Appendix 1

IOWA CITIZENS FOR COMMUNITY IMPROVEMENT, IOWA CHAPTER OF THE SIERRA CLUB, ENVIRONMENTAL INTEGRITY PROJECT

September 20, 2007

Via overnight mail

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PETITION FOR WITHDRAWAL OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM DELEGATION FROM THE STATE OF IOWA

Iowa Citizens for Community Improvement ("Iowa CCI")[1], the Sierra Club,[2] and the Environmental Integrity Project ("EIP")[3] petition the U.S. Environmental Protection Agency ("EPA") to initiate formal proceedings to withdraw the Iowa Department of Natural Resources' ("IDNR") authority to issue National Pollutant Discharge Elimination System ("NPDES") permits because of the State of Iowa's continuing violations of the Clean Water Act and its implementing regulations. These citizen groups request that EPA formally respond to this petition in writing by notifying the State of Iowa that it is not administering the permit program

[1] Iowa CCI is a 31 year old membership-based community organization that works in both urban and rural areas on issues that people are concerned about. CCI encourages citizen participation and holds public and private institutions accountable to grassroots people. CCI has over 3,500 members statewide. The majority of CCI members are family farmers, independent livestock producers, and rural residents. Many of the members live near CAFOs and have been impacted by the problems they create.

[2] The Sierra Club is a national nonprofit organization of approximately 780,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club's concerns encompass the protection of the environment from pollution caused by animal feeding operations. The Sierra Club has approximately 6,000 members in the state of Iowa.

[3] EIP is a nonprofit, tax-exempt organization created to safeguard federal environmental laws by improving the quality of federal and state enforcement and permitting, and by protecting those programs from political interference. EIP assists community groups in Iowa that have long been active in efforts to reduce pollution from animal feeding operations and to promote sustainable agriculture.

for Concentrated Animal Feeding Operation ("CAFO") discharges into the waters of Iowa in accordance with the Clean Water Act, and to conduct a public hearing regarding these violations as required by 33 U.S.C. § 1342(c)(3). Because Iowa fails to demonstrate sufficient authority and willingness to carry out the NPDES program, the citizen groups further petition EPA to withdraw its approval of Iowa's NPDES delegation and to assume administration and enforcement of the program.

BACKGROUND

Since IDNR received authority to implement and enforce the Clean Water Act in 1978,[4] its program has failed to keep pace with dramatic changes in Iowa's livestock industry. Iowa has become the nation's number one producer of both hogs and eggs, and is home to more than 2,100 large CAFOs.[5] Iowa livestock produce more than 50 million tons of waste each year,[6] and since receiving Clean Water Act authority, IDNR has allowed CAFOs to illegally discharge millions of gallons of manure into hundreds of rivers and streams, killing millions of fish and contributing to widespread water quality impairments.[7] IDNR is aware of its failure to regulate CAFOs under the Clean Water Act, and even acknowledged that "the most obvious threat to maintaining good chemical water quality in Iowa surface waters is the recent expansion of the confined animal feeding industry."[8]

Despite repeated attempts by EPA and citizen groups to spur IDNR to action, IDNR has resisted making any meaningful progress to bring CAFOs into compliance with the Clean Water Act. After years of notice from citizens and EPA, IDNR has issued no NPDES permits to confinement dischargers, and has issued permits to only a fraction of open feedlot dischargers.

A 2003 GAO report addressed nationwide problems implementing the Clean Water Act for CAFOs, highlighting deficiencies in Iowa's program, and calling on EPA for strong leadership: "For its part, EPA will need to increase its oversight of state programs to ensure that the new requirements are adopted and implemented. Neither the states nor EPA have determined how they will meet these challenges."[9] Unless EPA acts to withdraw Iowa's program, IDNR will continue delaying Clean Water Act implementation for the hundreds of CAFO polluters in the

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[4] EPA, *National Pollutant Discharge Elimination System Memorandum of Agreement between Regional Administrator and the Executive Director* (Aug. 10, 1978) (attachment A).

[5] Environmental Integrity Project, *Threatening Iowa's Future* (2004) at 15, 17 *available at* http://environmentalintegrity.org/pub194.cfm. IDNR has documented more than 1,800 large confinement CAFOs, and USDA estimates Iowa has more than 300 large open feedlot CAFOs. *Id.*

[6] Iowa Manure Management Action Group, *Most Frequently Asked Questions about Manure and Manure Management in Iowa available at* http://www.agronext.iastate.edu/immag/faqdetails.html#q1.

[7] *See infra* pp. 16-19

[8] IDNR, *Water Quality in Iowa During 1998 and 1999* at 1-7 (2001) *available at* http://wqm.igsb.uiowa.edu/wqa/305b/2000/2000_305b.html.

[9] U.S. Government Accountability Office, *Increased EPA Oversight Will Improve Environmental Program for Concentrated Animal Feeding Operations*, GAO-03-285 (January 2003) at 2 *available at* http://www.gao.gov/new.items/d03285.pdf.

state as evidenced by IDNR's announced intention[10] to forestall permitting until EPA promulgates new rules in accordance with *Waterkeeper v. EPA.*[11]

Because hundreds of Iowa CAFOs continue to discharge illegally into waters of the United States, and the damage to these waters will only worsen with continued delay, we request EPA begin withdrawal of Iowa's delegation immediately. As outlined below, IDNR's failures warrant withdrawal pursuant to the criteria set forth in 40 C.F.R. § 123.63.

PETITIONERS' ARGUMENT

I. IOWA'S LEGAL AUTHORITY FAILS TO MEET THE FEDERAL NPDES REQUIREMENTS.

Iowa's legal authority fails to meet federal NPDES requirements[12] because the Iowa legislature has unlawfully limited IDNR's authority to implement the Clean Water Act for open feedlots and because Iowa's regulations fail to satisfy federal conflict of interest provisions.

A. The State Legislature Limited Iowa's Authority to Implement and Enforce the Clean Water Act by Passing House File 805.

House File ("HF") 805, which was signed into law on May 23, 2005, contains regulations for open feedlot runoff that are less stringent than the federal requirements. As EPA has noted this legislation is less stringent than federal law,[13] and makes it impossible for IDNR to comply with the Clean Water Act when regulating open feedlots. HF 805's most blatant areas of non-compliance with the Clean Water Act include: (1) the authorization of illegal discharges, (2) inconsistent definitions, (3) less stringent requirements for Nutrient Management Plans ("NMPs"), (4) less stringent record-keeping requirements, (5) improper method to calculate animal unit capacity, (6) failure to establish setbacks from waterways, and (7) limitations on IDNR's enforcement authority.

1. Authorization of Illegal Discharges

HF 805 authorizes discharges from open feedlots that are prohibited by the Clean Water Act by: (1) allowing discharge of effluent with solids settled out; and (2) allowing discharge due to precipitation without required inspection and recordkeeping provisions.

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[10] IDNR statements at February 13, 2007 meeting with Iowa CCI; Letter from IDNR to David Peterson re: pending NPDES permit (March 6, 2007) (attachment B).
[11] 399 F.3d 486 (2005).
[12] 40 C.F.R. § 123.63(1).
[13] In a series of letters, EPA identified numerous provisions of HF 805 that are less stringent than federal law. *See* Letter from Leo Alderman to Wayne Gieselman (March 7, 2005) (attachment C); Letter from Leo Alderman to Jeffrey Vonk (April 7, 2005) (attachment D); Letter from David Cozad to Wayne Gieselman (April 25, 2005) (attachment E).

First, no open feedlot that meets the federal definition of a CAFO may legally discharge pollutants without authorization from an NPDES permit.[14] Federal regulations establish that CAFO permits must authorize zero discharge from the production area.[15] Specifically, a production area must be designed to retain all manure, litter and process wastewater.[16] On the other hand, HF 805 requires only that "[a]ll settleable solids from open feedlot effluent shall be removed prior to discharge into waters of the state."[17] This creates a blanket authorization for Iowa's open feedlots to discharge settled manure effluent into waters of the United States.

Moreover, the Clean Water Act and federal regulations require any facility that is defined as a CAFO to obtain a permit to discharge pollutants into waters of the United States.[18] HF 805, however, only requires large CAFOs to obtain a permit before discharging settled effluent.[19] By omission, this allows discharges of settled effluent pollutants from un-permitted facilities that meet the federal definition of CAFOs; namely, this excludes small and medium CAFOs.

This failure to be as stringent as federal law has serious consequences. Specifically, EPA highlighted this shortcoming in its correspondence with IDNR, pointing out that effluent with the solids settled out "is a major source of ammonia, fecal coliform, and other feedlot related contamination."[20] Thus HF 805 allows discharges that are not only illegal, but that will increase levels of harmful nutrients and dangerous pathogens in Iowa's rivers and streams.

Second, federal regulations allow production area discharges due to precipitation from permitted existing CAFOs and new source cattle CAFOs if they are designed to retain all runoff from a 25-year, 24-hour storm event.[21] However, facilities that discharge pursuant to these provisions must meet additional production area inspection and record keeping requirements for their discharges to be exempt.[22] HF 805 also exempts discharges due to precipitation if a permitted open feedlot meets the applicable federal design standard, but fails to require these facilities to meet the additional federal requirements for production area inspection and record keeping before allowing discharges of pollutants.[23] Thus, Iowa allows CAFOs to discharge under circumstances less stringent than federal law.

2. *Definitions Inconsistent with Federal Law*

Iowa's definition of "effluent" conflicts with federal effluent limitations and its definition of "AFO" is inconsistent with the federal definition. With respect to "effluent," federal regulations set the effluent limitations applicable to permitted CAFOs. Under those regulations,

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[14] 33 U.S.C. §§ 1311(a), 1342 (a)(1). The Clean Water Act excludes agricultural stormwater discharges from the definition of point source. 33 U.S.C. § 1362(14). Thus, when Petitioners refer to CAFO discharges, they are referring to discharges other than those of agricultural stormwater.
[15] 40 C.F.R. §§ 412.31(a), 412.43(a).
[16] 40 C.F.R. §§ 412.31(a), 412.43(a).
[17] Iowa Code § 459A.401(1).
[18] 33 U.S.C. § 1311(a); 40 C.F.R. § 122.23(a).
[19] Iowa Code § 459A.401(3).
[20] Letter from Leo Alderman to Jeffrey Vonk (April 7, 2005) (Attachment D).
[21] 40 C.F.R. §§ 412.31(a)(1)(i), 412.43(a)(1).
[22] 40 C.F.R. §§ 412.37(a), (b).
[23] Iowa Code § 459A.401(2).

"there must be *no discharge of manure, litter, or process wastewater pollutants* into waters of the U.S. from the production area."[24] Iowa, however, only requires open feedlot CAFOs to manage "open feedlot effluent," which HF 805 defines as "a combination of manure, precipitation-induced runoff, or other runoff from an open feedlot before its settleable solids have been removed."[25] Thus, Iowa's definition of effluent is contrary to federal law, because it authorizes open feedlot discharges of litter, process wastewater, and even manure effluent with the solids settled out.

With respect to the definition of "AFO," federal regulations define an "AFO" as a facility where "Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility."[26] Iowa defines animal feeding operation similarly, as "a lot, yard, corral, building, or other area in which animals are confined and fed and maintained for forty-five days or more in any twelve-month period, and all structures used for the storage of manure from animals in the operation," but adds the caveat that "[a]n animal feeding operation does not include a livestock market."[27] However, the Iowa Code and regulations contain no restrictions that ensure that livestock markets do not meet the definition of AFO. To be consistent with federal law, Iowa must remove its exemption for livestock markets from its definition of animal feeding operation. If the exemption remains, Iowa may regulate a smaller universe of facilities than federal law requires.

3. *NMP Requirements Less Stringent than Federal Law*

The NMP requirements established for open feedlots in HF 805 fall short of federal NMP requirements because Iowa allows illegal land application area discharges, fails to require site specific conservation practices, allows Alternative Technology systems without the requisite technical analysis, and adopts a phosphorus index that does not ensure phosphorus will be applied at agronomic rates.

First, EPA requires CAFO NMPs to follow best management practices to prevent runoff of "manure, litter, and other process wastewater" applied to land.[28] As explained,[29] Iowa requires open feedlot NMPs to manage only "open feedlot effluent," which does not include litter, process wastewater, or liquid manure with the solids settled out. Therefore, Iowa's NMPs for open feedlots are less stringent than federal law requires.

Second, the federal NMP regulations require CAFOs to "identify appropriate site specific conservation practices to be implemented... to control runoff of pollutants to waters of the United States."[30] Iowa has no analogous requirement for NMPs and thus could impose less stringent requirements on open feedlots than required by federal regulations.

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[24] 40 C.F.R. §§ 412.31(a), 412.43(a) (emphasis added)
[25] Iowa Code § 459A.102(12).
[26] 40 C.F.R. § 122.23(b)(1), (2).
[27] Iowa Code § 459.102.
[28] 40 C.F.R. § 412.4(c)(2).
[29] *See supra* p. 4.
[30] 40 C.F.R. § 122.42(e)(1)(vi).

Third, federal law allows NPDES permit effluent limitations to be based on an Alternative Technology ("AT") system, but the CAFO operator seeking permit coverage for such a system must submit a supporting technical analysis. This analysis must include all daily inputs and outputs, as well as pollutant data including biological oxygen demand and total suspended solids.[31] In allowing AT systems for Iowa's open feedlots, HF 805 requires that the system "must provide an equivalent level of open feedlot effluent control as would be achieved by using a settled open feedlot effluent basin."[32] However, "the nutrient management plan is not required to provide for settled effluent that enters the alternative technology system."[33] By failing to require both the technical analysis and that the NMP account for settled effluent entering the AT system, HF 805 assumes rather than demonstrates that untested AT systems will retain all pollutants, and thus is less stringent than federal law.

Additionally, Iowa's AT design requirements only require "[c]ontrols on the solids settling facility or the AT system shall prevent release of collected open feedlot effluent to waters of the United States during the period from November 1 to March 30."[34] These AT provisions are less stringent than federal law because Iowa does not require open feedlots to ensure that settled effluent entering an AT system is not discharged into a water of the United States, and because Iowa authorizes illegal discharges of effluent to waters of the United States between March 31 and October 31.

Fourth, Iowa's phosphorus index requirements do not ensure compliance with federal law. Federal law requires CAFOs to determine manure application rates which will "minimize phosphorus and nitrogen transport from the field to surface waters in compliance with the technical standards for nutrient management established by the Director [of the delegated state agency]."[35] These standards must "[i]nclude a field-specific assessment of the potential for nitrogen and phosphorus transport from field to surface waters, and address the form, source, amount, timing, and method of application of nutrients on each field to achieve realistic production goals."[36]

While the Iowa NRCS phosphorus index, adopted for confinement and open feedlot CAFOs in Iowa Admin. Code 567-65.17(1)(d), does require field-specific calculations of phosphorus transport, certain provisions of Iowa's phosphorus index are less stringent than federal law. Iowa Admin. Code 567-65.17(6)(b) provides there is no penalty for "exceeding the nitrogen or phosphorus application rate for an unplanned crop." This is less stringent than federal law both because it does not ensure phosphorus transport will be minimized, and because it codifies a lack of consequences for non-compliance, thereby limiting IDNR's enforcement authority. Finally, Iowa Admin. Code 567-65.17(17)(f)(4) requires that for high phosphorus index site vulnerability, an operator must adopt practices "which reduce the phosphorus index to at least the Medium risk category" before applying manure. However, it does not specify what

[31] 40 C.F.R. § 412.31 (a)(2)(i)(A)-(E).
[32] Iowa Code § 459A.303(1).
[33] Iowa Code § 459A.208(8).
[34] Iowa Admin. Code 567-65.110(1)(a).
[35] 40 C.F.R. § 412.4(c)(2).
[36] 40 C.F.R. § 412.4(c)(2)(i).

those practices are or how the operator must demonstrate they have reduced the site's risk index. This is less stringent than federal law because Iowa CAFO operators are not required to demonstrate that their practices minimize phosphorus transport to surface waters.

4. *Recordkeeping Requirements are Less Stringent than Federal Law*

Federal law requires "[a] copy of the CAFO's site-specific nutrient management plan must be maintained on site and made available to the Director upon request."[37] Additionally, NMP compliance records and manure and soil test methods and results must be maintained on site and made available to the Director for at least 5 years.[38] HF 805 is not as stringent because it requires open feedlot CAFOs to "maintain a current nutrient management plan and maintain records sufficient to demonstrate compliance with the nutrient management plan," but fails to require that either the NMP or the records documenting compliance be kept on site, made available to IDNR, or available to the public.[39]

Moreover, although federal regulations do not currently require compliance documents be made available to the public, the Second Circuit strongly implied in its *Waterkeeper* decision that EPA's new rules will have to require that these documents be made available to the public, so as to comply with the Clean Water Act. To do otherwise, could "deprive the public of its right to assist in the...enforcement of... [an] *effluent limitation*."[40] Because Iowa does not require compliance documents be made available to the public, open feedlot records requirements do not comply with the Clean Water Act.

5. *Improper Method to Calculate Animal Unit Capacity*

When determining whether an animal feeding operation meets the federal definition of a CAFO, federal regulations make no distinction between animals housed in open feedlots and those housed in confinement buildings. EPA has clarified its method of determining the size of a CAFO: "EPA no longer uses the term "animal unit," but instead refers to the actual number of animals at the operation to define a CAFO."[41] Iowa adopted a method to calculate open feedlot animal capacity that is both illogical and, as pointed out by EPA,[42] contrary to the federal method: "[i]n calculating the animal unit capacity of an open feedlot operation, the animal unit capacity shall not include the animal unit capacity of any confinement feeding operation building as defined in section 459.102, which is part of the open feedlot operation."[43] This method results in feedlots EPA defines as medium or large CAFOs escaping the NPDES permit requirement, which is in clear conflict with the Clean Water Act and implementing regulations.

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[37] 40 C.F.R. §122.42(e)(2)(ii).
[38] 40 C.F.R. § 122.42(e)(2)(i).
[39] Iowa Code § 459A.208(9).
[40] *Waterkeeper* at 503 (quoting 33 U.S.C. § 1251(e)) (emphasis added).
[41] EPA, *Animal Feeding Operations Overview*, available at http://cfpub.epa.gov/npdes/home.cfm?program_id=7.
[42] Letter from David Cozad to Wayne Gieselman (April 25, 2005) (Attachment E).
[43] Iowa Code § 459A.103(3).

6. *Failure to Establish Setbacks from Waters of the United States*

Federal law prohibits any CAFO from applying manure, litter, or process wastewater within 100 feet of "any down-gradient surface waters, open tile line intake structures, sinkholes, agricultural well heads, or other conduits to surface waters,"[44] unless the CAFO either uses a 35-foot vegetated buffer or demonstrates equivalent or greater protection through alternative conservation practices.[45] Iowa, however, allows open feedlot – and confinement – CAFOs to apply manure with zero separation distance from waters of the United States if the manure is incorporated within 24 hours.[46] Despite this historical weakness in Iowa's regulations, HF 805 failed to correct this defect. Because this rule fails to demonstrate that incorporation is as protective to water resources as maintaining a 100-foot separation or a 35-foot vegetated buffer, it is less stringent than federal law.

7. *Limitation on Enforcement Authority*

To ensure that authorized states can adequately implement and enforce the Clean Water Act, the statute requires delegated state agencies to have criminal enforcement authority for NPDES permit violations, as well as the authority to enact civil penalties.[47] Additionally, in determining whether to delegate authority, "[t]he administrator shall approve each submitted program unless he determines that adequate authority does not exist... [t]o abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement."[48] Thus a state must be able to impose criminal penalties to have delegated NPDES authority.

IDNR's authority to impose criminal penalties against open feedlots, however, is ambiguous at best. Under Iowa Code § 459A.502, open feedlot violations "shall be subject to a *civil* penalty... as provided in Iowa Code § 455B.191." (emphasis added). While 455B.191(2) authorizes criminal sanctions for negligent or knowing violations, 459A.502 only mentions civil penalties. While HF 805 amended Iowa Code § 455B.112 to allow the Attorney General to "institute civil or criminal proceedings" to enforce Iowa Code chapters 459 or 459A, it is not clear how that provision interacts with 459A.502's failure to mention criminal penalties. If 459A.502 is interpreted to prevent criminal penalties, then Iowa's program is legally insufficient.

B. Iowa Fails to Comply with Federal Conflict of Interest Requirements.

Federal law provides conflict of interest provisions for board and body members responsible for approving permits. Specifically, these positions may not be filled by "any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit."[49] This requirement applies to Iowa's Environmental Protection Commission ("EPC") members because the EPC is a "Board

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[44] 40 C.F.R. § 412.4(c)(5).
[45] 40 C.F.R. §§ 412.4(c)(5)(i)-(ii).
[46] Iowa Code § 459.205(4)(a).
[47] 33 U.S.C. § 1319(b), (c).
[48] 33 U.S.C. § 1342(b)(7).
[49] 40 C.F.R. § 123.25(c).

or body . . . who has or shares authority to approve all or portions of permits either in the first instance, as modified or reissued, or on appeal." [50]

At first blush, Iowa's EPC rules appear to comply with federal law as they provide that a commissioner may not "sell... any goods or services to individuals, associations, or corporations subject to the regulatory authority of the department."[51] However, Iowa law permits commissioners to apply for consent for a sale to regulated parties. Iowa law then grants automatic consent for otherwise prohibited sales in certain sectors, including the "sale of farm products at market prices to a buyer ordinarily engaged in the business of purchasing farm products."[52] This authorizes appointment of EPC members who profit from sales of farm products to CAFO operators, despite the clear conflict of interest. Furthermore, the chance of such a conflict is heightened by the requirement that three of the nine EPC members be "actively engaged in livestock and grain farming."[53] As a result, Iowa's statutory conflict of interest provisions fall short of federal requirements.

II. IOWA'S OPERATION OF ITS STATE PROGRAM FAILS TO COMPLY WITH NPDES REGULATIONS.

In addition to defects in its statutes and regulations, Iowa's operation of its NPDES program fails to comply with the Clean Water Act. Thus, this petition satisfies the second criteria for EPA to withdraw delegation.[54] Specifically, IDNR has failed to issue permits to the majority of CAFOs that require them and has repeatedly issued NPDES permits to CAFOs that do not conform to federal requirements, including the public participation requirements.

A. Iowa Fails to Exercise Control Over Activities Required to be Regulated Under the NPDES Program, Including Failure to Issue Permits.

The Clean Water Act's permit requirements apply to CAFOs that have discharged into water of the United States. Although *Waterkeeper* invalidated the requirement in EPA's 2003 rules that a CAFO with the "potential to discharge" seek permit coverage, neither that case nor any EPA regulations has ever cast doubt on the requirement that CAFOs with actual discharges seek a NPDES permit. IDNR, however, has consistently failed to issue permits to CAFOs that actually discharge. Furthermore, EPA's proposed revised CAFO rule will require CAFOs to seek NPDES permit coverage if they propose to discharge.[55] This rule clarifies the meaning of "propose to discharge" by listing circumstances in which a CAFO is likely to discharge, and therefore should seek coverage.[56] These circumstances include when CAFO production areas are not designed or operated for zero discharge, and when CAFOs have discharged in the past and

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[50] 40 C.F.R. § 123.25(c)(1)(i).
[51] Iowa Admin. Code 567-1.11(1).
[52] Iowa Admin. Code 567-1.11(6)(b)(2).
[53] Iowa Code § 455A.6(1)(a).
[54] 40 C.F.R. § 123.63(2).
[55] EPA, Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to Waterkeeper Decision, 71 Fed. Reg. 37,749, 37,784 (proposed June 30, 2006) (to be codified at 40 C.F.R. pts. 122 and 412).
[56] *Id.*

have failed to correct the factors that caused the discharge to occur.[57] IDNR has also failed to permit CAFOs which propose to discharge.

1. Iowa Has Failed to Issue Permits to all CAFOs that Have Discharged.

The Clean Water Act requires all point source dischargers to obtain and comply with an NPDES permit.[58] Despite this clear mandate, however, Iowa has failed to issue permits to hundreds of confinement and open feedlot CAFOs that have discharged into waters of the United States but have failed to correct the factors that caused the discharge to occur.

Between 1992 and 2006, Iowa AFOs were responsible for 589 documented manure spills, approximately half of which reached waters of the state, and more than 100 of which caused fish kills in Iowa surface waters.[59] These spills killed more than 2.9 million fish.[60]

When these facilities discharged they were required to apply for NPDES permits as a matter of law. But despite hundreds of illegal discharges from Iowa CAFOs, IDNR has only issued NPDES permits to a fraction of open feedlots, and has *never* issued an NPDES permit to a confinement feeding operation.

a. Open Feedlots

To address open feedlot pollution, IDNR created the Iowa Plan for Open Feedlots in 2001. Under this voluntary plan, feedlots registered for NPDES permit coverage, and, in return, received amnesty for Clean Water Act violations that occur while the facility is making progress towards compliance. EPA Region VII supported the plan, conditional on IDNR having permitted all participating feedlots by the end of its five year timeframe; the program ended in 2006. EPA made clear to IDNR that "at the end of the five year timeframe for the Open Feedlot program, EPA expects all open feedlots that registered…to be in full compliance with the Clean Water Act. …EPA considers the five year compliance deadline to be a firm one."[61]

By establishing the Open Feedlot Plan, IDNR acknowledged its obligation to permit open feedlot CAFOs. The agency has also been aware for several years of EPA's stated position and the possible consequences of continued noncompliance. In 2001, in an explanation of the open feedlot plan, IDNR Environmental Services Division Director Wayne Gieselman stated:

> Our lax enforcement and administration of the operation permit program for large open feedlots are inconsistent with our duties under the Clean Water Act and state law. Driven by lawsuits and three large manure spills, including one that occurred in Iowa, the federal EPA has begun an enforcement effort to bring open feedlots into compliance with the Clean Water Act. EPA has also reviewed our

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[57] *Id.*
[58] 33 U.S.C. § 1342(a).
[59] Iowa Manure Spill Database (Attachment F).
[60] *Id.*
[61] Letter from Leo Alderman, Director, EPA Region VII Water, Wetlands and Pesticides Division, to Carol Balvanz, Iowa Cattlemen's Association (July 21, 2004) (attachment G).

administration of federal requirements the implementation of which has been delegated to us, and has been critical of our lax enforcement. We face the prospect of losing grant funding or even authority to administer the federal operation permit program.[62]

Although IDNR has begun issuing NPDES permits to open feedlots pursuant to this plan, the majority of those requiring permits still do not have them, many of those with permits still have not submitted NMPs, and many facilities requiring permits failed to register. Alarmingly, though 1,576 producers registered for IDNR's open feedlot plan[63] by indicating on the application form that they may meet the criteria for an NPDES permit, IDNR has issued only 112 permits.[64] Furthermore, as of August 28, 2007, IDNR still has not received at least 70 of these permits' NMPs.[65] Finally, though more than 1,000 medium and large CAFOs registered for the Iowa Plan,[66] many feedlots requiring NPDES permits failed to register. USDA estimated in 2001 that Iowa has more than 300 large open feedlots,[67] yet fewer than 200 registered for the Iowa Plan.[68] Thus even if IDNR had successfully implemented the Iowa Plan by permitting all registered feedlots by 2006, more than 100 of Iowa's largest open feedlot CAFOs would continue to escape regulation.

Because Iowa has not satisfied the express condition EPA put on approval of the plan, EPA cannot allow the lax enforcement and implementation to continue. Despite the increased oversight EPA provided to ensure the success of the Iowa Plan, IDNR has refused to bring open feedlots into Clean Water Act compliance. EPA must act to withdraw IDNR's authority; alternative courses of action have proven ineffective.

b. Confinements

Efforts to persuade IDNR to permit confinement dischargers have been even more unsuccessful. Beginning in 2005, citizen groups lobbied IDNR to issue a permit to the David Peterson confinement in Winnebago County. Peterson's 3,300 head hog confinement facility discharged an estimated 120,000 gallons of manure into Beaver Creek on October 19, 2004,[69] making it a clear candidate for an NPDES permit. IDNR eventually proposed a draft permit and released it for public comment, but has still failed to issue the permit. IDNR's resistance to issuing NPDES permits following even the most egregious confinement discharges demonstrates the agency's unwillingness and inability to adequately implement their program. Moreover, IDNR's proposed permit had serious deficiencies, including failure to consider water quality

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[62] Wayne Gieselman, IDNR, *Policy/Procedure Statement: Concentrated Animal Feeding Operation Registration Program* (March 22, 2001), available at http://www.iowadnr.com/afo/files/0601expl.pdf.
[63] *Threatening Iowa's Future* at 16.
[64] IDNR Agricultural NPDES permits, available at http://programs.iowadnr.gov/wwpie/default.aspx#results.
[65] IDNR field offices communication, from Jeff Prier, IDNR, August 28, 2007 (attachment H).
[66] IDNR AFO Statistics, available at http://www.iowadnr.com/afo/stats.html.
[67] *Threatening Iowa's Future* at 15.
[68] IDNR AFO Statistics available at http://www.iowadnr.com/afo/stats.html.
[69] Randall Clark, IDNR Litigation Report (October 24, 2005) (attachment I).

based effluent limitations in case of dry weather land discharges that may violate Water Quality Standards.[70]

The agency asserts that the state regulatory system for confinement feeding operations is equivalent to, and in some cases, more stringent than, the federal CAFO program; accordingly, Iowa has never required confinement operations to obtain NPDES permits. However, although Iowa law ostensibly prohibits discharges from confinement feeding operations, this prohibition has failed to prevent hundreds of discharges. Once a facility has discharged, it must obtain a NPDES permit.[71]

In addition to the zero discharge standard, IDNR also asserts that its program is as stringent as the federal program because large confinement operations (and medium operations seeking to use an unformed manure storage structure) must obtain a construction permit, and because confinements housing more than 500 animal units must submit a Manure Management Plan ("MMP").[72] However, as discussed below confinement construction permits are not equivalent to NPDES permits, and MMPs are not equivalent to NMPs.

i. IDNR Construction Permits are not Equivalent to NPDES Permits

Iowa requires all confinement feeding operations housing more than 1,000 animal units obtain a construction permit.[73] However, federal law requires confinements that discharge to obtain NPDES permits and does not make exceptions for facilities with state construction permits. Moreover, IDNR's construction permits are not functionally equivalent to NPDES permits, but rather fall short of NPDES requirements by covering a smaller number of facilities, lacking regular review and update provisions, and restricting public participation.

First, federal law requires all CAFOs that discharge into waters of the United States to obtain NPDES permits. There is no federal provision to grandfather in facilities constructed prior to the creation of the NPDES program. However, Iowa has more than 1,800 documented confinements larger than 1,000 animal units,[74] but only 623 were required to obtain construction permits when they were built.[75] The CAFOs that do not have construction permits may still need NPDES permits. Clearly, the state construction permits do not cover the universe of CAFOs needing NPDES permits.

Second, NPDES permits must contain fixed terms and be subject to regular review and update. Permitting authorities may not issue NPDES permits with terms exceeding five years[76] and before their permit term expires, operators must apply for a new permit to continue

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[70] *See Waterkeeper* at 521-525; *see also* EIP, Iowa CCI, Sierra Club comments Re. Draft NPDES Permit for the Dave Peterson Swine Confinement (Dec. 29, 2006) (attachment J).
[71] 33 U.S.C. § 1311(a).
[72] Letter with attached comments from Jeffrey Vonk, Director of IDNR, to EPA Office of Water, regarding the CAFO Proposed Rule. (July 30, 2001) (attachment K).
[73] Iowa Code § 459.303.
[74] *Threatening Iowa's Future* at 16.
[75] *Id.* at 17.
[76] 33 U.S.C. § 1342(b)(1)(B).

operating.[77] Moreover, federal law does not guarantee an NPDES permit will be reissued; EPA or the state permitting agency may terminate an NPDES permit if the operator fails to comply with its terms.[78] In contrast, IDNR construction permits last indefinitely. Additionally, IDNR cannot revoke a construction permit unless it determines the operation "constitutes a clear, present and impending danger to public health or the environment."[79]

Third, the Clean Water Act requires public notice of every NPDES permit application, as well as opportunity to comment and request a public hearing before the permitting agency makes a final decision.[80] Although Iowa law requires public notice of construction permit applications in the county of the proposed construction, the county is not required to submit public comments received to IDNR.[81] In addition, citizens cannot request a public hearing, and as a result may be completely cut out of the permitting process.[82] For these reasons, IDNR's assertion that construction permits render NPDES permits unnecessary is without merit.

ii. IDNR Manure Management Plans are Less Stringent than Federal NMPs

Iowa requires confinement AFOs housing 500 or more animal units, and which were constructed or expanded after May 31, 1985, to submit an MMP to IDNR.[83] However, MMPs are less stringent than federally required NMPs in the following respects: MMPs regulate a smaller universe of CAFO discharges than NMPs, fail to prohibit all discharges of manure to waters of the United States, fail to require adequate setback distances from surface waters, and fail to meet federal record keeping and inspection requirements.

First, federal law requires CAFOs to retain all "manure, litter, and process wastewater."[84] Iowa laws regulating confinement CAFOs, however, define manure as "animal excreta or other commonly associated wastes of animals including; but not limited to, bedding, litter, or feed losses. Manure does not include wastewater resulting from the washing and in-shell packaging of eggs."[85] Thus MMPs, unlike federal NMPs, fail to prohibit discharges of all process wastewater, and are not substitutes for NMPs.

Second, federal law requires that NPDES CAFO permits meet a zero discharge standard from production areas by requiring facilities to meet design standards.[86] Iowa's MMPs fall short of this requirement both by failing to impose facility design standards and by prohibiting only "direct" discharges from production areas to waters of the state. The only design requirement Iowa imposes for confinement manure storage structures is that they must have sufficient

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[77] 40 C.F.R. § 122.23(h).
[78] 40 C.F.R. § 122.64.
[79] Iowa Admin. Code 567-65.7(6).
[80] 33 U.S.C. § 1342(b) (3).
[81] Iowa Admin. Code 567-65.10(2)(b).
[82] Iowa Admin. Code 567-65.10(7), (8).
[83] Iowa Code § 459.312.
[84] 40 C.F.R. § 122.42(e)(1)(i); *see supra* pp 4-5.
[85] Iowa Admin. Code 567-65.1.
[86] 40 C.F.R. § 412.

capacity to retain all manure between land applications.[87] Further, whereas federal law prohibits all production area discharges of "pollutants into waters of the U.S.,"[88] Iowa requires only that "manure" cannot be "discharged *directly* into a water of the state or into a tile line that discharges to waters of the state" from a confinement facility.[89]

Third, federal law requires a minimum 100-foot setback or alternative conservation practice between manure application areas and surface waters or conduits to surface waters.[90] Under Iowa law, confinement CAFOs are permitted to apply manure with zero separation distance from surface waters or conduits to surface waters, simply by incorporating or injecting the manure within 24 hours.

Fourth, federal law currently requires NMPs and compliance records to be kept on-site and available to the IDNR for inspection,[91] and *Waterkeeper* will require EPA to allow public inspection and enforcement of NMPs.[92] In contrast, MMPs and compliance records must only be kept within 30 miles of the CAFO.[93] In addition, Iowa regulations require that IDNR keep these records confidential and they are not subject to public review.[94]

Because IDNR's construction permits and MMPs are not functionally equivalent to the federal program's requirement of an NPDES permit with a nutrient management plan for every medium and large discharging facility, Iowa has unjustifiably refused to issue permits to confinement CAFOs that discharge. The failure to establish an NPDES permit program for confinement CAFOs that discharge, and the failure to issue NPDES permits to all open feedlots that discharge, is a failure to exercise control over activities required to be regulated under the NPDES program, and so EPA must withdraw Iowa's program.

2. *Iowa Does Not Issue Permits to all CAFOs that Propose to Discharge.*

a. Open Feedlots are Designed to Discharge

Iowa has hundreds of open feedlots that meet the federal definition of a medium or large CAFO.[95] As established, more than 1,500 open feedlots in Iowa thought they met the federal requirements for an NPDES permit, and so registered for the Iowa Plan for Open Feedlots. However, the majority of these facilities have not been covered by the NPDES permits they sought. Because these un-permitted feedlot operators believe they need permit coverage, EPA must presume their facilities were built in accordance with Iowa's construction standards for permitted feedlots, which require only that feedlots production areas will not discharge in a 25-year, 24-hour storm event. Iowa Code § 459A.401(2)(a). Thus, many open feedlots without NPDES permits propose to discharge in any storm event greater than 25-year, 24-hour. Although

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[87] Iowa Admin. Code 567-65.2(3).
[88] 40 C.F.R. §§ 412.31(a) and 412.46(a).
[89] Iowa Admin. Code 567-65.2(3) (emphasis added).
[90] *See supra* p. 6.
[91] 40 CFR §§ 122.42(e)(1)(ix) and (e)(2)(ii).
[92] *Waterkeeper* at 503 (quoting 33 U.S.C. § 1251(e)).
[93] Iowa Admin. Code 567-65.17(12)-(13).
[94] Iowa Admin. Code 567-65.17(14).
[95] IDNR AFO Statistics, available at http://www.iowadnr.com/afo/stats.html.

federal regulations provide a limited exception from zero discharges in those circumstances, facilities that do not have NPDES permits cannot avail themselves of the exemptions for precipitation-related discharges from the production area in the effluent guidelines.[96] Thus, IDNR has failed to issue permits to all open feedlot CAFOs that are designed to, and therefore propose to, discharge.

b. Open Feedlots Will Discharge Pursuant to HF 805

As discussed above, open feedlots also propose to discharge under the terms of HF 805, because HF 805 authorizes discharges from open feedlots, including discharges that are prohibited by the Clean Water Act.[97]

B. Iowa Issues Permits that do not Conform to the Requirements of the NPDES Regulations, Including the Public Participation Requirements.

1. Open feedlot permits issued federal NPDES requirements.

The open feedlot NPDES permits issued by IDNR do not conform to the federal NPDES regulations. First, as established, the permits contain no required setback distance between manure application areas and surface waters.[98] Second, most permitted feedlots failed to submit their NMPs by the May 31 deadline written into each permit, and some permits are still incomplete.[99] Third, once NMPs for permitted facilities are approved, they will likely be deficient in ways authorized by HF 805 – by managing only effluent without the solids settled out, using untested Alternative Technology systems, and failing to minimize phosphorus runoff.

Fourth, IDNR open feedlot permits issued thus far state that they incorporate EPA's standard terms, listed in 40 C.F.R. § 122.41. However, Section VIII: Standard Conditions only incorporates some, but not all, of the standard terms. Although the Section states that "to meet the requirements of 40 C.F.R. § 122.41, standard conditions applicable to all NPDES permits, including yours is attached to your permit for your review and compliance," Iowa attaches an edited, and in some provisions less stringent, version.

For example, 40 C.F.R. § 122.41(k)(l)(3) provides that a permit "is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the Clean Water Act. (See § 122.61; in some cases, modification or revocation and reissuance is mandatory.)" Iowa open feedlot permits, however, state that "[i]f title to your facility, or any part of it, is transferred the new owner shall be subject to this permit." This is less stringent than federal law, because it does not allow IDNR to modify, revoke, or reissue a permit upon transfer of a facility.

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[96] 40 C.F.R. § 412.31(a), § 412.45(a).
[97] *See supra* pp. 4-5.
[98] IDNR Agricultural NPDES Permits, available at http://programs.iowadnr.gov/wwpie/default.aspx#results. None of the NPDES permits issued to open feedlots include required setbacks from surface waters.
[99] IDNR Field Offices Communications, from Jeff Prier, IDNR, August 28, 2007 (attachment H).

In addition, under 40 C.F.R. § 122.41(j) all permits must include monitoring and recordkeeping standards, including that samples and measurements must be representative and that monitoring and analysis methods must be recorded. This requirement is absent from Iowa's list of standard terms. The federal requirement that "reports of compliance or noncompliance with...interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date,"[100] is also absent from Iowa's standard terms, making Iowa's open feedlot permits less stringent than federal law.

Fifth, according to the U.S. Court of Appeals for the Second Circuit, a valid regulatory program for CAFOs must include a technology-based standard to reduce pathogens.[101] IDNR's NPDES permits for CAFOs must limit pathogens from the land application areas as well as the production areas, beyond any incidental reductions that might occur from the agricultural utilization requirement on waste. However, neither Iowa's administrative rules nor the open feedlot permits issued to date address technology-based standards to reduce pathogens. As a result, Iowa's open feedlot permits fail to meet the requirements of the NPDES program, and continue putting Iowa waters at risk of bacterial contamination.

C. Iowa's Enforcement Program Fails to Comply with NPDES Regulations.

Iowa's enforcement program fails to comply with NPDES regulations because IDNR fails to act on permit and program violations, fails to seek adequate enforcement penalties or collect administrative fines when imposed, and fails to inspect and monitor CAFOs subject to Clean Water Act regulation. Thus, Petitioners also establish that the Iowa's program meets this criterion for withdrawal.[102]

1. Iowa Fails to Act on Violations of Permits and other Program Violations.

a. Iowa fails to investigate complaints and take enforcement actions

IDNR also fails to take enforcement actions against a large number of CAFO dischargers. Between 1992 and 2006, IDNR imposed monetary penalties in response to only about 75 percent of reported manure spills that reached waters of the U.S.[103] More than 72 reported manure spills that impacted water quality during this period did not result in any monetary penalty or required improvements to the facility.[104] Because IDNR has consistently demonstrated its inability to respond appropriately to the many violations of state and federal law committed by Iowa CAFOs – through investigations and penalties that deter future discharges – EPA must withdraw its authority.

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[100] 40 C.F.R. § 122.41(k)(1)(3).
[101] *Waterkeeper* at 519.
[102] 40 C.F.R. § 123.63(3).
[103] Iowa Manure Spill Database (attachment F); IDNR Enforcement Database (attachment L).
[104] *Id.*

b. Iowa Failed to Enforce its NMP Submission Deadline

The majority of permitted open feedlots in Iowa have failed to submit their NMP to IDNR by the deadline stated in their NPDES permits. These permits made clear that the permittee "must ensure that the site-specific NMP for this facility is received by DNR's Field Office 3 no later than **May 31, 2007** (60 days prior to July 31, 2007 [approval and implementation] deadline)."[105] Despite this deadline, which in some cases provided *years* of advance notice, IDNR had not received the majority of the required open feedlot NMPs for permits already issued by May 31.[106]

Rather than hold CAFO operators to their NMP submission deadlines, Iowa DNR has reinterpreted its own permits to require submission, and not implementation, by July 31, 2007, despite clear language to the contrary. IDNR thus created a disincentive for operators to meet deadlines necessary to ensure compliance with the Clean Water Act. Moreover, participation in the Open Feedlot amnesty agreement does not exempt feedlots from enforcement actions for compliance with their NPDES permit terms. Participating facilities are on notice that "the limited amnesty does not apply to permitted facilities, since they already have a permit and are on a compliance schedule if appropriate."[107] By failing to enforce the deadline for NMP submission for the few Iowa CAFOs the agency has permitted, IDNR has failed to act on violations of permits and EPA must revoke its authority.

2. *Iowa Fails to Seek Adequate Enforcement Penalties or to Collect Administrative Fines When Imposed.*

IDNR has long defended its CAFO program, claiming that its zero discharge standard makes Iowa's regulatory scheme more protective than federal law. As demonstrated, however, this zero discharge standard has failed to prevent hundreds of illegal discharges. IDNR's lax enforcement practices following these discharges – including inadequate penalties and failure to collect fines – have created a system where it pays to pollute, and there is no disincentive for CAFOs to repeatedly discharge pollutants illegally.

IDNR's penalties for CAFO discharges are too low to deter future violations. Moreover, Iowa law imposes limits on IDNR's authority to obtain adequate penalties that are contrary to federal law. Federal law allows penalties of up to $32,500 per violation per day.[108] Iowa law, however, places a maximum of $5,000 per violation per day on penalties for discharges or other permit violations, and of $10,000 per day for multiple violations.[109] Furthermore, as explained above, federal law requires state agencies have the authority to recover at least $10,000 per day

[105] IDNR, Beef & Bacon Drive, Inc. Open Feedlot NPDES permit at 5 (January 22, 2007) (emphasis in original), available at http://programs.iowadnr.gov/wwpie/Documents/Permits/6057418_fp.pdf. Every IDNR open feedlot NPDES permit issued in 2007 includes this deadline for NMP submission.
[106] IDNR Field Offices Communications from Jeff Prier, IDNR, August 28, 2007 (attachment H)
[107] Iowa Open Feedlot Working Group, *Answering Your Questions about the Iowa Open Feedlot Plan* (April 2001), available at http://www.agronext.iastate.edu/immag/openfeedlot/qa.html.
[108] 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4, Table 1.
[109] Iowa Admin. Code 567-10.3.

in criminal fines for willful or negligent violations,[110] but Iowa law does not clearly allow IDNR to impose criminal penalties.

Compounding these serious limitations on the effectiveness of IDNR's enforcement system, the agency rarely collects its maximum penalty, even for the most egregious manure spills on record. In July of 1995, a hog confinement in Hamilton County discharged approximately 1.5 million gallons of manure into the South Fork of the Iowa River when its manure storage structure failed below ground. Despite the fact that this was the largest documented volume manure spill in Iowa history, IDNR collected a mere $2,000 penalty and $6,000 fish restitution, and of course failed to require the discharger to obtain an NPDES permit.[111] In September of 1996, another hog confinement discharged more than 100,000 gallons of manure into North Buffalo Creek, killing an estimated 586,753 fish along with all other aquatic life over 22 miles of the stream. This was the largest manure spill fish kill in Iowa history, yet IDNR collected only a $3,000 penalty along with its fish restitution.[112] In yet another incident, in May of 2002, Grieg and Co., Inc. discharged up to one million gallons of manure from its cattle feedlot into Brown Creek and the Des Moines River, killing 33,428 fish valued at $23,934.40. Despite this assessment of the fish's value, IDNR collected a fish restitution of only $15,000.[113]

IDNR's collection of these inadequate penalties has been equally ineffective. Of the 168 penalties assessed between 1997 and 2006, 29 have yet to be collected as of August 1, 2007.[114] To assess the effectiveness of IDNR's enforcement program, one must only look at the spill records for the past 15 years and the number and severity of manure spills despite IDNR's regulations and enforcement actions. In fact, in the last six years, the number of spills has increased while fines for pollution have not.[115] Because IDNR fails to seek adequate enforcement penalties and to collect fines when imposed, manure spills continue unabated and EPA must withdraw Iowa's authority to implement the program.

3. *Iowa Fails to Inspect and Monitor Activities Subject to Regulation.*

Comprehensive oversight is a cornerstone of effective Clean Water Act implementation; to ensure regulations have meaning, authorized states must have and use means of monitoring for compliance. Accordingly, federal law requires authorized states to have "inspection and surveillance procedures to determine…compliance or noncompliance with applicable program requirements."[116] Specifically, federal law requires Iowa to maintain "a program which is capable of making comprehensive surveys of all facilities and activities subject to the State Director's authority,"[117] and "a program for periodic inspections of the facilities and activities subject to regulation."[118] IDNR fails to comply with these federal requirements because IDNR is

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[110] 40 C.F.R. § 123.27(a)(3)(ii).
[111] *Threatening Iowa's Future* at 18; IDNR Enforcement Database (attachment L).
[112] *Threatening Iowa's Future* at 25; IDNR Enforcement Database (attachment L).
[113] IDNR Enforcement Database (attachment L).
[114] *Id.*
[115] IDNR Manure Spill Database (attachment F).
[116] 40 C.F.R. § 123.26(b).
[117] 40 C.F.R. § 123.26(b)(1).
[118] 40 C.F.R. § 123.26(b)(2).

not capable of making comprehensive surveys of all CAFOs subject to regulation, and because IDNR fails to inspect and monitor CAFOs subject to Clean Water Act regulation.

As established, Iowa has thousands of CAFOs subject to regulation; nearly 1,500 open feedlots are waiting for NPDES permit coverage, more than 100 additional large open feedlots that failed to register for the Open Feedlot Plan are subject to permitting, and several hundred confinements that have discharged illegally into waters of the United States also require NPDES permits. For several reasons, IDNR is not capable of making comprehensive surveys of this universe of facilities. IDNR regulates its thousands of animal feeding operations with only approximately 30.9 full-time equivalent positions dedicated to inspections, permitting and enforcement.[119] The actual inspections are conducted by just 25 field staff around the state; these field staff must also review MMPs for every confinement housing more than 500 Animal Units.[120]

IDNR's actual inspection record demonstrates the agency's inability to periodically inspect facilities subject to regulation. In 2005 and 2006, IDNR conducted 121 and 349 inspections on open feedlots.[121] While this is an improvement from previous years, IDNR has in no way demonstrated ability or intent to transition from this sporadic inspection scheme to one in which the agency "comprehensively" or "periodically" monitors all 1,576 open feedlots and several hundred confinements requiring NPDES permits. Thus, IDNR fails to comply with federal law by failing to inspect and monitor CAFOs subject to regulation, and EPA must act to withdraw Iowa's authority.

CONCLUSION

For the foregoing reasons, Iowa Citizens for Community Improvement, Environmental Integrity Project, and the Sierra Club request that EPA take immediate action to notify the State of Iowa of its ongoing violations of the Clean Water Act, and request that EPA withdraw its approval of Iowa's NPDES program and take other actions as are necessary and appropriate.

Respectfully Submitted,

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cc: Richard Leopold, Iowa DNR Director

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[119] DNR Environmental Services State Fiscal Year Animal Feeding Operations Activity Report (attachment M)
[120] *Id.*
[121] DNR Environmental Services State Fiscal Year Animal Feeding Operations Activity Report (attachment M).

Appendix 2

ENVIRONMENTAL INTEGRITY PROJECT

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VIA CERTIFIED AND ELECTRONIC MAIL

August 18, 2011

Lisa Jackson, Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, D.C. 20460

Re: Notice of Intent to Sue for Unreasonable Delay Issuing a Response to 2007 Citizens' Petition for Withdrawal of Iowa's National Pollutant Discharge Elimination System Program Delegation

Dear Administrator Jackson,

Petitioners Environmental Integrity Project (EIP), Iowa Citizens for Community Improvement (Iowa CCI), and the Iowa Chapter of the Sierra Club (collectively, Petitioners) write to request prompt action by the U.S. Environmental Protection Agency (EPA) to issue a response to our September 20, 2007 Petition for Withdrawal of the National Pollutant Discharge Elimination System Program Delegation from the State of Iowa (Petition). Iowa's continued refusal to effectively regulated unpermitted discharges from Concentrated Animal Feeding Operations (CAFOs) has contributed to the ongoing degradation of the state's waters, and EPA's nearly four year delay in issuing a response – with no sign that it intends to do so in the near future – is unreasonable. This delay is particularly unreasonable in light of the agency's recent response to a similar petition filed more recently in Illinois.[1]

Though the Administrative Procedure Act (APA) does not require notice prior to filing suit to compel agency action unreasonably delayed, the Petitioners are providing this notice in the hopes that EPA will timely respond to the Iowa Petition and render legal action unnecessary.

[1] *See, e.g.*, EPA Region 5, *Initial Results of an Informal Investigation of the National Pollutant Discharge Elimination System Program for Concentrated Animal Feeding Operations in the State of Illinois* and Appendices, *available at* http://www.epa.gov/region5/illinoisworkplan/index.html. EPA issued this response to Illinois Citizens for Clean Air and Water's petition for de-delegation, which was filed on March 27, 2008.

100% PCW

However, if EPA fails to issue a comprehensive and prompt response, such as its response to the Illinois petition, the Petitioners will pursue legal remedies. If the Petitioners prevail in court on an unreasonable delay claim, we will seek full reimbursement of fees and expenses pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 (2006).

Iowa's CAFO program continues to violate the Clean Water Act.

Since EIP, Iowa CCI, and the Sierra Club filed the Iowa Petition in 2007, very little has changed with regard to Iowa's implementation and enforcement of the Clean Water Act (CWA) for CAFOs. The Petition documented Iowa's failure to issue adequate National Pollutant Discharge Elimination System (NPDES) permits to open feedlots – including those that registered under the state's permitting program – as well as the state's failure to issue a single NPDES permit to a confinement CAFO, despite hundreds of discharges to waters of the United States. The Petition also demonstrated that Iowa has disregarded critical conflict of interest regulations and failed to establish adequate programs for CAFO inspections and enforcement, creating a culture of non-compliance that persists today.

Nearly four years later, Iowa CAFOs continue to illegally discharge manure and the state still has not issued a NPDES permit to a single confinement operation. EPA Region 7 has sent several letters to the Iowa Department of Natural Resources (IDNR), in which EPA concurred with several claims in the Petition.[2] However, these letters failed to address several of the Petition's most significant issues, including Iowa's failure to issue permits to confinement operations[3] and its inadequate CAFO inspection and enforcement programs. Moreover, EPA's letters did not bring Iowa's CAFO program into compliance with federal law and have not prevented numerous illegal discharges.

Between the Petition filing date and January 6, 2011, IDNR assessed penalties for approximately 60 discharges from animal feeding operations, many of which were confinement hog facilities. This list does not include discharges for which the agency did not issue penalties or discharges unreported to the state. In 2010, the state finally initiated a rulemaking process to establish CAFO NPDES permit requirements for confinement operations that discharge, only to abandon the proposed rule in June.[4] IDNR has not proposed an alternative plan to come into compliance with the CWA, despite its own extensive records of illegal discharges.

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[2] Letter from John Askew, EPA Region 7, to Richard Leopold, IDNR Director (June 25, 2008); Letter from David Cozad, EPA Region 7, to Wayne Gieselman, IDNR Division Administrator (Mar. 30, 2009); Letter from David Cozad, EPA Region 7, to Richard Leopold, IDNR Director (Jan. 12, 2010).

[3] Although the 5th Circuit recently vacated EPA's 2008 CAFO rule in part, *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011), EPA has not acted to amend the rule and this decision does not affect the obligation of states outside the 5th Circuit to comply with the rule. Moreover, this decision did not affect the duty to apply for a NPDES permit for CAFOs that actually discharge, such as the hundreds of confinements with documented discharges in Iowa.

[4] *See Iowa Environmental Panel Dumps Regulations for Large Farms*, SIOUX CITY JOURNAL, June 21, 2011, *available at* http://www.siouxcityjournal.com/news/state-and-regional/iowa/article_d33d7c1c-9c4b-11e0-b9f6-

Manure spills and over-application of waste from CAFOs has caused significant harm to Iowa's water quality. Nitrogen and phosphorus in livestock waste can be toxic to aquatic life, reducing dissolved oxygen levels and leading to eutrophication of waterways. Manure spills have killed millions of fish in the state, and bacteria have impaired hundreds of Iowa's river and stream segments.[5] IDNR has acknowledged that Iowa's livestock industry is a major polluter, finding that "the most obvious threat to maintaining good chemical water quality in Iowa surface waters is the recent expansion of the confined animal feeding industry."[6] However, in the absence of oversight by EPA, Iowa continues to do nothing.

EPA has a duty to respond to the Iowa Petition in writing, and its nearly four year delay in responding is unreasonable.

Both the APA and EPA's own CWA regulations require the agency to grant or deny the Iowa Petition. EPA must "respond in writing to any petition to commence withdrawal proceedings,"[7] and has in fact issued written responses to numerous petitions for withdrawal in the past.[8] In addition, the APA requires EPA to "conclude a matter presented to it" "within a reasonable time."[9] When EPA fails to do so, the APA further empowers the courts to review EPA inaction and "compel agency action…unreasonably delayed."[10]

EPA's nearly four year delay in responding to the Iowa Petition, particularly considering the agency's responses to more recently filed de-delegation petitions, is unreasonable and violates the APA. While the CWA regulations and the APA do not set out a clear deadline for EPA's response to a de-delegation petition, the D.C. Circuit has established that "a reasonable time for agency action is typically counted in weeks or months, not years."[11]

The Petitioners have made repeated requests that EPA act on the Iowa Petition and take action to bring Iowa's CAFO program into compliance with the CWA. After meetings between the Petitioners, EPA Region 7, and EPA headquarters in 2007, 2008, and 2009 yielded no results, EIP organized a meeting with EPA's former Assistant Administrator for the Office of Water, Peter Silva, in September 2010. At this meeting citizens from several states highlighted EPA's slow and inconsistent responses to de-delegation petitions, and urged the agency to exercise

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001cc4c002e0.html. The Petition alleged, and petitioners continue to allege, that the Environmental Protection Commission responsible for terminating the CAFO rule violates EPA's conflict of interest regulations.

[5] *See* The Draft 2010 Iowa list of Section 303(d) Impaired Waters, http://www.igsb.uiowa.edu/wqm/ImpairedWaters/Year2010/FactSheetForDraft2010List_Jan2011.pdf.

[6] IDNR, Water Quality in Iowa During 1998 and 1999 at 1-7 (2001) available at http://wqm.igsb.uiowa.edu/wqa/305b/2000/2000_305b.html.

[7] 40 C.F.R. § 123.64(b)(1).

[8] EPA recently responded to petitions for de-delegation of Illinois' and Maryland's NPDES authorization. Since 2000, EPA has also issued written responses to petitions for de-delegation in Florida, Hawaii, Michigan, Oregon, Pennsylvania, and Washington, though the responses were inconsistent and untimely.

[9] 5 U.S.C. § 555(b).

[10] 5 U.S.C. § 706(1). *See also Telecommunications Research & Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984).

[11] *In re. American Rivers & Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004).

oversight over the Regions to issue timely and complete responses that will improve state water programs. Iowa CCI subsequently organized yet another meeting with Regional Administrator Karl Brooks. This October 27, 2010 meeting made clear that EPA had not made progress investigating Iowa's CAFO program and had no plan for its response to the Petition.

Despite this repeated outreach to EPA by the Petitioners, EPA has yet to issue a response or even a timeline or plan indicating it intends to respond. Although the Petitioners appreciate EPA's willingness to discuss the Iowa Petition, other pending de-delegation petitions, and CAFO pollution in Iowa, none of the communications with EPA or actions by EPA have resolved the issues raised in the Petition or rendered a thorough, formal investigation report unnecessary. To the contrary, as time elapses unpermitted CAFOs in Iowa continue to degrade the state's water quality without consequence.

Conclusion

EPA has long recognized the need to regulate CAFOs that discharge pollutants into waters of the U.S. under the CWA NPDES permit program. However, Iowa has failed to meet its obligation to effectively regulate this industry through permitting, inspections, and enforcement. EIP, Iowa CCI, and Sierra Club petitioned EPA to exercise its oversight authority, asking it to review Iowa's CAFO program and initiate withdrawal proceedings if the state does not come into compliance. Nearly four years later, the state steadfastly refuses to implement federal CAFO regulations and unpermitted manure spills pollute the state's waters unabated. EPA has an unambiguous obligation to timely respond to the Petition, and its delay in doing so is unreasonable.

The Petitioners respectfully request a formal response granting or denying the Petition. Considering that hundreds of CAFOs in Iowa have records of illegal discharges, yet no confinements in the state are subject to NPDES permits, the state's non-compliance with federal requirements is clear. Therefore, a sufficient response to the Petition will include an Investigation Report similar to that issued by Region 5 with regard to Illinois' CAFO program, and will establish a plan to either bring Iowa's CAFO program into compliance with the CWA or initiate formal withdrawal proceedings. We look forward to EPA's response, and hope that it will allow us to avoid legal action.

Sincerely,

Eric Schaeffer
Executive Director
Environmental Integrity Project
One Thomas Circle, NW, Suite 900
Washington, D.C. 20005

On behalf of petitioners:

Environmental Integrity Project
Iowa Citizens for Community Improvement
Iowa Chapter of the Sierra Club

Cc.

Karl Brooks
Regional Administrator
EPA Region 7 901
North 5th Street
Kansas City, KS 66101

Nancy Stoner
Acting Assistant Administrator
EPA Office of Water
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Mail Code 4101M
Washington, D.C. 20460

Appendix 3

Responses to Issues Requiring Statutory/Regulatory Changes:

Allegation 1: House File 805 authorizes discharges from open feedlots that are prohibited by the Clean Water Act by allowing discharges of "settled open feedlot effluent".

Allegation 2: HF 805 omits permitting requirements for medium and small facilities that discharge settled effluent.

Allegation 3: Iowa's definition of "effluent" is inconsistent with the federal definition of effluent.

Allegation 4: The Nutrient Management Plan (NMP) requirements of Iowa statutes are less stringent than federal requirements because of discrepancies created by HF 805's distinction between "open feedlot effluent" and "settled open feedlot effluent".

Allegation 5: Iowa's statutory Alternative Technology (AT) requirements do not address "settled open feedlot effluent".

Allegation 6: Iowa only requires controls on AT systems to prevent discharges between November 1 and March 30 because of "settled open feedlot effluent".

Allegation 7: Once NMPs are approved, they will likely not regulate settled effluent.

Response: The Iowa legislature included a "savings clause" in Iowa Code 459A that states that regulation of open feedlot effluent shall be construed as also regulating settled open feedlot effluent and solids. Iowa Code 459A.103(6) addresses the concerns raised in Allegations 1-7. This concern is further addressed by Iowa Admin. Code 567-65.101(3) which specifically states that medium and large CAFOs shall not discharge, among other things, settled open feedlot effluent unless it is pursuant to an NPDES permit.

Allegation 8: IDNR does not require NMPs from AT systems to provide for settled open feedlot effluent going into an AT system.

Response: AT systems are designed to treat feedlot effluent in lieu of land applying the process wastewater. Since process wastewater is not land applied an NMP is not required for the settled open feedlot effluent. This allegation appears to be further addressed by the "savings clause" contained in Iowa Code 459A.103(6) and discussed above.

Allegation 9: Facilities that are designed to contain a 25 year – 24 hour precipitation event are not required by IDNR to meet sufficiently stringent inspection and recordkeeping requirements.

Response: Iowa Admin. Code 567- 62.4(12) incorporates 40 CFR 412 (federal Effluent Limitation Guidelines) by reference, including the inspection and recordkeeping requirements of 412.37(a) and (b). As a result, Iowa's regulations on this issue are sufficiently stringent.

Allegation 10: The exclusion of livestock markets from Iowa's statutory definition of an "animal feeding operation" is inconsistent with federal law.

Response: In 2008, Iowa Code 459.102(4) was revised to include livestock markets within the definition of an animal feeding operation for NPDES permitting purposes.

Allegation 11: There is no state requirement for CAFOs to "identify appropriate site specific conservation practices to be implemented . . . to control runoff of pollutants to waters of the United States".

Response: This is required in Iowa Admin. Code 567-65.112(8)"e"(7).

Allegation 12: Iowa law is less stringent than federal law because it allows the application of manure without a separation distance if it is incorporated into the soil within 24 hours rather than establishing separation distances.

Response: Federal regulations require that conservation practices, including buffer strips, be included in the NMP requirements. While Iowa regulation (Iowa Admin. Code 567-65.101(6)) contained separation distances for land application and requirements for filter strips and buffers, there was no comparable state requirement related to their implementation. Iowa has since amended its regulatory requirements for NMPs at Iowa Admin. Code 567-65.101(6)(b)(1) to state: "for purposes of the NPDES permitting program, if applicable, the person must also demonstrate that a setback or buffer is not necessary because implementation of alternative conservation practices or field specific conditions will provide reductions equivalent to or better than the reductions that would be achieved by 200 and 800 foot setbacks". Implementation of this regulatory change will make Iowa's setback distances more stringent than the 100 foot setback requirement of 40 C.F.R. 412.4(c)(5).

Allegation 13: Iowa's recordkeeping requirements are less stringent than federal law in that they fail to require the NMP or the NMP compliance records to be maintained on-site, made available to IDNR, or available to the public.

Response: Iowa Admin. Code 567-65.112 sets forth Iowa's NMP requirements, which meet the federal requirements for maintaining the NMP on-site, along with records of compliance for 5 years. These requirements include provisions for public notice of the NMP and the availability of the NMP to IDNR.

Allegation 14: There is no comparable state requirement to the federal requirement at 40 C.F.R. 412.31(a)(2), which requires specific supporting analyses and other data before a permit is issued with alternative effluent limits. Thus, there is no initial demonstration that an untested alternative technology system will retain pollutants.

Response: Iowa amended Iowa Admin. Code 567-65.104(7) to state that permit applications involving alternative technology shall include the results of predictive modeling, as required by Iowa Admin. Code 567- 65.110(6)(a) and (7)(a).

Allegation 15: Iowa's regulatory exemption from penalties for "exceeding the nitrogen and phosphorous application rate for an unplanned crop" creates a situation where state law is less stringent than federal law because it does not ensure that phosphorous transport will be minimized and codifies a lack of consequences for non-compliance.

Response: Iowa added language that removed the regulatory exemption from penalties for exceeding nitrogen and phosphorous application rates for an unplanned crop for confinement operations subject to the NPDES permit program. *See* Iowa Admin. Code 567- 65.17(6)"b."

Allegation 16: Iowa's method of counting animals undercounts the number of animals and is therefore less stringent than federal law.

Response: In 2008, Iowa's legislature removed the distinction between animals confined outside and those confined under roof when determining the number of animals for NPDES permitting purposes. *See* Iowa Code §459A.103(3)(b).

Allegation 17: Federal conflict of interest requirements set forth at 40 C.F.R. 123.25(c) are violated by EPC members' abilities to trade with regulated parties.

Response: In the 2010 legislative session Iowa revised Iowa Code 455B taking NPDES permit appeals out of the hands of the EPC and placing them with an Iowa administrative law judge to resolve this issue. *See* Iowa Code §455B.174(4)(b).

<u>Protocol for Responding to Issues Related to Permitting</u>:

Allegation 1: Iowa has failed to issue permits to all open feedlots that have discharged.

Allegation 2: Iowa has failed to issue permits to all confinement CAFOs that have discharged.

Allegation 3: NPDES permits issued by IDNR do not include all standard terms listed in 40 C.F.R. 122.41.

Allegation 4: Facilities permitted by IDNR have failed to submit NMPs by the 5-31-2007 deadline.

Allegation 5: IDNR does not include setback distances in its CAFO permits.

Allegation 6: Iowa NPDES permits do not include a provision to address pathogens as required by the Waterkeeper decision.

Response: We will review IDNR files, including selected facility files (complaint investigations, inspection reports, NMPs, MMPs, compliance remedies, etc), enforcement case files (including enforcement referral files), spill and release reports, fish kill reports and public comments/complaints to determine whether the evidence supports the Petitioners' allegations that there are CAFOs, including open feedlots and confinement operations, subject to NPDES requirements that have not been permitted by IDNR.

We will review selected NPDES permits issued to CAFOs by IDNR to determine whether they include the standard conditions set forth in 40 C.F.R. 122.41, the setback requirements set forth in 40 C.F.R. 412.4(c)(5), and technology-based standards to reduce pathogens. We will also review the dates upon which the NMPs for these facilities were submitted and determine whether they were submitted in accordance with the federal deadline (2009).

Schedule: During the last week of October, 2011, we will visit the IDNR office in Des Moines, and as appropriate IDNR Field Offices, to review IDNR permit application forms, procedures and files. Prior to the visit, we will send a letter to IDNR explaining the purpose of and schedule for the visit, asking that the information be made available, and arranging for copying as necessary. For each session, there will be an entrance interview with state managers and staff (participation by IDNR personnel is at the state's discretion) and an exit interview during which preliminary findings will be outlined. In addition to the file reviews, the audit team will pose questions to IDNR staff involved in responding to inquiries from potential permit applicants or reviewing permit applications. Stephen Pollard will be the EPA contact for this effort.

Protocol for Responding to Issues Related to Compliance and Enforcement:

Allegation 1: IDNR's authority to impose criminal penalties against violators is ambiguous. Under Iowa Code 459A.502, open feedlot violations are subject to a civil penalty, as provided in Iowa Code 455B.191. Although HF 805 amended Iowa Code 455B.112 to allow the Iowa Attorney General to institute civil or criminal proceedings to enforce Iowa Code Chapters 459 or 459A, it is not clear how that provision interacts with 459A.502's failure to mention criminal penalties. If

459A.502 is interpreted to prevent the imposition of criminal penalties, then Iowa's program is legally insufficient.

Response: Iowa Code 455B.112 specifically provides the Iowa Attorney General authority to institute civil or criminal proceedings, including action for injunctions pursuant to Iowa Code 459, 459A, and 459B. We will request a formal opinion from the Iowa Attorney General's Office to clarify Iowa's interpretation of these statutes and their interplay with one another.

Allegation 2: IDNR fails to investigate complaints and take enforcement actions.

Allegation 3: IDNR fails to enforce its NMP submission deadline.

Allegation 4: IDNR fails to seek adequate enforcement penalties or to collect administrative penalties when imposed.

Allegation 5: IDNR fails to inspect and monitor activities subject to regulation.

Response: Our review of IDNR's compliance monitoring, inspection and enforcement of CAFOs will consist of the following: files reviews at IDNR Headquarters and Field Offices and/or the Iowa Attorney General's Office, interviews with state staff, and written information requests to the state. We will review IDNR files, including selected facility files (and the information contained therein including complaint investigations, inspection reports, NMPs, MMPs, compliance records, etc), enforcement case files (including enforcement referral files), spill and release reports, fish kill reports and public comments/complaints to determine whether the evidence supports the allegations above. EPA will also be reviewing implementation and planning documents such as IDNR's Enforcement Management System and CWA Section 106 annual work plans.

EPA staff will determine:

(1) Whether IDNR has investigated complaints of violations of state and federal law committed by Iowa CAFOs and where warranted, assessed penalties to deter future violations;
(2) Whether IDNR's program is capable of making comprehensive evaluations of all CAFO facilities subject to regulation under NPDES requirements. We will review IDNR's files, protocols, and procedures to determine its process for identifying AFOs that are CAFOs subject to NPDES requirements. This will include a review of selected unpermitted facility files, including those with complaints/spill reports, to determine whether any of these facilities should be subject to regulation under NPDES requirements. As part of this review, we

will look at IDNR's use of data from other sources, which could be used to identify such facilities;

(3) The cause for the inspections IDNR has conducted at AFOs;

(4) Whether, during the course of an inspection, IDNR determines whether the facility subject to the inspection is a CAFO, has discharged, and has met or failed to meet NPDES permit application requirements, including timely submission of its NMP;

(5) Whether IDNR has sought adequate enforcement penalties;

(6) Whether IDNR seeks to collect enforcement penalties once assessed;

(7) Consistency of IDNR's action with its Enforcement Management System and EPA's Enforcement Response Guide.

Schedule: During the last week of October, 2011, we expect to visit the IDNR office in Des Moines, and as appropriate Field Offices, to review copies of inspection and other relevant reports. Prior to the visit, we will send a letter to IDNR explaining the purpose of and schedule for the visit, asking that the information be made available, and arranging for copying as necessary. For each session, there will be an entrance interview with state managers and staff (participation by IDNR personnel is at the state's discretion) and an exit interview during which preliminary findings will be outlined. In addition to the file reviews, the audit team will pose questions to IDNR staff involved in responding to complaints about potential violations from CAFOs. Stephen Pollard will be the EPA contact for this effort.

Responses to Additional Concerns Raised regarding Iowa's CAFO program

Allegation 1: Iowa's Phosphorous Index requirements do not meet the federal requirement because Iowa standards do not include field specific assessment of potential for runoff and the statement that "application rates will minimize runoff".

Response: In 2010 Iowa Admin. Code 567-65.112(8) was revised to require in a NMP a phosphorous index of each field that meets the requirements of Iowa Admin. Code 567-65.17(17) which, in turn, requires the phosphorous index to meet the requirements of USDA Natural Resource Conservation Service Iowa Technical Note 25. Moreover, Iowa Admin. Code 567-65.112(8)(e) was revised to include all of the nine minimum criteria of 40 CFR 122(e)(1). These revisions addressed this allegation.

Allegation 2: IDNR manure management plans (MMPs) are less stringent than federal NMPs.

Response: Iowa requires that CAFO facilities subject to NPDES requirements submit an NMP along with their permit applications. MMPs are only required to be submitted by non-discharging facilities not otherwise subject to NPDES

requirements; therefore, their terms are not required to be as stringent as federal NMPs.

Allegation 3: Open feedlots propose to discharge and IDNR has failed to issue NPDES permits to these operations.

Response: Only facilities that actually discharge are subject to NPDES regulation per the Fifth Circuit's decision in the National Pork Producers case.

Appendix 4

EPA REGION 7 – 2011 IOWA PROGRAM REVIEW CAFO CHECKLIST					
Reviewer:				Review Date:	
Page _____ of _____		IDNR Program ID:		Field Office:	

SECTION 1: FACILITY INFORMATION

Facility Name:

TYPE OF OPERATION	NUMBER OF ANIMALS	CAPACITY	TYPE OF CONFINEMENT
☐ BEEF CATTLE	_____	_____	☐ OPEN LOT
☐ DAIRY	_____	_____	☐ DUAL CONFINEMENT
☐ SWINE	_____	_____	☐ TOTAL CONFINEMENT
☐ TURKEYS	_____	_____	☐ OTHER _____
☐ CHICKENS	_____	_____	
☐ OTHER _____	_____	_____	

1.	Type of Livestock/Poultry Waste Controls: ☐ Holding Pond, Lagoon, or Settled Open Feedlot Effluent Basin ☐ Deep Pits ☐ Other *(Please Specify)* _____		
2.	Does the facility have an CAFO NPDES Permit? (If yes, reviewer will need to complete Section 4 of the File Review Checklist.)	☐ YES	☐ NO
3.	Does the facility have a Manure Management Plan (MMP)?	☐ YES	☐ NO
4.	Are there additional factors that are relevant to determining if this facility is subject to CWA/NPDES requirements (e.g., proximity to waters of the U.S., adjacency, common ownership, etc.).	☐ YES	☐ NO
4a.	If YES, provide a detailed description of these factors.		
5.	NOTES/ADDITIONAL COMMENTS:		

EPA REGION 7 – 2011 IOWA PROGRAM REVIEW CAFO CHECKLIST					
Reviewer:				Review Date:	
Page _____ of _____		IDNR Program ID:		Field Office:	

SECTION 2: COMPLIANCE EVALUATIONS / INSPECTIONS

Note: Section 2 should be completed for each evaluation/inspection that occurred at the facility during the review period.

1.	Evaluation/Inspection Type:		
2.	Evaluation/Inspection Date:		
3.	What was the reason/cause for the evaluation/inspection?		
4.	Was a discharge/release of manure litter or process wastewater documented?	☐ YES	☐ NO
5.	If YES, answer the following questions:		
5a.	Was the discharge/release from the production area?	☐ YES	☐ NO
5b.	Was the discharge/release from a land application area?	☐ YES	☐ NO
5b-i	Was the discharge/release caused by failure to comply with NMP or MMP?	☐ YES	☐ NO
5b-ii	Was the discharge/release agricultural storm water?	☐ YES	☐ NO
5c.	Was the discharge/release through a man-made ditch, flushing system, or similar man-made device?	☐ YES	☐ NO
5d.	Did the discharge/release reach waters of the U.S.?	☐ YES	☐ NO
5e.	Did the discharge/release cause/contribute to a fish kill?	☐ YES	☐ NO
5f.	Were samples taken?	☐ YES	☐ NO
6.	Were there other CAFO related violations identified?	☐ YES	☐ NO
6a.	If YES, Provide a detailed description of the violations.		
7.	Was a formal report written documenting the findings of the evaluation/inspection?	☐ YES	☐ NO
8.	Did IDNR make a an AFO or CAFO determination as a result of this evaluation/inspection?	☐ YES	☐ NO
8a.	Is there sufficient information in the report for the reviewer to determine the compliance status of the facility?	☐ YES	☐ NO
9.	Did IDNR initiate any formal or informal enforcement response as a result of the evaluation/inspection?	☐ YES	☐ NO
9a.	If YES, Reviewer will need to complete *SECTION 3 – ENFORCEMENT RESPONSE.*		
9b.	If NO, Was there rationalization in the file as to why no action was taken?	☐ YES	☐ NO
10.	NOTES/ADDITIONAL COMMENTS:		

EPA REGION 7 – 2011 IOWA PROGRAM REVIEW CAFO CHECKLIST					
Reviewer:				Review Date:	
Page _____ of _____		IDNR Program ID:		Field Office:	

SECTION 3: ENFORCEMENT RESPONSE

Note: Section 3 should be completed for each enforcement action that occurred at the facility during the review period.

1.	Enforcement Type:		
2.	Issued/Filed Date:		
3.	Has or will the action returned the facility to compliance?	☐ YES	☐ NO
4.	Does the action contain a penalty?	☐ YES	☐ NO
5.	Does the penalty contain a gravity component?	☐ YES	☐ NO
6.	Does the penalty contain an economic benefit component?	☐ YES	☐ NO
7.	Is the write-up in the file explaining how the penalty was calculated?	☐ YES	☐ NO
8.	Is there evidence in the file showing the penalty has been collected?	☐ YES	☐ NO
9.	Is there documentation in the file that shows the facility has complied with the terms of the action?	☐ YES	☐ NO
10.	Did the action include the requirement for the facility to apply for an NDPES permit?	☐ YES	☐ NO
11.	For actions that involved unpermitted discharges to waters of the U.S, what steps has the facility taken to address the discharges and to prevent them from occurring in the future? (Reviewer should include changes to both O/M and facility)		
12.	NOTES/ADDITIONAL COMMENTS:		

EPA REGION 7 – 2011 IOWA PROGRAM REVIEW CAFO CHECKLIST					
Reviewer:				Review Date:	
Page _____ of _____		IDNR Program ID:		Field Office:	

SECTION 4: NPDES PERMIT – NUTRIENT MANAGEMENT PLANS

1.	What type of NPDES permit has been issued?				
	☐ Individual NPDES Permit	☐ General NPDES Permit	NPDES #		
2.	What date was the NPDES permit issued?				
3.	What date does the NPDES permit expire?				
4.	Does the NPDES permit include Alternative Technology discharge criteria?			☐ YES	☐ NO
5.	Does the NPDES permit include and Nutrient Management Plan?			☐ YES	☐ NO
6.	If Yes, when was the NMP submitted?				
6a.	Does the NMP include the nine minimum criteria required under 40 CFR 122.42(e)(1)?			☐ YES	☐ NO
7.	Does the NMP contain BMP language from 40 CFR § 412.4?			☐ YES	☐ NO
8.	Does the NMP include standard conditions that include the revisions to 40 CFR § 123.41?			☐ YES	☐ NO
9.	Does the NMP include requirement that records be onsite?			☐ YES	☐ NO
10.	Does the NMP include setback requirements found at 40 CFR § 412.4 & 412.37(b)?			☐ YES	☐ NO
11.	Is the CAFO utilizing the alternative setback requirements found at 40 CFR 412.4(c)(5)?			☐ YES	☐ NO
12.	If Yes, has the CAFO demonstrated that buffer is not necessary?			☐ YES	☐ NO
13.	If you answered NO to questions 8-12, provide a detailed description of what was not included.				
14.	NOTES/ADDITIONAL COMMENTS:				

Appendix 5

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

OCT 28 2011

Mr. William Ehm, Director
Environmental Services Division
Iowa Department of Natural Resources
Wallace State Office Building
502 East 9th Street
Des Moines, Iowa 50319-0034

Dear Bill:

As part of the U.S. Environmental Protection Agency Region 7 review of Iowa's Clean Water Act National Pollutant Discharge Elimination System permitting and enforcement programs associated with concentrated animal feeding operations, the EPA is requesting your assistance by providing answers to the questions enclosed. We ask that you provide a written response to these questions by November 15, 2011.

Please contact Stephen Pollard at 913-551-7582 if you have questions regarding this request. Also, as we have previously discussed, the EPA staff involved in this review will be in Des Moines on Friday, October 28, and can discuss the enclosed questions with you and your staff at that time.

Sincerely,

Karen A. Flournoy for
Acting Director
Water Wetlands and Pesticides Division

Enclosure

Cc: Barbara Lynch, IDNR
Ed Tormey, IDNR
Shelli Grapp, IDNR
Kenneth Hessenious, IDNR
David Cozad, EPA Region 7 Regional Counsel
Tarah Heinzen, Iowa Environmental Integrity Project

General Questions About IDNR's CAFO Program

1. What FTE (full-time employee) allocation has been dedicated for each of the last 5 years to both the confinement and open lot programs, broken down by permitting, inspections, and enforcement?
2. How does IDNR ensure consistency in CAFO permitting, inspections, and enforcement across field offices?
3. What is IDNR's annual planning process for identifying inspection, enforcement, and permitting priorities?

Questions Related to Compliance and Enforcement

1. Are there mechanisms or procedures in place for ensuring that IDNR has the best possible information about the regulated universe? What are those? Are there other sources of information about CAFO facilities within the state that are utilized and what are those?
2. What other sources of information does IDNR consider to identify CAFOs that are discharging?
3. Does IDNR believe that it has identified all large and medium open feedlot operations (and their locations) that require NPDES permits? What information forms the basis for that belief and how is that information updated?
4. Do all citizen complaints concerning CAFO operations, including but not limited to spills, result in on-site inspections? If not, which complaints, including those concerning spills, do result in on-site inspections? What factors are taken into account by IDNR in deciding whether to conduct an on-site inspection upon receipt of a complaint, including those complaints concerning spills?
5. How does IDNR respond to those complaints, including spill complaints, that do not result in on-site inspections?
6. How soon are on-site inspections resulting from complaints, including spill complaints, conducted? Are these inspections announced in advance to the CAFO facility being inspected?
7. Under what circumstances does IDNR conduct random, unannounced, on-site CAFO inspections and how often does this occur?
8. Do IDNR inspectors use standard forms when investigating complaints?
9. Under what circumstances do IDNR inspectors conduct sampling during investigation of complaints of an illegal discharge from a CAFO? What is the general sampling protocol when investigating illegal discharges?
10. What type of inspection is used by IDNR to evaluate confinement operations to determine their compliance with the Clean Water Act?
11. How does IDNR determine whether a confinement operation that experiences a discharge needs an NPDES permit? Who makes this decision? How is the decision documented? Are there established criteria that are considered?
12. What steps does IDNR take to monitor and evaluate whether confinement operations discharge during land application?

13. What is IDNR's process for reviewing Manure Management Plans and ensuring that they will not result in confinement operation discharges?
14. How many animal feeding operations in Iowa confine animals within the medium CAFO threshold? Describe how IDNR evaluates whether these operations meet the definition of a medium CAFO and require NPDES permits, including the timeframes within which such determinations are made and the number of FTE allocated to these evaluations and any resulting permitting actions.
15. What does IDNR consider a man-made conveyance when evaluating whether an animal feeding operation is a medium CAFO?
16. Does IDNR have an established enforcement process that is followed when conducting CAFO enforcement? If so, describe the process, and any timelines within which certain actions must be taken.
17. Under what circumstances does IDNR refer a facility to IDNR's Legal Bureau for action? What further communication about that referral occurs thereafter between IDNR and its Legal Bureau?
18. What information does IDNR's Legal Bureau consider when determining whether to pursue an enforcement action against a facility?
19. How does IDNR determine whether to assess penalties against a facility? How are such penalties calculated and documented? Do such penalties usually include the collection of the economic benefit of noncompliance experienced by the facility? How is this component calculated and documented?
20. How does IDNR document any change between its initial proposed penalty and the final penalty included in an administrative order?
21. Does IDNR have procedures in place to collect penalties assessed against a facility that remain unpaid? Describe these procedures and the length of time that is usually required to exhaust these efforts.

Questions Related to Permitting

1. How long does it take IDNR to process a permit application?
2. What are IDNR's procedures and timeframes for reviewing and processing NPDES permit applications and issuing permits?
3. How many permit applications has IDNR received from confinement operations within the last five years? What actions were taken on these applications?
4. For CAFO facilities with both open lots and confinement operations, does IDNR include both operations in any NPDES permit issued? If not, what factors are considered in any decision not to permit both operations?

Appendix 6

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

DEC 0 6 2011

Mr. William Ehm, Director
Environmental Services Division
Iowa Department of Natural Resources
Wallace State Office Building
502 East 9th Street
Des Moines, Iowa 50319-0034

Re: IDNR's Responses dated November 18, 2011

Dear Bill:

We are in receipt of IDNR's responses dated November 18, 2011, to the questions that the EPA posed concerning Iowa's Clean Water Act National Pollutant Discharge Elimination System permitting and enforcement programs associated with concentrated animal feeding operations. After reviewing these responses, we have identified a few questions where additional clarification is necessary. We have enclosed follow-up inquiries and request that IDNR supply its written responses to these no later than December 14, 2011.

Please contact Stephen Pollard at (913) 551-7582 if you have questions regarding these requests. Thank you for your prompt attention to these questions.

Sincerely,

Karen A. Flournoy

Karen A. Flournoy
Director
Water, Wetlands and Pesticides Division

Enclosure

Cc: Barbara Lynch, IDNR
Ed Tormey, IDNR
Shelli Grapp, IDNR
Kenneth Hessenious, IDNR
David Cozad, EPA Region 7 Regional Counsel
Tarah Heinzen, Iowa Environmental Integrity Project

General Questions About IDNR's CAFO Program

1. What document(s) does IDNR use to conduct its annual planning process for identifying inspection, enforcement and permitting priorities? Please provide copies of all document(s) with your response. In EPA's most recent NPDES program review (2008) it was documented that IDNR utilized a document titled "Enforcement Management System" (2006 revision) for guidance on compliance and enforcement activities in Iowa. Does IDNR continue to use this document? If not, please provide any documents IDNR may use in its place. Has the document been updated since 2006? If so, please provide an updated version.

2. Iowa's FFY 2011-2012 PPG commitment for inspection of NPDES permitted CAFOs is once every five (5) years. In its response, IDNR indicated that it inspects all NPDES permitted operations once every two (2) years. Please clarify if NPDES permitted CAFOs are inspected once every five (5) years, or once every two (2) years.

Questions Related to Compliance and Enforcement

1. In its response to EPA's General Questions, IDNR indicated that it responds on-site to nearly all reported spills and manure releases. However, the answer did not specify what factors are taken into account by IDNR in deciding whether to conduct an on-site inspection upon receipt of a complaint, including those complaints concerning spills?

2. IDNR has indicated that if there is a concern that a confinement operation is not in compliance with the Clean Water Act, a "comprehensive investigation of the site is conducted." Please provide a description of what is entailed in completion of a "comprehensive investigation" and how is such an investigation classified in your field office database?

3. In its response to EPA's General Questions, IDNR indicated that it "spot checks" a percentage of the Manure Management Plans (MMPs) in the field each year. What percentage of MMPs are spot checked in the field each year? What type of evaluation is utilized for this activity?

4. IDNR indicated that it has operational information (e.g., location, animal type and number) on approximately 1,700 open feedlots. IDNR has also indicated that there are approximately 150 NPDES permitted animal feeding operations. How many open lot animal feeding operations in Iowa fall within the medium CAFO definition?

5. In its response to EPA's General Questions, IDNR provides citations to its authorities to seek penalties but did not provide adequate information on how IDNR determines whether to assess penalties against a facility. Please provide this information.

6. Below is a list of inspection types IDNR has associated with animal waste in your field office database (If there are additional inspection types that are relevant to the question please include them in your response). For each inspection type please provide the following information:
    a. A detailed description of the inspection type's purpose and what regulatory areas are covered by the inspection;
    b. Any standard operating procedures, or other documentation developed by IDNR that inspectors use when performing the inspection type; and
    c. Example copies of any forms, checklist or other templates used to perform /document the inspector's findings from the inspection type.

    Inspection Types
    AFO – NPDES
    AFO – Small Open Lot
    Ag Drainage Well
    Certified Manure Applicator
    Commercial Manure Service
    Complaint Investigations
    Composting
    Concrete
    Confinement– Routine
    Confinement Site Survey
    Earthen Basin
    Feedlot – Routine
    Manure Management Plan
    Nutrient Management Plan

Questions Related to Permitting

1. How many NPDES permit applications has IDNR received from confinement operations (not combined confinement operations) within the last five years? For each application received, please provide the name, site location information, facility/program ID number and what actions were taken by IDNR on the application.

Appendix 7

Checklist for Iowa NPDES Permits and NMPs

NPDES Permits

1. Iowa NPDES CAFO permit Section I.A.C (Discharge Limitations) requires compliance with 40 CFR 412.37(a) & (b) [IAC567-65.104(9)"b" & "e"] as described in Section III.A.4 &6 (General Operation: Minimum Required Practices). Section III.A.4 includes the inspection requirements of 40 CFR 412.37(a) and Section III.A.6. of the NPDES permit includes the recordkeeping requirements of 40 CFR 412.37(b). [Allegation 9].

2. Section III.A.6 requires records to be kept for 5 years onsite and made available to IDNR upon request. This permit section also includes the production and land application requirements of 40 CFR 412.37(b) & (c). [Allegation 9].

3. "Appropriate site specific conservation practices to be implemented . . . to control runoff of pollutants to waters of the United States." This is required in Iowa Admin. Code 567-65.112(8)"e"(7). This requirement has been incorporated verbatim into Iowa's NPDES CAFO permits at permit Section III.A.5(vii). [Allegation 11].

4. Region 7 noted that the 40 CFR 412(4) setbacks, or their alternatives, are in its regulation and NPDES permit at Section IV.3 (reference to IAC 567-65.101(6). [Allegation 12].

5. Iowa Admin. Code 567-65.112 sets forth Iowa's NMP requirements, which meet the federal requirements for maintaining the NMP on-site, along with records of compliance for 5 years. These requirements include provisions for public notice of the NMP and the availability of the NMP to IDNR. Requirements are found in Section III.A.6 and Section III.A.5, respectively. [Allegation 13].

6. Revised (2008) Standard Conditions (40 CFR 122.41) attached to all NPDES CAFO permits [Allegation 3, Permitting]

7. Production area effluent limits at Section 1.A.1 and incorporate 40 CFR 412.31 by reference. The requirement that the production area shall be operated in accordance with 40 CFR 412.37 is contained in Section 1.A.2 of the NPDES permit. [Allegation 6, Permitting, Pathogens].

8. Requirement that the CAFO meet the land application effluent guidelines are found in Section I.A.2 and Section III.A. 5&6 of the NPDES permit. [Allegation 6, Permitting, Pathogens].

Appendix 8

Fields of Opportunities

STATE OF IOWA

TERRY E. BRANSTAD, GOVERNOR
KIM REYNOLDS, LT. GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
ROGER L. LANDE, DIRECTOR

November 18, 2011

Ms. Karen A. Flournoy, Acting Director
Water Wetlands and Pesticides Division
United States Environmental Protection Agency-Region 7
901 North 5th Street
Kansas City, Kansas 66101

Dear Karen:

I am in receipt of your letter dated October 28, 2011, requesting answers to various questions pertaining to EPA's review of Iowa's NPDES permitting and enforcement program associated with concentrated animal feeding operations. The Department's responses are enclosed.

Please contact me at 515/281-5817 if you have any questions. Thank you.

Sincerely,

William A Ehm

William Ehm, Administrator
Environmental Services Division
Iowa Department of Natural Resources

Enclosure: Responses to EPA questions

502 EAST 9th STREET / DES MOINES, IOWA 50319-0034
PHONE 515-281-5918 FAX 515-281-6794 www.iowadnr.gov

Iowa DNR Environmental Services Division

Animal Feeding Operations (AFO) Program Staffing, State Fiscal Years 2007 - 2012

Animal Feeding Operations Program Full-Time Equivalent Staff (FTE)	State Fiscal Year					
	2007	2008	2009	2010	2011	2012
Field Services Bureau Confinements [Inspections]						
EPA Funded (PPG)	0.00	0.00	0.00	0.00	0.00	0.00
State or Other Funded	23.00	19.00	19.00	11.50	8.75	9.00
Total Confinement Inspections FTE	23.00	19.00	19.00	11.50	8.75	9.00
Field Services Bureau Open Lots [Inspections]						
EPA Funded (PPG) (medium & large NPDES covered lots only)	2.00	2.00	2.00	2.00	2.00	2.00
State or Other Funded (small & medium non-NPDES lots only)	0.00	4.00	4.00	4.00	6.00	4.25
Total Open Lot FTE	2.00	6.00	6.00	6.00	8.00	6.25
Water Quality Bureau All AFO [Permitting: NPDES & Construction]						
EPA Funded (PPG)	0.00	0.00	0.00	0.00	0.00	0.00
State or Other Funded	5.25	5.58	6.33	5.30	4.40	4.00
Total FTE	5.25	5.58	6.33	5.30	4.40	4.00
* DNR Legal Services All AFO [Enforcement]						
*EPA funded (PPG) Estimate	2.00	2.00	2.00	2.00	2.00	2.00
State or Other Funded	0.00	0.00	0.00	0.00	0.00	0.00
Total Open Lot FTE	2.00	2.00	2.00	2.00	2.00	2.00
Grand Total Animal Feeding Program FTE	32.25	32.58	33.33	24.80	23.15	21.25

* EPA funding is comingled with state and other funding, with total animal feeding operations enforcement FTE estimated at 2.00 per year, supported through PPG funding.

IOWA DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL SERVICES DIVISION
POLICY/PROCEDURE STATEMENT

TOPIC: Fish Kills/Stream Sampling/Cost Recovery

Policy Procedure Number: 5-b-01 (WW)
Date: 06/17/2010

Replaces Number: 5-b-01 (WW)
Effective Date: 11/29/1995
Revised: 10/05/2009

Preparer: Kathy Lee, Emergency Response & Homeland Security Unit

Reviewers: ESD Field Office Supervisors Joe Larscheid & Martin Konrad, Con & Rec Fisheries Bureau

Approval:

Bureau Chief:

Barb Lynch, Field Services & Compliance — Date: 6/23/10

Ed Tormey, Legal Services — 7/1/10

Joe Larscheid, Fisheries — 7/1/10

DA:

Wayne Gieselman, Environmental Services — Date: 6/23/10

Diane Ford, Conservation and Recreation — 6-23-10

Applicable Code of Iowa or Iowa Administrative Code Rule:

455B.186	Prohibited Discharge
455B 392 – 396	Hazardous Conditions
481A.151	Restitution for Pollution Causing Injury to Wild Animals
567 IAC Chapter 61	Water Quality Standards
567 IAC Chapter 131	Notification of Hazardous Conditions
567 IAC Chapter 133	Rules for Determining Cleanup Actions and Responsible Parties
571 IAC Chapter	Restitution for Pollution Causing Injury to Wild Animals

REASON OR BACKGROUND

This procedure statement is required so that the investigation and assessment of fish kills by each division is coordinated, and costs for fish restitution, salaries, meals, lodging and miscellaneous expenses are collected uniformly across divisions.

LEGAL BASIS

In sum, Iowa Code section 455B.392(1)(c) authorizes the Department to hold a person having control over a hazardous substance strictly liable to the state for the damages to natural resources resulting from a hazardous condition caused by that person; damages includes the "costs of assessing the injury." Similarly, Iowa Code section 481A.151(1) authorizes the Department to recover "administrative costs" for the time Department staff spends investigating a fish kill, be it caused by a hazardous condition or otherwise. When these two related provisions are harmonized, it becomes clear the legislature authorized the Department to recover the salaries of employees who are unable to perform other duties because they must respond to an illegal discharge into a water of the state that resulted in a loss of natural resources. (See memo from Tamara Mullen to Kathy Lee & Ed Tormey, January 5, 2010, for a complete discussion.)

FISH KILLS/ STREAM SAMPLING/COST RECOVERY

A. COORDINATION OF RESPONSE ACTIVIES BY ESD AND C&R

I. COMMUNICATIONS/NOTIFICATION PROCEDURES

a. Either the Environmental Services Division (ESD) or the Conservation and Recreation Division (CRD), upon learning of an alleged fish kill, shall immediately notify the field office (FO) of the other division having jurisdiction over the area.

b. Generally, the ESD field offices shall initiate the investigation and sampling at the site. However, in limited cases, CRD's Fisheries Bureau may need to initiate the investigation if ESD staff are not able to travel to the site in a timely manner.

c. In cases where a spill has occurred and a fish kill is expected, Fisheries staff must exercise caution with respect to the concentration of the chemical(s) involved. It may be necessary for ESD FO staff or local officials to conduct an initial hazmat assessment to determine if the area is safe to investigate

d. If a spill or fish kill occurs on a border river in a National Fish and Wildlife Refuge, notification of DNR state and federal counterparts is required as outlined in the Upper Mississippi River Spill Response Plan and Resource Manual and the Omaha-Council Bluffs Sub-Area Contingency Plan. This notification shall be made by ESD Field Offices or the Emergency Response Unit.

II. FOLLOW UP INVESTIGATIONS

a. Upon completing the initial investigation, the division making first response shall contact the other division field office to decide which division will conduct the follow-up. Typically, fish kills involving sources such as feedlots, industries, agricultural chemicals, and spills would be investigated by ESD. CRD would typically investigate fish kills involving natural causes (i.e. winter kill, disease, low dissolved oxygen from natural causes, etc.)

b. Joint follow-ups may help speed up completion of the investigation. Decisions on follow-up shall be made by the supervisory staff of both divisions.

III. WRITTEN REPORTS

a. Each division shall forward copies of all written reports to the other division.

IV. ENFORCEMENT ACTIONS

a. ESD is responsible for determining the source and identity of pollutants and collecting water quality samples. CRD is responsible for documenting the extent of the fish kill, assessing fish losses, and determining the compensation value and lost recreational value, if applicable.

b. When the cause of the fish kill can be documented as a discharge of pollutants, ESD will normally pursue enforcement for violations of water pollution laws. Restitution for the dead fish (see B.II-a-3-d) shall also be sought. ESD shall take the lead on the enforcement case and incorporate the findings and reports from the Fisheries Bureau into the referral package to the Legal Services Bureau.

B. INVESTIGATION AND SAMPLING

I. Photographs/videos are useful for documenting cases of surface water pollution. The photographer, time of day, and description of scene shall be provided for each photograph. It is recommended that the time-date stamp be turned on so that photographs and videotape contain the time-date stamp to help with the legal documentation. Photographs shall be taken of the pollution source and areas where water samples are collected (i.e. upstream and downstream of the pollution source). Any impacts potentially related to the

pollution source (e.g. dead fish) shall also be documented with photographs. In general, Field Services shall document the water quality violations and the Fisheries Bureau shall document the dead fish and extent of the kill.

II. Initial on-scene investigation. Upon arrival at the scene of a fish kill, the field investigator shall:

a. Note the physical condition of the following:

1. Water involved: (Fisheries and Field Services Bureaus)
   a) Stagnant
   b) Slow moving
   c) Fast moving-oxygenated by riffles
   d) Shallow, deep, cold, warm, color
   e) Odors and sheen
   f) Field tests shall be taken for temperature, DO, pH, and ammonia (Field Services Bureau)
2. Aquatic organisms (Fisheries Bureau)
   a) Alive
   b) Stressed
   c) Dead
   d) Location in stream (floating, on the bottom, on the bank)
   e) Fish behavior such as sucking for air, jumping out of the water, etc.
3. Species affected (Fisheries Bureau)
   a) Identify those dead
   b) Identify those stressed
   c) Identify those normal
   d) Attempt to determine the cause of the fish kill, particularly any source and/or entry point of contaminants into the water in which the fish kill took place. Once this has been done, fish kill counting procedures and sampling methods to estimate fish kill statistics shall follow American Fisheries Society guidelines as identified in 571 Iowa Administrative Code chapter 113. Monetary value assessments shall also follow AFS guidelines as laid out in rule. This work is to be done by Fisheries personnel and reported to ESD.

III. SAMPLING

a. Investigation of Surface Water Pollution

1. Prior to investigating incidents of surface water pollution, Field Services shall determine the classification of the affected water body as described in the ESD water quality standards, and identify the boundaries of the classifications. In many cases, a stream may have different classifications within the same segment. Obtain guidance or assistance from the Water Resources Section to define the segments and classifications, if there are questions.

2. When investigation of surface water pollution involves water bodies with a designated use(s), sampling shall be conducted to determine whether violations of numeric water quality criteria have occurred. Refer to the Bacteria Criteria Table and Tables 1-4 of the water quality standards to determine the appropriate numerical water quality standard(s) for the designated use(s) of the stream segment. Some of the most common parameters to sample include: BOD, pH, temperature, DO, ammonia, TSS, E. coli, and common pesticides.

3. Upstream and downstream samples shall be obtained, since some criteria are related to the degree to which contamination is increased by a pollution source. Parameters need not be tested if there is no reason to suspect that a parameter is included in the pollution source. When sampling for ammonia nitrogen, water temperature and pH must be included for each sample. Water shall first be field tested for ammonia nitrogen, and if positive results are obtained, samples for laboratory analysis shall be collected.

4. Normal procedure is to obtain a discharge source sample, an upstream sample, and one or more downstream samples. One downstream sample shall be taken fairly near the confluence of the discharge and receiving water in the plume of the contamination, and additional samples would normally be advisable at one or more downstream locations (or more remote in the case of lakes) to document the extent of contamination. Any tributaries in the vicinity of the pollution event and sampling area shall also be sampled and observed for dead or stressed fish and aquatic life prior to entering the receiving stream.

5. Estimates of the duration of the pollution event shall be provided. These estimates can be based on information from the person reporting the incident or complaint. Field staff shall document any impacts potentially related to the pollution event (e.g. dead fish, floating debris, abnormal water color). All surface waters, including waters with designated uses as well as "general" waters, are protected by the "narrative" water quality criteria of subrule 567 IAC 61.3(2), which include free from –
   a) Settleable substances attributable to point source discharges that form sludge deposits;
   b) Nuisance floating debris, oil, grease, scum, etc.;
   c) Materials producing objectionable odors, color, etc.;
   d) Substances that are acutely toxic to human, animal or plant life;
   e) Substances in quantities that produce undesirable or nuisance aquatic life

   In addition, numeric criteria apply to all waters, as follows:
   f) Turbidity cannot be increased more than 25 Nephelometric units by a point source (this analysis is infrequently performed);
   g) Cations and anions guidelines values to protect livestock watering may be found in the "Supporting Document for Iowa Water Quality Management Plan," Chapter IV, July 1976, as revised on November 11, 2009. (These parameters are sampled infrequently.)
   h) The E. coli content of water which enters sinkhole or losing stream segment, regardless of the water body's designated use, shall not exceed a geometric mean of 126 organisms/100 mL or a sample maximum value of 235 organisms/100mL.

Observations and sampling relevant to applicable narrative or numeric criteria shall be conducted to document apparent violations of any of these standards. Visual or olfactory observation, including photographs or videotape, would normally be sufficient to document violations of narrative criteria, although sampling for settleable solids ("a"), oil and grease ("b"), or dissolved oxygen, ammonia nitrogen or other chemicals ("d") may be appropriate. Sampling for turbidity, cations/ions or E. coli would be necessary to document violations of "f-h", respectively.

Samples of water shall have chain-of-custody documentation from the field to the laboratory. Sample containers shall be a 1 quart glass jar/Teflon lid. (Check with nearest ESD Field Office for

jars) Sampling technique: dip quart jar into, and in an arc, back out of water- this gives a rough composite. If contaminated product is floating or pooling- sample as much of the material as possible. Samples will be sent to UHL or closer lab recommended by ESD or district field offices.

b. Fish Flesh Samples

Fish kills are normally caused by short-term exposures to acute levels of toxic chemicals, diseases, or other altered environmental conditions such as low dissolved oxygen. Fish tissue sampling normally reveals the bioaccumulation (long-term) of chemicals, and seldom is useful in determining short-term chemical exposures or toxic conditions, such as low dissolved oxygen. Therefore, fish tissue samples are not helpful in evaluating the majority of fish kills. An exception is where a disease is causing significant fish kills in a single major drainage basin. CRD may decide in such a case that samples are warranted for fish disease evaluation. Samples for this type of evaluation are not included in the Univ. Hygienic Laboratory contract.

Univ. Hygienic Lab (UHL) prefers that flesh samples be frozen within 24 hours of death. Stressed and recently dead fish within the affected area are the best specimens to freeze.

1. Identify the location from which sample was taken.
2. Written information is to accompany sample:
   a) Coloring or mottling noted specimen at collection time
   b) Inflamed gills or spots on body
   c) Rigidity of Specimen body

c. Sample preparation for shipment to lab
   1. All jars shall be tightly sealed and placed in plastic bags and sealed
   2. Each jar shall have identifying information printed on a label
   3. Jars shall be placed in a Styrofoam shipping container- iced down and sealed for shipment
   4. Follow chain of custody procedures

C. DOCUMENTATION OF COSTS

Field Services and Fisheries staff shall document the following costs of investigation:

1. Wages for staff time spent investigating the fish kill, compiling data, and preparing reports. This also includes time spent overseeing investigation and cleanup of the spill.
2. DNR indirect costs for staff wages
3. Meals, lodging, and miscellaneous costs consistent with the State of Iowa reimbursement policy and rates in place at the time of the investigation. Meals, lodging, and miscellaneous costs shall be documented on a travel voucher. A copy of the travel voucher signed by the supervisor or acting supervisor is to be included with the referral package as part of the documentation.
4. Costs of samples collected and analyzed during the investigation
5. UHL administrative costs for sample analysis
6. Mileage must be calculated on a per vehicle basis rather than using the standard rates listed on the Iowa Department of Administrative Services' website. Until further notice, mileage will not be included in cost recovery due to the difficulty of obtaining all of the information required to properly calculate it. (See Iowa Code section 8A.362)

FISH KILLS/ STREAM SAMPLING/COST RECOVERY

Indirect costs, UHL sample and administrative costs shall be updated and posted on the intranet at the beginning of each state fiscal year. Partial payment of costs from administrative orders shall be pro-rated between Fisheries Bureau staff costs, Field Services Bureau staff costs and the fish restitution cost

Example

Tables A-C must be shown in the supporting documents for the referral package. Table D must be included in the actual referral document.

Table A: Fish Restitution
Table B: Fisheries Bureau Costs
Table C: Field Services Costs
Table D: Total expenses and fish restitution costs

Table C	Field Services Costs	
Wages	Joe Smith – 20 hours @ 26.78/hr.	$535.60
	Sara Johns – 14 hours @28.50/hr	$399.00
	Total wages	$934.60
Indirect	SFY10 rate = 14.03%	$131.12
UHL Samples	7 samples @ 95.00 per (all analyses)	$665.00
UHL Admin	SFY10 = 8.0%	$53.20
Meals	Joe Smith	$35.03
	Sara Johns	$20.62
Lodging	N/A this trip	$0.00
Misc	Rope for sampling	$7.96
Total		$2782.13

Table D: Total expenses and fish restitution costs

Table	Description	Fund	Costs
Table A	Fish Restitution	Fish and Wildlife Trust Fund	$3,048.62
Table B	Fisheries Bureau Cost	Fish and Wildlife Trust Fund (Director's Discretion)	$847.00
Table C	Field Services Bureau Cost	Hazardous Substance Remedial Fund Fines/Penalties 0098-512-0651- -0649 12-1225	$2782.13
Total			$6,677.75

New Construction 2011	FO#1	FO#2	FO#3	FO#4	FO#5	FO#6	2011 Totals	2010 Totals	2009 Totals	2008 Totals	2007 Totals	2006 Totals
Unpermitted Hogs (new)	27	20	30	12	6	10	105	28	26	200	362	441
Unpermitted Hogs (expansion)	3	5	15	0	1	9	33	18	12	1	50	52
Permitted Hogs (new)	1	1	4	3	0	0	9	2	5	98	125	72
Permitted Hogs (expansions)	10	10	23	10	4	9	66	16	20	95	117	95
Permitted Poultry	0	0	1	1	0	0	2	3	5	1	2	3
Unpermitted Poultry	0	0	5	0	1	0	6	1	4	7	1	2
Permitted Open Cattle lots	0	0	11	0	0	0	11	1	7	13	7	33
Permitted Confined Beef Cattle	1	5	5	2	1	0	14	1	2	5	6	51
Permitted Confined Dairy Cattle	1	0	2	0	1	0	4	3	8	2	5	4
Permitted Combined Operation	0	0	7	1	0	0	8	1	11			
Unpermitted Confined Cattle	0	2	8	6	0	0	16	1	7	8	40	43
Swine Manure Storage	0	0	3	0	0	0	13					
Dairy Manure Storage	0	0	1	0	1	0	2					
Totals	43	43	115	35	15	28	279	[illegible]	107	428	704	831

These totals are as of 9/30/11

These are applications for new construction. Construction may not be okayed yet, but review by the FO has been done.

(12)New regulations in 2009 brought in the permitting of combined operations which are facilities with the same type of animal, but different housing. (Confined animals and open lot animals.)
(14&15)New regulations in late 2009/early 2010 brought in manure application on frozen ground rules, requiring some facilities to build extra manure storage to store longer.

Appendix 9

WWPD Rec'd DEC 23 2011

Fields of Opportunities

STATE OF IOWA

TERRY E. BRANSTAD, GOVERNOR
KIM REYNOLDS, LT. GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
ROGER L. LANDE, DIRECTOR

December 16, 2011

Ms. Karen A. Flournoy, Acting Director
Water Wetlands and Pesticides Division
United States Environmental Protection Agency-Region 7
901 North 5th Street
Kansas City, Kansas 66101

Dear Karen:

I am in receipt of your letter dated December 6, 2011, requesting answers to various follow-up questions pertaining to EPA's review of Iowa's NPDES permitting and enforcement program associated with concentrated animal feeding operations. The Department's responses are enclosed.

Please contact me at 515/281-5817 if you have any questions. Thank you.

Sincerely,

William Ehm, Administrator
Environmental Services Division
Iowa Department of Natural Resources

Enclosure: Responses to EPA questions

502 EAST 9th STREET / DES MOINES, IOWA 50319-0034
PHONE 515-281-5918 FAX 515-281-6794 www.iowadnr.gov

General Questions About IDNR's CAFO Program

1. What document(s) does IDNR use to conduct its annual planning process for identifying inspection, enforcement and permitting priorities? Please provide copies of all document(s) with your response. In EPA's most recent NPDES program review (2008) it was documented that IDNR utilized a document titled "Enforcement Management System" (2006 revision) for guidance on compliance and enforcement activities in Iowa. Does IDNR continue to use this document? If not, please provide any documents IDNR may use in its place. Has the document been updated since 2006? If so, please provide an updated version.

Answer: IDNR Field Services and Compliance Bureau Supervisors and Bureau Chief meet at least annually to review priority field inspection efforts and priority enforcement efforts. Based on these priorities and based on the renewal status of the individual CAFO's NPDES permit, the inspection targets are determined for each office. Further, the IDNR uses the Performance Partnership Grant (PPG) agreement with EPA for guidance in identifying inspections, enforcement and permitting priorities. Those priorities are adjusted annually depending on compliance issues that arise and as agreed to by EPA and IDNR pursuant to EPA's "Clean Water Act National Pollutant Discharge Elimination System Compliance Monitoring Strategy for the Core Program and Wet Weather Sources." The updated "Enforcement Management System" (December 2011 Revision) is attached.

2. Iowa's FFY 2011-2012 PPG commitment for inspection of NPDES permitted CAFOs is once every five (5) years. In its response, IDNR indicated that it inspects <u>all</u> NPDES permitted operations once every two (2) years. Please clarify if NPDES permitted CAFOs are inspected once every five (5) years, or once every two (2) years.

Answer: The correct answer is that NPDES permitted CAFOs are inspected once every five years.

Questions Related to Compliance and Enforcement

1. In its response to EPA's General Questions, IDNR indicated that it responds on-site to nearly all reported spills and manure releases. However, the answer did not specify what factors are taken into account by IDNR in deciding whether to conduct an on-site inspection upon receipt of a complaint, including those complaints concerning spills?

Answer: Many factors are taken into account by IDNR when deciding to perform an on-site inspection upon receipt of a complaint, including a complaint concerning spills. Factors taken into account regarding complaint response include: nature and type of the complaint, potential for discharge (if the complaint is about a spill or release) to a water of the state, or if the complaint falls within the regulatory authority of the IDNR. Complaints alleging pollution events are investigated via an on-site response in almost all cases. However, complaints regarding odor or other nuisances may not be investigated because the state lacks regulatory authority for odors. Some complaints, including land application of manure sold pursuant to Chapter 200A of the Code of Iowa, are referred to the Iowa Department of Agriculture and Land Stewardship as the primary regulatory authority in those instances.

However, if the 200A-related application causes, or has the potential to cause pollution of a water of the state, IDNR will conduct an on-site investigation.

IDNR is also required to consider the factors and follow the procedures set forth in 567 Iowa Administrative Code (IAC) 65.10(10)("a-e") and 561 IAC 3.3(1)"b":

65.10(10) *Complaint investigations.* Complaints of violations of Iowa Code chapter 455B and this rule, which are received by the department or are forwarded to the department by a county, following a county board of supervisors' determination that a complainant's allegation constitutes a violation, shall be investigated by the department if it is determined that the complaint is legally sufficient and an investigation is justified.

a. If after evaluating a complaint to determine whether the allegation may constitute a violation, without investigating whether the facts supporting the allegation are true or untrue, the county board of supervisors shall forward its finding to the department director.

b. A complaint is legally sufficient if it contains adequate information to investigate the complaint and if the allegation constitutes a violation, without investigating whether the facts supporting the allegation are true or untrue, of rules adopted by the department, Iowa Code chapter 455B or environmental standards in regulations subject to federal law and enforced by the department.

c. The department in its discretion shall determine the urgency of the investigation, and the time and resources required to complete the investigation, based upon the circumstances of the case, including the severity of the threat to the quality of surface water or groundwater.

d. The department shall notify the complainant and the alleged violator if an investigation is not conducted specifying the reason for the decision not to conduct an investigation.

e. The department will notify the county board of supervisors where the violation is alleged to have occurred before doing a site investigation unless the department determines that a clear, present and impending danger to the public health or environment requires immediate action.

b. Investigation procedure.

(1) Mandatory investigations. The department shall investigate the following types of complaints: alleged unauthorized depleting uses of water pursuant to Iowa Code section 455B.274; alleged violations of air or water pollution statutes, rules or permits when requested by any state agency, political subdivision, local board of health, or 25 residents of the state pursuant to Iowa Code subsections 455B.134(8) and 455B.174(1). The appropriate office shall conduct an investigation and notify the complainant of the results of the investigation.

(2) Discretionary investigations. Complaints not described in 3.3(1)*"b"*(1) may be investigated by the department if it appears that an investigation is needed to ensure compliance with applicable departmental statutes or rules. In the case of written complaints, the appropriate office shall notify the complainant of the results of the investigation or of its decision not to conduct an investigation, unless the complaint is anonymous.

2. IDNR has indicated that if there is a concern that a confinement operation is not in compliance with the Clean Water Act, a "comprehensive investigation of the site is conducted." Please provide a description of what is entailed in completion of a "comprehensive investigation" and how is such an investigation classified in your field office database?

Answer: This would include an inspection of manure storage structures and land application areas, if appropriate. The inspection would include a thorough inspection of the facilities and associated grounds for evidence of discharges. It may also include a review of land application records or the MMP, interviews with the owner/operator, and visual observation of streams and waterways in the vicinity. On-site sampling and/or laboratory samples may be taken for analysis if needed. This would be classified as a Feedlot (open or confinement) – Routine inspection in the field office compliance database.

3. In its response to EPA's General Questions, IDNR indicated that it "spot checks" a percentage of the Manure Management Plans (MMPs) in the field each year. What percentage of MMPs are spot checked in the field each year? What type of evaluation is utilized for this activity?

Answer: Randomly selected spot checks will be scheduled for approximately 10% of facilities that have MMPs on file with the IDNR in State Fiscal Year 2012. This percentage may vary from year to year depending on priorities and funding levels. An on-site MMP inspection is conducted for this activity.

4. IDNR indicated that it has operational information (e.g., location, animal type and number) on approximately 1,700 open feedlots. IDNR has also indicated that there are approximately 150 NPDES permitted animal feeding operations. How many open lot animal feeding operations in Iowa fall within the medium CAFO definition?

Answer: The IDNR AFO database has 1,122 beef facilities with a head count of 300-999 animals. There are likely several hundred more facilities in that animal unit range for which IDNR has no record. Therefore, IDNR estimates there are approximately 2,000 facilities statewide with a head count of 300-999 animals. How many of these estimated 2,000 facilities fall within the medium CAFO definition is difficult to determine due to a number of factors such as variability in runoff controls related to precipitation, animal numbers due to market conditions, and feed costs. To date, the IDNR has received an application for an NPDES permit from one medium CAFO.

5. In its response to EPA's General Questions, IDNR provides citations to its authorities to seek penalties but did not provide adequate information on how IDNR determines whether to assess penalties against a facility. Please provide this information.

Answer: Not only does 567 Iowa Administrative Code Chapter 10 provide direction in determining the penalty amount but also in determining whether to assess an administrative penalty:

- 567 IAC 10.2, 10.2(1, 2 &3)- The administrator shall screen each **case** to determine the most equitable and efficient means of redressing and abating the violation. **In evaluating a violation for purposes of screening the violation to determine which cases may be appropriate for administrative assessment of penalties** or for purposes of assessing administrative penalties, **the department will consider among other relevant factors the following:**

10.2(1) Costs saved or likely to be saved by noncompliance by the violator. Where the violator realizes an economic benefit through the violation or by not taking timely compliance or corrective measures, the department shall take enforcement action which includes penalties which at least offset the economic benefit. Reasonable estimates of economic benefit should be made where clear data are not available.

10.2(2) Gravity of the violation. Factors include but are not limited to:

a. The actual or threatened harm to the environment or the public health and safety.
b. Involvement of toxic or hazardous substances or potential long-term effects of the violation.
c. The degree to which ambient or source-specific standards are exceeded, where pertinent.
d. Federal program priorities, size of facility, or other pertinent factors.
e. Whether the violation is repeated and whether it violates an administrative or court order.

f. Whether the type of violation threatens the integrity of a regulatory program.

g. Expenses or efforts by the government in detecting, documenting, or responding to a violation.

10.2(3) Culpability. Factors include but are not limited to:

a. The degree of intent or negligence. The standard of care required by the laws of the state of Iowa will be considered.

b. Whether the case involves false reporting of required information, or tampering with monitoring devices.

c. Whether the violator has taken remedial measures or mitigated the harm caused by the violation. [emphasis supplied]

- 567 IAC 10.2(5)- Whether the assessment of administrative penalties appears to be the only or most appropriate way to deter future violations, either by the person involved or by others similarly situated.
- 567 IAC 10.2(6)- Other relevant factors. The department will consider other relevant factors which arise from the circumstances of each case.
- 567 IAC 10.2(7)- This screening procedure shall not limit the discretion of the department to refer any case to the attorney general for legal action, nor does this procedure require the commission or the director to pursue an administrative remedy before seeking a remedy in the courts of this state.

6. Below is a list of inspection types IDNR has associated with animal waste in your field office database (If there are additional inspection types that are relevant to the question please include them in your response). For each inspection type please provide the following information:
    a. A detailed description of the inspection type's purpose and what regulatory areas are covered by the inspection;
    b. Any standard operating procedures, or other documentation developed by IDNR that inspectors use when performing the inspection type; and
    c. Example copies of any forms, checklist or other templates used to perform /document the inspector's findings from the inspection type.

<u>Inspection Types</u>

AFO – NPDES
AFO – Small Open Lot
Ag Drainage Well
Certified Manure Applicator
Commercial Manure Service
Complaint Investigations
Composting
Concrete
Confinement– Routine
Confinement Site Survey
Earthen Basin
Feedlot – Routine
Manure Management Plan
Nutrient Management Plan

Answer:

AFO NPDES Inspection – The purpose of this inspection type is to determine compliance with the facility's NPDES permit and conditions, including, but not limited to: nutrient management plan (NMP), land application of manure solids and liquids, recordkeeping, monitoring, reporting of discharges, submittal of required reports, visual observation of manure control structures, and stockpile locations. This inspection is limited to AFO facilities with an NPDES permit. Regulatory areas covered are AFO NPDES permit compliance and associated state and federal regulations. See attached form #1.

AFO Small Open Lot – The general purpose of this inspection is to determine if a facility meets the definition of medium CAFO per NDPES rules and regulations or is causing or likely to cause a water quality violation per state rules. If a facility meets the definition of a medium CAFO, a facility must apply for an NPDES permit or remove the conditions that require NPDES permitting (reduce size, remove man-made conveyance, or remove animals from contact with state/federal waters). See attached form #2.

Ag Drainage Well – The purpose of this inspection is to determine whether or not the land owner is in compliance with conditions in an agricultural drainage well (ADW) permit. This state program involves AFOs only to the extent that land application of manure is near an AFO. There are no standard operating procedures for the ADW inspections. The inspection form, attached, mirrors the ADW permit and goes through the 13 conditions of the permit and determines whether or not the owner is in compliance with those conditions.

Certified Manure Applicator – The general purpose of this inspection is to check if the manure applicator is properly certified to apply manure in Iowa. This includes training and certification every three years. State law and rules require certification of confinement manure applicators from facilities with >500 animal units.

Commercial Manure Service (CMS)– This inspection is similar to certified manure applicator inspections. CMS are businesses that apply manure from facilities for hire. Per state law, the owner and employees must be properly certified, including training and yearly certification. Review of land applications records may be included in the inspection.

Complaint investigations – Inspections resulting from complaints vary depending on the complaint type and complaint allegations. Any of the other inspection types may also result from a complaint. These inspections allow the IDNR to determine whether operations are in compliance with state and federal regulations, including compliance with the Clean Water Act. See attached form #3.

Composting – Inspections of this type usually involve composting of dead animals. Compliance with state rules is determined from these inspections.

Concrete – This inspection generally occurs while, or shortly after, a facility is constructed. Compliance with state concrete standards is determined. Concrete standards were created to ensure that these facilities are adequately constructed and have storage capacity to retain all manure between periods of manure application. See attached form #4.

Confinement routine – The general purpose of this inspection is to determine compliance with Iowa MMP rules, including associated records and manure application. In addition, a visual inspection is included of the manure storage facilities to determine compliance with Iowa law, which prohibits discharges from confinements, and compliance with the Clean Water Act, which prohibits discharges from CAFOs without an NDPES permit. See attached forms #5 and 5A.

Confinement Site Survey – This is an inspection of a site prior to construction that requires a construction permit. The inspection ensures facility compliance with state required separation distances from businesses, public use areas, residences, water sources, wells and other designated areas. These inspections, along with state regulations, ensure proper siting of facilities to minimize potential environmental and social impacts. See attached form #6.

Earthen Basin – Earthen basin inspections are conducted annually in Iowa as required by state statute. These inspections are generally stand alone but may be conducted in conjunction with an MMP or other inspection type. These are generally visual inspections used to help prevent discharges from basins to waters of the state and for compliance with state law and the Clean Water Act. See form #7.

Feedlot routine – same as AFO Small Open Lot above.

Manure Management Plan – This inspection is the same as Confinement Routine, above, except that it is limited to compliance with Iowa MMP rules only.

Nutrient Management Plan – This is an inspection of a facility's NMP. It may be conducted in the office or at the facility. It is a comprehensive review of the NMP, including all provisions required by the plan, including public notice, to determine compliance with state and federal regulations. See form #8.

Questions Related to Permitting

1. How many NPDES permit applications has IDNR received from confinement operations (not combined confinement operations) within the last five years? For each application received, please provide the name, site location information, facility/program ID number and what actions were taken by IDNR on the application.

Answer:

No applications have been received in the last five years. Before then, one application was received on or about May 23, 2006.

Name of the applicant: David Peterson

Reason for application: Required as part of "Agreement for Pretrial Diversion" in criminal prosecution by U.S. Dept. of Justice

Site Location: 23695 420th Street, Lake Mills, Iowa 50450, Winnebago County; Facility ID # is 57824.

Actions taken: IDNR issued a draft NPDES Permit to this operation on September 29, 2006. Voluminous written comments were received and a public hearing was conducted. A final permit was not issued due to uncertainties regarding criteria for permit conditions.

Enforcement Management System

Iowa Department of Natural Resources
September 2006
Revised October 2010
Revised December 2011

This document is intended only for use by the staff of the Iowa Department of Natural Resources (Iowa DNR) as an internal management procedural tool, and does not affect private rights or procedures available to persons or entities outside the Iowa DNR. It is not intended to create or add to rights otherwise held by any person outside the Iowa DNR; nor is it intended to reduce, eliminate or limit any rights held by any person outside the Iowa DNR.

Iowa Department of Natural Resources
Enforcement Management System

Introduction

The Iowa Department of Natural Resources (Iowa DNR) uses this Enforcement Management System (EMS) to outline the process by which the various regulatory programs in the Environmental Services Division (ESD) of the Iowa DNR pursue compliance with chapters 455B, 455D, 459, 459A, and 459B of the Iowa Code and the rules promulgated thereunder. The general objective of the EMS is to protect the public health and environment of the State of Iowa through enforcement of the environmental regulatory requirements in a timely, consistent and fair manner. This enforcement seeks to:

- Obtain prompt compliance with statutory and regulatory requirements;
- Pose a deterrent to actions that delay or prevent prompt compliance;
- Provide an incentive for timely and responsible compliance behavior; and,
- Ensure that persons who comply with environmental requirements are not placed at a competitive disadvantage.

The EMS includes compliance monitoring and enforcement procedures to be used by all regulatory programs within Iowa DNR's ESD.

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I. Roles

Effective enforcement requires team work; and Iowa DNR has established the following roles in its ESD enforcement program:

A. Enforcement Coordinator

Each environmental program within Iowa DNR's ESD has an Enforcement Coordinator. The role of the Enforcement Coordinator is to ensure that:

- there is consistent enforcement of Iowa DNR's laws and rules across the state;
- formal enforcement action is taken against the most egregious violators; and
- penalties and corrective actions are consistent and equitable.

The Enforcement Coordinator is responsible for deciding which cases move forward to formal enforcement action and decide what penalties are considered consistent and equitable based on:

- established priorities and thresholds
- advice and concurrence of the field offices, central office, DNR Legal Services Bureau, and/or the Attorney General's office.

B. Environmental Specialist

Environmental Specialists are responsible for the day-to-day inspections of regulated entities within their respective program and/or part of the state. They serve as the primary contact with those entities and prepare enforcement referrals to the Legal Services Bureau when appropriate. As part of the enforcement referral process, the Environmental Specialist will:

- complete the referral summary and request a referral meeting;
- complete the referral package; and
- be available for questions as the referral moves through the process.

C. Environmental Specialist Senior

The Environmental Specialist Senior performs roles similar to the Environmental Specialist. In addition, he or she should be available to provide technical advice or conduct reviews for other staff within their program / field office.

D. Supervisor

A Supervisor manages the day-to-day affairs of a field office or central office program area. The Supervisors should assist their staff as necessary in the enforcement process and be available for discussion and provide input as new situations or problems arise.

E. Field Office and Compliance Bureau Chief / Legal Services Bureau Chief

In addition to their other duties, the Field Office and Compliance Bureau Chief and the Legal Services Bureau Chief should:

- facilitate communication on enforcement matters;
- participate in enforcement discussions when requested by other enforcement staff; and

In addition, the Legal Services Bureau Chief assigns enforcement cases to Attorneys on the legal staff, reviews proposed orders and litigation reports, and tracks the progress of each case.

F. Attorney

The Attorney drafts the enforcement documents in each case and handles all legal issues that arise. The Attorney normally takes the lead in settlement discussions, if any, and prepares for administrative hearings or trials when appropriate. The Attorney will normally be a member of the Iowa DNR Legal Services Bureau (DNR Attorney). However, if referral to the Attorney General's office is appropriate, the Attorney will be an Assistant Attorney General.

G. Division Director of the Environmental Law Division, Iowa Attorney General's Office (Division Director)

The Division Director will review each enforcement referral to determine if the case merits referral to the Iowa Attorney General's office. In addition, this individual will work with the Legal Services Bureau Chief on resolving significant legal issues that may arise in the State of Iowa's environmental enforcement program.

II. Compliance Monitoring and Evaluation

Compliance with Iowa's environmental laws and rules is primarily monitored through either investigations or record reviews. Investigations are performed as part of normal planned activities (e.g., permitted facilities, other regulated facilities, noncompliance follow-ups) or in response to complaints or releases. There are many forms of record reviews, including: reports required by rule or permit; permit application information; and self-reported information. In addition, follow-up compliance monitoring of enforcement orders may involve both investigations and record reviews.

Investigations

Environmental Specialists (normally located in the field) shall investigate citizen complaints, self-reported violations and work requests from central office programs within fourteen (14) days after assignment by a Supervisor or Environmental Specialist

Senior. These investigations are in addition to conducting scheduled inspections at regulated facilities.

Notices of Violation

Within thirty (30) days after confirming a violation(s) has taken place, the Environmental Specialist writes and mails a Notice of Violation (NOV) or other similar letter to the violator. However, the confirmation date of a violation may be subject to argument and interpretation. For example, the investigation may be completed, but the violation may not be known without gathering additional information (e.g., analysis of samples taken, additional information from the facility). To accommodate this concern, the Iowa DNR will use the term "confirmation date" to be the date upon which the additional information became available. In the investigation awaiting sample results instance, the violation would fairly be defined as confirmed when the sample results were obtained.

If there is no actionable violation found, that finding shall be documented to the file and no further action is needed. In most instances, if a violator receives an NOV and returns to compliance in a timely manner, no further action will take place. The Environmental Specialist shall document the compliance (e.g., reinspection or report from violator) in the appropriate file. Typically, for a return to compliance to be considered timely, the violator must abate the violation within ninety (90) days after receipt of the NOV or other similar letter. However, for some violations, the Environmental Specialist should consider escalated enforcement even if timely compliance is achieved. Examples would include violations causing serious environmental impact, having regulatory significance, or resulting in significant economic benefit of noncompliance. If these violations occur, the Environmental Specialists shall follow the procedure set forth below.

All NOVs and similar letters are tracked by the field offices and/or central office programs.

III. Criteria for Escalated Enforcement

Once an Environmental Specialist determines that a violator has failed to return to compliance in a timely manner (or if significant violations have occurred), the Environmental Specialist shall immediately determine if the violation meets one or more of Iowa DNR's Enforcement Priorities. If the Environmental Specialist determines that a violation(s) does not meet one or more Enforcement Priorities, in most cases the Environmental Specialist shall monitor the violator's progress in reaching compliance. This may require additional site visits to the violator's facility and/or additional technical assistance. If the violator achieves compliance, the Environmental Specialist shall document the compliance (e.g., reinspection or report from violator) in the appropriate file. If the violator fails to reach compliance after these additional efforts, the Environmental Specialist should reconsider the referral option (i.e., it is possible that this case now meets an Enforcement Priority). There may be situations that warrant further enforcement that do not meet the Enforcement Priorities.

If the Environmental Specialist believes that a violation(s) meets one or more of Iowa DNR's Enforcement Priorities, the Environmental Specialist will prepare a summary of the proposed enforcement referral and submit it to his/her Supervisor and appropriate Enforcement Coordinator. A meeting date to discuss the enforcement referral is then set. This meeting shall occur within ten (10) days after the Environmental Specialist determines that a violation(s) meets one or more Enforcement Priorities. This meeting will usually be conducted by conference call and will include the Environmental Specialist, the Environmental Specialist's Supervisor, and the Enforcement Coordinator of the relevant program area. Others may also be invited to this meeting, including other Supervisors (either field or central office) who have involvement in this matter.

At this meeting, the Environmental Specialist will present a summary of the case and outline the violation history, the aspects of the proposed referral that meet an Enforcement Priority, the recommendation of the type of action to be taken (e.g., Administrative Consent Order, Administrative [unilateral] Order or referral to the Attorney General's office), and the penalty recommendation. The Environmental Specialist's Supervisor may provide additional supporting comments. The Enforcement Coordinator will comment on whether the proposed referral meets an Enforcement Priority, is comparable to other referrals received before, and if the penalty recommendation is appropriate based on similar actions taken by Iowa DNR. The individuals at this meeting shall attempt to reach consensus on whether to proceed to referral, but if consensus is not reached, the Enforcement Coordinator's decision is final. *Note: a decision may be made to recommend referral even if the violation(s) does not meet an Enforcement Priority.*

If a decision to move to referral is made, the Environmental Specialist will be directed to prepare and submit a complete Referral Package with ten (10) days after the decision is made. If a decision is made not to refer, the Environmental Specialist shall monitor the violator's progress in reaching compliance. A violator should be provided no more than ninety (90) days to demonstrate compliance. During this time period the Environmental Specialist shall conduct additional site visits to the violator's facility and/or provide additional technical assistance. If the violator achieves compliance, the Environmental Specialist shall document the compliance (e.g., reinspection or report from violator) in the appropriate file. If the violator fails to reach compliance after these additional efforts, the Environmental Specialist will be directed to prepare a new referral summary and schedule another meeting within ten (10) days after making this final determination of non-compliance. A decision to refer should be strongly considered at this time.

IV. The Referral Process

If a decision to refer has been made, the next step is for the Environmental Specialist to prepare a Referral Package. The Referral Package shall include the following elements:

- Identification of the violator, including status (individual, corporation, etc.) and registered agent and/or attorney for the violator;
- Location (address, city, county) of the facility or violations;

- Description of the facility (i.e., what it processes or manufactures, types of equipment, etc.);
- If the violator is an individual, a description of the property in question, including the local address and legal description from the appropriate county office;
- Citations to statutory and rule provisions violated, with factual statement of the act or omission that constituted each violation;
- Chronology of the events leading up to and including the cited violations, including copies of:
    - Complaint forms;
    - Field notes;
    - Inspection reports;
    - NOVs;
    - Phone logs;
    - Correspondence between violator and Iowa DNR;
    - Affected permits and amendments to those permits;
    - Permit applications or permit modification applications;
    - Photos or videotapes;
    - Sample results;
    - Chain of custody documents;
    - Reports from other law enforcement agencies;
    - Return receipts from any service or certified mail;
    - Other service documents;
    - E-mails concerning the matter; and
    - Lab reports.
- Chronology of the past history with the violator, if any exists. This would include copies of:
    - Complaint forms;
    - Field notes;
    - Inspection reports;
    - NOVs;
    - Previous administrative orders and/or referrals to the Attorney General's office;
    - Phone logs;
    - Correspondence between violator and Iowa DNR;
    - Photos or videotapes;
    - Sample and lab results; and
    - Chain of custody documents.
- If known, the violator's position regarding the violations;
- Penalty recommendation, including discussion and analysis of the factors in 567 Iowa Administrative Code (IAC) chapter 10, including:
    - Economic benefit of noncompliance – description of information used to calculate the economic benefit, including the benefit for not complying (avoided costs) and the benefit for delaying compliance (delayed costs). This should include any supporting documentation justifying the economic benefit estimate (e.g., landfill costs, preparation costs, etc.);

- Gravity – discussion of the effects and impact of the violations on the environment (actual or threatened); size of the facility; degree ambient standards were exceeded; repeated violations and/or violations of administrative orders; and threats to the integrity of the regulatory program;
- Culpability – the degree of intent or negligence involved in committing the violations and a description of efforts made by the violator to avoid or correct the violations;
- Mitigating or aggravating factors – description of actions or events that would increase or decrease the penalty.
- See Section VIII for a discussion of how Iowa DNR calculates administrative penalties.

- Recommendation of the type of enforcement recommended (i.e., Administrative Consent Order, Administrative [unilateral] Order or referral to the Attorney General's office) and specific reasons to support the recommendation.
- Detailed description of the technical remedy that is sought through enforcement.

To assist in this effort, Iowa DNR has created a Referral Template to use in putting together the Referral Package. The amount of detail to be included in each Referral Package should be discussed by the Environmental Specialist, his/her Supervisor, and, if necessary, the Enforcement Coordinator. The completed Referral Package shall be reviewed by the Environmental Specialist's Supervisor within five (5) days after receipt. Once approved, the Environmental Specialist (or designee) shall send the Referral Package to the Enforcement Coordinator, the Legal Services Bureau Chief, and the Division Director via e-mail. Others may also receive this package, depending on the specific facts of the case. In the e-mail, the Environmental Specialist (or designee) should state clearly that the appropriate Enforcement Coordinator has approved the referral. That will be the Legal Services Bureau Chief's prompt to assign this case to a DNR Attorney.

V. Referral to Legal

Within five (5) days after receipt of the Referral Package, the Legal Services Bureau Chief will assign the enforcement case to a DNR Attorney. The version of the Referral Package received by the Legal Services Bureau Chief will be an electronic version. This version may not contain all the documents related to the case. Those documents are normally sent in regular mail and take a few extra days to arrive. Nevertheless, the Legal Services Bureau Chief will move forward with assignment, knowing that the DNR Attorney may not have all the information necessary to proceed with the case. After assigning a DNR Attorney to the case, the Legal Services Bureau Chief will forward the electronic version of the Referral Package (and notice of case assignment) to the DNR Attorney, all Supervisors in the ESD, and the Division Director. The purpose of sending the Referral Package to other ESD Supervisors is to solicit information about the violator that may not have been known by the Environmental Specialist, Supervisor, or Enforcement Coordinator (e.g., issues or concerns about the violator in another program area). This is an opportunity for the other ESD Supervisors to provide that information to Legal.

The DNR Attorney, within seven (7) days after case assignment, will check the Referral Package for completeness (including determining whether all hard copies have arrived in the mail). If the DNR Attorney determines that the Referral Package is incomplete, the DNR Attorney will notify the Environmental Specialist and the Environmental Specialist will supplement the referral within ten (10) days after notice from the DNR Attorney. Once the Referral Package is complete, the DNR Attorney will draft the appropriate legal document (e.g., enforcement order or Litigation Report) within ninety (90) days.

Soon after receiving the Referral Package, the Division Director will review the package to determine if the case merits referral to the Iowa Attorney General's office. The Division Director will notify the Legal Services Bureau Chief and the DNR Attorney assigned to the case of the decision made by the Division Director.

VI. Types of Administrative/Civil Enforcement

There are three major types of escalated administrative/civil enforcement taken by Iowa DNR ESD:

- Administrative Consent Orders
- Administrative [unilateral] Orders
- Referrals to the Iowa Attorney General's office.

Administrative orders (either consent or unilateral) are used only to resolve civil violations, never criminal violations. They may be used when Iowa DNR assesses penalties of not more than $10,000 for violations of Iowa Code chapters 455B, 455D, 459, 459A and 459B or rules, permits, or orders adopted or issued under those chapters. See Iowa Code section 455B.109. Referrals to the Attorney General's office should occur for the reasons noted below. One additional enforcement option, referral to US EPA, is used on occasion and is also described below.

As noted above, when a DNR Attorney receives a Referral Package, it will contain a recommendation on the type of enforcement to take in the case. The presumption is that this recommendation will be the appropriate enforcement response, unless the DNR Attorney (and Legal Services Bureau Chief) can demonstrate that another enforcement action is more appropriate. If Legal recommends another course of action, the DNR Attorney shall schedule a meeting with the Environmental Specialist, Supervisor, Enforcement Coordinator, and Legal Services Bureau Chief to discuss this matter and attempt to reach consensus on the appropriate enforcement response. If consensus is not reached, the decision of the Enforcement Coordinator is final. Also, as noted above, if the Division Director indicates that a case is appropriate for referral to the Iowa Attorney General's office, that recommendation should be considered and, if accepted, a Litigation Report prepared by the DNR Attorney.

In addition, the DNR Attorney will review the penalty recommendation contained within the Referral Package. If the DNR Attorney has recommendations on changes to

that penalty calculation, the DNR Attorney will contact the Environmental Specialist, Supervisor and Enforcement Coordinator. The parties will attempt to reach consensus on the proper penalty calculation. Again, however, if consensus is not reached, the decision of the Enforcement Coordinator is final. See Section VIII for a discussion of how Iowa DNR calculates administrative penalties.

A. Administrative Consent Order

Administrative Consent Orders involve negotiations between Iowa DNR and the violator to reach agreement on the content of the orders. Administrative Consent Orders should be used when both Iowa DNR and the violator are interested in reaching a settlement agreeable to both the violator and Iowa DNR. Iowa DNR staff can use Administrative Consent Orders when schedules of compliance or remedies need to be negotiated with a company. These orders may also contain stipulated penalties to address potential future violations. Supplemental Environmental Projects can also be agreed upon as part of these settlements. By signing the Administrative Consent Order, the violator waives its right to seek a contested case hearing / judicial review of the order under chapter 17A of the Iowa Code.

If a decision is made to pursue an Administrative Consent Order with the violator, the DNR Attorney will draft the order and send the draft to the Legal Services Bureau Chief, Enforcement Coordinator, Environmental Specialist and Supervisor. This draft shall be sent within ninety (90) days after the DNR Attorney receives a complete Referral Package. Within ten (10) days after receipt of the draft, the reviewers will provide their comments to the DNR Attorney and the DNR Attorney should make all necessary changes and send the Administrative Consent Order to the violator (i.e., an "invitation to negotiate"). In the invitation, the DNR Attorney will inform the violator that it must notify the DNR Attorney within fourteen (14) days regarding its willingness to negotiate a settlement of this matter. If the violator refuses to negotiate, the DNR Attorney shall discuss other enforcement options with the Environmental Specialist, Supervisor, Enforcement Coordinator, and Legal Services Bureau Chief. If the violator notifies the DNR Attorney that it wishes to negotiate, then settlement discussions shall take place for a time period not to exceed one-hundred twenty (120) days. If settlement occurs, then the DNR Attorney shall draft the final terms and conditions of the order and send to the violator for signature within ten (10) days after reaching settlement. If settlement is not reached, then the DNR Attorney shall discuss other enforcement options with the Environmental Specialist, Supervisor, Enforcement Coordinator, and Legal Services Bureau Chief.

Once the DNR Attorney receives a signed Administrative Consent Order, the DNR Attorney shall immediately send the order to the Director for signature (or have the Legal Services Bureau Chief deliver to the Director for signature). The Director of Iowa DNR will sign the Administrative Consent Order within five (5) days after receipt. The Environmental Specialist shall document compliance with the order in the appropriate file. See Section X.

B. Referral to the Iowa Attorney General's office

Iowa DNR staff should refer civil cases to the Attorney General's office when the potential penalty exceeds the $10,000 limit set out in Iowa Code section 455B.109. In addition, Iowa DNR staff can refer a violator to the Attorney General's office if the violator has exhibited a history of recalcitrance, is not expected to negotiate an Administrative Consent Order, or has violated previous Iowa DNR orders. Other factors to consider in making an Attorney General referral recommendation include, but are not limited to, the gravity of the violations, the need for temporary or permanent injunctive relief, presence of multi-media violations, violation of an earlier judicial consent order or judgment, and possible bankruptcy. In addition, if Iowa DNR and the violator fail to negotiate a settlement administratively, the case may be referred to the Attorney General's Office for civil action.

Iowa DNR staff must seek approval from the Environmental Protection Commission (EPC) before referring a case to the Attorney General's office. However, the Attorney General does have independent authority to commence civil or criminal proceedings pursuant to section 455B.112 of the Iowa Code.

The DNR Attorney shall notify the violator as soon as the determination has been made to seek referral. In the communication, the DNR attorney shall inform the violator of the proposed referral. After a decision is made to refer a case to the Iowa Attorney General for civil enforcement action, the DNR Attorney will draft a Litigation Report and send the report to the Legal Services Bureau Chief, Enforcement Coordinator, Environmental Specialist and Supervisor. This report shall be sent within ninety (90) days after the DNR Attorney receives a complete Referral Package. Within ten (10) days after receipt of the report, the reviewers will provide their comments to the DNR Attorney and the DNR Attorney should make all necessary changes and send to the Legal Services Bureau Chief and Division Director. The Legal Services Bureau Chief will prepare an agenda item for the upcoming EPC meeting to ensure that the case will be heard at that time. The DNR Attorney will once again notify the violator of the date of the EPC meeting, provide a copy of the public litigation report for the violator, and either provide a specific appointment time or inform the violator that a time to speak before the EPC regarding the proposed referral may be requested. Prior to the time of the next EPC meeting the EPC members will be provided a copy of the Litigation Report and agenda item.

At the EPC meeting, the EPC will discuss the merits of referring the case to the Attorney General's office. The DNR Attorney will provide information in support of referral and will be prepared to answer questions from the EPC members. If it requested time, the violator will be able to also present information to the EPC (usually information in opposition to the referral). If the EPC votes to refer, then the Legal Services Bureau Chief will send a letter informing the Division Director of that decision within seven (7) days after the EPC meeting. Accompanying this letter will be supporting documentation from Iowa DNR's enforcement file. If the EPC votes not to refer then the DNR Attorney will discuss other enforcement options with the Environmental Specialist, Supervisor, Enforcement Coordinator, and Legal Services Bureau Chief. Of

course, the Iowa Attorney General may use his/her independent authority to pursue this matter pursuant to section 455B.112 of the Iowa Code.

C. Administrative Order

Administrative Orders are actions by Iowa DNR and are issued without negotiations with the violator. They are signed only by Iowa DNR. They may require a violator to perform certain actions, usually within certain time frames. In addition, Administrative Orders usually include the requirement to pay an administrative penalty. These orders are subject to a contested case hearing / judicial review under chapter 17A of the Iowa Code. Iowa DNR staff should recommend the use of Administrative Orders only in limited instances. For example, Administrative Orders are appropriate if immediate emergency action is needed to abate violations directly impacting human health and the environment.

If a decision is made to prepare an Administrative Order, the DNR Attorney will draft the order and send the draft to the Legal Services Bureau Chief, Enforcement Coordinator, Environmental Specialist and Supervisor. This draft shall be sent within ninety (90) days after the DNR Attorney receives a complete Referral Package. Within ten (10) days after receipt of the draft, the reviewers will provide their comments to the DNR Attorney and the DNR Attorney should make all necessary changes and send the order to the Director for signature (or have the Legal Services Bureau Chief deliver to the Director for signature). The Director of Iowa DNR will sign the Administrative Consent Order within five (5) days after receipt.

Within three (3) days after receiving the signed Administrative Order from the Director, the Legal Services Bureau will send the order to the violator. If the violator complies with the terms of the Administrative Order, the Environmental Specialist shall document compliance with the order in the appropriate file. See Section X.

If the violator wishes to appeal this Administrative Order, he/she will file a Notice of Appeal with the Iowa DNR. At that point, the DNR Attorney may attempt to settle this appeal with the violator. Any settlement discussions shall take place within ninety (90) days after receipt of the Notice of Appeal. If settlement is not achieved within that time frame, the DNR Attorney will set that appeal for administrative hearing. If a case is set for hearing, Iowa DNR will comply with the schedule set by the administrative law judge and/or the EPC. See 561 IAC chapter 7.

D. Referrals to US EPA

Iowa DNR may refer violations of federal regulatory programs to the US EPA without following the procedures outlined above. Enforcement staff may also choose to make the enforcement recommendation for a US EPA referral at any stage of the proceedings, or even before they are begun. Typically, Iowa DNR, the Division Director, and US EPA staff will discuss referral before any formal decision is made. Also, US EPA staff may want to review state program files before concurring with a referral recommendation.

VII. Criminal Enforcement

Iowa DNR enforcement staff may determine that some violations warrant more significant penalties than allowed for administrative or civil enforcement. These would include cases where the Environmental Specialist suspects fraud or falsification of records by the violator, a violator who knowingly commits an illegal act, or where the violator has a history of committing significant environmental violations. Once an Environmental Specialist identifies a case as being potentially criminal, the Environmental Specialist should discuss the case with the Supervisor, Enforcement Coordinator, Field Services and Compliance Bureau Chief, and Legal Services Bureau Chief. This communication can take place electronically, by phone, or in person. This dialogue should occur immediately, as it is imperative that criminal investigations take place as soon as possible to ensure the preservation of evidence.

If consensus is reached on recommending a criminal investigation of the matter, the Environmental Specialist shall contact the appropriate authorities for possible criminal investigation and prosecution.

VIII. Administrative Penalties

The primary purpose of a penalty assessment is to maximize compliance with regulatory programs both in its application to individual violators and the regulated public in general. This purpose can be served most effectively by a fair and equitable policy which is consistently applied, establishes clear and predictable consequences to non-compliance, does not allow violators to gain an economic benefit or competitive advantage from non-compliance or delayed compliance, encourages respect for regulatory authority, recognizes good faith mitigating factors, deters future and ongoing violations through imposition of financial incentives and disincentives and encourages timely and efficient resolution of regulatory disputes.

Iowa Code section 455B.109(1) sets out that Iowa DNR's administrative penalties shall be determined from evaluation of the following relevant factors: (1) economic benefit associated with the violation, (2) gravity of the violation, (3) the culpability of the violator, and (4) the maximum penalty authorized for that violation under Iowa Code chapter 455B. These factors, and how to calculate the penalty, are further explained in 567 IAC chapter 10. As set out in both statute and rule, Iowa DNR is limited to a penalty assessment of $10,000 per order. Therefore, Iowa DNR should refer to the Iowa Attorney General those enforcement matters where the penalty assessment is greater than this amount.

A. Relevant Factors

As set out above, the relevant factors in calculating an administrative penalty include the economic benefit associated with the violation, the gravity of the violation, the culpability of the violator, and the maximum penalty authorized for that violation under Iowa Code chapter 455B. These and other factors are discussed below.

1. Economic Benefit Assessment

Economic benefit represents the financial or other economic benefit or advantage the violator has gained due to delayed or avoided costs of compliance, partial compliance or failure to comply. 567 IAC 10.3(2) requires that, in assessing an administrative penalty, "[t]he actual or reasonably estimated economic benefit shall always be assessed." Reasonable estimates of economic benefit should be made where clear data are not available. 567 IAC 10.2(1). The different kinds of economic benefit are discussed below.

a. Avoidance Costs

Avoidance costs are those which the violator has likely saved due to noncompliance or partial noncompliance and which will not be incurred by taking corrective action. Compliance costs may represent avoided capital and service related costs and costs associated with the expenditure of time and resources which have been avoided or cannot be incurred by taking some corrective action as the result of a violation. Examples might include costs saved due to (1) failure to conduct periodic monitoring, testing and sampling or other periodic regulatory action such as failure to maintain records over a period of time; (2) failure to properly operate or maintain existing control equipment; and (3) avoidance of operation and maintenance expenses for equipment that was not installed.

b. Delayed Compliance Costs

Delayed compliance costs are those that must be incurred in order to remedy a violation and which have been delayed due to non-compliance or partial non-compliance. This economic benefit represents the value of money earned on the total cost of full compliance over the period of delayed compliance. The period of non-compliance shall be calculated beginning with the earliest compliance date unless the Iowa DNR has granted a written compliance extension which expressly acknowledges the extension is based on a good cause finding excusing the failure to comply. Iowa DNR's failure to respond to a request for extension shall not be considered a grant of an extension for purposes of penalty assessment.

2. Gravity Assessment

The gravity of a violation takes into consideration the following factors: (1) actual or threatened harm to the environment or the public health and safety; (2) involvement of toxic or hazardous substances or potential long-term effects of the violation; (3) the degree to which ambient or source-specific standards are exceeded; (4) state and federal program priorities, size of facility, and other pertinent factors; (5) whether the violation is repeated and whether it violates an administrative or court order; (6) whether the type of violation threatens the integrity of a regulatory program; and (7) expenses or efforts by Iowa DNR in detecting, documenting, or responding to a violation. 567 IAC 10.2(2).

In assessing gravity, Iowa DNR staff should consider the amount of a pollutant that has been released or could have been released, the toxicity of the pollutant, the sensitivity of the environment, the proximity of actual or potential routes of human exposure and exposure receptors, the length of time of exposure, the potential for explosive, fire and other safety hazards. This assessment should also include whether the violation

threatens the integrity of a regulatory program. Examples would include the failure to maintain financial assurance to cover liability for releases of contaminants, failure to conduct leak detection or monitor pollution control equipment, failure to report and respond to suspected or actual releases of contaminants, or failure to maintain accurate records. Gravity also takes into account the extent of deviation from a regulatory standard. Factors to consider include the duration of time over which there has been non-compliance, the delay in reaching compliance and the degree to which the violator has partially satisfied a regulatory standard.

567 IAC 10.3(2) allows the Iowa DNR to assess up to $3,000 for the gravity portion of the penalty. This is a per day penalty limit; thus, any gravity calculation above $3,000 must include multiple days of violations.

3. Culpability Assessment

Culpability takes into account the degree of intent or negligence of the violator in committing the violation. Factors under 567 IAC 10.2(3) include whether the case involves false reporting of required information or tampering with monitoring devices. It also includes whether the violator has taken remedial measures or mitigated the harm caused by the violation. Under 567 IAC 10.3(2), the Iowa DNR may assess up to $3,000 for the culpability portion of the penalty. This is a per day penalty limit; thus, any culpability calculation above $3,000 must include multiple days of violations.

4. Maximum Penalty Authorized Under Iowa Code chapter 455B

The penalty provisions of Iowa Code chapter 455B establish different maximum penalties for different categories of violations, for example: $500 per day for flood plain and water rights (455B.279); $1,000 for hazardous condition notification (455B.386); $5,000 per day for solid waste (455B.307), wastewater and drinking water (455B.191), and underground tanks (455B.477); and $10,000 per day for air pollution (455B.146).

5. Minimum Assessment

567 IAC 10.3(1) sets out that "[n]o penalty may be assessed unless the cumulative amount is $50 or more."

6. Multiple Violation Assessment

If multiple violations are being evaluated, Iowa DNR may apply the penalty assessment under this rule for each violation or may consider one or more violations as a group for purposes of applying the penalty assessment.

7. Mitigation and Aggravation Adjustment

Pursuant to 567 IAC 10.3(2), Iowa DNR in its discretion may take into account aggravating or mitigating factors to increase or decrease the penalty by up to $1,000. Factors to consider include the extent to which the violator has taken remedial measures to mitigate the harm caused by the violation or the violator's history of violations, non-compliance and/or remedial actions.

B. Other Considerations

There are some miscellaneous items to discuss with respect to administrative penalties. These include documentation of penalty reduction, stipulated penalties, and collection of past due penalty amounts.

1. Documentation of Penalty Reduction

If during negotiations involving an Administrative Consent Order or in settling an Administrative Order, Iowa DNR agrees to reduce the original penalty amount, Iowa DNR staff shall document the rationale or justification for such penalty reduction and include in the enforcement file. All penalty reductions shall be calculated in a manner that is consistent with the above penalty process.

2. Stipulated Penalties

Stipulated penalties for future violations may be incorporated into an Administrative Consent Order or in settlement of an Administrative Order, provided the stipulated penalty provision complies with 567 IAC chapter 10 and preserves the right of the Iowa DNR and the State of Iowa to pursue, in lieu of the stipulated penalties, all other administrative and judicial enforcement remedies for any future violations. In no event shall the stipulated penalties assessed under an Administrative Consent Order or settlement of an Administrative Order, when added to the originally assessed penalties under the order, exceed the $10,000 maximum established in Iowa Code section 455B.109.

3. Collection of Unpaid Penalties

Iowa DNR has entered into an Iowa Code chapter 28 Agreement with the Department of Revenue to provide additional means of collecting penalties, in May 2005. This 28E Agreement was chosen because of the particular statutory collection powers available to the Department of Revenue. A penalty amount may be forwarded to the Department of Revenue for collections at any time, based upon the recommendation of the assigned DNR Attorney. The Department of Revenue provides the Legal Services Bureau a monthly report that documents the penalty monies collected by Revenue that month.

IX. Supplemental Environmental Projects (SEPs)

Iowa DNR may offer or the violator may propose a SEP as part of the settlement of an Administrative Consent Order. Whether to allow or accept a SEP is entirely within the discretion of Iowa DNR as a litigation settlement option. The practice of utilizing SEPs as settlement options shall not be interpreted to grant any right of entitlement or expectation interest in utilizing a SEP as part of a penalty assessment.

X. Monitoring Compliance with Administrative Consent Orders and Administrative Orders

Monitoring compliance with signed Administrative Consent Orders and Administrative Orders is the primary responsibility of the Environmental Specialist. The DNR Attorney

assigned to the case will track payment of the administrative penalty, but any other requirements contained within the order (e.g., compliance schedule) are the responsibility of the Environmental Specialist to track. This also includes tracking whether stipulated penalties become due for failure to meet requirements of an order. If stipulated penalties become due, the Environmental Specialist shall contact the DNR Attorney for appropriate follow-up.

The Environmental Specialist shall maintain documentation in the facility file of compliance with the order (e.g., injunctive relief). The DNR Attorney shall provide the Environmental Specialist with a copy of the check sent by the violator, or with other evidence that the penalty has been paid, to satisfy the penalty portion of the order. In addition, as set out above, these enforcement files shall contain justifications for penalty reductions in a manner that is calculated and consistent with the penalty process described above.

XI. Reporting

Numerous reports are generated during the enforcement process. On a monthly basis, the Legal Services Bureau Chief provides the Enforcement Coordinators with a status report of each open case. In addition, the Legal Services Bureau provides the EPC monthly reports on the following:

- List of Unpaid Administrative Penalties;
- Cases Referred to the Attorney General's office (and current status);
- Appealed cases (and current status);
- Penalties paid the previous month (including penalties collected by the Department of Revenue); and
- New enforcement actions taken the previous month.

The reports to the EPC are also located on Iowa DNR's website for public review

XII. Enforcement Priorities

Animal Feeding Operations

1. **Fish kill/acute water quality degradation**. Manure spills and/or discharges that result in destruction of aquatic life, including fish, are a top priority.

2. **Serious water quality degradation**. Release of pollutants may result in degradation of an aquatic resource without an obvious fish kill, but the effect may be impaired use and enjoyment of the water resource or chronic pollution harming aquatic life.

3. **Unauthorized construction**. Construction of AFO structures (including open lots) without or contrary to a permit or other required documentation is

also a DNR priority. Proper compliance with AFO siting and construction requirements are essential elements of the AFO program, which helps keep pollutants out of streams.

4. **Failure to submit MMP updates**. MMPs are the cornerstone of the animal feeding program. The MMP helps ensure that any proposed or current confinement feeding operation over 500 animal units has adequate land to use the manure nutrients it produces.

5. **Failure to obtain proper manure application certification.** The manure applicator certification program is an important component of the animal feeding operation regulations. The program ensures that manure is transported and applied properly.

Air Quality

1. **Asbestos violations**. Asbestos violations at schools, hospitals and community centers are a top priority. Because these facilities gather large groups of people in enclosed spaces for significant periods during a day, the DNR is focusing resources to ensure these facilities meet state asbestos removal requirements.

2. **Major source and/or repeat air quality violations**. Violations meeting at least one of these criteria are a DNR priority:
   a. At a major source, the violation relates to the pollutant for which the source is considered major (for example, particulate matter, sulfur dioxide).
   b. Violation affects minor source status at a synthetic minor source.
   c. Chronic or repeat violations.
   d. Violations that are an immediate threat to health or the environment.

Solid Waste

1. **Open burning**. It is a DNR priority to eliminate improper disposal of trade wastes, including open burning. Trade wastes are made up of waste resulting from trade, business, industry or commercial venture. Proper disposal will eliminate burning of these wastes, which helps improve or maintain air and water quality.

2. **Construction and demolition wastes**. Another priority is to ensure compliance with proper disposal of construction and demolition wastes by businesses. Construction and demolition debris is responsible for 16 percent, or 450,000 tons, of material landfilled in Iowa each year. This debris consists of materials such as wood, insulation, concrete, asphalt, brick, drywall, metal and shingles. Improper disposal can cause air and water pollution.

Underground Storage Tanks

1. **Failure to report a suspected release**, Priority will be given to responsible parties that fail to timely report a release or suspected release or fail to take corrective action upon learning of such potential or actual release. Prompt report of a release can reduce or halt the spread of contamination.

2. **Operating USTs without an approved financial responsibility mechanism**. The ownership and responsibility for USTs requires demonstrated financial responsibility to ensure adequate resources in the event of a leak. Maintaining proper financial responsibility and providing proper notification can reduce liability and allow insurance coverage in the event of a leak.

3. **Permanent closure of UST systems**. Proper closure of USTs no longer in use helps minimize potential contamination and may reveal the necessity for remediation, which is best addressed at the time of removal of a system.

4. **UST operation and maintenance violations**. To reduce contamination, responsible parties must follow laws and rules regarding the operation and maintenance of USTs. Failure to comply with these laws and rules can result in increased risks of releases and the failure to respond to a release once it occurs.

Leaking Underground Storage Tanks

1. **Free product assessment**. Responsible parties are required to initiate free product assessment and interim recovery upon discovery of a release. They must then submit an assessment plan to the DNR. Priority will be given to failure to implement a DNR approved active recovery system. Note: "free product" refers to a regulated substance that is present in a non-aqueous phase liquid (for example, liquid not dissolved in water).

2. **Corrective action design report**. Where a site has been classified as high risk, the responsible party must timely submit a corrective action design report, complete a Tier 3 work plan, or participate in DNR corrective action design meetings.

3. **Remediation assessment**. Failure to implement a remediation assessment or work plan is a DNR priority. Special priority consideration will be given to sites with known impacts to high risk receptors, such as plastic water lines, sewer lines or wells.

4. **Risk based tiered site assessment**. Failure to initiate and complete a risk based tiered site assessment is another priority. Special priority consideration

will be given to sites with "historical" contamination, recent releases or where no prior site assessment has been completed.

5. **Tiered assessment report.** The DNR also focuses on parties that fail to complete and obtain approval of a tiered assessment report. Priority consideration will be given to those situations where assessment deficiencies are such that a reliable risk classification cannot be made.

Contaminated Sites

1. **Site assessment.** The highest enforcement priority for the section is requiring a site assessment when the DNR possesses evidence of contamination at a site above standards. During this assessment, the extent of contamination is detailed and potential exposure pathways are identified.

2. **Site cleanup.** Potentially unsafe exposures may exist at sites with contaminated soils or groundwater. Cleanup actions are needed to protect human health and the environment.

Water Supply

1. **Acute maximum contaminant level (MCL) violations.** An acute MCL indicates an immediate threat to health and human safety.

2. **Failure to monitor violations.** By failing to monitor a drinking water supply, health and human safety are at risk. If a water supply does not monitor, there is no information on whether or not the supply is safe.

3. **In-progress construction without a permit.** It is essential that there is a permit prior to construction of a water supply. A construction permit ensures that the construction standards are being met to protect health and human safety.

4. **Cumulative non-acute MCLs.** Ongoing violations of a non-acute MCL indicates a long-term threat to health and human safety.

5. **Operator certification compliance.** The purpose of the water operator certification program is to ensure that water and wastewater system operators have sufficient knowledge and experience to properly operate the systems, and in turn protect health and human safety and the environment. Failure to have a certified operator is a long-term threat to health and human safety.

Wastewater

1. **Significant wastewater effluent violations.** These violations occur when a wastewater treatment facility significantly exceeds its monthly average permit limits. For example, if a wastewater treatment facility exceeds its monthly average permit limit for various pollutants (e.g. zinc, total suspended

solids) four out of six months, DNR will consider that facility to have significant effluent violations.

2. **Bypass events**. Wastewater treatment plants are designed for two basic purposes: to speed up the natural purification processes that occur in rivers, lakes, and streams; and to reduce pollutants that may interfere with these processes. When wastewater treatment facilities are "bypassed," the waste is not treated before it is deposited directly into a body of water. Chronic bypass events are a priority for enforcement.

3. **Failure to obtain or renew an NPDES permit**. The discharge of any pollutant from a point source into a navigable water is prohibited unless authorized by an NPDES permit.

Storm Water

1. **Failure to have a permit**. No storm water construction permit or failure to renew a permit. A permit for storm water discharge applies primarily to industrial and commercial facilities and activities. Contaminants introduced in storm water runoff or into storm sewers may impact drinking water sources, waters protected for recreation, and waters protected for aquatic life as well as other beneficial uses.

2. **No Storm Water Pollution Prevention Plan**. A SWPPP is a fundamental requirement of a storm water permit. The plan identifies potential sources of pollution, describes practices to reduce pollutants, and helps assure compliance with permit conditions (when properly designed and implemented).

IOWA DEPARTMENT OF NATURAL RESOURCES
FIELD OFFICE 2, MASON CITY
AGRICULTURAL DRAINAGE WELL INSPECTION FORM

CONTACT INFORMATION

Permit Holder: _____ **Permit #:** _____

Mailing address: _____

Date of Inspection: _____ **Persons Present:** _____

WELL INFORMATION

Legal Description: _____
(¼, ¼) (¼) (Section) (Township) (County)

GPS Coordinates: **X (easting):** _____ **Y (northing):** _____

Depth of ADW: _____ **feet** **Diameter of ADW:** _____ **inches**

Approximate Drainage Area: _____ **acres** **Land Use in Drainage Area:** _____

Is Well in Flow Path or Depression? _____

Background: _____

PERMIT CONDITIONS COMPLIANCE

1. Other Statutes. Permittee shall be responsible for compliance with all applicable provisions of state law and the rules and regulations of this Department and of federal and local health and water pollution control agencies.

2. Observation Wells Permittee's may be required to construct, maintain, and monitor observation wells, if specifically directed by the Department, to define the effects of permittee's use of an agricultural drainage well or other associated diversion of water into groundwater or on other water users who might be affected by the injection authorized herein.

a. Has the Department Required Observation Wells? **Yes:** ☐ **No:** ☐

b. Are there Observation Wells Present? **Yes:** ☐ **No:** ☐

Comments: _____

3. Surface Water Intakes The permittee's are responsible to remove any surface intakes within the agricultural drainage well and associated drainage system by December 31, 2001. Additional tile lines may be added to compensate for removal of surface water intakes provided the replacement tile does not increase the size of the agricultural drainage well area. Replacement tiles shall generally conform with the NRCS Tile Intake Replacement Interim Standard 980.

a. Are there Surface Intakes Present in Drainage Area? **Yes:** ☐ **No:** ☐

Comments: _____

4. Cisterns. The permittee's must seal or otherwise eliminate or modify as necessary any cistern within the agricultural drainage well area and associated drainage system by December 31, 2001. Compliance with the NRCS Wellhead Protection Interim Standard 981 will be considered as complying with this condition. Alternatives to the Interim Standard may be allowed with Department approval..

a. Construction Material of the Cistern? _____

b. Number of Discharge Tiles Visible in Cistern? _____

c. Number of Tiles Discharging During Inspection? _____

d. Cistern Raised to Maximum Expected Water Level?	**Yes:**	☐	**No:**	☐
e. Is the Cistern at least two feet above the ground?	**Yes:**	☐	**No:**	☐
f. Above Ground Portion of the Cistern in Acceptable Condition?	**Yes:**	☐	**No:**	☐
g. Below Ground Portion of the Cistern in Acceptable Condition?	**Yes:**	☐	**No:**	☐
h. Is Cistern Protected with a Berm?	**Yes:**	☐	**No:**	☐
i. Any Extraneous Materials (Solid Waste, etc...) in Cistern?	**Yes:**	☐	**No:**	☐

Comments: _____

5. Access/ventilation. The agricultural drainage well or its cistern shall be provided with a locked cover to prevent unauthorized access. The agricultural drainage well and the related drainage system shall be adequately ventilated in a manner that does not allow surface water to enter the agricultural drainage well. The permittee's are responsible for the repair maintenance and modifications to the ADW and associated drainage system. The overall system shall be kept in good repair. The ADW and the related drainage system shall be adequately maintained in a condition so as to prevent surface water to enter the ADW.

a. Is the Cover of the Drainage Well Locked?	**Yes:**	☐	**No:**	☐
b. Is the ADW Ventilated?	**Yes:**	☐	**No:**	☐
c. Does Ventilation allow for entrance of surface water?	**Yes:**	☐	**No:**	☐

Comments: _____

6. Repair and maintenance. The permittee's are responsible for the repair maintenance and modifications to the ADW and associated drainage system. The overall system shall be kept in good repair. The ADW and the related drainage system shall be adequately maintained in a condition so as to prevent surface water to enter the ADW.

7. Modifications of drainage well. The ADW shall not be modified without Department approval. The related drainage system may be modified without Department approval providing the modification do not enlarge the ADW drainage area. Construction of new surface water intakes is prohibited.

a. Has the Cistern been Modified to Increase Drainage into the Well?	**Yes:**	☐	**No:**	☐
b. Has the ADW drainage area changed since the permit was issued?	**Yes:**	☐	**No:**	☐

Comments: _____

8. Closure If the permittee's discontinue use of the ADW, the Department shall be notified and closure shall be made in accordance with 567 – Chapter 39 IAC, or by, and alternative method as approved by the Department. The permit shall be revoked upon submission of proof that the drainage well was properly closed.

9. Modification or cancellation of permit. As provided in 567-52.7(455B), the Department may modify or cancel the permit or require the permittee to take other actions to protect the public health and safety, to protect the public interest in lands and waters, or to prevent any manner or substantial injury to persons or property.

10. Waste Systems. Effluent from wastewater treatment or storage systems, including on-site wastewater treatment and disposal systems such as septic systems, shall not be allowed to directly enter the ADW or associated tile drainage systems. The permittee shall remove any known connections between the ADW and any septic system or other wastewater treatment system.

a. Evidence of septic tank drainage into ADW?	**Yes:**	☐	**No:**	☐

Comments: _____

11. Animal Feedlot Wastes. Wastes from animal feedlots shall not be discharged across lands which are drained by the ADW or be allowed to directly enter the ADW or associated tile system.

a. Open Feedlots in ADW drainage area? Yes: ☐ No: ☐

b. Runoff from Open Feedlot directly entering ADW? Yes: ☐ No: ☐

c. Runoff from Open Feedlot in ADW drainage area? Yes: ☐ No: ☐

Comments: _____

12. Application of pesticides, herbicides, liquid animal wastes, and nitrogen management. Application of pesticides and herbicides within the area contained within the ADW catchment area must be made in accordance with label directions and pesticide rules of IDALS (Iowa Code Chapter 206 and rules adopted pursuant Chapter 206). Application of liquid animal waste to lands drained by the ADW shall be done in a manner that will not result in a discharge of the waste to the drainage well or associated catchment area/ drainage system without filtration through the existing soil profile. Application of nitrogen from all sources, including manure, legumes, and commercial fertilizers shall not exceed the ISU extension recommended optimum levels for the crop being grown (effective with the year 2000 crop season.

a. Insecticides Usage in Drainage Area (since permit issuance):

Name of Pesticide	Frequency of Application	Timing of Application	Application Rate

b. Herbicide Usage in Drainage Area (since permit issuance):

Name of Herbicide	Frequency of Application	Timing of Application	Application Rate

c. Is Liquid Manure Regularly Applied in Drainage Area? Yes: ☐ No: ☐

If yes, How Frequently? _____

If yes, Application Method Used? _____

If yes, Approximate Application Rates: _____ gal/acre _____ lbs N/acre

d. Commercial N Application in Drainage Area? Yes: ☐ No: ☐

If yes, Application Rate: **Crop:** _____ **Rate:** _____ lbs N/acre

Crop: _____ **Rate:** _____ lbs N/acre

13. Engineering Study. An engineering study must be completed by January 1, 2009 to determine if there is an economically and physically feasible alternative to the use of the ADW, unless the Department informs the permitted otherwise.

Has an engineering study been completed? Yes: ☐ No: ☐

Comments: _____

SPECIALIST: _____ DATE: _____ REVIEWER: _____ DATE: _____

Jeremy Klatt Jeff Vansteenburg

Fields of Opportunities

STATE OF IOWA

TERRY E. BRANSTAD, GOVERNOR
KIM REYNOLDS, LT. GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
ROGER L. LANDE, DIRECTOR

#1

dBase updated___

SUBJECT: Open Feedlot Compliance Inspection - County – Facility #
NPDES Permit #

Dear Mr. :

Attached is a copy of the report resulting from the National Pollutant Discharge Elimination System (NPDES) compliance inspection on . Your attention is directed to the requirements and recommendations portion of the report.

If you have any questions, or feel this report does not represent the conditions at your facility, please call me at 712/262-4177.

c: -Reza Khosravi, AFO, WQB, ESD, DNR, Des Moines
-EPA, Animal Feeding Unit, 901 N. 5th St., Kansas City, KS 66101

enc: NPDES Inspection Report
NMP Inspection form

FIELD OFFICE #3 / 1900 N. Grand / Gateway North, Suite E17 / Spencer, Iowa 51301-2200
712-262-4177 / FAX 712-262-2901

IOWA DEPARTMENT OF NATURAL RESOURCES
OPEN FEEDLOT NPDES COMPLIANCE INSPECTION

NPDES Permit # Facility ID# Page 1 of

FACILITY	NAME:		PERMIT EXPIRATION DATE:		
	ADDRESS:	CITY:	STATE: Iowa	ZIP:	
PERSONS INTERVIEWED	NAME:	PHONE:			
RECEIVING WATERCOURSE	STREAM NAME:				
INSPECTION DATE	DATE THIS INSPECTION:	DATE LAST INSPECTION:	TIME OF INSPECTION:		
SYSTEM TYPE	☐System 1 (once per year) ☐System 2 (July/Oct.)	☐System 3 (April/July/Oct.) ☐System 4 (Each Significant Precip. Event)	☐System 5 (April/May/Oct./Nov.) ☐AT System		
ANIMAL INFORMATION	ANIMAL TYPE(S)	PERMITTED HEAD	CURRENT HEAD		

PERMIT COMPLIANCE SUMMARY			
SELF-MONITORING	QUARTERLY OPERATION REPORTS SUBMITTED: ☐Sat. ☐Unsat.*	REQUIRED DATA ON QUARTLERY REPORT: ☐Sat. ☐Unsat.*	ROUTINE VISUAL INSPECTIONS: ☐Sat. ☐Unsat.*
	ANNUAL REPORTS SUBMITTED: ☐Sat. ☐Unsat.*	REQUIRED DATA ON ANNUAL REPORT: ☐Sat. ☐Unsat.*	ANNUAL MANURE SAMPLE TAKEN: ☐Sat. ☐Unsat.*
	NMP PUBLIC NOTICE: ☐Sat. ☐Unsat.*	CURRENT NMP: ☐Sat. ☐Unsat.*	LAND APPLICATION RECORDS: ☐Sat. ☐Unsat.*
	ANIMAL INVENTORY RECORDS: ☐Sat. ☐Unsat.*	EQUIPMENT INSPECTION DOCUMENTED ☐Sat. ☐Unsat.*	DEPTH GAUGE INSTALL & MONITORING: ☐Sat. ☐Unsat.*
OBSERVATIONS	SOLIDS SETTLING STRUCTURES: ☐Sat. ☐Unsat.*	BASIN OR AT STRUCTURES ☐Sat. ☐Unsat.*	EVIDENCE OF OVERFLOW:
	MANURE STOCKPILING ☐Sat. ☐Unsat.*	MANAGEMENT OF DEAD ANIMALS ☐Sat. ☐Unsat.*	MANAGEMENT OF CHEMICALS ☐Sat. ☐Unsat.*
	SURFACE DRAINAGE IS DIVERTED FROM OPENLOT ☐Sat. ☐Unsat.*	ANIMALS HAVE NO CONTACT WITH WATERS OF US ☐Sat. ☐Unsat.*	FEEDSTOCK PROPERLY HANDLED & STORED ☐Sat. ☐Unsat.*

* See comments

AUTHENTICATION	INSPECTOR:	DATE:	REVIEWER:	DATE:

GENERAL FACILITY DESCRIPTION

SELF MONITORING

Operation Reports Submitted; Required Data Entered on Reports
The operation reports were submitted on time and all required data was reported.

FACILITY EVALUATION

REQUIREMENTS AND RECOMMENDATIONS

#2

On-Site AFO Visit Form **ID#** _____ **County:** _____

Facility Name: _____ **Date of Visit:** _____

Facility Address: _____ **Section** _____ **Township** _____

Facility Owner/Operator: _____

Owner's Address: _____ **Home Phone:** _____
Cell Phone: _____

Animals at Facility in Open Feedlot:
Type of Animal(s) _____ Current Head: _____
Operation Year Round? (yes/no) Number of Pens: _____ Capacity: _____

Animals at Facility in Confinement:
Type of Animal(s) _____ Current Head: _____
Capacity: _____ Date of Construction: _____
Type(s) of manure storage: _____
Sufficient storage? _____ Discuss Winter Application Rules _____

Are there other buildings or open lots within 2500 feet of this site that are under common ownership?
No or Yes (if yes detail location, species, etc.)

Clean Water Diversion:
Clean water diversion present? (yes/no)
Comments:

Runoff:
Solids or Effluent Reaching State Waters? (yes/no)
Comments if answer is yes: _____
Feed storage contained properly? _____
Test Kit Samples Taken? (yes/no) Pictures Taken? (yes/no)
Laboratory Samples Taken? (yes/no)

Surface Tile Intakes Present in Runoff Area? (yes/no)
If yes, explain or describe: _____

Evaluation of Current Manure Control Facilities:
Solids Settling Structures Present? (yes/no) – (concrete/earthen)
If yes, describe _____
Runoff Control Basin Present? (yes/no)
If yes, describe: _____

Manure Handling Methods:
Manure Solids Scraping? (yes/no) – **Frequency of Removal:** _____ times/year
Stockpiling in Pens? (yes/no) Stockpiling Outside of Pens? (yes/no) – Location _____
Acres available for manure application: _____
Comments and Notes:

Discussion Points:

_____ Would this facility need an MMP? (constructed or expanded after 5/31/85) Yes or No
If so do they have one? Yes or No

_____ Would this facility be a combined operation? If so make sure a combined file is created for them.

_____ Would this facility need an NPDES permit? (1,000 or more animal units of the same species)

_____ Would this facility be considered a medium CAFO? (300 to 999 head open lot with manmade conveyance)

_____ Does this facility have an earthen basin for confinement animals? If so is it on our inspection list and if not discuss yearly inspections with them.

_____ Open feedlot operation includes a partially roofed animal feeding operation defined as an operation in which the animals have unrestricted access from any attached roofed structure and the square footage of the unroofed area is at least 10 percent of the square footage of any attached roofed area. (If they don't have 10%, then it must be counted as confinement.)

Office follow up:

_____Check AFO database for correct information, head, address, owner, etc.

_____Enter new facility into database with complete information.

_____ Make a file for the new facilities.

_____ If this facility has an unknown confinement earthen basin be sure to add it to our Excel basin spreadsheet and put a red E on the file.

_____ If we just have just an open lot file or just a confinement file and you found both types of housing be sure to have Linda create a combined file for this facility.

#3

Complaint Overview

Complaint ID:	14064		
Complaint Against:	Kirk TeGrootenhuis		
Date Received:	10/11/2011	Received By:	Lois Benson
Date Assigned	10/17/2011	Assigned To:	Jeff Prier
Date Responded:	10/18/2011	Status	Closed

Complainant Detail

Anonymous Y

Statement of Complaint

Feedlot does not have adequate controls for the dtarter yards and feed stocks area. Runoff goes into drainage ditch.

County Contact

County Contact: Phone: (___)___-____ Date:

Type Detail

Complaint Types
Feedlot Runoff

Program Types
AFO - Open Feedlot

Complaint Against Detail

Complaint Against:	Kirk TeGrootenhuis
Mailing Address:	3991 410th Street
Mailing City/State/Zip:	Alton IA 51003

Site Detail

Site Name	Performance Beef	**State ID**	311905856
Location Address	3991 410TH STREET	**Derived Address**	False
City / State / Zip	Alton IA 51003	**Direction**	712-230-0220 Cellular
County	Sioux	**GIS Accuracy**	20
Field Office	FO 3-Spencer	**Location Comment**	
Township Name	HOLLAND	legal, tiger, cir	

Section:	Tier:	Range:
14	95	44 W

Program Name	Program Id
Wastewater - NPDES Wastewater Treatment Operating Permit	8461089

#4

Construction Observation – Formed Manure Storage Structure

Facility Information

Name: _____, ID#: _____, _____ County

Person(s) Present: _____

☐ **Pre-Pour Observation** – ☐ **Floor and/or** ☐ **Wall – Date & Time:** _____

Sub-grade/base: Uniform: ☐ Yes ☐ No Level: ☐ Yes ☐ No Compacted: ☐ Yes ☐ No

Free of foreign matter: ☐ Yes ☐ No

Reinforcement: ☐ Not observed ☐ N/a

Rebar	Floor (both ways)	Wall (vertical)	Pump out (vertical)	Wall (horizontal)
Grade				
Size				
Spacing				

☐ Support chairs used ☐ Rebar cover minimum of 2" ☐ Splices staggered ☐ Vertical rebar closer to inside face of wall ☐ Rebar tied in place before placing of concrete ☐ Rebar continuous through construction joints

Stormwater Permit? ☐ Yes ☐ No ☐ N/a Controls? ☐ Yes ☐ No ☐ N/a

Comments _____

☐ **Pour Observation** – ☐ **Floor and/or** ☐ **Wall – Date & Time:** _____

Concrete – Compressive strength > 4,000 psi (floor/walls): ☐ Yes ☐ No ☐ Not observed

> 3,000 psi (footings): ☐ Yes ☐ No ☐ Not observed

Thickness (in): ☐ Not observed; Wall _____ Floor _____ Footing _____

Admixtures: ☐ Not used ☐ Not observed; Type and quantity: _____

Rigid forms used? ☐ Yes ☐ No ☐ Not observed

Wall rebar bent into floor or separate dowels installed to connect walls to footings? ☐ Yes ☐ No ☐ Not observed

Water stops present? ☐ Yes ☐ No ☐ Not observed

Comments _____

☐ **Post-Pour Observation** – ☐ **Floor and/or** ☐ **Wall – Date & Time:** _____

Curing: ☐ Cured w/ water ☐ Cured w/ curing compound ☐ Protected w/ wet burlap or plastic sheets

Proper curing? ☐ Yes ☐ No _____

Excessive cracking present? ☐ Yes ☐ No _____

Consolidation? ☐ Yes (Mechanical / Manual / Combination) ☐ No ☐ Not observed

Perimeter drain tile present? ☐ Yes ☐ No; Location from footing _____

Filter fabric installed? ☐ Yes ☐ No Daylights onsite? ☐ Yes ☐ No Sump pump used? ☐ Yes ☐ No

Shut-off valve installed? ☐ Yes ☐ No Sampling port installed? ☐ Yes ☐ No

Backfill placed after lateral support of walls installed: ☐ Yes ☐ No ☐ Not observed; Mixture: _____

Comments _____

Observer Name: _____

IOWA DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL SERVICES DIVISION

Field Office #1	Field Office #2	Field Office #3	Field Office #4	Field Office #5	Field Office #6
909 West Main, Ste 4	2300 15th St SW	1900 N. Grand Ave.	1401 Sunnyside Lane	401 SW 7th, Ste 1	1023 W. Madison
Manchester, IA 52057	Mason City, IA 50401	Spencer, IA 51301	Atlantic, IA 50022	Des Moines, IA 50309	Washington, IA 52353
563-927-2640	641-424-4073	712-262-4177	712-243-1934	515-725-0268	319-653-2136

#5

Manure Management Plan Compliance Review – Sales of Manure

Current Site Visit Date:	Number of Animals:	Animal Units:	N-based ☐ P-based ☐	Facility Location County:	Facility ID:

Facility Tier Status (circle): 1 2 3

Clerical Violation(s) ☐

Technical Violation(s) ☐

Violation(s) Comments _____

Facility Name _____ **Person(s) Contacted** _____ **Phone** _____

Facility Owner Information & Address Unchanged? Yes ☐ **No** ☐ **(Database must be updated)**

MMP Contents	*Are requirements being met for the following items?*	Yes	No	N.A.
a.	Current copy of IDALS certification for dry manure sales as soil conditioner [65.17(2)a; IDALS]?	☐	☐	☐
b.	Calculations to determine land area for application [65.17(2)b(1)]?	☐	☐	☐
c.	Total nitrogen available and phosphorus available, credits, application loses [65.17(2)b(2)]?	☐	☐	☐
d.	Estimate of annual amount of animal and manure production [65.17(2)b(5)]?	☐	☐	☐
e.	Manure sales forms [65.17(2)b(6)]?	☐	☐	☐
	1. Name and address of the buyer of manure?	☐	☐	☐
	2. Quantity of manure purchased?	☐	☐	☐
	3. Optimum crop yield, crop usage rate, and crop schedule?	☐	☐	☐
	4. Manure application methods and timing of application?	☐	☐	☐
	5. Location of manure application and number of acres?	☐	☐	☐
	6. Manure application rate?	☐	☐	☐
f.	Statements of intent or past manure sales records [65.17(2)b(7)]?	☐	☐	☐
	1. Name and address of person signing the statement?	☐	☐	☐
	2. Statement indicating intent of person to buy manure?	☐	☐	☐
	3. Location of farm to take manure and number of acres available?	☐	☐	☐
	4. Signature of the person who may buy the manure?	☐	☐	☐
g.	Does P Index no. generated correspond with P Index no. in plan? [65.17(17)]	☐	☐	☐
h.	Are proper soil sampling methods being used to calculate P Index?[65.17(16)]	☐	☐	☐
Records Review	*Are requirements being met for the following items?*	**Yes**	**No**	**N.A.**
i.	Copy of the current MMP [65.17(6)]?	☐	☐	☐
j.	Copy of 3* years of manure sales forms signed by each buyer and the applicant [65.17(8)]? **** In 2006 record requirements will change to five years.***	☐	☐	☐

Comments

_____

_____

_____

_____

_____

SPECIALIST NAME _____ **ON-SITE CONTACT** _____ **DATE** _____

original copy- DNR yellow copy - producer

Manure Management Plan Compliance Review – Sales of Manure

Field Observations of Manure Storage/Handling/Application & Disposal	*Are requirements being met for the following items?*	Yes	No	N.A.
k.	No obvious manure discharges [65.2(7) & 65.5]?	☐	☐	☐
l.	Manure storage structures appear to be properly operated & maintained [65.2&65.15]?	☐	☐	☐
m.	Dead animals disposed of properly [567 IAC 100.4(455B) & Code of Iowa 167.18]? Type: Compost ☐ Incinerator ☐ Burial ☐ Rendering ☐	☐	☐	☐
Discussion Items	*Were the following items discussed?*	**Yes**	**No**	**N.A.**
n.	Manure release notification made within 6 hours [65.2(9)]?	☐	☐	☐
o.	Deficiencies, violations, and tier status?	☐	☐	☐
p.	Recommendations, Improvements, environmental issues?	☐	☐	☐
q.	The manure applicator is certified [65.19]? Applicator name/number:	☐	☐	☐
r.	Proper manure application [65.3(2)-(3)]?			
s.	Other? (explain)	☐	☐	☐

Comments

SPECIALIST NAME _____ ON-SITE CONTACT _____ DATE _____

original copy- DNR yellow copy - producer

IOWA DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL SERVICES DIVISION

Field Office #1	Field Office #2	Field Office #3	Field Office #4	Field Office #5	Field Office #6
909 West Main, Ste 4	2300 15th St SW	1900 N. Grand Ave.	1401 Sunnyside Lane	401 SW 7th, Ste 1	1023 W. Madison
Manchester, IA 52057	Mason City, IA 50401	Spencer, IA 51301	Atlantic, IA 50022	Des Moines, IA 50309	Washington, IA 52353
563-927-2640	641-424-4073	712-262-4177	712-243-1934	515-725-0268	319-653-2135

#5A

Manure Management Plan Compliance Review – Nonsales of Manure

Site Visit Date Current: Last:	Number of Animals:	Animal Units:	N-based ☐ P-based ☐	Facility Location County:	Facility ID:

Facility Tier Status
Pre-visit (circle): 1 2 3
Post-visit (circle): 1 2 3

Clerical Violation(s) ☐
Technical Violation(s) ☐

Violation(s) Comments _____

Facility Name _____ Person(s) Contacted _____ Phone _____

Facility Owner Information & Address Unchanged? Yes ☐ No ☐ (Database must be updated)

Address of Facility:

MMP Contents	*Are requirements being met for the following items?*	Yes	No	N.A.
a.	Calculations to determine land area for application [65.17(4)]?	☐	☐	☐
b.	Total nitrogen and phosphorus available, credits, application losses [65.17(5)]?	☐	☐	☐
c.	Optimum crop yield, crop usage rate, and soils maps [65.17(6)]?	☐	☐	☐
d.	Manure application methods and timing of application [65.17(7)]?	☐	☐	☐
e.	Location of manure application and landowner agreements [65.17(8)]?	☐	☐	☐
f.	Estimate of annual animal production and amount of manure produced [65.17(9)]?	☐	☐	☐
g.	Methods, structures, or practices to reduce soil loss and potential surface water pollution (conservation plans for highly erodible land) [65.17(10)]?	☐	☐	☐
h.	Does P Index no. generated correspond with P Index no. in plan? [65.17(17)]	☐	☐	☐
i.	Are proper soil sampling methods being used to calculate P Index?[65.17(16)]	☐	☐	☐
Records Review	*Are requirements being met for the following items?*	**Yes**	**No**	**N.A.**
j.	Copy of the current MMP [65.17(12)]?	☐	☐	☐
k.	Records kept for 5* years (or crop rotation if longer) maintained [65.17(13)]? *10/25/06	☐	☐	☐
l.	Methods of application [65.17(13)a]?	☐	☐	☐
m.	Dates when manure was applied [65.17(13)b]?	☐	☐	☐
n.	Location of manure application and number of acres [65.17(13)c]?	☐	☐	☐
o.	Manure application rate [65.17(13)c]?	☐	☐	☐
p.	Statement of Intent for fields not owned or rented [65.17(13)e]	☐	☐	☐
Field Observations of Manure Storage/Handling/Application & Animal Disposal	*Are requirements being met for the following items?*	**Yes**	**No**	**N.A.**
q.	Manure storage structures appear to be properly operated & maintained [65.2&65.15]?	☐	☐	☐
r.	Dead animals disposed of properly [567 IAC 100.4(455B) & Code of Iowa 167.18]? Type: Compost ☐ Incinerator ☐ Burial ☐ Rendering ☐	☐	☐	☐
Discussion Items:	*Were the following items discussed?*	**Yes**	**No**	**N.A.**
s.	Manure release notification made within 6 hours [65.2(9)]?	☐	☐	☐
t.	Deficiencies, violations, and tier status?	☐	☐	☐
u.	Recommendations, improvements, environmental issues?	☐	☐	☐
v.	Manure applicator is certified [65.19]? Applicator name/number:	☐	☐	☐
w.	Proper manure application [65.3(2)-(3)]?	☐	☐	☐

Comments

SPECIALIST NAME_____ ON-SITE CONTACT _____ DATE _____

#6

IOWA DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL SERVICES DIVISION
Field Office 3, Spencer
AFO Site Survey Report

TO: Marlon Mueller **Facility Name:** **ID #:** **Facility Owner:**

Location: , Section , Township, County, Iowa

Animal Species: Expansion? No - If yes, previous construction date(s):

AUC: and/or AWC: lbs

MMP - Approval Date: or Disapproval Date:

FO DER Review Complete? Yes Committee Review Necessary? No

Investigation Date: **Date Emailed to Central Office:**

Persons Contacted:

TABLE 6 - STRUCTURE SEPARATION DISTANCE REQUIREMENTS AND OBSERVATIONS (FT)						
Type of Structure / Confinement buildings...	Residences, Businesses, Churches, Schools (Unincorporated & Incorporated Areas)	Public use areas	Major water sources[1], wellhead, cistern of ag drainage well, known sinkhole	Water sources[2]	Designated wetlands	Right-of-way of a thoroughfare maintained by a political subdivision
REQUIREMENTS	None - None	2500	1000	500	2500	100
OBSERVATIONS	-					

[1] Residences not owned by the owner of the animal feeding operation.
[2] Excluding farm ponds, privately owned lakes, or when a secondary containment barrier (SCB) is provided.

ALL AFOs - WELL SEPARATION DISTANCES REQUIREMENTS (REQ) AND OBSERVATIONS (OBS) (FT)								
Type of Structure	Public well REQ		Public well OBS		Private well REQ		Private well OBS	
	Shallow	Deep	Shallow	Deep	Shallow	Deep	Shallow	Deep
N/A	1000	400			400	400		
Formed manure storage structure	200	100			200	100		

This proposed facility as submitted by the responsible party appears to comply with the siting requirements of Chapter 459 of the Code of Iowa and Chapter 567 IAC 65. On-site observations and/or measurements document compliance with the siting requirements for this proposed facility.

SPECIALIST: Cindy Martens **DATE:** **REVIEWER:** Kenneth Hessenius **DATE:**

THIS REPORT IS FINAL AND HAS NOT BEEN ALTERED ELECTRONICALLY.

Rev. 08/16/10

#7

IOWA DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL SERVICES DIVISION

Field Office 1	Field Office 2	Field Office 3	Field Office 4	Field Office 5	Field Office 6
909 W Main St Ste 4	2300 15th St SW	1900 N Grand Ave	1401 Sunnyside Ln	401 SW 7th Ste I	1023 W Madison
Manchester IA 52057	Mason City IA 50401	Spencer IA 51301	Atlantic IA 50022	Des Moines IA 50309	Washington IA 52353
563-927-2640	641-424-4073	712-262-4177	712-243-1934	515-725-0268	319-653-2135

Uniformed Manure Storage Structure Inspection

Facility Information:

Facility Name _____ Facility ID No. _____

Legal Description (1/4, S, T, R) _____ County _____

Facility 911 Address _____ Permit/Project No. _____

Mail Address _____ Appt Time _____

Current Tier Rating _____ Clerical Violation ☐ Yes ☐ No (If yes explain) _____

Technical Violation ☐ Yes ☐ No (If yes explain) _____

Person Contacted _____ Phone No. _____ Date _____

Person Present _____ Date of Inspection _____ Previous Inspection _____

Basin Type(s) ☐ Storage Basin ☐ Anaerobic ☐ Lagoon ☐ Other _____ Year(s) Constructed _____

Animal Species ☐ Swine ☐ Poultry ☐ Cattle ☐ Dairy Head/Weight Capacity _____

Production Phase _____ Animal Unit Capacity _____

Basin Inspection:

1. Seepage In or Out?	☐ Yes	☐ No	☐ na	9. Poor Vegetation/Weeds?	☐ Yes	☐ No	☐ na
2. Stormwater Flow Into Basin?	☐ Yes	☐ No	☐ na	10. Trees/Woody Vegetation?	☐ Yes	☐ No	☐ na
3. Outer Berm Erosion?	☐ Yes	☐ No	☐ na	11. Discharge/Overflow Structure?	☐ Yes	☐ No	☐ na
4. Inner Berm Erosion?	☐ Yes	☐ No	☐ na	12. Freeboard Exceeded?	☐ Yes	☐ No	☐ na
5. Erosion Under Inlet Pipe?	☐ Yes	☐ No	☐ na	13. Deficient Groundwater Monitoring?	☐ Yes	☐ No	☐ na
6. Damaged Piping?	☐ Yes	☐ No	☐ na	14. Past Problems Unresolved	☐ Yes	☐ No	☐ na
7. Rodent Damage?	☐ Yes	☐ No	☐ na	15. Follow Up Required?	☐ Yes	☐ No	☐ na
8. Livestock Damage?	☐ Yes	☐ No	☐ na				

Last Drawdown _____ Future Drawdown _____

Comments _____

Inspector _____ Producer _____

Post-Inspection Reviewer _____

IOWA DEPARTMENT OF NATURAL RESOURCES
ENVIRONMENTAL SERVICES DIVISION

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563-927-2640	641-424-4073	712-262-4177	712-243-1934	515-725-0268	319 653-2135

#8

Nutrient Management Plan Compliance Review – Nonsales of Manure

Date of Inspection:	Facility ID#:
Facility Name:	Person(s) Contacted:
Facility Address:	Phone:

Facility Owner Information & Address Unchanged? Yes ☐ No ☐ (Database must be updated)

NMP Contents		Yes	No	N.A.
a.	Calculations to determine land area for application? [65.112(8)a]	☐	☐	☐
b.	Total nitrogen and phosphorus available, credits, application losses? [65.112(8)b]	☐	☐	☐
c.	Optimum crop yield and crop usage rate? [65.112(8)a]	☐	☐	☐
d.	Manure application methods and timing of application? [65.112(8)b]	☐	☐	☐
e.	Location of manure application fields? [65.112(8)b]	☐	☐	☐
f.	Landowner or renter agreements? [65.112(8)c]	☐	☐	☐
g.	Estimate of annual animal production and amount of manure produced? [65.112(8)d]	☐	☐	☐
h.	Does P Index no. generated correspond with P Index no. in plan? [65.112(8)a]	☐	☐	☐
i.	Are Rusle2 Profile Erosion Calculation Records included? [65.112(8)a]	☐	☐	☐
j.	Are proper soil sampling methods being used to calculate P Index? [65.112(10)b]	☐	☐	☐
Records Review		**Yes**	**No**	**N.A.**
k.	Copy of the current NMP? [65.112(10)a]	☐	☐	☐
l.	Records kept for 5 years (or crop rotation if longer)? [65.112(10)b]	☐	☐	☐
m.	Methods of application? [65.112(10)b]	☐	☐	☐
n.	Dates when manure was applied? [65.112(10)b]	☐	☐	☐
o.	Location of manure application? [65.112(10)b]	☐	☐	☐
p.	Number of acres? [65.112(10)b]	☐	☐	☐
q.	Actual manure application rate? [65.112(10)b]	☐	☐	☐
r.	Statement of Intent for application fields not owned or rented? [65.112(10)b]	☐	☐	☐
Field Observations of Manure Storage/Handling/Application & Animal Disposal		**Yes**	**No**	**N.A.**
s.	Manure storage structures appear to be properly operated & maintained? [65.112(e)1]	☐	☐	☐
t.	Dead animals disposed of properly [567 IAC 100.4(455B) & Code of Iowa 167.18]? Type: Compost ☐ Incinerator ☐ Burial ☐ Rendering ☐	☐	☐	☐
Discussion Items:		**Yes**	**No**	**N.A.**
u.	Manure release notification made within 6 hours? [65.2(9)a]	☐	☐	☐
v.	Deficiencies and violations?	☐	☐	☐
w.	Recommendations, improvements, environmental issues?	☐	☐	☐
x.	Proper manure application? [65.112(10)]	☐	☐	☐
		☐	☐	☐

Comments:

Appendix 10

IOWA DEPARTMENT OF NATURAL RESOURCES
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMIT

PERMITTEE

Brian Baldwin, Owner
2406 Mason Avenue
Anthon, Iowa 51004

IDENTITY AND LOCATION OF FACILITY

Brian Baldwin Feedlot
Feedlot Runoff Control Facility for an existing open feedlot with a total maximum animal capacity of 2,400 head of beef cattle on a 14.02-acre open feedlot. The two existing earthen settled open feedlot effluent basins (SOFEBs) with a total storage capacity of 4,012,621 gallons (1,551,372 gallons for east SOFEB and 2,461,249 gallons for west SOFEB) both designed under "System-3" are serving a drainage area of 20.5 acres. The operation's 911 address is shown under permittee's name above with a legal description of NW ¼ of Section 15, T87N, R43W, Miller Township, Woodbury County, Iowa

IDNR NPDES #: **9756538** EPA: **IA0080187**
RECEIVING WATERCOURSE: Unnamed Creek
DATE OF ISSUANCE: August 3, 2011
DATE OF EXPIRATION: August 2, 2016
YOU ARE REQUIRED TO FILE FOR RENEWAL OF THIS PERMIT BY:
February 4, 2016

The designated stream is: Unnamed Creek which is designated as presumed Class "A1, B (WW-1)".Primary contact recreational use (Class "A1"). Waters in which recreational or other uses may result in prolonged and direct contact with the water, involving considerable risk of ingesting water in quantities sufficient to pose a health hazard. such activities would include, but not be limited to, swimming, diving, water skiing, and water contact recreational canoeing. Warm water – Type 1 (Class "B (WW-1)"). Waters in which temperature, flow and other habitat characteristics are suitable to maintain warm water game fish populations along with a resident aquatic community that includes a variety of native nongame fish and invertebrate species. These waters generally include border rivers, large interior rivers, and the lower segments of medium-size tributary streams.

This permit is issued pursuant to the authority of section 402(b) of the Clean Water Act (33 U.S.C 1342(b)), Iowa Code section 455B.174, 567 Iowa Administrative Code (IAC) 62.4(12), 65.2, 65.5, 65.6, 65.101, 65.102, 65.103, 65.104, and the Federal CAFO regulations, 40 CFR 122.21, 122.23, 122.42, and 40 CFR Part 412. State and Federal rules require that the feedlot have a NPDES permit and that there be no discharge except when precipitation events greater than the 25-year, 24-hour rainfall event (5.2 inches) cause an overflow of the production area (defined in Section I A 1), that is designed, constructed and operated to comply with the requirements of 567 IAC 65, Appendix A, Open Feedlot "Control System 3" to contain manure, open feedlot effluent, settled open feedlot effluent, settleable solids or process wastewater. Generated manure must be land applied according to your IDNR approved nutrient management plan (NMP). In addition, you must be in compliance with the effluent limitations, monitoring requirements, and other adequate control measures and terms set forth in this permit to ensure that water quality standards are met by properly operating and maintaining your manure control systems to prevent water pollution from manure storage or application operations. Violations of water quality standards whether the discharge comes from the production area or land application area are violations of the permit. To find references to Iowa Administrative Code (IAC) 567

chapter 65, "Animal Feeding Operations", and the Code of Federal Regulations (CFR) used in this permit go to: http://www.iowadnr.com/afo/rules.html and http://www.gpoaccess.gov/cfr/index.html, respectively.

You may appeal any condition of this permit by filing a written notice of appeal and request for administrative hearing with the director of the IDNR within thirty (30) days of your receipt of this permit.

Any existing, unexpired Iowa operation permit or Iowa NPDES permit previously issued by the IDNR for the facility identified above is revoked by the issuance of this Iowa NPDES permit unless the facility is being upgraded or replaced by a new facility; then the existing permit will remain in effect until the new facility is completed and in operation.

BY: _____

Reza Khosravi, Ph.D.
Environmental Engineer Senior
NPDES SECTION
ENVIRONMENTAL SERVICES DIVISION

SPECIAL CONDITIONS (Conditions applicable to the production area and land application area of your operation)

SECTION I: Discharge Limitations:

A. In order to have an authorized discharge, you must meet the following requirements for both production area (item#1 "a", "b", "c") and application area (item #2 "a" & "b"):

1. For Production Area, that part of your open feedlot operation that includes the animal confinement area, the manure storage area, stockpiles of manure or liter regardless of where they are located (40 CFR 122.23 "b" "8"), the raw materials storage area, and the waste containment areas: In accordance with 567 IAC 65.101(2), and 40 Code of Federal Regulations (CFR) part 412.31, there must be no discharge of manure, open feedlot effluent, settled open feedlot effluent, settleable solids or process wastewater, into waters of the United States from the operation, unless the requirements described below in items "a", "b", and "c" are met:

   a) When a precipitation event causes an overflow, then Pollutants in the overflow may be discharged into waters of the United States provided the manure control system is designed, constructed, operated and maintained to contain all manure including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event (5.2 inches);

   b) The installed system for your two "Settled Open Feedlot Effluent Basins" or "SOFEBs" is "System 3" which was designed and proposed by your licensed engineer and approved by the IDNR to be installed and used in your operation. The design effluent storage volume for your SOFEBs is 4,012,621 gallons (1,551,372 gallons for east SOFEB and 2,461,249 gallons for west SOFEB) both designed under "System 3" serving a total drainage area of 20.5 acres. You shall comply with the following effluent application requirements regarding "System 3" as described in Chapter 65, Appendix A:

SYSTEM 3: APRIL, JULY AND OCTOBER OPEN FEEDLOT EFFLUENT APPLICATION

-Adequate capacity must be provided to collect and store the average runoff expected to occur during the six-month period from November 1 through April 30 from all feedlot and nonfeedlot areas which drain into the open feedlot effluent control system (additional storage is required if open feedlot effluent from other sources also drain into the control system).

-Collected open feedlot effluent may be removed from the control system and land applied during any period of the year that conditions are suitable. While application during other periods will minimize the need for application during the specified application months, sufficient open feedlot effluent must still be land applied during April, July and October to reduce the volume of open feedlot effluent remaining in the control system during these months to less than 10 percent of the system's design open feedlot effluent storage volume.

-During application periods under this system, land application shall be conducted at rates sufficient to ensure complete removal of accumulated open feedlot effluent from the basin in ten or fewer application days. Effluent removal is considered complete when the open feedlot effluent remaining in the basin occupies less than 10 percent of the system's design open feedlot effluent storage volume. Land application of manure shall be conducted on days when weather and soil conditions are suitable. Weather and soil conditions are normally considered suitable for manure application if:

-Land application areas are not frozen or snow -covered

-Temperatures during application are greater than 32 degrees Fahrenheit

-Precipitation has not exceeded 0.05 inch per day for each of the three days immediately preceding application and no precipitation is occurring on the day of application.

Emptying of basin(s) and land application of manure is always encouraged and may be accomplished at times other than during the mandatory authorized yearly period(s) when the basin(s) must be emptied.

c) The production area is operated in accordance with the additional measures and record keeping required by 40 CFR part 412.37(a) and (b) and 567 IAC 65.104(9)"b" & "e" as described in SECTION III A (General Operation: Minimum Required Practices) items #4 and #6 in this permit.

2. For land application areas: Discharges from land application areas are subject to the following requirements:

a) You must have an approved nutrient management plan (NMP) on site before it can be implemented. See Section III "A" item #5 for more details.

b) Maintain the records related to land application areas. See Section III "A" item #6 for more details.

SECTION II: Design Criteria:

Design criteria for the production area, including solids settling basins "SSBs" and settled open feedlot effluent basins "SOFEBs" must be in accordance with 65.101(1) "a" and "b" regarding "SSBs" and 65.109 regarding "SOFEBs" investigation, design and construction requirements.

SECTION III: General Operation (production area and land application area):

A. Minimum Required Practices:

1. Daily climatic conditions including, but not limited to temperature, and precipitation must be observed and recorded as an operation activity:

a) For temperature: Measure only **high temperature** from April through November and report it quarterly (See Section VI for details on quarterly reporting). The use of high temperature data is to decide if day was suitable for land application of manure. (temperatures during application are greater than 32 degrees Fahrenheit).

b) For Precipitation: Must be measured as **liquid precipitation**, which includes melted snow. Report it on a quarterly basis. The data can be obtained from a nearby National Weather Service standard rain gauge (see "Monitoring Section", Section V, A "3") or by installing and maintaining a precipitation gauge at the facility. The latter is strongly recommended.

2. A release, as defined in rule 65.100 must be observed, recorded **and reported as soon as possible, but no later than six hours after the onset or discovery of the release in accordance with 65.101(9).**

3. You are required to keep written records of when solids are removed from the solids settling basins and the volume of liquid removed from the outside impoundments. Occurrence of regular maintenance and scraping of lot areas must also be reported. If solids must be stockpiled for a period of time before land application, the permittee must comply with requirements of 567 IAC 65.101(8). In addition, feedlot-stocking information must be recorded whenever animals are added or removed from the operation. **These activities must be reported quarterly.**

4. You shall comply with additional requirements of 40 CFR part 412.37 "a" and 567 IAC 65.104(9) "b" and "e" as described below:

a) Visual inspection: There must be routine visual inspection of the CAFO production area, including daily inspection of water (drinking and cooling) lines, weekly inspections of all storm water diversion devices, runoff diversion structures, and devices channeling contaminated storm water to the wastewater and manure storage and containment structure(s).

b) All open surface liquid impoundments must have a depth marker that clearly indicates the minimum capacity necessary to contain the runoff and direct precipitation from a 25-year, 24-hour rainfall event. Check the depth marker after each rainfall and at least once a week. If no corrective action is needed, report the measured depth to DNR on a quarterly basis.

c) Corrective actions: any deficiencies found as a result of the inspections required in 65.104(9) "b" (1) or as a result of the liquid level reporting required in 65.104(9) "e" must be corrected, recorded and reported as soon as possible. In accordance with 40 CFR 412.37 (b) (3), any deficiencies that are not corrected within 30 days must be reported accompanied by an explanation of the factors preventing immediate correction.

5. Nutrient Management Plan (NMP): The nutrient management plan (NMP) that you have submitted has been reviewed and approved by Field Office #3 staff. The NMP was public noticed in a local newspaper and was available in FO #3 for public review and comments. A copy of the approved NMP is available in FO #3 as part of NPDES permit documents for your facility. However, you must also have a copy of the approved NMP on site before it can be implemented and before your final NPDES permit may be issued. IDNR must approve or disapprove a NMP within 60 days of receiving the NMP. The terms of the IDNR approved NMP are enforceable elements of this NPDES permit. Please refer to the attached rule "567 IAC 65.112" for public notification, content and record-keeping requirements pertaining to NMPs. Your NMP must include best management practices specified in 40 CFR parts 412.4 and 122.42 "e" "1" as described below:

i) Ensure adequate storage of manure, and process wastewater, including procedures to ensure proper operation and maintenance of the storage facilities;

ii) Ensure proper management of mortalities (i.e. dead animals) to ensure that they are not disposed of in a liquid manure, storm water, or process wastewater storage or treatment system that is not specifically designed to treat animal mortalities. You must comply with the requirements of 40 CFR 412.37 (4) related to the handling of mortalities;

iii) Ensure that clean water is diverted, as appropriate, from the production area including manure storage systems;

iv) Prevent direct contact of confined animals with waters of the United States;

v) Ensure that chemicals and other contaminants handled on-site are not disposed of in any manure, process wastewater, or storm water storage or treatment system unless specifically designed to treat such chemicals and other contaminants;

vi) Equipment used for land application of manure, process wastewater or open feedlot effluent must be periodically inspected for leaks. Always calibrate & maintain the equipments used for land application of manure according to manufacturer's design to prevent leaks;

vii) Identify appropriate site-specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the United States;

viii) Identify protocols for appropriate testing of manure and process wastewater, and soil;

ix) Establish protocols to land apply manure and process wastewater in accordance with site specific NMP practices that ensure appropriate agricultural utilization of the nutrients in the manure and process wastewater; and

x) Identify specific records that will be maintained to document the implementation and management of the minimum elements described above in 5(i) through 5(ix)

6 You must maintain on site for a period of five years from the date they are created a complete copy of the following records for the open feedlot operation according to 40 CFR part

412.37 "b" and 567 IAC 65.104(9) "b" (items a, b, c below), and land application area according to 40 CFR part 412.37 "c" and 567 IAC 65.112(10)" b" (items d through p below). You must provide these records to IDNR for review upon request:

a) Records documenting information required in Section III, A: 1, 2, 3, and 4;
b) Records documenting the current design of any manure storage structures, including volume for solids accumulation, design treatment volume, total design volume, and approximate number of days of storage capacity;
c) Records documenting the date, recipient name and address, and approximate amount of manure transferred to another person. Prior to transferring manure to other persons, you must provide the recipient of the manure with the most current nutrient analysis;
d) Expected crop yields;
e) The date(s) manure is applied to each field;
f) Weather conditions at the time of land application of manure and for 24 hours prior to and following application;
g) Test methods used to sample and analyze manure and soil;
h) Results from manure and soil sampling;
i) Explanation of the basis for determining manure application rates;
j) Calculations showing the total nitrogen and phosphorous to be applied to each field, including source other than manure;
k) Total amount of nitrogen and phosphorous actually applied to each field, including documentation of calculations for the total amount applied;
l) The method used to apply manure;
m) Date(s) of manure application equipment inspection;
n) Records of mortalities management and practices used by the operation to meet the requirements in 40 CFR 412.37 (a) (4) which is about avoiding the disposal of dead animals in any liquid manure or process wastewater system to prevent the discharge of pollutants to surface water unless alternative technologies approved by IDNR are designed to handle mortalities;
O) Records of date, time, and estimated volume of any releases and discharges from the land application areas and/or production areas; and
p) The permittee must collect and store for land application all wastewater derived from the cleaning of manure spreading equipment and shall otherwise prevent all such wastewater from being discharged to waters of the United States.

7. Water above the pens and lots must be diverted in a proper way to avoid contamination.

8. (Optional) The feedlot surface should be maintained in a smooth, well-drained condition free of potholes and/or standing water and without significant manure accumulations. If possible, scraping and manure removal should be done more frequently and ahead of impending precipitation events. Potholes or low spots should be filled with compacted earth. If mounds are used they should be maintained using clean soil as fill material; manure should not be piled and used for mounds.

9. The manure handling equipment shall be effectively maintained and operated at all times so that there is no discharge to waters of the United States. Conduct weekly inspection of the equipment when in use to ensure continual proper operation. It also must be calibrated annually to ensure accurate application of manure. In the event that the equipment fails to perform satisfactorily, including the creation of nuisance conditions or failure of an application area to adequately assimilate the manure, the permittee shall take immediate corrective actions. Deficiencies and corrective actions must be reported to the IDNR.

10. In the event this facility is closed for production purposes, this permit shall remain effective until the permittee demonstrates to the satisfaction of the Director that there is no remaining potential for a discharge of manure that was generated while the operation was active. All manure shall

be properly land applied, and in the case of facility closure, the manure storage structures shall be properly closed.

10. Issues required in the Compliance Inspection report dated November 4, 2010 by FO #3 staff must be either completed by now or at final stages of completion.

SECTION IV: Minimum Solids Settling and Settled Open Feedlot Effluent Basin Operation & Maintenance Requirements:

A. Manure must be removed from the open feedlot effluent control method(s) and applied by land application in accordance with the following requirements:

1. Solids Settling Structures: The solids settling structure(s) must precede the settled open feedlot effluent basin. Collected manure solids must be removed as necessary to maintain adequate solids storage capacity for future runoff events. As a minimum, accumulated solids shall be removed annually prior to entering the winter season and additionally as needed to:

   a) Assure that solids settling structure(s) maintains adequate capacity.
   b) Assure that solids do not accumulate above the maximum sediment marker.
   c) Assure that the original berm height of the solids settling structure(s) is maintained by adding soil and compacting it on the berms top.
   d) Porous outlets used with the settling basins must be managed to promote rapid dewatering of the solids settling areas during and immediately after runoff events. This may include scraping or raking the slots by hand to remove solids that may plug the outlets.
   e) Outlet pipes shall be checked to ensure they are free of any solids or trash.

2. Settled Open Feedlot Effluent Basin (Basin):
   Basin(s) must be emptied, based on the installed system designed and proposed by your licensed engineer and approved by IDNR, by land applying the manure. The basin(s) shall be considered to be empty when manure occupies less than 10 percent of the storage volume. Manure may also be land applied at times other than when the basin must be emptied. Emptying of basin before winter time is required to make sure there is enough capacity to store the generated manure during the wintertime.

3 Whenever manure is removed from the feedlot areas or the basin, it shall be land applied based on separation distance requirements for land application of manure described in 65.101(5).

4. The minimum land area required for total application of manure should be determined based on a nutrient analysis prior to application. You shall comply with the requirements of 65.112 and additional nutrient management plan requirements.

SECTION V: Monitoring Section:

A. The following requirements must be followed to ensure monitoring is done accurately:

1. Surface and groundwater sample collection (exact place, date, and time of measurement), preservation, and analysis (if required), shall be in accordance with those prescribed in subrule 567-IAC 63.1(1) which adopts by reference 40 CFR part 136, revised as of July 1, 2003. Soil samples must be collected, handled and analyzed according to procedural details from Iowa State University extension publication PM 287, "Take a Good Soil Sample to Help Make Good decisions" or other credible soil sampling publications.
2. You shall monitor and record precipitation daily as required in Section III A "1".
3. The official precipitation gauge for this permit shall be Oakland.
4. You shall monitor and record the liquid level in the basin <u>daily</u> when the available (unoccupied) storage capacity remaining in the basin is less than 90 percent of that required to maintain the

minimum capacity necessary to contain the runoff and direct precipitation from a 25-year, 24-hour rainfall event, and **weekly** when the available (unoccupied) storage capacity remaining in the basin is more than 90 percent of that required to maintain the minimum capacity necessary to contain the runoff and direct precipitation from a 25-year, 24-hour rainfall event. These records shall be submitted quarterly to the IDNR.

5. Manure must be analyzed a minimum of once annually for nitrogen and phosphorous content. Soil samples for manure land application areas where the phosphorous index must be used shall be obtained from each field in the nutrient management plan at least once every four years. Each soil sample shall be analyzed for P, and pH. Procedural details can be taken from Iowa State University extension publication PM 287, "Take a Good Soil Sample to Help Make Good Decisions", NRC-13 Report 348, "Soil Sampling for Variable-Rate Fertilizer and Lime Application", or other credible soil sampling publications.
6. The monitoring points (if required) must be clearly staked out and given unique identification numbers. Some of these monitoring points need to be constructed to accommodate sampling equipment and maintained in order to assure the integrity and consistency of the sampling over time.
7. The name of the laboratory that will receive the collected samples for analysis must be reported.
8. All records and information resulting from the monitoring activities required by this permit shall be retained by you for a minimum of five (5) years in accordance with 40 CFR part 122.42 "e" "2" and 567 IAC 65.104(9) "b", or longer if requested by the IDNR. You must make these records available to the IDNR for review upon request.

SECTION VI: Reporting Requirements:

A. All monitoring results shall be reported to the IDNR on a quarterly basis. The quarterly reports shall cover the periods January through March, April through June, July through September and October through December. The quarterly report for each period shall be submitted by the 10th day of the month following the quarter being reported.

B. You must submit a federally mandated yearly report by January 10 of the following year to the IDNR in accordance with 40 CFR part 122.42 "e" "4" and 567 IAC 65.104(9) "e". The annual report must include:

1. The type and the maximum number of animals confined at your open feedlot operation **at any one time during the year;**
2. Estimated amount of total manure generated by your operation in the previous twelve (12) months (tons/gallons);
3. Estimated amount of total manure transferred to other person in the previous twelve (12) months (tons/gallons);
4. Total number of acres for land application covered by the nutrient management plan;
5. Total number of acres under your control that were used for land application of manure in the previous twelve (12) months;
6. Summary of all manure discharges from the production area that have occurred in the previous twelve (12) months, including date, time, and approximate volume; and
7. A statement indicating whether the current version of your nutrient management plan was developed by a certified nutrient management planner.

C. Reports required herein shall be submitted, as appropriate, to the following address:

Iowa Department of Natural Resources
Field Office #3
1900 North Grand Ave
Spencer, Iowa 51301
Phone #: 712-262-4177
Fax #: 712-262-2901

SECTION VII: Discharge Reporting:

You shall report the occurrence of a release, as provided in 567 IAC 65.1, 567 IAC 65.2(9), 567 IAC 65.100 and 65.101(9), as soon as possible, but no later than six hours after the onset or discovery of the release, by calling the 24 -- hour Emergency Spill Response at **(515) 281-8694** regardless of whether the release originates from the production area or land application areas. The local police department or the office of the sheriff of the affected county shall also be contacted within the same time period if the spill involves a public roadway and public safety could be threatened. The absence of any reported release during any 12-month period shall be deemed to constitute a formal report that no release occurred for that period. Non-reporting of an actual release shall be a violation.

SECTION VIII: Standard Conditions:

To meet the requirements of 40 CFR 122.41, standard conditions applicable to all NPDES permits, including yours is attached to your permit for your review and compliance.

SECTION IX: Summary of the type and frequency of the reports due: You are responsible to review the content of the permit to help you prepare a complete report that lists all the items that must be measured and monitored.

a) **As soon as possible (ASAP) reports:** A release, as defined in rules 567 IAC 65.1 and 65.100 from your production area and land application areas, and any corrective actions done as a result of the routine inspections or inspections done by either DNR or Environmental Protection Agency (EPA).
b) **Quarterly reports:** Temperature data, precipitation data, depth marker check of the basin, solids removal from the solids settling basins and from scraping of the lots, volume of liquid removed from the outside impoundments, feedlot stocking and monitoring results(if any).
c) **Annual reports:** NMP updates (if any), results of the analysis of manure, and submittal of the federally mandated report (Section VI "B").
d) **Every Four year reports:** submit soil test results from your land application areas.

SECTION X: Expiration:

This permit shall expire on August 2, 2016. You shall file for reissuance of this permit at least 180 days prior to its expiration. In the event this facility is closed for production purposes, this permit shall remain effective until the permittee demonstrates to the satisfaction of the Director that there is no remaining potential for a discharge of manure that was generated while the operation was active. All manure shall be properly land applied, and in the case of facility closure, the manure storage structures shall be properly closed. Your NPDES permit to be renewed shall be subject to the provisions of all rules of the IDNR in effect at the time of the renewal.

STANDARD CONDITIONS

1. ADMINISTRATIVE RULES

Rules of this Department which govern the operation of your facility in connection with this permit are published in Part 567 of the Iowa Administrative Code (IAC) in Chapters 60-65, 67 and 121. Reference to the term "rule" in this permit means the designated provision of Part 567 of the Iowa Administrative Code.

2. DUTY TO COMPLY

You must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; permit termination, revocation and reissuance, or modification; or denial of a permit renewal application. Issuance of this permit does not relieve you of the responsibility to comply with all local, state and federal laws, ordinances, regulations or other legal requirements applying to the operation of your facility.
{See 40 CFR 122.41 "a" and 567-64.7(4) "c" IAC}

3. DUTY TO REAPPLY

If you wish to continue to discharge after the expiration date of this permit you must file an application for reissuance at least 180 days prior to the expiration date of this permit.
{See 567 IAC 64.8(1)}

4. NEED TO HALT OR REDUCE ACTIVITY

It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.
{See 40 CFR 122.41 "c" and 567 IAC 64.7(5) "j"}

5. DUTY TO MITIGATE

You shall take all reasonable steps to minimize or prevent any discharge in violation of this permit which has a reasonable likelihood of adversely affecting human health or the environment.
{See 40 CFR 122.41 "d" and 567 IAC 64.7(5) "f"}

6. PROPERTY RIGHTS

This permit does not convey any property rights of any sort or any exclusive privileges.
{See 567 IAC 64.4(3) "b"}

7. TRANSFER OF TITLE

If title to your facility, or any part of it, is transferred the new owner shall be subject to this permit. You are required to notify the new owner of the requirements of this permit in writing prior to any transfer of title. The Director shall be notified in writing within 30 days of the transfer. No transfer of the authorization to discharge from the facility represented by the permit shall take place prior to notifying the department of the transfer of title. Whenever the address of the owner is changed, the department shall be notified in writing within 30 days of the address change. Electronic notification is not sufficient; all title transfers or address changes must be reported to the department by mail.
{See 567 IAC 64.14 & 567 IAC 65.114}.

8. PROPER OPERATION AND MAINTENANCE

All facilities and control systems shall be operated as efficiently as possible and maintained in good working order. A sufficient number of staff, adequately trained and knowledgeable in the operation of your facility shall be retained at all times and adequate laboratory controls and appropriate quality assurance procedures shall be provided to maintain compliance with the conditions of this permit.
{See 40 CFR 122.41 "e" and 567 IAC 64.7(5) "f"}

9. DUTY TO PROVIDE INFORMATION

You must furnish to the Director, within a reasonable time, any information the Director may request to determine compliance with this permit or determine whether cause exists for modifying, revoking and reissuing, or terminating this permit. You must also furnish to the Director, upon request, copies of any records required to be kept by this permit.
{See 567 IAC 64.3(11) "c"}

10. MONITORING AND RECORDS OF OPERATION

(a) Maintenance of records. Records shall be maintained by the owner of an animal feeding operation who is required to submit a nutrient management plan. This recorded information shall be maintained for five years.
{See 567 IAC 65.112 (10)}

(b) Any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000 or by imprisonment for not more than two years, or both.
{See 40 CFR 122.41 "j" (5)}.

11. PERMIT MODIFICATION, SUSPENSION OR REVOCATION

(a) This permit may be modified, suspended, or revoked and reissued for cause including but not limited to those specified in
{See 567 IAC 64.3(11)}

(b) This permit may be modified due to conditions or information on which this permit is based, including any new standard the department may adopt that would change the required effluent limits.
{See 567 IAC 64.3(11)}

(c) If a toxic pollutant is present in your discharge and more stringent standards for toxic pollutants are established under Section 307(a) of the Clean Water Act, this permit will be modified in accordance with the new standards.
{See 40 CFR 122.62 "a" "6" & 567 IAC 64.7 "5" "g"}

The filing of a request for a permit modification, revocation or suspension, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

12. SEVERABILITY

The provisions of this permit are severable and if any provision or application of any provision to any circumstance is found to be invalid by this department or a court of law, the application of such provision to other circumstances, and the remainder of this permit, shall not be affected by such finding.

STANDARD CONDITIONS

13. INSPECTION OF PREMISES, RECORDS, EQUIPMENT, METHODS AND DISCHARGES

You are required to permit authorized personnel to:

(a) Enter upon the premises where a regulated facility or activity is located or conducted or where records are kept under conditions of this permit.

(b) Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit.

(c) Inspect, at reasonable times, any facilities, equipment, practices or operations regulated or required under this permit.

(d) Sample or monitor, at reasonable times, for the purpose of assuring compliance or as otherwise authorized by the Clean Water Act.

(e) The department shall notify the owner or person in charge and comply with standard biosecurity requirements.
{See 567 IAC 65.113 (9) "a" & "b"}.

14. TWENTY-FOUR HOUR REPORTING

You shall report any noncompliance that may endanger human health or the environment. Information shall be provided orally within 24 hours from the time you become aware of the circumstances. A written submission that includes a description of noncompliance and its cause; the period of noncompliance including exact dates and times, whether the noncompliance has been corrected or the anticipated time it is expected to continue; and the steps taken or planned to reduce, eliminate, and prevent a reoccurrence of the noncompliance must be provided within 5 days of the occurrence.
{See 567 IAC 63.12}

15. REPORTING OF A RELEASE

A person storing, handling, transporting, or land –applying manure, process wastewater, open feedlot effluent, settled open feedlot effluent or settleable solids from an open feedlot operation who becomes aware of a release shall notify the department of the occurrences of release as soon as possible but no later than six hours after the onset or discovery of the release by contacting the department at (515)281-8694.
{See 567 IAC 65.101(9) "a" "b" "c""d" "e".}

16. OTHER NONCOMPLIANCE

You shall report all instances of noncompliance not reported under Condition #14 & 15 at the time monitoring reports are submitted. You shall give advance notice to the appropriate regional field office of the department of any planned activity which may result in noncompliance with permit requirements
{See 567 IAC 63.14}

17. NOTICE OF CHANGED CONDITIONS

You are required to report any changes in existing conditions or information on which this permit is based:

(a) Facility expansions, increasing the animal unit capacity, increasing the volume of open feedlot effluent, production increases or process modifications which may result in new or increased discharges of pollutants must be reported to the Director in advance. If such discharges will exceed the volume approved by the department in a previous construction permit or NPDES permit, your report must include an application for a new permit.
{See 567 IAC 64.7(5) "a" & "b" & 567 IAC 65.105(1)}

(b) If any modification of, addition to, or construction of a disposal system is to be made, you must first obtain a written permit from this Department.
{See 567 IAC 64.2}

(c) You shall notify the Director as soon as you know or have reason to believe that any activity has occurred or will occur which would result in the discharge of any toxic pollutant which is not limited in this permit.
{See 40 CFR 122.42 "a"}

(d) No construction activity that will result in disturbance of one acre or more shall be initiated without first obtaining coverage under NPDES General Permit No. 2 for "Storm water discharge associated with construction activity".

You must also notify the Director if you have begun or will begin to use or manufacture as an intermediate or final product or byproduct any toxic pollutant which was not reported in the permit application

18. OTHER INFORMATION

Where you become aware that you failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report, you must promptly submit such facts or information. Where you become aware that you failed to submit any relevant facts in the submission of any report to the director, including records of operation, you shall promptly submit such facts or information.
{See 567 IAC 60.4(2) "a" & 567 IAC 63.7}

19. FAILURE TO SUBMIT FEES

This permit may be revoked, in whole or in part, if the appropriate permit fees are not submitted within thirty (30) days of the date of notification that such fees are due.
{See 567 IAC 64.16(1)}

STANDARD CONDITIONS

20. SIGNATORY REQUIREMENTS

Applications, reports or other information submitted to the Department in connection with this permit must be signed and certified.

{See 567 IAC 64.3(8)}.

21. USE OF CERTIFIED LABORATORIES

Effective October 1, 1996, analyses of wastewater, groundwater or sewage sludge that are required to be submitted to the department as a result of this permit must be performed by a laboratory certified by the State of Iowa. Routine, on-site monitoring for pH, temperature, dissolved oxygen, total residual chlorine and other pollutants that must be analyzed immediately upon sample collection, settleable solids, physical measurements, and operational monitoring tests specified in 567 IAC 63.3(4) are excluded from this requirement.

22. EFFECT OF A PERMIT

Compliance with a permit during its term constitutes compliance, for purposes of enforcement, with Sections 301, 302, 306, 307, 318, 403, and 405 (a) & (b) of the Clean Water Act, and equivalent limitations and standards set out in 567 IAC Chapters 61 and 62.

{See 567 IAC 64.4(3) "a"}

23. PLANNED CHANGES

The permittee shall give notice to the appropriate regional field office of the department 30 days prior to any planned physical alterations or additions to the permitted facility.

Notice is required only when:

(a) Notice has not been given to any other section of the department: (Note: facility expansions, production increases or process modifications which may result in new or increased discharges of pollutants must be reported to the Director in advance. If such discharges will exceed effluent limitations, your report must include an application for a new permit. If any modification of, addition to, or construction of a disposal system is to be made, you must first obtain a written permit from this department.

{See 567 IAC 64.7 (5) "a" & 567 IAC 64.2}

(b) The alteration or addition to permitted facility may meet one of the criteria for determining whether a facility is a new source as defined in 567 IAC 60.2(455B).

(c) The alteration or addition results in a significant change in the permittee's sludge use or disposal practices; or

(d) The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants that are not subject to effluent limitations in the permit.

{See 567 IAC 63.13 & 567 IAC 63.14}

567—65.112(459A) Nutrient management plan requirements.

65.112(1) The owner of an open feedlot operation which has an animal unit capacity of 1000 animal units or more or which is required to be issued an NPDES permit shall develop and implement a nutrient management plan meeting the requirements of this rule. The owner of an open feedlot operation that seeks to obtain or is required to be issued an NPDES permit after December 31, 2006, shall develop and implement a nutrient management plan meeting the requirements of this rule no later than the date on which the NPDES permit becomes effective. For the purpose of this rule, requirements pertaining to open feedlot effluent also apply to settled open feedlot effluent and settleable solids.
65.112(2) Not more than one open feedlot operation shall be covered by a single nutrient management plan. For an open feedlot operation that is required to have an NPDES permit and the animal feeding operation includes an open feedlot operation and a confinement feeding operation, the nutrient management plan must include both the open feedlot operation and the confinement feeding operation if the confinement feeding operation does not have a manure management plan. If the confinement feeding operation portion of the animal feeding operation does have a manure management plans required in 567-65.16(455B) and 567-65.17(455B), the confinement feeding operation portion shall not be included in the nutrient management; however, in that event, the manure management plan must be amended to include the information specified in 65.112(8) 'e."
65.112(3) A person shall not remove manure, process wastewater or open feedlot effluent from an open feedlot operation structure which is part of an open feedlot operation for which a nutrient management plan is required under this rule, unless the department approves a nutrient management plan as required in this rule.
65.112(4) The department shall not approve an application for a permit to construct a settled open feedlot effluent basin or AT system unless the owner of the open feedlot operation applying for approval submits a nutrient management plan together with the application for the construction permit as provided in rule 65.105(459A). The owner shall also submit proof that the owner has published a notice for public comment as provided in 65.112(7).
65.112(5) If a construction permit is required as provided in rule 567-65.105(459A), the department shall approve or disapprove the nutrient management plan as part of the construction permit application. If a construction permit is not required, the department shall approve or disapprove the nutrient management plan within 60 days from the date that the department receives the nutrient management plan.
65.112(6) Prior to approving or disapproving a nutrient management plan as required in this rule, the department may receive comments exclusively to determine whether the nutrient management plan is submitted according to procedures required by the department and that the nutrient management plan complies with the provisions of this rule.
65.112(7) Public notice.
a. The owner of the open feedlot operation shall publish a notice for public comment in a newspaper having a general circulation in the county where the open feedlot operation is or is proposed to be located and in the county where manure, process wastewater, or open feedlot effluent which originates from the open feedlot operation may be applied under the terms and conditions of the nutrient management plan.
b. The notice for public comment shall include all of the following:
(1) The name of the owner of the open feedlot operation submitting the nutrient management plan.
(2) The name of the township where the open feedlot operation is or is proposed to be located and the name of the township where manure, process wastewater, or open feedlot effluent originating from the open feedlot operation may be applied.
(3) The animal unit capacity of the open feedlot operation.
(4) The time when and the place where the nutrient management plan may be examined as provided in Iowa Code section 22.2.
(5) Procedures for providing public comment to the department. The notice shall also include procedures for requesting a public hearing conducted by the department. The department is not required to conduct a public hearing if it does not receive a request for the public hearing within ten days after the first publication of the notice for public comment as provided in this subrule. If such a request is received, the public hearing must be conducted within 30 days after the first date that the notice for public
comment was published.
(6) A statement that a person may acquire information relevant to making comments under this subrule by accessing the department's Internet Web site. The notice for public comment shall include the address of the department's Internet Web site as required by the department.
65.112(8) A nutrient management plan shall include all of the following:
a. Restrictions on the application of open feedlot effluent based on all of the following:
(1) A phosphorus index of each field in the nutrient management plan, as defined in 65.17(17) "a," including the factors used in the calculation. A copy of the NRCS phosphorus index detailed report shall satisfy the requirement to include the factors used in the calculation. In addition, total phosphorus (as P_2O_5) available to be applied from the open feedlot operation shall be included.

(2) Calculations necessary to determine the land area required for the application of manure, process wastewater and open feedlot effluent from an open feedlot operation based on nitrogen or phosphorus use levels (as determined by phosphorus index) in order to obtain optimum crop yields according to a crop schedule specified in the nutrient management plan, and according to requirements specified in 65.17(4). The 100 pounds of available nitrogen per acre limitation specified in paragraph 65.17(18)"c" (applicable to open feedlot operations and combined open feedlot and confinement operations with an NPDES permit because of requirements in subrule 65.17(4) pertaining to liquid manure applied to land currently planted to soybeans or to land where a soybean crop is planned applies only to liquid manure, process wastewater or settled open feedlot effluent.

b. Information relating to the application of the manure, process wastewater and open feedlot effluent, including all of the following:

(1) Nutrient levels of the manure, process wastewater and open feedlot effluent.

(2) Application methods, the timing of the application, and the location of the land where the application occurs.

c. If the application is on land other than land owned or rented for crop production by the owner of the open feedlot operation, the plan shall include a copy of each written agreement executed by the owner of the open feedlot operation and the landowner or the person renting the land for crop production where the manure, process wastewater or open feedlot effluent may be applied.

d. An estimate of the manure, process wastewater and open feedlot effluent volume or weight produced by the open feedlot operation.

e. Information which shows all of the following:

(1) There is adequate storage for manure, process wastewater, stockpiled manure and open feedlot effluent, including procedures to ensure proper operation and maintenance of the storage structures.

(2) The proper management of animal mortalities to prevent discharge of pollutants to surface water and to ensure that animals are not disposed of in an open feedlot operation structure or a treatment system that is not specifically designed to treat animal mortalities.

(3) Surface drainage prior to contact with an open feedlot structure is diverted, as appropriate, from the open feedlot operation.

(4) Animals kept in the open feedlot operation do not have direct contact with any waters of the United States.

(5) Chemicals or other contaminants handled on site are not disposed of in manure, process wastewater, an open feedlot operation structure or a treatment system that is not specifically designed to treat such chemicals or contaminants.

(6) Equipment used for the land application of manure, process wastewater or open feedlot effluent must be periodically inspected for leaks.

(7) Appropriate site-specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the United States.

(8) Protocols for appropriate testing of manure, process wastewater, open feedlot effluent and soil.

(9) Protocols to land-apply manure, process wastewater, open feedlot effluent in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, process wastewater, or open feedlot effluent.

(10) Identification of specific records that will be maintained to document the implementation and management of the requirements in this subrule.

65.112(9) If an open feedlot operation uses an alternative technology system as provided in rule 567-65.110(459A), the nutrient management plan is not required to provide for settled open feedlot effluent that enters the AT system.

65.112(10) Current nutrient management plan, record keeping and inspections.

a. Current nutrient management plan. The owner of an open feedlot operation who is required to submit a nutrient management plan shall maintain a current nutrient management plan at the site of the open feedlot operation and shall make the current nutrient management plan available to the department upon request. If nutrient management practices change, a person required to submit a nutrient management plan shall make appropriate changes consistent with this rule. If values other than the standard table values are used for nutrient management plan calculations; the source of the values used shall be identified.

b. Record keeping. Records shall be maintained by the owner of an open feedlot operation who is required to submit a nutrient management plan. This recorded information shall be maintained for five years following the year of application or for the length of the crop rotation, whichever is greater. Records shall be maintained at the site of the open feedlot operation and shall be made available to the department upon request. Records to demonstrate compliance with the nutrient management plan shall include the following:

(1) Factors used to calculate the manure, process wastewater and open feedlot effluent application rate:

1. Optimum yield for the planned crop.

2. Types of nitrogen credits and amounts.
3. Remaining crop nitrogen needed.
4. Nitrogen content and first-year nitrogen availability of the manure, process wastewater and open feedlot effluent.
5. Phosphorus content of the manure, process wastewater and open feedlot effluent as required in 65.17(3) "f"(1) and (2). If an actual sample is used, documentation shall be provided.
(2) If phosphorus-based application rates are used, the following shall be included:
1. Crop rotation.
2. Phosphorus removed by crop harvest of that crop rotation.
(3) Maximum allowable manure, process wastewater and open feedlot effluent application rate.
(4) Actual manure, process wastewater and open feedlot effluent application information:
1. Method(s) of application when manure, process wastewater or open feedlot effluent from the open feedlot operation was applied.
2. Date(s) when the manure, process wastewater or open feedlot effluent from the open feedlot operation was applied.
3. Weather conditions at time of application and for 24 hours prior to and following the application.
4. Location of the field where the manure, process wastewater or open feedlot effluent from the open feedlot operation was applied, including the number of acres.
5. The manure, process wastewater or open feedlot effluent application rate.
6. Dates when application equipment was inspected.
(5) Date(s) and application rate(s) of commercial nitrogen and phosphorus on fields that received manure, process wastewater or open feedlot effluent. However, if the date and application rate information is for fields which are not owned for crop production or which are not rented or leased for crop production by the person required to keep records pursuant to this subrule, an enforcement action for noncompliance with a nutrient management plan or the requirements of this subrule shall not be pursued
against the person required to keep records pursuant to this subrule or against any other person who relied on the date and application rate in records required to be kept pursuant to this subrule, unless that person knew or should have known that nitrogen or phosphorus would be applied in excess of maximum levels set forth in paragraph 65.17(1) "a." If nutrients are applied to fields not owned, rented or leased for crop production by the person required to keep records pursuant to this subrule, that person shall obtain from the person who owns, rents or leases those fields a statement specifying the planned commercial nitrogen and phosphorus fertilizer rates to be applied to each field receiving the nutrients.
(6) A copy of the current soil test lab results for each field in the nutrient management plan.
(7) All applicable records identified in 65.112(8) "a"(7).
c. Record inspection. The department may inspect an open feedlot operation at any time during normal working hours and may inspect the nutrient management plan and any records required to be maintained.
65.112(11) Settled open feedlot effluent on land planted to soybeans. Effective May 14, 2013, the owner of an open feedlot operation that is required to submit a nutrient management plan shall not apply liquid manure, process wastewater or settled open feedlot effluent to land that is currently planted to soybeans or to the land where the current crop has been harvested that will be planted to soybeans the next crop season. Not later than November 14, 2012, the commission shall review the available scientific evidence and determine whether any further or alternative action is necessary. The prohibition on applying liquid manure, process wastewater or settled open feedlot effluent shall not become effective unless the commission publishes a notice in Iowa Administrative Bulletin confirming that it has reviewed the available scientific evidence and that the prohibition shall take effect on May 14, 2013.

Appendix 11

THOMAS J. MILLER
ATTORNEY GENERAL

Department of Justice

ADDRESS REPLY TO:
ENVIRONMENTAL AND FARM DIVISIONS
LUCAS STATE OFFICE BUILDING
321 E 12TH GROUND LEVEL, ROOM 018
DES MOINES IOWA 50319
PHONE: (515) 281-5351
FAX: (515) 242-6072

November 15, 2011

Randy Clark
Department of Natural Resources
Wallace Building
LOCAL

RE: U.S. E.P.A. Inquiry RE Iowa Code section 459A.502

Dear Randy:

You forwarded to me an inquiry from the United States Environmental Protection Agency, Region VII, on whether the adoption of Iowa Code section 459A.502, authorizing civil penalties for violations of chapter 459A, precludes criminal sanctions under Iowa Code section 455B.191(3) against an open feedlot for negligent or knowing violations of the prohibition on unpermitted discharges contained in Iowa Code section 455B.186(1).

There is a presumption against the implied repeal of a statute. *E.g., State v. Wissing*, 528 N.W.2d 561, 566 (Iowa 1995); *State v. Rauhauser*, 272 N.W.2d 432, 434 (Iowa 1978); *Dan Dugan Transport Company v. Worth County*, 243 N.W.2d 655, 657 (Iowa 1976). No implied repeal has been found even when the legislature has adopted two statutes with different criminal penalties for essentially the same conduct:

> The fact that two statutes provide different criminal penalties for essentially the same conduct is no justification for taking liberties with unequivocal statutory language. The adoption of one statute does not implicitly repeal another statute whenever a defendant's conduct might violate both. It is not enough to show the two statutes produce different results when applied to the same factual situation. The legislative intent to repeal must be manifest in the "positive repugnancy between the provisions."

State v. Wissing, 528 N.W.2d at 566-567; State v. Perry, 440 N.W.2d 389, 391 (Iowa 1989).

Iowa Code section 459A.502 only refers to civil penalties and makes no mention of criminal sanctions in general or Iowa Code section 455B.191(3) in particular. Accordingly, we conclude that the adoption of Iowa Code section 459A.502 in no way evidences any legislative intent to effectively repeal the criminal enforcement provisions contained in Iowa Code section

455B.191(3) against open feedlots for negligent or knowing unpermitted discharges into waters of the State.

This letter is offered as informal advice and is not a formal opinion of the Attorney General Please let me know if you have any questions Thank you.

Sincerely,

DAVID R. SHERIDAN
Assistant Attorney General
Environmental Law Division
Phone: (515) 281-5351
E-mail: dsherid@ag.state.ia.us

DRS/cj
cc: Tim Benton
R:\5\CAFO Letter to Randy Clark re Criminal Prosec Open Feedlots 111511 doc

Appendix 12

Enforcement Management System

Iowa Department of Natural Resources
September 2006
Revised October 2010
Revised December 2011

This document is intended only for use by the staff of the Iowa Department of Natural Resources (Iowa DNR) as an internal management procedural tool, and does not affect private rights or procedures available to persons or entities outside the Iowa DNR. It is not intended to create or add to rights otherwise held by any person outside the Iowa DNR; nor is it intended to reduce, eliminate or limit any rights held by any person outside the Iowa DNR.

Iowa Department of Natural Resources
Enforcement Management System

Introduction

The Iowa Department of Natural Resources (Iowa DNR) uses this Enforcement Management System (EMS) to outline the process by which the various regulatory programs in the Environmental Services Division (ESD) of the Iowa DNR pursue compliance with chapters 455B, 455D, 459, 459A, and 459B of the Iowa Code and the rules promulgated thereunder. The general objective of the EMS is to protect the public health and environment of the State of Iowa through enforcement of the environmental regulatory requirements in a timely, consistent and fair manner. This enforcement seeks to:

- Obtain prompt compliance with statutory and regulatory requirements;
- Pose a deterrent to actions that delay or prevent prompt compliance;
- Provide an incentive for timely and responsible compliance behavior; and,
- Ensure that persons who comply with environmental requirements are not placed at a competitive disadvantage.

The EMS includes compliance monitoring and enforcement procedures to be used by all regulatory programs within Iowa DNR's ESD.

NOTICE: This document is intended only for use by the ESD staff of the Iowa DNR as an internal management procedural tool, and does not affect private rights or procedures available to persons or entities outside the Iowa DNR. It is not intended to create or add to rights otherwise held by any person outside the Iowa DNR; nor is it intended to reduce, eliminate or limit any rights held by any person outside the Iowa DNR.

I. Roles

Effective enforcement requires team work; and Iowa DNR has established the following roles in its ESD enforcement program:

A. Enforcement Coordinator

Each environmental program within Iowa DNR's ESD has an Enforcement Coordinator. The role of the Enforcement Coordinator is to ensure that:

- there is consistent enforcement of Iowa DNR's laws and rules across the state;
- formal enforcement action is taken against the most egregious violators; and
- penalties and corrective actions are consistent and equitable.

The Euforcement Coordinator is responsible for deciding which cases move forward to formal enforcement action and decide what penalties are considered consistent and equitable based on:

- established priorities and thresholds
- advice and concurrence of the field offices, central office, DNR Legal Services Bureau, and/or the Attorney General's office.

B. Environmental Specialist

Environmental Specialists are responsible for the day-to-day inspections of regulated entities within their respective program and/or part of the state. They serve as the primary contact with those entities and prepare enforcement referrals to the Legal Services Bureau when appropriate. As part of the enforcement referral process, the Environmental Specialist will:

- complete the referral summary and request a referral meeting;
- complete the referral package; and
- be available for questions as the referral moves through the process.

C. Environmental Specialist Senior

The Environmental Specialist Senior performs roles similar to the Environmental Specialist. In addition, he or she should be available to provide technical advice or conduct reviews for other staff within their program / field office.

D. Supervisor

A Supervisor manages the day-to-day affairs of a field office or central office program area. The Supervisors should assist their staff as necessary in the enforcement process and be available for discussion and provide input as new situations or problems arise.

E. Field Office and Compliance Bureau Chief / Legal Services Bureau Chief

In addition to their other duties, the Field Office and Compliance Bureau Chief and the Legal Services Bureau Chief should:

- facilitate communication on enforcement matters;
- participate in enforcement discussions when requested by other enforcement staff; and

In addition, the Legal Services Bureau Chief assigns enforcement cases to Attorneys on the legal staff, reviews proposed orders and litigation reports, and tracks the progress of each case.

F. Attorney

The Attorney drafts the enforcement documents in each case and handles all legal issues that arise. The Attorney normally takes the lead in settlement discussions, if any, and prepares for administrative hearings or trials when appropriate. The Attorney will normally be a member of the Iowa DNR Legal Services Bureau (DNR Attorney). However, if referral to the Attorney General's office is appropriate, the Attorney will be an Assistant Attorney General.

G. Division Director of the Environmental Law Division, Iowa Attorney General's Office (Division Director)

The Division Director will review each enforcement referral to determine if the case merits referral to the Iowa Attorney General's office. In addition, this individual will work with the Legal Services Bureau Chief on resolving significant legal issues that may arise in the State of Iowa's environmental enforcement program.

II. Compliance Monitoring and Evaluation

Compliance with Iowa's environmental laws and rules is primarily monitored through either investigations or record reviews. Investigations are performed as part of normal planned activities (e.g., permitted facilities, other regulated facilities, noncompliance follow-ups) or in response to complaints or releases. There are many forms of record reviews, including: reports required by rule or permit; permit application information; and self-reported information. In addition, follow-up compliance monitoring of enforcement orders may involve both investigations and record reviews.

Investigations

Environmental Specialists (normally located in the field) shall investigate citizen complaints, self-reported violations and work requests from central office programs within fourteen (14) days after assignment by a Supervisor or Environmental Specialist

Senior. These investigations are in addition to conducting scheduled inspections at regulated facilities.

Notices of Violation

Within thirty (30) days after confirming a violation(s) has taken place, the Environmental Specialist writes and mails a Notice of Violation (NOV) or other similar letter to the violator. However, the confirmation date of a violation may be subject to argument and interpretation. For example, the investigation may be completed, but the violation may not be known without gathering additional information (e.g., analysis of samples taken, additional information from the facility). To accommodate this concern, the Iowa DNR will use the term "confirmation date" to be the date upon which the additional information became available. In the investigation awaiting sample results instance, the violation would fairly be defined as confirmed when the sample results were obtained.

If there is no actionable violation found, that finding shall be documented to the file and no further action is needed. In most instances, if a violator receives an NOV and returns to compliance in a timely manner, no further action will take place. The Environmental Specialist shall document the compliance (e.g., reinspection or report from violator) in the appropriate file. Typically, for a return to compliance to be considered timely, the violator must abate the violation within ninety (90) days after receipt of the NOV or other similar letter. However, for some violations, the Environmental Specialist should consider escalated enforcement even if timely compliance is achieved. Examples would include violations causing serious environmental impact, having regulatory significance, or resulting in significant economic benefit of noncompliance. If these violations occur, the Environmental Specialists shall follow the procedure set forth below.

All NOVs and similar letters are tracked by the field offices and/or central office programs.

III. Criteria for Escalated Enforcement

Once an Environmental Specialist determines that a violator has failed to return to compliance in a timely manner (or if significant violations have occurred), the Environmental Specialist shall immediately determine if the violation meets one or more of Iowa DNR's Enforcement Priorities. If the Environmental Specialist determines that a violation(s) does not meet one or more Enforcement Priorities, in most cases the Environmental Specialist shall monitor the violator's progress in reaching compliance. This may require additional site visits to the violator's facility and/or additional technical assistance. If the violator achieves compliance, the Environmental Specialist shall document the compliance (e.g., reinspection or report from violator) in the appropriate file. If the violator fails to reach compliance after these additional efforts, the Environmental Specialist should reconsider the referral option (i.e., it is possible that this case now meets an Enforcement Priority). There may be situations that warrant further enforcement that do not meet the Enforcement Priorities.

If the Environmental Specialist believes that a violation(s) meets one or more of Iowa DNR's Enforcement Priorities, the Environmental Specialist will prepare a summary of the proposed enforcement referral and submit it to his/her Supervisor and appropriate Enforcement Coordinator. A meeting date to discuss the enforcement referral is then set. This meeting shall occur within ten (10) days after the Environmental Specialist determines that a violation(s) meets one or more Enforcement Priorities. This meeting will usually be conducted by conference call and will include the Environmental Specialist, the Environmental Specialist's Supervisor, and the Enforcement Coordinator of the relevant program area. Others may also be invited to this meeting, including other Supervisors (either field or central office) who have involvement in this matter.

At this meeting, the Environmental Specialist will present a summary of the case and outline the violation history, the aspects of the proposed referral that meet an Enforcement Priority, the recommendation of the type of action to be taken (e.g., Administrative Consent Order, Administrative [unilateral] Order or referral to the Attorney General's office), and the penalty recommendation. The Environmental Specialist's Supervisor may provide additional supporting comments. The Enforcement Coordinator will comment on whether the proposed referral meets an Enforcement Priority, is comparable to other referrals received before, and if the penalty recommendation is appropriate based on similar actions taken by Iowa DNR. The individuals at this meeting shall attempt to reach consensus on whether to proceed to referral, but if consensus is not reached, the Enforcement Coordinator's decision is final. *Note: a decision may be made to recommend referral even if the violation(s) does not meet an Enforcement Priority.*

If a decision to move to referral is made, the Environmental Specialist will be directed to prepare and submit a complete Referral Package with ten (10) days after the decision is made. If a decision is made not to refer, the Environmental Specialist shall monitor the violator's progress in reaching compliance. A violator should be provided no more than ninety (90) days to demonstrate compliance. During this time period the Environmental Specialist shall conduct additional site visits to the violator's facility and/or provide additional technical assistance. If the violator achieves compliance, the Environmental Specialist shall document the compliance (e.g., reinspection or report from violator) in the appropriate file. If the violator fails to reach compliance after these additional efforts, the Environmental Specialist will be directed to prepare a new referral summary and schedule another meeting within ten (10) days after making this final determination of non-compliance. A decision to refer should be strongly considered at this time.

IV. The Referral Process

If a decision to refer has been made, the next step is for the Environmental Specialist to prepare a Referral Package. The Referral Package shall include the following elements:

- Identification of the violator, including status (individual, corporation, etc.) and registered agent and/or attorney for the violator;
- Location (address, city, county) of the facility or violations;

- Description of the facility (i.e., what it processes or manufactures, types of equipment, etc.);
- If the violator is an individual, a description of the property in question, including the local address and legal description from the appropriate county office;
- Citations to statutory and rule provisions violated, with factual statement of the act or omission that constituted each violation;
- Chronology of the events leading up to and including the cited violations, including copies of:
    - Complaint forms;
    - Field notes;
    - Inspection reports;
    - NOVs;
    - Phone logs;
    - Correspondence between violator and Iowa DNR;
    - Affected permits and amendments to those permits;
    - Permit applications or permit modification applications;
    - Photos or videotapes;
    - Sample results;
    - Chain of custody documents;
    - Reports from other law enforcement agencies;
    - Return receipts from any service or certified mail;
    - Other service documents;
    - E-mails concerning the matter; and
    - Lab reports.
- Chronology of the past history with the violator, if any exists. This would include copies of:
    - Complaint forms;
    - Field notes;
    - Inspection reports;
    - NOVs;
    - Previous administrative orders and/or referrals to the Attorney General's office;
    - Phone logs;
    - Correspondence between violator and Iowa DNR;
    - Photos or videotapes;
    - Sample and lab results; and
    - Chain of custody documents.
- If known, the violator's position regarding the violations;
- Penalty recommendation, including discussion and analysis of the factors in 567 Iowa Administrative Code (IAC) chapter 10, including:
    - Economic benefit of noncompliance – description of information used to calculate the economic benefit, including the benefit for not complying (avoided costs) and the benefit for delaying compliance (delayed costs). This should include any supporting documentation justifying the economic benefit estimate (e.g., landfill costs, preparation costs, etc.);

- Gravity – discussion of the effects and impact of the violations on the environment (actual or threatened); size of the facility; degree ambient standards were exceeded; repeated violations and/or violations of administrative orders; and threats to the integrity of the regulatory program;
- Culpability – the degree of intent or negligence involved in committing the violations and a description of efforts made by the violator to avoid or correct the violations;
- Mitigating or aggravating factors – description of actions or events that would increase or decrease the penalty.
- See Section VIII for a discussion of how Iowa DNR calculates administrative penalties.

- Recommendation of the type of enforcement recommended (i.e., Administrative Consent Order, Administrative [unilateral] Order or referral to the Attorney General's office) and specific reasons to support the recommendation.
- Detailed description of the technical remedy that is sought through enforcement.

To assist in this effort, Iowa DNR has created a Referral Template to use in putting together the Referral Package. The amount of detail to be included in each Referral Package should be discussed by the Environmental Specialist, his/her Supervisor, and, if necessary, the Enforcement Coordinator. The completed Referral Package shall be reviewed by the Environmental Specialist's Supervisor within five (5) days after receipt. Once approved, the Environmental Specialist (or designee) shall send the Referral Package to the Enforcement Coordinator, the Legal Services Bureau Chief, and the Division Director via e-mail. Others may also receive this package, depending on the specific facts of the case. In the e-mail, the Environmental Specialist (or designee) should state clearly that the appropriate Enforcement Coordinator has approved the referral. That will be the Legal Services Bureau Chief's prompt to assign this case to a DNR Attorney.

V. Referral to Legal

Within five (5) days after receipt of the Referral Package, the Legal Services Bureau Chief will assign the enforcement case to a DNR Attorney. The version of the Referral Package received by the Legal Services Bureau Chief will be an electronic version. This version may not contain all the documents related to the case. Those documents are normally sent in regular mail and take a few extra days to arrive. Nevertheless, the Legal Services Bureau Chief will move forward with assignment, knowing that the DNR Attorney may not have all the information necessary to proceed with the case. After assigning a DNR Attorney to the case, the Legal Services Bureau Chief will forward the electronic version of the Referral Package (and notice of case assignment) to the DNR Attorney, all Supervisors in the ESD, and the Division Director. The purpose of sending the Referral Package to other ESD Supervisors is to solicit information about the violator that may not have been known by the Environmental Specialist, Supervisor, or Enforcement Coordinator (e.g., issues or concerns about the violator in another program area). This is an opportunity for the other ESD Supervisors to provide that information to Legal.

The DNR Attorney, within seven (7) days after case assignment, will check the Referral Package for completeness (including determining whether all hard copies have arrived in the mail). If the DNR Attorney determines that the Referral Package is incomplete, the DNR Attorney will notify the Environmental Specialist and the Environmental Specialist will supplement the referral within ten (10) days after notice from the DNR Attorney. Once the Referral Package is complete, the DNR Attorney will draft the appropriate legal document (e.g., enforcement order or Litigation Report) within ninety (90) days.

Soon after receiving the Referral Package, the Division Director will review the package to determine if the case merits referral to the Iowa Attorney General's office. The Division Director will notify the Legal Services Bureau Chief and the DNR Attorney assigned to the case of the decision made by the Division Director.

VI. Types of Administrative/Civil Enforcement

There are three major types of escalated administrative/civil enforcement taken by Iowa DNR ESD:

- Administrative Consent Orders
- Administrative [unilateral] Orders
- Referrals to the Iowa Attorney General's office.

Administrative orders (either consent or unilateral) are used only to resolve civil violations, never criminal violations. They may be used when Iowa DNR assesses penalties of not more than $10,000 for violations of Iowa Code chapters 455B, 455D, 459, 459A and 459B or rules, permits, or orders adopted or issued under those chapters. See Iowa Code section 455B.109. Referrals to the Attorney General's office should occur for the reasons noted below. One additional enforcement option, referral to US EPA, is used on occasion and is also described below.

As noted above, when a DNR Attorney receives a Referral Package, it will contain a recommendation on the type of enforcement to take in the case. The presumption is that this recommendation will be the appropriate enforcement response, unless the DNR Attorney (and Legal Services Bureau Chief) can demonstrate that another enforcement action is more appropriate. If Legal recommends another course of action, the DNR Attorney shall schedule a meeting with the Environmental Specialist, Supervisor, Enforcement Coordinator, and Legal Services Bureau Chief to discuss this matter and attempt to reach consensus on the appropriate enforcement response. If consensus is not reached, the decision of the Enforcement Coordinator is final. Also, as noted above, if the Division Director indicates that a case is appropriate for referral to the Iowa Attorney General's office, that recommendation should be considered and, if accepted, a Litigation Report prepared by the DNR Attorney.

In addition, the DNR Attorney will review the penalty recommendation contained within the Referral Package. If the DNR Attorney has recommendations on changes to

that penalty calculation, the DNR Attorney will contact the Environmental Specialist, Supervisor and Enforcement Coordinator. The parties will attempt to reach consensus on the proper penalty calculation. Again, however, if consensus is not reached, the decision of the Enforcement Coordinator is final. See Section VIII for a discussion of how Iowa DNR calculates administrative penalties.

A. Administrative Consent Order

Administrative Consent Orders involve negotiations between Iowa DNR and the violator to reach agreement on the content of the orders. Administrative Consent Orders should be used when both Iowa DNR and the violator are interested in reaching a settlement agreeable to both the violator and Iowa DNR. Iowa DNR staff can use Administrative Consent Orders when schedules of compliance or remedies need to be negotiated with a company. These orders may also contain stipulated penalties to address potential future violations. Supplemental Environmental Projects can also be agreed upon as part of these settlements. By signing the Administrative Consent Order, the violator waives its right to seek a contested case hearing / judicial review of the order under chapter 17A of the Iowa Code.

If a decision is made to pursue an Administrative Consent Order with the violator, the DNR Attorney will draft the order and send the draft to the Legal Services Bureau Chief, Enforcement Coordinator, Environmental Specialist and Supervisor. This draft shall be sent within ninety (90) days after the DNR Attorney receives a complete Referral Package. Within ten (10) days after receipt of the draft, the reviewers will provide their comments to the DNR Attorney and the DNR Attorney should make all necessary changes and send the Administrative Consent Order to the violator (i.e., an "invitation to negotiate"). In the invitation, the DNR Attorney will inform the violator that it must notify the DNR Attorney within fourteen (14) days regarding its willingness to negotiate a settlement of this matter. If the violator refuses to negotiate, the DNR Attorney shall discuss other enforcement options with the Environmental Specialist, Supervisor, Enforcement Coordinator, and Legal Services Bureau Chief. If the violator notifies the DNR Attorney that it wishes to negotiate, then settlement discussions shall take place for a time period not to exceed one-hundred twenty (120) days. If settlement occurs, then the DNR Attorney shall draft the final terms and conditions of the order and send to the violator for signature within ten (10) days after reaching settlement. If settlement is not reached, then the DNR Attorney shall discuss other enforcement options with the Environmental Specialist, Supervisor, Enforcement Coordinator, and Legal Services Bureau Chief.

Once the DNR Attorney receives a signed Administrative Consent Order, the DNR Attorney shall immediately send the order to the Director for signature (or have the Legal Services Bureau Chief deliver to the Director for signature). The Director of Iowa DNR will sign the Administrative Consent Order within five (5) days after receipt. The Environmental Specialist shall document compliance with the order in the appropriate file. See Section X.

B. Referral to the Iowa Attorney General's office

Iowa DNR staff should refer civil cases to the Attorney General's office when the potential penalty exceeds the $10,000 limit set out in Iowa Code section 455B.109. In addition, Iowa DNR staff can refer a violator to the Attorney General's office if the violator has exhibited a history of recalcitrance, is not expected to negotiate an Administrative Consent Order, or has violated previous Iowa DNR orders. Other factors to consider in making an Attorney General referral recommendation include, but are not limited to, the gravity of the violations, the need for temporary or permanent injunctive relief, presence of multi-media violations, violation of an earlier judicial consent order or judgment, and possible bankruptcy. In addition, if Iowa DNR and the violator fail to negotiate a settlement administratively, the case may be referred to the Attorney General's Office for civil action.

Iowa DNR staff must seek approval from the Environmental Protection Commission (EPC) before referring a case to the Attorney General's office. However, the Attorney General does have independent authority to commence civil or criminal proceedings pursuant to section 455B.112 of the Iowa Code.

The DNR Attorney shall notify the violator as soon as the determination has been made to seek referral. In the communication, the DNR attorney shall inform the violator of the proposed referral. After a decision is made to refer a case to the Iowa Attorney General for civil enforcement action, the DNR Attorney will draft a Litigation Report and send the report to the Legal Services Bureau Chief, Enforcement Coordinator, Environmental Specialist and Supervisor. This report shall be sent within ninety (90) days after the DNR Attorney receives a complete Referral Package. Within ten (10) days after receipt of the report, the reviewers will provide their comments to the DNR Attorney and the DNR Attorney should make all necessary changes and send to the Legal Services Bureau Chief and Division Director. The Legal Services Bureau Chief will prepare an agenda item for the upcoming EPC meeting to ensure that the case will be heard at that time. The DNR Attorney will once again notify the violator of the date of the EPC meeting, provide a copy of the public litigation report for the violator, and either provide a specific appointment time or inform the violator that a time to speak before the EPC regarding the proposed referral may be requested. Prior to the time of the next EPC meeting the EPC members will be provided a copy of the Litigation Report and agenda item.

At the EPC meeting, the EPC will discuss the merits of referring the case to the Attorney General's office. The DNR Attorney will provide information in support of referral and will be prepared to answer questions from the EPC members. If it requested time, the violator will be able to also present information to the EPC (usually information in opposition to the referral). If the EPC votes to refer, then the Legal Services Bureau Chief will send a letter informing the Division Director of that decision within seven (7) days after the EPC meeting. Accompanying this letter will be supporting documentation from Iowa DNR's enforcement file. If the EPC votes not to refer then the DNR Attorney will discuss other enforcement options with the Environmental Specialist, Supervisor, Enforcement Coordinator, and Legal Services Bureau Chief. Of

course, the Iowa Attorney General may use his/her independent authority to pursue this matter pursuant to section 455B.112 of the Iowa Code.

C. Administrative Order

Administrative Orders are actions by Iowa DNR and are issued without negotiations with the violator. They are signed only by Iowa DNR. They may require a violator to perform certain actions, usually within certain time frames. In addition, Administrative Orders usually include the requirement to pay an administrative penalty. These orders are subject to a contested case hearing / judicial review under chapter 17A of the Iowa Code. Iowa DNR staff should recommend the use of Administrative Orders only in limited instances. For example, Administrative Orders are appropriate if immediate emergency action is needed to abate violations directly impacting human health and the environment.

If a decision is made to prepare an Administrative Order, the DNR Attorney will draft the order and send the draft to the Legal Services Bureau Chief, Enforcement Coordinator, Environmental Specialist and Supervisor. This draft shall be sent within ninety (90) days after the DNR Attorney receives a complete Referral Package. Within ten (10) days after receipt of the draft, the reviewers will provide their comments to the DNR Attorney and the DNR Attorney should make all necessary changes and send the order to the Director for signature (or have the Legal Services Bureau Chief deliver to the Director for signature). The Director of Iowa DNR will sign the Administrative Consent Order within five (5) days after receipt.

Within three (3) days after receiving the signed Administrative Order from the Director, the Legal Services Bureau will send the order to the violator. If the violator complies with the terms of the Administrative Order, the Environmental Specialist shall document compliance with the order in the appropriate file. See Section X.

If the violator wishes to appeal this Administrative Order, he/she will file a Notice of Appeal with the Iowa DNR. At that point, the DNR Attorney may attempt to settle this appeal with the violator. Any settlement discussions shall take place within ninety (90) days after receipt of the Notice of Appeal. If settlement is not achieved within that time frame, the DNR Attorney will set that appeal for administrative hearing. If a case is set for hearing, Iowa DNR will comply with the schedule set by the administrative law judge and/or the EPC. See 561 IAC chapter 7.

D. Referrals to US EPA

Iowa DNR may refer violations of federal regulatory programs to the US EPA without following the procedures outlined above. Enforcement staff may also choose to make the enforcement recommendation for a US EPA referral at any stage of the proceedings, or even before they are begun. Typically, Iowa DNR, the Division Director, and US EPA staff will discuss referral before any formal decision is made. Also, US EPA staff may want to review state program files before concurring with a referral recommendation.

VII. Criminal Enforcement

Iowa DNR enforcement staff may determine that some violations warrant more significant penalties than allowed for administrative or civil enforcement. These would include cases where the Environmental Specialist suspects fraud or falsification of records by the violator, a violator who knowingly commits an illegal act, or where the violator has a history of committing significant environmental violations. Once an Environmental Specialist identifies a case as being potentially criminal, the Environmental Specialist should discuss the case with the Supervisor, Enforcement Coordinator, Field Services and Compliance Bureau Chief, and Legal Services Bureau Chief. This communication can take place electronically, by phone, or in person. This dialogue should occur immediately, as it is imperative that criminal investigations take place as soon as possible to ensure the preservation of evidence.

If consensus is reached on recommending a criminal investigation of the matter, the Environmental Specialist shall contact the appropriate authorities for possible criminal investigation and prosecution.

VIII. Administrative Penalties

The primary purpose of a penalty assessment is to maximize compliance with regulatory programs both in its application to individual violators and the regulated public in general. This purpose can be served most effectively by a fair and equitable policy which is consistently applied, establishes clear and predictable consequences to non-compliance, does not allow violators to gain an economic benefit or competitive advantage from non-compliance or delayed compliance, encourages respect for regulatory authority, recognizes good faith mitigating factors, deters future and ongoing violations through imposition of financial incentives and disincentives and encourages timely and efficient resolution of regulatory disputes.

Iowa Code section 455B.109(1) sets out that Iowa DNR's administrative penalties shall be determined from evaluation of the following relevant factors: (1) economic benefit associated with the violation, (2) gravity of the violation, (3) the culpability of the violator, and (4) the maximum penalty authorized for that violation under Iowa Code chapter 455B. These factors, and how to calculate the penalty, are further explained in 567 IAC chapter 10. As set out in both statute and rule, Iowa DNR is limited to a penalty assessment of $10,000 per order. Therefore, Iowa DNR should refer to the Iowa Attorney General those enforcement matters where the penalty assessment is greater than this amount.

A. Relevant Factors

As set out above, the relevant factors in calculating an administrative penalty include the economic benefit associated with the violation, the gravity of the violation, the culpability of the violator, and the maximum penalty authorized for that violation under Iowa Code chapter 455B. These and other factors are discussed below.

1. Economic Benefit Assessment

Economic benefit represents the financial or other economic benefit or advantage the violator has gained due to delayed or avoided costs of compliance, partial compliance or failure to comply. 567 IAC 10.3(2) requires that, in assessing an administrative penalty, "[t]he actual or reasonably estimated economic benefit shall always be assessed." Reasonable estimates of economic benefit should be made where clear data are not available. 567 IAC 10.2(1). The different kinds of economic benefit are discussed below.

a. Avoidance Costs

Avoidance costs are those which the violator has likely saved due to noncompliance or partial noncompliance and which will not be incurred by taking corrective action. Compliance costs may represent avoided capital and service related costs and costs associated with the expenditure of time and resources which have been avoided or cannot be incurred by taking some corrective action as the result of a violation. Examples might include costs saved due to (1) failure to conduct periodic monitoring, testing and sampling or other periodic regulatory action such as failure to maintain records over a period of time; (2) failure to properly operate or maintain existing control equipment; and (3) avoidance of operation and maintenance expenses for equipment that was not installed.

b. Delayed Compliance Costs

Delayed compliance costs are those that must be incurred in order to remedy a violation and which have been delayed due to non-compliance or partial non-compliance. This economic benefit represents the value of money earned on the total cost of full compliance over the period of delayed compliance. The period of non-compliance shall be calculated beginning with the earliest compliance date unless the Iowa DNR has granted a written compliance extension which expressly acknowledges the extension is based on a good cause finding excusing the failure to comply. Iowa DNR's failure to respond to a request for extension shall not be considered a grant of an extension for purposes of penalty assessment.

2. Gravity Assessment

The gravity of a violation takes into consideration the following factors: (1) actual or threatened harm to the environment or the public health and safety; (2) involvement of toxic or hazardous substances or potential long-term effects of the violation; (3) the degree to which ambient or source-specific standards are exceeded; (4) state and federal program priorities, size of facility, and other pertinent factors; (5) whether the violation is repeated and whether it violates an administrative or court order; (6) whether the type of violation threatens the integrity of a regulatory program; and (7) expenses or efforts by Iowa DNR in detecting, documenting, or responding to a violation. 567 IAC 10.2(2).

In assessing gravity, Iowa DNR staff should consider the amount of a pollutant that has been released or could have been released, the toxicity of the pollutant, the sensitivity of the environment, the proximity of actual or potential routes of human exposure and exposure receptors, the length of time of exposure, the potential for explosive, fire and other safety hazards. This assessment should also include whether the violation

threatens the integrity of a regulatory program. Examples would include the failure to maintain financial assurance to cover liability for releases of contaminants, failure to conduct leak detection or monitor pollution control equipment, failure to report and respond to suspected or actual releases of contaminants, or failure to maintain accurate records. Gravity also takes into account the extent of deviation from a regulatory standard. Factors to consider include the duration of time over which there has been non-compliance, the delay in reaching compliance and the degree to which the violator has partially satisfied a regulatory standard.

567 IAC 10.3(2) allows the Iowa DNR to assess up to $3,000 for the gravity portion of the penalty. This is a per day penalty limit; thus, any gravity calculation above $3,000 must include multiple days of violations.

3. Culpability Assessment

Culpability takes into account the degree of intent or negligence of the violator in committing the violation. Factors under 567 IAC 10.2(3) include whether the case involves false reporting of required information or tampering with monitoring devices. It also includes whether the violator has taken remedial measures or mitigated the harm caused by the violation. Under 567 IAC 10.3(2), the Iowa DNR may assess up to $3,000 for the culpability portion of the penalty. This is a per day penalty limit; thus, any culpability calculation above $3,000 must include multiple days of violations.

4. Maximum Penalty Authorized Under Iowa Code chapter 455B

The penalty provisions of Iowa Code chapter 455B establish different maximum penalties for different categories of violations, for example: $500 per day for flood plain and water rights (455B.279); $1,000 for hazardous condition notification (455B.386); $5,000 per day for solid waste (455B.307), wastewater and drinking water (455B.191), and underground tanks (455B.477); and $10,000 per day for air pollution (455B.146).

5. Minimum Assessment

567 IAC 10.3(1) sets out that "[n]o penalty may be assessed unless the cumulative amount is $50 or more."

6. Multiple Violation Assessment

If multiple violations are being evaluated, Iowa DNR may apply the penalty assessment under this rule for each violation or may consider one or more violations as a group for purposes of applying the penalty assessment.

7. Mitigation and Aggravation Adjustment

Pursuant to 567 IAC 10.3(2), Iowa DNR in its discretion may take into account aggravating or mitigating factors to increase or decrease the penalty by up to $1,000. Factors to consider include the extent to which the violator has taken remedial measures to mitigate the harm caused by the violation or the violator's history of violations, non-compliance and/or remedial actions.

B. Other Considerations

There are some miscellaneous items to discuss with respect to administrative penalties. These include documentation of penalty reduction, stipulated penalties, and collection of past due penalty amounts.

1. Documentation of Penalty Reduction

If during negotiations involving an Administrative Consent Order or in settling an Administrative Order, Iowa DNR agrees to reduce the original penalty amount, Iowa DNR staff shall document the rationale or justification for such penalty reduction and include in the enforcement file. All penalty reductions shall be calculated in a manner that is consistent with the above penalty process.

2. Stipulated Penalties

Stipulated penalties for future violations may be incorporated into an Administrative Consent Order or in settlement of an Administrative Order, provided the stipulated penalty provision complies with 567 IAC chapter 10 and preserves the right of the Iowa DNR and the State of Iowa to pursue, in lieu of the stipulated penalties, all other administrative and judicial enforcement remedies for any future violations. In no event shall the stipulated penalties assessed under an Administrative Consent Order or settlement of an Administrative Order, when added to the originally assessed penalties under the order, exceed the $10,000 maximum established in Iowa Code section 455B.109.

3. Collection of Unpaid Penalties

Iowa DNR has entered into an Iowa Code chapter 28 Agreement with the Department of Revenue to provide additional means of collecting penalties, in May 2005. This 28E Agreement was chosen because of the particular statutory collection powers available to the Department of Revenue. A penalty amount may be forwarded to the Department of Revenue for collections at any time, based upon the recommendation of the assigned DNR Attorney. The Department of Revenue provides the Legal Services Bureau a monthly report that documents the penalty monies collected by Revenue that month.

IX. Supplemental Environmental Projects (SEPs)

Iowa DNR may offer or the violator may propose a SEP as part of the settlement of an Administrative Consent Order. Whether to allow or accept a SEP is entirely within the discretion of Iowa DNR as a litigation settlement option. The practice of utilizing SEPs as settlement options shall not be interpreted to grant any right of entitlement or expectation interest in utilizing a SEP as part of a penalty assessment.

X. Monitoring Compliance with Administrative Consent Orders and Administrative Orders

Monitoring compliance with signed Administrative Consent Orders and Administrative Orders is the primary responsibility of the Environmental Specialist. The DNR Attorney

assigned to the case will track payment of the administrative penalty, but any other requirements contained within the order (e.g., compliance schedule) are the responsibility of the Environmental Specialist to track. This also includes tracking whether stipulated penalties become due for failure to meet requirements of an order. If stipulated penalties become due, the Environmental Specialist shall contact the DNR Attorney for appropriate follow-up.

The Environmental Specialist shall maintain documentation in the facility file of compliance with the order (e.g., injunctive relief). The DNR Attorney shall provide the Environmental Specialist with a copy of the check sent by the violator, or with other evidence that the penalty has been paid, to satisfy the penalty portion of the order. In addition, as set out above, these enforcement files shall contain justifications for penalty reductions in a manner that is calculated and consistent with the penalty process described above.

XI. Reporting

Numerous reports are generated during the enforcement process. On a monthly basis, the Legal Services Bureau Chief provides the Enforcement Coordinators with a status report of each open case. In addition, the Legal Services Bureau provides the EPC monthly reports on the following:

- List of Unpaid Administrative Penalties;
- Cases Referred to the Attorney General's office (and current status);
- Appealed cases (and current status);
- Penalties paid the previous month (including penalties collected by the Department of Revenue); and
- New enforcement actions taken the previous month.

The reports to the EPC are also located on Iowa DNR's website for public review

XII. Enforcement Priorities

Animal Feeding Operations

1. **Fish kill/acute water quality degradation.** Manure spills and/or discharges that result in destruction of aquatic life, including fish, are a top priority.

2. **Serious water quality degradation.** Release of pollutants may result in degradation of an aquatic resource without an obvious fish kill, but the effect may be impaired use and enjoyment of the water resource or chronic pollution harming aquatic life.

3. **Unauthorized construction.** Construction of AFO structures (including open lots) without or contrary to a permit or other required documentation is

also a DNR priority. Proper compliance with AFO siting and construction requirements are essential elements of the AFO program, which helps keep pollutants out of streams.

4. **Failure to submit MMP updates.** MMPs are the cornerstone of the animal feeding program. The MMP helps ensure that any proposed or current confinement feeding operation over 500 animal units has adequate land to use the manure nutrients it produces.

5. **Failure to obtain proper manure application certification.** The manure applicator certification program is an important component of the animal feeding operation regulations. The program ensures that manure is transported and applied properly.

Air Quality

1. **Asbestos violations.** Asbestos violations at schools, hospitals and community centers are a top priority. Because these facilities gather large groups of people in enclosed spaces for significant periods during a day, the DNR is focusing resources to ensure these facilities meet state asbestos removal requirements.

2. **Major source and/or repeat air quality violations.** Violations meeting at least one of these criteria are a DNR priority:
   a. At a major source, the violation relates to the pollutant for which the source is considered major (for example, particulate matter, sulfur dioxide).
   b. Violation affects minor source status at a synthetic minor source.
   c. Chronic or repeat violations.
   d. Violations that are an immediate threat to health or the environment.

Solid Waste

1. **Open burning.** It is a DNR priority to eliminate improper disposal of trade wastes, including open burning. Trade wastes are made up of waste resulting from trade, business, industry or commercial venture. Proper disposal will eliminate burning of these wastes, which helps improve or maintain air and water quality.

2. **Construction and demolition wastes.** Another priority is to ensure compliance with proper disposal of construction and demolition wastes by businesses. Construction and demolition debris is responsible for 16 percent, or 450,000 tons, of material landfilled in Iowa each year. This debris consists of materials such as wood, insulation, concrete, asphalt, brick, drywall, metal and shingles. Improper disposal can cause air and water pollution.

Underground Storage Tanks

1. **Failure to report a suspected release.** Priority will be given to responsible parties that fail to timely report a release or suspected release or fail to take corrective action upon learning of such potential or actual release. Prompt report of a release can reduce or halt the spread of contamination.

2. **Operating USTs without an approved financial responsibility mechanism.** The ownership and responsibility for USTs requires demonstrated financial responsibility to ensure adequate resources in the event of a leak. Maintaining proper financial responsibility and providing proper notification can reduce liability and allow insurance coverage in the event of a leak.

3. **Permanent closure of UST systems.** Proper closure of USTs no longer in use helps minimize potential contamination and may reveal the necessity for remediation, which is best addressed at the time of removal of a system.

4. **UST operation and maintenance violations.** To reduce contamination, responsible parties must follow laws and rules regarding the operation and maintenance of USTs. Failure to comply with these laws and rules can result in increased risks of releases and the failure to respond to a release once it occurs.

Leaking Underground Storage Tanks

1. **Free product assessment.** Responsible parties are required to initiate free product assessment and interim recovery upon discovery of a release. They must then submit an assessment plan to the DNR. Priority will be given to failure to implement a DNR approved active recovery system. Note: "free product" refers to a regulated substance that is present in a non-aqueous phase liquid (for example, liquid not dissolved in water).

2. **Corrective action design report.** Where a site has been classified as high risk, the responsible party must timely submit a corrective action design report, complete a Tier 3 work plan, or participate in DNR corrective action design meetings.

3. **Remediation assessment.** Failure to implement a remediation assessment or work plan is a DNR priority. Special priority consideration will be given to sites with known impacts to high risk receptors, such as plastic water lines, sewer lines or wells.

4. **Risk based tiered site assessment.** Failure to initiate and complete a risk based tiered site assessment is another priority. Special priority consideration

will be given to sites with "historical" contamination, recent releases or where no prior site assessment has been completed.

5. **Tiered assessment report.** The DNR also focuses on parties that fail to complete and obtain approval of a tiered assessment report. Priority consideration will be given to those situations where assessment deficiencies are such that a reliable risk classification cannot be made.

Contaminated Sites

1. **Site assessment.** The highest enforcement priority for the section is requiring a site assessment when the DNR possesses evidence of contamination at a site above standards. During this assessment, the extent of contamination is detailed and potential exposure pathways are identified.

2. **Site cleanup.** Potentially unsafe exposures may exist at sites with contaminated soils or groundwater. Cleanup actions are needed to protect human health and the environment.

Water Supply

1. **Acute maximum contaminant level (MCL) violations.** An acute MCL indicates an immediate threat to health and human safety.

2. **Failure to monitor violations.** By failing to monitor a drinking water supply, health and human safety are at risk. If a water supply does not monitor, there is no information on whether or not the supply is safe.

3. **In-progress construction without a permit.** It is essential that there is a permit prior to construction of a water supply. A construction permit ensures that the construction standards are being met to protect health and human safety.

4. **Cumulative non-acute MCLs.** Ongoing violations of a non-acute MCL indicates a long-term threat to health and human safety.

5. **Operator certification compliance.** The purpose of the water operator certification program is to ensure that water and wastewater system operators have sufficient knowledge and experience to properly operate the systems, and in turn protect health and human safety and the environment. Failure to have a certified operator is a long-term threat to health and human safety.

Wastewater

1. **Significant wastewater effluent violations.** These violations occur when a wastewater treatment facility significantly exceeds its monthly average permit limits. For example, if a wastewater treatment facility exceeds its monthly average permit limit for various pollutants (e.g. zinc, total suspended

solids) four out of six months, DNR will consider that facility to have significant effluent violations.

2. **Bypass events.** Wastewater treatment plants are designed for two basic purposes: to speed up the natural purification processes that occur in rivers, lakes, and streams; and to reduce pollutants that may interfere with these processes. When wastewater treatment facilities are "bypassed," the waste is not treated before it is deposited directly into a body of water. Chronic bypass events are a priority for enforcement.

3. **Failure to obtain or renew an NPDES permit.** The discharge of any pollutant from a point source into a navigable water is prohibited unless authorized by an NPDES permit.

Storm Water

1. **Failure to have a permit.** No storm water construction permit or failure to renew a permit. A permit for storm water discharge applies primarily to industrial and commercial facilities and activities. Contaminants introduced in storm water runoff or into storm sewers may impact drinking water sources, waters protected for recreation, and waters protected for aquatic life as well as other beneficial uses.

2. **No Storm Water Pollution Prevention Plan.** A SWPPP is a fundamental requirement of a storm water permit. The plan identifies potential sources of pollution, describes practices to reduce pollutants, and helps assure compliance with permit conditions (when properly designed and implemented).

Appendix 13

POLICY ON CIVIL PENALTIES

EPA GENERAL ENFORCEMENT POLICY #GM - 21

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: FEB 16 1984

Introduction

This document, Policy on Civil Penalties, establishes a single set of goals for penalty assessment in EPA administrative and judicial enforcement actions. These goals - deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems - are presented here in general terms. An outline of the general process for the assessment of penalties is contained in Attachment A.

A companion document, A Framework for Statute-Specific Approaches to Penalty Assessments, will also be issued today. This document provides guidance to the user of the policy on how to write penalty assessment guidance specific to the user's particular program. The first part of the Framework provides general guidance on developing program-specific guidance; the second part contains a detailed appendix which explains the basis for that guidance. Thus, the user need only refer to the appendix when he wants an explanation of the guidance in the first part of the Framework.

In order to achieve the above Agency policy goals, all administratively imposed penalties and settlements of civil penalty actions should, where possible, be consistent with the guidance contained in the Framework document. Deviations from the Framework's methodology, where merited, are authorized as long as the reasons for the deviations are documented. Documentation for deviations from the Framework in program-specific guidance should be located in that guidance. Documentation for deviations from the program-specific guidance in calculating individual penalties should be contained in both the case files and in any memoranda that accompany the settlements.

The Agency will make every effort to urge administrative law judges to impose penalties consistent with this policy and any medium-specific implementing guidance. For cases that go to court, the Agency will request the statutory maximum penalty in the filed complaint. And, as proceedings warrant, EPA will continue to pursue a penalty no less than that supported by the applicable program policy. Of course, all penalties must be consistent with applicable statutory provisions, based upon the number and duration of the violations at issue.

Applicability

This policy statement does not attempt to address the specific mechanisms for achieving the goals set out for penalty assessment. Nor does it prescribe a negotiation strategy to achieve the penalty target figures. Similarly, it does not address differences between statutes or between priorities of different programs. Accordingly, it cannot be used, by itself, as a basis for determining an appropriate penalty in a specific

action. Each EPA program office, in a joint effort with the Office of Enforcement and Compliance Monitoring, will revise existing policies, or write new policies as needed. These policies will guide the assessment of penalties under each statute in a manner consistent with this document and, to the extent reasonable, the accompanying Framework.

Until new program-specific policies are issued, the current penalty policies will remain in effect. Once new program-specific policies are issued, the Agency should calculate penalties as follows:

- For cases that are substantially settled, apply the old policy.

- For cases that will require further substantial negotiation, apply the new policy if that will not be too disruptive.

Because of the unique issues associated with civil penalties in certain types of cases, this policy does not apply to the following areas:

- CERCLA §107. This is an area in which Congress has directed a particular kind of response explicitly oriented toward recovering the cost of Government cleanup activity and natural resource damage.

- Clean Water Act §311(f) and (g). This also is cost recovery in nature. As in CERCLA §107 actions, the penalty assessment approach is inappropriate.

- Clean Air Act §120. Congress has set out in considerable detail the level of recovery under this section. It has been implemented with regulations which, as required by law, prescribe a non-exclusive remedy which focuses on recovery of the economic benefit of noncompliance. It should be noted, however, that this general penalty policy builds upon, and is consistent with the approach Congress took in that section.

Much of the rationale supporting this policy generally applies to non-profit institutions, including government entities. In applying this policy to such entities, EPA must exercise judgment case-by-case in deciding, for example, how to apply the economic benefit and ability to pay sanctions, if at all. Further guidance on the issue of seeking penalties against non-profit entities will be forthcoming.

Deterrence

The first goal of penalty assessment is to deter people from violating the law. Specifically, the penalty should persuade the violator to take precautions against falling into noncompliance again (specific deterrence) and dissuade others from violating the law (general deterrence). Successful deterrence is important because it provides the best protection for the environment. In addition, it reduces the resources necessary to administer the laws by addressing noncompliance before it occurs.

If a penalty is to achieve deterrence, both the violator and the general public must be convinced that the penalty places the violator in a worse position than those who have complied in a timely fashion. Neither the violator nor the general public is likely to believe this if the violator is able to retain an overall advantage from noncompliance. Moreover, allowing a violator to benefit from noncompliance punishes those who have complied by placing them at a competitive disadvantage. This creates a disincentive for compliance. For these reasons, it is Agency policy that penalties generally should, <u>at a minimum</u>, remove any significant economic benefits resulting from failure to comply with the law. This amount will be referred to as the "benefit component" of the penalty.

Where the penalty fails to remove the significant economic benefit, as defined by the program-specific guidance, the case development team must explain in the case file why it fails to do so. The case development team must then include this explanation in the memorandum accompanying each settlement for the signature of the Assistant Administrator of Enforcement and Compliance Monitoring, or the appropriate Regional official.

The removal of the economic benefit of noncompliance only places the violator in the same position as he would have been if compliance had been achieved on time. Both deterrence and fundamental fairness require that the penalty include an additional amount to ensure that the violator is economically worse off than if it had obeyed the law. This additional amount should reflect the seriousness of the violation. In doing so, the penalty will be perceived as fair. In addition the penalty's size will tend to deter other potential violators.

In some classes of cases, the normal gravity calculation may be insufficient to effect general deterrence. This could happen if, for example, there was extensive noncompliance with certain regulatory programs in specific areas of the United States. This would demonstrate that the normal penalty assessments had not been achieving general deterrence. In such cases, the case development team should consider increasing the gravity component sufficient to

achieve general deterrence. These extra assessments should balance the other goals of this policy, particularly equitable treatment of the regulated community.

This approach is consistent with the civil penalty provisions in the environmental laws. Almost all of them require consideration of the seriousness of the violation. This additional amount which reflects the seriousness of the violation is referred to as the "gravity component". The combination of the benefit and gravity components yields the "preliminary deterrence figure."

As explained later in this policy, the case development team will adjust this figure as appropriate. Nevertheless, EPA typically should seek to recover, at a minimum, a penalty which includes the benefit component plus some non-trivial gravity component. This is important because otherwise, regulated parties would have a general economic incentive to delay compliance until the Agency commenced an enforcement action. Once the Agency brought the action, the violator could then settle for a penalty less than their economic benefit of noncompliance. This incentive would directly undermine the goal of deterrence.

Fair and Equitable Treatment of the Regulated Community

The second goal of penalty assessment is the fair and equitable treatment of the regulated community. Fair and equitable treatment requires that the Agency's penalties must display both consistency and flexibility. The consistent application of a penalty policy is important because otherwise the resulting penalties might be seen as being arbitrarily assessed. Thus violators would be more inclined to litigate over those penalties. This would consume Agency resources and make swift resolution of environmental problems less likely.

But any system for calculating penalties must have enough flexibility to make adjustments to reflect legitimate differences between similar violations. Otherwise the policy might be viewed as unfair. Again, the result would be to undermine the goals of the Agency to achieve swift and equitable resolutions of environmental problems.

Methods for quantifying the benefit and gravity components are explained in the Framework guidance. These methods significantly further the goal of equitable treatment of violators. To begin with, the benefit component promotes equity by removing the unfair economic advantage which a violator may have gained over complying parties. Furthermore, because the benefit and gravity components are generated systematically, they

will exhibit relative consistency from case to case. Because the methodologies account for a wide range of relevant factors, the penalties generated will be responsive to legitimate differences between cases.

However, not all the possibly relevant differences between cases are accounted for in generating the preliminary deterrence amount. Accordingly, all preliminary deterrence amounts should be increased or mitigated for the following factors to account for differences between cases:

- Degree of willfulness and/or negligence
- History of noncompliance.
- Ability to pay.
- Degree of cooperation/noncooperation.
- Other unique factors specific to the violator or the case.

Mitigation based on these factors is appropriate to the extent the violator clearly demonstrates that it is entitled to mitigation.

The preliminary deterrence amount adjusted prior to the start of settlement negotiations yields the "initial penalty target figure". In administrative actions, this figure generally is the penalty assessed in the complaint. In judicial actions, EPA will use this figure as the first settlement goal. This settlement goal is an internal target and should not be revealed to the violator unless the case development team feels that it is appropriate. The initial penalty target may be further adjusted as negotiations proceed and additional information becomes available or as the original information is reassessed.

Swift Resolution of Environmental Problems

The third goal of penalty assessment is swift resolution of environmental problems. The Agency's primary mission is to protect the environment. As long as an environmental violation continues, precious natural resources, and possibly public health, are at risk. For this reason, swift correction of identified environmental problems must be an important goal of any enforcement action. In addition, swift compliance conserves Agency personnel and resources.

The Agency will pursue two basic approaches to promoting quick settlements which include swift resolution of environmental problems without undermining deterrence. Those two approaches are as follows:

1. Provide incentives to settle and institute prompt remedial action.

EPA policy will be to provide specific incentives to settle, including the following:

- The Agency will consider reducing the gravity component of the penalty for settlements in which the violator already has instituted expeditious remedies to the identified violations prior to the commencement of litigation.1/ This would be considered in the adjustment factor called degree of cooperation/noncooperation discussed above.
- The Agency will consider accepting additional environmental cleanup, and mitigating the penalty figures accordingly. But normally, the Agency will only accept this arrangement if agreed to in pre-litigation settlement.

Other incentives can be used, as long as they do not result in allowing the violator to retain a significant economic benefit.

2. Provide disincentives to delaying compliance.

The preliminary deterrence amount is based in part upon the expected duration of the violation. If that projected period of time is extended during the course of settlement negotiations due to the defendant's actions, the case development team should adjust that figure upward. The case development team should consider making this fact known to the violator early in the negotiation process. This will provide a strong disincentive to delay compliance.

1/ For the purposes of this document, litigation is deemed to begin:

- for administrative actions - when the respondent files a response to an administrative complaint or when the time to file expires or
- for judicial actions - when an Assistant United States Attorney files a complaint in court.

Intent of Policy and Information Requests for Penalty Calculations

The policies and procedures set out in this document and in the Framework for Statute-Specific Approaches to Penalty Assessment are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create any rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with these policies and procedures and to change them at any time without public notice. In addition, any penalty calculations under this policy made in anticipation of litigation are exempt from disclosure under the Freedom of Information Act. Nevertheless as a matter of public interest, the Agency may elect to release this information in some cases.

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Attachment

ATTACHMENT A

Outline of Civil Penalty Assessment

I. Calculate Preliminary Deterrence Amount

A. Economic benefit component and

B. Gravity component

(This yields the preliminary deterrence amount.)

II. Apply Adjustment Factors

A. Degree of cooperation/noncooperation (indicated through pre-settlement action.)

B. Degree of willfulness and/or negligence.

C. History of noncompliance.

D. Ability to pay (optional at this stage.)

E. Other unique factors (including strength of case, competing public policy concerns.)

(This yields the initial penalty target figure.)

III. Adjustments to Initial Penalty Target Figure After Negotiations Have Begun

A. Ability to pay (to the extent not considered in calculating initial penalty target.)

B. Reassess adjustments used in calculating initial penalty target. (Agency may want to reexamine evidence used as a basis for the penalty in the light of new information.)

C. Reassess preliminary deterrence amount to reflect continued periods of noncompliance not reflected in the original calculation.

D. Alternative payments agreed upon prior to the commencement of litigation.

(This yields the adjusted penalty target figure.)

A FRAMEWORK FOR STATUTE-SPECIFIC APPROACHES TO PENALTY ASSESSMENTS:

IMPLEMENTING EPA'S POLICY ON CIVIL PENALTIES

EPA GENERAL ENFORCEMENT POLICY #GM - 22

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

EFFECTIVE DATE: FEB 16 1984

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Introduction

This document, A Framework for Statute-Specific Approaches to Penalty Assessment, provides guidance to the user of the Policy on Civil Penalties on how to develop a medium-specific penalty policy. Such policies will apply to administratively imposed penalties and settlements of both administrative and judicial penalty actions.

In the Policy on Civil Penalties, the Environmental Protection Agency establishes a single set of goals for penalty assessment. Those goals - deterrence, fair and equitable treatment of the regulated community, and swift resolution of environmental problems - will be substantially impaired unless they are pursued in a consistent fashion. Even different terminology could cause confusion that would detract from the achievement of these goals. At the same time, too much rigidity will stifle negotiation and make settlement impossible.

The purpose of this document is to promote the goals of the Policy on Civil Penalties by providing a framework for medium-specific penalty policies. The Framework is detailed enough to allow individual programs to develop policies that will consistently further the Agency's goals and be easy to administer. In addition, it is general enough to allow each program to tailor the policy to the relevant statutory provisions and the particular priorities of each program.

While this document contains detailed guidance, it is not cast in absolute terms. Nevertheless, the policy does not encourage deviation from this guidance in either the development of medium-specific policies or in developing actual penalty figures. Where there are deviations in developing medium-specific policies, the reasons for those changes must be recorded in the actual policy. Where there are deviations from medium-specific policies in calculating a penalty figure, the case development team must detail the reasons for those changes in the case file. In addition, the rationale behind the deviations must be incorporated in the memorandum accompanying the settlement package to Headquarters or the appropriate Regional official.

This document is divided into two sections. The first one gives brief instructions to the user on how to write a medium-specific policy. The second section is an appendix that gives detailed guidance on implementing each section of the instructions and explains how the instructions are intended to further the goals of the policy.

Writing a Program Specific Policy

Summarized below are those elements that should be present in a program-specific penalty policy. For a detailed discussion of each of these ideas, the corresponding portions of the appendix should be consulted.

I. Developing a Penalty Figure

The development of a penalty figure is a two step process. First the case development team must calculate a preliminary deterrence figure. This figure is composed of the economic benefit component (where applicable) and the gravity component. The second step is to adjust the preliminary deterrence figure through a number of factors. The resulting penalty figure is the initial penalty target figure. In judicial actions, the initial penalty target figure is the penalty amount which the government normally sets as a goal at the outset of settlement negotiations. It is essentially an internal settlement goal and should not be revealed to the violator unless the case development team feels it is appropriate. In administrative actions, this figure generally is the penalty assessed in the complaint. While in judicial actions, the government's complaint will request the maximum penalty authorized by law.

This initial penalty target figure may be further adjusted in the course of negotiations. Each policy should ensure that the penalty assessed or requested is within any applicable statutory constraints, based upon the number and duration of violations at issue.

II. Calculating a Preliminary Deterrence Amount

Each program-specific policy must contain a section on calculating the preliminary deterrence figure. That section should contain materials on each of the following areas:

- Benefit Component. This section should explain:

  a. the relevent measure of economic benefit for various types of violations,
  b. the information needed,
  c. where to get assistance in computing this figure and
  d. how to use available computer systems to compare a case with similar previous violations.

- Gravity Component. This section should first rank different types of violations according to the seriousness of the act. In creating that ranking, the following factors should be considered:

  a. actual or possible harm,
  b. importance to the regulatory scheme and
  c. availability of data from other sources.

In evaluating actual or possible harm, your scheme should consider the following facts:

- amount of pollutant,
- toxicity of pollutant,
- sensitivity of the environment,
- length of time of a violation and
- size of the violator.

The policy then should assign appropriate dollar amounts or ranges of amounts to the different ranked violations to constitute the "gravity component". This amount, added to the amount reflecting economic benefit, constitutes the preliminary deterrence figure.

III. Adjusting the Preliminary Deterrence Amount to Derive the Initial Penalty Target Figure (Prenegotiation Adjustment)

Each program-specific penalty policy should give detailed guidance on applying the appropriate adjustments to the preliminary deterrence figure. This is to ensure that penalties also further Agency goals besides deterrence (i.e. equity and swift correction of environmental problems). Those guidelines should be consistent with the approach described in the appendix. The factors may be separated according to whether they can be considered before or after negotiation has begun or both.

Adjustments (increases or decreases, as appropriate) that can be made to the preliminary deterrence penalty to develop an initial penaly target to use at the outset of negotiation include:

- Degree of willfulness and/or negligence

- Cooperation/noncooperation through pre-settlement action.

- History of noncompliance.

- Ability to pay.

- Other unique factors (including strength of case, competing public policy considerations).

The policy may permit consideration of the violator's ability to pay as an adjustment factor before negotiations begin. It may also postpone consideration of that factor until after negotiations have begun. This would allow the violator to produce evidence substantiating its inability to pay.

The policy should prescribe appropriate amounts, or ranges of amounts, by which the preliminary deterrence penalty should be adjusted. Adjustments will depend on the extent to which certain factors are pertinent. In order to preserve the penalty's deterrent effect, the policy should also ensure that, except for the specific exceptions described in this document, the adjusted penalty will: 1) always remove any significant economic benefit of noncompliance and 2) contain some non-trivial amount as a gravity component.

IV. Adjusting the Initial Penalty Target During Negotiations

Each program-specific policy should call for periodic reassessment of these adjustments during the course of negotiations. This would occur as additional relevant information becomes available and the old evidence is re-evaluated in the light of new evidence. Once negotiations have begun, the policy also should permit adjustment of the penalty target to reflect "alternative payments" the violator agrees to make in settlement of the case. Adjustments for alternative payments and pre-settlement corrective action are generally permissible only before litigation has begun.

Again, the policy should be structured to ensure that any settlement made after negotiations have begun reflects the economic benefit of noncompliance up to the date of compliance plus some non-trivial gravity component. This means that if lengthy settlement negotiations cause the violation to continue longer than initially anticipated, the penalty target figure should be increased. The increase would be based upon the extent that the violations continue to produce ongoing environmental risk and increasing economic benefit.

Use of the Policy In Litigation

Each program-specific policy should contain a section on the use of the policy in litigation. Requests for penalties

should account for all the factors identified in the relevant statute and still allow for compromises in settlement without exceeding the parameters outlined in this document. (For each program, all the statutory factors are contained in the Framework either explicitly or as part of broader factors.) For administrative proceedings, the policy should explain how to formulate a penalty figure, consistent with the policy. The case development team will put this figure in the administrative complaint.

In judicial actions, the EPA will use the initial penalty target figure as its first settlement goal. This settlement goal is an internal target and should not be revealed to the violator unless the case development team feels it is appropriate. In judicial litigation, the government should request the maximum penalty authorized by law in its complaint. The policy should also explain how it and any applicable precedents should be used in responding to any explicit requests from a court for a minimum assesment which the Agency would deem appropriate.

Use of the Policy as a Feedback Device

Each program-specific policy should first explain in detail what information needs to be put into the case file and into the relevant computer tracking system. Furthermore, each policy should cover how to use that system to examine penalty assessments in other cases. This would thereby assist the Agency in making judgments about the size of adjustments to the penalty for the case at hand. Each policy should also explain how to present penalty calculations in litigation reports.

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Attachment

APPENDIX

Introduction

This appendix contains three sections. The first two sections set out guidelines for achieving the goals of the Policy on Civil Penalties. The first section focuses on achieving deterrence by assuring that the penalty first removes any economic benefit from noncompliance. Then it adds an amount to the penalty which reflects the seriousness of the violation. The second section provides adjustment factors so that both a fair and equitable penalty will result and that there will be a swift resolution of the environmental problem. The third section of the framework presents some practical advice on the use of the penalty figures generated by the policy.

The Preliminary Deterrence Amount

The Policy on Civil Penalties establishes deterrence as an important goal of penalty assessment. More specifically, it specifies that any penalty should, at a minimum, remove any significant benefits resulting from noncompliance. In addition, it should include an amount beyond removal of economic benefit to reflect the seriousness of the violation. That portion of the penalty which removes the economic benefit of noncompliance is referred to as the "benefit component;" that part of the penalty which reflects the seriousness of the violation is referred to as the "gravity component." When combined, these two components yield the "preliminary deterrence amount."

This section of the document provides guidelines for calculating the benefit component and the gravity component. It will also present and discuss a simplified version of the economic benefit calculation for use in developing quick penalty determinations. This section will also discuss the limited circumstances which justify settling for less than the benefit component. The uses of the preliminary deterrence amount will be explained in subsequent portions of this document.

I. The Benefit Component

In order to ensure that penalties remove any significant economic benefit of noncompliance, it is necessary to have reliable methods to calculate that benefit. The existence of reliable methods also strengthens the Agency's position in both litigation and negotiation. This section sets out guidelines for computing the benefit component. It first addresses costs which are delayed by noncompliance. Then it addresses costs which are avoided completely by noncompliance. It also identifies issues

to be considered when computing the benefit component for those violations where the benefit of noncompliance results from factors other than cost savings. This section concludes with a discussion of the proper use of the benefit component in developing penalty figures and in settlement negotiations.

A. Benefit from delayed costs

In many instances, the economic advantage to be derived from noncompliance is the ability to delay making the expenditures necessary to achieve compliance. For example, a facility which fails to construct required settling ponds will eventually have to spend the money needed to build those ponds in order to achieve compliance. But, by deferring these one-time nonrecurring costs until EPA or a State takes an enforcement action, that facility has achieved an economic benefit. Among the types of violations which result in savings from deferred cost are the following:

- Failure to install equipment needed to meet discharge or emission control standards.
- Failure to effect process changes needed to eliminate pollutants from products or waste streams.
- Testing violations, where the testing still must be done to demonstrate achieved compliance.
- Improper disposal, where proper disposal is still required to achieve compliance.
- Improper storage where proper storage is still required to achieve compliance.
- Failure to obtain necessary permits for discharge, where such permits would probably be granted. (While the avoided cost for many programs would be negligible, there are programs where the the permit process can be expensive).

The Agency has a substantial amount of experience under the air and water programs in calculating the economic benefit that results from delaying costs necessary to achieve compliance. This experience indicates that it is possible to estimate the benefit of delayed compliance through the use of a simple formula. Specifically, the economic benefit of delayed compliance may be estimated at: 5% per year of the delayed one-time capital cost for the period from the date the violation began until the date

compliance was or is expected to be achieved. This will be referred to as the "rule of thumb for delayed compliance" method. Each program may adopt its own "rule of thumb" if appropriate. The applicable medium-specific guidance should state what that method is.

The rule of thumb method can usually be used in making decisions on whether to develop a case or in setting a penalty target for settlement negotiations. In using this rule of thumb method in settlement negotiations, the Agency may want to make the violator fully aware that it is using an estimate and not a more precise penalty determination procedure. The decision whether to reveal this information is up to the negotiators.

The "rule of thumb" method only provides a first-cut estimate of the benefit of delayed compliance. For this reason, its use is probably inappropriate in situations where a detailed analysis of the economic effect of noncompliance is needed to support or defend the Agency's position. Accordingly, this "rule of thumb" method generally should not be used in any of the following circumstances:

- A hearing is likely on the amount of the penalty.
- The defendant wishes to negotiate over the amount of the economic benefit on the basis of factors unique to the financial condition of the company.
- The case development team has reason to believe it will produce a substantially inaccurate estimate; for example, where the defendant is in a highly unusual financial position, or where noncompliance has or will continue for an unusually long period.

There usually are avoided costs associated with this type of situation. Therefore, the "rule of thumb for avoided costs" should also be applied. (See pages 9-10). For most cases, both figures are needed to yield the major portion of the economic benefit component.

When the rule of thumb method is not applicable, the economic benefit of delayed compliance should be computed using the <u>Methodology for Computing the Economic Benefit of Noncompliance</u>. This document, which is under development, provides a method for computing the economic benefit of noncompliance based on a detailed economic analysis. The method will largely be a refined version of the method used in the previous <u>Civil Penalty Policy</u> issued July 8, 1980, for the Clean Water Act and Title I of the Clean Air Act. It will also be consistent with the regulations

implementing Section 120 of the Clean Air Act. A computer program will be available to the Regions to perform the analysis, together with instructions for its use. Until the Methodology is issued, the economic model contained in the July 8, 1980, Civil Penalty Policy should be used. It should be noted that the Agency recently modified this guidance to reflect changes in the tax law.

B. Benefit from avoided costs

Many kinds of violations enable a violator to permanently avoid certain costs associated with compliance.

- Cost savings for operation and maintenance of equipment that the violator failed to install.
- Failure to properly operate and maintain existing control equipment.
- Failure to employ sufficient number of adequately trained staff.
- Failure to establish or follow precautionary methods required by regulations or permits.
- Improper storage, where commercial storage is reasonably available.
- Improper disposal, where redisposal or cleanup is not possible.
- Process, operational, or maintenance savings from removing pollution equipment.
- Failure to conduct necessary testing.

As with the benefit from delayed costs, the benefit component for avoided costs may be estimated by another "rule of thumb" method. Since these costs will never be incurred, the estimate is the expenses avoided until the date compliance is achieved less any tax savings. The use of this "rule of thumb" method is subject to the same limitations as those discussed in the preceding section.

Where the "rule of thumb for avoided costs" method cannot be used, the benefit from avoided costs must be computed using the Methodology for Computing the Economic Benefit of Noncompliance. Again, until the Methology is issued, the method contained in the July 8, 1980, Civil Penalty Policy should be used as modified to reflect recent changes in the tax law.

C. Benefit from competitive advantage

For most violations, removing the savings which accrue from noncompliance will usually be sufficient to remove the competitive advantage the violator clearly has gained from noncompliance. But there are some situations in which noncompliance allows the violator to provide goods or services which are not available elsewhere or are more attractive to the consumer. Examples of such violations include:

- Selling banned products.
- Selling products for banned uses.
- Selling products without required labelling or warnings.
- Removing or altering pollution control equipment for a fee, (e.g., tampering with automobile emission controls.)
- Selling products without required regulatory clearance, (e.g., pesticide registration or premanufacture notice under TSCA.)

To adequately remove the economic incentive for such violations, it is helpful to estimate the net profits made from the improper transactions (i.e. those transactions which would not have occurred if the party had complied). The case development team is responsible for identifying violations in which this element of economic benefit clearly is present and significant. This calculation may be substantially different depending on the type of violation. Consequently the program-specific policies should contain guidance on identifying these types of violations and estimating these profits. In formulating that guidance, the following principles should be followed:

- The amount of the profit should be based on the best information available concerning the number of transactions resulting from noncompliance.
- Where available, information about the average profit per transaction may be used. In some cases, this may be available from the rulemaking record of the provision violated.
- The benefit derived should be adjusted to reflect the present value of net profits derived in the past.

It is recognized that the methods developed for estimating the profit from those transactions will sometimes rely substantially on expertise rather than verifiable data. Nevertheless, the programs should make all reasonable efforts to ensure that the estimates developed are defensible. The programs are encouraged to work with the Office of Policy, Planning and Evaluation to ensure that the methods developed are consistent with the forthcoming Methodology for Computing the Economic Benefit of Noncompliance and with methods developed by other programs. The programs should also ensure that sufficient contract funds are available to obtain expert advice in this area as needed to support penalty development, negotiation and trial of these kinds of cases.

D. Settling cases for an amount less than the economic benefit

As noted above, settling for an amount which does not remove the economic benefit of noncompliance can encourage people to wait until EPA or the State begins an enforcement action before complying. For this reason, it is general Agency policy not to settle for less than this amount. There are three general areas where settling for less than economic benefit may be appropriate. But in any individual case where the Agency decides to settle for less than enconomic benefit, the case development team must detail those reasons in the case file and in any memoranda accompanying the settlement.

1. Benefit component involves insignificant amount

It is clear that assessing the benefit component and negotiating over it will often represent a substantial commitment of resources. Such a commitment of resources may not be warranted in cases where the magnitude of the benefit component is not likely to be significant, (e.g. not likely to have a substantial impact on the violator's competitive positions). For this reason, the case development team has the discretion not to seek the benefit component where it appears that the amount of that component is likely to be less than $10,000. (A program may determine that other cut-off points are more reasonable based on the likelihood that retaining the benefit could encourage noncomplying behavior.) In exercising that discretion, the case development team should consider the following factors:

- Impact on violator: The likelihood that assessing the benefit component as part of the penalty will have a noticeable effect on the violator's competitive position or overall profits. If no such effect appears likely, the benefit component should probably not be pursued.

- The size of the gravity component: If the gravity component is relatively small, it may not provide a sufficient deterrent, by

itself, to achieve the goals of this policy.

- The certainty of the size of the benefit component: If the economic benefit is quite well defined, it is not likely to require as much effort to seek to include it in the penalty assessment. Such circumstances also increase the likelihood that the economic benefit was a substantial motivation for the noncompliance. This would make the inclusion of the benefit component more necessary to achieve specific deterrence.

It may be appropriate not to seek the benefit component in an entire class of violation. In that situation, the rationale behind that approach should be clearly stated in the appropriate medium-specific policy. For example, the most appropriate way to handle a small non-recurring operation and maintenance violation may be a small penalty. Obviously it makes little sense to assess in detail the economic benefit for each individual violation because the benefit is likely to be so small. The medium-specific policy would state this as the rationale.

2. Compelling public concerns

The Agency recognizes that there may be some instances where there are compelling public concerns that would not be served by taking a case to trial. In such instances, it may become necessary to consider settling a case for less than the benefit component. This may be done only if it is absolutely necessary to preserve the countervailing public interests. Such settlements might be appropriate where the following circumstances occur:

- There is a very substantial risk of creating precedent which will have a significant adverse effect upon the Agency's ability to enforce the law or clean up pollution if the case is taken to trial.

- Settlement will avoid or terminate an imminent risk to human health or the environment. This is an adequate justification only if injunctive relief is unavailable for some reason, and if settlement on remedial responsibilities could not be reached independent of any settlement of civil penalty liability.

- Removal of the economic benefit would result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business.

Alternative payment plans should be fully explored before resorting to this option. Otherwise, the Agency will give the perception that shirking one's environmental responsibilities is a way to keep a failing enterprise afloat. This exemption does not apply to situations where the plant was likely to close anyway, or where there is a likelihood of continued harmful noncompliance.

3. Litigation practicalities

The Agency realizes that in certain cases, it is highly unlikely the EPA will be able to recover the economic benefit in litigation. This may be due to applicable precedent, competing public interest considerations, or the specific facts, equities, or evidentiary issues pertaining to a particular case. In such a situation it is unrealistic to expect EPA to obtain a penalty in litigation which would remove the economic benefit. The case development team then may pursue a lower penalty amount.

II. The Gravity Component

As noted above, the Policy on Civil Penalties specifies that a penalty, to achieve deterrence, should not only remove any economic benefit of noncompliance, but also include an amount reflecting the seriousness of the violation. This latter amount is referred to as the "gravity component." The purpose of this section of the document is to establish an approach to quantifying the gravity component. This approach can encompass the differences between programs and still provide the basis for a sound consistent treatment of this issue.

A. Quantifying the gravity of a violation

Assigning a dollar figure to represent the gravity of a violation is an essentially subjective process. Nevertheless, the relative seriousness of different violations can be fairly accurately determined in most cases. This can be accomplished by reference to the goals of the specific regulatory scheme and the facts of each particular violation. Thus, linking the dollar amount of the gravity component to these objective factors is a useful way of insuring that violations of approximately equal seriousness are treated the same way.

Such a linkage promotes consistency. This consistency strengthens the Agency's position both in negotiation and before a trier of fact. This approach consequently also encourages swift resolution of environmental problems.

Each program must develop a system for quantifying the gravity of violations of the laws and regulations it administers.

This development must occur within the context of the penalty amounts authorized by law for that program. That system must be based, whenever possible, on objective indicators of the seriousness of the violation. Examples of such indicators are given below. The seriousness of the violation should be based primarily on: 1) the risk of harm inherent in the violation at the time it was committed and 2) the actual harm that resulted from the violation. In some cases, the seriousness of the risk of harm will exceed that of the actual harm. Thus, each system should provide enough flexibility to allow EPA to consider both factors in assessing penalties.

Each system must also be designed to minimize the possibility that two persons applying the system to the same set of facts would come up with substantially different numbers. Thus, to the extent the system depends on categorizing events, those categories must be clearly defined. That way there is little possibility for argument over the category in which a violation belongs. In addition, the categorization of the events relevant to the penalty decision should be noted in the penalty development portion of the case file.

B. Gravity Factors

In quantifying the gravity of a violation, a program-specific policy should rank different types of violations according to the seriousness of the act. The following is a suggested approach to ranking the seriousness of violations. In this approach to ranking, the following factors should be considered:

- Actual or possible harm: This factor focuses on whether (and to what extent) the activity of the defendant actually resulted or was likely to result in an unpermitted discharge or exposure.

- Importance to the regulatory scheme: This factor focuses on the importance of the requirement to achieving the goal of the statute or regulation. For example, if labelling is the only method used to prevent dangerous exposure to a chemical, then failure to label should result in a relatively high penalty. By contrast, a warning sign that was visibly posted but was smaller than the required size would not normally be considered as serious.

- Availability of data from other sources: The violation of any recordkeeping or reporting requirement is a very serious

matter. But if the involved requirement is the only source of information, the violation is far more serious. By contrast, if the Agency has another readily available and cheap source for the necessary information, a smaller penalty may be appropriate. (E.g. a customer of the violator purchased all the violator's illegally produced substance. Even though the violator does not have the required records, the customer does.)

- Size of violator: In some cases, the gravity component should be increased where it is clear that the resultant penalty will otherwise have little impact on the violator in light of the risk of harm posed by the violation. This factor is only relevant to the extent it is not taken into account by other factors.

The assessment of the first gravity factor listed above, risk or harm arising from a violation, is a complex matter. For purposes of ranking violations according to seriousness, it is possible to distinguish violations within a category on the basis of certain considerations, including the following:

- Amount of pollutant: Adjustments for the concentration of the pollutant may be appropriate, depending on the regulatory scheme and the characteristics of the pollutant. Such adjustments need not be linear, especially if the pollutant can be harmful at low concentrations.

- Toxicity of the pollutant: Violations involving highly toxic pollutants are more serious and should result in relatively larger penalties.

- Sensitivity of the environment: This factor focuses on the location where the violation was committed. For example, improper discharge into waters near a drinking water intake or a recreational beach is usually more serious than discharge into waters not near any such use.

- The length of time a violation continues: In most circumstances, the longer a violation continues uncorrected, the greater is the risk of harm.

Although each program-specific policy should address each of the factors listed above, or determine why it is not relevant, the factors listed above are not meant to be exhaustive. The programs should make every effort to identify all factors relevant to assessing the seriousness of any violation. The programs should then systematically prescribe a dollar amount to yield a gravity component for the penalty. The program-specific policies may prescribe a dollar range for a certain category of violation rather than a precise dollar amount within that range based on the specific facts of an individual case.

The process by which the gravity component was computed must be memorialized in the case file. Combining the benefit component with the gravity component yields the preliminary deterrence amount.

In some classes of cases, the normal gravity calculation may be insufficient to effect general deterrence. This could happen if there was extensive noncompliance with certain regulatory programs in specific areas of the United States. This would demonstrate that the normal penalty assessments had not been achieving general deterrence. The medium specific policies should address this issue. One possible approach would be to direct the case development team to consider increasing the gravity component within a certain range to achieve general deterrence. These extra assessments should be consistent with the other goals of this policy.

Initial and Adjusted Penalty Target Figure

The second goal of the Policy on Civil Penalties is the equitable treatment of the regulated community. One important mechanism for promoting equitable treatment is to include the benefit component discussed above in a civil penalty assessment. This approach would prevent violators from benefitting economically from their noncompliance relative to parties which have complied with environmental requirements.

In addition, in order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts of each case. Yet it still must produce enough consistent results to treat similarly-situated violators similarly. This is accomplished by identifying many of the legitimate differences between cases and providing guidelines for how to adjust the preliminary deterrence amount when those facts occur. The application of these adjustments to the preliminary deterrence amount prior to the commencement of negotiation yields the initial penalty target figure. During the course of negotiation, the case development team may further adjust this figure to yield the adjusted penalty target figure.

Nevertheless, it should be noted that equitable treatment is a two-edged sword. While it means that a particular violator will receive no higher penalty than a similarly situated violator, it also means that the penalty will be no lower.

I. Flexibility-Adjustment Factors

The purpose of this section of the document is to establish additional adjustment factors to promote flexibility and to identify management techniques that will promote consistency. This section sets out guidelines for adjusting penalties to account for some factors that frequently distinguish different cases. Those factors are: degree of willfulness and/or negligence, degree of cooperation/noncooperation, history of noncompliance, ability to pay, and other unique factors. Unless otherwise specified, these adjustment factors will apply only to the gravity component and not to the economic benefit component. Violators bear the burden of justifying mitigation adjustments they propose based on these factors.

Within each factor there are three suggested ranges of adjustment. The actual ranges for each medium-specific policy will be determined by those developing the policy. The actual ranges may differ from these suggested ranges based upon program specific needs. The first, typically a 0-20% adjustment of the gravity component, is within the absolute discretion of the case development team. 1/ The second, typically a 21-30% adjustment, is only appropriate in unusual circumstances. The third range, typically beyond 30% adjustment, is only appropriate in extraordinary circumstances. Adjustments in the latter two ranges, unusual and extraordinary circumstances, will be subject to scrutiny in any performance audit. The case development team may wish to reevaluate these adjustment factors as the negotiations progress. This allows the team to reconsider evidence used as a basis for the penalty in light of new information.

Where the Region develops the penalty figure, the application of adjustment factors will be part of the planned Regional audits. Headquarters will be responsible for proper application of these factors in nationally-managed cases. A detailed discussion of these factors follows.

A. Degree of Willfulness and/or Negligence

Although most of the statutes which EPA administers are strict liability statutes, this does not render the violator's

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1/ Absolute discretion means that the case development team may make penalty development decisions independent of EPA Headquarters. Nevertheless it is understood that in all judicial matters, the Department of Justice can still review these determinations if they so desire. Of course the authority to exercise the Agency's concurrence in final settlements is covered by the applicable delegations.

willfulness and/or negligence irrelevant. Knowing or willful violations can give rise to criminal liability, and the lack of any culpability may, depending upon the particular program, indicate that no penalty action is appropriate. Between these two extremes, the willfulness and/or negligence of the violator should be reflected in the amount of the penalty.

In assessing the degree of willfulness and/or negligence, all of the following points should be considered in most cases:

- How much control the violator had over the events constituting the violation.
- The forseeability of the events constituting the violation.
- Whether the violator took reasonable precautions against the events constituting the violation.
- Whether the violator knew or should have known of the hazards associated with the conduct.
- The level of sophistication within the industry in dealing with compliance issues and/or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the technology forcing nature of the statute, where applicable.
- Whether the violator in fact knew of the legal requirement which was violated.

It should be noted that this last point, lack of knowledge of the legal requirement, should never be used as a basis to reduce the penalty. To do so would encourage ignorance of the law. Rather, knowledge of the law should serve only to enhance the penalty.

The amount of control which the violator had over how quickly the violation was remedied is also relevent in certain circumstances. Specifically, if correction of the environmental problem was delayed by factors which the violator can clearly show were not reasonably foreseeable and out of its control, the penalty may be reduced.

The suggested approach for this factor is for the case development team to have absolute discretion to adjust the penalty up or down by 20% of the gravity component. Adjustments in the ± 21-30% range should only be made in unusual circumstances.

Adjustments for this factor beyond ± 30% should be made only in extraordinary circumstances. Adjustments in the unusual or extraordinary circumstance range will be subject to scrutiny in any audit of performance.

B. Degree of Cooperation/Noncooperation

The degree of cooperation or noncooperation of the violator in remedying the violation is an appropriate factor to consider in adjusting the penalty. Such adjustments are mandated by both the goals of equitable treatment and swift resolution of environmental problems. There are three areas where this factor is relevant.

1. Prompt reporting of noncompliance

Cooperation can be manifested by the violator promptly reporting its noncompliance. Assuming such self-reporting is not required by law, such behavior should result in the mitigation of any penalty.

The suggested ranges of adjustment are as follows. The case development team has absolute discretion on any adjustments up to ± 10% of the gravity component for cooperation/noncooperation. Adjustments can be made up to ± 20% of the gravity component, but only in unusual circumstances. In extraordinary circumstances, such as self reporting of a TSCA premanufacture notice violation, the case development team may adjust the penalty beyond the ± 20% factor. Adjustments in the unusual or extraordinary circumstances ranges will be subject to scrutiny in any performance audit.

2. Prompt correction of environmental problems

The Agency should provide incentives for the violator to commit to correcting the problem promptly. This correction must take place before litigation is begun, except in extraordinary circumstances.2/ But since these incentives must be consistent with deterrence, they must be used judiciously.

2/ For the purposes of this document, litigation is deemed to begin:

- for administrative actions - when the respondent files a response to an administrative complaint or when the time to file expires or

- for judicial actions - when an Assistant United States Attorney files a complaint in court.

The circumstances under which the penalty is reduced depend on the type of violation involved and the source's response to the problem. A straightforward reduction in the amount of the gravity component of the penalty is most appropriate in those cases where either: 1) the environmental problem is actually corrected prior to initiating litigation, or 2) ideally, immediately upon discovery of the violation. Under this approach, the reduction typically should be a substantial portion of the unadjusted gravity component.

In general, the earlier the violator instituted corrective action after discovery of the violation and the more complete the corrective action instituted, the larger the penalty reduction EPA will consider. At the discretion of the case development team, the unadjusted gravity component may be reduced up to 50%. This would depend on how long the environmental problem continued before correction and the amount of any environmental damage. Adjustments greater than 50% are permitted, but will be the subject of close scrutiny in auditing performance.

It should be noted that in some instances, the violator will take all necessary steps toward correcting the problem but may refuse to reach any agreement on penalties. Similarly, a violator may take some steps to ameliorate the problem, but choose to litigate over what constitutes compliance. In such cases, the gravity component of the penalty may be reduced up to 25% at the discretion of the case development team. This smaller adjustment still recognizes the efforts made to correct the environmental problem, but the benefit to the source is not as great as if a complete settlement is reached. Adjustments greater than 25% are permitted, but will be the subject of close scrutiny in auditing performance.

In all instances, the facts and rationale justifying the penalty reduction must be recorded in the case file and included in any memoranda accompanying settlement.

3. Delaying compliance

Swift resolution of environmental problems will be encouraged if the violator clearly sees that it will be financially disadvantageous for the violator to litigate without remedying noncompliance. The settlement terms described in the preceding section are only available to parties who take steps to correct a problem prior to initiation of litigation. To some extent, this is an incentive to comply as soon as possible. Nevertheless, once litigation has commenced, it should be clear that the defendant litigates at its own risk.

In addition, the methods for computing the benefit component and the gravity component are both structured so that the penalty target increases the longer the violation remains uncorrected. The larger penalty for longer noncompliance is systematically linked to the benefits accruing to the violator and to the continuing risk to human health and the environment. This occurs even after litigation has commenced. This linkage will put the Agency in a strong position to convince the trier of fact to impose such larger penalties. For these reasons, the Policy on Civil Penalties provides substantial disincentives to litigating without complying.

C. History of noncompliance

Where a party has violated a similar environmental requirement before, this is usually clear evidence that the party was not deterred by the Agency's previous enforcement response. Unless the previous violation was caused by factors entirely out of the control of the violator, this is an indication that the penalty should be adjusted upwards.

In deciding how large these adjustments should be, the case development team should consider the following points:

- How similar the previous violation was.
- How recent the previous violation was.
- The number of previous violations.
- Violator's response to previous violation(s) in regard to correction of the previous problem.

Detailed criteria for what constitutes a "similar violation" should be contained in each program-specific policy. Nevertheless a violation should generally be considered "similar" if the Agency's previous enforcement response should have alerted the party to a particular type of compliance problem. Some facts that indicate a "similar violation" was committed are as follows:

- The same permit was violated.
- The same substance was involved.
- The same process points were the source of the violation.
- The same statutory or regulatory provision was violated.

- A similar act or omission (e.g. the failure to properly store chemicals) was the basis of the violation.

For purposes of this section, a "prior violation" includes any act or omission for which a formal enforcement response has occurred (e.g. notice of violation, warning letter, complaint, consent decree, consent agreement, or final order). It also includes any act or omission for which the violator has previously been given written notification, however informal, that the Agency believes a violation exists.

In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a previous instance of noncompliance should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, the case development team should ascertain who in the organization had control and oversight responsibility for the conduct resulting in the violation. In some situations the same persons or the same organizational unit had or reasonably should have had control or oversight responsibility for violative conduct. In those cases, the violation will be considered part of the compliance history of that regulated party.

In general, the case development team should begin with the assumption that if the same corporation was involved, the adjustments for history of noncompliance should apply. In addition, the case development team should be wary of a party changing operators or shifting responsibility for compliance to different groups as a way of avoiding increased penalties. The Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection. Consequently, the adjustment for history of noncompliance should probably apply unless the violator can demonstrate that the other violating corporate facilities are independent.

The following are the Framework's suggested adjustment ranges. If the pattern is one of "dissimilar" violations, relatively few in number, the case development team has absolute discretion to raise the penalty amount by 35%. For a relatively large number of dissimilar violations, the gravity component can be increased up to 70%. If the pattern is one of "similar" violations, the case development team has absolute discretion to raise the penalty amount up to 35% for the first repeat violation, and up to 70% for further repeated similar violations. The case development team may make higher adjustments in extraordinary circumstances, but such adjustments will be subject to scrutiny in any performance audit.

D. Ability to pay

The Agency will generally not request penalties that are clearly beyond the means of the violator. Therefore EPA should consider the ability to pay a penalty in arriving at a specific final penalty assessment. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially troubled business. EPA reserves the option, in appropriate circumstances, of seeking a penalty that might put a company out of business.

For example, it is unlikely that EPA would reduce a penalty where a facility refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations. That long history would demonstrate that less severe measures are ineffective.

The financial ability adjustment will normally require a significant amount of financial information specific to the violator. If this information is available prior to commencement of negotiations, it should be assessed as part of the initial penalty target figure. If it is not available, the case development team should assess this factor after commencement of negotiation with the source.

The burden to demonstrate inability to pay, as with the burden of demonstrating the presence of any mitigating circumstances, rests on the defendant. If the violator fails to provide sufficient information, then the case development team should disregard this factor in adjusting the penalty. The National Enforcement Investigations Center (NEIC) has developed the capability to assist the Regions in determining a firm's ability to pay. Further information on this system will be made available shortly under separate cover.

When it is determined that a violator cannot afford the penalty prescribed by this policy, the following options should be considered:

- Consider a delayed payment schedule: Such a schedule might even be contingent upon an increase in sales or some other indicator of improved business. This approach is a real burden on the Agency and should only be considered on rare occasions.

- Consider non-monetary alternatives, such as public service activities: For example, in the mobile source program, fleet operators who tampered with pollution control devices

on their vehicles agreed to display anti-tampering ads on their vehicles. Similar solutions may be possible in other industries.

- Consider straight penalty reductions as a last recourse: If this approach is necessary, the reasons for the case development team's conclusion as to the size of the necessary reduction should be made a part of the formal enforcement file and the memorandum accompanying the settlement. 3/

- Consider joinder of the violator's individual owners: This is appropriate if joinder is legally possible and justified under the circumstances.

Regardless of the Agency's determination of an appropriate penalty amount to pursue based on ability to pay considerations, the violator is still expected to comply with the law.

E. Other unique factors

Individual programs may be able to predict other factors that can be expected to affect the appropriate penalty amount. Those factors should be identified and guidelines for their use set out in the program-specific policies. Nevertheless, each policy should allow for adjustment for unanticipated factors which might affect the penalty in each case.

It is suggested that there be absolute discretion to adjust penalties up or down by 10% of the gravity component for such reasons. Adjustments beyond the absolute discretion range will be subject to scrutiny during audits. In addition, they will primarily be allowed for compelling public policy concerns or the strengths and equities of the case. The rationale for the reduction must be expressed in writing in the case file and in any memoranda accompanying the settlement. See the discussion on pages 12 and 13 for further specifics on adjustments appropriate on the basis of either compelling public policy concerns or the strengths and equities of the case.

II. Alternative Payments

In the past, the Agency has accepted various environmentally beneficial expenditures in settlement of a case and chosen not to

3/ If a firm fails to pay the agreed-to penalty in an administrative or judicial final order, then the Agency must follow the Federal Claims Collection Act procedures for obtaining the penalty amount.

pursue more severe penalties. In general, the regulated community has been very receptive to this practice. In many cases, violators have found "alternative payments" to be more attractive than a traditional penalty. Many useful projects have been accomplished with such funds. But in some instances, EPA has accepted for credit certain expenditures whose actual environmental benefit has been somewhat speculative.

The Agency believes that these alternative payment projects should be reserved as an incentive to settlement before litigation. For this reason, such arrangements will be allowed only in prelitigation agreements except in extraordinary circumstances.

In addition, the acceptance of alternative payments for environmentally beneficial expenditures is subject to certain conditions. The Agency has designed these conditions to prevent the abuse of this procedure. Most of the conditions below applied in the past, but some are new. All of these conditions must be met before alternative payments may be accepted:[4/]

- No credits can be given for activities that currently are or will be required under current law or are likely to be required under existing statutory authority in the forseeable future (e.g., through upcoming rulemaking).
- The majority of the project's environmental benefit should accrue to the general public rather than to the source or any particular governmental unit.
- The project cannot be something which the violator could reasonably be expected to do as part of sound business practices.

4/ In extraordinary circumstances, the Agency may choose not to pursue higher penalties for "alternative" work done prior to commencement of negotiations. For example, a firm may recall a product found to be in violation despite the fact that such recall is not required. In order for EPA to forgo seeking higher penalties, the violator must prove that it has met the other conditions herein stated. If the violator fails to prove this in a satisfactory manner, the case development team has the discretion to completely disallow the credit project. As with all alternative projects, the case development team has the discretion to still pursue some penalties in settlement.

- EPA must not lower the amount it decides to accept in penalties by more than the after-tax amount the violator spends on the project.5/

In all cases where alternative payments are allowed, the case file should contain documentation showing that each of the conditions listed above have been met in that particular case. In addition when considering penalty credits, Agency negotiators should take into account the following points:

- The project should not require a large amount of EPA oversight for its completion. In general the less oversight the proposed credit project would require from EPA to ensure proper completion, the more receptive EPA can be toward accepting the project in settlement.

- The project should receive stronger consideration if it will result in the abatement of existing pollution, ameliorate the pollution problem that is the basis of the government's claim and involve an activity that could be ordered by a judge as equitable relief.

- The project should receive stronger consideration if undertaken at the facility where the violation took place.

- The company should agree that any publicity it disseminates regarding its funding of the project must include a statement that such funding is in settlement of a lawsuit brought by EPA or the State.

5/ This limitation does not apply to public awareness activities such as those employed for fuel switching and tampering violations under the Clean Air Act. The purpose of the limitation is to preserve the deterrent value of the settlement. But these violations are often the result of public misconceptions about the economic value of these violations. Consequently, the public awareness activities can be effective in preventing others from violating the law. Thus, the high general deterrent value of public awareness activities in these circumstances obviates the need for the one-to-one requirement on penalty credits.

Each alternative payment plan must entail an identified project to be completely performed by the defendant. Under the plan, EPA must not hold any funds which are to be spent at EPA's discretion unless the relevant statute specifically provides that authority. The final order, decree or judgment should state what financial penalty the violator is actually paying and describe as precisely as possible the credit project the violator is expected to perform.

III. Promoting Consistency

Treating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment. This document has established several mechanisms to promote such consistency. Yet it still leaves enough flexibility for settlement and for tailoring the penalty to particular circumstances. Perhaps the most important mechanisms for achieving consistency are the systematic methods for calculating the benefit component and gravity component of the penalty. Together, they add up to the preliminary deterrence amount. The document also sets out guidance on uniform approaches for applying adjustment factors to arrive at an initial penalty target prior to beginning settlement negotiations or an adjusted penalty target after negotiations have begun.

Nevertheless, if the Agency is to promote consistency, it is essential that each case file contain a complete description of how each penalty was developed. This description should cover how the preliminary deterrence amount was calculated and any adjustments made to the preliminary deterrence amount. It should also describe the facts and reasons which support such adjustments. Only through such complete documentation can enforcement attorneys, program staff and their managers learn from each others' experience and promote the fairness required by the Policy on Civil Penalties.

To facilitate the use of this information, Office of Legal and Enforcement Policy will pursue integration of penalty information from judicial enforcement actions into a computer system. Both Headquarters and all Regional offices will have access to the system through terminals. This would make it possible for the Regions to compare the handling of their cases with those of other Regions. It could potentially allow the Regions, as well as Headquarters, to learn from each others' experience and to identify problem areas where policy change or further guidance is needed.

Use of Penalty Figure in Settlement Discussions

The Policy and Framework do not seek to constrain negotiations. Their goal is to set settlement target figures for the internal use of Agency negotiators. Consequently, the penalty figures under negotiation do not necessarily have to be as low as the internal target figures. Nevertheless, the final settlement figures should go no lower than the internal target figures unless either: 1) the medium-specific penalty policy so provides or 2) the reasons for the deviation are properly documented.

Appendix 14

TO: Honorable Governor Terry Edward Branstad
Charlie Smithson, Chief Clerk of the House
Michael Marshall, Secretary of the Senate
Ron Parker, Senate Democrat Caucus
John Hodges, Senate Republican Caucus
Joseph Romano, House Democrat Caucus Staff
Jeff Mitchell, House Republican Caucus Staff
Julie Vande Hoef, Governor's Office

FROM: The Environmental Protection Commission

DATE: January 18, 2012

SUBJECT: 2011 Annual Report and Recommendations

The Iowa Environmental Protection Commission (EPC) respectfully submits its Annual Report and Recommendations to the Governor and General Assembly of Iowa pursuant to Iowa Code Chapter 455B.105(5). The report presents what it considers the major activities and accomplishments of the EPC for 2011. More importantly, the Commission submits its recommendations for policy and legislative changes for 2012. These recommendations reflect the issues that the Commission has worked on over the past year and equally important reflect many of the comments we have heard from citizens of Iowa during our commission meetings and during formal public comment periods of our rules.

We thank you for your consideration of the report and its recommendations. The Commission stands ready to answer any questions you may have on the report and its recommendations.
Sincerely,

David Petty, Chair, Eldora
Environmental Protection Commission

Mary Boote, Secretary, Des Moines
Dee Bruemmer, Davenport
Nancy Couser, Nevada
John Glenn, Centerville
Dolores Mertz, Algona
Lorna Puntillo, Vice-Chair, Sioux City
Brent Rasteiter, Ames
Marty Stimson, Cedar Rapids

IOWA ENVIRONMENTAL PROTECTION COMMISSION
2011 ANNUAL REPORT AND RECOMMENDATIONS

Pursuant to Code of Iowa Section 455B.105(5) the Iowa Environmental Protection Commission (the "Commission") submits the following report to Governor Branstad and the Iowa General Assembly. As specified in the statute, this report discusses the accomplishments and status of the programs administered by the Environmental Services Division of the Department of Natural Resources. The report also makes legislative recommendations for consideration by the Governor and General Assembly based on Commission observations regarding the state of the environment in the past year. The report takes into account comments and concerns the Commission frequently hears from Iowa citizens.

In issuing this report and making these recommendations, the Commission encourages the Governor and the General Assembly to protect Iowa's natural resources when developing statewide policies for economic development. The Commission believes the protection of the environment is consistent with and, in fact, promotes the development of a strong economy and enhances the quality of life necessary to attract workers and jobs to our state. The Commission's recommendations are based on the understanding that proper environmental protection and economic growth are compatible goals for the State of Iowa.

BUDGET

As has been the case with all of state government, the DNR has faced a shrinking General Fund appropriation and reduction in staff over the past several years and anticipates reduced federal funding in the coming year. This has presented both challenges and opportunities for the Department. The DNR has conducted over 80 Kaizen events over the last decade, more than any other agency in state government, and continues to incorporate process improvement whenever appropriate. These events, that include the regulated community, have discovered ways that the Department can accomplish its mission of "protecting and enhancing our natural resources" with ever changing financial and human resources.

To meet the administration's goals of increased economic development and job growth in the state, it will be critical that the DNR provide timely service to business and industry, all the while protecting our citizens, water, land, and air. The Department is striving to build stronger partnerships with businesses and communities. A successful partnership will rely heavily upon business, communities, and their consultants to provide sufficient and timely information and data such that projects can be reviewed and permits issued expeditiously.

Major Accomplishments of the Department and Commission in 2011

WATER QUALITY

Drinking Water

- The water supply rules package passed the Commission in November and established rules to:
  - Ensure public water supply systems using surface water sources have sufficient treatment to remove *Cryptosporidium* and other pathogenic microorganisms in drinking water;
  - Reduce potential cancer, reproduction, and developmental health risks from exposure to disinfection byproducts in drinking water, which are formed when disinfectants are used to control microbial pathogens. The rules strengthen public health protections for all persons served by the public water supply systems by targeting higher risk areas within each system and ensures that all persons are served water which meets the health standards; and
  - Updates both the laboratory methods used for drinking water sample analysis and the construction standards to current practices.

  Portions of these rules had early implementation requirements that required significant effort on the part of Iowa's state water supply program staff, water supply operators, and environmental laboratories. Because of those efforts, over 99% of Iowa's 942 systems met the early requirements of these new rules and are well-positioned to provide safe water to Iowans as the remaining requirements become effective.

- The annual public water supply compliance report was presented to the Commission in August, which provides the Commissioners information about the condition of Iowa's public water systems for the previous year. In 2010, there were 1,966 active public water supply systems in Iowa, serving more than 2.8 million people. The most frequent violations of health standards continue to be coliform bacteria and nitrate.

- The water use and allocation program had an outdated computer database, which was inadequate for needs of the program. A multi-year and multi-phase project to improve the database and its functionality for both state program staff and permittees is underway. This project has entailed contracts and amendments that were approved by the Commission to develop and implement the specifications, programming, testing, and production. The permittees will be able to use the Internet to access the program for several necessary functions, which is more convenient, timely, and cost-effective. The database will also allow for better evaluation of Iowa's water resources which is vital for ensuring sustainable communities and commerce.

Clean Water

- The EPC approved final rules for the following:
  - General Permit 5 renewal - Identifies conditions under which quarry dewatering is permitted.
  - General Permit 7 - Identifies conditions under which discharges from aquatic nuisance pesticide applications are permitted.

- The EPC authorized a contract to update the NPDES database. With updates, the database will conform to current database structure and security standards.

AIR QUALITY

In 2011 the Air Quality Bureau, working in collaboration with regulated industry and the public developed seven proposals for reducing the regulatory burden on industry while continuing to assure that air quality is protected for all Iowan's. The results of these efforts will not only help to reduce the cost of compliance for industry struggling to recover from the economic recession; but will help the department streamline regulatory efforts to focus on protecting air quality and providing meaningful environmental reviews of new projects. In brief these seven actions will:

1. Provide additional flexibility for regulated portable plants (e.g. concrete batch) by reducing the notification time, and allowing electronic submittals,
2. Reduce the number of portable plants required to report emissions triennially by initiating a review and analysis of portable plant emissions,
3. Reduce regulatory burdens by eliminating state-only emissions testing procedures (the Compliance Sampling Manual) and adopting, federal methods for emissions testing,
4. Offer uniform regulations by updating the definition of particulate matter and other air quality definitions to be consistent with federal regulations,
5. Increase transparency and consistency in conducting emissions testing by placing into rule the specific procedures for conducting emissions testing,
6. Reduce unnecessary air dispersion modeling reviews while still protecting public health,
7. Listing (in rule) procedures available to DNR when undertaking compliance or enforcement.

In 2011, the department saw a significant increase in air construction permit requests. From December 2010 – November 2011, the Air Quality Bureau issued 2,014 pre-construction permits (or made specific permitting determinations) for facilities planning to build or modify air pollution emitting equipment at industrial facilities. In the same period in the prior year 1,660 permits were issued. Permitting projects each have around 2-3 permits, and it took, on average 106 days to issue each project. This turn-around time is higher than normal due to additional work on issuing permits for several long term projects which involved legal issues and the higher number of projects. In addition, the Air Quality Bureau issued an unprecedented number of Prevention of Significant Deterioration (PSD) projects for large new or additional industrial projects. Those 27 projects were issued on average in 9.2 months. In the prior year the bureau issued 8 PSD projects.

Industrial facilities are considered "Major" sources of air pollution, if annually the facility emits over 100 tons of one or more common air pollutants, or 10 tons of one or 25 tons of all hazardous air pollutants. This federally established designation of large sources of air pollution brings an obligation for those facilities to operate under a state issued "Title V (five)" operating permit. There are 276 facilities in Iowa subject to the Title V operating permit program. During 2011, the Air Quality Bureau issued 32 operating permits. This is a lower than normal output of permits due to a 30% reduction in the number of staff working on these permit due to funding limits. As a result there is a current backlog of 105 applications in-house. To maintain timely 5-year permit re-issuance rates, more than 50 permits should be issued annually.

Staff reductions in 2010 reduced DNR's ability to respond timely to requests for air quality records information. In response to an increase in the number of requests for public records

information, an online air quality records search system was further implemented in 2011 to allow for external access via the internet. The new system allows the DNR to respond to information requests more efficiently and provides greater transparency. In 2011 alone, there were more than 120,000 pages downloaded from the online system, saving the public more than $50,000 in copying costs and it likely saved thousands of miles traveling to Des Moines. The DNR will need to continue to focus on responding to the decreased resources available for information technology support in 2012.

In 2011, the DNR and its small business assistance partners initiated the development of new online training tutorials and webinars that were available at no charge to more than 600 businesses. As additional federal regulations are implemented in the future, the DNR will need to continue to focus on responding to the regulatory assistance needs of Iowa businesses and industries.

The DNR also developed the 2011 Annual Air Monitoring Network Plan to compare federal monitoring requirements to the existing Iowa network, identify proposed network changes, and ensure monitors are in place to determine compliance with National Ambient Air Quality Standards (NAAQS). The department also developed reports on the status of Iowa's air quality relative to the NAAQS and provided information on NAAQS exceedances throughout the year.

ANIMAL FEEDING OPERATIONS

Field Services conducted 183 MMP (Manure Management Plan) on-site inspections during SFY 2011. Inspections were based on a combination of 1) responses to complaints from the public, 2) possible discharge resulting from application, 3) response to a producer requesting assistance, and 4) MMP submittal spot check verification. The following table summarizes the program inspection categories.

ESD Field Services Bureau Animal Feeding Operations Inspections, SFY 2008 - 2011

Program Inspection Categories	SFY 2008	SFY 2009	SFY 2010	SFY 2011	*SFY 2012 Projection
Total Confined Animal Feeding Inspections	227	119	7	29	*30*
Total Site Survey Inspections (for construction)	291	187	45	84	*85*
Total Open Feedlot Inspections	104	141	147	107	*105*
Total MMP Inspections	652	819	299	183	*180*
Total AFO Basin Inspections	586	660	572	618	*615*
Total Concrete Inspections	126	109	4	1	*1*
Grand Total AFO Inspections	1,986	2,035	1,074	1,022	*1,016*

* SFY 2012 inspection numbers are projected to be roughly the same, or slightly lower than the numbers for SFY 2011, based on the fact that the program has approximately 1.5 fewer full-time staff for SFY 2012.

Five public hearings were held in January, 2011 to obtain comments on proposed rules to implement federal legislation requiring concentrated animal feeding operations to comply with applicable EPA requirements regarding NPDES permits. On March 15, 2011 the U.S. Court of Appeals for the Fifth Circuit issued a decision which vacated part of the EPA requirements. Therefore the Commission terminated the rulemaking in June, 2011. Once EPA revises the NPDES CAFO regulations to comply with the Fifth Circuit's decision an appropriate rule package will be presented to comply with the EPA regulations.

SOLID WASTE

Pollution Prevention Intern Program

Pollution Prevention Services provides confidential, non-regulatory technical assistance to business and industry; working with plant managers to identify and implement environmental improvement projects, leading to more efficient use of resources and economic savings. The assistance provided industry, include:

- Assessments services;
- Nationally recognized Intern Program;
- Environmental management systems assistance; and
- Workshops & training.

Through the intern program, upper-level engineering and environmental science students from Iowa colleges and universities provide host companies with a designated resource to analyze processes, research alternatives, evaluate efficiencies, document savings and provide implementation support of environmental projects. During 2011, 15 12-week and 5 24-week interns helped Iowa companies achieve the following savings:

- $1,236,487 million dollars
- 21,849,252 gallons of water
- 296 tons of solid waste
- 5,833 gallons of hazardous waste
- 9 tons of hazardous waste
- 10,921,589 kilowatt hours of energy
- 113,073 therms of natural gas

Since 2001, over 250 Pollution Prevention Interns have ***saved 150 companies more than $66.1 million dollars*** by recommending and implementing projects that conserve resources and improve processes. The following list is testimony to these accomplishments in terms of wastes that have been eliminated or reduced:

- 1,119,806,206 gallons of water
- 200,048 tons of solid and special waste
- 1,512,492 gallons of hazardous waste
- 560 tons of hazardous waste
- 42,817 grams of mercury abated
- 312,374,233 kilowatt hours of energy
- 6,881,138 therms of natural gas

PUBLIC HEARINGS

Approximately 26 public hearings were held around the state seeking public input on a variety of issues, as outlined in Table 1. It is estimated that 136 people attended these hearings and 373 people provided written comment.

TABLE 1 - 2011 Public Hearings				
Chapter	Description	# of Hearings	# of People Attended	# of Written Comments
22,33	Biogenic emissions of CO2	1	0	2
22,30,&33	Terminated - Title V Fee Cap	2	6	10
40-43,83	Drinking Water and Laboratory Certification Programs	1	0	2
48	Terminated - GHEX Closed Loop Ground Heat Exchangers; Ch. 38; Ch. 39; Ch. 49; Ch. 82`	6	24	19
61	Nutrient WQ Standards for Lakes to Support Recreational Use	7	36	105
64	WW Construction and Operation Permits	1	3	0
65	Terminated - Animal Feeding Operations; Confinement NPDES	5	67	235
135	Legislative Amendments to Underground Storage Tank Rules	3	0	0
		26	136	373

Recommendations for Future Legislative Action

WATER QUALITY

- Continue dedicating resources to improve nutrient management and reduce non-point source pollution from all sources to decrease impairment of Iowa's waters. Episodes of *Cyanobacteria* blooms and elevated ammonia levels threaten surface waters, while excessive nitrate and *E. coli* levels threaten both surface and ground waters. Peoples' health can be at risk from recreational activities in impaired waters. Drinking water systems must react with more treatment at added cost to produce water fit for human consumption.

- Modify management of the Jordan aquifer to possibly allow additional water withdrawals while protecting against over allocation of these water resources. Water resources are vital in meeting critical economic development needs for industries and public water supplies. The Silurian aquifer in eastern Iowa should also be evaluated in order to protect it from over use and damage to the aquifer structure itself.

- Revise water supply rules to incorporate federal rule changes projected to occur in 2012, with the addition of a new rule that requires source water monitoring if fecal bacteria contamination is detected in a groundwater public water supply system; amendments to lead and copper rules to require notification of the homeowners of the lead levels detected in their home; and additional analytical methods.

- In accordance with Senate File 407, which was passed in April, continue rulemaking that will define how communities qualify as disadvantaged communities when complying with wastewater treatment regulations.

- Renew General Permit 4 for discharges from private sewage disposal systems and Stormwater General Permits 1, 2, and 3.

- Clarify time of transfer rules for private sewage disposal systems.

- Initiate rulemaking for land application of on-farm food processing waste.

- Seek 401 certification for the 404 nationwide permit renewals.

- Update and streamline wasteload allocation procedures (updated methodologies and science to) which are used to determine limits used in NPDES permits.

- Review flood plain and dam safety rules to clarify and update as needed.

AIR QUALITY

Focus resources on permitting new construction in support of economic recovery while protecting the quality of the air we breathe. Escalating rates of requests for permits for new

construction, or for permits for equipment upgrades or changing product lines is stretching the limits of the current staffing levels.

Adopt appropriate regulatory plans for assuring that the entire state will meet the health-based National Ambient Air Quality Standards for fine particulate (PM2.5).

Establish a plan for eliminating violations of the Lead National Ambient Air Quality Standard in Council Bluffs to bring the area back into attainment. Submission of a plan to EPA, and three years of non-violating air quality monitoring results are necessary to remove the federal nonattainment designation issued in December 2011.

In collaboration with communities and businesses, establish firm commitments for emissions reductions to assure that air quality in the Muscatine area meets air quality standards for fine particulate (PM2.5) and sulfur dioxide (SO2) as soon as possible.

Seek support to adjust current funding mechanisms to assure that fees paid correlate to the services provided for permit issuance and oversight, and that adequate funding is available to provide those services. This will be critical to our ability to provide customer service to industry and the public.

Utilize Kaizen Lean principals to reduce the backlog in Title V operating permit issuance; and obtain necessary resources to issue new permits and permit renewals. By the end of 2012, it is anticipated that the Air Bureau will have a backlog of 125 Title V operating permit applications. Federal requirements trigger an increase in the number of sources subject to the permit program from 276 to 308. The increasing backlog projected over the next year makes the establishment of sustainable funding and staff resources for the Title V program more important than ever.

ANIMAL FEEDING OPERATIONS

It is recognized that animal feeding operations remain a significant part of our states sustainable farming operations. As such, the EPC requests additional funding to help support the Iowa Department of Natural Resources' animal feeding operations program to provide compliance assistance and enforcement activity where necessary to Iowa's growing agricultural community.

SOLID WASTE

The DNR does not feel that additional legislation is needed to address the management of coal combustion waste and are not requesting that the Legislature provide any. The revision of CCR disposal regulations will result in more protective management and disposal operations, without the unwarranted burden and stigma associated with hazardous waste designation, while also providing long-term monitoring and closure responsibility at these sites. The DNR asks for the Legislature's support in this rulemaking.

Conclusion

The Commission recognizes that the state is in a difficult budget situation. Nevertheless, taxpayers will pay for corrective action eventually if proper enforcement of anti-pollution laws is not followed. In budgeting, the legislature should provide the Department with a sufficient budget

for an effective environmental enforcement program and sufficient funds for the Department to operate its permitting programs in a timely and efficient manner.

It is clear from public comment before the Commission that Iowans want and expect clean air and clean water. It is evident that Iowans are concerned about other global environmental issues, such as energy efficiency. climate change, and declining biodiversity. The Commission believes that Iowans, working in a partnership of individuals, government and business representatives, will meet the challenges of environmental stewardship in the 21st century.

The Commission thanks the Governor and the General Assembly for the opportunity to submit this report and invites further inquiry and conversation about these issues.

David Petty, Chair, Eldora
Environmental Protection Commission

Mary Boote, Secretary, Des Moines

Dee Bruemmer, Davenport

Nancy Couser, Nevada

John Glenn, Centerville

Dolores Mertz, Algona

Lorna Puntillo, Vice-Chair, Sioux City

Brent Rastetter, Ames

Marty Stimson, Cedar Rapids

Appendix 15

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 17 2007

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

Subject: Clean Water Act National Pollutant Discharge Elimination System Compliance Monitoring Strategy for the Core Program and Wet Weather Sources

From: Granta Y. Nakayama
Assistant Administrator

To: Regional Administrators
Deputy Regional Administrators
Regional Enforcement Division Directors
Regional Water Division Directors

This Compliance Monitoring Strategy (CMS) memorandum provides inspection frequency goals for the core National Pollutant Discharge Elimination System (NPDES) program and for wet weather sources. Your leadership and close coordination by your staff with our state and local program partners will be essential as full implementation of the CMS occurs at the start of FY 2009.

Compliance monitoring is a cornerstone of EPA's program to achieve clean water. The primary goal of the combined EPA and state compliance monitoring efforts -- on-site inspections plus evaluation of permittee self reported Discharge Monitoring Report (DMR) data -- is to ensure and document whether entities possessing NPDES permits are complying with their Clean Water Act (CWA) obligations. EPA and state compliance monitoring programs should accurately identify and document compliance and noncompliance, support the enforcement process, monitor compliance with enforcement orders and decrees, establish presence in the regulated community, support the permitting process, and further the broad watershed improvement goals of the NPDES program.

Achieving these goals has always been a challenge. The challenges have increased as the program has increased emphasis on addressing water quality degradation, particularly stemming from wet weather discharges, while resources at all levels of government have been limited. Given these competing challenges, both EPA and state NPDES inspection programs must be increasingly innovative and efficient, directing resources toward the most important noncompliance and environmental problems. To better meet today's challenges, OECA is updating inspection frequency goals for the core NPDES program and is articulating goals for the wet weather program areas. Regulations found at 40 CFR Part 123.26 set forth requirements for compliance

evaluation programs for states seeking to obtain or retain program authorization.[1] Analogous regulations for the pretreatment program are set forth in 40 CFR Part 403.10(f)(2). This memorandum provides benchmarks for core program and wet weather inspection frequencies which, from a national perspective, EPA believes constitute a strong and balanced compliance monitoring program.

We recognize that achieving these frequencies may be an ambitious goal. As a result, we would expect that there will be a dialogue between regions and individual states about annual program commitments and potential resource trade-offs. Goals are a starting point for negotiations, and flexibility allows adaptation to particular situations as necessary. We note that EPA's Annual Commitment System (ACS) provides opportunities for program commitment flexibility. ACS allows regions and states to address the unique mix of regulated entities and environmental issues in particular states, and to identify and document state-specific NPDES inspection frequency goals that differ from the frequencies recommended in this memorandum. States and regions may utilize flexibility to alter inspection frequency goals for facilities with good compliance records that are not contributing to water quality impairments. Trade-offs should be considered in the context of supporting overall NPDES program integrity. Where state programs have demonstrated that they have met the inspection frequency goals in this memorandum and would like to seek flexibility outside that which is offered in this strategy, states may make proposals under Element 13 of the State Review Framework (SRF). It is expected that these proposals will be strategic in nature (focused on particular sources, watersheds or water bodies) and result in additional compliance and environmental gains. In general, proposals under Element 13 should be monitored over time and limited in duration (i.e., should be evaluated after one planning cycle).

We recognize that we are reducing longstanding inspection frequency goals in some NPDES program areas in order to direct resources toward other environmental problems where noncompliance is currently not well addressed. These changes are appropriate to ensure an effective balance across the NPDES compliance monitoring program. We believe that

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[1] This regulation includes, in part, the requirement that a state maintain:

(1) A program which is capable of making comprehensive surveys of all facilities and activities subject to the State Director's authority to identify persons subject to regulation who have failed to comply with permit application or other program requirements. Any compilation, index or inventory of such facilities and activities shall be made available to the Regional Administrator upon request.

(2) A program for periodic inspections of the facilities and activities subject to regulation. These inspections shall be conducted in a manner designed to:

- (i) Determine compliance or noncompliance with issued permit conditions and other permit requirements
- (ii) Verify the accuracy of information submitted by permittees and other regulated persons in reporting forms and other forms supplying monitoring data; and
- (iii) Verify the accuracy of sampling, monitoring and other methods used by permittees and other regulated persons to develop that information;

(3) A program for investigating information obtained regarding violations of applicable program and permit requirements; and

(4) Procedures for receiving and ensuring proper consideration of information submitted by the public about violations.

this balance provides deterrence to noncompliance in the most significant environmental areas. In addition, these changes will allow increased efforts in other important NPDES program areas that we expect will result in water quality improvements in priority watersheds and water segments.

Planning Process

Attachment 1 addresses inspections for the Core NPDES program: major permittees, minor permittees, pretreatment, oversight, and biosolids. Attachment 2 addresses planning for inspections of Wet Weather sources: Combined Sewer Overflows (CSO), Sanitary Sewer Overflows (SSO), Concentrated Animal Feeding Operations (CAFO), and Storm Water.

Core and Wet Weather programs may be quite different. The suggested overall planning process to implement the program areas addressed in the Attachments is one that separately identifies core program inspection needs and wet weather program needs and then strikes an appropriate balance between the two by considering factors including: noncompliance trends, water quality considerations within individual states, and state and EPA resources. The suggested process is not intended to disrupt or replace existing EPA and state planning processes that are working well. The purpose of this CMS is to better focus inspection resources overall; it is not intended to draw resources from other NPDES program areas. These inspection planning goals are intended to promote joint planning where such processes do not exist or need to be strengthened. The planning process, guided by the goals articulated in Attachments 1 and 2, is also intended to provide an opportunity to identify state-specific circumstances and encourage dialogue on the approaches the state expects to implement.

EPA regional NPDES programs should work closely with each of their states to plan for core program and wet weather priority inspections, and to ensure a reasonable inspection presence in each program area. Where a state chooses a different mix of inspection frequencies from those recommended here, it will be useful for regional EPA NPDES programs to identify and describe these different approaches. At the conclusion of the EPA and state inspection planning process, regions and states should prepare a brief document describing the rationale for any deviations and tradeoffs to which the region and states have agreed.

EPA's Annual Commitment System (ACS) provides an opportunity, at the beginning of the fiscal year and at mid-year, to review plans and commitments, and should be used to communicate to OECA the variations from the frequencies contained in this memorandum that are agreed to by the regions and states. Proposed revisions to numerical end-of-year commitments contained in the plans that regions and states request at mid-year will be reviewed by OECA based on information in ACS justifying the change (i.e., issues related to staffing, funding, etc.) supplied by the region and/or state. The CMS will be fully effective in the Fiscal Year (FY) 2009 planning cycle. The CMS may be utilized in FY 2008 if a state wishes to negotiate the flexibilities available in the Strategy with their region. Regions will be asked to consider beginning implementation of the Strategy in FY 2008 if a state so requests.

EPA and state inspection planning will rely on compliance data obtained from PCS and ICIS-NPDES, and on citizen tips and complaints. To support attainment of water quality goals, the inspection planning process should increasingly be influenced by information on nonattainment of water quality standards to which facilities may be contributing (pursuant to listings under CWA Sections 303(d) and 305(b)). As discussed further in Attachment 1, Section 1.A.1 and Section 1.B.1., to support a more data driven planning process, OECA will develop two software tools to assist the regions and states in preliminary screening, identification of inspection targets, and inspection plan development based on data taken from PCS, ICIS-NPDES, and the AskWATERS database from the Office of Water. The first versions of these On-line Tracking and Information System (OTIS) based tools are expected to be available for testing in during the Spring of 2008. Refinements to the tools will be made over time as regions and states use them and identify additional necessary analytical functions.

Oversight

No changes in current oversight practices are contemplated; however OECA will generate new data reports from PCS and ICIS-NPDES to assess progress in implementing the goals contained in this memorandum. Existing procedures such as mid-year and end-of-year reviews and periodic State Review Framework evaluations will be utilized to assess regional and state performance. The goal of performance assessments should be to improve regional or state compliance monitoring programs, identifying strengths and weaknesses of regional and state programs, and developing mutual commitments to achieve ongoing program improvement.

Reporting and Measurement

State and regional compliance monitoring activities described in this memorandum should be reported into the appropriate national information system, either PCS or ICIS-NPDES, in accordance with documents which establish data requirements and reporting timeframes for those systems. Measurement relative to CMS goals will commence at the beginning of FY 2009. Reporting at the end of FY 2009 and each fiscal year thereafter will provide cumulative state-specific data on accomplishments for each goal over the relevant timeframe for each goal (e.g., the percent of the major universe inspected for the FY 2009 -- FY 2010 timeframe; the percent of the "traditional" minor universe inspected for the FY 2009 – FY 2013 timeframe, etc.). Under this cumulative approach to reporting over the relevant timeframe of the individual goal, for example, the results at the end of FY 2009 for "traditional" minors could show that more or less than 20% of the universe has been inspected, and at the end of FY 2010 the data might show that more or less than 40% of the universe has been inspected.

Conclusion

At the conclusion of FY 2011, after three years of implementation of these revised NPDES inspection frequencies, OECA will evaluate whether the CMS is achieving the desired results and will adjust it as appropriate for any areas that may not be producing the desired results.

I want to thank the individuals in the states, state associations, EPA regions and Headquarters who have helped in developing this set of new and revised inspection frequencies for the NPDES program. My staff and I will regularly monitor and evaluate implementation of these revised NPDES inspection frequencies. . If needed, in advance of the FY 2009 inspection commitment setting process, we will modify and refine the frequencies to address any components which are not producing the desired results.

Lastly, in addition to the CMS, OECA has worked with the states and EPA regional offices to develop two additional policies that align with the current NPDES program regulatory structure. The two additional policies are the Wet Weather Significant Noncompliance Policy, and the Integrated Compliance Information System for NPDES (ICIS-NPDES) Policy Statement. Attachment 4 discusses how the three policies relate to one another and next steps for each of them.

If you have any questions or concerns regarding this memorandum please contact Rick Duffy (202-564-5014) or Mike Alushin (202-564-2300). Thank you in advance for your cooperation as we implement the revised NPDES inspection frequency goals.

Attachments

Attachment 1 - Core NPDES Program Inspection Frequencies
Attachment 2 - Wet Weather Programs
Attachment 3 - Inspection Type Descriptions
Attachment 4 - Next Steps for the Three NPDES Policies: the ICIS NPDES Policy Statement, the Wet Weather Significant Noncompliance Policy, and the NPDES Compliance Monitoring Strategy

cc: Benjamin Grumbles, Assistant Administrator for Water
Linda Eichmiller, Executive Director, ASIWPCA
Sean Rolland, Deputy Director, ASIWPCA
State NPDES Program Directors
David Paylor, President, ECOS
Michael Linder, Compliance Subcommittee Chair, ECOS
Stephen Brown, Executive Director, ECOS
State Environmental Commissioners

Attachment 1 - Core NPDES Program Inspection Frequencies

1.A. Major Permittees

Major NPDES permits cover discharges from Publicly Owned Treatment Works (POTW) facilities with designed discharge flows of greater than 1 millions gallons per day and active major industrial facilities scoring more than 80 for the six factors on the "NPDES Permit Rating Work Sheet". As of March 2006, there are 6,524 active major NPDES permits (4,200 active major POTW permits, 2,230 active major industrial permits, and 94 active Federal permits).

OECA's revised goal for state and regional inspection of major permittees is a minimum frequency of at least one comprehensive inspection every two fiscal years. This modifies the existing measure of inspections of major permittees which expresses the goal of inspecting 100% of major permittees annually (also known as the "inspection coverage measure"). The existing measure for major permittee inspections does not stipulate a minimum frequency for conducting comprehensive, in-depth Compliance Evaluation Inspections (CEI), Compliance Sampling Inspections (CSI), Performance Audit Inspections (PAI), Diagnostic Inspections (DI), Compliance Bio-monitoring Inspections (CBI), and/or Toxics Sampling inspections (XSI). Data from the Permit Compliance System (PCS) indicate that nearly one-fifth (~20%) of major permittees have not received a comprehensive inspection within the most recent two years.

1.A.1. Goal and Measure for Major Permittee Comprehensive Inspection

The goal for inspections of major permittees is revised as follows: 100% of major permittees should receive at least one CEI, CSI, PAI, DI, CBI, and/or XSI every two fiscal years. At the end of each federal fiscal year, data will be taken from the appropriate automated national information system (either ICIS-NPDES or PCS) to report on both a regional and state-by-state basis ~~on~~ the percentage of majors that have received a CEI, CSI, PAI, DI, CBI, or XSI within the most recent two completed federal fiscal years. Inspections coded in PCS as either C, S, A, D, B, or X will be counted for this measure. Inspections coded in ICIS-NPDES as either AU1, CBI, CEI, DIA, SA1, or TX1 will be counted for this measure. Inspections of major POTW's inspections may be conducted in conjunction with inspections of the Sanitary Sewer Systems (and their satellites) and Combined Sewer Systems are connected to the POTW.

OECA will develop an inspection targeting model to assist regions and states in targeting inspections at major permittees. This model will be available on OTIS, will integrate data from PCS, ICIS-NPDES, AskWATERS, and other systems. OECA will convene a workgroup including regional and state participants to provide input to OECA in developing the model. A separate memorandum will be sent to regions and states to solicit membership on the workgroup. The purpose of this model is to distinguish between facilities that have strong records of compliance and those who have records indicating compliance problems, particularly for effluent violations for pollutants that may be contributing to water quality impairments reflected in Section 303(d) or 305(b) listings. States that use this targeting model can adjust the inspection frequency for NPDES major facilities that are in compliance and are not contributing to Section 303(d) or 305(b) listings to one comprehensive inspection every three (3) years. Facilities that

do not meet these criteria will remain subject to a minimum comprehensive inspection frequency of once every two fiscal years. Flexibility relative to the goal in this section is available for major permittees participating in the Performance Track program. Regions and states should refer to current EPA issued documents addressing inspection frequencies for permittees participating in the Performance Track program.

1.A.2. Activity Indicator for Major Permittee Inspection and Compliance Assessment

EPA will continue to report data on the total number of inspections that are conducted at major permittees each fiscal year. This will be an activity indicator only and will not be compared to a numerical goal or target. This indicator will use the CEI's, CSI's, PAI's, DI's CBI's, and XSI's that are counted under measure A.1. above, and will add to it other types of inspections that are conducted, including reconnaissance (R), enforcement follow-up (@), oversight (O), and sludge-biosolids (Z) inspection types. Inspections coded in PCS as C, S, A, D, B, X, R, @, O, and Z will be counted for this measure. Inspections coded in ICIS-NPDES either as AU1, CBI, CEI, DIA, SA1, TX1, RWS, ROS, FLP, OVS, or, for sludge/biosolids, sludge/biosolids CWAS program and the appropriate compliance monitoring type (i.e., CEI for evaluation or SA1 for sampling inspection) will also be counted for this measure.

Some state data system users have defined fields to count "operations and maintenance" inspections (O & M). O & M inspections may be more detailed than a reconnaissance inspection, but not as in-depth as a CEI, CSI, or diagnostic inspection. O & M inspections are not an officially recognized inspection type. O & M inspections will not be counted toward the 1.A.1 inspection targets, but will be counted under the 1.A.2. activity indicator. States will need to provide the appropriate region and OECA with information on which user defined field they are using to store information on O & M inspections. States utilizing ICIS-NPDES should use the OPM (alternative) code for O & M inspections.

In lieu of conducting an on-site inspection under this indicator measure, as new reporting capabilities in ICIS-NPDES come on-line, regions and states may receive credit for conducting thorough off-site compliance and engineering evaluations of major permittees that meet certain qualifying standards. The purpose of off-site evaluations is to ascertain compliance with the terms and conditions of the permit, self monitoring reports, and other information. Off-site evaluations are intended for use solely at facilities that have a consistent track record of being well operated and in compliance with permit terms and conditions. Determination of facilities that are candidates for off-site evaluations should be based on the knowledge of the inspector, and in conjunction with information obtained from DMR's and prior on-site inspections from PCS and ICIS-NPDES. Off-site evaluations are not appropriate for facilities that: (1) are currently subject to enforcement actions or compliance schedules that are the result of concluded enforcement actions; (2) have been reported in Significant Noncompliance (SNC) within the previous eight (8) quarters; (3) have one or more late/missing DMR submissions in the previous eight (8) quarters; (4) have unresolved single event violation(s) identified in prior inspection(s); (5) discharge to CWA 303(d)/305(b) listed waters for pollutant(s) contributing to the listing; or

(6) have known potential to impact drinking water supplies (discharge points or outfalls within 2 miles of drinking water intakes).

OECA will convene a workgroup consisting of regional and state compliance officers and inspectors to develop further policy on conducting off-site evaluations. Off-site evaluations are expected to be more detailed than the monthly and quarterly Discharge Monitoring Report (DMR) reviews that states and regions already conduct. Off-site evaluations are a broad and comprehensive examination of information, data, records, facility annual reports, and engineering information to ascertain compliance. Routine review of DMR data and phone contacts with the facility would not qualify for credit as an off-site evaluation. ICIS-NPDES has capability to record these off-site evaluations. For states reporting through PCS, OECA will provide instructions on how report these evaluations, most likely through user defined fields.

1.B. Minor Permittees: Goal and Measure for "Traditional" Minor Permittee Inspection

Minor NPDES permits (also sometimes referred to as "traditional" minor permits) cover discharges from POTW facilities with designed discharge flows of less than 1 million gallons per day (1 MGD)(generally serving communities with populations of less than 10,000 persons) and active minor industrial facilities (facilities scoring less than 80 for the six factors on the "NPDES Permit Rating Work Sheet"). As of March 2006, there are 40,210 active minor NPDES standard permits (10,750 active minor POTW permits, 28,800 active minor industrial permits, and 660 active minor Federal permits). These permit data do not include facilities that are minor POTWs or industrial sites operating under General Permits, however, inspection frequency goals under this section is are intended to apply to such facilities.

There are no current inspection type or frequency goals for "traditional" minor NPDES permittees. EPA reports annual totals for the number of EPA and state inspections conducted at minor permittees from data obtained from PCS. While EPA has not previously set goals or reported minor permittee inspection coverage rates, or reported data by inspection type, an OECA analysis indicates that more than half of the universe of "traditional" minors has not received a comprehensive inspection (CEI, CSI, PAI, DI, CBI or XSI) within the previous five years.

Separate goals are contained in Attachment 2 to address individual inspection frequencies for the Wet Weather program areas (Combined Sewer Systems, Sanitary Sewer Systems, Storm Water, and Concentrated Animal Feeding Operations).

"Traditional" minor permittees include POTWs with daily flows of less the 1 MGD, and industrial facilities scoring less than 80 for the six factors on the "NPDES Permit Rating Work Sheet." OECA's goal is state/regional inspection frequency for each "traditional" minor permittee of at least once in each five (5) year permit term. In the early years of strategy implementation, the screening process should be attentive to facilities that do not appear, based on the data, to have been inspected in more than 5 years. In addition, a preference for early

inspection attention should be given to facilities with histories of noncompliance, citizen complaints, and/or facilities that may be contributing to water quality violation(s). Inspections of "traditional" minor POTW's may be conducted in conjunction with inspections of the Sanitary Sewer Systems (and their satellites) and Combined Sewer Systems are connected to the POTW.

To facilitate the targeting of inspections for "traditional" minors, OECA will develop a software tool to assist the regions and states in preliminary screening and identification of inspection targets. The first version of this On-line Tracking and Information System (OTIS) based facility sorting tool is expected to be available for testing in mid-2008. Refinements to the tool will be made over time as regions and states use the tool and identify additional needed analytical functions. The sorting tool will not utilize weightings (differing from the model described under 1.A.1 for targeting majors) due to concerns about the current completeness of data for traditional minors and how that might affect the results obtained from a weighted model. The sorting tool will allow regions and states to sort facilities based on factors including: information on water quality impairments; associated pollutants that may be discharged by the permittee; SNC within the most recent two years; unresolved Single Event Violations; days since last comprehensive inspection; days since last inspection (all types), and current enforcement actions. The use of the sorting tool will be optional. States that achieve and maintain sufficiently good quality for their universe of "traditional" minors in PCS or ICIS-NPDES will have the option of utilizing the inspection targeting model described in 1.A.1 above. EPA Regional Offices will determine the adequacy of the data. Whether using the sorting tool or the inspection targeting model, the goal to inspect traditional minors at least once in each five (5) year permit term will not be altered by use of either tool.

a. "Traditional" minor permittees that do not discharge to water bodies listed on the CWA Section 303(d) list of impaired waters. This indicator will count the following types of inspections: CEI, CSI, PAI, DI, CBI, XSI, reconnaissance, enforcement follow-up, oversight, and sludge-biosolids. The corresponding PCS codes will be used for data retrievals: C, S, A, D, B, X, R, @, O, and Z. The non-comprehensive R, @, O, and Z inspections will be counted under this measure because these facilities are not discharging to CWA Section 303(d) listed waters. In addition, user specified fields such as those discussed in Section 1.A.2. (e.g., O & M inspections) above will be counted under this measure. Inspections coded in ICIS-NPDES either as AUI, CBI, CEI, DIA, SA1, TX1, RWS, ROS, FLP, OVS, or, for sludge/biosolids, sludge/biosolids CWAS program and the appropriate compliance monitoring type (i.e., CEI for evaluation or SA1 for sampling inspection) will be counted for this measure. States utilizing ICIS-NPDES should use the OPM (alternative) code for O & M inspections.

During the annual planning process, when determining which "traditional" minor facilities should be inspected using a comprehensive inspection, regions and states should inform that decision by carefully reviewing available information on the permittees, such as noncompliance information and information that is indicative of the completeness and currency of ambient monitoring information for the receiving waters to which the permittees discharge. Where information indicates patterns of noncompliance or uncertainty about the status of receiving waters, strong consideration should be given to utilizing a comprehensive inspection. In order to ensure a minimum level playing field, states and regions are encouraged to conduct a comprehensive inspection at least 5% of their "traditional" minor universe each year.

b. "Traditional" minors that discharge to CWA Section 303(d) and 305(b) listed waters. As of March 2006, more than 5,200 of the 40,210 "traditional" minors are indicated as discharging to water bodies on the CWA Section 303(d) impaired waters list. "Traditional" minor facilities that are permitted to discharge pollutants of concern corresponding to the Section 303(d) or 305(b) listing parameter should be inspected at least once in each five year permit term with a comprehensive inspection including CEI, CSI, PAI, DI, CBI, and/or XSI. Of the 5,200 permittees that discharge to Section 303(d) listed waters, OECA expects there are some that due to the nature of their discharges are not in fact contributing to the water quality conditions that have resulted in the Section 303(d) or 305(b) listings; such facilities on impaired waters that are not contributing to the impairment may be inspected with a less comprehensive inspection (e.g., a reconnaissance inspection). Comprehensive inspections coded in PCS as either C, S, A, D, B, or X will be counted for this measure. Comprehensive inspections coded in ICIS-NPDES either as AU1, CBI, CEI, DIA, SAI, or TX1 will be counted for this measure.

1.C. Pretreatment

1.C.1. Pretreatment Audits

For the pretreatment program, all approved active POTW pretreatment programs should receive at least one audit in each five year permit term, generally corresponding to an annual audit rate of 20% of approved active programs. Data retrievals for this measure will count audits coded in PCS as: G. The corresponding ICIS-NPDES code is AU1 with program code CWAPRTRT.

During each audit, oversight inspections should be conducted of at least two Industrial Users (IU) discharging to the POTW. The purposes of these oversight inspections include verifying that the IU permit correctly reflects the physical and operational conditions of the facility, validating whether the POTW has been correctly evaluating compliance (including correct sampling), and assessing the POTW's IU inspection procedures. Data retrievals for this measure will count the following inspection types: Pretreatment Compliance Oversight, IU Inspection with Pretreatment Audit, IU Sampling Inspection, IU Non-Sampling Inspection, IU Toxics Inspection, IU Sampling Inspection with Pretreatment, IU Non-Sampling Inspection with Pretreatment, and IU Toxics with Pretreatment. The corresponding PCS codes are: 1, U, 2, 3, 4, 5, 6, 7. The corresponding ICIS-NPDES codes with program code CWAPRTRT are: OVS (alternative), AU2 (industrial), PSI (industrial), CE2 or PIU (industrial), TX2 (industrial), PSI (industrial), CE2 or PIU (industrial), and TX2 (industrial).

1.C.2. Pretreatment Compliance Inspections

Approved active POTW pretreatment programs should receive at least two (2) Pretreatment Compliance Inspections (PCI) during each five year permit term. Data retrievals will count the following types of inspections: Pretreatment Compliance Inspections, Pretreatment Follow-up Inspections, and Pretreatment Compliance Oversight. The corresponding PCS codes are: P, F, and!. The corresponding ICIS-NPDES codes with program code CWAPRTRT are: CEI (comprehensive), FLP (alternative), and OVS (alternative).

1.C.3. Significant Industrial User Inspections

For the industrial pretreatment program, the appropriate EPA or state permitting authority should track the submission of POTW reports made pursuant to C.F.R. 403.12(i) and review 100% of all submissions to determine if the POTW is correctly implementing the program, including, as appropriate, enforcement of SIUs. For SIUs discharging to non-authorized POTWs where EPA or the state are the direct implementing authority, EPA or the state should track submission of SIU semi-annual reports submitted pursuant to 40 CFR 403.12(e) and (h). The corresponding PCS codes are: !, U, 2, 3, 4, 5, 6, 7. The corresponding ICIS-NPDES codes with program code CWAPRTRT are: OVS (alternative), AU2 (industrial), PSI (industrial), CE2 or PIU (industrial), TX2 (industrial), PSI (industrial), CE2 or PIU (industrial), and TX2 (industrial).

For the industrial pretreatment program, 100% of SIUs permitted by approved POTWs should be inspected, and sampled subject to regulations or ERP requirements, by the approved POTW when required semi-annual self monitoring reports from SIUs show noncompliance, or based on tips or complaints received by EPA, state, or approved POTW. In the course of conducting audits of approved POTW's, states should evaluate POTW programs to ensure that follow-up to reports of noncompliance by SIUs routinely occurs. SIUs directly regulated by regional offices or states should be inspected annually, with sampling as appropriate, except where the SIU is designated with a reduction in monitoring and inspection frequency designated in 403.12(e)(3). Data retrievals for this measure will count the following inspections: Sampling Inspection, IU Non-Sampling Inspection, IU Toxics Inspection, IU Sampling Inspection with Pretreatment, IU Non-Sampling Inspection with Pretreatment, and IU Toxics with Pretreatment. The corresponding PCS codes are: 2, 3, 4, 5, 6, 7. The corresponding ICIS-NPDES codes with program code CWAPRTRT are: PSI (industrial), CE2 or PIU (industrial), TX2 (industrial), PSI (industrial), CE2 or PIU (industrial), and TX2 (industrial).

1.D. Oversight

OECA does not contemplate any changes to its oversight processes as a result of issuance of the CMS. Oversight inspections are described in the memorandum *Revised Policy Framework for State/EPA Enforcement Agreements* (August 1986) and an Office of Water memorandum *1987 National Guidance for Oversight of NPDES Programs* (April 1986). These memoranda establish that oversight inspections should: (1) assess how well the state inspectors are determining compliance; (2) be tailored to fit state performance; (3) provide incentives to strong state performance by reducing the number, level and/or frequency of some reporting requirements consistent with regulations or reducing the frequency of oversight inspections. In states where criteria for good performance are not met, EPA may suggest changes in procedures and the state use of resources or training, provide technical assistance, and/or increase the number of oversight inspections.

OECA reaffirms the principle that there is "no one size fits all way to do oversight." Regions will develop a state-by-state oversight proposal for each year. The OECA State Review Framework (SRF) is the major oversight activity for the NPDES compliance monitoring program, and the schedule of SRF reviews should be a significant factor in scheduling of

oversight inspections. EPA oversight inspections should ordinarily occur before an SRF review and the information from them should be considered in the SRF. A minimum of five (5) EPA oversight inspections should be conducted in each state where an SRF review is scheduled to take place in the subsequent fiscal year. These inspections may also include joint state/EPA inspections where the state has the lead role in the inspection.

Additional factors that EPA may consider when scheduling oversight include: (1) significant changes in state program structures or personnel are taking place; (2) a new state regulatory structure is being implemented; (3) the state is reporting low violation identification rates; (4) the state is reporting low inspection coverage rates; or (5) patterns in complaints from citizens.

EPA's Annual Commitment System (ACS) contains a measure requiring the regions to project the combined number of oversight inspections and joint state / EPA inspections (state lead) that they will conduct. Data retrievals for this measure will count inspections under the following inspection types Compliance Evaluation Oversight, and state inspections designated under the inspector code for Joint/EPA Inspectors – State Lead that are at the level of CEI, CSI, PAI, DI, CBI, and/or XSI. The corresponding PCS codes are: ! and O. The corresponding ICIS-NPDES code is OVS (alternative). Compliance evaluation oversight inspections should be entered using the code OVS (alternative) and a program code different than CWAPRTRT. Pretreatment oversight inspections should be entered using the code OVS (alternative) and program code equal to CWAPRTRT.

1.E. Biosolids

The objectives of a sewage sludge inspection are to determine compliance with Federal sludge regulations for any facility engaged in a regulated sludge or disposal practice and to evaluate the permittee's compliance with sludge monitoring, recordkeeping and reporting, treatment operations, and sampling and laboratory quality assurance.

The inspection goal for sludge-biosolids inspections is that each major POTW receive at least one sludge-biosolids inspection every five years. POTW sludge land disposal operations should receive at least one sludge-biosolids inspection every five years. These inspections may be conducted in conjunction with compliance inspections at major and minor POTWs. Inspections may also be conducted to respond to citizen complaints. Inspection type counted for this indicator measure: sludge-biosolids. The corresponding PCS code is Z. To enter biosolids inspections in ICIS-NPDES use the CWAS program code and the appropriate compliance monitoring type code (i.e., CEI or SA1).

Attachment 2 - Wet Weather Programs

At the conclusion of FY 2011, after three years of implementation of these revised NPDES inspection frequencies, OECA will evaluate whether the CMS is achieving the desired results, will adjust the goals as appropriate for any areas that may not be producing the desired results.

2.A. Combined Sewer System

Combined Sewer System (CSS) inspections evaluate compliance with Combined Sewer Overflow (CSO) provisions present in the NPDES permit, an enforcement order, a consent decree, or another enforceable document. The inspector verifies that the permittee is preventing CSOs during dry weather, implementing the nine minimum CSO controls, adhering to a schedule for development, submission, and implementation of a Long-Term CSO Control Plan, eliminating or relocating overflows from sensitive areas, adhering to effluent limitations, and implementing a monitoring program.

As of the date of this memorandum, nationally there are 837 permitted CSS's. The CSS inspection goal is: Major CSS's should receive at least one CSO inspection every three (3) fiscal years. Minor CSS's should receive at least one CSO inspection every five (5) years. These inspections may be conducted in conjunction with compliance inspections at major and minor POTWs. Data retrievals for this measure will count the following inspection types: PCS: CSO Sampling (#), CSO Non-Sampling ($). The corresponding ICIS-NPDES codes are SA1 (comprehensive) with program code CWACSO, and CEI (comprehensive) with program code CWACSO. CSS inspections, as well as broader inspections that include connected satellite systems, may be conducted in conjunction with compliance inspections at major and minor POTW's. When entering EPA CSS inspections, the OECA National Priority "Wet Weather – Combined Sewer Overflow (CSO)" should be selected.

In the event that regions and states are not able to meet this goal, proposals for alternate frequency goals may be considered for particular systems based on information such as: overall history of good compliance based on information from prior CSO inspections (e.g., permit conditions, Nine Minimum Controls), no dry weather overflows (identified through inspections or record reviews), declining CSO activation rates, and status of receiving waters.

2.B. Sanitary Sewer Systems

Sanitary Sewer Overflow (SSO) inspections evaluate compliance with SSO provisions present in the NPDES permit, an enforcement order, a consent decree, or another enforceable document. The inspector collects information to verify that the permittee is complying with the NPDES permit conditions (duty to mitigate and proper operation and maintenance) and the required notification procedures. The inspector also determines whether there have been any unpermitted discharges, or discharges from a location other than the discharge point specified in the permit, to waters of the United States.

There is no set inspection frequency or goal for SSO inspections. Inspections are scheduled as needed based on information about overflow occurrences received directly by EPA.

or from other governmental organizations, citizens groups, or non-governmental organizations. SSO inspections, as well as broader inspections of Sanitary Sewer Systems (SSS) and their satellites, may be conducted in conjunction with compliance inspections at major and minor POTWs. Data retrievals for the indicator measure for SSO inspections will count inspections under the following inspection types: PCS: SSO Sampling (+), SSO Non-Sampling (&). The corresponding ICIS-NPDES codes are SA1 (comprehensive) with program code CWASSO, and CEI (comprehensive) with program code CWASSO. When entering EPA SSO inspections, the OECA National Priority "Wet Weather – Sanitary Sewer Overflow (SSO)" should be selected.

2.C. Storm Water

2.C.1. Municipal Separate Storm Sewer Systems (MS4)

a. Phase I Audits

Nationally, there are approximately 280 Phase I MS4 permits which covers approximately 1,000 permittees (the difference being that many MS4 permits include two or more co-permittees). Audits (definition contained in Attachment 3) of Phase I MS4's should be completed within five years of the issuance of this memorandum. After the first audit on the MS4 is completed, regions and states will determine future audit frequency based on permit compliance. If violations were discovered that require the issuance of an enforcement order, regions or states should conduct a follow-up audit within one year. If either minor or no violations were discovered, regions or states should conduct another audit within 5 years. Data retrievals for the indicator measure for MS4 Phase I audits will count under the following PCS code: Stormwater (MS4) Audit (>).The corresponding ICIS-NPDES code is AU1 (comprehensive) with program code CWASTMM. When entering EPA audits, the OECA National Priority "Wet Weather – Storm Water – MS4" should be selected.

b. Phase I Inspections

MS4 inspections (definition contained in Attachment 3) assess a subset of the MS4's permit compliance, respond to citizen complaints, or respond to requests or referrals from other governmental organizations, citizens groups, or non-governmental organizations. Inspections of Phase I MS4's should be conducted on an as needed basis. Many Phase I MS4's may technically qualify as "major permittees" per the "NPDES Permit Rating Sheet." The inspection frequency for major permittees under heading 1.A.1 is not intended to apply to Phase I MS4's. Data retrievals for the indicator measure for MS4 Phase I inspections will count under the following PCS codes: Stormwater (MS4) Sampling (<),Stormwater (MS4) Non-Sampling (-).The corresponding ICIS-NPDES codes are SA1 (comprehensive) and CEI (comprehensive) with program code CWASTMM. When entering EPA inspections, the OECA National Priority "Wet Weather – Storm Water – MS4" should be selected.

c. Phase II Audits and Inspections

The Office of Water estimates that there are approximately 5,000 Phase II MS4's nationally. There is a strong need for permitting authorities to assess the quality of these MS4 programs. Audits (evaluating all aspects of the MS4), on-site inspections (inspecting individual parts of the MS4 program), and review of annual reports are valuable tools to determine if the Phase II MS4s are in compliance with permit requirements.

The goal is to conduct an appropriate combination of audits and inspections to determine compliance within seven years of the issuance of this memorandum. Given the overarching need to assess the Phase II programs, this goal provides flexibility to regions and states to determine the most appropriate approach to assess compliance within the Phase II universe. Since the size of the universe is large, if regions or states experience difficulty meeting this goal, priority should be given to auditing or inspecting Phase II MS4s located in priority watersheds that contribute to CWA Section 303(d) or 305(b) listings, and at Phase II MS4s located near high quality waters that the state has designated for higher levels of protection to prevent degradation. After the region or state has made compliance determination at individual Phase II MS4s the future assessment frequency should be based on whether the Phase II MS4 was or was not in compliance with the permit, and other information (e.g., review of annual reports, citizen complaints, etc.). If violations are discovered that require the issuance of an enforcement order, regions or states should conduct a follow-up audit or on-site inspection within one year. If either minor or no violations were discovered, regions or states should conduct another follow-up audit or inspection within 5 years.

Data retrievals for the indicator measure for MS4 Phase II audits will count under the following PCS codes: Stormwater (MS4) Audit (>), Stormwater (MS4) Sampling (<), Stormwater (MS4) Non-Sampling (-). The corresponding ICIS-NPDES codes AU1 (comprehensive), SA1 (comprehensive), and CEI (comprehensive) with program code CWASTMM. When entering EPA audits and inspections, the OECA National Priority "Wet Weather–Storm Water–MS4" should be selected.

2.C.2. Industrial Storm Water

Industrial storm water inspections are designed to ensure that regulated facilities have an NPDES permit for storm water discharge and a Storm Water Pollution Prevention Plan (SWPPP), and that the facility is in compliance with the permit and is implementing the SWPPP to ensure that the permittee is meeting technology and water quality based requirements. During the inspection the inspector reviews the permit and the SWPPP, reviews self-inspection reports and other records to verify that the facility is complying with its permit and is implementing the SWPPP, and walks the site to verify that the SWPPP is accurate and BMPs are in place and functioning properly.

Estimates indicate that there are more than 100,000 industrial storm water permittees nationwide, contained within 29 industrial categories. The long-term inspection goal for industrial storm water permittees is to inspect at least 10% of the universe each fiscal year. Given the size of the universe, if regions or states experience difficulty meeting this goal, priority

should be given to inspecting permittees of environmental concern and those located in priority watersheds that may discharge a pollutant(s) that contributes to CWA Section 303(d) or 305(b) listings, and permittees located near high quality waters that the state has designated for higher levels of protection to prevent degradation. OECA will work with the regions and states during FY 2008 – FY 2010 to incrementally improve information on the universe of industrial storm water permittees, particularly for the subset of industrial categories addressed in OECA's national storm water priorities: Ready-Mix Concrete; Sand and Gravel; Crushed Stone; Road Building; and Ports.

Data retrievals for the industrial storm water inspection indicator measure will count under the following PCS codes: Stormwater (Non-Construction) Sampling (:), Stormwater (Non-Construction) Non-Sampling (~). The corresponding ICIS-NPDES codes are SAI (comprehensive) and CEI (comprehensive) with program code CWASTMN. When entering EPA industrial storm water inspections, the OECA National Priority "Wet Weather–Storm Water-Industrial-Non-construction" should be selected.

2.C.3. Construction

Storm water inspections are designed to ensure that regulated facilities have a NPDES permit for storm water discharge and a Storm Water Pollution Prevention Plan (SWPPP) and are following the specifications in each. During the inspection, the inspector reviews the permit and the SWPPP and determines whether the SWPPP meets the requirements set forth in the permit. The inspector also reviews records, such as self-inspection reports, to verify that the facility is complying with its permit and the SWPPP and walks the site to verify that the SWPPP is accurate and BMPs are in place and functioning properly.

a. Phase I (Greater than 5 acres)

OECA recommends a joint EPA and state annual goal to inspect at least 10% of the permitted Phase I construction sites, with priority given to sites located near Section 303(d) or 305(b) listed waters that are impaired for construction-associated pollutants, and at sites located near high quality waters that the state has designated for higher levels of protection to prevent degradation.

EPA estimates that there are approximately 157,500 Phase I construction starts nationwide annually. EPA and the states should establish the additional goal to inspect all Phase I sites where there is an indication (including tips and complaints) of unpermitted construction activity. Inspections conducted pursuant to a tip or complaint will count toward the annual Phase I universe coverage goal. For states that enter all construction storm water inspections in ICIS-NPDES, data retrievals for the construction storm water inspection indicator measure will count under the following PCS codes: Stormwater (Construction) Sampling ({), Stormwater (Construction) Non-Sampling (}). The corresponding ICIS-NPDES codes are SAI (comprehensive) and CEI (comprehensive) with program code CWASTMC. When entering EPA industrial storm water inspections, the OECA National Priority "Wet Weather–Storm Water-Industrial Construction" should be selected.

Given the size and transient nature of the Phase I construction storm water universe, EPA has provided in the draft ICIS-NPDES Policy Statement that only the inspections that should be entered into ICIS-NPDES are those where the state, territory, or tribe issues a formal enforcement action, administrative penalty order, or informal enforcement action (but only if informal action addresses Significant Noncompliance). For estimating joint EPA and state progress relative to the joint annual goal at the end of the federal fiscal year, states should submit to the appropriate EPA regional office aggregate reporting of the total number of NPDES Phase I construction storm water inspections that have been conducted during the fiscal year. This report may also include separate numerical data on the NPDES Phase I construction storm water inspections conducted by counties or localities.

b. Phase II (1 to 5 acres)

OECA recommends a joint EPA and state annual goal to inspect at least 5% of the permitted Phase II construction sites, with priority given to sites located near Section 303(d) or 305(b) listed waters that are impaired for construction-associated pollutants, and at sites located near high quality waters that the state has designated for higher levels of protection to prevent degradation.

EPA estimates that there are 87,875 Phase II construction starts nationwide annually. EPA and the states should establish the additional goal to inspect all Phase II sites where there is an indication (including tips and complaints) of unpermitted construction activity. Inspections conducted pursuant to a tip or complaint may count toward the annual Phase II universe coverage goal. For states that enter all construction storm water inspections in ICIS-NPDES, data retrievals for the construction storm water inspection indicator measure will count under the following PCS codes: Stormwater (Construction) Sampling ({), Stormwater (Construction) Non-Sampling (}). The corresponding ICIS-NPDES codes are SA1 (comprehensive) and CEI (comprehensive) with program code CWASTMC. When entering EPA industrial storm water inspections, the OECA National Priority "Wet Weather--Storm Water-Industrial Construction" should be selected.

Given the size and transient nature of the Phase II construction storm water universe, EPA has provided in the draft ICIS-NPDES Policy Statement that only the inspections that should be entered into ICIS-NPDES are those where the state, territory, or tribe issues a formal enforcement action, administrative penalty order, or informal enforcement action (but only if informal action addresses Significant Noncompliance). For estimating joint EPA and state progress relative to the joint annual goal at the end of the federal fiscal year, states should submit to the appropriate EPA regional office aggregate reporting of the total number of NPDES Phase II construction storm water inspections that have been conducted during the fiscal year. This report may also include separate numerical data on the NPDES Phase II construction storm water inspections conducted by counties or localities.

2.D. Concentrated Animal Feeding Operations

The objective of Concentrated Animal Feeding Operations (CAFO) inspections is to verify that CAFOs are not illegally discharging to waters of the United States, as well as to verify that permitted CAFOs are in compliance with their NPDES permits.

2.D.1. Large and Medium CAFOs with NPDES permits.

EPA recommends that states and regions inspect at least once every five years to determine compliance with the permit, including terms of the nutrient management plan. More frequent inspections, including annual inspections, may be appropriate for facilities that meet any of the following criteria (Section 2.2.1 NPDES Permit Writers Guidance for CAFOs, December, 2003):

- Exceptionally large operations (existing and new)
- Operation that has historical compliance problems
- Operation that has significant environmental concerns
- Operation located in an area of significant environmental concern or with particular water quality impairment
- Operation subject to voluntary alternative performance standard
- Operation subject to additional state requirements that apply to specific areas of operations

Data retrievals for the large and medium CAFOs with NPDES permits inspection indicator measure will count under the following PCS codes: CAFO-Sampling (\ ), CAFO-Non-Sampling (=). The corresponding ICIS-NPDES codes are SA1 (comprehensive) and CE1 (comprehensive) with program code CWACAFO. When entering EPA CAFO inspections, the OECA National Priority "Wet Weather–CAFO" should be selected.

2.D.2. Large CAFOs without NPDES permits.

If not inspected to date, inspect all unpermitted large CAFOs within five years to determine whether the facility discharges. Thereafter, as needed based on the possibility for an unauthorized discharge.

Data retrievals for the large CAFOs without NPDES permits inspection indicator measure will count under the following PCS codes: CAFO-Sampling (\ ), CAFO-Non-Sampling (=). The corresponding ICIS-NPDES codes are SA1 (comprehensive) and CE1 (comprehensive) with program code CWACAFO. When entering EPA CAFO inspections, the OECA National Priority "Wet Weather–CAFO" should be selected.

2.D.3. Medium AFOs without NPDES Permits

Assess one-time initially to determine whether the facility is a medium CAFO, including whether the facility discharges. Prioritize assessments based on priority watersheds, nutrient

impairments, complaints, or other information. After the initial assessment if the facility is not a medium CAFO, States and regions should inspect and designate as needed based on citizen complaint or other information to determine whether facility is a significant contributor of contaminants and has a discharge through a manmade conveyance or there is direct contact by animals in the production area. *(Note: assessments evaluate whether the facility meets the definition of a medium CAFO -- manmade ditch, or pipe carries manure or process waste water from the facility to surface waters or animals come into contact with surface water that runs through the area they are confined).*

Data retrievals for the medium AFO assessment indicator measure will count under the following PCS codes: CAFO-Sampling (\ ), CAFO-Non-Sampling (=). The corresponding ICIS-NPDES codes are SA1 (comprehensive) and CEI (comprehensive) with program code CWACAFO. When entering EPA CAFO inspections, the OECA National Priority "Wet Weather–CAFO" should be selected.

2.D.4. Small AFOs

States and regions should inspect and designate as needed based on citizen complaint or other information to determine whether facility is a significant contributor of contaminants and has a discharge through a manmade conveyance or there is direct contact by animals in the production area.

Data retrievals for the small AFO inspection indicator measure will count under the following PCS codes: CAFO-Sampling (\ ), CAFO-Non-Sampling (=). The corresponding ICIS-NPDES codes are SA1 (comprehensive) and CEI (comprehensive) with program code CWACAFO. When entering EPA CAFO inspections, the OECA National Priority "Wet Weather–CAFO" should be selected.

Attachment 3 – Inspection Type Descriptions

(Source: National Pollutant Discharge Elimination System Compliance Inspection Manual, July 2004)

Compliance Evaluation Inspection (CEI)

The CEI is a nonsampling inspection designed to verify permittee compliance with applicable permit self-monitoring requirements, effluent limits, and compliance schedules. Inspectors must review records, make visual observations and evaluate treatment facilities, laboratories, effluents and receiving waters. During the CEI, the inspector must examine both chemical and biological self-monitoring, which form the basis for all other inspection types except the Reconnaissance Inspection.

Compliance Sampling Inspection (CSI)

During the CSI, NPDES permitted or unpermitted facilities, inspectors must take representative samples. Inspectors then verify the accuracy of the permittee's self-monitoring program and reports through chemical and bacteriological analysis; determine compliance with discharge limitations; determine the quantity and quality of effluents; develop permits; and provide evidence for enforcement proceedings where appropriate. In addition, the CSI includes the same objectives and tasks as a CEI.

Performance Audit Inspection (PAI)

The inspector conducts a PAI to evaluate the permittee's self-monitoring program. As with a CEI, the PAI verifies the permittee's reported data and compliance through a records check. However, the PAI provides a more resource-intensive review of the permittee's self-monitoring program and evaluates the permittee's procedures for sample collection, flow measurement, chain-of-custody, laboratory analyses, data compilation, reporting, and other areas related to the self-monitoring program. In a CEI, the inspector makes a cursory visual observation of the treatment facility, laboratory, effluents, and receiving waters. In a PAI, the inspector observes the permittee performing the self-monitoring process from sample collection and flow measurement through laboratory analyses, data workup, and reporting. The PAI does not include the collection of samples by the inspector. However, the inspector may require the permittee to analyze performance samples for laboratory evaluation purposes.

Compliance Bio-monitoring Inspection (CBI)

This inspection includes the same objectives and tasks as a CSI. A CBI reviews a permittee's toxicity bioassay techniques and records maintenance to evaluate compliance with the bio-monitoring terms of the NPDES permit and to determine whether the permittee's effluent is toxic. The CBI also includes the collection of effluent samples by the inspector to conduct acute and chronic toxicity testing to evaluate the biological effect of a permittee's effluent discharge(s) on test organisms. Each state should have the ability to conduct bio-monitoring inspections, have a designated contractor conduct inspections, or have an equivalent program to independently verify a discharger's compliance with Whole Effluent Toxicity (WET) permit requirements.

Toxics Sampling Inspection (XSI)

The XSI has the same objectives as a conventional CSI. However, it places increased emphasis on toxic substances regulated by the NPDES permit. The XSI covers priority pollutants other than heavy metals, phenols, and cyanide, which are typically included in a CSI (if regulated by the NPDES permit). An XSI uses more resources than a CSI because sophisticated techniques are required to sample and analyze toxic pollutants. An XSI may also evaluate raw materials, process operations, and treatment facilities to identify toxic substances requiring controls.

Diagnostic Inspection (DI)

The DI primarily focuses on Publicly Owned Treatment Works (POTWs) that have not achieved permit compliance. POTWs that are having difficulty diagnosing their problems are targeted. The purposes of the DI are to identify the causes of noncompliance, suggest immediate remedies that will help the POTW achieve compliance, and support current or future enforcement action. Once the cause of noncompliance is defined, an administrative order is usually issued that requires the permittee to conduct a detailed analysis and develop a composite correction plan.

Reconnaissance Inspection (RI)

The RI is used to obtain a preliminary overview of a permittee's compliance program. The inspector performs a brief visual inspection of the permittee's treatment facility, effluents, and receiving waters. The RI uses the inspector's experience and judgment to summarize quickly any potential compliance problems. The objective of the RI is to expand inspection coverage without increasing inspection resources. The RI is the briefest and least resource intensive of all NPDES inspections.

Pretreatment Compliance Inspection (PCI) and Pretreatment Audit

The PCI evaluates the POTW's implementation of its approved pretreatment program. It includes a review of the POTW's records on monitoring, inspections, and enforcement activities for its industrial users (IUs). The PCI may be supplemented with IU inspections. An IU inspection is an inspection of any significant IU that discharges to the POTW. The inspection can include sampling or not, depending on the reason for the inspection. If feasible, inspectors should conduct the PCI concurrently with another NPDES inspection of the POTW. Additional information is available in EPA's *Guidance for Conducting a Pretreatment Compliance Inspection* (September 1991).

It should be noted that a related type of review procedure, the pretreatment audit, is also performed by Approval Authorities. The pretreatment audit is defined and discussed in Section 1.2, page 1-1, of EPA's Pretreatment Compliance Inspection and Audit Manual for Approval Authorities (July 1986) and the Control Authority Pretreatment Audit Checklist and Instructions (May 1992).

Follow-up Inspection

The follow-up inspection is a resource intensive inspection conducted when a compliance problem is identified as a result of a routine inspection or a complaint. For a follow-up inspection, the appropriate resources are assembled to deal effectively with a specific enforcement problem.

Sewage Sludge (Biosolids) Inspection

The objectives of a sewage sludge (biosolids) inspection are to determine compliance with Federal 503 sludge regulations for any facility engaged in a regulated sludge or disposal practice and to evaluate the permittee's compliance with sludge monitoring, recordkeeping and reporting, treatment operations, and sampling and laboratory quality assurance. The PCI, CEI, and PAI are the most likely vehicles for evaluating compliance with sludge requirements.

Storm Water Inspection

Storm water inspections are designed to ensure that regulated facilities have a NPDES permit for storm water discharge and a Storm Water Pollution Prevention Plan (SWPPP) and are following the specifications in each. During the inspection, the inspector reviews the permit and the SWPPP and determines whether the SWPPP meets the requirements set forth in the permit. The inspector also reviews records, such as self-inspection reports, to verify that the facility is complying with its permit and the SWPPP and walks the site to verify that the SWPPP is accurate and BMPs are in place and functioning properly.

Municipal Separate Storm Sewer System (MS4) Audit

An MS4 audit is used to evaluate overall MS4 storm water program implementation, and identify problems the local government may have in implementing the program. MS4 audits involve a comprehensive review of the local government's MS4 storm water program including: a review of the program elements including structural and source control measures, detection and removal of illicit discharges and improper disposal into storm sewers, monitoring and controlling pollutants in storm water discharges, implementing and maintaining structural and nonstructural Best Management Practices (BMPs), verification of implementation schedules, assignment of appropriate individuals, review of the inspection and enforcement program for industrial facilities and construction sites, evaluation of the dry weather screening program, determination of whether controls are in place and are in good working order, and whether facilities have schedules for construction of structural control measures.

Municipal Separate Storm Sewer System (MS4) Inspection

An MS4 inspection involves reviewing some, but not all, elements of the MS4's permit. The MS4 inspection would involve some amount of field work to observe some of the MS4's operations. MS4 inspections may involve the following two activities designed to determine if the MS4 control authority is implementing an adequate program in one or more selected MS4 program elements. If the region or a state conducts either of the following two activities it would meet the definition of an MS4 inspection.

1. Review a limited subset of the MS4 control authority's permit elements. The subset would be determined by the region or a state after a review of the MS4 permit. The inspection could involve either a significant review of one specific aspect of the program (e.g., structural and source control measures), or a review of 2-3 specific MS4 permit program elements (see MS4 audit definition for program elements), depending upon the specific objectives laid out by the region or a state, or
2. Conduct an inspection at an individual site (e.g., construction, industrial) within the MS4's jurisdiction that is not linked to a specific MS4 audit. The specific purpose of this MS4 inspection would be to determine if the control authority has an adequate inspection program. In other words this would be an MS4 oversight inspection. Based on the general definition of oversight inspections, this MS4 inspection could be conducted at the same time with the MS4 inspector, or shortly after (within 2-3 weeks) the MS4 inspector visited the facility/site.

Combined Sewer Overflow (CSO) Inspection

During a CSO inspection, the inspector evaluates compliance with CSO provisions present in the NPDES permit, an enforcement order, a consent decree, or another enforceable document. The inspector verifies that the permittee is preventing CSOs during dry weather, implementing the nine minimum CSO controls, adhering to a schedule for development, submission, and implementation of a Long-Term CSO Control Plan, eliminating or relocating overflows from sensitive areas, adhering to effluent limitations, and implementing a monitoring program.

Sanitary Sewer Overflow (SSO) Inspection

During an SSO inspection, the inspector evaluates compliance with SSO provisions present in the NPDES permit, an enforcement order, a consent decree, or another enforceable document. The inspector collects information to verify that the permittee is complying with the NPDES standard permit conditions (duty to mitigate and proper operation and maintenance) and the required notification procedures. The inspector also determines whether there have been any unpermitted discharges, or discharges from a location other than the discharge point specified in the permit, to waters of the United States.

Concentrated Animal Feeding Operation (CAFO) Inspection

The objective of this inspection is to evaluate a CAFO's compliance with permit requirements, permit conditions, applicable regulations, and other requirements. The three types of CAFO inspections are the Status Determination Inspection, the Permit Compliance Inspection, and the Settlement Agreement Inspection. The type of information that the inspector gathers depends on the type of CAFO inspection being conducted.

Summary

The inspector should plan all activities and coordinate with the appropriate compliance personnel in their office before the inspection. The type of inspection may serve as a basis for deciding what activities will be conducted onsite and for determining what additional information is to be gathered or verified during the inspection. Compliance personnel should choose the type of inspection to be conducted based on the compliance status and history of the facility, the

information needed from the facility, and the type of facility involved. Note that some types of NPDES inspections may encompass several elements of the primary inspection types (e.g., a storm water inspection may encompass elements from both a CSI and a PAI).

Attachment 4

Next Steps for the Three NPDES Policies:
the ICIS-NPDES Policy Statement, the Wet Weather Significant Noncompliance Policy, and the NPDES Compliance Monitoring Strategy

October 2, 2007

Overview

The Clean Water Act National Pollutant Discharge Elimination System (NPDES) program has evolved through the years to include important wet weather pollution sources. To keep the enforcement and information management components of the NPDES program in alignment with the current NPDES program regulatory structure, EPA has been working with the States to update its policies, guidance, and database. The relationship between the program's regulatory structure, EPA's past policies and their revision, and program implementation and management was explained in an April 30, 2007 paper.[1] On this same date, EPA distributed the following three NPDES policies to States, the Environmental Council of States (ECOS) and the Association of State and Interstate Water Pollution Control Administrators (ASIWPCA) for review and comment:

- the Integrated Compliance Information System for NPDES (ICIS-NPDES) Policy Statement;
- EPA's Significant Noncompliance (SNC) Policy for CWA Violations Associated with Combined Sewer Overflows (CSOs), Sanitary Sewer Overflows (SSOs), Concentrated Animal Feeding Operations (CAFOs), and Stormwater Point Sources (aka "Interim Wet Weather SNC Policy"); and
- CWA NPDES Inspection Frequency Guidance for the Core Program and Wet Weather Sources (aka "NPDES Compliance Monitoring Strategy").

There are several commonalities between these policies. Each policy:

- Promotes both national consistency and flexibility in NPDES program management and implementation.
- Focuses resources to the most critical programmatic and environmental areas.
- Updates and strengthens existing NPDES program decision-making and management policies that were out-of-date.
- Prompts changes in current NPDES business practices among the authorized states and territories to reflect the changes in the program over the last 20 years.

[1] Relationship between three NPDES Policies: the ICIS-NPDES Policy Statement, the Wet Weather Significant Noncompliance Policy, and the NPDES Compliance Monitoring Strategy, U.S. EPA, April 30, 2007.

EPA received comments from 30 States, the majority of which dealt with resource or program oversight issues. EPA received few specific substantive comments on any of the three policies.

On September 12, 2007, EPA sent ECOS a letter outlining EPA's next steps on the 3 policies based on the States' comments. This document expands on the initial paper about the relationships of the three NPDES policies to include EPA's current approach for proceeding on these policies.

Compliance Monitoring Strategy

Objective: Both the Permitting for Environmental Results and the State Review Framework reviews highlighted the need to revisit the inspection frequency goals set in the Enforcement Management System (EMS) written in 1989. The revised Compliance Monitoring Strategy (CMS) will establish new goals for all parts of the current core program, while acknowledging the emergence of wet weather sources and "traditional" minor facilities that may be contributing to non-attainment of water quality standards. The NPDES CMS is intended to guide this decision-making process, and focus resources on the most critical environmental areas. The NPDES CMS includes flexibility to set priorities in annual agreements between EPA regional offices and States that take into account resource constraints.

Comments: State comments received focused on three major recommendations: (1) accommodate limited State inspection resources; (2) maintain adequate presence in core program areas as attention turns toward wet weather issues; and (3) ensure that the flexibility that is built into the CMS is actually implemented.

Next Step: OECA has accommodated many of the comments that States and regions have made in the review periods of the CMS, which have improved the clarity of the document and increased the flexibilities the CMS now offers. OECA will finalize the CMS by the end of September 2007. The CMS may be utilized in FY2008 if a State wishes to negotiate the flexibilities available in the CMS with their region, but will be fully effective in the FY2009 planning cycle. Regions will be asked to consider beginning implementation of the strategy in FY2008 if a State so requests.

Interim Wet Weather SNC Policy

Objective: The Interim Wet Weather SNC Policy supplements the existing 1986 NPDES SNC Policy and will provide EPA and States with a tool to better manage the current NPDES program by providing guidance on prioritizing and tracking violations in EPA's Clean Water Act wet weather national enforcement priority areas. The objective is the same as EPA's original policy – to help focus limited enforcement resources with some degree of national consistency. A critical part of implementing this Policy includes

the ability to track and manage the identification of violations and follow-up actions by EPA and States on a national level.

Comments: Only a few States submitted substantive comments on the policy approach, including: 1) appreciation of the flexibility built into the policy with some concern that it may also lead to inconsistent interpretations of the SNC criteria and response options in the policy, 2) the desire to establish specific thresholds within some of the definitions in the policy, and 3) the elimination of the CAFO section because EPA does not have a final revised CAFO rule yet.

Next Step: The draft Interim Policy did not identify the related data elements that are critical to tracking and managing these activities, as it relied on a small subset of the data elements set out in the Requisite ICIS-NPDES Data Elements (RIDE) in the draft ICIS-NPDES Policy Statement. Because of the multi-step approach EPA is taking to resolve ICIS-NPDES Policy Statement issues (see below), OECA will be initially issuing the Interim Wet Weather SNC Policy only at the federal level by the end of September 2007. OECA welcomes any State's interest in piloting the Interim Wet Weather SNC Policy, and recommends that those States contact and work through their regions.

EPA will, in consultation with the ASIWPCA State-EPA NPDES Advisory Group, develop an approach for tracking and reporting wet weather SNC information. Full implementation of this policy will be coordinated with the implementation of the new ICIS-NPDES data system and associated policies.

ICIS-NPDES Policy Statement

Objective: The ICIS-NPDES Policy Statement will reflect the move from the Permit Compliance system (PCS) to the new Integrated Compliance Information System (ICIS-NPDES) as the national database for the NPDES permitting and enforcement programs. The ICIS-NPDES Policy Statement will provide EPA and NPDES-authorized States with guidance on information management practices and responsibilities to ensure that ICIS-NPDES contains accurate, complete, consistent, and timely information, which will support effective management of the NPDES program. The Policy Statement also identifies a set of data, the Requisite ICIS-NPDES Data Elements (RIDE), which will allow EPA to manage the national NPDES program.

Comments: State comments on this Policy centered on the following areas on concern: resource implications related to the number of data elements; the amount of time to transition to this policy; and sharing State data to maintain a national NPDES data base.

Next Steps: In consideration of the States' concerns about the draft Policy Statement, EPA developed an approach that will allow provide the necessary guidance to the States already using ICIS-NPDES while allowing additional time to work on issues concerning what new data to exchange and how to exchange it. There are currently 21

States, 2 Tribes and 9 Territories that directly use ICIS-NPDES; 9 hybrid States (that use ICIS-NPDES but also batch some data to PCS) that will begin using ICIS-NPDES in FY2008; and 23 full batch States (that use their own data system and currently send data to PCS). It is critical that the approach taken ensures fair and equal treatment of all states, regardless of what system they use, as well as the continuance of a consistent national data set for the NPDES program.

EPA intends to pursue a rule-making approach to establish the required data elements in ICIS-NPDES and the reporting requirements for the full NPDES program. Since this can be a lengthy process, EPA will, in the interim take the following steps:

- Issue an Interim ICIS-NPDES Policy Statement for direct users of the ICIS-NPDES system that will require them to submit the equivalent set of data that is now required to be submitted to PCS.
- Continue to work with the hybrid States to migrate their data from PCS and develop the batch data flow through the Exchange Network. Once these States are on ICIS-NPDES, the Interim ICIS-NPDES Policy Statement will apply.
- Continue to work with Texas and 10 other States on a net DMR tool that will allow facilities to directly submit DMR data to ICIS-NPDES. The NetDMR tool and other electronic DMR tools are the key way of reducing data entry burden since 90% of the burden associated with the data elements identified in the ICIS-NPDES Policy Statement is associated with DMRs.
- Continue to work with States through Integrated Project Teams (IPTs) on how data will flow from States with their own systems through the Exchange Network and the Central Data Exchange into ICIS-NPDES.

Conclusion

The business needs of the national CWA NPDES permitting and enforcement program build a strong case for these policies and for having this data available at the national level. These policies are important to keep the information management components of the NPDES program in alignment with the current NPDES program regulatory structure as it has evolved over the past 20 years. EPA's approaches outlined above for updating its permitting and enforcement policies take into consideration the input and concerns of our State partners and provide EPA with a path forward for meeting EPA's national NPDES program management needs.