

Midwest Environmental ADVOCATES

pro bono publico

January 16, 2002

Members of the Natural Resources Board

Trygve Solberg
P.O. Box 50
Minocqua, WI 54548

James Tiefenthaler, Jr.
W228 N683 Westmound Drive
Waukesha, WI 53186

Herbert Behnke
N5960 Wolf River Road
Shawano, WI 54166

Gerald O'Brien
Box 228
Stevens Point, WI 54481

Howard Poulson
1212 Deming Way
P.O. Box 5550
Madison, WI 53705

Catherine Stepp
14520 50th Road
Sturtevant, WI 53177

Stephen Willett
P.O. Box 89
Phillips, WI 54555

RE: PROPOSED ORDER TO REPEAL AND RECREATE CH. NR 243
RELATING TO ANIMAL FEEDING OPERATIONS

Dear Members:

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 and has previously submitted comments to the Department of Natural Resources (DNR) on the proposed changes to NR 243 on April 19, 2001. Today we are submitting these comments on behalf of Wisconsin's Environmental Decade, Western Lakes Wildlife Center, River Alliance of Wisconsin, Magnolia Citizens for Factory Farm Controls, Conserve Our Water and Surroundings, and Wisconsin Public Interest Research Group.

Midwest Environmental Advocates, Inc.
Comments on Proposed Changes to NR 243
January 16, 2002

Page 1

We wish to express our qualified support for the Department of Natural Resources' revision of Ch. NR 243. These new rules represent a substantial improvement over the existing requirements in NR 243. However, there remain key areas where these rules fall short of complying with federal law, jeopardizing Wisconsin's continued implementation of the federal Clean Water Act.

We offer the comments below to help ensure that these revised rules comply with federal law.

I. REQUIREMENTS STILL WEAKER THAN THOSE REQUIRED BY FEDERAL LAW

A. Some Definitions Remain Inconsistent with Federal Definitions

1) NR 243.03(2) "Animal Feeding Operation"

This definition should include operations that utilize a common "area," as well as a common system, for the disposal of waste. This would make clear that operations that collect manure from two or more facilities and spread that manure on the same fields would be considered an animal feeding operation. This definition should also make clear that operations that utilize common "equipment" for landspreading should also be considered one animal feeding operation. Our suggested revision will ensure that operations cannot avoid the requirements of NR 243 simply by parsing elements of their operation.

2) NR 243.03(5) "Chronic Rainfall Event"

As noted in our April 19, 2001 comments, proposed NR243.03(5) should provide a more specific definition of "chronic rainfall event." As currently defined, a few days of rain could be considered chronic. "Chronic rainfall event" should be defined as a given amount of rain over a given period of time.

3) NR 243.03(10) "Contaminated Runoff"

To the extent that animal feeding operation is not defined to include the fields where manure is applied, the definition of "contaminated runoff" should make clear that contaminated runoff also flows from fields where manure is applied and not only the lot or facility. As noted in our April 19, 2001 comments, the current definition is unnecessarily restrictive.

4) NR 243.03(26) "Permanent runoff control systems"

This definition should strike the word “retard.” The purpose of a runoff control system is to prevent discharges to waters of the state. Whether the discharge happens quickly or slowly is irrelevant.

5) NR 243.03(33) “Unacceptable practice”

This definition should include those practices that create a substantial risk of discharge of pollutants to waters of the state. A practice becomes unacceptable when the risk of discharge is created, as well as when the discharge occurs. Our suggested definition would allow the DNR to more proactively prevent these discharges.

B. Effluent Limits and Standards Remain Inconsistent with Federal Definitions

1) Proposed NR 243.12(2), Water Usage

As noted in our April 19, 2001 comments, 40 CFR 412 requires that the state require information about the amount of groundwater that will be used. A portion of that water will eventually be commingled with wastes and placed in the manure storage pit, which is subject to the no-discharge effluent limitation.

2) Phosphorus-based application on exceptional or impaired waters

We reiterate that in order to comply with the Clean Water Act’s zero discharge prohibition and implementing regulations in 40 CFR 412, the DNR must require phosphorus-based application rates on all lands, not merely exceptional or impaired waters designated under state law. Application of manure at nitrogen-based rates will likely result in a discharge of phosphorus to waters of the state in violation of state and federal law. As a result, manure should be applied at phosphorus-based levels to prevent that discharge and ensure compliance with the Clean Water Act.

Likewise, limiting phosphorus application rates to exceptional or impaired waters is inconsistent with NR 104.01, Wisconsin’s antidegradation policy. Under that rule, surface waters that because of natural conditions cannot support a full array of aquatic life “shall not be degraded below present levels, but shall be upgraded as necessary to support assigned uses.” NR 104.01. *See also* 40 CFR 131.12. This means that simply because a waterbody is not exceptional or pristine does not mean that it is entitled to less regulatory protection. Even small additions of phosphorus can impair an otherwise healthy water body. The DNR should require phosphorous application rates

on all cropland to prevent discharges of phosphorus, associated water quality impairment, and consequent violation of the state's antidegradation policy.

3) Submissions subsequent to permit issuance

We oppose any provision in the revised rule that allows an animal feeding operation to submit plans and specifications for manure storage, runoff control or any other designed structure or system subsequent to issuance of a WPDES permit.

As such, proposed NR 243.12(2)(a)4 and 5 should delete "upon approval by the department, plans and specifications for proposed storage or composting facilities may be submitted during the term of the permit." The DNR cannot ensure that the federal prohibition on discharges will be met, as it is required to do under 40 CFR 412, unless this information is provided prior to issuance of the permit.

Similarly, NR 243.15(1) should delete "unless written department approval is received for a later submittal." We reiterate that approval of a later submission constitutes the use of a compliance schedule in violation of 40 CFR 122.47(a). Under that federal regulation, compliance schedules are available in only very limited circumstances. The currently proposed language in NR 243.15 is inconsistent with those circumstances.

C. Other animal feeding operations

1) Proposed NR 243.24(1)(a)2, Designation as a CAFO

Proposed NR 243.24(1)(a)2 should delete "or chronic rainfall event." The federal rules do not make this allowance in determining whether an operation should be designated as a point source. 40 CFR. Appendix B to Part 122.

Proposed NR 243.05(1)(a)2 should also delete "and the discharges are from a facility, structure or area which is properly designed and maintained to contain manure and other wastes from the operation and the rain from a 25-year, 24-hour rainfall event." This provision is unclear. It states that an animal feeding operation is not a point source if it discharges as the result of a 25-year 24-hour storm event from a structure designed to handle the runoff from such a storm event. If the structure or facility is designed to handle this runoff, then there should be no discharge except in a chronic rainfall event. If there is a discharge in the absence of a chronic rainfall event, then the facility is a point source and a WPDES permit should be issued.

2) Proposed NR 243.24(3)(b), Issuance of Notice of Discharge for Point Sources Discharges

Appendix B to 40 CFR Part 122 states that an animal feeding operation is a concentration animal feeding operation if it has 300 animal units or more and there has been a discharge of pollutants to waters of the United States. Concentrated animal feeding operations are point sources subject to the Clean Water Act's prohibition on discharges without a permit.

NR 243.24(3)(b) allows the DNR to issue a Notice of Discharge (NOD), rather than exclusively require a WPDES permit, to an animal feeding operation that has caused a discharge from a point source to waters of the state. In other words, the DNR is exempting a class of point source discharges from having to obtain a permit. This provision is inconsistent with federal regulations and should be removed.

II. CONCLUSION

Thank you again for the opportunity to submit comments on the Proposed Revisions to Ch. NR 243 Relating to Animal Feeding Operations. We commend the DNR for the progress it has made in developing a regulatory structure governing water pollution from animal feeding operations consistent with federal law. We hope you will consider our comments carefully in reviewing this version of Ch. NR 243.

Respectfully submitted,

Andrew C. Hanson, Attorney
Midwest Environmental Advocates, Inc.