

From 10/15/03 email and follow-up conversations.

EPA has the following comments:

Overall, North Dakota's CAFO regulations appear as stringent as the revised federal regulations because the State has adopted the federal regulations by reference.

There are, however, a few issues with regard to clarity of requirements and potential duplication.

1. The State has not adopted the federal revisions to 40 CFR 122.28, which address information requirements for general permit applications (i.e., NOI). The State's NDPDES regulations authorize the use of general permits, and provide for issuance and administration in accordance with "applicable requirements of chapter 33-16-01." The State regulations do not expressly require that CAFO general permit applications include the same data specified in the revised federal regulations. It is not entirely clear which requirements are "applicable" in this context. Thus, it is not clear whether the State requires the same information in a general permit application as it requires in an individual permit application. Please clarify this issue.

2. The design standards, operating procedures, and nutrient management planning provisions in the State's technical standards generally appear to be consistent with the federal CAFO ELG provisions. However, the State's setback provision (at Chapter 7.6.2) allows injection or incorporation of manure as a compliance alternative to the required setback (federal rules require 100 foot setback, 35 foot vegetated setback [buffer] or alternative equivalent to 100 foot setback). Under this standard manure apparently could be injected or incorporated into soil that is immediately adjacent to down-gradient surface waters. The federal regulations do not provide this exception. Unless the State can show, under 40 CFR §412.4(c)(ii) that this procedure "will provide pollutant protections equivalent or better than the reductions that would be achieved by the 100-foot setback," the State's provision may be less stringent than federal requirements. Please provide rationale on how this compliance alternative is equivalent to the 100 foot setback.

3. In general, the State should be aware that by adopting federal requirements and maintaining State CAFO regulations (in AFO rules), certain provisions are duplicated (e.g., definitions, requirement to obtain permit, NMP requirements, etc.). This creates a potential for inconsistency between parallel requirements (although no significant inconsistencies have been identified at this time), and may result in confusion in implementation. The State rules do not state that the most stringent provisions should be applied.

4. Some provisions in the AFO regulations do not specify whether they apply to CAFO or AFOs. For example the NMP requirements at 33-16-03.1-08.5 do not indicate whether they apply to AFOs or CAFOs or both. This should be clarified given that the AFO regulations include provisions that independently address AFO and CAFOs.

5. Overall, North Dakota's nutrient management requirements appear to be as stringent as the Federal requirements, with the exceptions noted below:

a. Nutrient Management Plan Element/Production Area: 122.42(e)(1)(iii) Ensure that clean water is diverted from the production area (to the extent applicable). TS 5.6 includes standards for diversions, however, it does not appear to require diversions (except for constructed/ expanded after 4/14/04) . This element only appears to be required by incorporation of 40 CFR 122.42.

b. Nutrient Management Plan Element/Production Area: 122.42(e)(1)(iv) Prevent direct contact of confined animals with waters of the United States (to the extent applicable). This element is not listed in ND's Technical Standards, and therefore, only appears to be required by incorporation of 40 CFR 122.42.

c. Nutrient Management Plan Element/Land Application Area: 412.4(c)(1)Base plan on a field-specific assessment of the potential for nitrogen and phosphorus transport. TS 7.5.4 requires assessment of potential for P transport. TS 7.9.13 applies to NMPs which require State review, but it is not clear if this is applicable to CAFOs. The equivalent requirement for all CAFOs through NMP requirements is found in TS Ch. 7, but specifically required only by incorporation of 40 CFR 412.

d. Nutrient Management Plan Element/Land Application Area: 412.4(c)(5) Do not apply manure, litter, or process wastewater within 100 feet of any down-gradient surface water, open tile line intakes, sinkholes, agricultural well heads, or other conduits to surface waters OR implement one of the compliance alternatives. TS 7.6.2 appears to be less stringent due to allowing incorporation as a compliance alternative. Please clarify.

e. Nutrient Management Plan Element/Record-keeping. 122.42(e)(2)(ii)412.37(c) Maintain on-site a copy of the nutrient management plan. This element is not listed in ND's Technical Standard TS 7.7.1, and therefore, only appears to be required by incorporation of 40 CFR 122.42.

f. Nutrient Management Plan Element/ Manure Transfers: 122.42(e)(3) Large CAFOs must retain records of the date, recipient name and address, and approximate amount of manure transferred. TS 7.7.4.c appears to be less stringent than federal requirements because it does not require the CAFO to keep records of the date of transfer. Please clarify.

5. In the versions of the North Dakota technical standards and NPDES regulations provided, we cannot find any language incorporating 40 CFR part 412 (or any section within that part) by reference.

6. Section 6.5 (Dead animal disposal) does not expressly include the prohibition against disposing of animal mortalities in a storm water treatment system that is not designed for such disposal, as is required by 40 CFR §122.42(e)(ii). Section 6.5 does say "Dead animals shall be disposed of in a manner that will not cause a detrimental impact to waters of the state and air quality." Likewise, section 6.5 does not include the prohibition in 40 CFR 412.37(a)(4) against handling mortalities in such a way as to prevent discharges to surface water. The State's omnibus prohibition does not call attention to a prohibition against disposal in storm water

treatment systems or the prohibition against discharges and may therefore be less stringent than federal requirements.

7. Section 5.6 states, "Clean water diversions are used to route clean water away from concentrated livestock areas and manure storage areas." This declaratory statement might not be interpreted as a requirement that clean water be diverted away from production areas, as required by 40 CFR §122.42(e)(1)(iii). Further clarification from the State is recommended.

8. Section 6.3.4 states, "Chemicals or other contaminants handled on site shall not be disposed of in a manure storage or treatment structure unless it is specifically designed for that purpose." 40 CFR §122.42(e)(1)(v) requires nutrient management plans to ensure that chemicals or other contaminants handled on-site are not disposed of in any "manure, *litter*, *process wastewater*, or *storm water* storage or treatment system" unless it is specifically designed for such treatment. The State's prohibition does not appear to be as broad as the federal requirement

9. Section 7.3.6 only states, "BMPs shall be implemented to manage nutrients as efficiently and effectively as possible." An electronic search of the technical standards for the words "once a year" and nutrient" and "analyze manure" did not result in locating a state technical standard section equivalent (or similar) to 40 CFR §412.4(c)(3), except section 5.7, which allows "water spreading" as "an alternate method of containing and utilizing runoff from open lot livestock operations." Section 5.7 goes on to say that, "The soils within the water spreading area shall be sampled for nitrogen and phosphorous prior to installation of the system. Soils shall be sampled at a minimum of once every three years of operation to determine if there is an excess buildup of nutrients in the soil." So, this portion of the state's program, at least, is as stringent as the requirements of 40 CFR §412.4(c)(3), at least with respect to soil sampling, not manure sampling.

April 12, 2004

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APR 12

RE: Comments on Animal Feeding Operation proposed administrative rules and design manual

The North Dakota Stockmen's Association appreciates the opportunity to comment on the proposed rules and design manual that the Department of Health is presenting for comments.

Our comments will be directed first toward the design manual then the rule itself. We are concerned that many of the recommendations are enforceable requirements and would like some assurance that no changes imposed may be more stringent unless that change goes through a formal rule-making process. If the design manual is to be enforced and have the impact of law or rule, it cannot have the flexibility of being changed by the department (to reflect a higher standard) without industry input or the transparency of the legislature or rule-making process.

Specific comments:

Page 9, #13 Manure or livestock manure definition is too broad that includes snow melt and rainwater which is mixed with manure, but is not manure and can be managed differently.

Page 12, #28 We feel that the medication pens should not be included in the production area definition since cattle are not kept there for extended periods of time.

Page 13, #40 There is a need to have a specific definition for wintering operations. The first two paragraphs on page 14 should be deleted as it leads to confusion. The first sentence in the second paragraph should be placed on page 13, #40 as the official definition. There is also no need to place two sets of definitions in two separate documents, therefore, we would recommend deleting all definition in the design manual since they already will exist in 33-16-03.1-03. If two sets are needed, the definition of wintering operations needs to be added to the rules. This definition should be: winter feeding operation means where the animals are in areas (e.g., pastures, croplands or rangelands) that sustain crops or forage growth during the normal grazing season.

Page 13, #2.4 The term "blue line" should be an actual named water course. At the very least, it should be a solid "blue line" vs. a dashed "blue line".

Page 16, #2.6.2 and #2.7 We feel this producer information should not be available to the general public and would like provisions made to keep it confidential.

Page 18, #3.2.1 - 1a We feel that for consistency in terminology, that "livestock area" either needs to be defined or changed to "production area". Feed storage area is not needed unless it may be stored silage. Other feed stored is information that does not need to be documented.

Page 19, #3.2.1 - 2c We feel it is difficult to note evidence of any past water tables when providing soil borings and should be deleted.

Page 20, #5a This seems to be out of the scope of the environmental section of the Health Department. Ensuring a safe work site need not be a part of the permitting system or application process.

Page 24, #4.1 objective – Although site location is important, we do not feel it is the most important factor in locating a facility. We feel management is more important and not enough credit is given to potential management practices that can be in place to offset many of the costly demands on site location. We would prefer to have the poorest site and the best manager than the best site and poorest manager. If management options were given more credibility, many of the costly construction and testing requirements in this manual could be eliminated.

Page 25, 4.2.2 – additional considerations – “Minimize visual impacts” should be removed since it has nothing to do with whether or not an operation is in compliance. Gauging “visual impacts” is subjective and difficult to regulate.

Page 27, last paragraph – We are concerned with requiring soil borings to be plugged according to NDAC 33-18-20. Soil borings are not usually drilled into the aquifer as are water wells. These kinds of provisions add tremendously to the cost of a system that are unnecessary, only when the borings enter a useable aquifer should this requirement be made.

Page 28, #5.2, #1 We are concerned with requiring 270 days storage when, in the past, 180 days has been sufficient. We recommend the option be given to the producer in consultation with the engineer to make the size determination based on the producer’s management strategy and its location and distance to a named water course. The 270 day storage also appears on page 22, #6a of the rule. We are also concerned with the term manure instead of runoff that comes in contact with manure.

Pages 28-35, Section 5.1 through 5.3.8 – Offers very little flexibility for new technology. We feel there needs to be the ability to use other sources of impervious materials such as fly ash or hard packed manure for pond liners. They have proved successful in other Midwestern states. Clay liners are not always available or cost-effective.

Page 39, #5.7, last paragraph – We disagree that with the statement “course-textured soils with high percolation rates are not acceptable for water spreading systems.” They are allowed in other industries (irrigation). The soil types at the surface may not indicate the potential for nutrients to reach a water table that could be impacted. Subsoil types may prevent nutrients from reaching subsurface water and subsurface water may be at a distance that is so deep that it may never be impacted anyway. Don’t place restrictions on one industry that is not consistent with the regulation of other industries.

Page 42, #6.6 The annual reporting requirements should also be kept confidential and not accessible to the general public. Most often, this information is used to harass producers and is no one’s business except the regulators for enforcement purposes. The Department of Health needs to protect the producers’ rights by protecting their information.

Page 45, 7.4, #2 and #4 Duplicate language on heavy metals and salts - Who will make this determination? What feeds will be fed that will indicate a problem? We do not believe that the department has a nutritionist on staff to make this judgment call. This is another test requirement that will cost the producer and should be removed.

Page 44, #49 Section 7 is a repeat in general terms of 3.2.2 on page 21-22. A general statement concerning the nutrient management plan could be made on page 21 with the bulk of the information being moved to Section 7, so all of the information is in one place.

Page 50, #8.1, #1 It should not be the responsibility and financial burden of the producer to finance the construction of monitoring wells to define the hydro geologic characteristics of the site. If current maps are not sufficient, the state or federal government should appropriate the dollars to complete a map that is useable. Also, if a pond is constructed according to specifications, monitoring wells should not be required at all. If monitoring wells are installed, they should be at the useable water level and not any shallower.

Contamination of ground water is very hard if not impossible to prove the source. It appears the rules are slanted against the producer in all cases by assuming contamination is going to occur without any proof or even a chance it could occur. The assumption is that contamination is going to occur and the producer is left with the cost of over-constructing to prevent something that may never happen.

Throughout the design manual there is reference to "controlling odor during land application of manure". We feel that needs to be deleted since that is not a part of the permit process and is specifically exempt from odor standards during application. Also found throughout the manual are references to additional design or monitoring requirements "as needed" or "as the department determines". We feel this causes additional burden and cost to the producer with often times no science or logic in requiring any additional measures.

We are also disappointed that more flexibility isn't given to alternative technology measures that can be used to replace expensive construction. EPA and USDA are working to identify several of these measures and flexibility would be appreciated in adopting these new technologies.

The following comments are directed to the rule itself, NDAC 33-16-03.1.

Page 13, #2-#3-#4 All refer to a general statement "likely to cause water pollution." This language concerns us because there may not be any evidence of past pollution but a producer will still have to go through a permit process, and for no reason. Someone's judgment of "likely" is too broad. There needs to be some specific test or evidence that waters of the state are impacted based on the operation.

Page 13, Add #5 We recommend that wording be placed in this section to exempt normal wintering operations from the permit process. (Ex. Normal wintering operations as defined are exempt from this permit requirement) If this section is not the appropriate place for this exemption perhaps 33-16-03.1-06 or 07 would address it. Regardless, we feel the provision which EPA has recognized needs to be part of the official rules.

Page 14, #1 We feel that once a determination has been made there should not be a requirement that a determination be made again in five years unless changes to the operation have been made. The last sentence should be deleted.

Page 14, #3 We believe that the language should be changed from “discharge” to “pollute”. The “spring runoff” language is not well defined. It is a possibility that no livestock operation could qualify because of a broad interpretation of this language.

Page 15, #3 We ask that the words “potential or” be deleted. There needs to be more evidence that there is a problem that needs to be addressed through a permit process.

In several locations in the rules the department refers to “minimizing odors during land application” (page 17-3b, page20-c(2), page 22-5h and page 24-10b) We feel these references should be deleted. The producers need to manage and land apply their manure and needs to be exempt from the odor standards when they are properly land applying.

The reference to the design manual continues to be a concern. The rules (manual) could easily be changed by the department without the official rule-making procedure.

Page 17, # 3c It is unclear as to what additional record keeping and reporting would be necessary.

Page 17, #4 Delete “nor likely cause”. This language is similar to the “potential” language on page 15, #3. Again the permit requirement needs to proceed when there is a problem to be resolved.

Page 18, #9 We would support language that would require the permit holder to “notify” the department but oppose the mandate of requiring “prior written approval”. The intent should be to keep a mailing list current for the renewal process or to make sure the new owner has correct information on the permit content.

Page 21, e We ask that this section be deleted. It gives us the impression that even though we have an understanding as to who must submit nutrient management plans, the Department could require any or all operations to submit them.

Page 21, #5 We are unsure as to who this is directed at and cannot understand the purpose of the entire section. It should be deleted unless it is directed specifically at certain types of AFO’s or CAFO’s (page 22 of the design manual #17 and #18 conflicts with this section).

Page 23, f We feel this should be deleted. It leaves too much unknown to the producer as to what could be required in a facility. If the requirement is based on sound science, that would be acceptable but with no strong reasoning except “the Department would like it” is not acceptable.

Page 26, #4 The words “or is likely to cause” should be deleted. The operation is not in violation and a subjective determination is unfair to the producer with no proof.

Page 29-31, public participation - Public notices and hearings should only be required if the local governing authority requires them as per their local zoning ordinances. Public hearings for existing operations wanting to upgrade facilities are unnecessary and are invasions of privacy

rights. These hearings often result in undue negative publicity yet do not generate any positive management steps to prevent or remedy problems. It is our feeling that on page 29 #1 the wording "significant degree of public interest" is not defined and could be abused. The same is true on page 31 #6 the wording "deem appropriate" is also a judgment call that could be abused.

This entire section (33-16-03.1-13) is a zoning ordinance issue and not a function of the Health Department. In most cases these feedlots are trying to comply with state and federal rules where a hearing will bring only emotion to the table. It serves no purpose, especially to those who already are feeding cattle. The permit procedure needs to be based strictly on science and the environment. By recognizing this is a zoning issue relieves the Health Department of the burden of sighting approval based on politics or emotion.

We also feel that somewhere in the rule, (potentially 33-16-03.1-10, following the last sentence) a procedure should be in place for issuing complaints against a producer. Those complaints should be in writing and made available to the producer upon request. Only citizens who live or own property in the area that may be potentially negatively affected should have standing to make a complaint.

Again, we feel permit information should be confidential and not made available to the general public.

We feel it is important to remind the Department of Health that a discharge from a livestock production area is only considered a violation when it reaches waters of the state.

We also feel that is the responsibility of the state to prove a violation occurred and that the producer is not automatically in violation until proof is provided. Many producers' locations are a long distance from the waters of the state and are being asked to over-construct when there is no indication a violation could ever occur.

We feel the department staff needs to expedite the permit process and should not spend its time recalculating engineering plans submitted. The process could be streamlined and more approvals completed in a shorter time.

We feel that the rules must reflect the intent of a winter feeding operation that is exempt from the permit process. This could be addressed in 33-16.03.1-06 or 07 on page 13-14 with a general statement that there is no potential to pollute for the wintering operation or place an exemption to section 33-16-03.1-05 on page 13 for winter feeding operations.

We are hopeful that these concerns with the rules and design manual will be addressed in their final versions.

Sincerely,



Wade Moser

Executive Vice President

ND Stockmen's Association

Haberstroh, Gary D.

From: David & Linda Ahlberg [ahlberg@stellarnet.com]
Sent: Tuesday, April 06, 2004 5:31 PM
To: ghaberst@STATE.ND.US
Subject: Zoning Regulations Suggestions

These comments and assessments by no means reflect a comprehensive analyses of the zoning regulations governing CAFOs in North Dakota, but rather emphasize a few of our major concerns.

- 1-What guarantee is in place that air quality is not being degraded for neighboring residents, and what are the requirements for limiting such pollutions? What penalties are forthcoming if this pollution happens?
- 2-What guarantee is in place so the disposal of waste is done properly and that excessive amounts of phosphorous and nitrogen are not allowed to build up in the soil, and who is checking? Does the North Dakota Department of Health have a signed agreement between owner and operator on units where waste is to be applied?
- 3-Soil tests should be taken by a reputable agency each year on each unit (40 Acres) before waste is to be applied.
- 4-What bonding requirements are in place for clean-up after closure, so the public is not responsible for cleanup, and who will check to see that cleanup is being done properly? What is being considered in a case of abandonment? Is a professional engineer who has experience in these matters to be consulted?
- 5-Who is monitoring these sites to make sure the water, surface and underground, is not being contaminated, Who is, monitoring wells at the site, and who is doing the sampling? Will the public have access to the results? How long will the site be monitored and who pays for the tests?
- 6-Does the North Dakota Department of Health require a nutrient plan from each facility?
- 7- Each facility should have its own permit that should never be allowed to be transferred.

Thank you for your attention to these important considerations.

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April 15, 2004

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Dear Mr. Bracht:

Thank you for the opportunity to comment on the *North Dakota Proposed Rules for Animal Feeding Operations*.

I would like to commend the Department of Health for providing informational meetings and holding hearings throughout the state to learn the concerns of livestock producers. I encourage the Department to consider carefully the comments received by ranchers and farmers since they are the ones affected by these proposed rules.

The Health Department and our livestock industry have worked well together to keep our environment clean and to prevent animal waste from polluting our waters. I hope this relationship continues with the implementation of the new rules.

I want to thank you for including some of my earlier comments as part of the proposed rules.

However, I still have some concerns about the following two comments that were made in the initial comment period.

- **Page 7, Section 2. "Waters of the state' means all waters within the jurisdiction of this state including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, and all other bodies or accumulations of water on or under the surface of the earth, natural or artificial, public or private, situated wholly or partly within or bordering upon the state, except those private waters which do not combine or effect a junction with natural surface or underground waters just defined."**

Are all wetlands included in this definition? Are producers who are not polluting when waters are at normal water levels in violation in years when high water levels occur, if run off gets into these production areas? We believe the rules should provide clarification during years of extremely high water levels.

- **Page 62 of the Control of Pollution from Animal Feeding Operations**

6. **“The permit shall be valid until its expiration date as long as the animal feeding operation is not materially changed, or waters of the state are not impacted pursuant to chapter 33-16-02.1 If an operator plans to change the type or increase the number of animals or change the facility (including expanding barns or pens or changing manure storage or water pollution control structures), the operator shall inform the department in writing prior to implementation of these changes.”**

The expansion of pens or barns should not require approval as long as the producer constructs them within the containment area and does not exceed animal numbers allowed by the permit.

In addition, I hope you will consider the following comments before the final draft is adopted.

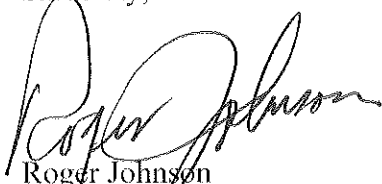
- The North Dakota Livestock Program Design Manual should be included as a component in the ND Administrative Code 33-16-03.1 “Control of Pollution from Animal Feeding Operations”. This would ensure that the design manual could not be changed without going through the legislative or rule-making process. This would allow all individuals affected by any change in the manual the opportunity to be heard before changes are implemented.
- The NDDH needs to insert the definition of *winter feeding operations* from the Design Manual into the ND Administrative Code 33-16-03.1
- When monitoring wells are required, usable existing wells should also be considered as monitoring wells instead of requiring new wells to be drilled.
- “Medication pens” or handling facilities should be excluded from the production area as long as animals are not confined longer than 45 days in these facilities.
- I also request that you develop example criteria so that livestock producers will better understand some of these situations.

Gary Bracht
April 15, 2004
Page 3

As I stated in my earlier comments, I urge you to err on the side of common sense as you interpret and apply these rules. These rules could place a tremendous financial burden on livestock producers who will be required to install animal waste containment systems without adequate state or federal cost share. As a result, some livestock producers may not be able to meet your regulatory compliance and may be forced out of business.

Again, thank you for the opportunity to comment on the proposed rules.

Sincerely,



Roger Johnson
Commissioner

RJ/jw/jb