

RESPONSE TO COMMENTS
General NPDES Permit
Concentrated Animal Feeding Operation

On August 28, 1995, EPA, Region 10, issued a notice for a proposed National Pollutant Discharge Elimination System (NPDES) General Permit (GP) for Concentrated Animal Feeding Operations (CAFO) in Idaho (60 FR 44489, Monday, August 28, 1995). During the public notice period, comments were received from Idaho Fish and Game (IDF&G), Idaho Department of Health and Welfare Division of Environmental Quality (DEQ), Idaho Farm Bureau Federation (IFBF), Army Corps of Engineers, Idaho Dairymen's Association (IDA), Idaho Pork Producers Association (IPPA), J.R. Simplot Company (Simplot), and Idaho Cattle Association (ICA). Public Hearings were held in Boise, Idaho on September 27, 1995, and in Twin Falls, Idaho on September 28, 1995. This document directly responds to the significant comments pertaining to the GP, made in writing and at the Public Hearings.

1. **Comment:** The IDF&G commented that "The draft permit does not mention the possibility of groundwater contamination, which would seem a high priority as a result of a CAFO." Commenter claims that this, especially, would be true considering the number of new dairies in certain areas, such as Jerome County. The commenter also claims the need to maintain high quality water in the springs along the Snake River because of the fish hatcheries and wild fish populations make it paramount that the present good quality groundwater be maintained. The commenter requests that a discussion on CAFO and groundwater contamination should be included in the permit.

Response: The EPA agrees that groundwater contamination is a concern around CAFO facilities. However, the Clean Water Act does not give EPA the authority to regulate groundwater quality through NPDES permits.

The only situation in which groundwater may be affected by the NPDES program is when a discharge of pollutants to surface waters can be proven to be via groundwater. The GP already addresses this situation by requiring that lagoons be designed in accordance with Soil Conservation Service Technical Note 716.

2. **Comment:** Simplot and the ICA request that EPA delete the references to groundwater in parts II.C.2. and VII.L. and M. of the proposed permit. They claim that the Clean Water Act does not give EPA the authority to regulate groundwater through NPDES permits.

Response: As in the response to comment #1 above, the EPA agrees that the Clean Water Act does not give EPA the authority to regulate groundwater quality through NPDES permits. However, the permit requirements established in parts II.C.2. and VII.L. and M. of the proposed permit are not intended to regulate groundwater. Rather, they are intended to protect surface waters which are contaminated via a groundwater (subsurface) connection.

As mentioned in the fact sheet to the GP, this determination is supported by the following decisions:

- Leslie Salt Co. v. United States, 896 F.2d 354, 358 (9th Cir. 1990) (CWA jurisdiction existed over salt flat even though hydrologic connection between salt flat and navigable waters was man-made).
- Washington Wilderness Coalition v. Hecla Mining, 870 F. Supp 983 (E.D. Wash 1994) (Point source discharge of pollutants to surface waters of the United States, either directly or through groundwater, is subject to regulation by NPDES permit).
- Sierra Club v. Colorado Refining Co., Civ. No. CIV.A.93-K-1713 (D. Col. Dec. 8, 1993) ("[The] Clean Water Act's preclusion of the discharge of any pollutant into `navigable waters' includes such discharge which reaches `navigable waters' through groundwater.");
- McClellan Ecological Seepage v. Weinberger, 707 F. Supp. 1182, 1194 (E.D. Cal. 1988) (where hydrologic connection exists between groundwater and surface waters, NPDES permit may be required);

3. **Comment:** The IDF&G recommends that, in addition to fencing, the Best Management Practices portion of the GP be expanded to include such things as filter strips, straw bales, etc.

Response: The purpose of including fencing in the GP is to restrict animal access, within the CAFO boundary, to receiving waters, without which the "no discharge" requirement could not be achieved. While it is desirable to include filter strips and straw bales, these may or may not be necessary to achieve the "no discharge" requirement. However, it is the responsibility of the permittee to incorporate whatever best management practice is necessary to achieve the "no discharge" requirement.

4. **Comment:** The GP requires that the permittee notify the EPA verbally within 24 hours after a discharge. The IDF&G recommends that this language be changed so that immediate notification is mandatory.

Response: EPA agrees that immediate notification is preferred. However, this provision is consistent with 40 CFR 122.41(1)(6). Therefore, this provision will not be modified.

5. **Comment:** The IDF&G comments that concentrated duck feeding operations established prior to 1974 are exempt from regulations. The commenter claims that this regulation appears to be protecting a special interest party or group and should be deleted and that all operations should be covered without favoritism toward any one special group or operation.

Response: EPA disagrees with this assessment of the CAFO GP. This permit does not exempt the duck feeding operations established prior to 1974 from meeting regulations. Rather, it states that such operations will not be covered under this particular permit. This does not imply that they are exempt from regulation.

As mentioned in section III.C. in the fact sheet, "EPA's regulations do authorize the issuance of "general permits" to categories of discharges (40 CFR 122.28) when a number of point sources are:

- a. Located within the same geographic area and warrant similar pollution control measures;
- b. Involve the same or substantially similar types of operations;
- c. Discharge the same types of waste;
- d. Require the same effluent limitations or operating conditions;
- e. Require the same or similar monitoring requirements; and
- f. In the opinion of the Director, are more appropriately controlled under a general permit than under individual permits."

In other words, this CAFO general permit would not be appropriate to cover CAFOs and electroplating operations (for example) because they are substantially different operations. The fact that we do not cover electroplating operations in this permit does not exempt electroplaters from regulation. It just means they are **not** covered by this particular permit and must obtain coverage under another permit.

The CAFO GP is not applicable for concentrated duck feeding operations established prior to 1974 because the requirements (established in 40 CFR 412 Subpart B) for such operations are substantially different. Unlike the duck feeding operations established after 1974, the duck feeding operations established prior to 1974 are allowed to have a discharge which must meet certain biochemical oxygen demand and fecal coliform levels. This GP is designed for facilities which are required to achieve "no discharge."

Again, not covering duck feeding operations established prior to 1974 under this permit does not exempt them from regulation. They are just not covered under this particular permit.

6. **Comment:** One of the criteria used in determining whether an animal feeding operation is a CAFO is the number of animals confined at the facility. The IDF&G expressed concerns regarding this criteria. The commenter claims that there are a number of instances when a single cattle operator has purposely kept slightly less than 200 mature dairy cattle because this number of dairy cows would not be considered a CAFO. In very close proximity this same operator keeps another group of less than 200 dairy cattle. IDF&G claims that by operating in this manner, an operator is able to circumvent the CAFO regulations. As a result, the commenter recommends that the number of animals required to be considered a CAFO be reduced.

Response: The regulations (40 CFR 122 Appendix B) specify the number of animal units that a facility must confine to be considered a CAFO. Therefore, the agency cannot arbitrarily select a lower number for use in this permit.

The EPA agrees that there may be situations, as described by the commenter, where a facility may divide its animals into smaller farms to circumvent the regulations. The regulations have accounted for this. In 40 CFR 122.23(b)(2), it states that "Two or more animal feeding

operations under common ownership are considered, for the purposes of these regulations, to be a single animal feeding operation if they adjoin each other or if they use a common area or system for the disposal of wastes."

In addition, even though a facility has fewer than the number of animals necessary to be considered a CAFO, 40 CFR 122.23(c) allows for the designation as a CAFO for any size facility on a case-by-case basis. This allows the flexibility to regulate smaller problem facilities which are determined to be significant contributors of pollutants.

7. **Comment:** Part II.A.2. of the draft permit states that control facilities must also be designed to contain the 25-year, 24-hour storm event. The DEQ inquires as to who will classify actual duration and intensity of the rainfall event should enforcement be required.

Response: Rainfall intensity information for a particular area can be obtained from the National Weather Service.

8. **Comment:** DEQ commented on the capacity of a waste holding facility to contain contaminated water accumulated over the winter. The commenter states that it should be noted that some geographical areas may require facilities to collect wastewater longer than four months which may result in larger holding capacities.

Response: The purpose of this requirement is to assure that water quality is not violated during the winter months. The reason for concern is the land application of wastewater onto frozen ground is likely to result in runoff into waters of the United States because of its low water holding capacity.

The EPA agrees there are areas in Idaho where the climate is such that fields are frozen for longer than four months. If these fields are located such that there is a potential for runoff, wastewater should not be applied.

The permit takes these site specific factors into account by allowing the use of the one-in-five-year winter precipitation amount when calculating the lagoon volume.

9. **Comment:** The IFBF recommends that Part V.C. of the draft permit (Need to Halt or Reduce Activity not a Defense) be eliminated from the permit.

Response: This provision of the permit is required pursuant to 40 CFR 122.41(c). Therefore, this request is denied.

10. **Comment:** The IFBF and IDA recommend that Part VI.D. of the draft permit (Duty to Provide Information) be eliminated from the permit. In addition, the IDA claims that this language is too broad.

Response: This provision of the permit is required pursuant to 40 CFR 122.41(h). Therefore, this part of the permit will not be modified or deleted.

11. **Comment:** The IFBF recommends that Part VI.I. of the draft permit (Property Rights) be eliminated from the permit.

Response: This provision of the permit is required pursuant to 40 CFR 122.41(g). Therefore, this request is denied.

12. **Comment:** The IFBF objects to the last sentence in part VII.E. of the permit. The commenter claims that giving the director the authority to establish other animal unit factors for animal types not listed in part VII.E. is lacking the safeguards afforded every other group. They recommend a language change to allow for proper notification and hearings prior to establishing these animal unit factors.

Response: Based on further review of available information, EPA has decided to delete this language. EPA regulations provide that animal feeding operations with animal types other than those identified in 40 CFR 122 Appendix B may be designated a CAFO on a case-by-case basis in accordance with 40 CFR 122.23(c).

13. **Comment:** The Army Corp of Engineers commented that the draft NPDES permit limits wastewater discharges by requiring containment of the discharge into constructed sedimentation ponds. The commenter states that if these sedimentation ponds or other methods to contain the wastewater discharge will involve the discharge of fill material into waters of the United States, including wetlands, a Department of the Army Permit will be required. The commenter requests that in such situations the owner of the concentrated animal feeding operation should contact the Department of the Army for permit requirements.

Response: EPA agrees that if fill material is or will be discharged into waters of the United States that the

Department of the Army should be contacted for information on their permitting requirements.

14. **Comment:** The IDA objects to the language in Parts II.A.3.a. and b. of the permit. The commenter states that "The addition of these elements into the minimum requirements for wastewater control facilities will substantially increase the cost of dairy operations without a demonstrated commensurate benefit to water quality protection. Additionally, the commenter states that the requirements contained in these parts are not found in the CAFO regulations under 40 CFR 122.23. Consequently, the requirements exceed the legal authority of EPA under its own implementing regulations."

Response: The EPA agrees that the requirements established in Parts II.A.3.a. and b. of the permit are not found in 40 CFR 122.23. However, as mentioned in the fact sheet for the GP, these are not the only regulations which must be considered when developing NPDES permit requirements. These requirements are included in the permit to insure that State water quality standards are not exceeded as a result of CAFO discharges pursuant to Section 301(b)(1)(C) of the Clean Water Act.

Section 301(b)(1)(C) of the Clean Water Act states that... "In order to carry out the objectives of the Act there shall be achieved not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedule of compliance, established pursuant to any State law or regulations, or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act." Note that this section of the Clean Water Act does not specify the consideration of economics when establishing limitations necessary to achieve water quality standards.

In addition to the above, the existing permit which was issued in 1987 incorporated these same requirements. In accordance with 40 CFR 122.44(1), limitations in reissued permits must be at least as stringent as the limitations in the previously issued permit. As a result, Parts II.A.3.a. and b. of the permit will not be modified.

15. **Comment:** The IDA objects to the language in part II.B.1. of the permit which specifies that plans and specifications for control facilities shall be submitted to the Idaho

Department of Health and Welfare Division of Environmental Quality for review and approval prior to construction. The commenter claims that the review process of plans by DEQ conflicts with the Idaho Dairy Pollution Prevention Initiative Memorandum of Understanding which has been agreed to among DEQ, EPA, Idaho Department of Agriculture, and the IDA.

Response: The EPA agrees with this comment, with respect to dairy facilities, and will modify the permit to reflect the roles and responsibilities established in the Memorandum of Understanding.

16. **Comment:** The IDA and the IPPA object to the inspection and entry language contained in part IV.D. of the permit. The IDA claims that this language is too broad and inclusive. The IPPA also states that this section of the permit should include more specific standards and circumstances for when and how inspections will occur.

Response: The inspection and entry provisions of the permit are consistent with 40 CFR 122.41(i). Therefore, this part of the permit will not be modified or deleted.

17. **Comment:** The IDA objects to the language in part VI.A. (Anticipated Noncompliance) of the permit. The commenter claims that this language will require the permittee to give advance notice to the Director of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements. The commenter also claims this language is far too broad and would require a permittee to notify EPA of any possible changes in the dairy facilities or daily operations which might, hypothetically, result in noncompliance regardless of realistic probability.

Response: Part VI.A. of the permit is consistent with 40 CFR 122.41(1)(2). Therefore, this part of the permit will not be modified or deleted.

There appears to be some confusion, however, about what is required by this provision. Advance notice does not have to be given to EPA for every change at a facility. This language is designed to accommodate such conditions as when a dairy increases its herd size to the point where the amount of waste generated exceeds the design capacity of the waste collection system. However, if the herd size is increased and the waste management system is capable of

handling the additional waste, it is not necessary to report this planned change to EPA.

18. **Comment:** The IDA objects to the language in part VI.F.4. of the permit which establishes the certification statement that the permittee must sign when submitting particular documents. The commenter only indicates that the certification statement is unacceptable in its present form. The commenter did not explain the rationale behind the concern nor was any alternative language presented.

Response: This certification statement is required pursuant to 40 CFR 122.22(d). Therefore, this part of the permit will not be modified or deleted.

19. **Comment:** The IDA objects to the language in Appendix C of the permit. The commenter objects to paragraph 5 which reads as follows:

Name of the receiving water(s) to which wastewaters are (or may be) discharged from the facility (receiving waters include canals, laterals, rivers, streams, etc.).

The commenter objects to the portion which identifies canals and laterals as receiving waters.

Response: Canals and laterals which empty into (or connect with) waters of the United such as rivers, streams, lakes, etc. are themselves waters of the United States in accordance with the definition of waters of the United States in 40 CFR 122.2(e). As a result, discharges into canals and laterals are considered point source discharges which must be regulated under the NPDES permitting program. This position is supported by the following:

- Order of Summary Determination of Liability in the matter of Luis Bettencourt, Docket #1093-04-17-309(g),
- Bailey v. U.S. Corps of Engineers, 647 F. Supp 44 at 48 (D. Ida. 1986),
- U.S. v. Saint Bernard Parish, 589 F. Supp 617 at 620 (E. D. La., 1984), and
- Town of Buckeye, Arizona, NPDES Opinion #67, November 11, 1977.

20. **Comment:** The ICA commented on part I.B. of the permit. The commenter claims that "Runoff from corrals, stockpiled manure..." is too broad a statement.

Response: The intent of this section is only to give examples of what constitutes a discharge. Therefore, this part of the permit will not be modified.

Any discharge from corrals or stockpiled manure is considered process wastewater. This includes any runoff from these areas caused by precipitation, watering system overflows or any other way in which contaminated runoff emanates from such areas. If this process wastewater makes its way into waters of the United States, this constitutes a discharge of process wastewater.

Note that the requirement in part II.A. of the permit is "no discharge" of process wastewater to waters of the United States except during certain precipitation events.

21. **Comment:** The ICA commented on part I.B. of the permit. They claim that "silage piles" appear to be beyond the scope of law.

Response: The silage piles in question are those associated with CAFO operations. Typically, these piles are located near confinement areas. The wastes emanating from these piles may include moisture from within the silage pile or runoff resulting from precipitation on the pile. Silage wastewater can have extremely high levels of BOD.

40 CFR 412.11 of the Feedlot Point Source Category defines process wastewater as "...any precipitation (rain or snow) which comes into contact with any manure, litter or bedding, or any other raw material or intermediate or final material or product used in or resulting from the production of animals or poultry or direct products (e.g. milk, eggs)." Silage is used in the production of animals. As a result, wastewaters from these piles are included as process wastewater from a CAFO in accordance with 40 CFR 412.11.

In addition, 40 CFR 122.1(b)(1) states that "The NPDES program requires permits for the discharge of pollutants from any point source into waters of the United States." CAFOs are a point source as defined in 40 CFR 122.1(b)(2). Any pollutants emanating from a silage pile associated with a CAFO is a discharge from a CAFO (or point source) which requires an NPDES permit for discharge.

22. **Comment:** The ICA commented on part II.C.3. of the permit. This provision of the permit prohibits the discharge or drainage of land applied wastes from land applied areas to waters of the United States. The commenter claims that this provision is a broad assumption of the interpretation of the Court ruling in Care vs. Southview Farm which spoke to a specific and unique situation which existed in that case.

Response: EPA will clarify this provision. The intent of this provision is to prohibit land application of wastewater which is applied at an excessive rate, i.e., in such a manner that it reaches waters of the United States. Therefore, the final permit is modified to reflect this intent.

23. **Comment:** The IPPA objects to section II.B.1. of the permit which references the Idaho State Waste Management Guidelines for Animal Feeding Operations; and the most recent edition of the Natural Resource Conservation Service (NRCS) National Handbook of Conservation Practices and associated State Addenda, SCS Technical Note #716. IPPA claims that because these documents have not been included as part of the necessary rule making process for the General Permit, they may not be used to establish legal standards for enforcement of the permit.

In addition, IPPA objects to EPA's reliance to these documents because of the moving target created by them. IPPA states that these documents can be modified at any time and that the EPA has failed to identify a set point in time or other document description to ensure which version of the above documents applies to CAFOs.

Response: The documents referenced above have gone through the necessary steps to be included in this permit, including a 60 day comment period which was initiated by publication of the permit in the federal register. However, EPA agrees with the commenter that the version of the above documents should be specified in the permit. The final permit reflects the current documents.

24. **Comment:** The IPPA requests that EPA clarify the intent and applicability of part III.B. of the permit (Requiring an Individual Permit).

Response: Part III.B. of the permit is included for informational purposes only. A General Permit is a resource

saving tool. As mentioned in section III.C. of the fact sheet, a General Permit is issued to categories of discharges when a number of point sources are:

- a. Located within the same geographic area and warrant similar pollution control measures;
- b. Involve the same or substantially similar types of operations;
- c. Discharge the same types of waste;
- d. Require the same effluent limitations or operating conditions;
- e. Require the same or similar monitoring requirements; and
- f. In the opinion of the Director, are more appropriately controlled under a general permit than under individual permits.

The purpose of Part III.B. of the permit is to point out that there are situations in which this permit is not appropriate. In such cases, the individual permit is an option. This part also identifies the procedures that must be followed if an individual permit is determined to be more appropriate or if a permittee requests to be covered by an individual permit.

25. **Comment:** The IPPA requests that within part V. of the permit (Compliance Responsibilities) a provision should be added so as to allow for good faith compliance and de minimis violations. The commenter claims that, as written, compliance is absolute and mandatory.

Response: Compliance Responsibility requirements in part V. of the permit are required pursuant to 40 CFR 122. There is no provision in this regulation concerning de minimis violations. Therefore, part V. of the permit will not be modified.

The significance of the violation, however, can be taken into consideration when determining the appropriate enforcement response by the agency.

26. **Comment:** IPPA objects to part VI.K. of the permit (State Laws). The commenter recognizes the responsibility of

complying with both state and federal laws. However, the commenter claims that it is unfair to subject IPPA members to differing interpretations of the regulations from differing agencies. They request that, at a minimum, there should be one source where information can be obtained or questions answered.

Response: The EPA agrees that compliance must be achieved with both state and federal laws. However, EPA disagrees that there are differing interpretations of the laws and regulations from differing agencies. Rather, there are laws and regulations which establish differing roles and responsibilities for the state and federal government. For example, EPA is responsible for issuing NPDES permits in the state of Idaho. On the other hand, the state is responsible for establishing state water quality standards. Both of these tasks are required to regulate the CAFO industry.

Although it may be more convenient to establish one contact for CAFOs to deal with, the laws and regulations are currently written such that both the state and federal government have regulatory responsibilities. Therefore, part VI.K. will not be modified.

27. **Comment:** The IPPA objects to Appendix B of the permit which discusses Significant Contributors of Pollutants (SCP). The commenter claims that the SCP provisions are excessively broad such that operators are without notice of any legal standard under which this section applies. For example, this section simply allows EPA to consider "other relevant factors." The commenter states that the determination of when to apply this provision cannot be made on an ad hoc basis and the EPA must apply the regulations in a uniform non-discriminatory basis. The commenter further states that this section should be rewritten to include specific criteria where an SCP can be made and restricted in its application by those criteria.

Response: The conditions in Appendix B of the permit are established pursuant to 40 CFR 122.23(c). Therefore, this part of the permit will not be modified.

28. **Comment:** Simplot and the ICA request that the language in parts I.B. and I.C.8. of the permit which pertains to runoff from land applied or irrigated fields and to waste application at agronomic rates be deleted. Simplot claims that it is EPA's responsibility to regulate point sources of pollution under the Clean Water Act. In addition, Simplot

claims that the above identified sections of the permit are an attempt to regulate nonpoint source discharges and go beyond the authority of EPA as provided in the Clean Water Act.

The ICA stated that these sections are beyond the scope of the definition of a CAFO which refers to areas where animals are "stabled, confined, fed or maintained."

Response: See response to comment # 22 above. In addition, the language pertaining to agronomic rates will not be deleted from the permit. Rather, it will be modified to reflect the language suggested by to Division of Environmental Quality in the Section 401 Water Quality Certification, dated November 25, 1996.

29. Part I.C.3. of the permit has been modified to accurately reflect the requirements in 40 CFR 122.23(b)(1)(ii).