**United States Department of Agriculture**

NRCS

Natural Resources Conservation Service
P.O. Box 1458
Bismarck, ND 58502-1458

APR 12

April 8, 2004

Dennis Fewless, Director
Division of Water Quality
North Dakota Department of Health
PO Box 5520
Bismarck, ND 58506-5520

Dear Mr. Fewless:

The Natural Resources Conservation Service (NRCS) is providing written comments on the proposed rule revisions relating to animal feeding operations. The majority of these comments were shared with you and Mr. David Glatt during our meeting on March 29, 2004.

I want to compliment the North Dakota Department of Health (NDDH) on the readability of the "Draft Rules" and the North Dakota Livestock Program Design Manual. Both documents are well organized and cross referenced. Considerable effort has been made to make both of the documents user-friendly.

NRCS has concerns regarding several of the requirements proposed in the Design Manual. The first item is in Section 3.2.5 which requires that design plans shall be stamped by an engineer registered in North Dakota. We have no doubt that the planning of water pollution control structures constitutes the "Practice of engineering and practice of professional engineering" as regulated by North Dakota Century Code (NDCC) Chapter 43-19.1. As stated in NDCC 43-19.1-31, it is the duty of all dully constituted officers of the state, and of all political subdivisions thereof, to enforce the provisions of this chapter.

By placing the requirement on design plans that they be stamped by an engineer registered in North Dakota, NDDH has shifted the burden of registration compliance from NDDH to the permit applicant. This has serious ramifications on the technical assistance delivery system provided by the NRCS staff. We use the services of engineers who have been determined to be competent to carry out the delivery of our technical assistance on animal feeding operations. In some instances, those engineers are not registered in the State of North Dakota. By placing the registration requirement in the permitting process, your agency will significantly reduce the ability of our agency to assist our program participants in addressing the permitting process for animal feeding operations.

Attached is a copy of correspondence, subject titled, "Exemption of Federal Engineers from State Registration", from attorneys for USDA to the Department of Professional Regulation, Florida, dated February 1993, referring to Johnson v. Maryland, 245 US 51. This case "stands for the proposition that States cannot question the qualifications of federal employees that have

been selected by the federal government to carry out programs created by Congress." We present this as background information on the issue of exemption of federal engineers from state registration requirements. We would be glad to meet with you and representatives of the North Dakota Board of Registration for Professional Engineers and Land Surveyors to help clarify the issue of exemption for NRCS engineers. Wesley Wiedenmeyer, State Conservation Engineer, has met with members of the Board on numerous occasions discussing our engineering job approval process.

Section 4.3.2 establishes minimum requirements for advancing soil borings for site assessments. The minimum depth of 25 feet for bore holes and a method of boring that retrieves a relatively undisturbed sample cannot be achieved with any of the field equipment currently used by NRCS in North Dakota to perform site investigations. The proposed requirements will necessitate the use of private drilling contractors to obtain the soils information. The costs to complete this effort are additional costs. Considering NRCS current and future year budgets, our ability to cover these additional costs may be limited or non-existent.

The third paragraph in Section 4.3.2 indicates that all soil borings shall be completed and abandoned according to the requirements in NDAC Chapter 33-18-20 (Ground Water Monitoring Well Construction Requirements). This statement is misleading as boreholes advanced above an aquifer for the purpose of determining local stratigraphy are excluded from these provisions. Perhaps this paragraph could be rewritten to clarify that only those holes that extend below the surface of an aquifer are to be abandoned in compliance with NDAC Chapter 33-18-02 (not 33-18-20, as shown in the draft).

Section 5.3.1 establishes a minimum of two feet of freeboard on ponds where the longest length of surface water is 300 feet or more. This additional foot of freeboard requirement seems excessive and will add considerable cost to a significant percentage of ponds constructed to control runoff from feedlots. The cost of a pond cover, which would be required instead of the additional freeboard, would also be excessive. NRCS standards have required a minimum of one foot of freeboard on these types of installations for many years. We are unaware of any problems associated with this method of design.

Section 5.3.4 establishes some moisture requirements for compacted clay liners. Permeability tends to decrease with moisture content. We have used construction specifications that required an optimum plus moisture percentage and not established a top range for the moisture percentage as long as the density can be achieved.

Section 5.3.5 details the testing requirements for constructed clay liners. There seems to be significant disparity in the levels of testing when comparing the number of tests required for compaction and density versus laboratory testing for permeability. On a typical pond the requirement for four tests for each lift placed and testing on at least two sidewalls (assume the requirements are the same, one per each lift) would require 24 density and moisture tests to be completed. This method of testing would also require the testing firm to be present throughout the placement of the liner as tests would need to be taken as the liner is constructed or excavations into the liner would be needed to expose covered layers.

The testing for permeability only requires one tube per acre of pond surface area or a minimum of two per pond. This provides quality control on two samples rather than the 24 required by the density and moisture testing. This testing will also be done when the liner is completely placed and no changes in compaction methods or moisture control are possible to correct the in-place density.

Sections 5.3.7 and 5.3.8.2 both require laboratory testing of soil classified as CL or CH to verify in-situ soils below manure storage ponds and runoff ponds. The qualifications of the individual conducting the investigation should be adequate to preclude the need for laboratory testing to determine the unified classification or permeability of the materials when these sites are located in a non-sensitive ground water area. It would also be difficult to determine when samples for these laboratory tests are required to be taken as most ponds are not designed before the on-site soil testing is conducted. So pond depth, pond volumes, etc, have not been calculated. These sections also reiterate the requirement of design under the supervision of a registered professional engineer.

NRCS has worked with the North Dakota Department of Health for many years in providing assistance to producers who have animal feeding operations. Our combined efforts have greatly reduced the negative impacts to the environment that are sometimes caused by these operations. The concerns we have listed are based on the resources that will be required to comply with the draft rules whether these expenses are incurred by our agency or the producer. We understand that documentation of the planning and design of an animal feeding operation is required to assure the public that the environment is protected.

If you have any questions pertaining to our comments, please contact Wesley Wiedenmeyer, State Conservation Engineer, at (701) 530-2086.

Sincerely,

J. R. FLORES
State Conservationist

Attachment

United States Department of Agriculture

Office of the General Counsel

Washington, D.C. 20250-1400

17 FEB 1995

904-922-8038

TO: Ms. Cindy Hogan
Department of Professional Regulation
1940 N. Monroe Street
Tallahassee, Florida 32399-0792

FROM: Lawrence D. Hughes
Attorney, Natural Resources Division

SUBJECT: Exemption of Federal Engineers from State Registration.

Dear Ms. Hogan:

I enclose a copy of Johnson v Maryland, 245 US 51, which stands for the proposition that states cannot question the qualifications of federal employees that have been selected by the federal government to carry out programs created by Congress.

I also enclose summaries of the primary statutes creating federal programs being carried out by SCS engineers in Florida.

Please feel free to call me to discuss this after you have had a chance to review this material. My phone number is 202-720-5769.

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United States Department of Agriculture

Office of General Counsel

Washington, D.C. 20250

JAN 21 1982

SUBJECT: State Statutes Requiring Registration of Engineers

TO: James W. Mitchell
State Conservationist
SCS, Gainesville, Florida

State Engineer, James Martin, has referred us to Chapter 471 of the Florida statutes which requires the registration of engineers and has asked if it is applicable to Soil Conservation Service engineers and technicians.

The states, through their police power, may regulate engineers since the public safety is involved. However, in the absence of clear statutory consent, the states may not use their police power to interfere with the "operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." McCulloch v. Maryland, (1819) 4 Wheat. 316.

More specifically, the states cannot question the qualifications of federal employees that have been selected by the federal government to carry out programs created by Congress. The Supreme Court in Johnson v. Maryland, (1920) 245 US 51, in a decision written by Justice Holmes, said:

> It seems to us that the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state office upon examination that they are competent for a necessary part of them and pay a fee for permission to go on. Such a requirement does not merely touch the Government servants remotely by a general rule of conduct; it lays hold of them in their specific attempt to obey orders and requires qualifications in addition to those that the Government has pronounced sufficient. It is the duty of the Department to employ persons competent for their work and that duty it must be presumed has been performed.

Congress has created various programs administered by the Soil Conservation Service which require a large staff of professional engineers as well as engineering technicians. SCS has determined that they are competent to carry out their assigned duties. These employees work in the Washington office, Technical Service Centers and in the states. They transfer between the various offices and are involved in projects in different states. The SCS programs could not be carried out if each state were to impose its review of the competence of these employees.

It is our opinion that registration statutes such as Florida's have no applicability to SCS engineers or engineering technicians selected and found competent by SCS to carry out their duties.

We should caution, however, that sponsors, and individuals, receiving technical assistance are subject to the laws of their state. Because of the local project nature of SCS programs the state might interfere with a project by imposing restrictions directly on the sponsor. In the event that a state imposes restrictions relating to the engineering of an SCS project, either directly or indirectly, we should be notified immediately so that we can analyze the specific situation.

B. D. Turner, Jr.

B. D. TURNER, JR.
Deputy Assistant General Counsel
Natural Resources Division

cc:
Mr. Norman A. Berg, Chief, Soil Conservation Service
Mr. Buell Ferguson, Director, Engineering, Soil Conservation Service
Mr. Richard Fowler
Mr. B. D. Turner, Jr.
Mr. L. D. Hughes
OGC Opinion file
Chron. file

OGC:NRD:LDHughes:mmw:1/19/82

To whom it may Concern!

I am writing in regards to our huge feed lots that we feel is getting to be a huge problem down the road in years to come!

Right now we have a huge Park (Cattle Bovine) Co that has access to 10 hog barns North of us with 20,000 animals - with the prospects of another about 3 1/2 miles from us - with intentions of 20,000 - It is with deep concerns of ours since we live in Mozo township with only about 100 to 200 ft from the Marvis Coulee - Which contains excellent fishing from R/Lake - What is all this going to do with our Water, Air etc ??? They feel there is no danger we beg to differ with that - We are almost 1/2 of our land is under high water and it is in CRP. Where do you

think all of this run off has came from? Of Course all way North of us with all of the ditching thats been going on - It is all too sad to see our township go down the tubes Last Spring we had 2 new permits sent to us thru our township Clerk's - Sad, one was for 6,000 Sow operation the other for 8 buildings with each barn housing 2500 each - And who do you suppose typed up these permits to us,? no other than Mr Bruce Gibbens the Lawyer here in Cando, who now already has a 20,000 operation in progress,

You are quite remarkable!
You take it all in stride.

They did not even have their land description right - We are fully zoned now with a process of amendments being made at this present time With the hopes of your deep concerns this will not come about!

Our community is already very much divided with this huge operation being discussed in our local meetings etc

Proponents claim hog farms are environmentally safe and boost economy!

Lets get real with this World + realize this so far has not happened

over

You are quite remarkable!
You take it all in stride.

We felt this matter was very well worth our time to write - Our hopes you also can understand our concerns -

Thank You -

Sincerely
Carl & Betty Hartl -

Western & Central Stark Soil Conservation Districts
2493 4th Ave W, Room C
Dickinson, ND 58601

Dear ND Department of Health:

The Central Stark and Western Soil Conservation Districts would like to take this opportunity to comment on the proposed rules for Animal Feeding Operations.

A few areas within the proposed rules give us concern.

- Section 2.4. of the draft manual says "Blue line waters on 7 ½ Minutes USGS Quadrangle maps may be used to locate surface waters of the state." Does this mean all blue line waters-both solid and dashed-or is there a distinction between solid and dashed lines?
- Section 4.3.2. of the draft manual says that "soil borings shall be advanced to at least 25 feet below ground surface or at least 10 feet below the base of the manure storage structure, whichever depth is greater." Should all manure storage structure areas have to be bored to this depth, even if an adequate layer of clay (verified by a certified engineer) has been reached at a depth shallower than 25 feet?

In addition, we feel that a greater amount of publicity should have been given to this issue and the scheduled hearings before they were held. Public notice in a small ad in the paper may be enough to satisfy legal requirements for notice, but is not always seen by many who would have attended and commented at a hearing.

Sincerely,

Tony Kessel, Chair, Western Soil Conservation District
Julie Hoff, Chair, Central Stark Soil Conservation District

April 7, 2004

North Dakota Department of Health
P.O. Box 5520
Bismarck, N.D. 58506-5520

To Whom It May Concern:

The following is a list of comments concerning the Health Departments' rules and regulations for CAFOs in our state.

When issuing permits the facts given by the person or entity applying need to be checked out more thoroughly and if any false information is given the permits should be refused or revoked when it is shown that there is a discrepancy.

Sites should not be allowed to be located so close to coulees and aquifers. The maps on slides we were shown by NDSU showed red coulees on either side of both sites near Cando. Your office must have seen these maps and still you issued them permits for these areas and an aquifer is located within the circle where the manure is to be spread.

The manure should be spread in the spring immediately prior to planting instead of in the fall as that would shorten the interval between application and the time the manure is used by the crop so it lessens the chance of erosion and movement in the soil.

Your site inspections need to be done more often without informing them that you are coming.

They should have to have enough cropland to spread the manure on ahead of time with signed papers from any landlords saying that they are allowed to spread the manure on their land prior to them being given a permit. These signed papers should be on file at the County Auditors office and the N.D. Dept. of Health office and should have to be done yearly.

It should be mandatory to have on file annually in the N. D. Dept. of Health office; a plan approved at least 6 months prior to application of manure, and applied in accordance with recommended amounts of nitrogen, phos., potash, etc.

It should be mandatory to leave a buffer strip between land application of manure & any stream, coulee, man-made drainage ditch or surface water, etc.

All earthen manure storage lagoons, holding ponds, etc should be constructed so they would not leak or seep more than 1/56 inch per day.

Odor emissions standards should be more stringent than they are at present.

Changing from animal units to actual numbers is a good idea as most people were not familiar with animal units and it was very confusing for them.

Sincerely,

Don & Lorna Halverson

Don Halverson
6417 80th St. NE
Cando, ND 58324-9466

APR - 0

April 8

North Dakota Department of Health,

This letter is in concern with the new proposed rule changes on Animal Feeding Rules. I'm writing this letter on behalf of the North Dakota Lamb and Wool Producers Association.

On visiting with Scott Ressler with the North Dakota Stockman's Association, the NDLWPA and the NDSA feel the same concerns on the new animal feeding rules. The two industries are similar in the way that animal are fed and confined. Because of this, we support the NDSA changes to the new rules.

Sincerely,

Brent Stroh

Brent Stroh
President of North Dakota Lamb and Wool Producers Association

4-7-04

From: Neal Rau
To: N.D. Dept. of Health
Topic: Proposed Livestock regulations

My comments: I would be pleased if you could make these regulations simpler, shorter, and less burdensome for all sizes of animal feeding operations.

Regarding "Medium" and smaller animal feeding operations: It is my concern that the proposed regulations will put financial burdens on operations. I worry these regulations in many cases will be unnecessary and unrealistic and present problems where there is truly no scientific evidence that the environment will be harmed. I also suggest, if you haven't already done so, to contact someone like N.D.S.U. and find out if the financial burdens of the proposed regulations can be spread out over the number of animals in an operation without putting the operation out of business.

Thankyou, Neal Rau
4144, 57th Ave SE
Medina, N.D. 58467-9755