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TITLE 327 WATER POLLUTION CONTROL BOARD

Proposed Rule LSA Document #05-322

DIGEST

Amends 327 IAC 5-4-3, 327 IAC 15-15-11, and 327 IAC 15-15-12 to extend the date whereby an operation newly defined as a concentrated animal feeding operation (CAFO) under the 2003 federal regulation amendments must apply for permit coverage and to extend the dates whereby existing CAFOs must complete and implement Soil Conservation Practice Plans and comply with certain nutrient management requirements. Makes other nonsubstantive style changes. Effective 30 days after filing with the Secretary of State.

HISTORY

Commissioner's Findings and IC 13-14-9-7 (Draft Rule) Comment Period: December 1, 2005, Indiana Register (29 IR 1046).

Notice of First Hearing: December 1, 2005, Indiana Register (29 IR 1049).

First Hearing: January 11, 2006.

PUBLIC COMMENTS UNDER IC 13-14-9-4.5

IC 13-14-9-4.5 states that a board may not adopt a rule under IC 13-14-9 that is substantially different from the draft rule published under IC 13-14-9-4, until the board has conducted a third comment period that is at least twenty-one (21) days long.

Because this proposed rule is not substantially different from the draft rule published on December 1, 2005 at 29 IR 1046, the Indiana Department of Environmental Management (IDEM) is not requesting additional comment on this proposed rule.

SUMMARY/RESPONSE TO COMMENTS RECEIVED FROM THE IC 13-14-9-7 (DRAFT RULE) COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from December 1, 2005, through December 30, 2005, on the draft rule language for amendments to the rule at 327 IAC 5-4-3, 327 IAC 15-15-11, and 327 IAC 15-15-12 concerning concentrated animal feeding operations. IDEM received comments from the following parties:

Joseph A. Miller, Rose Acre Farms (RAF-JM)

Cal Jackson, Creighton Brothers (CBF)

Terry Fleck, Indiana Pork Producers (IPPA)

Justin Schneider, Indiana Farm Bureau (IFB)

Comment: The main focus of the Notice is to seek comments upon proposed changes in the dates on which certain requirement must be met by Concentrated Animal Feeding Operations (CAFO's) in Indiana. These changes in dates are required so that EPA can have time in which to issue new regulations and requirements which CAFO's will be expected to meet [*sic*] to protect the waters of the U.S. Since Indiana receives its authority through EPA to enforce the Clean Water Act it would only be prudent for Indiana to also change the dates on which those same CAFO's would need to comply with new regulations and requirements EPA is in the process of developing. In that way Indiana can have adequate time in which to review the newly developed EPA requirements and then incorporate them into current Indiana regulations. RAF supports this change in dates. (RAF-JM) (CBF)

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

Comment: The case cited by IDEM in relation to the changes in the above stated dates is *Waterkeeper Alliance et al v. EPA*. A major ruling in that case surrounded the "duty to apply" of a CAFO and the wording of the regulations promulgated by EPA to enforce the Clean Water Act. EPA included within its regulations a duty to apply for National Pollutant Discharge Elimination System (NPDES) permits for those operations which "had a potential" to discharge into waters of the U.S. Indiana adopted similar language in its regulations. The Court made clear in that ruling that the Clean Water Act itself did not give EPA authority to regulate

“potential” discharges but only actual discharges into the waters of the U.S. To quote from the case itself “In other words, unless there is a ‘discharge of any pollutant,’ there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit.” The Court went on to state, “Thus, in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.” Since it is clear that EPA will be required to delete a reference to a “potential to discharge” in its regulations Indiana will also be required to delete such references in its regulations.

Given that it is clear that any such references must be deleted from the regulations, and that 327 IAC 5-4-3 is the specific regulation being changed at this time, and that within 327 IAC 5-4-3 are references to “potential discharges” it would seem prudent to make these changes now rather than retain language that clearly is outside of the scope of regulation by the state. (RAF-JM) (CBF)

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court’s decision. It would be premature for IDEM to make changes before seeing how EPA will address the court’s ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

Comment: As such, RAF recommends the following changes also be made in 327 IAC 5-4-3 at the same time other proposed changes are made: 1) Sec. 3. (a) should be changed to read as follows: Concentrated animal feeding operations or CAFOs are point sources that require NPDES permits for discharges. Once an operations is defined as a CAFO that discharges under this section, the NPDES requirements for all such CAFOs apply: Explanation: This change deletes the “potential discharges” language and makes clear that NPDES permits are only required for those CAFOs that discharge. (RAF-JM) (CBF) (IFB)

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court’s decision. It would be premature for IDEM to make changes before seeing how EPA will address the court’s ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

Comment: 2) Sec 3(a)(2)(d) should be changed to read as follows: All CAFO owners or operators that discharge into the waters of the state must seek coverage under either an individual NPDES permit or a general NPDES permit under 327 IAC 15-15. Explanation: This qualifies that only those that discharge pollutants into the waters of the state are required to obtain an NPDES permit, which would bring our statute into conformance with the Waterkeeper case being cited by IDEM as the basis for any and all of these changes. (RAF-JM) (CBF)

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court’s decision. It would be premature for IDEM to make changes before seeing how EPA will address the court’s ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

Comment: 3) Sec. 3.(b)(1) should delete the wording “from a land application area where the manure, litter, or process wastewater has been applied” so that it reads: “Agricultural storm water discharge” means a precipitation-related discharge in accordance with: Explanation: The Clean Water Act states, in reference to the definition of a point source, that “This term does not include **agricultural stormwater** discharges.” The Clean Water Act does not include the additional requirement of a land application area and therefore these words should be deleted from the Indiana regulations as EPA does not have authority to include them under the law and therefore does not have the authority to pass any such authority on to the State of Indiana. (RAF-JM) (CBF)

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court’s decision. It would be premature for IDEM to make changes before seeing how EPA will address the court’s ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

Comment: 4) Sec. 3(i)(6) should be changed to read as follows: (6) New Sources that will discharge pollutants into the waters of the state, as defined by 327 IAC 15-15-3(4), must seek permit coverage at least one hundred eighty (180) days before the CAFO is expected to commence operation. A new CAFO that discharges pollutants into the waters of the state may commence operation at the time that the facility obtains an NPDES permit. Explanation: This change reflects that new sources that discharge and new

CAFO's that discharge will be required to obtain NPDES permits. Again, adding the discharge qualifier comports with the Waterkeeper case being referenced by IDEM as the bases for the changes being made in this rule. (RAF-JM) (CBF)

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

Comment: 5) 327 IAC 5-4-3(b)(11) is the definition currently in the regulation which defines "No potential to discharge." Since the *Waterkeeper* case clearly ruled that EPA does not have authority to regulate such potentials to discharge this definition should be eliminated from this regulation. (RAF-JM) (CBF)

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

Comment: 6) Likewise, 327 IAC 5-4-3(d) should also be eliminated. This section currently states: "An owner or operator of a large CAFO does not need to seek permit coverage under this rule or 327 IAC 15-15 if the owner or operator has received a notification from the commissioner of a determination that a CAFO has no potential to discharge in accordance with 327 IAC 5-4-3.2 (IDEM proposes to change this language to "section 3.1 of this rule). Explanation: Again, since EPA and therefore Indiana, cannot regulate a "potential to discharge" having a notification from the commissioner that you do not a potential to discharge is redundant and unnecessary. If IDEM cannot regulate such "potential to discharges" there is no need to obtain from the commissioner a notification that you don't need to apply for an NPDES permit due to your "no potential to discharge" determination. (RAF-JM) (CBF)

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

Comment: 327 IAC 15-15-11 Section 11© [sic] should be changed to read as follows: All new sources, as defined in Section 3 of this rule, must comply with this section by December 31, 2009. Explanation: This change puts a date certain in the rule and would also make the same rules for all CAFO's required to comply with the rules. Under the current language new sources would be held to a different time frame than existing sources. It makes no sense to have different time frames apply to similar operations with the only difference being the date by which they began operations. (RAF-JM)

Response: IDEM agrees that this is a good suggestion; however, due to the expedited nature of the proposed rule changes, it is recommended that the suggested revision be made between preliminary and final adoption of this rule.

Comment: 327 IAC 15-15-12 should be changed to reflect that the definition of a CAFO's requiring permits only applies to those operations that have a discharge. Explanation: The *Waterkeeper* case clearly stated that only those operations that need NPDES permits (CAFO's that actually discharge, not those that that [sic] merely have the "potential to discharge") need to develop nutrient management plans (NMP's). As a result this section should be changed to clearly meet the standard set forth by the *Waterkeeper* case limiting NMP's to those CAFO's that discharge pollutants into the waters of the state. (RAF-JM)

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

Comment: Since the Second Circuit Court of Appeals has overturned key provisions of USEPA's Clean Water Act rules for CAFO's, including a denial of USEPA's authority to require CAFO's to obtain an NPDES permit, we concur that major changes need to be made in our Indiana CAFO rule. The extent of the changes proposed by IDEM, however, fall far short of the changes mandated by the Second Circuit Court. (IPPA)

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language

existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

Comment: We understand that USEPA has yet to define how it will develop policy to respond to the court ruling. We concur with the common sense approach of awaiting the outcome of USEPA's revision process prior to taking major action on Indiana's CAFO rule. Any further action could turn out to be in conflict with IDEM's federal authority. Therefore, we agree with the proposed draft rule changes that will postpone the timelines for newly defined and exempted CAFO operations. This will avoid wasted effort on IDEM's part, and is the most sensible approach given the lack of specific direction necessary to effect further changes. (IPPA)

Response: IDEM concurs.

Comment: Permit us to point out that all CAFO operators in the state must continue to operate under the stringent standard of the CFO rule and permit, whether they have filed their notice of intent or have yet to apply. We notice the fact that there are variances in the amount of reporting and recordkeeping between those who have filed their notice and those that have not. We would suggest that IDEM address these perceived inequities through a process where current NPDES permit holders are allowed to choose a process consistent with their understanding of current federal and state law. A balance needs to be struck *[sic]* where the compliance standards under the CAFO general permit are encouraged, while not creating unfairness toward those in the program vis-à-vis those yet to enter the program. (IPPA)

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

Comment: We appreciate the opportunity to comment upon the proposed amendments to the Indiana CAFO rule because of the EPA's proposal to extend timelines for implementation of various components of the federal rule due to the Second Circuit Court of Appeals decision in *Waterkeeper Alliance, Inc. V. United States Environmental Protection Agency*, 339 F.3d 486 (2005). We understand the difficult position under which IDEM has had to proceed in trying to meet deadlines for rulemaking in Indiana while anticipating the changes that EPA would make. Furthermore, we recognize that EPA's decision to publish a proposed rule that only addresses deadlines for implementation may limit the ability of IDEM to propose any substantive changes to the CAFO rule at this time. (IFB)

Response: IDEM concurs.

Comment: IFB was involved throughout the entire proceeding for the creation of the CAFO rule in Indiana because a vast number of our members were to be, and have been, affected by the rule. With the decision in *Waterkeeper Alliance* it would appear that the EPA's interpretation of the Clean Water Act – that they could regulate producers for the “potential to discharge” – is no longer valid. Indiana's CAFO rule incorporates this same language, and we believe there is no distinction between EPA's lack of authority to regulate for the potential to discharge and any authority which IDEM may have been acting under. Thus, a large number of our members who operate CAFOs would appear to fall outside the scope of the rule.

In that regard, IFB and its members believe that the CAFO rule should be amended to remove any requirement that operators of AFOs receive a NPDES permit simply based upon the size of their operation. Furthermore, according to the decision in *Waterkeeper Alliance*, a producer cannot be required to seek a “no potential to discharge determination” as a sole means to be excluded from the rule. Rather, it would appear that all operations should be presumed to be a facility that will not discharge, which indeed is the standard set in the effluent limitation guidelines in the federal and state rules. As an example, 40 C.F.R. § 412.31(a) and 327 IAC 15-15-4(g) both state that there must be no discharge of manure, litter, or process wastewater from the CAFO production area, with an exception provided for with the occurrence of a twenty-five year, twenty-four hour rainfall event. (IFB)

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

Comment: The definition of “large CAFO” in 5-4-3(b)(7) should also be amended to incorporate the discharge requirement of “medium CAFOs” found in 5-4-3(b)(10). Both of these changes are needed to make clear that CAFOs are only those facilities that discharge, and they alone need an NPDES permit. All other operations are just considered AFOs and would only need a CFO permit, if one is required by law, to operate a livestock facility. (IFB)

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes

before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

Comment: IFB and its members also recommend that 327 IAC 5-4-3.1 and any references to it be stricken in their entirety because the commissioner has no authority to require that an operator of an AFO prove that there is no potential to discharge. The definition of "new source" in 327 IAC 15-15-3(4) should be amended to read:

"New source" means any building, structure, facility, or installation from which there is a discharge of pollutants, the construction of which commenced after February 13, 2003." (IFB)

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

Comment: By implementing these changes in the Indiana CAFO rule, IDEM would ensure that our rule follows the holding of the court in Waterkeeper Alliance because only those AFOs that discharge would be required to have an NPDES permit. However, IFB and its members recognize that under the existing time constraints immediate action must be taken so that certain operations not be required to receive NPDES permits by deadlines previously set for February and April, 2006. In the event that the above recommended changes would extend the rulemaking process too far into the future, and recognizing that the EPA has not presented any guidance as to what a new federal rule may encompass, IFB and its members recommend the following for this rulemaking with the previously raised concern to be addressed in a subsequent rulemaking:

- 1) The proposed extensions of the timelines in 327 IAC 15-15-11, the soil Conservation practice plan requirement, should be broadened to include all CAFOs, including any new source, and not just those that are presently in operation. This would make application of the rule consistent amongst all CAFOs.

- 2) The proposed extension of time for compliance with the NRCS 590 standard found in 15-15-12(d) should also include new sources as discussed in 15-15-12(e). Once again, this change would make application of the rule consistent for each CAFO. (IFB)

Response: IDEM agrees that this is a good suggestion; however, due to the expedited nature of the proposed rule changes, it is recommended that the suggested revision be made between preliminary and final adoption of this rule.

SUMMARY/RESPONSE TO COMMENTS RECEIVED AT THE FIRST PUBLIC HEARING

On January 11, 2006, the water pollution control board (board) conducted the first public hearing/board meeting concerning the development of amendments to the rule at 327 IAC 5-4-3, 327 IAC 15-15-11, and 327 IAC 15-15-12 concerning concentrated animal feeding operations. Comments were made by the following parties:

Justin Schneider, Indiana Farm Bureau (IFB)

Malcolm DeKryger, Pork Producer and Indiana Pork Advocacy Coalition (MD)

Dr. Rae Schnapp, Hoosier Environmental Council (HEC)

Following is a summary of the comments received and IDEM's responses thereto.

Comment: Well, First of all, I'd just like to thank IDEM for what they've done on this, and we appreciate the fact that, you know, they've moved fairly quickly on this without really knowing what EPA was going to do. In fact, I think they've done an excellent job with having some foresight into what was coming. (IFB)

Response: IDEM is conscious of the resources that both the producers and the state will invest to accomplish the milestone dates for compliance of certain rule provisions. If the United States Environmental Protection Agency's (EPA's) rule negated the need for those provisions much resources will be conserved and both the producers and the state will have avoided investing the resources to accomplish a task not being imposed due to EPA's rule changes.

Comment: And while Indiana Farm Bureau did make some suggestions as to substantive changes more in line with what was in the Water Keeper decision, what Nancy was calling more the middle of the rule, we understand that right now is not a good time to make those changes. So, therefore, we fully support the decision to look at just moving the time frames back. (IFB)

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

Comment: With that, a comment that we did make was that the time line for the soil conservation practice plan and for the NRCS

590 standards now apply to just a small group of CAFO's, rather than the entire group of CAFO's. It does not include new sources. In order to—for the issues of equity, fairness and the level playing field, our members believe that the time line should be extended for all CAFO operations, not just a small group. Otherwise all new sources, which were CAFO's after the rule was adopted in Indiana, will have to go ahead and have the soil conservation practice plan before the end of the time frames that have been extended. That was—IDEM has agreed in principle to this in the comments. It was the last comment that was made. They suggested that we wait until the final rule for adoption rather than this preliminary adoption. As long as it gets in here at some point, we're okay with that. I'm not sure why that we needed to wait until final adoption rather than right now. (IFB)

Response: IDEM agrees that this is a good suggestion and will make the suggested changes between preliminary and final adoption of this rule.

Comment: My name is Malcolm DeKryger. You were pretty close. I'm from De Motte, Indiana. I'm a pig farmer, pork producer from there. I'm also on the Board of the Indiana Pork Advocacy Coalition. We, as a group and individually, would like to support IDEM asking for these to be pushed back. I have both confined feeding operation, a CFO, and I have CAFO's in my operations. Because we have had no violations ever, we have applied for and received exemptions for the rules that are going on right now, so in some ways we have not had to comply because of our excellent record. However, we would certainly like to make sure that everybody is on the same page, both from a federal and a state standpoint, before we have to jump off this diving board and into this new sea. So, therefore, as the time comes whatever [*sic*] the Federal Government gets all of its act together, we would certainly ask that we push this back until the time is right for the state to make its own decisions along the same lines. (MD)

Response: IDEM agree it is most efficient to know what changes must be made to comply with the federal rule before investing much effort to address what may need revision in the state rule.

Comment: I found it interesting that some comments were asked and made by—about the fiscal impact of \$500,000. Certainly pushing the dates back for a number of months or years will not really have a big impact on our business as it is today. I can certainly assure you, and I know one of your members who is in the pig business will certainly assure you, that when the time comes, \$500,000 will be a mere drop in the bucket as to what it's going to cost us. For relatively small operations, it will be a very big burden because of the professionals that they will have to hire and pay money to, to keep them in compliance. In my particular case, I have already hired and am paying an individual to make sure that a lot of my CAFO regulations that have been handed down to us now in the last couple of years—even though I am exempt, I am complying, as we always have. But as they continue to change these rules, the amount of work and the amount of money that I'm paying is going to be adding up in a hurry. I hope that the competitiveness of our industry is not too direly affected, but that is not what this hearing is about. (MD)

Response: IDEM agrees that this rule has no fiscal impact for the regulated facilities.

Comment: I have operations in both Indiana and Illinois, and so I'm able to allocate my individual employees' expenses right now over a certain number of operations, but I would suspect that on a per-farm basis, I'm looking at not less than five to seven thousand dollars per farm. And that is on an annual basis, because just to get ready for this year doesn't mean that I've got all of my nutrient management plans ready again for the next year or the next year, because this whole thing includes cropping operations and soil testing and the changes of soils as we improve the till for the soil with our manure nutrients. It's a very dynamic situation for us, and so it's not a one-time shot. In my particular case, we designed our farms to be able to comply with federal, even in spite of the new regulations. From an equipment standpoint, I'm probably not in too bad of a shape. It's more a matter of the scientific planning and bookkeeping and paperwork and people time and testing that's going to add up. Whether it's in my CFO or my CAFO's, I'm running them the same way, because it doesn't—it just does not pay not to. Our nutrients have become a pretty expensive resource at this point. (MD)

Response: This rule has no fiscal impact on the regulated facilities.

Comment: Thank you, Mr. Chairman and members of the Board. My name is Rae Schnapp. I'm the Water Policy Director at the Hoosier Environmental Council. I'm also the Wabash River Keeper, which means that we are a member of the Water Keeper Alliance. I'm going to ask you not to preliminarily adopt this rule today, and I want to give you a little brief summary of our perspective on the Second Circuit decision. I appreciate the opportunity to presently [*sic*] our perspective on this, and we urge you to reject the rule that's being proposed today.

Response: The proposed rule change only reflects changes EPA has recently proposed during the initial efforts to comply with the Second Circuit Court Decision.

Comment: The Second Circuit did not eliminate EPA's authority to require NPDES permits for CAFO's. It did not clearly disagree with EPA's presumed authority to require NPDES permits on the basis of their potential to discharge. The Second Circuit clearly left open the possibility that EPA and delegated state agencies can retain their authority to regulate CAFO's on the basis of an actual discharge or a proposed discharge. All of our general permits are currently on the basis of a proposed discharge. CAFO's are generally designed to discharge under certain circumstances. They're typically designed to capture a 25-year, 24-hour storm event, and, of course, if we get a storm event that's greater than that, there—it would be an expected discharge.

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes

before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

Comment: The Court also reaffirmed the right for states to require NPDES permits in order to address activities that cause or contribute to water quality problems. Indiana has many, many streams that are listed as impaired for E. Coli [*sic*] or for nutrients. Clearly we have the authority to require NPDES permits to address confined feeding discharges to those streams. Confined feeding land application areas are also confirmed sites of discharge or likely sites of discharge, and should be permanent [*sic*]. The Second Circuit decision definitively ruled that land application areas are point sources and that discharges from land application areas require NPDES permits unless they are found to be exempt as agricultural storm water. This clearly means that dry-weather discharges, discharges due to excessive manure application, are not covered by the exemption. The Second Circuit decision found that EPA's confined feeding regulations create an impermissible self-regulatory regime, and that it failed to meet the requirements of the Clean Water Act, because—because it fails to make the nutrient management plan part of the permit, and the nutrient management plan is really the key component of an effluent limitation for a confined feeding operation. And that was really the heart of the Water Keeper lawsuit in the first place, that the manure management plan, the nutrient management plan, is the central locus of our wastewater or manure application rates, and needs to be part of the permit.

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

Comment: And a third component of the Second Circuit decision that I want to just briefly mention is that it did require briefly mention is that it did require effluent limitations to reduce pathogens. I have a lot of material here, but I didn't want to read it all. Unfortunately, the Second Circuit decision has been sort of put—we've put a spin on it—the industry has put a spin on it to try to justify a hands-off approach, but we think that that approach really is counter to Indiana's authority to take affirmative steps that will secure the health and integrity of our waters, and it's not an effective means to prevent water pollution from confined feeding operations. We need to address those waters that are impaired for pathogens and nutrients, and not to use this as an excuse to postpone compliance.

Response: This rulemaking is not intended to address the substantive issues raised by the second circuit court opinion as it is incumbent upon EPA to amend their regulations to address the court's decision. It would be premature for IDEM to make changes before seeing how EPA will address the court's ruling and potentially result in significant confusion to have conflicting language existing at the federal and state level. IDEM does not intend to make any changes at this time beyond those immediately proposed by EPA regarding the date changes. It is expected that future rule revisions will be proposed once EPA has issued their revised regulations.

327 IAC 5-4-3

327 IAC 15-15-11

327 IAC 15-15-12

SECTION 1. 327 IAC 5-4-3 IS AMENDED TO READ AS FOLLOWS:

327 IAC 5-4-3 Concentrated animal feeding operations

Authority: IC 13-14-8; IC 13-15-1-2; IC 13-15-2-1; IC 13-18-2; IC 13-18-3

Affected: IC 13-11-2; IC 13-13-5-1; IC 13-18-4

Sec. 3. (a) Concentrated animal feeding operations or CAFOs are point sources that require NPDES permits for discharges or potential discharges. Once an operation is defined as a CAFO under this section, the NPDES requirements for CAFOs apply with respect to all:

(1) animals in confinement at the operation; and ~~and~~

(2) manure, litter, and process wastewater generated by those animals or the production of those animals;

regardless of the type of animal. Except as provided in subsection (d), all CAFO owners or operators must seek coverage under either an individual NPDES permit or a general NPDES permit under 327 IAC 15-15.

(b) The following definitions apply throughout this rule:

(1) "Agricultural storm water discharge" means a precipitation-related discharge from a land application area where the manure, litter, or process wastewater has been applied in accordance with:

(A) this rule; and

(B) site-specific nutrient management practices;

to ensure the agronomic utilization of the nutrients in the manure, litter, or process wastewater.

(2) "Animal confinement area" means the areas of the operation where animals are housed. ~~It~~ **The term** includes, but is not limited to, the following areas:

(A) Open lots.

(B) Housed lots.

(C) Feedlots.

(D) Confinement houses.

(E) Stall barns.

(F) Free stall barns.

(G) Milk rooms.

(H) Milking center.

(I) Cowyards.

(J) Barnyards.

(K) Medication pens.

(L) Walkers.

(M) Animal walkways.

(N) Stables.

(3) "Animal feeding operation" or "AFO" means a lot or facility, other than an aquatic animal production facility, where both ~~these~~ **of the following** conditions are met:

(A) Animals, other than aquatic animals, have been, are, or will be stabled or confined and fed or maintained for a total of **at least** forty-five (45) days ~~or more~~ in any twelve (12) month period. ~~and~~

(B) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over at least fifty percent (50%) of the lot or facility.

(4) "CFO approval" means a valid approval issued by the commissioner under 327 IAC 16.

~~(4)~~ **(5)** "Concentrated animal feeding operation" or "CAFO" means an AFO that is one (1) of the following:

(A) A large CAFO.

(B) A medium CAFO.

(C) Designated as a CAFO by the commissioner under subsection (c).

Two (2) or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if the AFOs adjoin each other or if the AFOs use a common area or system for land application of manure, litter, or process wastewater.

~~(5) "CFO approval" means a valid approval issued by the commissioner under 327 IAC 16.~~

(6) "Land application area" means land under the control of an AFO owner or operator, whether the land is:

(A) owned;

(B) rented;

(C) leased; or

(D) subject to an access agreement;

to which manure, litter, or process wastewater from the production area is or may be applied.

(7) "Large concentrated animal feeding operation" or "large CAFO" means an AFO that stables or confines **at least** as many as ~~or more than~~ the number of animals specified in any of the following categories:

(A) Seven hundred (700) mature dairy cows, whether milked or dry.

(B) One thousand (1,000) veal calves.

(C) One thousand (1,000) cattle other than mature dairy cows or veal calves. Cattle includes, but is not limited to, **the following**:

(i) Heifers.

(ii) Steers.

(iii) Bulls. ~~and~~

(iv) Cow/calf pairs.

(D) Two thousand five hundred (2,500) swine each weighing **at least** fifty-five (55) pounds. ~~or more.~~

(E) Ten thousand (10,000) swine each weighing less than fifty-five (55) pounds.

(F) Five hundred (500) horses.

(G) Ten thousand (10,000) sheep or lambs.

(H) Fifty-five thousand (55,000) turkeys.

(I) If the AFO uses a liquid manure handling system, either of the following:

(i) Thirty thousand (30,000) laying hens or broilers. ~~if the AFO uses a liquid manure handling system.~~

(ii) Five thousand (5,000) ducks.

(J) If the AFO uses other than a liquid manure handling system, any of the following:

~~(J)~~ **(i)** One hundred twenty-five thousand (125,000) chickens, other than laying hens. ~~if the AFO uses other than a liquid manure handling system.~~

~~(K)~~ **(ii)** Eighty-two thousand (82,000) laying hens. ~~if the AFO uses other than a liquid manure handling system.~~

~~(L)~~ **(iii)** Thirty thousand (30,000) ducks. ~~if the AFO uses other than a liquid manure handling system.~~

~~(M)~~ **Five thousand (5,000) ducks; if the AFO uses a liquid manure handling system.**

(8) “Manure” means the following:

(A) Animal feces or urine, or both. ~~and~~

(B) Materials, such as:

(i) bedding;

(ii) compost;

(iii) raw materials; or

(iv) other materials;

commingled with animal feces or urine, or both. ~~feces and urine.~~

(9) “Manure storage area” means any area where manure is kept. ~~It~~ The term includes, but is not limited to, the following areas:

(A) Lagoons.

(B) Run-off ponds.

(C) Storage sheds.

(D) Stockpiles.

(E) Under house or pit storage.

(F) Liquid impoundments.

(G) Static piles.

(H) Composting piles.

(10) “Medium concentrated animal feeding operation” or “medium CAFO” means the following:

(A) An AFO, where the type and number of animals that are stabled or confined at the operation falls within the following ranges:

(i) Two hundred (200) to six hundred ninety-nine (699) mature dairy cows, whether milked or dry.

(ii) Three hundred (300) to nine hundred ninety-nine (999) veal calves.

(iii) Three hundred (300) to nine hundred ninety-nine (999) cattle other than mature dairy cows or veal calves. Cattle includes, but is not limited to, **the following:**

(AA) Heifers.

(BB) Steers.

(CC) Bulls. ~~and~~

(DD) Cow/calf pairs.

(iv) Seven hundred fifty (750) to two thousand four hundred ninety-nine (2,499) swine each weighing **at least** fifty-five (55) pounds. ~~or more.~~

(v) Three thousand (3,000) to nine thousand nine hundred ninety-nine (9,999) swine each weighing less than fifty-five (55) pounds.

(vi) One hundred fifty (150) to four hundred ninety-nine (499) horses.

(vii) Three thousand (3,000) to nine thousand nine hundred ninety-nine (9,999) sheep or lambs.

(viii) Sixteen thousand five hundred (16,500) to fifty-four thousand nine hundred ninety-nine (54,999) turkeys.

(ix) If the AFO uses a liquid manure handling system, either of the following:

~~(ix)~~ **(AA)** Nine thousand (9,000) to twenty-nine thousand nine hundred ninety-nine (29,999) laying hens or broilers. ~~if the AFO uses a liquid manure handling system.~~

(BB) One thousand five hundred (1,500) to four thousand nine hundred ninety-nine (4,999) ducks.

(x) If the AFO uses other than a liquid manure handling system, any of the following:

~~(x)~~ **(AA)** Thirty-seven thousand five hundred (37,500) to one hundred twenty-four thousand nine hundred ninety-nine (124,999) chickens, other than laying hens. ~~if the AFO uses other than a liquid manure handling system.~~

~~(xi)~~ **(BB)** Twenty-five thousand (25,000) to eighty-one thousand nine hundred ninety-nine (81,999) laying hens. ~~if the AFO uses other than a liquid manure handling system.~~

~~(xii)~~ **(CC)** Ten thousand (10,000) to twenty-nine thousand nine hundred ninety-nine (29,999) ducks. ~~if the AFO uses other~~

~~than a liquid manure handling system.~~

~~(xiii) One thousand five hundred (1,500) to four thousand nine hundred ninety-nine (4,999) ducks, if the AFO uses a liquid manure handling system; and~~

~~(B) One (1) of these conditions are met:~~

~~(i) (B) Pollutants are discharged in one (1) of the following ways:~~

~~(i) Into waters of the state through a:~~

~~(AA) manmade ditch;~~

~~(BB) flushing system; or other~~

~~(CC) similar manmade device. or~~

~~(ii) Pollutants are discharged~~ Directly into waters of the state that originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(11) “No potential to discharge” means, for purposes of section 3.1 of this rule, that there is no potential for any CAFO manure, litter, or process wastewater to be added to waters of the state under any circumstance or climatic condition.

(12) “Process wastewater” means the following:

(A) Water directly or indirectly used in the operation of the AFO for any or all of the following:

(i) Spillage or overflow from animal or poultry watering systems.

(ii) Washing, cleaning, or flushing **any of the following:**

(AA) Pens.

(BB) Barns.

(CC) Manure pits. ~~or~~

(DD) Other AFO facilities.

(iii) Direct contact swimming, washing, or spray cooling of animals.

(iv) Dust control.

(B) Process wastewater includes any water that comes into contact with or is a constituent of any raw materials, products, or byproducts, including **the following:**

(i) Manure.

(ii) Litter.

(iii) Feed.

(iv) Milk.

(v) Eggs. ~~or~~

(vi) Bedding.

(13) “Production area” means that part of an AFO that includes the following:

(A) The animal confinement areas.

(B) The manure storage areas.

(C) The raw materials storage areas.

(D) The waste containment areas.

(E) ~~An~~ egg washing or processing facility.

(F) ~~A~~ milking parlor.

(G) Any area used in the:

(i) storage;

(ii) handling;

(iii) treatment; or

(iv) disposal;

of mortalities.

(14) “Raw materials storage area” includes, but is not limited to, the following:

(A) Feed silos.

(B) Silage bunkers.

(C) Bedding materials storage sheds.

(D) Feed bins.

(E) Feedstuffs storage bunkers and sheds.

(15) “Small concentrated animal feeding operation” or “small CAFO” means an AFO that is:

(A) designated as a CAFO; and ~~is~~

(B) not a medium CAFO or large CAFO.

(16) “Waste containment area” means an area designed to contain manure, litter, or process wastewater and includes, but is not limited to, the following:

- (A) Settling basins.
- (B) Areas within berms and diversions that separate uncontaminated storm water.

(c) Case-by-case designation of an AFO as a CAFO shall occur as follows:

(1) Notwithstanding any other provision of this section, any AFO may be designated as a CAFO where it is determined to be a significant contributor of pollutants to the waters of the state. In making this designation, the commissioner shall consider the following factors:

- (A) The size of the AFO and the amount of wastes reaching waters of the state.
- (B) The location of the AFO relative to waters of the state.
- (C) The means of conveyance of manure, litter, and process wastewaters into waters of the state.
- (D) The:
 - (i) slope;
 - (ii) vegetation;
 - (iii) rainfall; and
 - (iv) other factors;affecting the likelihood or frequency of discharge of manure, litter, and process wastewater into waters of the state.
- (E) Other factors relevant to the significance of the pollution problem under consideration.

(2) In no case shall an AFO be designated as a CAFO under this subsection until there has been:

- (A) an on-site inspection of the operation; and
- (B) a determination that the operation should be regulated under the permit program.

(3) No AFO with ~~less~~ **fewer** than the numbers of animals set forth in subsection (b)(10) shall be designated as a CAFO unless **pollutants are discharged in one (1) of the following ways:**

(A) ~~pollutants are discharged~~ Into waters of the state through a:

- (i) manmade ditch;
- (ii) flushing system; or ~~other~~
- (iii) similar manmade device. ~~or~~

(B) ~~pollutants are discharged~~ Directly into waters of the state that 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) An owner or operator of a large CAFO does not need to seek permit coverage under this rule or 327 IAC 15-15 if the owner or operator has received a notification from the commissioner of a determination that the CAFO has no potential to discharge in accordance with ~~327 IAC 5-4-3.1~~ **section 3.1 of this rule.**

(e) In addition to the requirements of 327 IAC 5-2-3, the owners or operators of new and existing CAFOs applying for an individual NPDES permit shall provide to the department the following:

(1) The following information on forms provided by the department:

- (A) **The** name, telephone number, and mailing address of the owner and operator.
- (B) **The** name, location, and address of the operation **and the** contact person and telephone number.
- (C) **The** type and number of animals at the operation.
- (D) **The** type of containment and storage and total capacity for manure, litter, and process wastewater storage (ton/gallons).
- (E) **The** total number of acres under control of the applicant available for land application.
- (F) **The** estimated amount of manure, litter, and process wastewater **as follows:**
 - (i) Generated per year (tons/gallons).
 - ~~(G) Estimated amount of manure, litter, and process wastewater~~ (ii) Transferred to other persons per year (tons/gallons).
- ~~(H)~~ (G) A list of other environmental permits held and permit numbers including, if applicable, the CFO farm ID number provided on state CFO approval under 327 IAC 16.
- ~~(H)~~ (H) A soil survey map of the geographic area in which the CAFO is located showing the location of **the following:**
 - (i) The production area facility. ~~and~~
 - (ii) Land application areas.
- ~~(I)~~ (I) **The** SIC code for the operation.
- ~~(J)~~ (J) **The** name of **the** waterbody receiving drainage from the production area.
- ~~(K)~~ (K) **The** telephone number and title of **the** person signing the application.

(2) Payment of the application fee of fifty dollars (\$50).

(f) The department shall process the application in accordance with the procedures specified in 327 IAC 5-3. The permit will

require the applicant to comply with nutrient management and water quality standards under 327 IAC 15-15 and 327 IAC 16.

(g) The discharge of manure, litter, or process wastewater from a CAFO to waters of the state as a result of land application of manure, litter, or process wastewater by the CAFO to land application areas under the control of the CAFO owner or operator is a discharge subject to NPDES permit requirements under this rule or 327 IAC 15-15, except where it is an agricultural storm water discharge.

(h) Not later than one hundred eighty (180) days before the expiration of the permit, the permittee shall submit an application to renew the permit on forms provided by the department. The permittee need not reapply for a permit if the facility has:

- (1) ceased operation and has demonstrated to the commissioner that there is no remaining potential to discharge; or
- (2) reduced the number of animals such that the facility is no longer defined as a CAFO.

(i) The deadlines to either seek coverage under an individual NPDES permit ~~pursuant to~~ **under** this rule or under a general NPDES permit ~~pursuant to~~ **under** 327 IAC 15-15 are as follows:

(1) Operations defined as CAFOs ~~prior to~~ **before** April 14, 2003, must **do the following**:

(A) Seek coverage as of April 14, 2003. ~~and~~

(B) Comply with all applicable requirements at the time of coverage.

(2) The following operations, which were defined as CAFOs as of April 14, 2003, but were not defined as CAFOs ~~prior to~~ **before** that date, must seek coverage ~~no not later than~~ **February 13, 2009**:

(A) CAFOs with **at least** one thousand (1,000) ~~or more~~ heifers.

(B) CAFOs with **at least** ten thousand (10,000) ~~or more~~ swine weighing less than fifty-five (55) pounds.

(C) CAFOs with **at least**:

(i) one hundred twenty-five thousand (125,000) ~~or more~~ chickens, other than laying hens; ~~if the CAFO uses other than a liquid manure handling system; or~~

~~(D) CAFOs with~~ (ii) eighty-two thousand (82,000) ~~or more~~ laying hens; if the CAFO uses other than a liquid manure handling system.

(3) Operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs ~~prior to~~ **before** April 14, 2003, because the operation has not discharged except in the event of a twenty-five (25) year, twenty-four (24) hour rainfall event must **do the following**:

(A) Maintain a CFO approval under 327 IAC 16 until:

(i) an individual NPDES permit is obtained; or

(ii) the operation receives general permit coverage under 327 IAC 15-15.

(B) Certify **the following** to the commissioner in writing within ninety (90) days of the effective date of this rule: ~~that:~~

(i) The AFO was not required to apply for a permit under ~~327 IAC 5~~; **this article**.

(ii) A discharge has not occurred from the AFO. ~~and~~

(iii) The operation was constructed and is at all ~~time~~ **times** maintained to prevent a discharge during dry weather and wet weather up to and including a twenty-five (25) ~~year~~, twenty-four (24) hour rainfall event.

(C) Sign the certification in accordance with 327 IAC 15-15-5(c).

(D) Seek permit coverage under an individual permit ~~pursuant to~~ **under** this rule or ~~under~~ a general NPDES permit ~~pursuant to~~ **under** 327 IAC 15-15 by April 13, ~~2006; and~~ **2009**.

(E) Not discharge manure, litter, or process wastewater to the waters of the state. If an AFO has a discharge after submitting a certification to the commissioner, the AFO must **do the following**:

(i) Notify the department of the discharge within twenty-four (24) hours of the discharge. ~~and~~

(ii) Seek coverage within thirty (30) days of the discharge under **either of the following**:

(AA) An individual NPDES permit ~~pursuant to the~~ **under this rule**. ~~or~~

(BB) A general NPDES permit ~~pursuant to~~ **under** 327 IAC 15-15.

(4) Any operation that has a discharge after submitting the certification under this subsection to the commissioner shall **do the following**:

(A) Immediately notify the department of the discharge. ~~and~~

(B) Seek coverage within thirty (30) days of the discharge under **either of the following**:

(i) An individual NPDES permit under this rule. ~~or~~

(ii) The NPDES general permit rule under 327 IAC 15-15.

(5) For operations that are newly constructed or that make changes, such that the operation becomes a CAFO as defined under this rule, after April 14, 2003, but are not new sources as defined by 327 IAC 15-15-3(4), **one (1) of the following**:

(A) For newly constructed operations not subject to effluent limitations guidelines in 40 CFR 412, effective April 14, 2003, one

hundred eighty (180) days ~~prior to~~ **before** the commencement of operations. ~~or~~

(B) For other operations, ~~no~~ **not** later than ninety (90) days after becoming a CAFO as defined under this rule.

However, if an operational change that makes the operation a CAFO would not have made the operation CAFO ~~prior to~~ **before** April 14, 2003, the operation has until April 13, ~~2006~~, **2009**, or ninety (90) days from becoming defined as a CAFO, whichever is later, to seek coverage.

(6) New sources, as defined by 327 IAC 15-15-3(4), must seek permit coverage at least one hundred eighty (180) days ~~prior to~~ **the time before** the CAFO is expected to commence operation. A new CAFO may commence operation at the time that the facility obtains an NPDES permit.

(7) Operations designated as a CAFO must seek permit coverage within ninety (90) days of being designated.

(j) A CAFO that obtains:

(1) an individual NPDES permit under this section; or ~~obtains~~

(2) a general permit under 327 IAC 15-15;

is not required to obtain or renew the CFO approval under 327 IAC 16-7.

(k) Permits for CAFOs shall include conditions based on the requirements in 327 IAC 5-2-8, ~~5-2-10~~, **327 IAC 5-2-10**, and ~~5-2-12~~. **327 IAC 5-2-12.** (*Water Pollution Control Board; 327 IAC 5-4-3; filed Sep 24, 1987, 3:00 p.m.: 11 IR 642; filed Feb 23, 2004, 12:15 p.m.: 27 IR 2225*)

SECTION 2. 327 IAC 15-15-11 IS AMENDED TO READ AS FOLLOWS:

327 IAC 15-15-11 Soil conservation practice plan

Authority: IC 13-13-5-1; IC 13-15-1-2; IC 13-15-2-1

Affected: IC 13-18-10

Sec. 11. (a) Except as provided in subsection (b), any person with a facility subject to this rule must develop and implement a soil conservation practice plan for land application areas by December 31, ~~2006~~, **2009**. The following milestones shall be met for the development and implementation of the plan **by the owner or operator of the CAFO who:**

(1) ~~The owner or operator of the CAFO~~ Must identify the person who will develop the soil conservation practice plan by December 31, 2004.

(2) ~~The owner or operator of the CAFO~~ Must have completed the soil conservation practice plan by December 31, ~~2005~~, **2008**.

(3) ~~The owner or operator of the CAFO~~ Must have implemented the soil conservation practice plan by December 31, ~~2006~~, **2009**.

(4) ~~The owner or operator of the CAFO~~ Shall report progress toward meeting each milestone in this section in the annual report required under section 9(b) of this rule.

(b) For CAFOs that become subject to this rule after December 31, ~~2006~~, **2009**, the requirement to develop and implement a soil conservation practice plan shall apply as of the date permit coverage commences. If a person is proposing to apply manure, litter, or process wastewater to snow-covered or frozen ground or to highly erodible land, a soil conservation practice plan must be developed and implemented in accordance with section 14 of this rule ~~before such~~ **the** application. Any land subject to a land use agreement:

(1) not owned or controlled by the CAFO owner or operator to which manure, litter, or process wastewater is applied; and

(2) where the landowner does not implement conservation practices, as applicable under this rule;

must be used in accordance with sections 10 ~~and 12~~ **and through** 14 of this rule.

(c) All new sources, as defined in section 3 of this rule, must comply with this section ~~upon the date of permit coverage under this rule.~~ **as of December 31, 2009.**

(d) The soil conservation practice plan must:

(1) be developed in accordance with NRCS conservation practice standards; and ~~must~~

(2) specify, for each field receiving manure, litter, or process wastewater for land application, how to:

(1) ~~(A)~~ **(A)** reduce soil erosion to a tolerable loss (T); and

(2) ~~(B)~~ **(B)** minimize nutrient loss through leaching and run-off.

(e) The soil conservation practice plan must contain the following:

(1) A soil map clearly showing the specific fields subject to the conservation practices.

- (2) A description of the soil types present.
- (3) **The** slope of land application sites.
- (4) Identification of appropriate:
 - (A) site-specific conservation practices to reduce soil erosion and control run-off of pollutants; **and**
 - ~~(5) Identification of appropriate~~ (B) methods to minimize nutrient leaching.
- ~~(6)~~ (5) If applicable, **the following**:
 - (A) A plan for application of manure, litter, or process wastewater to frozen or snow-covered ground, as required under section 14 of this rule.
 - ~~(7) If applicable;~~ (B) Identification of **the following**:
 - (i) Land application sites for frozen or snow-covered ground application.
 - ~~(8) If applicable; identification of~~ (ii) Highly erodible land, as required under **section 12(i)** of this rule.
- (f) The soil conservation practice plan shall be kept with the operating record required under section 17 of this rule. (*Water Pollution Control Board; 327 IAC 15-15-11; filed Feb 23, 2004, 12:15 p.m.: 27 IR 2238*)

SECTION 3. 327 IAC 15-15-12 IS AMENDED TO READ AS FOLLOWS:

327 IAC 15-15-12 Nutrient management requirements

Authority: IC 13-13-5-1; IC 13-15-1-2; IC 13-15-2-1

Affected: IC 13-18-10

Sec. 12. (a) CAFOs that are not new sources must conduct manure, litter, and process wastewater testing for nitrogen and phosphorus annually. Soil sampling and testing must be conducted at a minimum **of** once every three (3) years. Owners or operators may use the most recent data required under 327 IAC 16-7-11 to meet this requirement after the effective date of this rule.

(b) CAFOs that are new sources must, as of the date of permit coverage, conduct manure, litter, and process wastewater testing for nitrogen and phosphorus ~~prior to before~~ the first land application and annually thereafter. All CAFOs, except for new sources, shall conduct soil testing for phosphorus:

- (1) as of the date of permit coverage; and
- (2) once every three (3) years thereafter.

(c) Owners or operators shall use the protocols listed in the NRCS 590 standard for sampling and testing of soil, manure, litter, and process wastewater.

(d) CAFOs that are not new sources must adjust land application rates to conform with the NRCS 590 standard by December 31, ~~2006.~~ **2009.**

(e) CAFOs that are new sources must, ~~as of the date of permit coverage;~~ **as of December 31, 2009,** be prepared to conform with land application rates based on the NRCS 590 standard for the first and all subsequent land application activities.

(f) Except as otherwise provided under this section, application of manure, litter, and process wastewater must be in accordance with the setbacks in Table 1:

Table 1.
SETBACK DISTANCES FROM DOWNGRAIENT SURFACE FEATURES (in feet)

Known Feature	Less than or Equal to 6% Slope; or Residue Cover		Greater than 6% Slope
Public water supply wells and public water supply surface intake structures	500		500
Surface waters of the state	100		200
Sinkholes (measured from the surface opening or the lowest point)	100		200
Wells	100		200
Drainage inlets	100		200
Property lines and public roads	50		50

(1) All setback distances must be measured from the edge of the area of actual placement of manure, litter, or process wastewater on the land.

(2) The property line setback distances specified in Table 1 may be waived in writing by the owner of the adjoining property.
(3) **The setback is the width of the filter strip** if a properly designed and maintained filter strip of at least thirty-five (35) feet in width is located between the application site and **any of the following:**

- (A) Surface waters of the state.
- (B) Any known private well.
- (C) The surface opening or lowest point of any sinkhole. ~~or~~
- (D) Any drainage inlet, including water and sediment control basins.

~~then the setback is the width of the filter strip.~~

(4) The setback is ten (10) feet if a gradient barrier is located between the application site and **any of the following:**

- (A) Surface waters of the state.
- (B) Any known well.
- (C) The surface opening or lowest point of any sinkhole. ~~or~~
- (D) Any drainage inlet, including water and sediment control basins.

(g) Manure, litter, or process wastewater must not be applied to the land from manure application equipment operating on a public road.

(h) Manure, litter, and process wastewater shall not be applied to saturated ground.

(i) When planning land application, the owner or operator must take into account the:

(1) weather forecast and ~~the~~ likelihood of precipitation events for the twenty-four (24) hour period ~~prior to~~ **before** and after the application; and

(2) site soil conditions;

to assure that manure, litter, and process wastewater are not applied ~~prior to~~ **before** a rain event that, when combined with soil conditions, would likely result in run-off.

(j) Manure, litter, and process wastewater must not be applied to highly erodible land unless **the:**

(1) ~~the~~ land is:

(A) pastureland; ~~or~~

~~(2) the land is~~ **(B)** planted in a cover crop that reduces or controls erosion; or

~~(3) the~~ **(2)** manure, litter, or process wastewater is applied in accordance with the soil conservation practice plan required under section 11 of this rule.

(k) Land application sites must be inspected to identify any field tile outlets under or immediately bordering the land application site. Visual monitoring of identified field tile outlets must occur during and immediately following land application of the manure, litter, or process wastewater. If there is evidence of manure or process wastewater discharging from the field tile outlet, the land application must cease immediately and the flow stopped or captured. Any flow that is captured shall be either land applied or returned to storage.

(l) If a CAFO is land applying manure, litter, or process wastewater by injection or single pass incorporation, the CAFO must comply with the following setbacks:

- (1) Public water supply wells and public water supply surface intake structures: five hundred (500) feet.
- (2) Surface waters: twenty-five (25) feet.
- (3) Sinkholes: twenty-five (25) feet.
- (4) Wells: fifty (50) feet.
- (5) Drainage inlets: five (5) feet. ~~and~~
- (6) Property lines and public roads: zero (0) feet.

(m) If a CAFO is land applying solid manure or litter by surface application followed by incorporation within twelve (12) hours, the CAFO must comply with the following setbacks:

- (1) Public water supply wells and public water supply surface intake structures: five hundred (500) feet.
- (2) Surface waters: fifty (50) feet.
- (3) Sinkholes: fifty (50) feet.
- (4) Wells: fifty (50) feet.
- (5) Drainage inlets: fifty (50) feet. ~~and~~

(6) Property lines and public roads: ten (10) feet.
(Water Pollution Control Board; 327 IAC 15-15-12; filed Feb 23, 2004, 12:15 p.m.: 27 IR 2239)

Notice of Public Hearing

Under IC 4-22-2-24, IC 13-14-8-1, IC 13-14-8-2, and IC 13-14-9, notice is hereby given that on May 10, 2006 at 1:30 p.m., at the Indiana Government Center-South, 402 West Washington Street, Conference Center Room A, Indianapolis, Indiana the Water Pollution Control Board will hold a public hearing on proposed amendments to rules for concentrated animal feeding operations at 327 IAC 5-4-3, 327 IAC 15-15-11, and 327 IAC 15-15-12.

The purpose of this hearing is to receive comments from the public prior to final adoption of these rules by the board. All interested persons are invited and will be given reasonable opportunity to express their views concerning the proposed amendments. Oral statements will be heard, but, for the accuracy of the record, all comments should be submitted in writing.

Additional information regarding this action may be obtained from Lynn West, Rules, Planning, and Outreach Section, Office of Land Quality, (317) 232-3593 or (800) 451-6027 (in Indiana).

Individuals requiring reasonable accommodations for participation in this event should contact the Indiana Department of Environmental Management, Americans with Disabilities Act coordinator at:

Attn: ADA Coordinator

Indiana Department of Environmental Management

100 North Senate Avenue

Indianapolis, Indiana 46204-2251

or call (317) 233-0855 or (317) 233-6565 (TDD). Speech and hearing impaired callers may contact IDEM via the Indiana Relay Service at 1-800-743-3333. Please provide a minimum of 72 hours' notification.

Copies of these rules are now on file at the Office of Land Quality, Indiana Department of Environmental Management, Indiana Government Center-North, 100 North Senate Avenue, Eleventh Floor and Legislative Services Agency, One North Capitol, Suite 325, Indianapolis, Indiana and are open for public inspection.

Bruce H. Palin
Assistant Commissioner
Office of Land Quality