
TITLE 327 WATER POLLUTION CONTROL BOARD**FIRST NOTICE OF COMMENT PERIOD**

LSA Document #09-213

DEVELOPMENT OF AMENDMENTS TO RULES AT [327 IAC 5-4-3](#) CONCERNING CONCENTRATED ANIMAL FEEDING OPERATIONS, AND [327 IAC 15-15-1](#), [327 IAC 15-15-2](#), [327 IAC 15-15-9](#), [327 IAC 15-15-11](#), AND [327 IAC 15-15-12](#) CONCERNING THE NPDES GENERAL PERMIT RULE PROGRAM**PURPOSE OF NOTICE**

The Indiana Department of Environmental Management (IDEM) is soliciting public comment on amendments to rules at [327 IAC 5-4-3](#) concerning concentrated animal feeding operations (CAFO), and [327 IAC 15-15-1](#), [327 IAC 15-15-2](#), [327 IAC 15-15-9](#), [327 IAC 15-15-11](#), and [327 IAC 15-15-12](#) concerning the NPDES general permit rule program. IDEM seeks comment on the affected citations listed and any other provisions of Title 327 that may be affected by this rulemaking.

CITATIONS AFFECTED: [327 IAC 5-4-3](#); [327 IAC 15-15-1](#); [327 IAC 15-15-2](#); [327 IAC 15-15-9](#); [327 IAC 15-15-11](#); [327 IAC 15-15-12](#).

AUTHORITY: [IC 13-14-8](#); [IC 13-18-10](#); [IC 13-18-20](#).

SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING**Basic Purpose and Background**

The EPA began regulating discharges of wastewater and manure from CAFOs in the 1970s. The EPA initially issued national effluent limitations guidelines and standards for feedlots on February 14, 1974 (39 FR 5704) and NPDES CAFO regulations on March 18, 1976 (41 FR 11,458). In February 2003, EPA issued revisions to these regulations that focused on the 5% of the nation's animal feeding operations (AFOs) that presented the highest risk of impairing water quality and public health (68 FR 7176-7274; February 12, 2003) (the 2003 CAFO rule). The 2003 CAFO rule required the owners or operators of all CAFOs to seek coverage under an NPDES permit, unless they demonstrated no potential to discharge.

A number of CAFO industry and several environmental groups filed petitions for judicial review of certain aspects of the 2003 CAFO rule. This case was brought before the U.S. Court of Appeals for the Second Circuit. On February 28, 2005, the court ruled on these petitions and upheld most provisions of the 2003 rule but vacated and remanded others. *Waterkeeper Alliance, et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005).

The CAFO industry organizations argued that EPA exceeded its statutory authority by requiring all CAFOs to either apply for NPDES permits or demonstrate that they have no potential to discharge. The court agreed with the CAFO industry petitioners on this issue and therefore vacated the "duty to apply" provision of the 2003 CAFO rule and ordered EPA to revise the "duty to apply" to include only CAFOs that discharge or propose to discharge. The court also made several other rulings relative to nutrient management plans. On November 20, 2008, EPA published rules to incorporate all of the changes ordered by the court.

Due to the impact of deadlines in IDEM's rules on operations that would no longer have to comply with those deadlines under the revisions to the "duty to apply", IDEM published an emergency rule in the Indiana Register that incorporates the revisions to the "duty to apply" ordered by the court. This rule can be found at the Indiana Register's website at DIN: [20090225-IR-327090145ERA](#), February 25, 2009. The permanent rule will be similar in form and content to the emergency rule. The emergency rule covers the interim period between its publication and the regular rulemaking process and will expire 90 days after publication. [IC 4-22-2-37.1\(a\)\(13\)](#) authorizes IDEM to publish emergency rules.

IDEM did not include all revisions covered in the new federal rules in the emergency rule for several reasons. IDEM has rules that regulate confined feeding operations (CFOs) that are not CAFOs, and a more comprehensive evaluation of how those rules may be revised to address some of the provisions in the federal rules is appropriate. In addition, legislation relative to CAFOs and CFOs is pending in the state legislature that, if passed, may impact rule revisions. Also, petitions challenging the recent federal rules have been filed in seven different courts by seven different groups.

Alternatives to Be Considered Within the Rulemaking

Alternative 1. Incorporating only the changes addressed in the emergency rule.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? Yes.
- Is this alternative imposed by federal law or is there a comparable federal law? Yes.
- If it is a federal requirement, is it different from federal law? Yes.
- If it is different, describe the differences. This alternative would not include other changes made in the federal rules relative to:
 - Self-certification for CAFO's not proposing to discharge

- Clarifications relative to agricultural stormwater discharge exemptions
- Additional requirements relative to nutrient management plans
- Clarifications to the water quality-based effluent limitations.

Alternative 2. Incorporating all the changes addressed in EPA's November 20, 2008, rulemaking.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? Yes.
- Is this alternative imposed by federal law or is there a comparable federal law? Yes.
- If it is a federal requirement, is it different from federal law? No.
- If it is different, describe the differences. Not applicable.

Applicable Federal Law

68 FR 7176-7274 (December 22, 2008) "National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs)" (40 CFR 122.412,9).

Potential Fiscal Impact

Potential fiscal impact of all alternatives: There are currently approximately 130 farms in Indiana that the current rule would require to seek a permit. The proposed amendments would relieve them of this requirement. Since the permit term is five years and the application fee is \$150, the approximate annual cost savings to the regulated community for this rulemaking is \$3,900.

Small Business Assistance Information

IDEM established a compliance and technical assistance (CTAP) program under [IC 13-28-3](#). The program provides assistance to small businesses and information regarding compliance with environmental regulations. In accordance with [IC 13-28-3](#) and [IC 13-28-5](#), there is a small business assistance program ombudsman to provide a point of contact for small businesses affected by environmental regulations. Information on the CTAP program, the monthly CTAP newsletter, and other resources available can be found at:

www.in.gov/idem/compliance/ctap/index.html

Small businesses affected by this rulemaking may contact the Small Business Regulatory Coordinator:

Alison Surface

IDEM Compliance and Technical Assistance Program - OPPTA

100 North Senate Avenue, MC 60-04

Indianapolis, IN 46204-2251

(317) 234-1191 or (800) 988-7901

ctap@idem.in.gov

The Small Business Assistance Program Ombudsman is:

Brad Baughn

IDEM Small Business Assistance Program Ombudsman

MC 50-01 - IGCN 1301

100 North Senate Avenue

Indianapolis, IN 46204-2251

(317) 234-3386

bbaughn@idem.in.gov

Public Participation and Workgroup Information

Currently no workgroup is planned for this rulemaking. If you feel that a workgroup or other informal discussion on the rule is appropriate, please contact Lydia Kuykendal, Rules Development Branch, Office of Legal Counsel, (317) 234-5345, or (800) 451-6027 (in Indiana).

STATUTORY AND REGULATORY REQUIREMENTS

[IC 13-14-8-4](#) requires the board to consider the following factors in promulgating rules:

- (1) All existing physical conditions and the character of the area affected.
- (2) Past, present, and probable future uses of the area, including the character of the uses of surrounding areas.
- (3) Zoning classifications.
- (4) The nature of the existing air quality or existing water quality, as the case may be.
- (5) Technical feasibility, including the quality conditions that could reasonably be achieved through coordinated control of all factors affecting the quality.
- (6) Economic reasonableness of measuring or reducing any particular type of pollution.
- (7) The right of all persons to an environment sufficiently uncontaminated as not to be injurious to human, plant, animal, or aquatic life or to the reasonable enjoyment of life and property.

REQUEST FOR PUBLIC COMMENTS

At this time, IDEM solicits the following:

- (1) The submission of alternative ways to achieve the purpose of the rule.
- (2) The submission of suggestions for the development of draft rule language.

(3) The submission of comments on the fiscal impact of this rulemaking.

Mailed comments should be addressed to:

#09-213(WPCB) (CAFO Rulemaking)

Janet Pittman

Rules Development Branch

Office of Legal Counsel

Indiana Department of Environmental Management

100 North Senate Avenue MC 65-46

Indianapolis, Indiana 46204-2251

Hand delivered comments will be accepted by the IDEM receptionist on duty at the thirteenth floor reception desk, Office of Legal Counsel, Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana.

Comments may be submitted by facsimile at the IDEM fax number: (317) 233-5517, Monday through Friday, between 8:15 a.m. and 4:45 p.m. Please confirm the timely receipt of faxed comments by calling the Rules Development Branch at (317) 232-8922.

COMMENT PERIOD DEADLINE

Comments must be postmarked, faxed, or hand delivered by May 8, 2009.

Additional information regarding this action may be obtained from Lydia Kuykendal, Rules Development Branch, Office of Legal Counsel, (317) 234-5345, or (800) 451-6027 (in Indiana).

Nancy King

Chief, Rules Development Branch

Office of Legal Counsel

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