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

LSA Document #09-615

**DEVELOPMENT OF AMENDMENTS TO RULES AT [327 IAC 5-4-3](#) AND [327 IAC 5-4-3.1](#) CONCERNING CONCENTRATED ANIMAL FEEDING OPERATIONS, [327 IAC 15-15](#) CONCERNING THE NPDES CAFO GENERAL PERMIT RULE PROGRAM, AND [327 IAC 16](#) CONCERNING CONFINED FEEDING OPERATIONS****PURPOSE OF NOTICE**

The Indiana Department of Environmental Management (IDEM) is soliciting public comment on amendments to rules at [327 IAC 5-4-3](#) and [327 IAC 5-4-3.1](#) concerning concentrated animal feeding operations (CAFO), [327 IAC 15-15](#) concerning the NPDES CAFO general permit rule program, and [327 IAC 16](#) concerning confined feeding operations (CFO). 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 5-4-3.1](#); [327 IAC 15-15](#); [327 IAC 16](#).

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

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

Indiana has had a CFO program in place since 1971, prior to EPA's NPDES program for CAFOs. When the federal rules under the Clean Water Act (CWA) were revised in 2003, the Indiana CFO statutes and rules were revised in 2004 to mesh the federal and state programs. With revisions to the federal rules in 2008, a new opportunity is being presented to reevaluate the state program and make changes that will better align the state and federal rules and make it clearer what is expected from each. On April 8, 2009, IDEM published a first notice in the Indiana Register at DIN: [20090408-IR-327090213FNA](#). That notice was to inform the public of IDEM's intention to update parts of the CAFO NPDES rules to incorporate the recent revisions to the federal rules. This notice, while related to the previous notice, is separate and deals with issues specific to the state of Indiana, primarily the state CFO program.

IDEM is requesting comments relative to what type of changes should be made to the regulations that apply to CAFOs as defined under the CWA and CFOs as defined by Indiana statute. IDEM is particularly interested in making changes that would update and streamline both programs and make it easier for the regulated community and the public to understand what is required under each program.

IDEM believes that recent changes to the federal NPDES rules will reduce the number of CAFOs that will continue to maintain or apply for an NPDES permit. In light of this expectation, IDEM is considering the creation of a new category under the CFO rules for large CFOs that previously held an NPDES permit but are no longer required to be permitted under the federal rules. These farms are, by definition, CFOs under Indiana law and would still be required to have a CFO approval (permit). Each regulated farm would fall into one of the following four categories:

- (1) CAFOs that are required to have an NPDES permit.
- (2) CAFOs that choose to have an NPDES permit.
- (3) Large CFOs (formerly required to have an NPDES permit) that do not have an NPDES permit but will have a CFO approval.
- (4) CFOs with a CFO approval.

The third category would have all the same requirements of a CFO with additional operational requirements similar to what is currently required in the state's NPDES regulations for CAFOs.

Another alternative that IDEM is considering, which would further simplify the rules, would upgrade the requirements for all CFOs to be the same and essentially equivalent to current requirements for large CAFOs that will not require an NPDES permit in the future. This approach would eliminate the need for two separate categories of CFOs, small and large. Such an approach would likely require a phase-in period for compliance by the small CFOs.

Due to the expected decrease in the number of CAFOs seeking NPDES permits, the reason for the use of general NPDES permits, that is, to efficiently issue NPDES general permits to a large number of qualifying CAFOs, may no longer be a major concern. IDEM is considering proposing that the general NPDES permit for CAFOs be eliminated. IDEM is requesting comments on whether the issuance of only individual NPDES permits for CAFOs seeking a NPDES permit would provide for a more effective permitting program by allowing each permit to be tailored to the specific circumstances at each farm.

There are many possible ways to improve the current set of rules, and IDEM is open to consideration of any approaches that are both protective of the state's water resources and practical to implement.

[IC 13-18-10](#) provides IDEM statutory authority to require approval prior to the start of construction of a CFO or CAFO, as well as approval procedures and construction standards. [IC 13-18-20](#) contains the fees assessed for each facility that has an NPDES permit.

### **Alternatives to Be Considered Within the Rulemaking**

Alternative 1. Updating the state CFO and CAFO program and maintaining NPDES general and individual permits for CAFOs.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? Partially, for the general permit and individual permit provisions.
- Is this alternative imposed by federal law or is there a comparable federal law? NPDES general permits are allowed under federal law.
- If it is a federal requirement, is it different from federal law? No.
- If it is different, describe the differences. Indiana statutes at [IC 13-18-10](#) require state CFO regulations.

Alternative 2. Updating the state CFO program to require all CFOs, regardless of size, to comply with requirements currently applied to permitted CAFOs. Updating individual NPDES permit rule and eliminating NPDES general permits for CAFOs seeking an NPDES permit.

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

Alternative 3. Updating the state CFO program to create two categories of CFOs. Large CFOs that are not seeking a NPDES permit but are defined as large CAFOs under federal NPDES regulations would be required to comply with additional requirements. Updating the individual NPDES permit rule and eliminating NPDES general permits for CAFOs seeking a NPDES permit.

- Is this alternative an incorporation of federal standards, either by reference or full text incorporation? No.
- Is this alternative imposed by federal law or is there a comparable federal law? This alternative is not imposed by federal law and there is no comparable federal law.
- If it is a federal requirement, is it different from federal law? Not applicable.
- 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**

IDEM anticipates that this rulemaking will have a significant fiscal impact of greater than \$500,000. As this rulemaking progresses, IDEM staff will consult with the public and regulated community to further determine the possible economic impacts of this rule.

### **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](http://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](mailto: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](mailto:bbaughn@idem.in.gov)

### **Public Participation and Workgroup Information**

IDEM will establish a workgroup with representation from all interested persons to address the issues

presented by this rulemaking. If you are interested in participating, 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:

#09-615(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 eleventh floor reception desk, Office of Land Quality, 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 September 18, 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

*Posted: 08/19/2009 by Legislative Services Agency*

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