



VIA EMAIL

October 21, 2003

Ms. Ronda Wuycheck, Environmental Quality Specialist
Water Division
Department of Environmental Quality
525 West Allegan
Lansing, MI 48913

Dear Ms. Wuycheck:

We've reviewed the first draft of the proposed rules for National Pollution Discharge Elimination System Permits (NPDES) for Concentrated Animal Feeding Operations in Michigan.

The overall thrust of the proposed rules as currently drafted would be to reverse longstanding strict prohibitions Michigan DEQ has been enforcing against discharges of animal waste from CAFO operations into Michigan surface waters. The proposed rules would accomplish this end by granting an enforcement shield to CAFO operators by adopting an inappropriate and illegal interpretation of the "agricultural stormwater" discharge exemption in the Federal Clean Water Act.

Under the scheme envisioned by the proposed rules, CAFO operators would be free to erect such an enforcement shield merely by the creation of a comprehensive nutrient management plan (CNMP) that is never approved by Michigan DEQ and, for all practical purposes, is not available to the public. Elements of such a non-approved, non-reviewed CNMP apparently could not be enforced by MDEQ even if they were known.

This proposed non-regulatory scheme contained in the draft rule for allowing virtually unlimited, unregulated pollution of surface waters by animal wastes under a wet weather exemption as long as a CAFO operator adopts and manages their operation under a non-disclosed, unapproved and unreviewed Comprehensive Nutrient Management Plan cannot be considered as being compliant with either the Federal Clean Water Act or the Michigan Natural Resources and Environmental Protection Act

Most importantly, adoption of the “agriculture stormwater exception” in the form envisioned in the proposal would explicitly repudiate all past MDEQ “no discharge” enforcement actions and jeopardize all ongoing enforcement actions involving precipitation events as they have been carried out by the Water Division district offices and central Water Division escalated enforcement office.

Under the Clean Water Act, concentrated animal feeding operations [which are production areas and land application areas together in the aggregate] have to be regarded as point sources of animal waste pollution to surface waters of the State of Michigan and the United States. As a result, NPDES permits for such operations must contain effluent limitations reflecting water pollution control at least as stringent as Best Available Technology as defined under the Act. 33 USC Sec. 1311. In addition, where a point source causes or may cause a violation of surface water quality standards, an NPDES permit for such a source must incorporate water quality-based effluent limitations to limit or prevent damage to surface waters. 33 USC Sec. 1312

Permits for CAFO operations must not allow for backsliding in the form of relaxation of limitations on effluents over current requirements. 33 USC Sec. 1342(o).

Moreover, permitting for new and existing CAFO operations must be accountable to existing water quality planning and improvement plans for Michigan’s surface water stream segments that currently violate water quality standards. Finally, the Clean Water Act mandates public participation in the development of permits for point sources of pollution, including procedures for public notice and comment on proposed permits.

From a Michigan law perspective, both Michigan DEQ and persons within the meaning of Michigan law must not approve, permit or allow conduct that causes “pollution, impairment or destruction:”

(2) In **administrative, licensing, or other proceedings**, and in any judicial review of such a proceeding, **the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined**, and **conduct shall not be authorized or approved** that has or **is likely to** have such an effect if there is a **feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare**. MCL 324.1705(2) (emphasis added)

Other water provisions of Michigan law provide:.

(1) A person shall not **directly or indirectly discharge into the waters of the state a substance that is or may become injurious** to any of the following:

(a) To the public health, safety, or welfare.

(b) To domestic, commercial, industrial, agricultural, recreational, or other

uses that are being made or may be made of such waters.

(c) To the value or utility of riparian lands.

(d) To livestock, wild animals, birds, fish, aquatic life, or plants or to the growth, propagation, or the growth or propagation thereof be prevented or injuriously affected; or whereby the value of fish and game is or may be destroyed or impaired.....

.....(4) A **violation of this section is prima facie evidence of the existence of a public nuisance** and in addition to the remedies provided for in this part may be abated according to law in an action brought by the attorney general in a court of competent jurisdiction. MCL 324.3109. (emphasis added)

Still other Michigan water law provisions state:

(1) A person shall not discharge any waste or waste effluent into the waters of this state unless the person is in possession of a valid permit from the department.The department shall condition the continued validity of a permit upon the permittee's meeting the **effluent requirements that the department considers necessary to prevent unlawful pollution** by the dates that the department considers to be reasonable and necessary and to assure compliance with applicable federal law and regulations. If the department finds that the terms of a permit have been, are being, or may be violated, it may modify, suspend, or revoke the permit or grant the permittee a reasonable period of time in which to comply with the permit. The department may reissue a revoked permit upon a showing satisfactory to the department that the permittee has corrected the violation. A person who has had a permit revoked may apply for a new permit. MCL 324.3112. (emphasis added)

MDEQ's overall mandatory charge in the protection of the waters of the State of Michigan provides:

(1) The department **shall protect and conserve the water resources** of the state and shall have control of the pollution of surface or underground waters of the state and the Great Lakes, which are or may be affected by **waste disposal of any person**. The department shall enforce this part and shall promulgate rules as it considers necessary to carry out its duties under this part. MCL 324.3103. (emphasis added)

Applicable Michigan water statute authority further provides:

“The department shall establish pollution standards for lakes, rivers, streams, and other waters of the state in relation to the public use to which they are or may be put, as it considers necessary. The department **shall issue permits that will assure**

compliance with state standards to regulate municipal, industrial, and commercial **discharges or storage of any substance that may affect the quality of the waters of the state**. The department may set permit restrictions that will assure compliance with applicable federal law and regulations. The department may ascertain and determine for record and in making its order what volume of water actually flows in all streams, and the high and low water marks of lakes and other waters of the state, affected by the waste disposal or pollution of any persons. The department may promulgate rules and issue orders **restricting the polluting content of any waste material or polluting substance discharged or sought to be discharged** into any lake, river, stream, or other waters of the state. The department shall **take all appropriate steps to prevent any pollution the department considers to be unreasonable and against public interest** in view of the existing conditions in any lake, river, stream, or other waters of the state. MCL 324.3106. (emphasis added)

Finally, Michigan law provides discretionary authority to control harmful effects of discharged water pollutants:

The department may promulgate **rules and issue orders for the prevention of harmful interference** with the discharge and stage characteristics of streams. The department may ascertain and determine for record and in making its order the location and extent of floodplains, stream beds, and channels and the discharge and stage characteristics of streams at various times and circumstances. MCL 324.3107 (emphasis added)

Uncontrolled wet weather discharges of precipitation-borne animal waste have a high likelihood of causing serious water pollution. Expected problems from this type of event include contamination from pathogens, hormones, veterinary medical agents, dissolved solids, ammonia, nitrates, phosphorus, color and excessive BOD5. Water quality problems inherent from such discharges include potential contamination of public water supplies/surface and groundwater with pathogens, acute and chronic destruction of fishery resources from depressed downstream oxygen and inherent aquatic toxicity of discharged pollutants, damage to fish and aquatic habitats, eutrophication of lakes/streams/wetlands, damage to existing downstream water uses, odors from contaminated stream-courses and endocrine disruption in exposed species.

To summarize, the wet weather animal waste exception for Michigan DEQ's proposed CAFO NPDES rules violates the federal law requirement to ensure that enforceable effluent limitations and work practices reflecting best available technology economically achievable and required water quality-based effluent limitations are provided for CAFO operations in the State of Michigan. This type of exception allowing uncontrolled discharge of animal waste to surface waters of the United States was never envisioned by Congress when it structured an agricultural stormwater exception in the Act.

Allowing unregulated wet weather animal waste discharges from land application areas

will violate federal law requirements that point source NPDES permit have such effluent limitations cited in the prior paragraph. Further, such an approach allows impermissible backsliding of effluent control requirements. The approach for allowing all facilities regardless of size, location, impact or status as a new/expanding as general permit units frustrates the Act's requirements to promote public notice and participation on waste pollution permits.

From a Michigan law perspective, the proposed MDEQ approach to allow a wet weather animal waste stormwater pollution exception contemplates impermissible pollution, impairment and destruction of the state's natural resources when alternatives are clearly available.

Because of the high likelihood of damaging water pollution and threats to public health from the discharge of uncontrolled wet weather animal waste pollution, enactment of such an exception violates the MDEQ's general duties in the control of water pollution and protection of the state's water resources and would constitute an abuse of discretion of its discretionary authority to enact measures to protect water quality. Finally, and most importantly, MDEQ's proposed wet weather animal waste pollution allowance would impermissibly countenance CAFO operators engaging in prohibited conduct under the water resource provisions of NREPA.

Specific Comments on the Proposed Draft Rule Language

Definitions

The proposed definition of a **concentrated animal feeding operation** must be amended to clearly incorporate both the production area together with the land application area since both together are defined as a point source of pollution. The definition of a CAFO must account for aggregation of facilities of different animal classes through a mechanism similar to what is presently used by EPA for combining animal units.

The proposed definition of **land application area** should be expanded to include all land areas where animal waste disposal from a CAFO takes place. MDEQ policy on waste management has always embraced generator responsibility for the disposition of wastes. A CAFO operator should not be allowed to evade responsibility for ultimate disposition of their animal wastes through contractual divestment of responsibility with arrangements for disposal on another land owner's property.

The proposed definition of **agriculture stormwater discharge** should definitely be amended to not embrace any stormwater contaminated with animal waste and/or agricultural litter. Congress never intended to enact a carte blanche exception to the Act for stormwater contaminated with an unlimited level of animal waste pollution. Allowance of pollution under such an exception should not embrace a level of animal

waste pollution that is greater than runoff and/or tile drainage from fields that are not used for animal waste disposal.

The definition of **manure** should be dropped and substituted with an analogous definition for **animal waste**.

A definition of **silage leachate** should be added. In addition, the rules should recognize the potential for silage leachate to be commingled with animal waste.

The definition of a **medium CAFO** does not countenance swine weighing more than 55 pounds.

The definition of **process wastewater** should be changed to account for silage leachate and its commingling with animal and production area waste. **Process wastewater** should be further amended to include wastewater from the production area that is commingled with precipitation and stormwater.

Rule 2161 Stormwater Discharge Permits

This language under new section (h) should be amended to require individual site permits for all large CAFOs and for all new and expanding CAFOs. Each individual permit CAFO must be subject to public notice and participation procedures under provisions elsewhere in the water rules.

The language should be amended to disallow a director determination of “no potential for discharge” determinations for any facility incorporating its own land disposal for animal waste or which ultimately used land for disposal in its ultimate disposition.

The language should incorporate specific criteria for decisionmaking and a public notice and participation procedure for determinations of no potential for discharge determinations.

Language under new section (j) allowing the agricultural stormwater exemption for stormwater contaminated with animal waste should be stricken completely from the draft.

Rule 2189

Sierra Club opposes Michigan’s adoption of the new CFR language under sections 122.41 through 122.49 until such time as national litigation against the new federal rules has cleared the litigation and appeal procedures.

Rule 2196

Sierra Club renews its comment in general here that all large CAFOs should be covered by individual site specific permits. Absent adoption of that position, all new and expanded CAFOs should be subject to individual site permitting requirements.

The second paragraph appears to earlier contravene requirements contained in the most recent MDEQ general permit program for facilities having a recent discharge. It is our understanding that MDEQ has required all facilities having a discharge after January 14, 2000, or facilities which have been specifically identified by MDEQ as needing to apply for permit cover, to have a CAFO permit. The proposed language conflicts with this requirement.

Third paragraph. The “becomes defined” language implies the suggestion that sources who do not come forward will not be covered

Fourth/fifth paragraph. Expanded CAFOs should be treated in the same manner as new facilities and should be subject to individual site specific NPDES permits with public notice and public participation requirements prior to issuance.

This rule should be amended to require environmental impact determinations on new and expanded CAFO operations in order to identify all adverse impacts that may result from issuance of such permits. In addition, new and expanded CAFO operations should require a permit to commence construction rather than a permit to simply commence operations.

This concludes comments the Sierra Club Mackinac Chapter has at the present time. If you have any questions, please contact me at (517)332-6971 [ajs@sagady.com] or Anne Woiwode at (517)484-2372 [anne.woiwode@sierraclub.org].

Sincerely,

SIERRA CLUB MACKINAC CHAPTER



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