject to any State program under section 1342 of this title, and (2) within sixty days from October 18, 1972, promulgate guidelines establishing the minimum procedural and other elements of any State program under section 1342 of this title, which shall include:

(A) monitoring requirements;

(B) reporting requirements (including procedures to make information available to the public);

(C) enforcement provisions; and

(D) funding, personnel qualifications, and manpower requirements (including a requirement that no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit).

(j) Lake restoration guidance manual

The Administrator shall, within 1 year after February 4, 1987, and biennially thereafter, publish and disseminate a lake restoration guidance manual describing methods, procedures, and processes to guide State and local efforts to improve, restore, and enhance water quality in the Nation's publicly owned lakes.

(k) Agreements with Secretaries of Agriculture, Army, and the Interior to provide maximum utilization of programs to achieve and maintain water quality; transfer of funds; authorization of appropriations

(1) The Administrator shall enter into agreements with the Secretary of Agriculture, the Secretary of the Army, and the Secretary of the Interior, and the heads of such other departments, agencies, and instrumentalities of the United States as the Administrator determines, to provide for the maximum utilization of other Federal laws and programs for the purpose of achieving and maintaining water quality through appropriate implementation of plans approved under section 1288 of this title and nonpoint source pollution management programs approved under section 1329 of this title.

(2) The Administrator is authorized to transfer to the Secretary of Agriculture, the Secretary of the Army, and the Secretary of the Interior and the heads of such other departments, agencies, and instrumentalities of the United States as the Administrator determines, any funds appropriated under paragraph (3) of this subsection to supplement funds otherwise appropriated to programs authorized pursuant to any agreement under paragraph (1).

(3) There is authorized to be appropriated to carry out the provisions of this subsection, \$100,000,000 per fiscal year for the fiscal years 1979 through 1983 and such sums as may be necessary for fiscal years 1984 through 1990.

(l) Individual control strategies for toxic pollutants

(1) State list of navigable waters and development of strategies

Not later than 2 years after February 4, 1987, each State shall submit to the Administrator for review, approval, and implementation under this subsection—

(A) a list of those waters within the State which after the application of effluent limitations required under section 1311(b)(2) of this title cannot reasonably be anticipated to attain or maintain (i) water quality standards for such waters reviewed, revised, or adopted in accordance with section 1313(c)(2)(B) of this title, due to toxic pollutants, or (ii) that water quality which shall assure protection of public health, public water supplies, agricultural and industrial

ceived from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of

this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

(June 30, 1948, ch. 758, title IV, §401, as added Pub. L. 92-500, §2, Oct. 18, 1972, 86 Stat. 877; amended Pub. L. 95-217, §§61(b), 64, Dec. 27, 1977, 91 Stat. 1598, 1599.)

Editorial Notes

AMENDMENTS

1977—Subsec. (a). Pub. L. 95-217 inserted reference to section 1313 of this title in pars. (1), (3), (4), and (5), struck out par. (6) which provided that no Federal agency be deemed an applicant for purposes of this subsection, and redesignated par. (7) as (6).

§ 1342. National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the ju-

jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(i)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs

At any time after the promulgation of the guidelines required by subsection (i)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 1317(b) of this title into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of Federal program upon submission of State program; withdrawal of approval of State program; return of State program to Administrator

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those discharges subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(i)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(i)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(4) LIMITATIONS ON PARTIAL PERMIT PROGRAM RETURNS AND WITHDRAWALS.—A State may return to the Administrator administration, and the Administrator may withdraw under paragraph (3) of this subsection approval, of—

(A) a State partial permit program approved under subsection (n)(3) only if the entire permit program being administered by the State department or agency at the time is returned or withdrawn; and

(B) a State partial permit program approved under subsection (n)(4) only if an entire phased component of the permit program being administered by the State at the time is returned or withdrawn.

(d) Notification of Administrator

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter. Whenever the Administrator objects to the issuance of a permit under this paragraph such written objection shall contain a statement of the reasons for such objection and the effluent limitations and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after December 27, 1977, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, on request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this chapter.

(e) Waiver of notification requirement

In accordance with guidelines promulgated pursuant to subsection (i)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants

Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works

In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 1319(a) of this title that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(j) Public information

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any standard imposed under section

ation of the cost analysis for the 1999 proposal to issue and modify nationwide permits and the supplement prepared pursuant to this Act [H.R. 5483, as enacted by section 1(a)(2) of Pub. L. 106-377, see Tables for classification] and by September 30, 2001, prepare, submit to Congress and publish in the Federal Register a Permit Processing Management Plan by which the Corps of Engineers will handle the additional work associated with all projected increases in the number of individual permit applications and preconstruction notifications related to the new and replacement permits and general conditions. The Permit Processing Management Plan shall include specific objective goals and criteria by which the Corps of Engineers' progress towards reducing any permit backlog can be measured; (3) beginning on December 31, 2001, and on a biannual basis thereafter, report to Congress and publish in the Federal Register, an analysis of the performance of its program as measured against the criteria set out in the Permit Processing Management Plan; (4) implement a 1-year pilot program to publish quarterly on the U.S. Army Corps of Engineer's Regulatory Program website all Regulatory Analysis and Management Systems (RAMS) data for the South Pacific Division and North Atlantic Division beginning within 30 days of the enactment of this Act [Oct. 27, 2000]; and (5) publish in Division Office websites all findings, rulings, and decisions rendered under the administrative appeals process for the Corps of Engineers Regulatory Program as established in Public Law 106-60 [113 Stat. 486]: *Provided further*, That, through the period ending on September 30, 2003, the Corps of Engineers shall allow any appellant to keep a verbatim record of the proceedings of the appeals conference under the aforementioned administrative appeals process: *Provided further*, That within 30 days of the enactment of this Act, the Secretary of the Army, acting through the Chief of Engineers, shall require all U.S. Army Corps of Engineers Divisions and Districts to record the date on which a section 404 individual permit application or nationwide permit notification is filed with the Corps of Engineers: *Provided further*, That the Corps of Engineers, when reporting permit processing times, shall track both the date a permit application is first received and the date the application is considered complete, as well as the reason that the application is not considered complete upon first submission."

AUTHORITY TO DELEGATE TO STATE OF WASHINGTON FUNCTIONS OF THE SECRETARY RELATING TO LAKE CHELAN, WASHINGTON

Pub. L. 95-217, §76, Dec. 27, 1977, 91 Stat. 1610, provided that: "The Secretary of the Army, acting through the Chief of Engineers, is authorized to delegate to the State of Washington upon its request all or any part of those functions vested in such Secretary by section 404 of the Federal Water Pollution Control Act [this section] and by sections 9, 10, and 13 of the Act of March 3, 1899 [sections 401, 403, and 407 of this title], relating to Lake Chelan, Washington, if the Secretary determines (1) that such State has the authority, responsibility, and capability to carry out such functions, and (2) that such delegation is in the public interest. Such delegation shall be subject to such terms and conditions as the Secretary deems necessary, including, but not limited to, suspension and revocation for cause of such delegation."

DREDGED MATERIAL DISPOSAL

Pub. L. 114-322, title I, §1189, Dec. 16, 2016, 130 Stat. 1681, provided that: "Disposal of dredged material shall not be considered environmentally acceptable for the purposes of identifying the Federal standard (as defined in section 335.7 of title 33, Code of Federal Regulations (or successor regulations)) if the disposal violates applicable State water quality standards approved by the Administrator of the Environmental Protection Agency under section 303 of the Federal Water Pollution Control Act (33 U.S.C. 1313)."

Executive Documents

TRANSFER OF FUNCTIONS

Enforcement functions of Administrator or other official of the Environmental Protection Agency and of Secretary or other official in Department of the Interior relating to review of the Corps of Engineers' dredged and fill material permits and such functions of Secretary of the Army, Chief of Engineers, or other official in Corps of Engineers of the United States Army relating to compliance with dredged and fill material permits issued under this section with respect to preconstruction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas were transferred to the Federal Inspector, Office of Federal Inspector for the Alaska Natural Gas Transportation System, until the first anniversary of the date of initial operation of the Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§102(a), (b), (e), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102-486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

CONTIGUOUS ZONE OF UNITED STATES

For extension of contiguous zone of United States, see Proc. No. 7219, set out as a note under section 1331 of Title 43, Public Lands.

§ 1345. Disposal or use of sewage sludge

(a) Permit

Notwithstanding any other provision of this chapter or of any other law, in any case where the disposal of sewage sludge resulting from the operation of a treatment works as defined in section 1292 of this title (including the removal of in-place sewage sludge from one location and its deposit at another location) would result in any pollutant from such sewage sludge entering the navigable waters, such disposal is prohibited except in accordance with a permit issued by the Administrator under section 1342 of this title.

(b) Issuance of permit; regulations

The Administrator shall issue regulations governing the issuance of permits for the disposal of sewage sludge subject to subsection (a) of this section and section 1342 of this title. Such regulations shall require the application to such disposal of each criterion, factor, procedure, and requirement applicable to a permit issued under section 1342 of this title.

(c) State permit program

Each State desiring to administer its own permit program for disposal of sewage sludge subject to subsection (a) of this section within its jurisdiction may do so in accordance with section 1342 of this title.

(d) Regulations

(1) Regulations

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after December 27,

1977, and from time to time thereafter, regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes. Such regulations shall—

(A) identify uses for sludge, including disposal;

(B) specify factors to be taken into account in determining the measures and practices applicable to each such use or disposal (including publication of information on costs);

(C) identify concentrations of pollutants which interfere with each such use or disposal.

The Administrator is authorized to revise any regulation issued under this subsection.

(2) Identification and regulation of toxic pollutants

(A) On basis of available information

(i) Proposed regulations

Not later than November 30, 1986, the Administrator shall identify those toxic pollutants which, on the basis of available information on their toxicity, persistence, concentration, mobility, or potential for exposure, may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each such pollutant for each use identified under paragraph (1)(A).

(ii) Final regulations

Not later than August 31, 1987, and after opportunity for public hearing, the Administrator shall promulgate the regulations required by subparagraph (A)(i).

(B) Others

(i) Proposed regulations

Not later than July 31, 1987, the Administrator shall identify those toxic pollutants not identified under subparagraph (A)(i) which may be present in sewage sludge in concentrations which may adversely affect public health or the environment, and propose regulations specifying acceptable management practices for sewage sludge containing each such toxic pollutant and establishing numerical limitations for each pollutant for each such use identified under paragraph (1)(A).

(ii) Final regulations

Not later than June 15, 1988, the Administrator shall promulgate the regulations required by subparagraph (B)(i).

(C) Review

From time to time, but not less often than every 2 years, the Administrator shall review the regulations promulgated under this paragraph for the purpose of identifying additional toxic pollutants and promulgating regulations for such pollutants consistent with the requirements of this paragraph.

(D) Minimum standards; compliance date

The management practices and numerical criteria established under subparagraphs

(A), (B), and (C) shall be adequate to protect public health and the environment from any reasonably anticipated adverse effects of each pollutant. Such regulations shall require compliance as expeditiously as practicable but in no case later than 12 months after their publication, unless such regulations require the construction of new pollution control facilities, in which case the regulations shall require compliance as expeditiously as practicable but in no case later than two years from the date of their publication.

(3) Alternative standards

For purposes of this subsection, if, in the judgment of the Administrator, it is not feasible to prescribe or enforce a numerical limitation for a pollutant identified under paragraph (2), the Administrator may instead promulgate a design, equipment, management practice, or operational standard, or combination thereof, which in the Administrator's judgment is adequate to protect public health and the environment from any reasonably anticipated adverse effects of such pollutant. In the event the Administrator promulgates a design or equipment standard under this subsection, the Administrator shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(4) Conditions on permits

Prior to the promulgation of the regulations required by paragraph (2), the Administrator shall impose conditions in permits issued to publicly owned treatment works under section 1342 of this title or take such other measures as the Administrator deems appropriate to protect public health and the environment from any adverse effects which may occur from toxic pollutants in sewage sludge.

(5) Limitation on statutory construction

Nothing in this section is intended to waive more stringent requirements established by this chapter or any other law.

(e) Manner of sludge disposal

The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations.

(f) Implementation of regulations

(1) Through section 1342 permits

Any permit issued under section 1342 of this title to a publicly owned treatment works or any other treatment works treating domestic sewage shall include requirements for the use and disposal of sludge that implement the regulations established pursuant to subsection (d) of this section, unless such requirements have been included in a permit issued under the appropriate provisions of subtitle C of the Solid

Statutory Notes and Related Subsidiaries

APPLICABILITY OF SPILL PREVENTION, CONTROL, AND COUNTERMEASURE RULE

Pub. L. 113-121, title I, § 1049, June 10, 2014, 128 Stat. 1257, as amended by Pub. L. 114-322, title IV, § 5011, Dec. 16, 2016, 130 Stat. 1902, provided that:

“(a) DEFINITIONS.—In this section:

“(1) ADMINISTRATOR.—The term ‘Administrator’ means the Administrator of the Environmental Protection Agency.

“(2) FARM.—The term ‘farm’ has the meaning given the term in section 112.2 of title 40, Code of Federal Regulations (or successor regulations).

“(3) GALLON.—The term ‘gallon’ means a United States gallon.

“(4) OIL.—The term ‘oil’ has the meaning given the term in section 112.2 of title 40, Code of Federal Regulations (or successor regulations).

“(5) OIL DISCHARGE.—The term ‘oil discharge’ has the meaning given the term ‘discharge’ in section 112.2 of title 40, Code of Federal Regulations (or successor regulations).

“(6) REPORTABLE OIL DISCHARGE HISTORY.—

“(A) IN GENERAL.—Subject to subparagraph (B), the term ‘reportable oil discharge history’ means a single oil discharge, as described in section 112.1(b) of title 40, Code of Federal Regulations (including successor regulations), that exceeds 1,000 gallons or 2 oil discharges, as described in section 112.1(b) of title 40, Code of Federal Regulations (including successor regulations), that each exceed 42 gallons within any 12-month period—

“(i) in the 3 years prior to the certification date of the Spill Prevention, Control, and Countermeasure plan (as described in section 112.3 of title 40, Code of Federal Regulations (including successor regulations)); or

“(ii) since becoming subject to part 112 of title 40, Code of Federal Regulations, if the facility has been in operation for less than 3 years.

“(B) EXCLUSIONS.—The term ‘reportable oil discharge history’ does not include an oil discharge, as described in section 112.1(b) of title 40, Code of Federal Regulations (including successor regulations), that is the result of a natural disaster, an act of war, or terrorism.

“(7) SPILL PREVENTION, CONTROL, AND COUNTERMEASURE RULE.—The term ‘Spill Prevention, Control, and Countermeasure rule’ means the regulation, including amendments, promulgated by the Administrator under part 112 of title 40, Code of Federal Regulations (or successor regulations).

“(b) CERTIFICATION.—In implementing the Spill Prevention, Control, and Countermeasure rule with respect to any farm, the Administrator shall—

“(1) require certification by a professional engineer for a farm with—

“(A) an individual tank with an aboveground storage capacity greater than 10,000 gallons;

“(B) an aggregate aboveground storage capacity greater than or equal to 20,000 gallons; or

“(C) a reportable oil discharge history; or

“(2) allow certification by the owner or operator of the farm (via self-certification) for a farm with—

“(A) an aggregate aboveground storage capacity less than 20,000 gallons and greater than the lesser of—

“(i) 6,000 gallons; and

“(ii) the adjustment quantity established under subsection (d)(2); and

“(B) no reportable oil discharge history; and

“(3) not require compliance with the rule by any farm—

“(A) with an aggregate aboveground storage capacity greater than 2,500 gallons and less than the lesser of—

“(i) 6,000 gallons; and

“(ii) the adjustment quantity established under subsection (d)(2); and

“(B) no reportable oil discharge history; and

“(4) not require compliance with the rule by any farm with an aggregate aboveground storage capacity of less than 2,500 gallons.

“(c) REGULATION OF ABOVEGROUND STORAGE AT FARMS.—

“(1) CALCULATION OF AGGREGATE ABOVEGROUND STORAGE CAPACITY.—For purposes of subsection (b), the aggregate aboveground storage capacity of a farm excludes—

“(A) all containers on separate parcels that have a capacity that is 1,000 gallons or less; and

“(B) all containers holding animal feed ingredients approved for use in livestock feed by the Commissioner of Food and Drugs.

“(2) CERTAIN FARM CONTAINERS.—Part 112 of title 40, Code of Federal Regulations (or successor regulations), shall not apply to the following containers located at a farm:

“(A) Containers on a separate parcel that have—

“(i) an individual capacity of not greater than 1,000 gallons; and

“(ii) an aggregate capacity of not greater than 2,500 gallons.

“(B) A container holding animal feed ingredients approved for use in livestock feed by the Food and Drug Administration.

“(d) STUDY.—

“(1) IN GENERAL.—Not later than 1 year after the date of enactment of this Act [June 10, 2014], the Administrator, in consultation with the Secretary of Agriculture, shall conduct a study to determine the appropriate exemption under paragraphs (2) and (3) of subsection (b), which shall be not more than 6,000 gallons and not less than 2,500 gallons, based on a significant risk of discharge to water.

“(2) ADJUSTMENT.—Not later than 18 months after the date on which the study described in paragraph (1) is complete, the Administrator, in consultation with the Secretary of Agriculture, shall promulgate a rule to adjust the exemption levels described in paragraphs (2) and (3) of subsection (b) in accordance with the study.”

ENVIRONMENTAL COURT FEASIBILITY STUDY

Pub. L. 92-500, § 9, Oct. 18, 1972, 86 Stat. 899, authorized the President, acting through the Attorney General, to study the feasibility of establishing a separate court or court system with jurisdiction over environmental matters and required him to report the results of his study, together with his recommendations, to Congress not later than one year after Oct. 18, 1972.

TRANSFER OF PUBLIC HEALTH SERVICE OFFICERS

Pub. L. 89-234, § 2(b)–(k), Oct. 2, 1965, 79 Stat. 904, 905, authorized the transfer of certain commissioned officers of the Public Health Service to classified positions in the Federal Water Pollution Control Administration, now the Environmental Protection Agency, where such transfer was requested within six months after the establishment of the Administration and made certain administrative provisions relating to pension and retirement rights of the transferees, sick leave benefits, group life insurance, and certain other miscellaneous provisions.

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

(1) The term “State water pollution control agency” means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term “interstate agency” means an agency of two or more States established by or pursuant to an agreement or compact approved

by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term “State” means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

(4) The term “municipality” means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

(5) The term “person” means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term “pollutant” means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) “sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces” within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term “navigable waters” means the waters of the United States, including the territorial seas.

(8) The term “territorial seas” means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term “contiguous zone” means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term “ocean” means any portion of the high seas beyond the contiguous zone.

(11) The term “effluent limitation” means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term “discharge of a pollutant” and the term “discharge of pollutants” each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition

of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term “toxic pollutant” means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term “point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

(15) The term “biological monitoring” shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term “discharge” when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term “schedule of compliance” means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term “industrial user” means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category of “Division D—Manufacturing” and such other classes of significant waste producers as, by regulation, the Administrator deems appropriate.

(19) The term “pollution” means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

(20) The term “medical waste” means isolation wastes; infectious agents; human blood and blood products; pathological wastes; sharps; body parts; contaminated bedding; surgical wastes and potentially contaminated laboratory wastes; dialysis wastes; and such additional medical items as the Administrator shall prescribe by regulation.

(21) COASTAL RECREATION WATERS.—

(A) IN GENERAL.—The term “coastal recreation waters” means—

(i) the Great Lakes; and

(ii) marine coastal waters (including coastal estuaries) that are designated under section 1313(c) of this title by a State for use for

swimming, bathing, surfing, or similar water contact activities.

(B) EXCLUSIONS.—The term “coastal recreation waters” does not include—

- (i) inland waters; or
- (ii) waters upstream of the mouth of a river or stream having an unimpaired natural connection with the open sea.

(22) FLOATABLE MATERIAL.—

(A) IN GENERAL.—The term “floatable material” means any foreign matter that may float or remain suspended in the water column.

(B) INCLUSIONS.—The term “floatable material” includes—

- (i) plastic;
- (ii) aluminum cans;
- (iii) wood products;
- (iv) bottles; and
- (v) paper products.

(23) PATHOGEN INDICATOR.—The term “pathogen indicator” means a substance that indicates the potential for human infectious disease.

(24) OIL AND GAS EXPLORATION AND PRODUCTION.—The term “oil and gas exploration, production, processing, or treatment operations or transmission facilities” means all field activities or operations associated with exploration, production, processing, or treatment operations, or transmission facilities, including activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to be construction activities.

(25) RECREATIONAL VESSEL.—

(A) IN GENERAL.—The term “recreational vessel” means any vessel that is—

- (i) manufactured or used primarily for pleasure; or
- (ii) leased, rented, or chartered to a person for the pleasure of that person.

(B) EXCLUSION.—The term “recreational vessel” does not include a vessel that is subject to Coast Guard inspection and that—

- (i) is engaged in commercial use; or
- (ii) carries paying passengers.

(26) TREATMENT WORKS.—The term “treatment works” has the meaning given the term in section 1292 of this title.

(27) GREEN INFRASTRUCTURE.—The term “green infrastructure” means the range of measures that use plant or soil systems, permeable pavement or other permeable surfaces or substrates, stormwater harvest and reuse, or landscaping to store, infiltrate, or evapotranspire stormwater and reduce flows to sewer systems or to surface waters.

(June 30, 1948, ch. 758, title V, § 502, as added Pub. L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 886; amended Pub. L. 95-217, § 33(b), Dec. 27, 1977, 91 Stat. 1577; Pub. L. 100-4, title V, §§ 502(a), 503, Feb. 4, 1987, 101 Stat. 75; Pub. L. 100-688, title III, § 3202(a), Nov. 18, 1988, 102 Stat. 4154; Pub. L. 104-106, div. A, title III, § 325(c)(3), Feb. 10, 1996, 110 Stat. 259; Pub. L. 106-284, § 5, Oct. 10, 2000, 114 Stat. 875; Pub. L. 109-58, title III, § 323, Aug. 8, 2005, 119 Stat. 694; Pub. L. 110-288, § 3, July 29, 2008, 122 Stat. 2650; Pub. L. 113-121, title V, § 5012(b), June

10, 2014, 128 Stat. 1328; Pub. L. 115-436, § 5(a), Jan. 14, 2019, 132 Stat. 5561.)

Editorial Notes

AMENDMENTS

- 2019—Par. (27). Pub. L. 115-436 added par. (27).
- 2014—Par. (26). Pub. L. 113-121 added par. (26).
- 2008—Par. (25). Pub. L. 110-288 added par. (25).
- 2005—Par. (24). Pub. L. 109-58 added par. (24).
- 2000—Pars. (21) to (23). Pub. L. 106-284 added pars. (21) to (23).
- 1996—Par. (6)(A). Pub. L. 104-106 substituted “sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces” for “sewage from vessels”.
- 1988—Par. (20). Pub. L. 100-688 added par. (20).
- 1987—Par. (3). Pub. L. 100-4, § 502(a), inserted “the Commonwealth of the Northern Mariana Islands,” after “Samoa.”
- Par. (14). Pub. L. 100-4, § 503, inserted “agricultural stormwater discharges and” after “does not include”.
- 1977—Par. (14). Pub. L. 95-217 inserted provision that “point source” does not include return flows from irrigated agriculture.

Statutory Notes and Related Subsidiaries

EFFECTIVE DATE OF 2014 AMENDMENT

Amendment by Pub. L. 113-121 effective Oct. 1, 2014, see section 5012(c) of Pub. L. 113-121, set out as a note under section 1292 of this title.

DEFINITION OF “POINT SOURCE”

Pub. L. 100-4, title V, § 507, Feb. 4, 1987, 101 Stat. 78, provided that: “For purposes of the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.], the term ‘point source’ includes a landfill leachate collection system.”

Executive Documents

TERMINATION OF TRUST TERRITORY OF THE PACIFIC ISLANDS

For termination of Trust Territory of the Pacific Islands, see note set out preceding section 1681 of Title 48, Territories and Insular Possessions.

TERRITORIAL SEA AND CONTIGUOUS ZONE OF UNITED STATES

For extension of territorial sea and contiguous zone of United States, see Proc. No. 5928 and Proc. No. 7219, respectively, set out as notes under section 1331 of Title 43, Public Lands.

§ 1363. Water Pollution Control Advisory Board

(a) Establishment; composition; terms of office

(1) There is hereby established in the Environmental Protection Agency a Water Pollution Control Advisory Board, composed of the Administrator or his designee, who shall be Chairman, and nine members appointed by the President, none of whom shall be Federal officers or employees. The appointed members, having due regard for the purposes of this chapter, shall be selected from among representatives of various State, interstate, and local governmental agencies, of public or private interests contributing to, affected by, or concerned with pollution, and of other public and private agencies, organizations, or groups demonstrating an active interest in the field of pollution prevention and control, as well as other individuals who are expert in this field.

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proposed project or in the receiving waters into which the discharge may occur.

(b) If the Administrator in his or her discretion determines that a public hearing is appropriate or necessary, the EPA shall: Schedule such hearing at an appropriate time and place; and, to the extent practicable, give all interested and affected parties the opportunity to present evidence or testimony in person or by other means at the hearing.

Subpart E—Consultations

§ 121.16 Review and advice.

The Administrator may, and upon request shall, provide Federal agencies, certifying authorities, and project proponents with relevant information and assistance regarding the meaning of, content of, application of, and methods to comply with water quality requirements.

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

Subpart A—Definitions and General Program Requirements

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- 122.43 Establishing permit conditions (applicable to State programs, see §123.25).
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- 122.46 Duration of permits (applicable to State programs, see §123.25).
- 122.47 Schedules of compliance.
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Subpart D—Transfer, Modification, Revocation and Reissuance, and Termination of Permits

- 122.61 Transfer of permits (applicable to State programs, see §123.25).

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D to part 3) (Cross-Media Electronic Reporting) and 40 CFR part 127 (NPDES Electronic Reporting Requirements) are met for that submission.

(Clean Water Act (33 U.S.C. 1251 *et seq.*), Safe Drinking Water Act (42 U.S.C. 300f *et seq.*), Clean Air Act (42 U.S.C. 7401 *et seq.*), Resource Conservation and Recovery Act (42 U.S.C. 6901 *et seq.*)

[48 FR 14153, Apr. 1, 1983, as amended at 48 FR 39619, Sept. 1, 1983; 49 FR 38047, Sept. 29, 1984; 50 FR 6941, Feb. 19, 1985; 55 FR 48063, Nov. 16, 1990; 65 FR 30907, May 15, 2000; 80 FR 64096, Oct. 22, 2015]

§ 122.23 Concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25).

(a) *Scope.* Concentrated animal feeding operations (CAFOs), as defined in paragraph (b) of this section or designated in accordance with paragraph (c) of this section, are point sources, subject to NPDES permitting requirements as provided in this section. Once an animal feeding operation is defined as a CAFO for at least one type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

(b) Definitions applicable to this section:

(1) *Animal feeding operation* (“AFO”) means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

(i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and

(ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

(2) *Concentrated animal feeding operation* (“CAFO”) means an AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section. Two or more AFOs under common ownership are considered to be a single AFO for the purposes of de-

termining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes.

(3) The term *land application area* means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied.

(4) *Large concentrated animal feeding operation* (“Large CAFO”). An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:

(i) 700 mature dairy cows, whether milked or dry;

(ii) 1,000 veal calves;

(iii) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;

(iv) 2,500 swine each weighing 55 pounds or more;

(v) 10,000 swine each weighing less than 55 pounds;

(vi) 500 horses;

(vii) 10,000 sheep or lambs;

(viii) 55,000 turkeys;

(ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;

(x) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;

(xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;

(xii) 30,000 ducks (if the AFO uses other than a liquid manure handling system); or

(xiii) 5,000 ducks (if the AFO uses a liquid manure handling system).

(5) The term *manure* is defined to include manure, bedding, compost and raw materials or other materials commingled with manure or set aside for disposal.

(6) *Medium concentrated animal feeding operation* (“Medium CAFO”). The term Medium CAFO includes any AFO with the type and number of animals that fall within any of the ranges listed in paragraph (b)(6)(i) of this section and which has been defined or designated as a CAFO. An AFO is defined as a Medium CAFO if:

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(i) The type and number of animals that it stables or confines falls within any of the following ranges:

(A) 200 to 699 mature dairy cows, whether milked or dry;

(B) 300 to 999 veal calves;

(C) 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;

(D) 750 to 2,499 swine each weighing 55 pounds or more;

(E) 3,000 to 9,999 swine each weighing less than 55 pounds;

(F) 150 to 499 horses;

(G) 3,000 to 9,999 sheep or lambs;

(H) 16,500 to 54,999 turkeys;

(I) 9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system;

(J) 37,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;

(K) 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system;

(L) 10,000 to 29,999 ducks (if the AFO uses other than a liquid manure handling system); or

(M) 1,500 to 4,999 ducks (if the AFO uses a liquid manure handling system); and

(ii) Either one of the following conditions are met:

(A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or

(B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(7) *Process wastewater* means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including ma-

nure, litter, feed, milk, eggs or bedding.

(8) *Production area* means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

(9) *Small concentrated animal feeding operation* ("Small CAFO"). An AFO that is designated as a CAFO and is not a Medium CAFO.

(c) *How may an AFO be designated as a CAFO?* The appropriate authority (*i.e.*, State Director or Regional Administrator, or both, as specified in paragraph (c)(1) of this section) may designate any AFO as a CAFO upon determining that it is a significant contributor of pollutants to waters of the United States.

(1) *Who may designate?*—(i) *Approved States.* In States that are approved or authorized by EPA under Part 123, CAFO designations may be made by the State Director. The Regional Administrator may also designate CAFOs in approved States, but only where the Regional Administrator has determined that one or more pollutants in the AFO's discharge contributes to an impairment in a downstream or adjacent State or Indian country water that is impaired for that pollutant.

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(ii) *States with no approved program.* The Regional Administrator may designate CAFOs in States that do not have an approved program and in Indian country where no entity has expressly demonstrated authority and has been expressly authorized by EPA to implement the NPDES program.

(2) In making this designation, the State Director or the Regional Administrator shall consider the following factors:

(i) The size of the AFO and the amount of wastes reaching waters of the United States;

(ii) The location of the AFO relative to waters of the United States;

(iii) The means of conveyance of animal wastes and process waste waters into waters of the United States;

(iv) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes manure and process waste waters into waters of the United States; and

(v) Other relevant factors.

(3) No AFO shall be designated under this paragraph unless the State Director or the Regional Administrator has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program. In addition, no AFO with numbers of animals below those established in paragraph (b)(6) of this section may be designated as a CAFO unless:

(i) Pollutants are discharged into waters of the United States through a manmade ditch, flushing system, or other similar manmade device; or

(ii) Pollutants are discharged directly into waters of the United States which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(d) *NPDES permit authorization—(1) Permit Requirement.* A CAFO must not discharge unless the discharge is authorized by an NPDES permit. In order to obtain authorization under an NPDES permit, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit.

(2) *Information to submit with permit application or notice of intent.* An application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.

(3) *Information to submit with permit application.* A permit application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.

(e) *Land application discharges from a CAFO are subject to NPDES requirements.* The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14). For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)–(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

(1) For unpermitted Large CAFOs, a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi) through (ix).

(2) Unpermitted Large CAFOs must maintain documentation specified in § 122.42(e)(1)(ix) either on site or at a nearby office, or otherwise make such documentation readily available to the

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Director or Regional Administrator upon request.

(f) *By when must the owner or operator of a CAFO have an NPDES permit if it discharges?* A CAFO must be covered by a permit at the time that it discharges.

(g) [Reserved]

(h) *Procedures for CAFOs seeking coverage under a general permit.* (1) CAFO owners or operators must submit a notice of intent when seeking authorization to discharge under a general permit in accordance with § 122.28(b). The Director must review notices of intent submitted by CAFO owners or operators to ensure that the notice of intent includes the information required by § 122.21(i)(1), including a nutrient management plan that meets the requirements of § 122.42(e) and applicable effluent limitations and standards, including those specified in 40 CFR part 412. When additional information is necessary to complete the notice of intent or clarify, modify, or supplement previously submitted material, the Director may request such information from the owner or operator. If the Director makes a preliminary determination that the notice of intent meets the requirements of §§ 122.21(i)(1) and 122.42(e), the Director must notify the public of the Director's proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's nutrient management plan, and the draft terms of the nutrient management plan to be incorporated into the permit. The process for submitting public comments and hearing requests, and the hearing process if a request for a hearing is granted, must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Director may establish, either by regulation or in the general permit, an appropriate period of time for the public to comment and request a hearing that differs from the time period specified in 40 CFR 124.10. The Director must respond to significant comments received during the comment period, as provided in 40 CFR 124.17, and, if necessary, require the CAFO owner or operator to revise the nutrient management plan in order to be granted permit coverage. When the

Director authorizes coverage for the CAFO owner or operator under the general permit, the terms of the nutrient management plan shall become incorporated as terms and conditions of the permit for the CAFO. The Director shall notify the CAFO owner or operator and inform the public that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(2) *For EPA-issued permits only.* The Regional Administrator shall notify each person who has submitted written comments on the proposal to grant coverage and the draft terms of the nutrient management plan or requested notice of the final permit decision. Such notification shall include notice that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(3) Nothing in this paragraph (h) shall affect the authority of the Director to require an individual permit under § 122.28(b)(3).

[68 FR 7265, Feb. 12, 2003, as amended at 71 FR 6984, Feb. 10, 2006; 72 FR 40250, July 24, 2007; 73 FR 70480, Nov. 20, 2008; 77 FR 44497, July 30, 2012]

§ 122.24 Concentrated aquatic animal production facilities (applicable to State NPDES programs, see § 123.25).

(a) *Permit requirement.* Concentrated aquatic animal production facilities, as defined in this section, are point sources subject to the NPDES permit program.

(b) *Definition.* *Concentrated aquatic animal production facility* means a hatchery, fish farm, or other facility which meets the criteria in appendix C of this part, or which the Director designates under paragraph (c) of this section.

(c) *Case-by-case designation of concentrated aquatic animal production facilities.* (1) The Director may designate any warm or cold water aquatic animal production facility as a concentrated aquatic animal production facility upon determining that it is a significant contributor of pollution to waters

459.310 Distance requirements.

1. Except as provided in [subsections 3 and 4](#), the following shall apply:

a. A confinement feeding operation structure shall not be constructed closer than five hundred feet away from the surface intake of an agricultural drainage well. A confinement feeding operation structure shall not be constructed closer than one thousand feet from a wellhead, cistern of an agricultural drainage well, or known sinkhole. However, the department may adopt rules requiring an increased separation distance under this paragraph in order to protect the integrity of a water of the state. The increased separation distance shall not be more than two thousand feet. If the department exercises its discretion to increase the separation distance requirement, the department shall not approve an application for the construction of a confinement feeding operation structure within that separation distance as provided in [section 459.303](#).

b. A confinement feeding operation structure shall not be constructed if the confinement feeding operation structure as constructed is closer than any of the following:

- (1) Five hundred feet away from a water source other than a major water source.
- (2) One thousand feet away from a major water source.
- (3) Two thousand five hundred feet away from a designated wetland.

c. (1) A water source, other than a major water source, shall not be constructed, expanded, or diverted, if the water source as constructed, expanded, or diverted is closer than five hundred feet away from a confinement feeding operation structure.

(2) A major water source shall not be constructed, expanded, or diverted, if the major water source as constructed, expanded, or diverted is closer than one thousand feet from a confinement feeding operation structure.

(3) A designated wetland shall not be established, if the designated wetland is closer than two thousand five hundred feet away from a confinement feeding operation structure.

2. Except as provided in [subsection 4](#), a confinement feeding operation structure shall not be constructed on land that is part of a one hundred year floodplain as designated by rules adopted by the department pursuant to [section 459.301](#).

3. A separation distance required in [subsection 1](#) shall not apply to any of the following:

a. A location or object and a farm pond or privately owned lake, as defined in [section 462A.2](#).

b. A confinement feeding operation building, an egg washwater storage structure, or a manure storage structure constructed with a secondary containment barrier. The department shall adopt rules providing for the construction and use of a secondary containment barrier, including construction design standards.

4. A separation distance required in [subsection 1](#) or the prohibition against construction of a confinement feeding operation structure on a one hundred year floodplain as provided in [subsection 2](#) shall not apply to a confinement feeding operation that includes a confinement feeding operation structure that was constructed prior to March 1, 2003, if any of the following apply:

a. One or more unformed manure storage structures that are part of the confinement feeding operation are replaced with one or more formed manure storage structures on or after April 28, 2003, and all of the following apply:

(1) The animal weight capacity or animal unit capacity, whichever is applicable, is not increased for that portion of the confinement feeding operation that utilizes all replacement formed manure storage structures.

(2) The use of each replaced unformed manure storage structure is discontinued within one year after the construction of the replacement formed manure storage structure.

(3) The capacity of all replacement formed manure storage structures does not exceed the amount required to store manure produced by that portion of the confinement feeding operation utilizing the formed manure storage structures during any eighteen-month period.

(4) No portion of the replacement formed manure storage structure is closer to the location or object from which separation is required under [subsection 1](#) than any other confinement feeding operation structure which is part of the operation.

(5) The formed manure storage structure meets or exceeds the requirements of [section 459.307](#).

b. (1) A formed manure storage structure that is part of the confinement feeding operation is constructed on or after April 28, 2003, pursuant to a variance granted by the department. In granting the variance, the department shall make a finding of all of the following:

(a) The replacement formed manure storage structure replaces the confinement feeding operation's existing manure storage and handling facilities.

(b) The replacement formed manure storage structure complies with standards adopted pursuant to [section 459.307](#).

(c) The replacement formed manure storage structure more likely than not provides a higher degree of environmental protection than the confinement feeding operation's existing manure storage and handling facilities.

(2) If the formed manure storage structure will replace any existing manure storage structure, the department shall, as a condition of granting the variance, require that the replaced manure storage structure be properly closed.

5. A person shall not construct or expand an unformed manure storage structure within an agricultural drainage well area as provided in [section 460.205](#).

[95 Acts, ch 195, §26](#)

[CS95, §455B.204](#)

[98 Acts, ch 1209, §35, 53; 2002 Acts, ch 1137, §44, 45, 68, 71; 2002 Acts, 2nd Ex, ch 1003, §259, 260, 262](#)

[C2003, §459.310](#)

[2003 Acts, ch 84, §3 – 6; 2003 Acts, ch 108, §84, 85; 2011 Acts, ch 25, §143](#)

Referred to in [§459.304](#), [459.305](#), [459.307](#), [459.318](#), [459A.404](#)

For regulation of surface water entry into and closure of agricultural drainage wells, see [chapter 460](#)

459.311B Stockpiling dry manure — minimum separation distance requirements and prohibitions.

1. A person shall not stockpile dry manure within the following distances from any of the following:

a. A terrace tile inlet or surface tile inlet, two hundred feet. However, this paragraph does not apply to a person who stockpiles the dry manure in a manner that does not allow precipitation-induced runoff to drain from the stockpile to the terrace tile inlet or surface tile inlet. A terrace tile inlet or surface tile inlet does not include a tile inlet that is not directly connected to a tile line that discharges directly into a water of the state.

b. (1) A designated area, four hundred feet. However, an increased separation distance of eight hundred feet shall apply to all of the following:

- (a) A high-quality water resource.
- (b) An agricultural drainage well.
- (c) A known sinkhole.

(2) Subparagraph (1) does not apply to a person who stockpiles dry manure in a manner that does not allow precipitation-induced runoff to drain from the stockpile to the designated area.

2. A person shall not stockpile dry manure in a grassed waterway.

3. A person shall not stockpile dry manure on land having a slope of more than three percent. However, [this subsection](#) shall not apply to a person who stockpiles dry manure using methods, structures, or practices that contain the stockpile, including but not limited to silt fences, temporary earthen berms, or other effective measures, and that prevent or diminish precipitation-induced runoff from the stockpile.

[2009 Acts, ch 38, §10, 16](#)

Part 2. Certification of Animal Waste Management System Operators.

§ 90A-47. Purpose.

The purpose of this Part is to reduce nonpoint source pollution in order to protect the public health and to conserve and protect the quality of the State's water resources, to encourage the development and improvement of the State's agricultural land for the production of food and other agricultural products, and to require the examination of animal waste management system operators and certification of their competency to operate or supervise the operation of those systems. (1995 (Reg. Sess., 1996), c. 626, s. 6(b).)

§ 90A-47.2. Certified operator in charge required; qualifications for certification.

(a) No owner or other person in control of an animal operation having an animal waste management system shall allow the system to be operated by a person who does not hold a valid certificate as an operator in charge of an animal waste management system issued by the Commission. No person shall perform the duties of an operator in charge of an animal waste management system without being certified under the provisions of this Part. Other persons may assist in the operation of an animal waste management system so long as they are directly supervised by an operator in charge who is certified under this Part.

(b) The owner or other person in control of an animal operation may contract with a certified animal waste management system operator in charge to provide for the operation of the animal waste management system at that animal operation. The Commission may adopt rules requiring that any certified animal waste management system operator in charge who contracts with one or more owners or other persons in control of an animal operation file an annual report with the Commission as to the operation of each system at which the services of the operator in charge are provided. (1995 (Reg. Sess., 1996), c. 626, s. 6(b).)

§ 90A-47.3. Qualifications for certification; training; examination.

(a) The Commission shall develop and administer a certification program for animal waste management system operators in charge that provides for receipt of applications, training and examination of applicants, and investigation of the qualifications of applicants.

(b) The Commission, in cooperation with the Division of Water Resources of the Department of Environmental Quality, and the Cooperative Extension Service, shall develop and administer a training program for animal waste management system operators in charge. An applicant for initial certification shall complete 10 hours of classroom instruction prior to taking the examination. In order to remain certified, an animal waste management system operator in charge shall complete six hours of approved additional training during each three-year period following initial certification. A certified animal waste management system operator in charge who fails to complete approved additional training within 30 days of the end of the three-year period shall take and pass the examination for certification in order to renew the certificate. (1995 (Reg. Sess., 1996), c. 626, s. 6(b); 1996, 2nd Ex. Sess., c. 18, s. 27.34(c); 1997-443, s. 11A.119(a); 2013-413, s. 57(c); 2014-115, s. 17; 2015-241, s. 14.30(u).)

§ 106-803. Siting requirements for swine houses, lagoons, and land areas onto which waste is applied at swine farms.

- (a) A swine house or a lagoon that is a component of a swine farm shall be located:
- (1) At least 1,500 feet from any occupied residence.
 - (2) At least 2,500 feet from any school; hospital; church; outdoor recreational facility; national park; State Park, as defined in G.S. 143B-135.44; historic property acquired by the State pursuant to G.S. 121-9 or listed in the North Carolina Register of Historic Places pursuant to G.S. 121-4.1; or child care center, as defined in G.S. 110-86, that is licensed under Article 7 of Chapter 110 of the General Statutes.
 - (3) At least 500 feet from any property boundary.
 - (4) At least 500 feet from any well supplying water to a public water system, as defined in G.S. 130A-313.
 - (5) At least 500 feet from any other well that supplies water for human consumption. This subdivision does not apply to a well located on the same parcel or tract of land on which the swine house or lagoon is located and that supplies water only for use on that parcel or tract of land or for use on adjacent parcels or tracts of land all of which are under common ownership or control.

(a1) The outer perimeter of the land area onto which waste is applied from a lagoon that is a component of a swine farm shall be at least 75 feet from any boundary of property on which an occupied residence is located and from any perennial stream or river, other than an irrigation ditch or canal.

(a2) No component of a liquid animal waste management system for which a permit is required under Part 1 or 1A of Article 21 of Chapter 143 of the General Statutes, other than a land application site, shall be constructed on land that is located within the 100-year floodplain.

(b) A swine house or a lagoon that is a component of a swine farm may be located closer to a residence, school, hospital, church, or a property boundary than is allowed under subsection (a) of this section if written permission is given by the owner of the property and recorded with the Register of Deeds. (1995, c. 420, s. 1; 1995 (Reg. Sess., 1996), c. 626, s. 7(a); 1997-458, s. 4.1; 2015-241, s. 14.30(mm).)

§ 143-215.10C. Applications and permits.

(a) No person shall construct or operate an animal waste management system for an animal operation or operate an animal waste management system for a dry litter poultry facility that is required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), without first obtaining an individual permit or a general permit under this Article. The Commission shall develop a system of individual and general permits for animal operations and dry litter poultry facilities based on species, number of animals, and other relevant factors. The Commission shall develop a general permit for animal operations that includes authorization for the permittee to construct and operate a farm digester system. It is the intent of the General Assembly that most animal waste management systems be permitted under a general permit. The Commission, in its discretion, may require that an animal waste management system, including an animal waste management system that utilizes a farm digester system, be permitted under an individual permit if the Commission determines that an individual permit is necessary to protect water quality, public health, or the environment. After the general permit for animal operations that includes authorization for the permittee to construct and operate a farm digester system has been issued, the decision to require an individual permit shall not be based solely on the fact that the animal waste management system utilizes a farm digester system. The owner or operator of an animal operation shall submit an application for a permit at least 180 days prior to construction of a new animal waste management system or expansion of an existing animal waste management system and shall obtain the permit prior to commencement of the construction or expansion. The owner or operator of a dry litter poultry facility that is required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), shall submit an application for a permit at least 180 days prior to operation of a new animal waste management system.

(a1) An owner or operator of an animal waste management system for an animal operation or a dry litter poultry facility that is required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), shall apply for an individual National Pollutant Discharge Elimination System (NPDES) permit or a general NPDES permit under this Article and may not discharge into waters of the State except in compliance with an NPDES permit.

(b) An animal waste management system that is not required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), shall be designed, constructed, and operated so that the animal operation served by the animal waste management system does not cause pollution in the waters of the State except as may result because of rainfall from a storm event more severe than the 25-year, 24-hour storm.

(b1) An existing animal waste management system that is required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), shall be designed, constructed, maintained, and operated in accordance with 40 Code of Federal Regulations § 412, as amended at 73 Federal Register 70418 (November 20, 2008), so that the animal operation served by the animal waste management system does not cause pollution in waters of the State except as may result because of rainfall from a storm event more severe than the 25-year, 24-hour storm. A new animal operation or dry litter poultry facility that is required to be permitted under 40 Code of Federal Regulations § 412.46, as amended at 73 Federal Register 70418 (November 20, 2008), shall be designed, constructed, maintained, and operated so that there is no discharge of pollutants to waters of the State.

(c) The Commission shall act on a permit application as quickly as possible and may conduct any inquiry or investigation it considers necessary before acting on an application. No permit shall be denied, and no condition shall be attached to a permit, except when the Commission finds that the denial or conditions are necessary to effectuate the purposes of this Part.

(c1) Failure of the Commission to make a final permitting decision involving a notice of intent for a certificate of coverage under a general permit for animal operations that includes authorization for the permittee to construct and operate a farm digester system within 90 days of the Commission's receipt of a completed notice of intent shall result in the deemed approval of coverage under the permit. If the Commission fails to act within 90 days of the Commission's receipt of a completed notice of intent, the permittee may request that the Commission provide written confirmation that the notice of intent is deemed approved. Failure to provide this written confirmation within 10 days of the request shall serve as a basis to seek a contested case hearing pursuant to Article 3 of Chapter 150B of the General Statutes. Unless all parties to the case agree otherwise in writing, the administrative law judge shall issue a final decision or order in the contested case no later than 120 days after its commencement pursuant to G.S. 150B-23; provided that, upon written request of the administrative law judge or any party to the hearing, the Chief Administrative Law Judge may extend this deadline for good cause shown, no more than two times, for not more than 30 days per extension. Upon review of a failure to act on a notice of intent, the administrative law judge may either (i) direct the Commission to issue a written certificate of coverage under the general permit or (ii) deny the petition.

(d) All applications for permits or for renewal of an existing permit shall be in writing, and the Commission may prescribe the form of the applications. All applications shall include an animal waste management system plan approved by a technical specialist. The Commission may require an applicant to submit additional information the Commission considers necessary to evaluate the application. Permits and renewals issued pursuant to this section shall be effective until the date specified therein or until rescinded unless modified or revoked by the Commission.

(e) An animal waste management plan for an animal operation shall include all of the following components:

- (1) A checklist of potential odor sources and a choice of site-specific, cost-effective remedial best management practices to minimize those sources.
- (2) A checklist of potential insect sources and a choice of site-specific, cost-effective best management practices to minimize insect problems.
- (3) Provisions that set forth acceptable methods of disposing of mortalities.
- (4) Provisions regarding best management practices for riparian buffers or equivalent controls, particularly along perennial streams.
- (5) Provisions regarding the use of emergency spillways and site-specific emergency management plans that set forth operating procedures to follow during emergencies in order to minimize the risk of environmental damage.
- (6) Provisions regarding periodic testing of waste products used as nutrient sources as close to the time of application as practical and at least within 60 days of the date of application and periodic testing, at least once every three years, of soils at crop sites where the waste products are applied. Nitrogen shall be a rate-determining element. Phosphorus shall be evaluated according to the nutrient management standard approved by the Soil and Water Conservation Commission of the Department of Agriculture and Consumer Services and the Natural Resources Conservation Service of the United States Department of Agriculture for facilities that are required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008). If the evaluation demonstrates the need to limit the application of phosphorus in order to comply with the nutrient management standard, then phosphorus shall be a rate-determining element. Zinc and copper levels in the soils shall be monitored, and alternative crop sites shall be used when these metals approach excess levels.

- (7) Provisions regarding waste utilization plans that assure a balance between nitrogen application rates and nitrogen crop requirements, that assure that lime is applied to maintain pH in the optimum range for crop production, and that include corrective action, including revisions to the waste utilization plan based on data of crop yields and crops analysis, that will be taken if this balance is not achieved as determined by testing conducted pursuant to subdivision (6) of this subsection.
- (8) Provisions regarding the completion and maintenance of records on forms developed by the Department, which records shall include information addressed in subdivisions (6) and (7) of this subsection, including the dates and rates that waste products are applied to soils at crop sites, and shall be made available upon request by the Department.

(f) Any owner or operator of a dry litter poultry facility that is not required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), but that involves 30,000 or more birds shall develop an animal waste management plan that complies with the testing and record-keeping requirements under subdivisions (6) through (8) of subsection (e) of this section. Any operator of this type of animal waste management system shall retain records required under this section and by the Department on-site for three years.

(f1) An animal waste management plan for a dry litter poultry facility required to be permitted under 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), shall include the components set out in subdivisions (3), (6), (7), and (8) of subsection (e) of this section, and to the extent required by 40 Code of Federal Regulations § 122, as amended at 73 Federal Register 70418 (November 20, 2008), for land application discharges, subdivision (4) of subsection (e) of this section.

(f2) Periodic testing of waste products as required in subdivision (6) of subsection (e) of this section, subsection (f) of this section and subsection (f1) of this section may be temporarily suspended in compliance with G.S. 106-399.4 when the State Veterinarian, in consultation with the Commissioner of Agriculture and with the approval of the Governor, determines that there is an imminent threat within the State of a contagious animal disease. The suspension of testing only applies to the animal operation types designated by the State Veterinarian, and shall be in effect for a period of time that the State Veterinarian deems necessary to prevent and control the animal disease. During the suspension of waste analysis, waste product nutrient content to be used for application of waste at no greater than agronomic rates shall be established by the 1217 Interagency Committee as created by Session Law 1995-626.

(g) The Commission shall encourage the development of alternative and innovative animal waste management technologies. The Commission shall provide sufficient flexibility in the regulatory process to allow for the timely evaluation of alternative and innovative animal waste management technologies and shall encourage operators of animal waste management systems to participate in the evaluation of these technologies. The Commission shall provide sufficient flexibility in the regulatory process to allow for the prompt implementation of alternative and innovative animal waste management technologies that are demonstrated to provide improved protection to public health and the environment.

(h) The owner or operator of an animal waste management system shall:

- (1) In the event of a discharge of 1,000 gallons or more of animal waste to the surface waters of the State, issue a press release to all print and electronic news media that provide general coverage in the county where the discharge occurred setting out the details of the discharge. The owner or operator shall issue the press release within 48 hours after the owner or operator has determined that the discharge has reached the surface waters of the State. The

owner or operator shall retain a copy of the press release and a list of the news media to which it was distributed for at least one year after the discharge and shall provide a copy of the press release and the list of the news media to which it was distributed to any person upon request.

- (2) In the event of a discharge of 15,000 gallons or more of animal waste to the surface waters of the State, publish a notice of the discharge in a newspaper having general circulation in the county in which the discharge occurs and in each county downstream from the point of discharge that is significantly affected by the discharge. The Secretary shall determine, at the Secretary's sole discretion, which counties are significantly affected by the discharge and shall approve the form and content of the notice and the newspapers in which the notice is to be published. The notice shall be captioned "NOTICE OF DISCHARGE OF ANIMAL WASTE". The owner or operator shall publish the notice within 10 days after the Secretary has determined the counties that are significantly affected by the discharge and approved the form and content of the notice and the newspapers in which the notice is to be published. The owner or operator shall file a copy of the notice and proof of publication with the Department within 30 days after the notice is published. Publication of a notice of discharge under this subdivision is in addition to the requirement to issue a press release under subdivision (1) of this subsection.

(i) A person who obtains an individual permit under G.S. 143-215.1 for an animal waste management system that serves a public livestock market shall not be required to obtain a permit under this Part and is not subject to the requirements of this Part.

(j) Any person subject to the requirements of this section who is required to obtain an individual or general permit from the Commission for an animal waste management system pursuant to this Part shall have a compliance boundary as may be established by rule or permit for various categories of animal waste management systems and beyond which groundwater quality standards may not be exceeded. Multiple contiguous properties under common ownership and permitted for use as an animal waste management system shall be treated as a single property for the purposes of determining a compliance boundary and setbacks to property lines.

(k) Where operation of an animal waste management system permitted pursuant to this section results in the exceedance of groundwater quality standards at or beyond the compliance boundary, the Commission shall require the permittee to undertake corrective action, without regard to the date the system was first permitted, to restore the groundwater quality by assessing the cause, significance, and extent of the violation of standards and submit the results of the investigation and a plan, including a proposed schedule, for corrective action to the Secretary. The permittee shall implement the plan as approved by, and in accordance with, a schedule established by the Secretary. In establishing a schedule for corrective action, the Secretary shall consider any reasonable schedule proposed by the permittee.

(l) A permit applicant, a permittee, or a third party who is dissatisfied with a decision of the Commission may commence a contested case by filing a petition under G.S. 150B-23 within 30 days after the Commission notifies the applicant or permittee of its decision. If the permit applicant, the permittee, or a third party does not file a petition within the required time, the Commission's decision is final and is not subject to review. (1995 (Reg. Sess., 1996), c. 626, s. 1; 1997-458, s. 9.2; 1999-329, s. 8.2; 1999-456, s. 68; 2001-254, ss. 3, 4; 2001-326, s. 2; 2004-176, s. 2; 2009-92, s. 1; 2011-145, s. 13.22A(q); 2013-228, s. 1; 2015-263, s. 33(b); 2021-78, s. 11(b); 2023-137, s. 15(b).)

§ 143-215.10F. Inspections.

(a) Except as provided in subsection (b) of this section, the Division shall conduct inspections of all animal operations that are subject to a permit under G.S. 143-215.10C at least once a year to determine whether the system is causing a violation of water quality standards and whether the system is in compliance with its animal waste management plan or any other condition of the permit.

(b) As an alternative to the inspection program set forth in subsection (a) of this section, the Division of Soil and Water Conservation of the Department of Agriculture and Consumer Services shall conduct inspections of all animal operations that are subject to a permit under G.S. 143-215.10C at least once a year to determine whether the system is causing a violation of water quality standards and whether the system is in compliance with its animal waste management plan or any other condition of the permit. The alternative inspection program shall be located in up to four counties selected using the criteria set forth in Section 15.4(a) of S.L. 1997-443, as amended, as it existed prior to its expiration. The Department of Agriculture and Consumer Services shall establish procedures whereby resources within the local Soil and Water Conservation Districts serving the counties are used for quick response to complaints and reported problems previously referred only to the Division of Water Resources. (1995 (Reg. Sess., 1996), c. 626, s. 1; 2013-131, s. 1; 2013-413, s. 57(gg).)

§ 143-215.10I. Performance standards for animal waste management systems that serve swine farms; lagoon and sprayfield systems prohibited.

(a) As used in this section:

- (1) "Anaerobic lagoon" means a lagoon that treats waste by converting it into carbon dioxide, methane, ammonia, and other gaseous compounds; organic acids; and cell tissue through an anaerobic process.
- (2) "Anaerobic process" means a biological treatment process that occurs in the absence of dissolved oxygen.
- (3) "Lagoon" has the same meaning as in G.S. 106-802.
- (4) "Swine farm" has the same meaning as in G.S. 106-802.

(b) The Commission shall not issue or modify a permit to authorize the construction, operation, or expansion of an animal waste management system that serves a swine farm that employs an anaerobic lagoon as the primary method of treatment and land application of waste by means of a sprayfield as the primary method of waste disposal unless:

- (1) The permitting action does not result in an increase in the permitted capacity of the swine farm, as measured by the annual steady state live weight capacity of the swine farm; or
- (2) The Commission determines that the animal waste management system will meet or exceed all of the following performance standards:
 - a. Eliminate the discharge of animal waste to surface water and groundwater through direct discharge, seepage, or runoff.
 - b. Substantially eliminate atmospheric emission of ammonia.
 - c. Substantially eliminate the emission of odor that is detectable beyond the boundaries of the parcel or tract of land on which the swine farm is located.
 - d. Substantially eliminate the release of disease-transmitting vectors and airborne pathogens.
 - e. Substantially eliminate nutrient and heavy metal contamination of soil and groundwater. (2007-523, s. 1(a); 2020-18, s. 11.)

567—65.7(455B,459,459A,459B) Karst terrain. Except as provided for in subrules 65.7(4) and 65.7(5), the provisions of this rule shall apply to the following structures: (1) confinement feeding operation structures at confinement feeding operations with over 500 animal units, (2) settled open feedlot effluent basins at open feedlot operations requiring a construction permit, (3) egg washwater structures, (4) AT systems, and (5) animal truck wash effluent structures.

65.7(1) Karst terrain submittal requirements. Prior to beginning construction of a structure identified in the introductory paragraph of this rule, the person planning the construction shall determine whether the proposed structure will be located in potential “karst terrain,” as defined in subrule 65.1(1). The AFO Siting Atlas shall be used to determine if the proposed structure is in potential karst terrain. The results of the karst terrain determination shall be submitted to the department according to the following:

a. If the proposed structure is not in potential karst terrain, the person planning the construction shall submit a printed map from the AFO Siting Atlas indicating the location of the structure, with the potential karst layer turned on, with the construction permit application documents or with the construction design statement if a construction permit is not required.

b. If the proposed formed manure storage structure is located in potential karst terrain, a PE licensed in Iowa, an NRCS-qualified staff person or a qualified organization shall submit a soil report, based on the results from soil corings, test pits or acceptable well log data, describing the subsurface materials and vertical separation distance from the bottom of the proposed structure to the underlying limestone, dolomite or soluble rock. A minimum of two soil corings spaced equally within the structure or two test pits located within five feet of the outside of the structure are required if acceptable well log data is not available. The soil corings shall be taken to a minimum depth of seven feet below the bottom elevation of the proposed structure or into bedrock, whichever is shallower. Any limestone, dolomite, or soluble bedrock in the corings or test pits shall be considered the bedrock surface rather than auger refusal. After the soil exploration is complete, each coring or test pit shall be properly plugged with concrete grout, bentonite or similar materials, and completion of this activity shall be documented in the soil report. If a 25-foot vertical separation distance can be maintained between the bottom of the proposed formed manure storage structure and limestone, dolomite, or other soluble rock, then the structure is not considered to be in karst terrain.

65.7(2) Construction standards for formed manure storage structures. A formed manure storage structure shall be constructed in accordance with the minimum concrete standards set forth in subrule 65.108(10) or Iowa Code section 459.307 if the structure is not constructed of concrete. No intact or weathered bedrock, including sandstone, shale, limestone, dolomite, or soluble rock, shall be removed or excavated during the construction of a storage structure.

65.7(3) Vertical separation distance requirements for formed manure storage structures. Except as provided for in subrule 65.7(5) related to the construction of a dry bedded confinement feeding operation structure, in addition to the concrete standards set forth in subrule 65.108(10) or Iowa Code section 459.307 if not constructed of concrete, a person constructing a formed manure storage structure on karst terrain shall comply with the following:

a. A minimum five-foot layer of low permeability soil (1×10^{-6} cm/sec) or rock between the bottom of a formed manure storage structure and limestone, dolomite, or other soluble rock is required if the formed manure storage structure is not designed by a PE or NRCS-qualified staff person.

b. If the vertical separation distance between the bottom of the proposed formed manure storage structure and limestone, dolomite, or other soluble rock is less than five feet, the structure shall be designed and sealed by a PE or NRCS-qualified staff person who certifies the structural integrity of the structure. A two-foot-thick layer of compacted clay liner material shall be constructed underneath the floor of the formed manure storage structure. However, it is recommended that any formed manure storage structure be constructed aboveground if the vertical separation distance between the bottom of the structure and the limestone, dolomite, or other soluble rock is less than five feet.

c. Groundwater monitoring shall be performed as specified by the department.

d. Backfilling shall not start until the floor slats have been placed or permanent bracing has been installed and grouted and shall be performed with material free of vegetation, large rocks, or debris.

65.7(4) *Unformed manure storage structures.* The construction of unformed manure storage structures, including unformed manure storage structures at SAFOs, is prohibited in karst terrain or an area that drains into a known sinkhole. In potential karst, at least one coring shall be taken to a minimum depth of 25 feet below the bottom elevation of the proposed unformed manure storage structure or into bedrock, whichever is shallower. If a 25-foot vertical separation distance can be maintained between the bottom of the unformed manure storage structure and limestone, dolomite, or other soluble rock, then the structure is not considered to be in karst terrain. No intact or weathered bedrock, including sandstone, shale, limestone, dolomite, or soluble rock, shall be removed or excavated during the construction of a manure storage structure.

65.7(5) *Dry bedded confinement feeding operation structure.* A person constructing any dry bedded confinement feeding operation structure, including structures at SAFOs, on karst terrain shall comply with all of the following:

a. The person must construct the structure at a location where there is a vertical separation distance of at least five feet between the bottom of the floor of the structure and the underlying limestone, dolomite, or other soluble rock in karst terrain or the underlying sand and gravel aquifer in an alluvial aquifer area.

b. The person must construct the structure with a floor consisting of reinforced concrete at least five inches thick.

[ARC 7965C, IAB 5/15/24, effective 6/19/24]

567—65.9(455B,459,459A,459B) Floodplains. The provisions of this rule shall apply to the following structures: (1) confinement feeding operation structures, (2) settled open feedlot effluent basins at open feedlot operations requiring a construction permit, (3) egg washwater structures, (4) AT systems, and (5) animal truck wash effluent structures.

65.9(1) Floodplains. A person shall not construct a manure storage structure in the one hundred year floodplain of a major water source. The one hundred year floodplain of major water source designations are included on the AFO Siting Atlas. For construction of facilities located in the counties that do not have a Federal Emergency Management Agency (FEMA) flood insurance rate map (FIRM), which are Black Hawk, Johnson, Louisa, Winneshiek, and Woodbury, a person shall have the ability to contest the one hundred year floodplain determination by supplying supporting documents to the department for further evaluation. Placing fill material on floodplain land to elevate the land above the one hundred year flood elevation will not be considered as removing the land from the one hundred year floodplain for the purpose of this subrule. Even if the proposed location of the manure storage structure is not on the one hundred year floodplain of a major water source, the site may be on the floodplain of a nonmajor water source and the department may require a floodplain development permit pursuant to 567—Chapters 70 through 76 if the drainage area of the nonmajor water source adjacent to the proposed structure is greater than ten square miles in a rural location or two square miles in an urban location. The proposed construction can be screened through the department’s online floodplain database siting tool.

65.9(2) Flooding protection. A confinement feeding operation or open feedlot structure proposed to be constructed on land that would be inundated by Q100 shall meet requirements as specified in 567—Chapters 70 through 76, unless otherwise prohibited according to subrule 65.9(1).

65.9(3) Submittal requirements. The person planning the construction shall submit a printed map from the AFO Siting Atlas indicating the location of the structure, with the one hundred year floodplain layer turned on, with the construction permit application documents or with the construction design statement if a construction permit is not required.

65.9(4) Exemptions to prohibition on one hundred year floodplain construction and separation distance requirements from water sources, major water sources, known sinkholes, agricultural drainage wells, designated wetlands confinement structures and animal truck wash effluent structures. As specified in Iowa Code sections 459.310(4) and 459A.404(3), a separation distance required in subrules 65.106(3) and 65.106(4) or the prohibition against construction of a confinement feeding operation structure on a one hundred year floodplain as provided in subrule 65.9(1) shall not apply to a confinement feeding operation or animal truck wash that includes a confinement feeding operation structure or animal truck wash effluent structure that was constructed prior to March 1, 2003, if any of the following apply:

a. One or more unformed manure storage structures or animal truck wash effluent structures that are part of the confinement feeding operation or animal truck wash are replaced with one or more formed manure storage structures or formed animal truck wash effluent structures on or after April 28, 2003, and all of the following apply:

(1) The animal weight capacity or animal unit capacity, whichever is applicable, is not increased for that portion of the confinement feeding operation or animal truck wash that utilizes all replacement formed manure storage structures or animal truck wash effluent structures.

(2) The use of each replaced unformed manure storage structure is discontinued within one year after the construction of the replacement formed manure storage structure or formed animal truck wash effluent structure.

(3) The capacity of all replacement formed manure storage structures or animal truck wash effluent structures does not exceed the amount required to store manure produced by that portion of the confinement feeding operation or animal truck wash utilizing the replacement formed manure storage structures or animal truck wash effluent structures during any 18-month period.

(4) No portion of the replacement formed manure storage structure or animal truck wash effluent structure is closer to the location or object from which separation is required under subrules 65.106(3) and 65.106(4) than any other confinement feeding operation structure or animal truck wash effluent structure which is part of the operation.

(5) The replacement formed manure storage structure or animal truck wash effluent structure meets or exceeds the requirements of Iowa Code section 459.307 and subrule 65.108(10).

b. A replacement formed manure storage structure that is part of the confinement feeding operation or animal truck wash is constructed on or after April 28, 2003, if it complies with the following provisions:

(1) The replacement formed manure storage structure or animal truck wash effluent structure replaces the confinement feeding operation or animal truck wash's existing manure storage and handling facilities.

(2) The replacement formed manure storage structure or animal truck wash effluent structure complies with standards adopted pursuant to Iowa Code section 459.307 and subrule 65.108(10).

(3) The replacement formed manure storage structure or animal truck wash effluent structure more likely than not provides a higher degree of environmental protection than the confinement feeding operation or animal truck wash's existing manure storage and handling facilities. If the formed manure storage structure or animal truck wash effluent structure will replace any existing manure storage structure or animal truck wash effluent structure, the department shall require that the replaced manure storage structure or animal truck wash effluent structure be properly closed.

[ARC 7965C, IAB 5/15/24, effective 6/19/24]

567—65.100(455B,459,459B) Minimum manure control requirements. Confinement feeding operations shall be constructed, managed and maintained to meet the minimum manure control requirements stated in subrules 65.100(1) to 65.100(6). A release shall be reported to the department as provided in subrule 65.2(1). Dry manure stockpiling requirements are stated in subrule 65.100(7). Dry bedded manure stockpiling requirements are stated in subrule 65.100(8).

65.100(1) The minimum level of manure control for a confinement feeding operation shall be the retention of all manure produced in the confinement enclosures between periods of manure application and as specified in this rule. In no case shall manure from a confinement feeding operation be discharged directly into a water of the state or into a tile line that discharges to waters of the state.

a. Control of manure from confinement feeding operations may be accomplished through use of manure storage structures or other manure control methods. Sufficient capacity shall be provided in the manure storage structure to store all manure between periods of manure application. A confinement feeding operation, other than a SAFO, that is constructed or expanded on or after July 1, 2009, shall not surface-apply liquid manure on frozen or snow-covered ground when there is an emergency, as described in subrule 65.101(4), unless the operation has a minimum of 180 days of manure storage capacity. Additional capacity shall be provided if precipitation, manure or wastes from other sources can enter the manure storage structure.

b. Manure shall be removed from the control facilities as necessary to prevent overflow or discharge of manure from the facilities. Manure stored in unformed manure storage structures or unformed egg washwater storage structures shall be removed from the structures as necessary to maintain a minimum of two feet of freeboard in the structure, unless a greater level of freeboard is required to maintain the structural integrity of the structure or prevent manure overflow. Manure stored in unroofed formed manure storage structures or formed egg washwater storage structures shall be removed from the structures as necessary to maintain a minimum of one foot of freeboard in the structure unless a greater level of freeboard is required to maintain the structural integrity of the structure or prevent manure overflow.

c. To ensure that adequate capacity exists in the manure storage structure to retain all manure produced during periods when manure application cannot be conducted (due to inclement weather conditions, lack of available land disposal areas, or other factors), the manure shall be removed from the manure storage structure as needed prior to these periods.

d. Dry manure or dry bedded manure originating at a confinement feeding operation may be retained as a stockpile so long as the stockpiled dry manure or dry bedded manure meets the following:

(1) Dry manure stockpiling requirements provided in subrule 65.100(7) or dry bedded manure stockpiling requirements provided in subrule 65.100(8).

(2) Applicable NPDES requirements pursuant to the Act.

(3) The dry manure or dry bedded manure is removed from the stockpile and applied in accordance with rule 567—56.101(459,459B) within six months after the dry manure or dry bedded manure is first stockpiled.

(4) Dry manure stockpiles are not required to meet the requirements in subparagraphs 65.100(1)“d”(1) to 65.100(1)“d”(3) above if the dry manure originates from a confinement feeding operation that was constructed prior to January 1, 2006, unless any of the following apply:

1. The confinement feeding operation is expanded after January 1, 2006.

2. Dry manure is stockpiled in violation of subrule 65.100(1).

3. Precipitation-induced runoff from the stockpile has drained off the property.

65.100(2) If site topography, operation procedures, experience, or other factors indicate that a greater or lesser level of manure control than that specified in subrule 65.100(1) is required to provide an adequate level of water pollution control for a specific AFO, the department may establish different minimum manure control requirements for that operation.

65.100(3) In lieu of using the manure control methods specified in subrule 65.100(1), the department may allow the use of manure treatment or other methods of manure control if it determines that an adequate level of manure control will result.

65.100(4) No direct discharge shall be allowed from an AFO into a publicly owned lake, a sinkhole, or an agricultural drainage well.

65.100(5) All manure removed from an AFO or its manure control facilities shall be land-applied in a manner that will not cause surface or groundwater pollution. Application in accordance with the provisions of state law and this chapter shall be deemed as compliance with this requirement.

65.100(6) As soon as practical but not later than six months after the use of an AFO is discontinued, all manure shall be removed from the discontinued AFO and its manure control facilities and be land applied.

65.100(7) Dry manure stockpiling requirements for a confinement feeding operation.

a. Requirements for terrain, other than karst terrain. Dry manure stockpiled on terrain, other than karst terrain, for more than 15 consecutive days shall comply with either of the following:

(1) Dry manure shall be stockpiled using any of the following:

1. A qualified stockpile structure; or

2. A qualified stockpile cover. Long-term stockpiles utilizing a qualified stockpile cover shall be placed on a constructed impervious base that can support the load of the equipment used under all weather conditions. The coefficient of permeability of the impervious base shall be less than 1×10^{-7} cm/sec (0.00028 feet/day). Permeability results shall be submitted to the department prior to use of the stockpile site.

(2) A stockpile inspection statement shall be delivered to the department as follows:

1. The department must receive the statement by the fifteenth day of each month.

2. The stockpile inspection statement shall provide the location of the stockpile and document the results of an inspection conducted during the previous month. The inspection must evaluate whether precipitation-induced runoff is draining away from the stockpile and, if so, describe actions taken to prevent the runoff. If an inspection by the department documents that precipitation-induced runoff is draining away from a stockpile, the dry manure must be immediately removed from the stockpile or comply with all directives of the department to prevent the runoff.

3. The stockpile inspection statement must be in writing and may be on a form prescribed by the department.

b. Dry manure stockpile siting prohibitions.

(1) Grassed waterway. A stockpile or stockpile structure shall not be placed in a grassed waterway.

(2) Sloping land. A stockpile or stockpile structure shall not be placed on land having a slope of more than 3 percent, unless the dry manure is stockpiled using methods, structures, or practices that contain the stockpile, including but not limited to silt fences, temporary earthen berms, or other effective measures, and that prevent or diminish precipitation-induced runoff from the stockpile.

65.100(8) Prohibitions and siting restrictions for dry bedded manure stockpiling requirements for a dry bedded confinement feeding operation.

a. Prohibition in a grassed waterway. A stockpile or stockpile structure shall not be placed in a grassed waterway, where water pools on the soil surface, or in any location where surface water will enter the stockpile.

b. Siting restrictions. A stockpile or stockpile structure shall not be placed on land having a slope of more than 3 percent, unless the dry manure or dry bedded manure is stockpiled using methods, structures, or practices that contain the stockpile, including but not limited to hay bales, silt fences, temporary earthen berms, or other effective measures that prevent or diminish precipitation-induced runoff from the stockpile. A stockpile or stockpile structure located in karst terrain must comply with the karst requirements in subrule 65.8(3).

[ARC 7965C, IAB 5/15/24, effective 6/19/24]

567—65.101(455B,459,459B) Requirements for land application of manure from a confinement feeding operation.

65.101(1) *General requirements for application rates and practices for confinement feeding operations.*

a. For manure originating from an anaerobic lagoon or aerobic structure, application rates and practices shall be used to minimize groundwater or surface water pollution resulting from application, including pollution caused by runoff or other manure flow resulting from precipitation events. In determining appropriate application rates and practices, the person land-applying the manure shall consider the site conditions at the time of application including anticipated precipitation and other weather factors, field residue and tillage, site topography, the existence and depth of known or suspected tile lines in the application field, and crop and soil conditions, including a good-faith estimate of the available water-holding capacity given precipitation events, the predominant soil types in the application field and planned manure application rate.

b. Spray irrigation equipment shall be operated in a manner and with an application rate and timing that does not cause runoff of the manure onto the property adjoining the property where the spray irrigation equipment is being operated.

c. For manure from an earthen waste slurry storage basin, earthen manure storage basin, or formed manure storage structure, restricted spray irrigation equipment shall not be used unless the manure has been diluted with surface water or groundwater to a ratio of at least 15 parts water to 1 part manure. Emergency use of spray irrigation equipment without dilution shall be allowed to minimize the impact of a release as approved by the department.

65.101(2) *Separation distance requirements for land application of manure.* Land application of manure shall be separated from objects and locations as specified in this subrule.

a. For liquid manure from a confinement feeding operation, the required separation distance from a residence not owned by the titleholder of the land, a business, a church, a school, or a public use area is 750 feet, as specified in Iowa Code section 459.204. The separation distance for application of manure by spray irrigation equipment shall be measured from the actual wetted perimeter and the closest point of the residence, business, church, school, or public use area.

b. The separation distance specified in paragraph 65.101(2)“*a*” shall not apply if any of the following apply:

(1) The liquid manure is injected into the soil or incorporated within the soil not later than 24 hours after the original application.

(2) The titleholder of the land benefitting from the separation distance requirement executes a written waiver with the titleholder of the land where the manure is applied.

(3) The liquid manure originates from a SAFO.

(4) The liquid manure is applied by low-pressure spray irrigation equipment pursuant to paragraph 65.101(2)“*a*.”

c. Separation distance for spray irrigation from property boundary line. Spray irrigation equipment shall be set up to provide for a minimum distance of 100 feet between the wetted perimeter as specified in the spray irrigation equipment manufacturer’s specifications and the boundary line of the property where the equipment is being operated. The actual wetted perimeter, as determined by wind speed and direction and other operating conditions, shall not exceed the boundary line of the property where the equipment is being operated. For property that includes a road right-of-way, railroad right-of-way or an access easement, the property boundary line shall be the boundary line of the right-of-way or easement.

d. Distance from structures for low-pressure irrigation systems. Low-pressure irrigation systems shall have a minimum separation distance of 250 feet between the actual wetted perimeter and the closest point of a residence, a business, church, school or public use area.

e. Waivers. Waivers to paragraph 65.101(2)“*c*” may be granted by the department if sufficient and proposed alternative information is provided to substantiate the need and propriety for such action. Waivers may be granted on a temporary or permanent basis. The request for a waiver shall be in writing and include information regarding:

(1) The type of manure storage structure from which the manure will be applied by spray irrigation equipment.

(2) The spray irrigation equipment to be used in the application of manure.

(3) Other information as the department may request.

f. Agricultural drainage wells. Manure shall not be applied by spray irrigation equipment on land located within an agricultural drainage well area.

g. Designated areas. A person shall not apply manure on land within 200 feet from a designated area or in the case of a high-quality water resource, within 800 feet, unless one of the following applies:

(1) The manure is land-applied by injection or incorporation on the same date as the manure was land-applied.

(2) An area of permanent vegetation cover, including filter strips and riparian forest buffers, exists for 50 feet surrounding the designated area other than an unplugged agricultural drainage well or surface intake to an unplugged agricultural drainage well, and the area of permanent vegetation cover is not subject to manure application.

h. Setback requirements for confinement feeding operations with NPDES permits. For confinement feeding operations with NPDES permits, the following is adopted by reference: 40 CFR 412.4(a), (b) and (c)(5).

65.101(3) *Surface application of liquid manure on frozen or snow-covered ground.* A person who applies liquid manure on frozen or snow-covered ground shall comply with applicable NPDES permit requirements pursuant to the Act and also shall comply with the following requirements:

a. Snow-covered ground. During the period beginning December 21 and ending April 1, a person may apply liquid manure originating from a manure storage structure that is part of a confinement feeding operation on snow-covered ground only when there is an emergency.

b. Frozen ground. During the period beginning February 1 and ending April 1, a person may apply liquid manure originating from a manure storage structure that is part of a confinement feeding operation on frozen ground only when there is an emergency.

c. What constitutes an emergency. For the purposes of this subrule, an emergency application is only allowed when there is an immediate need to apply manure to comply with the manure retention requirement of subrule 65.100(1) due to unforeseen circumstances affecting the storage of the liquid manure. The unforeseen circumstances must be beyond the control of the owner of the confinement feeding operation, including but not limited to natural disaster, unusual weather conditions, or equipment or structural failure. The authorization to apply liquid manure pursuant to this subrule does not apply to either of the following:

(1) An immediate need to apply manure in order to comply with the manure retention requirement of subrule 65.100(1) caused by the improper design or management of the manure storage structure, including but not limited to a failure to properly account for the volume of the manure to be stored. Based on the restrictions described in paragraphs 65.101(3)“*a*” and “*b*” and the possibility that the ground could be snow-covered and frozen for the entire period of December 21 to April 1, an operation should not plan to apply liquid manure during that time period. Confinement feeding operations with manure storage structures constructed after May 26, 2009, and without alternatives to manure application must have sufficient storage capacity to retain manure generated from December 21 to April 1 under normal circumstances in order to properly account for the volume of manure to be stored. For confinement feeding operations that have no manure storage structures constructed after May 26, 2009, the department will accept insufficient manure storage capacity as a reason for emergency application in the notification required in subrule 65.101(3).

(2) Liquid manure originating from a confinement feeding operation constructed or expanded on or after July 1, 2009, if the confinement feeding operation has a capacity to store manure for less than 180 days.

d. Procedure for emergency application. A person who is authorized to apply liquid manure on snow-covered ground or frozen ground when there is an emergency shall comply with all of the following:

(1) The person must notify the appropriate department field office by telephone prior to the application. The department will not consider the notification complete unless the owner's name, facility name, facility ID number, reason for emergency application, application date, estimated number of gallons of manure to be applied, and application fields as listed in the MMP are given. In cases where the emergency is not easily confirmed by weather reports, the owner must make documentation of the emergency available to the field office upon request.

(2) The liquid manure must be applied on land identified for such application in the current MMP maintained by the owner of the confinement feeding operation as required in subrule 65.111(7). The land must be identified in the current MMP prior to the application, and that change must also be reflected in the next annual update or complete MMP submitted to the department and county boards of supervisors following the application as required in paragraph 65.110(3) "b."

(3) The liquid manure must be applied on a field with a phosphorus index rating of 2 or less.

(4) Any surface water drain tile intake that is on land in the owner's MMP and located downgradient of the application must be temporarily blocked beginning not later than the time that the liquid manure is first applied and ending not earlier than two weeks after the completion of the application.

(5) Additional measures to contain runoff may be necessary in order to prevent violation of federal effluent standards in subrule 62.4(12).

e. Exceptions. Paragraphs 65.101(3) "a" through "d" do not apply to any of the following:

(1) The application of liquid manure originating from a SAFO.

(2) The application of liquid manure injected or incorporated into the soil on the same date.

[ARC 7965C, IAB 5/15/24, effective 6/19/24]

567—65.103(455B,459,459B) Construction permits—required approvals and permits. A person required to obtain a construction permit pursuant to subrule 65.103(1) or a construction approval letter pursuant to subrule 65.103(7) shall not begin construction, expansion or modification of a confinement feeding operation structure until the department issues a construction permit or a construction approval letter for a proposed or existing confinement feeding operation. In addition, the owner of a SAFO with formed manure storage structures who is not required to obtain a construction permit pursuant to subrule 65.103(1) or a construction approval letter pursuant to subrule 65.103(7) shall comply with the applicable construction approval requirements pursuant to subrule 65.103(8).

65.103(1) Confinement feeding operations required to obtain a construction permit prior to any of the following. Except as provided in subrule 65.103(2), a confinement feeding operation shall obtain a construction permit prior to any of the following:

a. Constructing or installing a confinement building that uses an unformed manure storage structure or constructing, installing or modifying an unformed manure storage structure.

b. Constructing or installing a confinement building that uses a formed manure storage structure or constructing, installing or modifying a formed manure storage structure if, after construction, installation or modification, the animal unit capacity of the operation is 1,000 animal units or more. This paragraph also applies to confinement feeding operations that store manure exclusively in a dry form.

c. Initiating a change, even if no construction of, or physical alteration to, an unformed manure storage structure is necessary, that would result in an increase in the volume of manure or a modification in the manner in which manure is stored in any unformed manure storage structure. Increases in the volume of manure due to an increase in animal capacity, animal weight capacity or animal unit capacity up to the limits specified in a previously issued construction permit do not require a new construction permit.

d. Initiating a change, even if no construction of or physical alteration to, a formed manure storage structure is necessary, that would result in an increase in the volume of manure or a modification in the manner in which manure is stored in a formed manure storage structure if, after the change, the animal unit capacity of the operation is 1,000 animal units or more. Increases in the volume of manure due to an increase in animal capacity, animal weight capacity or animal unit capacity up to the limits specified in a previously issued construction permit do not require a new construction permit.

e. Purchasing or acquiring an adjacent animal feeding confinement operation if after acquisition the animal unit capacity of the combined operation is 1,000 animal units or more. The construction permit application must be submitted within 60 days of the acquisition or purchase.

f. Constructing or modifying an egg washwater storage structure or a confinement building at a confinement feeding operation that includes an egg washwater storage structure.

g. Initiating a change, even if no construction of, or physical alteration to, an egg washwater storage structure is necessary, that would result in an increase in the volume of egg washwater or a modification in the manner in which egg washwater is stored. Increases in the volume of egg washwater due to an increase in animal capacity, animal weight capacity or animal unit capacity up to the limits specified in a previously issued construction permit do not require a new construction permit.

h. Repopulating a confinement feeding operation that had been a discontinued AFO for 24 months or more and if any of the following apply:

(1) The confinement feeding operation uses an unformed manure storage structure or egg washwater storage structure;

(2) The confinement feeding operation includes only confinement buildings and formed manure storage structures and has an animal unit capacity of 1,000 animal units or more.

i. Installing a permanent manure transfer piping system, unless the department determines that a construction permit is not required.

j. Initiating a remedial change, upgrade, replacement or construction when directed by the department as a result of departmental evaluation pursuant to rule 567—65.102(455B,459,459B) or as required by an administrative order or court order pursuant to Iowa Code section 455B.112 or 455B.175. Repairs to a confinement building or additions such as fans, slats, gates, roofs, or covers do not require a construction permit. In some instances, the department may determine that a construction permit

is not required to increase the volume of manure or egg washwater or a modification in the manner in which manure or egg washwater is stored if the increase or modification is deemed insignificant. Plans for repairs or modifications to a manure storage structure shall be submitted to the department to determine if a permit is required.

65.103(2) *Confinement feeding operations not required to obtain a construction permit.*

a. A construction permit shall not be required for a formed manure storage structure or for a confinement building that uses a formed manure storage structure in conjunction with a SAFO. However, this paragraph shall not apply to a SAFO that uses an unformed manure storage structure.

b. A construction permit shall not be required for a confinement feeding operation structure related to research activities and experiments performed under the authority and regulations of a research college.

c. A construction permit is not required to construct a formed manure storage structure at a confinement feeding operation having an animal unit capacity of more than 500 but less than 1,000 animal units; however, a construction approval letter is required from the department pursuant to subrule 65.103(8) and rule 567—65.104(455B,459,459B).

d. A construction permit is not required for a confinement feeding operation that exclusively confines fish and elects to comply with the permitting requirements of Iowa Code section 455B.183.

65.103(3) *Operations that shall not be issued construction permits.*

a. The department shall not issue a construction permit to a person if an enforcement action by the department, relating to a violation of this chapter concerning a confinement feeding operation in which the person has an interest, is pending.

b. The department shall not issue a construction permit to a person for five years after the date of the last violation committed by a person or confinement feeding operation in which the person holds a controlling interest during which the person or operation was classified as a habitual violator under Iowa Code sections 459.317 and 459.604.

c. The department shall not issue a construction permit to expand or modify a confinement feeding operation for 120 days after completion of the last construction or modification at the operation, if a permit was not required for the last construction or modification.

65.103(4) *Construction permit application plan review criteria.* Review of plans and specifications submitted with a construction permit application shall be conducted to determine the potential of the proposed manure control system to achieve the level of manure control being required of the confinement feeding operation. In conducting this review, applicable criteria contained in federal law, state law, these rules, NRCS design standards and specifications unless inconsistent with federal or state law or these rules, and U.S. Department of Commerce precipitation data shall be used. If the proposed facility plans are not adequately covered by these criteria, applicable criteria contained in current technical literature shall be used.

65.103(5) *Expiration of construction permits.* A construction permit shall expire if construction, as defined in rule 567—65.6(455B,459,459A,459B), is not begun within one year and completed within four years of the date of issuance. The director may grant an extension of time to begin or complete construction if it is necessary or justified, upon showing of such necessity or justification to the director, unless a person who has an interest in the proposed operation is the subject of a pending enforcement action or a person who has a controlling interest in the proposed operation has been classified as a habitual violator. If a permitted site has not completed all proposed permitted structures within the four-year limit, then the approved animal unit capacity in the construction permit shall be lowered to be equal to what was constructed and the department shall issue a construction permit amendment for what was constructed. Once all permitted construction has been completed, no amendments for new construction may be issued even though the four-year period has not expired. A new construction permit must be issued for the new proposed construction.

65.103(6) *Revocation of construction permits.* The department may revoke a construction permit or refuse to renew a permit expiring according to subrule 65.103(5) if it determines that the operation of the confinement feeding operation constitutes a clear, present and impending danger to public health or the environment.

65.103(7) *Confinement feeding operations required to obtain a construction approval letter.* A person planning to construct a confinement feeding operation, other than a SAFO as defined in rule 567—65.1(455B,459,459A,459B) or other than an operation required to obtain a construction permit pursuant to subrule 65.103(1), shall obtain from the department a construction approval letter as provided in subrule 65.104(2) prior to beginning construction of a formed manure storage structure or a confinement building. The construction approval letter shall expire if construction, as defined in subrule 65.6(1), is not begun within one year and completed within four years of the date of the construction approval letter.

65.103(8) *SAFOs.* The following requirements apply to SAFOs:

a. A construction permit shall not be required for a SAFO utilizing a formed manure storage structure; however, a construction permit is required for any unformed manure storage structures utilized at a SAFO.

b. If a SAFO cannot meet the required separation distance provided in Iowa Code section 459.310(1), a SAFO must comply with secondary containment barrier design in accordance with subrule 65.104(5).

c. A SAFO must comply with drain tile removal requirements if the SAFO utilizes an unformed manure storage structure in accordance with subrule 65.108(1).

d. SAFO confinement structures must comply with applicable separation distance requirements in rule 567—65.106(455B,459,459B).

65.103(9) *Compliance with permit conditions.* A person who constructs, modifies or expands a confinement feeding operation structure pursuant to a construction permit shall comply with all terms and conditions of the construction permit.

[ARC 7965C, IAB 5/15/24, effective 6/19/24]

567—65.104(455B,459,459B) Preconstruction submittal requirements. Prior to beginning construction, expansion or modification of a confinement feeding operation structure, a person shall obtain from the department a construction permit pursuant to subrule 65.103(1), a construction approval letter pursuant to subrule 65.103(7) or approval of a secondary containment barrier design pursuant to subrule 65.104(5), according to procedures established in this rule.

65.104(1) Construction permit application. Application for a construction permit for a confinement feeding operation shall be made on a form provided by the department. The application shall include all of the information required in the form. At the time the department receives a complete application, the department shall make a determination regarding the approval or denial of the permit in accordance with subrule 65.105(5). A construction permit application for a confinement feeding operation shall be filed as instructed on the form and shall include the following:

a. The name of the applicant and the name of the confinement feeding operation, including mailing address and telephone number.

b. The name of the current landowner or the proposed landowner of the land where the confinement feeding operation will be located.

c. The contact person for the confinement feeding operation, including mailing address and telephone number.

d. The location of the confinement feeding operation.

e. Whether the application is for the expansion of an existing operation or the construction of a proposed confinement feeding operation, and the date when it was first constructed if an existing operation.

f. The animal unit capacity by animal species of the current confinement feeding operation to be expanded, if applicable, and of the proposed confinement feeding operation. If the confinement feeding operation includes a confinement feeding operation structure that was constructed prior to March 1, 2003, the animal weight capacity by animal species of the current confinement feeding operation to be expanded, if applicable, and of the proposed confinement feeding operation shall also be included.

g. Engineering documents. A confinement feeding operation that utilizes an unformed manure storage structure, an egg washwater storage structure or a formed manure storage structure at an operation that meets the threshold requirements for an engineer as defined in rule 567—65.1(455B,459,459A,459B) shall include an engineering report, construction plans and specifications. The engineering report, construction plans and specifications must be prepared and signed by a licensed PE or by an NRCS-qualified staff person, must detail the proposed structures, and must include a statement certifying that the manure storage structure complies with the requirements of Iowa Code chapter 459. In addition, a qualified soils or groundwater professional, licensed PE or NRCS-qualified staff person shall submit a hydrogeologic report on soil corings in the area of the unformed manure storage structure or egg washwater storage structure as described in subrules 65.108(5) and 65.108(9).

h. Construction design statement or PE design certification. A confinement feeding operation that uses a formed manure storage structure and that is below the threshold requirements for an engineer as defined in rule 567—65.1(455B,459,459A,459B) shall submit a construction design statement pursuant to subrule 65.104(3) or a PE design certification pursuant to subrule 65.104(4). All elevations shall be in NAV 88 datum for sites with alluvial soils or floodplain requirements.

i. Payment to the department of the indemnity fund fee as required in Iowa Code section 459.502.

j. If the construction permit application is for three or more confinement feeding operation structures, a drainage tile certification shall be submitted as follows:

(1) If the application is for an unformed manure storage structure, an egg washwater storage structure or a formed manure storage structure that meets the threshold requirements for an engineer as defined in rule 567—65.1(455B,459,459A,459B), a licensed PE shall certify that either the construction of the structure will not impede the drainage through established drainage tile lines which cross property boundary lines or that if the drainage is impeded during construction, the drainage tile will be rerouted to reestablish the drainage prior to operation of the structure.

(2) If the application is for a formed manure storage structure that does not meet the threshold engineering requirements, a drainage tile certification shall be submitted as part of the construction design statement pursuant to subrule 65.104(3) or as part of the PE design certification pursuant to subrule 65.104(4).

k. Information (e.g., maps, drawings, aerial photos) that clearly shows the proposed location of the confinement feeding operation structures; any existing confinement feeding operation structures; any locations or objects from which a separation distance is required by Iowa Code sections 459.202, 459.203 and 459.310; and that the structures will meet all applicable separation distances. If applicable, a copy of a recorded separation distance waiver, pursuant to paragraph 65.107(1) “b,” must be included with the application. Also, if applicable, a secondary containment barrier design, pursuant to subrules 65.104(5) and 65.107(7), shall be included.

l. The names of all parties with an interest or controlling interest in the confinement feeding operation who also have an interest or controlling interest in at least one other confinement feeding operation in Iowa, and the names and locations of such other operations; for a partnership or corporation owning the confinement feeding operation, a list of all members and their percentage of ownership in the partnership or corporation.

m. Copies of the MMP pursuant to rule 567—65.110(455B,459,459B).

n. A construction permit application fee of \$250 and the MMP filing fee of \$250 as required in subrule 65.110(7).

o. A copy of the AFO Siting Atlas indicating the location of the proposed structure, with the one hundred year floodplain and karst layers included.

p. A copy of any master matrix evaluation provided to the county.

q. A livestock odor mitigation evaluation certificate issued by Iowa State University as provided in Iowa Code section 266.49. The applicant is not required to submit the certificate if any of the following apply:

(1) The confinement feeding operation is twice the minimum separation distance required from the nearest object or location from which a separation distance is required pursuant to Iowa Code section 459.202 on the date of the application, not including a public thoroughfare.

(2) The owner of each object or location that is less than twice the minimum separation distance required pursuant to Iowa Code section 459.202 from the confinement feeding operation on the date of the application, other than a public thoroughfare, executes a document consenting to the construction.

(3) The applicant submits a document swearing that Iowa State University has failed to furnish a certificate to the applicant within 45 days after the applicant requested Iowa State University to conduct a livestock odor mitigation evaluation as provided in Iowa Code section 266.49.

(4) The application is for a permit to expand a confinement feeding operation, if the confinement feeding operation was first constructed before January 1, 2009.

(5) Iowa State University does not provide for a livestock odor mitigation evaluation effort as provided in Iowa Code section 266.49, for any reason, including because funding is not available.

r. Documentation that copies of all the construction permit application documents have been provided to the county board of supervisors or county auditor in the county where the operation or structure subject to the permit is to be located, and documentation of the date received by the county.

65.104(2) Construction approval letter.

a. A confinement feeding operation that, pursuant to subrule 65.103(7), is required to obtain a construction approval letter as defined in rule 567—65.1(455B,459,459A,459B), but that is not required to obtain a construction permit pursuant to subrule 65.103(1), shall file with the department, at least 30 days prior to the date the proposed construction is scheduled to begin, all of the following:

(1) A construction design statement pursuant to subrule 65.104(3). In lieu of a construction design statement, a PE design certification pursuant to subrule 65.104(4) may be submitted.

(2) A copy of the MMP pursuant to rule 567—65.110(455B,459,459B).

(3) Information (e.g., maps, drawings, aerial photos) that clearly shows the intended location of the confinement feeding operation structures and animal weight capacities of any other confinement feeding

operations within a distance of 2,500 feet in which the owner has an ownership interest or which the owner manages.

(4) A fee of \$250 for filing an MMP pursuant to subrule 65.110(7) and a manure storage indemnity fee pursuant to subrule 65.110(6).

(5) Documentation that the board of supervisors or auditor of the county where the confinement feeding operation structure is proposed to be located received a copy of the MMP.

b. After submission of items in subparagraphs 65.104(2)“a”(1) through 65.104(2)“a”(5) and prior to issuance of the construction approval letter, the confinement feeding operation may make nonsubstantial revisions to the items and maintain the date construction is scheduled to begin.

65.104(3) Construction design statement. Prior to beginning construction of a formed manure storage structure, a person planning construction at a confinement feeding operation, other than a SAFO, that is below the threshold requirements for an engineer as defined in rule 567—65.1(455B,459,459A,459B) shall file with the department a construction design statement, as follows:

a. A confinement feeding operation with an animal unit capacity of more than 500 but less than 1,000 animal units that is required to obtain a construction approval letter from the department pursuant to subrule 65.103(7) but that is not required to obtain a construction permit pursuant to subrule 65.103(1) shall file with the department a construction design statement, as required in subrule 65.104(2). Within 30 days after the filing of a construction design statement, the department may issue a construction approval letter as defined in rule 567—65.1(455B,459,459A,459B) if the proposed formed manure storage structure meets the requirements of this chapter.

b. A confinement feeding operation that has an animal unit capacity of 1,000 animal units or more but that is below the threshold requirements for an engineer as defined in rule 567—65.1(455B,459,459A,459B) shall file a construction design statement as part of the construction permit application and as required in subrule 65.104(1).

c. The construction design statement shall be filed on a form provided by the department and shall include all of the following:

(1) The name of the person planning construction at the confinement feeding operation, the name of the confinement feeding operation, the location of the proposed formed manure storage structure, a detailed description of the type of confinement feeding operation structure being proposed, the dimensions of the structure, and whether the structure will be constructed of reinforced concrete or steel.

(2) An MMP pursuant to rule 567—65.110(455B,459,459B).

(3) A certification signed by the person responsible for constructing the formed manure storage structure that the proposed formed manure storage structure will be constructed according to the minimum concrete standards set forth in subrule 65.108(10). Otherwise, if the formed manure storage structure is to be constructed of steel, including a Slurrystore® tank, a certification signed by the person responsible for constructing the formed manure storage structure that the proposed formed manure storage structure will be constructed according to the requirements of Iowa Code chapter 459 and this chapter.

(4) If the confinement feeding operation is also required to obtain a construction permit at a confinement feeding operation proposing three or more confinement feeding operation structures, the construction design statement shall include a drainage tile certification signed by the person responsible for constructing or excavating the formed manure storage structure, shall certify that construction will not impede established existing drainage, and shall verify that if existing drainage tiles are found, corrective actions will be implemented to immediately reestablish existing drainage.

d. The following operations are not required to file a construction design statement with the department:

(1) A SAFO that constructs a formed manure storage structure.

(2) A confinement feeding operation that submits a PE design certification pursuant to this subrule.

(3) A confinement feeding operation that meets or exceeds threshold requirements for an engineer as defined in rule 567—65.1(455B,459,459A,459B).

(4) A confinement feeding operation that utilizes an unformed manure storage structure or an egg washwater storage structure.

65.104(4) PE design certification. In lieu of a construction design statement prior to beginning construction of a formed manure storage structure, a confinement feeding operation, other than a SAFO, that is below the threshold requirements for an engineer pursuant to rule 567—65.1(455B,459,459A,459B) may file with the department a PE design certification and design plans signed by a PE licensed in the state of Iowa or an NRCS-qualified staff person. The PE design certification shall be site-specific and shall be filed on a form provided by the department as follows:

a. A confinement feeding operation with an animal unit capacity of more than 500 but less than 1,000 animal units that is not required to obtain a construction permit pursuant to subrule 65.103(1) shall file with the department, at least 30 days before beginning construction of a formed manure storage structure, the PE design certification as required in subrule 65.104(2). Within 30 days after the filing of a PE design certification, the department may issue a construction approval letter if the proposed formed manure storage structure meets the requirements of this chapter.

b. A confinement feeding operation with an animal unit capacity of 1,000 animal units or more that is required to obtain a construction permit pursuant to subrule 65.103(1) but that is below the threshold requirements for an engineer pursuant to rule 567—65.1(455B,459,459A,459B) shall file with the department the PE design certification as part of the construction permit application and as required in subrule 65.104(1).

65.104(5) Secondary containment barrier design submittal requirements. The design for a secondary containment barrier to qualify any confinement feeding operation for the separation distance exemption provision in subrule 65.107(7) shall be filed with the department for approval prior to beginning construction of a formed manure storage structure that is part of a SAFO, shall accompany the construction design statement pursuant to subrule 65.104(2) if a construction permit is not required, or shall be filed as part of the construction permit application pursuant to subrule 65.104(1). The secondary containment barrier shall meet the design standards of subrule 65.108(11) and shall be prepared according to the following:

a. If a manure storage structure stores liquid or semiliquid manure, the secondary containment barrier design shall include engineering drawings prepared and signed by a PE licensed in the state of Iowa or an NRCS-qualified staff person. For purposes of this subrule only, “semiliquid manure” means manure that contains a percentage of dry matter that results in manure too solid for pumping but too liquid for stacking.

b. If the manure storage structure will store only dry manure or dry bedded manure, the owner or a representative of a confinement feeding operation may submit to the department detailed drawings of the design for a secondary containment barrier.

[ARC 7965C, IAB 5/15/24, effective 6/19/24]

567—65.110(455B,459,459B) Manure management plan (MMP) requirements.

65.110(1) In accordance with Iowa Code section 459.312, the following persons are required to submit MMPs to the department, including an original MMP and an updated MMP, as required by this rule:

a. An applicant for a construction permit for a confinement feeding operation. However, an MMP shall not be required of an applicant for an egg washwater storage structure or for a SAFO.

b. The owner of a confinement feeding operation, other than a SAFO, if one of the following applies:

(1) The confinement feeding operation was constructed or expanded after May 31, 1985, regardless of whether the confinement feeding operation structure was required to have a construction permit.

(2) The owner constructs a manure storage structure, regardless of whether the person is required to be issued a permit for the construction pursuant to Iowa Code section 459.303 or whether the person has submitted a prior MMP. If the new manure storage structure does not result in an increase in manure volume for the confinement feeding operation and there is no change in animal category for determining animal units, then a new MMP is not required to be submitted.

c. A person who applies manure in Iowa that was produced in a confinement feeding operation, other than a small operation, located outside of Iowa.

d. A new owner of a confinement feeding operation may apply manure under the most recent owner's MMP until the new owner develops and submits an original MMP. The new owner must develop and submit an original MMP within 60 days after acquiring the operation.

e. Exceptions.

(1) A research college is exempt from this subrule and the MMP requirements of rule 567—65.111(455B,459,459B) for research activities and experiments performed under the authority of the research college and related to confinement feeding operations.

(2) An AFO otherwise required to submit an updated MMP and pay an annual compliance fee may make an election to be considered a SAFO for purposes of filing updated MMPs and annual compliance fees if the confinement feeding operation maintains an animal unit capacity of 500 or fewer animal units. The election shall automatically terminate when more than 500 animal units are housed at the confinement feeding operation at any one time. If the confinement feeding operation exceeds more than 500 animal units, an MMP shall be submitted.

65.110(2) The owner of a proposed confinement feeding operation who is not required to obtain a construction permit pursuant to subrule 65.103(1) but who is required to file an MMP pursuant to paragraph 65.110(1) "b" shall file a construction design statement and provide the information required in subrule 65.104(2), including the confinement feeding operation's MMP, to the department at least 30 days before the construction of an AFO structure begins, as defined in subrules 65.6(1) and 65.6(2).

65.110(3) Scope of MMP; updated plans; annual compliance fee.

a. Each confinement feeding operation required to submit an MMP shall be covered by a separate MMP.

b. The owner of a confinement feeding operation who is required to submit an MMP under this rule shall submit an updated MMP on an annual basis to the department. The updated MMP may be submitted by hard copy or by electronic submittal. The updated plan must reflect all amendments made during the period of time since the previous MMP submission.

(1) If the plan is submitted by hard copy, the submittal process shall be as follows: The owner of the AFO shall also submit the updated MMP on an annual basis to the board of supervisors of each county where the confinement feeding operation is located and to the board of supervisors of each county where manure from the confinement feeding operation is land-applied. If the owner of the AFO has not previously submitted an MMP to the board of supervisors of each county where the confinement feeding operation is located and each county where manure is land-applied, the owner must submit a complete MMP to each required county. The county auditor or other county official or employee designated by the county board of supervisors may accept the updated plan on behalf of the board. The updated plan shall include documentation that the county board of supervisors or other designated county official or employee received the MMP update.

(2) If the plan is submitted electronically, the submittal process shall be as follows: The owner of the AFO shall submit the updated MMP to the department through the department's electronic web application. Once the submittal has been completed, the department shall provide electronic access of the updated MMP to the board of supervisors of each county where the confinement feeding operation is located and each county where manure is land-applied.

(3) The department will stagger the dates by which the updated MMPs are due and will notify each confinement feeding operation owner of the date on which the updated MMP is due. To satisfy the requirements of an updated MMP, an owner of a confinement feeding operation must submit one of the following:

1. A complete MMP;
2. A department-approved document stating that the MMP submitted in the prior year has not changed; or
3. A department-approved document listing all the changes made since the previous MMP was submitted and approved.

c. An annual compliance fee of \$0.15 per animal unit at the AFO shall accompany an annual MMP update submitted to the department for approval. The annual compliance fee is based on the animal unit capacity of the confinement feeding operation stated in the updated annual MMP submission. If the person submitting the MMP is a contract producer, as provided in Iowa Code chapter 202, the active contractor shall pay the annual compliance fee.

65.110(4) The department shall review and approve or disapprove all complete MMPs within 60 days of the date they are received.

65.110(5) Manure shall not be removed from a manure storage structure which is part of a confinement feeding operation required to submit an MMP until the department has approved the plan. Manure shall be applied in compliance with rule 567—65.100(455B,459,459B).

65.110(6) Manure storage indemnity fee. All persons required to submit an MMP to the department shall also pay to the department an indemnity fee as required in Iowa Code section 459.503 except those operations constructed prior to May 31, 1995, which were not required to obtain a construction permit.

65.110(7) Filing fee. Any person submitting an original MMP must also pay to the department an MMP filing fee of \$250. This fee shall be included with each original MMP being submitted. If the confinement feeding operation is required to obtain a construction permit and to submit an original MMP as part of the construction permit requirements, the applicant must pay the MMP filing fee together with the construction permit application fee, which total \$500.

[ARC 7965C, IAB 5/15/24, effective 6/19/24]

567—65.111(455B,459,459B) MMP content requirements. All MMPs are to be submitted on forms or electronically as prescribed by the department. The plans shall include all of the information specified in Iowa Code section 459.312 and as described below.

65.111(1) General.

a. A confinement feeding operation that is required to submit an MMP to the department shall not apply manure in excess of the nitrogen use levels necessary to obtain optimum crop yields. A confinement feeding operation shall not apply manure in excess of the rates determined in conjunction with the phosphorus index. Information to complete the required calculations may be obtained from the tables in this chapter, actual testing samples or from other credible sources reviewed and approved by the department including but not limited to Iowa State University, the United States Department of Agriculture (USDA), a licensed PE, or an individual certified as a crop consultant under the American Registry of Certified Professionals in Agronomy, Crops, and Soils program, the Certified Crop Advisors program, or the Registry of Environmental and Agricultural Professionals program.

b. MMPs shall include all of the following:

(1) The name of the owner and the name of the confinement feeding operation, including mailing address and telephone number.

(2) The name of the contact person for the confinement feeding operation, including mailing address and telephone number.

(3) The location of the confinement feeding operation identified by county, township, section, $\frac{1}{4}$ section and, if available, the 911 address.

(4) The animal unit capacity of the confinement feeding operation and, if applicable, the animal weight capacity.

c. A person who submits an MMP shall include a phosphorus index as part of the MMP as required in subrule 65.111(12).

d. A new owner of a confinement feeding operation may apply manure under the most recent owner's MMP until the new owner develops and submits an original MMP. The new owner must develop and submit an original MMP within 60 days after acquiring the confinement feeding operation.

e. A research college is exempt from this subrule for research activities and experiments performed under the authority of the research college and related to confinement feeding operations.

65.111(2) MMP contents. Confinement feeding operations that will not sell all of their manure shall submit the following for that portion of the manure which will not be sold:

a. The name of the owner and the name of the confinement feeding operation, including mailing address and telephone number.

b. The name of the contact person for the confinement feeding operation, including mailing address and telephone number.

c. The location of the confinement feeding operation identified by county, township, section, $\frac{1}{4}$ section and, if available, the 911 address.

d. An estimate of the nitrogen and phosphorus concentration of the manure and estimate of annual manure production.

e. Application rate calculations based on regulations in subrule 65.111(12).

f. The location of manure application.

g. Soil loss calculations using methods specified for Iowa phosphorus index.

h. A phosphorus index of each field in the MMP, as defined in paragraph 65.111(12)“*a*,” including the factors used in the calculation. A copy of the NRCS phosphorus index detailed report shall satisfy the requirement to include the factors used in the calculation.

65.111(3) Estimate of manure concentration and production. An MMP must include an estimate of nitrogen and phosphorus concentration and an estimate of annual manure production by one of the following methods.

a. Table values in Table 4 located at iowadnr.gov/afo/rules or other credible sources.

b. Actual concentration and production values from the operation or a similar operation. If an actual sample is used to represent the nutrient content of manure, the sample shall be taken in accordance with Iowa State University Extension and Outreach publication AE 3550, “How to Sample Manure for

Nutrient Analysis.” The department may require documentation of the manure sampling protocol or take a split sample to verify the nutrient content of the operation’s manure. If actual nitrogen and phosphorus are used for concentration in the MMP, actual manure production must also be used. Any sample used to estimate the concentration of manure must be less than four years old.

65.111(4) *Optimum crop yield and crop schedule.*

a. To determine the optimum crop yield, the applicant may either exclude the lowest crop yield for the period of the crop schedule in the determination or allow for a crop yield increase of 10 percent. In using these methods, adjustment to update yield averages to current yield levels may be made if it can be shown that the available yield data is not representative of current yields. The optimum crop yield shall be determined using any of the following methods for the cropland where the manure is to be applied:

(1) Soil survey interpretation record. The plan shall include a map showing soil map units for the fields where manure will be applied. The optimum crop yield for each field shall be determined by using the weighted average of the soil interpretation record yields for the soils on the cropland where the manure is to be applied. Soil interpretation records from NRCS shall be used to determine yields based on soil map units.

(2) USDA county crop yields. The plan shall use the county yield data from the USDA Iowa Agricultural Statistics Service.

(3) Proven yield methods. Proven yield methods may only be used if a minimum of the most recent three years of yield data for the crop is used. These yields can be proven on a field-by-field or farm-by-farm basis. To be considered a farm-by-farm basis, the fields must be owned, rented or leased for crop production by the person required to keep records pursuant to subrule 65.111(8) or included in a manure application agreement in that person’s MMP. Crop disaster years may be excluded when there is a 30 percent or more reduction in yield for a particular field or farm from the average yield over the most recent five years. Excluded years shall be replaced by the most recent nondisaster years. Proven yield data used to determine application rates shall be maintained with the current MMP. Any of the following proven yield methods may be used:

1. Proven yields for USDA Farm Service Agency. The plan shall use proven yield data or verified yield data for Farm Service Agency programs.

2. Proven yields for multiperil crop insurance. Yields established for the purpose of purchasing multiperil crop insurance shall be used as proven yield data.

3. Proven yields from other methods. The plan shall use the proven yield data and indicate the method used in determining the proven yield.

b. Crop schedule. Crop schedules shall include the name and total acres of the planned crop on a field-by-field or farm-by-farm basis where manure application will be made. A map may be used to indicate crop schedules by field or farm. The planned crop schedule shall name the crop(s) planned to be grown for the length of the crop rotation beginning with the crop planned or actually grown during the year this plan is submitted or the first year manure will be applied. The confinement feeding operation owner shall not be penalized for exceeding the nitrogen or phosphorus application rate for an unplanned crop if crop schedules are altered because of weather, farm program changes, market factor changes, or other unforeseeable circumstances. However, the penalty preclusion in the previous sentence does not apply to a confinement feeding operation owner subject to the NPDES permit program.

65.111(5) *Location of manure application.*

a. The MMP shall identify each field where the manure will be applied, the number of acres that will be available for the application of manure from the confinement feeding operation, and the basis under which the land is available.

b. A copy of each written agreement executed with the owner of the land where manure will be applied shall be maintained with the current MMP. The written agreement shall indicate the number of acres on which manure from the confinement feeding operation may be applied and the length of the agreement. A written agreement is not required if the land is owned or rented for crop production by the owner of the confinement feeding operation. Owners of dry bedded confinement feeding operations

required to have an MMP may execute a written agreement with the landowner or the person renting the land for crop production where the dry bedded manure will be applied.

65.111(6) *Soil loss calculations for phosphorus index.* The MMP shall indicate for each field in the plan the crop rotation, tillage practices and supporting practices used to calculate sheet and rill erosion for the phosphorus index. A copy of an NRCS RUSLE2 erosion calculation record shall satisfy this requirement. The plan shall also identify the highly erodible cropland where manure will be applied.

65.111(7) *Current MMP.* The owner of a confinement feeding operation who is required to submit an MMP shall maintain a current MMP at the site of the confinement feeding operation or at a residence or office of the owner or operator of the operation within 30 miles of the site. The MMP may be an electronic or hard copy. The MMP should include completed manure sales forms if the manure is sold. If manure management practices change, a person required to submit an MMP shall make appropriate changes consistent with this chapter. If values other than the standard table values are used for MMP calculations, the source of the values used shall be identified.

65.111(8) *Recordkeeping.* Records shall be maintained by the owner of a confinement feeding operation who is required to submit an MMP. Records shall be maintained for five years following the year of application or for the length of the crop rotation, whichever is greater. Records shall be maintained at the site of the confinement feeding operation or at a residence or office of the owner or operator of the facility within 30 miles of the site. Electronic records are acceptable in lieu of paper records at the facility or the office. Records to demonstrate compliance with the MMP shall include the following:

- a. Factors used to calculate the manure application rate:
 - (1) Optimum yield for the planned crop.
 - (2) Types of nitrogen credits and amounts.
 - (3) Remaining crop nitrogen needed.
 - (4) Nitrogen and phosphorus concentration and first-year nitrogen availability of the manure. If an actual sample is used, documentation shall be provided.
- b. If phosphorus-based application rates are used, the following shall be included:
 - (1) Crop rotation.
 - (2) Phosphorus removed by crop harvest of that crop rotation.
- c. Maximum allowable manure application rate.
- d. Actual manure application information:
 - (1) Methods of application when manure from the confinement feeding operation was applied.
 - (2) Date(s) when the manure from the confinement feeding operation was applied.
 - (3) Location of the field where the manure from the confinement feeding operation was applied, including the number of acres.
 - (4) The manure application rate.
- e. The date(s) and application rate(s) of commercial nitrogen and phosphorus on fields that received manure. However, if the date and application rate information is for fields that are not owned for crop production or that are not rented or leased for crop production by the person required to keep records pursuant to this subrule, an enforcement action for noncompliance with an MMP or the requirements of this subrule shall not be pursued against the person required to keep records pursuant to this subrule or against any other person who relied on the date and application rate in records required to be kept pursuant to this subrule, unless that person knew or should have known that nitrogen or phosphorus would be applied in excess of maximum levels set forth in paragraph 65.111(1)“a.” If manure is applied to fields not owned, rented or leased for crop production by the person required to keep records pursuant to this subrule, that person shall obtain from the person who owns, rents or leases those fields a statement specifying the planned commercial nitrogen and phosphorus fertilizer rates to be applied to each field receiving the manure.
- f. A copy of the current soil test lab results for each field in the MMP.
- g. For sales of manure under paragraph 65.111(15)“b,” recordkeeping requirements of subparagraph 65.111(15)“b”(7) shall be followed.
- h. The name and certification number of the certified manure applicator.

65.111(9) Record inspection. The department may inspect a confinement feeding operation at any time during normal working hours and may inspect the MMP and any records required to be maintained. As required in Iowa Code section 459.312(12), Iowa Code chapter 22 shall not apply to the records which shall be kept confidential by the department and its agents and employees. The contents of the records are not subject to disclosure except as follows:

- a. Upon waiver by the owner of the confinement feeding operation.
- b. In an action or administrative proceeding commenced under this chapter. Any hearing related to the action or proceeding shall be closed.
- c. When required by subpoena or court order.

65.111(10) Enforcement action. An owner required to provide the department an MMP pursuant to this rule who fails to provide the department an MMP or who is found in violation of the terms and conditions of the MMP shall not be subject to an enforcement action other than assessment of a civil penalty pursuant to Iowa Code section 455B.191.

65.111(11) Soil sampling requirements for fields where the phosphorus index must be used. Soil samples shall be obtained from each field in the MMP, and the soil samples shall be four years old or less. Each soil sample shall be analyzed for phosphorus and pH. The soil sampling protocol shall meet all of the following requirements:

- a. Acceptable soil sampling strategies include but are not limited to grid sampling, management zone sampling, and soil type sampling. Procedural details can be taken from Iowa State University Extension and Outreach publication CROP 31-8, "Take a Good Soil Sample to Help Make Good Fertilization Decisions," NCR-13 Report 348, "Soil Sampling for Variable-Rate Fertilizer and Lime Application," effective January 1, 2001, or other credible soil sampling publications.
- b. Each soil sample must be a composite of at least ten soil cores from the sampling area, with each core containing soil from the top six inches of the soil profile.
- c. Each soil sample shall represent no more than ten acres. For fields less than or equal to 15 acres, only one soil sample is necessary.
- d. Soil analysis must be performed by a lab enrolled in the Iowa department of agriculture and land stewardship (IDALS) soil testing certification program.
- e. The soil phosphorus test method must be an appropriate method for use with the phosphorus index. If soil pH is greater than or equal to 7.4, soil phosphorus data from the Bray-1 extraction method is not acceptable for use with the phosphorus index.
- f. If manure is applied as phosphorus-based rates within soil sampling periods, each soil sample may represent up to 20 acres for the next required soil sampling.

65.111(12) Use of the phosphorus index. Manure application rates shall be determined in conjunction with the use of the Iowa Phosphorus Index as specified by NRCS Iowa Technical Note No. 25 Iowa Phosphorus Index.

a. When sheet and rill erosion is calculated for the Iowa Phosphorus Index, the soil map unit used for the calculation shall be the predominant soil map unit of the steepest slope class that comprises at least 10 percent of the total field area. For fields less than 25 acres in size, the predominant soil map unit of the steepest slope class that comprises at least 20 percent of the total field area shall be used. In all MMPs submitted to the department for approval, the soil map unit used for the sheet and rill erosion calculation will be consistent with NRCS Iowa Agronomy Technical Note No. 29 Dominant Critical Area. For the calculations of ephemeral gullies, the provisions of NRCS Iowa Technical Note No. 25 Iowa Phosphorus Index with in-field measurement or estimates from review of at least four aerial photographs shall be used. If aerial photographs are used for the evaluation, aerial photography from the spring prior to crop canopy or fall after harvest must be included in the evaluation when available.

b. When sheet and rill erosion is calculated for the phosphorus index, the soil map unit used for the calculation shall be the predominant highly erodible soil map unit when planning for a highly erodible field and the predominant non-highly erodible soil map unit when planning for a non-highly erodible field. For the calculations of ephemeral gullies, the provisions of NRCS Iowa Technical Note No. 25 Iowa Phosphorus Index shall be used with: (1) supporting documents and spreadsheets or (2) aerial

photographs from at least four separate years, with at least one of the photographs being from the most vulnerable time of the year.

c. The average (arithmetic mean) soil phosphorus concentration of a field shall be used in the phosphorus index.

d. Soil phosphorus concentration data is considered valid for use in the phosphorus index if the data is four years old or less and meets the requirements of subrule 65.111(11).

e. For an original MMP, previous soil sampling data that does not meet the requirements of subrule 65.111(11) may be used in the phosphorus index if the data is four years old or less. In the case of fields for which soil sampling data is used that does not meet the requirements of subrule 65.111(11), the fields must be soil-sampled according to the requirements of subrule 65.111(11) no more than one year after the original MMP is approved and an updated original MMP shall be submitted with the results of the new samples at the time of the next MMP update.

f. The following are the manure application rate requirements for fields that are assigned the phosphorus index site vulnerability ratings below as determined by the NRCS Iowa Technical Note No. 25 Iowa Phosphorus Index to the NRCS 590 standard rounded to the nearest one-hundredth:

(1) Very Low or Low (0-2). Manure shall not be applied in excess of a nitrogen-based rate in accordance with subrule 65.111(13).

(2) Medium (>2-5). Manure shall not be applied (1) in excess of two times the phosphorus removed with crop harvest over the period of the crop rotation or (2) to exceed the nitrogen-based rate of the planned crop receiving the particular manure application.

(3) High or Very High (>5). Manure shall not be applied on a field with a rating greater than 5.

g. Additional commercial fertilizer may be applied as follows on fields receiving manure:

(1) Phosphorus fertilizer may be applied in addition to phosphorus provided by the manure up to amounts recommended by soil tests and Iowa State University Extension and Outreach publication PM 1688, "A General Guide for Crop Nutrient and Limestone Recommendations in Iowa."

(2) Nitrogen fertilizer may be applied in addition to nitrogen provided by the manure to meet the remaining nitrogen need of the crop as calculated in the current MMP. Additional nitrogen fertilizer may be applied up to the amounts indicated by soil test nitrogen results or crop nitrogen test results as necessary to obtain the optimum crop yield.

h. Updating the phosphorus index.

(1) When any inputs to the phosphorus index change, an operation shall recalculate the phosphorus index and adjust the application rates if necessary.

(2) If additional land becomes available for manure application, the phosphorus index shall be calculated to determine the manure application rate before manure is applied.

(3) An operation must submit a complete MMP using a new phosphorus index, including soil sampling as required in subrule 65.111(11), for each field in the MMP a minimum of once every four years.

65.111(13) Requirements for application of a nitrogen-based manure rate to a field.

a. Nitrogen-based application rates shall be based on the total nitrogen content of the manure unless the calculations are submitted to show that nitrogen crop usage rates based on plant-available nitrogen have not been exceeded for the crop schedule submitted.

b. The correction factor for nitrogen losses shall be determined for the method of application by the following or from other credible sources for nitrogen volatilization correction factors.

Knifed in or soil injection of liquids	0.98
Surface-apply liquid or dry with incorporation within 24 hours	0.95
Surface-apply liquid or dry with incorporation after 24 hours	0.80
Surface-apply liquids with no incorporation	0.75
Surface-apply dry with no incorporation	0.70
Irrigated liquids with no incorporation	0.60

c. Nitrogen-based applications rates shall be based on the optimum crop yields as determined in subrule 65.111(4) and crop nitrogen usage rate factor values in Table 4 located at iowadnr.gov/afo/rules or other credible sources. The calculations of manure applied from the facility must account for fertilizer from all other manure and nonmanure sources. Liquid manure applied to land that is currently planted to soybeans or to land where the current crop has been harvested and that will be planted to soybeans the next crop season shall not exceed 100 pounds of available nitrogen per acre. Further, the 100-pounds-per-acre application limitation in the previous sentence does not apply on or after June 1 of each year; in that event, subrule 65.111(4) and Table 4 would apply as provided in the first sentence of this paragraph.

d. A nitrogen-based manure rate shall account for legume production in the year prior to growing corn or other grass crops and shall account for any planned commercial fertilizer application.

65.111(14) Requirements for application of a phosphorus-based manure rate to a field.

a. Phosphorus removal by harvest for each crop in the crop schedule shall be determined using the optimum crop yield as determined in subrule 65.111(4) and phosphorus removal rates of the harvested crop from Table 4a located at iowadnr.gov/afo/rules or other credible sources. Phosphorus crop removal shall be determined by multiplying optimum crop yield by the phosphorus removal rate of the harvested crop.

b. Phosphorus removal by the crop schedule shall be determined by summing the phosphorus crop removal values determined in paragraph 65.111(14)“a” for each crop in the crop schedule.

c. The phosphorus applied over the duration of the crop schedule shall be less than or equal to the phosphorus removed with harvest during that crop schedule as calculated in paragraph 65.111(14)“b” unless additional phosphorus is recommended by soil tests and Iowa State University Extension and Outreach publication PM 1688, “A General Guide for Crop Nutrient and Limestone Recommendations in Iowa.”

d. Additional requirements for phosphorus-based rates.

(1) No single manure application shall exceed the nitrogen-based rate of the planned crop receiving the particular manure application.

(2) No single manure application shall exceed the rate that applies to the expected amount of phosphorus removed with harvest by the next four anticipated crops in the crop schedule.

e. If the actual crop schedule differs from the planned crop schedule, then any surplus or deficit of phosphorus shall be accounted for in the subsequent manure application.

f. Phosphorus in manure should be considered 100 percent available unless soil phosphorus concentrations are below optimum levels for crop production. If soil phosphorus concentrations are below optimum levels for crop production phosphorus availability, values suggested in Iowa State University Extension and Outreach publication PMR 1003, “Using Manure Nutrients for Crop Production” or other credible sources shall be used.

65.111(15) MMPs for sales of manure. Selling manure means the transfer of ownership of the manure for monetary or other valuable consideration. Selling manure does not include a transaction where the consideration is the value of the manure or where an easement, lease or other agreement granting the right to use the land only for manure application is executed.

a. Confinement feeding operations that will sell dry manure as a commercial fertilizer or soil conditioner regulated by IDALS under Iowa Code chapter 200 or bulk dry manure animal nutrient product regulated by IDALS under Iowa Code chapter 200A shall submit a copy of their site-specific IDALS license or documentation that manure will be sold pursuant to Iowa Code chapter 200 or 200A, along with the department-approved MMP form for sales of dry manure. Operations completely covered by this paragraph are not required to meet other MMP requirements in this rule.

b. A confinement feeding operation not fully covered by paragraph 65.111(15)“a” that has an established practice of selling manure, or a confinement feeding operation that contains an animal species for which selling manure is a common practice, shall submit an MMP that includes the following:

(1) An estimate of the number of acres required for manure application calculated by one of the following methods:

1. Dividing the total phosphorus (as P₂O₅) available to be applied from the confinement feeding operation by the corn crop removal of phosphorus. The corn crop removal of phosphorus may be

estimated by using the phosphorus removal rate in Table 4a located at iowadnr.gov/afo/rules and an estimate of the optimum crop yield for the property in the vicinity of the operation.

2. Totaling the quantity of manure that can be applied to each available field based on application rates determined in conjunction with the phosphorus index in accordance with subrule 65.111(12), and ensuring that the total quantity that can be applied is equal to or exceeds the manure annually generated at the operation.

(2) The total nitrogen available to be applied from the confinement feeding operation.

(3) The total phosphorus (as P₂O₅) available to be applied from the confinement feeding operation if the phosphorus index is required in accordance with paragraph 65.111(1)“c.”

(4) An estimate of the annual animal production and manure volume or weight produced.

(5) A manure sales form. If manure will be sold, the manure sales form shall include the following information:

1. A place for the name and address of the buyer of the manure.

2. A place for the quantity of manure purchased.

3. The planned crop schedule and optimum crop yields.

4. A place for the manure application methods and the timing of manure application.

5. A place for the location of the field, including the number of acres where the manure will be applied.

6. A place for the manure application rate.

7. A place for a phosphorus index of each field receiving manure, as defined in paragraph 65.111(12)“a,” including the factors used in the calculation. A copy of the NRCS phosphorus index detailed report shall satisfy the requirement to include the factors used in the calculation.

(6) Statements of intent if the manure will be sold. The number of acres indicated in the statements of intent shall be sufficient according to the MMP to apply the manure from the confinement feeding operation. The permit holder for an existing confinement feeding operation with a construction permit may submit past records of manure sales instead of statements of intent. The statements of intent shall include the following information:

1. The name and address of the person signing the statement.

2. A statement indicating the intent of the person to purchase the confinement feeding operation’s manure.

3. The location of the farm where the manure can be applied, including the total number of acres available for manure application.

4. The signature of the person who may purchase the confinement feeding operation’s manure.

(7) The owner shall maintain in the owner’s records a current MMP and copies of all of the manure sales forms, the sales forms must be completed and signed by each buyer of the manure and the applicant, and the copies must be maintained in the owner’s records for three years after each sale. The owner shall maintain in the owner’s records copies of all of the manure sales forms for five years after each sale. An owner of a confinement feeding operation shall not be required to maintain current statements of intent as part of the MMP.

[ARC 7965C, IAB 5/15/24, effective 6/19/24]

567—65.200(455B,459A) Minimum open feedlot effluent control requirements. An open feedlot operation shall provide for the management of manure, process wastewater, settled open feedlot effluent, settleable solids, scraped solids, and open feedlot effluent by using an open feedlot control method as provided in subrules 65.200(1) through 65.200(8). A release shall be reported to the department as provided in subrule 65.2(1).

65.200(1) All settleable solids from open feedlot effluent shall be removed prior to discharge into a water of the state.

a. The settleable solids shall be removed by use of a solids settling facility. The construction of a solids settling facility is not required where existing site conditions provide for removal of settleable solids prior to discharge into a water of the state.

b. The removal of settleable solids shall be deemed to have occurred when the velocity of flow of the open feedlot effluent has been reduced to less than one-half foot per second for a minimum of five minutes. A solids settling facility shall have sufficient capacity to store settleable solids between periods of land application and to provide required flow-velocity reduction for open feedlot effluent flow volumes resulting from a precipitation event of less intensity than a ten-year, one-hour frequency event. A solids settling facility that receives open feedlot effluent shall provide a minimum of one square foot of surface area for each eight cubic feet of open feedlot effluent per hour resulting from a ten-year, one-hour frequency precipitation event.

65.200(2) This subrule shall apply to an open feedlot operation which has obtained an NPDES permit pursuant to rule 567—65.3(455B,459,459A,459B) or 567—65.201(455B,459A).

a. An open feedlot operation may discharge manure, process wastewater, settled open feedlot effluent, settleable solids, or open feedlot effluent into any waters of the United States due to a precipitation event, if the open feedlot operation is designed, constructed, operated, and maintained to comply with the requirements of subrule 62.4(12) and 40 CFR Part 412.

b. If the open feedlot operation is designed, constructed, and operated in accordance with the requirements of subrule 2.4(12) and in accordance with any of the manure control alternatives listed in Appendix A located at iowadnr.gov/af0/rules or the AT system requirements in rule 567—65.207(455B,459A), the operation shall be considered to be in compliance with this rule, unless a discharge from the operation causes a violation of state water quality standards. If water quality standards violations occur, the department may impose additional open feedlot effluent control requirements upon the operation, as specified in subrule 65.200(3).

65.200(3) An open feedlot operation that has an animal unit capacity of 1,000 animal units or more, or an open feedlot operation that is a large CAFO, a medium CAFO, or a designated CAFO, shall not discharge manure, process wastewater, settled open feedlot effluent, settleable solids or open feedlot effluent from an open feedlot operation structure or production area into any waters of the United States, unless the discharge is pursuant to an NPDES permit. The control of manure, process wastewater, settled open feedlot effluent, settleable solids or open feedlot effluent originating from the open feedlot operation may be accomplished by the use of a solids settling facility, settled open feedlot effluent basin, AT system, or any other open feedlot effluent control structure or practice approved by the department. The department may require the diversion of surface drainage prior to contact with an open feedlot operation structure. Settleable solids shall be settled from open feedlot effluent before the effluent enters a settled open feedlot effluent basin or AT system.

65.200(4) Alternative control practices. If, because of topography or other factors related to the site of an open feedlot operation, it is economically or physically impractical to comply with open feedlot effluent control requirements using an open feedlot control method in subrule 65.200(4), the department shall allow an open feedlot operation covered by the NPDES permit application requirements of rule 567—65.3(455B,459,459A,459B) or 567—65.201(455B,459A) to use other open feedlot effluent control practices, provided the open feedlot operation satisfactorily demonstrates by appropriate methods that those practices will provide an equivalent level of open feedlot effluent control. Demonstration of equivalent performance must include the submission of computer modeling results that compares the predicted performance of the proposed system with that of a conventional runoff containment system over the same period. The specific requirements that must be met for an open feedlot operation to qualify

for use of an AT system and the information that must be submitted to the department are outlined in rule 567—65.207(455B,459A). Design requirements have been established for a stand-alone VTA. If other AT systems are developed that meet the equivalent performance standard established under EPA's CAFO rules, the department will consider their acceptance on a case-by-case basis.

65.200(5) No direct discharge of open feedlot effluent shall be allowed from an open feedlot operation into a publicly owned lake, a known sinkhole, or an agricultural drainage well.

65.200(6) Land application.

a. General requirements. Open feedlot effluent shall be land-applied in a manner that will not cause pollution of surface water or groundwater. Application in accordance with the provisions of state law and the rules in this chapter shall be deemed as compliance with this requirement.

b. Designated areas. A person shall not apply manure on land within 200 feet from a designated area or, in the case of a high-quality water resource, within 800 feet, unless one of the following applies:

(1) The manure is land-applied by injection or incorporation on the same date as the manure was land-applied.

(2) An area of permanent vegetation cover, including filter strips and riparian forest buffers, exists for 50 feet surrounding the designated area other than an unplugged agricultural drainage well or surface intake to an unplugged agricultural drainage well, and the area of permanent vegetation cover is not subject to manure application.

c. CAFOs.

(1) Land application discharges from a CAFO are subject to NPDES permit requirements. The discharge of manure, process wastewater, settled open feedlot effluent, settleable solids and open feedlot effluent to waters of the United States from a CAFO as a result of the application of that manure, process wastewater, settled open feedlot effluent, settleable solids and open feedlot effluent by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where the discharge is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14). For the purpose of this paragraph, where the manure, process wastewater, settled open feedlot effluent, settleable solids or open feedlot effluent has been applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, process wastewater, settled open feedlot effluent, settleable solids and open feedlot effluent as specified in subrule 65.209(8), a precipitation-related discharge of manure, process wastewater, settled open feedlot effluent, settleable solids and open feedlot effluent from land areas under the control of a CAFO is an agricultural storm water discharge.

(2) Setback requirements for open feedlot operations with NPDES permits. For open feedlot operations with NPDES permits, the following is adopted by reference: 40 CFR 412.4(a), (b) and (c)(5).

65.200(7) The owner of an open feedlot operation who discontinues the use of the operation shall remove and land-apply in accordance with state law all manure, process wastewater and open feedlot effluent from the open feedlot operation structures as soon as practical but not later than six months following the date the open feedlot operation is discontinued. The owner of a CAFO shall maintain compliance with all requirements in the CAFO's NPDES permit until all manure, process wastewater and open feedlot effluent has been removed and land applied pursuant to the CAFO's NMP, and the NPDES permit has been terminated in accordance with subrule 65.202(9).

65.200(8) Stockpiling of scraped solids and settleable solids. Stockpiles of solids scraped from open feedlot operations and stockpiles of settleable solids shall comply with the following requirements:

a. Stockpiles must be land-applied in accordance with subrule 65.200(6) as soon as possible but not later than six months after they are established.

b. Stockpiles shall not be located within 400 feet from a designated area or, in the case of a high-quality water resource, within 800 feet.

c. Stockpiles shall not be located in grassed waterways or areas where water ponds or has concentrated flow.

d. Stockpiles shall not be located within 200 feet of a terrace tile inlet or surface tile inlet or known sinkhole unless the stockpile is located so that any runoff from the stockpile will not reach the inlet or sinkhole.

e. Stockpiles shall not be located on land having a slope of more than 3 percent unless methods, structures or practices are implemented to contain the stockpiled solids, including but not limited to hay bales, silt fences, temporary earthen berms, or other effective measures, and to prevent or diminish precipitation-induced runoff from the stockpiled solids.

[ARC 7965C, IAB 5/15/24, effective 6/19/24]

567—65.209(455B,459A) NMP requirements.

65.209(1) The owner of an open feedlot operation that has an animal unit capacity of 1,000 animal units or more or that is required to be issued an NPDES permit shall develop and implement an NMP meeting the requirements of this rule. The owner of an open feedlot operation who seeks to obtain or is required to be issued an NPDES permit shall develop and implement an NMP meeting the requirements of this rule no later than the date on which the NPDES permit becomes effective. For the purpose of this rule, requirements pertaining to open feedlot effluent also apply to settled open feedlot effluent and settleable solids.

65.209(2) Not more than one open feedlot operation shall be covered by a single NMP. For an open feedlot operation that is required to have an NPDES permit and the AFO includes an open feedlot operation and a confinement feeding operation, the NMP must include both the open feedlot operation and the confinement feeding operation if the confinement feeding operation does not have an MMP. If the confinement feeding operation portion of the AFO does have an MMP as required in rules 567—65.110(455B,459,459B) and 567—65.111(455B,459,459B), the confinement feeding operation portion shall not be included in the NMP; however, in that event, the MMP must be amended to include the information specified in paragraph 65.209(8) “e.”

65.209(3) A person shall not remove manure, process wastewater or open feedlot effluent from an open feedlot operation structure that is part of an open feedlot operation for which an NMP is required under this rule, unless the department approves an NMP as required in this rule.

65.209(4) The department shall not approve an application for a permit to construct a settled open feedlot effluent basin or AT system unless the owner of the open feedlot operation applying for approval submits an NMP together with the application for the construction permit as provided in rule 567—65.203(455B,459A). The owner shall also submit proof that the owner has published a notice for public comment as provided in subrule 65.209(7).

65.209(5) If a construction permit is required as provided in rule 567—65.203(455B,459A), the department shall approve or disapprove the NMP as part of the construction permit application. If a construction permit is not required, the department shall approve or disapprove the NMP within 60 days from the date that the department receives the NMP.

65.209(6) Prior to approving or disapproving an NMP as required in this rule, the department may receive comments exclusively to determine whether the NMP is submitted according to procedures required by the department and that the NMP complies with the provisions of this rule.

65.209(7) Public notice.

a. The owner of the open feedlot operation shall publish a notice for public comment in a newspaper having a general circulation in the county where the open feedlot operation is or is proposed to be located and in the county where manure, process wastewater, or open feedlot effluent that originates from the open feedlot operation may be applied under the terms and conditions of the NMP.

b. The notice for public comment shall include all of the following:

- (1) The name of the owner of the open feedlot operation submitting the NMP.
- (2) The name of the township where the open feedlot operation is or is proposed to be located and the name of the township where manure, process wastewater, or open feedlot effluent originating from the open feedlot operation may be applied.
- (3) The animal unit capacity of the open feedlot operation.
- (4) The time when and the place where the NMP may be examined as provided in Iowa Code section 22.2.

(5) Procedures for providing public comment to the department. The notice shall also include procedures for requesting a public hearing conducted by the department. The department is not required to conduct a public hearing if it does not receive a request for the public hearing within ten days after the first publication of the notice for public comment as provided in this subrule. If such a request is received, the public hearing must be conducted within 30 days after the first date that the notice for public comment was published.

(6) A statement that a person may acquire information relevant to making comments under this subrule by accessing the department's Internet website. The notice for public comment shall include the address of the department's Internet website as required by the department.

65.209(8) Except as provided in paragraph 65.209(8) "f," an NMP shall include all of the following:

a. An estimate of the nitrogen and phosphorus concentration of manure, process wastewater and open feedlot effluent and an estimate of the manure, process wastewater, and open feedlot volume or weight produced by the open feedlot operation, in accordance with subrule 65.111(3).

b. Application rate calculations consistent with the requirements of subrule 65.111(12). The 100 pounds of available nitrogen per acre limitation specified in paragraph 65.111(13) "c" (applicable to open feedlot operations and combined open feedlot operations and confinement operations with an NPDES permit because of requirements in subrule 65.111(4)) pertaining to liquid manure applied to land currently planted to soybeans or to land where a soybean crop is planned applies only to liquid manure, process wastewater or settled open feedlot effluent.

c. The location of manure application. If the application is on land other than land owned or rented for crop production by the owner of the open feedlot operation, the plan shall include a copy of each written agreement executed by the owner of the open feedlot operation and the landowner or the person renting the land for crop production where the manure, process wastewater or open feedlot effluent may be applied. The written agreement shall indicate the number of acres on which the manure, process wastewater or effluent may be applied and the length of the agreement.

d. A phosphorus index of each field in the nutrient management plan, as defined in paragraph 65.111(12) "a," including the factors used in the calculation. A copy of the NRCS phosphorus index detailed report shall satisfy the requirement to include the factors used in the calculation.

e. Information that shows all of the following:

(1) There is adequate storage for manure, process wastewater, stockpiled manure and open feedlot effluent, including procedures to ensure proper operation and maintenance of the storage structures.

(2) The proper management of animal mortalities to prevent discharge of pollutants to surface water and to ensure that animals are not disposed of in an open feedlot operation structure or a treatment system that is not specifically designed to treat animal mortalities.

(3) Surface drainage prior to contact with an open feedlot structure is diverted, as appropriate, from the open feedlot operation.

(4) Animals kept in the open feedlot operation do not have direct contact with any waters of the United States.

(5) Chemicals or other contaminants handled on site are not disposed of in manure, process wastewater, an open feedlot operation structure or a treatment system that is not specifically designed to treat such chemicals or contaminants.

(6) Equipment used for the land application of manure, process wastewater or open feedlot effluent must be periodically inspected for leaks.

(7) Appropriate site-specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the United States.

(8) Protocols for appropriate testing of manure, process wastewater, open feedlot effluent and soil.

(9) Protocols to land-apply manure, process wastewater or open feedlot effluent in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, process wastewater or open feedlot effluent.

(10) Identification of specific records that will be maintained to document the implementation and management of the requirements in this subrule.

f. Sales of scraped solids or settleable solids licensed by IDALS. Open feedlot operations that will sell scraped solids or settleable solids as a commercial fertilizer or soil conditioner regulated by IDALS under Iowa Code chapter 200 or bulk dry animal nutrient product under Iowa Code chapter 200A shall submit a copy of their site-specific IDALS license or documentation that manure will be sold pursuant to Iowa Code chapter 200 or 200A as regulated by IDALS and may, in lieu of complying with this subrule for that portion of open feedlot effluent, submit to the department a copy of the operation's site-specific IDALS license or documentation for any scraped solids or settleable solids that will be sold pursuant to

Iowa Code chapter 200 or 200A, along with the department-approved NMP form for sales of scraped solids or settleable solids.

g. An open feedlot operation must submit a complete NMP using a new phosphorus index, including soil sampling as required in subrule 65.111(11), for each field in the NMP a minimum of once every five years, submitting the plan with the NPDES permit renewal application if the open feedlot operation has an NPDES permit.

65.209(9) If an open feedlot operation uses an alternative technology system as provided in rule 567—65.207(455B,459A), the NMP is not required to provide for settled open feedlot effluent that enters the AT system.

65.209(10) Current NMP; recordkeeping; record inspections.

a. *Current NMP.* The owner of an open feedlot operation who is required to submit an NMP shall maintain a current NMP at the site of the open feedlot operation and shall make the current NMP available to the department upon request. If nutrient management practices change, a person required to submit an NMP shall make appropriate changes consistent with this rule. If values other than the standard table values are used for NMP calculations, the source of the values used shall be identified.

b. *Recordkeeping.* Records shall be maintained by the owner of an open feedlot operation who is required to submit an NMP. This recorded information shall be maintained for five years following the year of application or for the length of the crop rotation, whichever is greater. Records shall be maintained at the site of the open feedlot operation and shall be made available to the department upon request. Records to demonstrate compliance with the NMP shall include the requirements of rule 567—65.111(455B,459,459B) and the following:

- (1) Weather conditions at time of application and for 24 hours prior to and following the application.
- (2) Date(s) when application equipment was inspected.
- (3) All applicable records identified in paragraph 65.209(8)“e.”

c. *Record inspection.* The department may inspect an open feedlot operation at any time during normal working hours and may inspect the NMP and any records required to be maintained.

[ARC 7965C, IAB 5/15/24, effective 6/19/24]

15A NCAC 02T .1307 SWINE WASTE MANAGEMENT SYSTEM PERFORMANCE STANDARDS

(a) This Rule applies to animal waste management systems subject to regulation pursuant to G.S. 143-215.10I and S.L. 2015-263.

(b) An animal waste management system that serves a swine farm subject to regulation pursuant to G.S. 143-215.10I shall meet all of the following performance standards:

- (1) Eliminate the discharge of animal waste to surface waters and groundwater through direct discharge, seepage, or runoff. To meet this standard:
 - (A) earthen structures shall be designed and constructed with synthetic liners to eliminate seepage;
 - (B) solids storage structures shall meet applicable engineering practices and NRCS design standards;
 - (C) the Certified Animal Waste Management Plan (CAWMP) shall include all components listed in G.S. 143-215.10C(e), meet current North Carolina NRCS 590 Nutrient Management Conservation Practice Standard requirements, and comply with the NRCS national policy for Comprehensive Nutrient Management Plans (CNMP) as defined in the NRCS General Manual, Title 190, Part 405, which are incorporated by reference, including subsequent additions or amendments. The General Manual may be downloaded at no cost from the NRCS website: <https://www.nrcs.usda.gov/>;
 - (D) swine waste treatment structures that automatically convey swine waste using pumps shall have audible and visible high water alarms with an auto dialer device set to contact the farm owner or farm manager; a gravity overflow to a basin that can contain the flow rate of the largest pump in the system for the maximum amount of time that an operator will not be on-site; or a secondary containment structure designed, constructed, and operated to contain the volume of the largest animal waste treatment structure and the flow rate of the largest pump in the system for the maximum amount of time that an operator will not be on-site; and
 - (E) no more than the equivalent volume of one month of design flow of untreated swine waste shall be accumulated and stored prior to the initiation of treatment;
- (2) Substantially eliminate atmospheric emission of ammonia. To meet this standard:
 - (A) Combined ammonia emissions from swine waste treatment and storage structures shall not exceed an annual average of 0.2 kg NH₃-N/wk/1,000 kg of steady-state live weight;
 - (B) Ammonia emissions from land application sites shall not exceed an annual average of 0.2 kg NH₃-N/wk/1,000 kg of steady-state live weight; and
 - (C) Ammonia emissions from the swine farm shall not exceed an annual average of 0.9 kg NH₃-N/wk/1,000 kg of steady-state live weight;
- (3) Substantially eliminate the emission of odor that is detectable beyond the boundaries of the parcel or tract of land on which the swine farm is located. To meet this standard, swine waste management systems shall reduce odor levels, frequency, and duration from the whole farm, such that the requirements of 15A NCAC 02D .1808 are met at the property boundary;
- (4) Substantially eliminate the release of disease-transmitting vectors and airborne pathogens. To meet this standard:
 - (A) Swine waste management systems shall meet the vector attraction reduction requirements of Rule .1107 of this Subchapter for the land application of separated solids and animal waste residuals for operations subject to this Rule;
 - (B) Swine waste management systems shall meet the pathogen reduction requirements of Rule .1106(a) of this Subchapter for Class A biosolids that are to be applied to a lawn, home garden, or public contact use site; sold or given away in a bag or container for land application or meet the pathogen reduction requirements of Rule .1106(b) for Class B biosolids that are to be otherwise applied to land; and
 - (C) Fecal coliform concentrations in the final liquid effluent shall not exceed an annual average of 7,000 Most Probable Number/100mL;
- (5) Substantially eliminate nutrient and heavy metal contamination of soil and groundwater. To meet this standard, swine waste management systems that land apply effluent shall:
 - (A) Meet the current North Carolina NRCS 590 Nutrient Management Conservation Practice Standard requirements and comply with the NRCS national policy for Comprehensive

Nutrient Management Plans (CNMP) as defined by NRCS General Manual, Title 190, Part 405; and

- (B) Demonstrate through predictive calculations or modeling that land application of swine waste at the proposed rate will not cause or contribute to a violation of groundwater standards set forth in 15A NCAC 02L.

History Note: Authority G.S. 143-215.1; 143-215.3(a); 143-215.10A; 143-215.10C; 143-215.10I; S.L. 2015-263; Eff. January 1, 2009;
Readopted Eff. September 1, 2018.