

# Midwest Environmental ADVOCATES

*pro bono publico*

April 19, 2001

Carol Holden  
Wisconsin Department of Natural Resources  
101 S. Webster St.  
Madison, WI 53707

RE: Proposed Order to Repeal and Recreate Ch. NR 243 Relating to Animal Feeding Operations

Dear Ms. Holden:

Midwest Environmental Advocates is a legal and technical resource center for community groups that are working for environmental justice in the Western Great Lakes region. Midwest Environmental Advocates has represented several statewide family farm and environmental groups and local communities adversely impacted by large animal feeding operations. Today we are submitting these comments on behalf of Wisconsin's Environmental Decade, River Alliance of Wisconsin, Sierra Club-John Muir Chapter, and 1,000 Friends of Wisconsin.

Thank you for the opportunity to submit written comments on the proposed changes to Wisconsin's Administrative Code, NR 243.

We are pleased with the progress that has been made in improving these rules. The current draft is much closer to meeting the federal Clean Water Act than the version released last year. However, there is still room for improvement. We offer the following comments in the hopes that the final rules will meet the requirements of federal law and put Wisconsin on track to attaining the goal of achieving clean water.

**I. Proposed NR 243 Violates 40 C.F.R. 122.4(a) and 123.25(a) because the Requirements are Weaker than those Required by the Federal Clean Water Act.**

A state, such as Wisconsin, that is authorized to administer the NPDES program must follow guidelines established in 40 C.F.R. 122 and 123. "All State Programs . . . must be administered in conformance with each [of the sections of the Code of Federal Regulations enumerated]." 40 C.F.R. 123.25(a).

The state cannot issue a permit that contains conditions that "do not provide for compliance with the applicable requirements of the CWA, or regulations promulgated under the CWA." 40 C.F.R. 122.4(a).

**A. Proposed Definitions are Incompatible With Federal Definitions.**

1) Table 2 shows the number of animal unit equivalency factors. The numbers used are not as stringent as the federal equivalency factors. When there are federal equivalency factors the state does not have the discretion to ignore them and use less stringent factors. This table should be changed to be as stringent as the federal standards. Of course, the department can provide numbers that are more stringent and we would fully support that decision. Further, when there are not federal equivalency factors available for comparison, the state factor may be more accurate if it were based on the estimated manure production from each type of animal, rather than on the animal's weight.

- For cows, the federal rule states that 700 mature dairy cattle (milked or dry) equals 1000 animal units. See 40 C.F.R. 122, Appendix B. This calculation is made without reference to weight of the animals. The state table allows a much greater concentration of dairy cows before reaching 1000 animal units by allowing 910 heifers weighing between 800 to 1200 lbs. and 1670 heifers weighing between 400 and 800 lbs.
- For cattle, the federal rule states that 1,000 slaughter and feeder cattle are equal to 1000 animal units. See 40 C.F.R. 122, Appendix B. The state table allows a greater concentration of cattle before reaching 1000 animal units. It differentiates by weight and states that 1250 steers or cows weighing between 600 to 1000 lbs. are equal to 1000 animal units. This is weaker than the federal rules.
- For chicken, the federal rule states that 100,000 laying hens or broilers equal 1000 animal units when the facility uses a continuous overflow watering system. That number goes down to 30,000 laying hens or broilers when the facility uses a liquid manure system. See 40 C.F.R. 122, Appendix B. The state table is confusing because it contains these numbers in addition to allowing 100,000 layers to equal 1000 animal units and 200,000 broilers to equal 1000 animal units, regardless of manure systems. The latter references should be deleted for clarity.

- For ducks, the federal rule states that 5,000 ducks are equal to 1000 animal units. See 40 C.F.R. 122, Appendix B. The state table is not stringent enough. It allows 100,000 ducks to equal 1,000 animal units.
  - For swine, the federal rule does not contain a category for swine under 55 lbs. However, there is no reasonable justification for allowing 10,000 pigs under 55 lbs. to equal 1,000 animal units when 2500 pigs over 55 lbs. equal 1000 animal units. The equivalency for smaller pigs must be much smaller.
- 2) Proposed NR 243.03(2) should define animal feeding operation as including a pasture where animals are confined.
  - 3) Proposed NR 243.03(5) should provide a sharper description of “chronic rain event.” As currently defined, a few days of rain could be considered chronic. This impacts the enforcement of the technology-based effluent standard applicable to CAFOs, and creates a much bigger exception to the effluent standard than desirable for attaining the goals of the Clean Water Act.
  - 4) Proposed NR 243.03(10) should delete “which flows from animal feeding operations” from the definition of “contaminated runoff.” This qualifying phrase unnecessarily restricts the definition.

**B. Proposed NR 243 Does not Ensure Compliance with Effluent Limits and Standards of Performance for Factory Farms, in Violation of 40 C.F.R. 412, 122.4 and 122.44.**

- 5) Proposed NR 243.12(2)(a)(3) should delete the word “preliminary” before manure management plan. The manure management plan provides essential information about whether or not the DNR can ensure that the facility meets the federal prohibition on discharges required by 40 C.F.R. 412. In order for the public and the DNR to be fully aware of the environmental impacts from a facility, the plan must be complete and available to the public prior to public notice of a proposed permit decision.
- 6) Proposed NR 243.12(2) should add a sentence that also requires submission of information on the amount of water that will be used for the operation. In order to design a facility in accordance with 40 C.F.R. 412, one needs to know how much water will be used. A portion of this water will eventually need to be contained in the manure storage pits.
- 7) Proposed NR 243.12(2)(4) and (2)(5) should delete “[u]pon approval by the department, plans and specifications for proposed storage or composting facilities may be submitted during the term of the permit.” These plans and specifications are a primary source of information about whether or not the DNR can ensure that the facility meets the federal prohibition on discharges required by 40 C.F.R. 412.

- In order for the public and the DNR to be fully aware of the environmental impacts from a facility, the proposed plans for storage, composting and/or runoff systems must be complete and available to the public prior to public notice of a proposed permit decision.
- 8) Although the proposed NR 243.14(1) now requires landspreading of manure that does not cause or contribute to the non-attainment of surface or ground water standards, proposed NR 243.14(4)(c) only requires a phosphorous-based limitation in 303(d) waterbodies and exceptional resource waters. NR 243.14(4)(c) appears to undercut the more general standard of NR 243.14(1). Further, this does not meet the requirements of 40 C.F.R. 412. The federal regulation does not merely prohibit discharges of nitrogen and allow discharges of phosphorous or only prohibit discharges to exceptional waterbodies. Rather, the regulation prohibits **all** discharges from the facility. Since the facility includes the lands where manure is spread, a phosphorous-based standard must be applied to all fields where CAFOs are spreading manure.
  - 9) The first sentence of proposed NR 243.15(1) should be amended by deleting “unless department approval is received for a later submittal.” As currently written, the proposed NR 243.15(1) violates the regulations implementing the federal Clean Water Act. Approval for a later submission is, in essence, using a compliance schedule to allow the facility greater time to comply with the no discharge standard of performance for CAFOs. Federal law prohibits the use of a compliance schedule for standards of performance. All new CAFO sources must meet the design, installation, and operation standard contained in 40 C.F.R. 412.15 from the facility’s first day of operation under the WPDES permit. See 40 C.F.R. 122.47(a). A permitting agency can only use compliance schedules in NPDES or WPDES permits in very limited situations. “The first NPDES permit issued to a new source or a new discharger **shall** contain a schedule of compliance **only when** necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised **after** commencement of construction but less than three years before commencement of the relevant discharge.” 40 C.F.R. 122.47(a)(2) (emphasis added).
  - 10) Proposed NR 243.15(2) and (3) could be improved by adding specific requirements for monitoring of these systems to ensure that they are in compliance with the effluent limit and water quality standards.
  - 11) Proposed NR 243.15(3)(c) should be amended to add that the structure must meet the criteria of NR 243.13, rather than simply comply with NRCS Standard 313.
  - 12) Proposed NR 243.15(3)(e)(1) and (e)(2) should delete the phrase “other qualified individual” from the list of people allowed to determine the structural integrity of earthen manure pits. This language will unnecessarily burden the DNR with the requirement of determining whether an individual is qualified. The DNR should

simply rely on engineers and soil testing laboratories to conduct these important analyses.

- 13) We object to proposed NR 243.15(4) on the basis that the DNR cannot simultaneously allow permanent spray irrigation systems and ensure that there will be no runoff to waters of the state.

**C. Proposed Subchapter III is Not as Stringent as Federal Law, 40 C.F.R. 122.23(2).**

- 14) Subchapter III – Other Animal Feeding Operations applies a creative and reasonable tiered system for categorizing unacceptable practices.
- 15) However, this section still does not meet the federal requirements of 40 C.F.R. 122.23(2). Federal law allows a facility with less than 1000 AU to be designated as a CAFO and regulated through a permit. 40 C.F.R. 122.23(2)(i)-(ii). Proposed NR 243.24(3) should require the facility with a Category I unacceptable practice to apply for a WPDES permit, and the DNR should begin regulating pollutants from the facility under the permitting system.
- 16) Proposed NR 243.24(4)(d) should be amended to shorten the time period for implementing corrective actions when there is “an imminent threat to public health or fish and aquatic life.” The proposed allowance of two months to correct an imminent threat is out of proportion to any imminent threat. If a threat is imminent, corrective measure should be undertaken immediately.

**II. Conclusion**

In sum, we see that the DNR has made progress towards creating rules for CAFOs that are clear and in conformity with the federal Clean Water Act. We hope that our comments have helped to further refine these rules and point out the remaining areas that keep the state from complying with federal law. We urge the DNR to adopt our proposed amendments to bring state law in alignment with the federal Clean Water Act and its implementing regulations.

Respectfully Submitted,

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Melissa K. Scanlan  
Executive Director, Midwest Environmental Advocates

On behalf of Wisconsin’s Environmental Decade, River Alliance of Wisconsin, Sierra Club-John Muir Chapter, and 1,000 Friends of Wisconsin.