

**WEST VIRGINIA  
SECRETARY OF STATE  
NATALIE E. TENNANT  
ADMINISTRATIVE LAW DIVISION**

Form #1

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OFFICE WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF A PUBLIC HEARING ON A PROPOSED RULE**

AGENCY: DEP - Division of Water & Waste Management TITLE NUMBER: 47

RULE TYPE: Legislative CITE AUTHORITY: W. Va. Code §22-11-4(a)(16)

AMENDMENT TO AN EXISTING RULE: YES  NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 10

TITLE OF RULE BEING AMENDED: National Pollutant Discharge Elimination System (NPDES) Program

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

DATE OF PUBLIC HEARING: Thursday, July 16, 2009 TIME: 6:45 p.m.

LOCATION OF PUBLIC HEARING: Coopers Rock Room (Room No. 1203 and 1204)  
WV Department of Environmental Protection  
601 57th Street SE  
Charleston, WV 25304

COMMENTS LIMITED TO: ORAL  WRITTEN  BOTH

DATE WRITTEN COMMENT PERIOD ENDS: July 16, 2009 TIME: 7:15 p.m.


WRITTEN COMMENTS MAY BE MAILED TO:

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

Public Information Office  
WV Department of Environmental Protection  
601 57th Street SE  
Charleston, WV 25304  
dep.comments@wv.gov

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

  
\_\_\_\_\_  
Authorized Signature

**DEPARTMENT OF ENVIRONMENTAL PROTECTION  
BRIEFING DOCUMENT**

**Rule Title:**

“National Pollutant Discharge Elimination System (NPDES) Program”, 47CSR10

**A. AUTHORITY:**

W.Va. Code 22-11-4(a)(16)

**B. SUMMARY OF RULE:**

The rule establishes requirements governing the State NPDES Program, including application requirements, modification and reissuance procedures, public notice requirements and final permit issuance.

2.6. "C.F.R." means the Code of Federal Regulations referenced throughout these rules effective July 1, 2006, unless otherwise noted.

**C. STATEMENT OF CIRCUMSTANCES WHICH REQUIRE RULE:**

The proposed revisions to the Rules Governing the State National Pollutant Discharge Elimination System (NPDES) Program Title 47, Series 10 reflect the updates to the Code of Federal Regulations (CFR), the National Pollutant Discharge Eliminations System (NPDES) permitting requirements for CAFOs (Section 122) and the Effluent Limitations Guidelines and Standards (ELGs) for CAFOs (Section 412). This rule revises and clarifies the regulatory requirements for concentrated animal feeding operations (CAFOs) under the State’s Water Pollution Control Act. This rule will ensure that CAFOs take appropriate actions to manage manure effectively in order to protect the State’s water quality. This rule revision is an integral part of the overall state strategy to support a vibrant agriculture economy while at the same time taking important steps to ensure that all animal feeding operations manage their manure properly and protect water quality. The WVDEP is uncertain about the universe of animal feeding operations who might need to receive regulatory coverage under this rule but believes the universe to be small.

**D. FEDERAL COUNTERPART REGULATIONS - INCORPORATION BY REFERENCE/DETERMINATION OF STRINGENCY:**

A federal counterpart to the proposed rule exists. Because proposed revisions are consistent with the federal counterpart regulation, no determination of stringency is required.

**E. CONSTITUTIONAL TAKINGS DETERMINATION:**

In accordance with §22-1A-1 and 3(c), the Secretary has determined that this rule will not result in taking of private property within the meaning of the Constitutions of West Virginia and the United States of America.

**F. CONSULTATION WITH THE ENVIRONMENTAL PROTECTION ADVISORY COUNCIL:**

At its meeting on June 3, 2009, the Environmental Protection Advisory Council discussed this rule. (See attached minutes for Council's discussion.)

# West Virginia Department of Environmental Protection

## ADVISORY COUNCIL MEETING MINUTES

Wednesday, June 3, 2009  
601 57th Street, SE, Charleston, West Virginia  
West Virginia Room – 3rd Floor

### IN ATTENDANCE:

#### *Members of the Council:*

Lisa Dooley  
Jackie Hallinan  
Larry Harris  
Karen Price  
Bill Raney  
Rick Roberts

#### *DEP:*

Raymond Franks II	General Counsel
Kristin Boggs	Associate General Counsel
Kathy Cosco	Chief Communications Officer
Tom Clarke	Director, Division of Mining & Reclamation
James Martin	Chief, Office of Oil & Gas
Robert Bates	Division of Water & Waste Management
Bill Brannon	Division of Water & Waste Management
Carroll Cather	Division of Water & Waste Management
Ellen Herndon	Division of Water & Waste Management
Jeff Knepper	Division of Water & Waste Management
Teresa Koon	Division of Water & Waste Management
Sudhir Patel	Division of Water & Waste Management
Yogesh Patel	Division of Water & Waste Management
Bill Timmermeyer	Division of Water & Waste Management
Ken Politan	Division of Mining & Reclamation
Jim Mason	Division of Air Quality

#### *Others:*

Don Garvin	Interested Citizen
Steve Hannah	Interested Citizen
Dave Yaussy	Interested Citizen

## **OLD BUSINESS:**

Raymond Franks called the meeting to order at 1:45 p.m. Mr. Franks noted that two members of the Council had pointed out a minor discrepancy in the April minutes as circulated, and that for expediency's sake the error would be corrected following the meeting and the April and June minutes each moved for approval at the September meeting.

Mr. Franks provided to the Council information it had requested at the April meeting regarding ongoing projects in the Office of Abandoned Mine Lands and recruiting potential for environmental inspectors. The Council agreed to review the information and discuss it in more detail at the September meeting.

## **NEW BUSINESS:**

Mr. Franks turned the meeting over to Kristin Boggs for presentation and discussion of the 2010 proposed Legislative Rules:

### **DIVISION OF WATER & WASTE MANAGEMENT – WATER RULES**

**47CSR10 – NPDES Rule:** Promulgated last in 2008. The proposed revisions reflect changes made to the Federal rule regarding Concentrated Animal Feeding Operations (CAFOs), which became effective in November 2008. EPA gave DEP two years to revise the State rules and start issuing permits. The revisions include a clarified definition of CAFO, a detailed explanation of the permitting process and the process for permit exemption, and an explanation of the required nutrient management plan. Technical revisions and corrections are made throughout.

**47CSR26 – Water Pollution Control Permit Fee Schedules:** Promulgated last in 2000. The proposed revisions reflect the CAFO changes made in the NPDES Rule. The fees for CAFOs will be as follows: \$300 for the initial application; \$300 for permit renewal; \$50 for permit modification; and \$50 for the annual permit fee. Technical revisions and corrections are made throughout.

**47CSR12 – Requirements re Groundwater Standards:** Promulgated last in 2002. The proposed revisions reflect updates and additions made to EPA's 2006 edition of the Drinking Water Standards & Health Advisories. Technical revisions and corrections are made throughout.

**47CSR59 – Monitoring Well Rule.** Promulgated last in 1994. The proposed revisions add new language to incorporate "high" and "low" risk boreholes, experience requirements for those persons applying for monitoring well driller certificates, recertification and training requirements for monitoring well drillers, and definitions. Technical revisions and corrections are made throughout.

**47CSR60 – Monitoring Well Design Standards.** Promulgated last in 1996. The proposed revisions bring this rule in conformance with the 47CSR59 *Monitoring Well Rule* definition changes, and "high" and "low" borehole requirements. Technical revisions and corrections are made throughout.

## **DIVISION OF WATER & WASTE MANAGEMENT – WASTE MANAGEMENT RULES**

**33CSR1 – *Solid Waste Management Rule*:** Promulgated last in 2006. The proposed revisions include removing the requirement that free day tonnage count toward monthly/daily totals and clarifying the definition of pick-up truck. Technical revisions and corrections are made throughout.

**33CSR20 – *Hazardous Waste Management System*:** Promulgated last in 2009. The proposed rule reflects the annual incorporation-by-reference (IBR) revisions made by DEP to its hazardous waste rule. The proposed revisions include changes to the academic laboratory waste provisions to allow alternative requirements for hazardous waste determination and accumulation of unwanted materials at labs owned by and affiliated with colleges and universities. Other proposed revisions are directed at the hazardous waste code 019 provisions, which expand the exclusion for sludges generated from the chemical conversion coating of aluminum using a zinc phosphating process. The F019 waste code exclusion only applies to the automobile or light truck manufacturing industry. This IBR specifically excludes two federal amendments that are currently undergoing reconsideration by the EPA, *i.e.*, revisions to the definition of solid waste and expansion of RCRA comparable fuel exclusion. Technical revisions and corrections are made throughout.

Mr. Franks asked whether the Council had any questions about the seven DWWM rules. Mr. Raney inquired about the impetus for the change in the monitoring well rules, since they have not been revised in several years. Ms. Boggs responded that the changes in the rules reflect changes in technology and practice over time. There were no further questions from the Council.

## **OFFICE OF OIL AND GAS RULE**

**35CSR4 – *Oil & Gas Wells and Other Wells*:** Promulgated last in 2001. The proposed revisions include updating the permit fees to reflect the 2005 statutory change, clarifying general requirements for pit and impoundment construction, and adding a new section setting forth requirements for constructing pits and impoundments that exceed a certain size. Technical revisions and corrections are made throughout.

Mr. Franks asked whether the Council had any questions about the OOG rule. Dr. Harris expressed concern that the current statutory bond amount may not suffice given the larger pits associated with Marcellus wells. Mr. Martin explained that the bond is a performance bond, not designed to cover any specific area of the well operation. Dr. Harris then asked about protections for surface owners whose water supply is impaired from drilling operations, in response to which Mr. Martin pointed out the statutory and regulatory remedies. There were no further questions from the Council.

## **DIVISION OF MINING & RECLAMATION RULE**

**47CSR30 – *Mining NPDES Rule*:** Promulgated last in 2009. The proposed revisions include deleting the certification language for NPDES maps and decreasing from two years to one the raw mine drainage water quality data required for abandonment of a deep mine. Technical revisions and corrections are made throughout.

Mr. Franks asked whether the Council had any questions about the DMR rule. Ms. Dooley inquired whether the changes were substantive or merely technical. Ms. Boggs explained that although the changes appeared merely technical, they had real-world effects upon licensed professional engineers and surveyors, whom the rule required to swear to the contents of a NPDES map under penalty of perjury. Engineers and surveyors could not obtain insurance for such an oath, because they did not create the maps and were therefore subjecting themselves to criminal penalties for work that was not entirely within their control. There were no further questions from the Council.

#### **DIVISION OF AIR QUALITY RULES**

**45CSR8 – *Ambient Air Quality Standards*:** Promulgated last in 2009. The proposed revisions include deletion of redundant measurement method language for lead and addition of new national primary and secondary ambient air quality standards for lead.

**45CSR14 – *Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution for the Prevention of Significant Deterioration*:** Promulgated last in 2009. The proposed revisions incorporate the New Source Review Program for Particulate Matter Less Than 2.5 Micrometers. Other miscellaneous revisions and corrections are also included, so that the rule comports with federal counterpart language.

**45CSR16 – *Standards of Performance for New Stationary Sources*:** Promulgated last in 2009. The proposed rule reflects the annual IBR revisions to New Source Performance Standards, including Stationary Spark-Ignition Internal Combustion Engines, Fossil Fuel-Fired Steam Generators and Industrial-Commercial-Institutional Steam Generating Units, Stationary Combustion Turbines, Nonroad Spark Ignition Engines, Alternative Work Practice To Detect Leaks From Equipment, Petroleum Refineries and Performance Specification 16 for Predictive Emissions Monitoring Systems, Amendments to Testing and Monitoring Provisions, and Nonmetallic Mineral Processing Plants. The IBR exclusion for the vacated Clean Air Mercury Rule has been removed.

**45CSR19 – *Permits for Construction and Major Modification of Major Stationary Sources of Air Pollution Which Cause or Contribute to Nonattainment*:** Promulgated last in 2005. The proposed revisions incorporate the New Source Review Program for Particulate Matter Less Than 2.5 Micrometers, Reasonable Possibility in Recordkeeping, Ethanol Production Facilities, and 8-Hour Ozone National Ambient Air Quality Standard provisions. Other proposed revisions to the rule remove references to pollution control projects and clean units per the 2005 decision by the United State Court of Appeals for the District of Columbia Circuit that vacated the parallel federal provisions. Other miscellaneous revisions and/or corrections are also included, so that the rule comports with federal counterpart language.

**45CSR25 – *Control of Air Pollution from Hazardous Waste Treatment, Storage and Disposal Facilities*:** Promulgated last in 2009. The proposed rule reflects the annual IBR revisions to the Hazardous Waste rule.

**45CSR33 – *Acid Rain Provisions and Permits*:** Promulgated last in 2006. The proposed rule

reflects the annual IBR revisions, including Air Pollution Control, Transport of Emissions of Nitrogen Oxide and Sulfur Dioxide; Amendments to Monitoring Provisions; Revisions to Acid Rain Program Rules, and Revisions to the Continuous Monitoring Rule for the Acid Rain Program.

**45CSR34 – *Emission Standards for Hazardous Air Pollutants*:** Promulgated last in 2009. The proposed rule reflects the annual IBR revisions to the Hazardous Air Pollutant rule. Excluded from incorporation by reference are the national emission standards for hazardous air pollutants affecting non-major (area) sources of hazardous air pollutants for Iron and Steel Foundries, Plating and Polishing Operations, Ferroalloys Production Facilities, and Metal Fabrication and Finishing Source Categories.

Mr. Franks asked whether the Council had any questions about the seven DAQ Rules, and there were none.

On general comment, Dr. Harris inquired about water quality standards for mercury, citing a newspaper report that DEP supported less stringent standards based on data that State residents consume relatively fewer fish per capita. Mr. Clarke explained the factual context of the reported quote and the method by which EPA developed the point three (0.3) standard. With respect to the rules presentation, Dr. Harris suggested a return to the practice of providing Council with written summaries of the proposed rules, along with justifications for the proposed changes. The suggestion was well-received.

Mr. Franks then opened the floor to questions from the general public. Don Garvin, Legislative Coordinator for the West Virginia Environmental Council, inquired about acid rain standards, to which Mr. Mason responded that the State's standards with respect to acid rain derive from Title VI of the federal Clean Air Act.

Dr. Harris then asked whether the downturn in the energy market has caused any decrease in the number of permit applications to drill gas wells in the Marcellus Shale. Mr. Martin responded that the economy has had some effect on the number of permit applications overall, and that he could later provide Dr. Harris with more precise statistics.

Mr. Garvin complimented the Agency and the Office of Oil & Gas on finally requiring pits to be lined. Mr. Raney then thanked DEP staff for their hard work on the rules.

With no further comments forthcoming from the Council or public, Mr. Franks reminded everyone that the next meeting is scheduled for Wednesday, September 23, 2009. On motion from Mr. Raney, seconded by Mr. Roberts, Mr. Franks declared the meeting adjourned at 2:45 p.m.

APPENDIX B

**FISCAL NOTE FOR PROPOSED RULES**

Rule Title: National Pollutant Discharge Elimination System (NPDES) Program, 47CSR10  
 Type of Rule:  Legislative  Interpretive  Procedural  
 Agency: West Virginia Department of Environmental Protection  
 Address: 601 57th Street, SE  
Charleston, WV 25304  
 Phone Number: (304) 926-0495 Email: Scott.G.Mandirola@wv.gov

**Fiscal Note Summary**

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

No fiscal impacts on state government are anticipated.

**Fiscal Note Detail**

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

<b>FISCAL YEAR</b>			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
<b>1. Estimated Total Cost</b>	0.00	0.00	0.00
Personal Services	0.00	0.00	0.00
Current Expenses	0.00	0.00	0.00
Repairs & Alterations	0.00	0.00	0.00
Assets	0.00	0.00	0.00
Other	0.00	0.00	0.00
<b>2. Estimated Total Revenues</b>	0.00	0.00	0.00

Rule Title: \_\_\_\_\_

Rule Title: National Pollutant Discharge Elimination System (NPDES) Program, 47CSR10

3. **Explanation of above estimates (including long-range effect):**  
Please include any increase or decrease in fees in your estimated total revenues.

None anticipated

### MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

The proposed revisions to the Rules Governing the State National Pollutant Discharge Elimination System (NPDES) Program Title 47, Series 10 reflect the updates to the Code of Federal Regulations (CFR), the National Pollutant Discharge Eliminations System (NPDES) permitting requirements for CAFOs (Section 122) and the Effluent Limitations Guidelines and Standards (ELGs) for CAFOs (Section 412). This rule revises and clarifies the regulatory requirements for concentrated animal feeding operations (CAFOs) under the State's Water Pollution Control Act. This rule will ensure that CAFOs take appropriate actions to manage manure effectively in order to protect the State's water quality. This rule revision is an integral part of the overall state strategy to support a vibrant agriculture economy while at the same time taking important steps to ensure that all animal feeding operations manage their manure properly and protect water quality. The WVDEP is uncertain about the universe of animal feeding operations who might need to receive regulatory coverage under this rule but believes the universe to be small.

Date: June 1, 2009

Signature of Agency Head or Authorized Representative



**TITLE 47  
LEGISLATIVE RULE  
DEPARTMENT OF ENVIRONMENTAL PROTECTION  
WATER RESOURCES**

**SERIES 10  
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PROGRAM**

**§47-10-1. General.**

1.1. Scope. -- This legislative rule establishes requirements governing the State National Pollutant Discharge Elimination System (NPDES) Program.

1.2. Authority. -- W. Va. Code §22-11-4(a)(16).

1.3. Filing Date. -- ~~April 17, 2008.~~

1.4. Effective Date. -- ~~May 1, 2008.~~

1.5. Former Rules -- This legislative rule amends 47CSR10 "National Pollutant Discharge Elimination System (NPDES) Program" that was filed on June 3, 2005 and became effective on June 3, 2005.

**§47-10-2. Definitions.**

The definitions set forth in W. Va. Code §22-11-3 shall apply to this series, along with the following definitions, unless the context clearly indicates otherwise.

2.1. "Administrator" means the Administrator of the United States Environmental Protection Agency or ~~an~~ his or her authorized representative.

2.2. "Applicable standards and limitations" means all State, interstate, and Federal standards and limitations to which a discharge or a related activity is subject under the Clean Water Act (CWA) and the State Act, including effluent limitations, water quality standards, standards of performance, toxic effluent standards or prohibitions, best management practices, and pretreatment standards under §§301, 302, 303, 304, 306, 307, 308, 403 and 405 of the CWA.

2.3. "Application" means the forms prescribed by the Chief and approved by EPA for applying for a permit or permit modification, including any additions, revisions or modifications to the forms.

2.4. "Average monthly discharge limitation" means the highest allowable average of daily discharges over a calendar month, calculated as the sum of all daily discharges measured during a calendar month divided by the number of daily discharges measured during that month.

2.5. "Best management practices" ("BMPs") means schedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce pollution of waters of the State. BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

2.6. "C.F.R." means the Code of Federal Regulations referenced throughout these rules that were effective as of July 1, 2006, unless otherwise noted.

2.7. "Chief" means the Director of the Division of Water and Waste Management (formerly the Office of Water Resources) as designated by the Secretary of the Department of Environmental Protection.

~~2.7.~~ 2.8. "Clean Water Act" ("CWA") (formerly referred to as the Federal Water Pollution Control Act or the Federal Water Pollution Control Act Amendments of 1972) Public Law 92-500, as amended by Public Law 95-217, Public Law 97-117 and Public Law 95-576 and codified at 33 U.S.C. §1251 et seq.

~~2.8.~~ 2.9. "Construction activity" means clearing, grading, and excavation that result in a land disturbance of equal to or greater than one (1) acre in size. Construction activity also includes disturbance of less than one (1) acre total land area that is part of a large common plan of development or sale if the common plan will ultimately disturb equal to or greater than one (1) acre. Construction activity does not include routine maintenance that is performed to maintain the original line and grade, hydraulic capacity, or original purpose of the facility.

~~2.9.~~ 2.10. "Continuous discharge" means any discharge that occurs without interruption throughout the operating hours of the facility, except for infrequent shutdowns for maintenance, process changes, or other similar activities.

~~2.10.~~ 2.11. "Daily discharge" means the discharge of a pollutant measured during a calendar day or within any specified period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the daily discharge is calculated as the total mass of the pollutant discharged over the day. For pollutants with limitations expressed in other units of measurement, the daily discharge is calculated as the average measurement of the pollutant over the day.

~~2.11.~~ 2.12. "Direct discharge" means the discharge of a pollutant.

~~2.12.~~ 2.13. "Discharge" when used without qualification means the discharge of a pollutant for purposes of this series.

~~2.13.~~ 2.14. "Discharge of a pollutant" means:

~~2.13.a.~~ 2.14.a. Any addition of any pollutant or combination of pollutants to waters of the State from any point source; and

~~2.13.b.~~ 2.14.b. This definition includes additions of pollutants into waters of the State from: surface runoff that is collected or channeled by man; storm water discharges from

construction activity; storm water discharges from a municipal separate storm sewer system; discharges through pipes, sewers or other conveyances owned by the State, a municipality, or other person that do not lead to a treatment work; and discharges through pipes, sewers, or other conveyances leading into privately owned treatment works. This term does not include an addition of pollutants by any indirect discharger.

~~2.14.~~ 2.15. "Discharge Monitoring Report" ("DMR") means the form(s) prescribed by the Chief and approved by EPA for the reporting of self-monitoring results by permittees. (See WV/EPA Memorandum of Agreement.)

~~2.15.~~ 2.16. "Draft permit" means a document prepared under section 10 of this rule, indicating the Chief's tentative decision to issue, modify, revoke and reissue, suspend or revoke a permit.

~~2.16.~~ 2.17. "Effluent limitation" means any restriction established under State or Federal law on quantities, discharge rates, concentrations or other specified units of measure of pollutants that are discharged from point sources into waters of the State.

~~2.17.~~ 2.18. "Effluent limitations guidelines" means a regulation to adopt or revise effluent limitations published by the Administrator under §304(b) of the CWA ~~to adopt or revise effluent limitations.~~

~~2.18.~~ 2.19. "Environmental Protection Agency" ("EPA") means the United States Environmental Protection Agency.

~~2.19.~~ 2.20. "Facility or activity" means any point source or any other facility or activity (including land or appurtenances thereto) that is subject to regulation under this series.

~~2.20.~~ 2.21. "General permit" means a permit authorizing a category of discharges within a geographical area issued under subsection 13.6 of this rule.

~~2.21.~~ 2.22. "Hazardous substance" means any substance designated under 40 C.F.R. §116 pursuant to §311 of the CWA.

~~2.22.~~ 2.23. "Indirect discharger" means a nondomestic discharger introducing pollutants to a publicly owned treatment works.

~~2.23.~~ 2.24. "Interference" means an indirect discharge which, along or in conjunction with a discharge or discharges from other sources, both:

~~2.23.a.~~ 2.24.a. Inhibits or disrupts the POTW, its treatment processes or operations, or its sludge processes, use or disposal; and

~~2.23.b.~~ 2.24.b. Therefore is a cause of a violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of a violation) or of the prevention of sewage sludge use or disposal in compliance with applicable statutory provisions, regulations or permits issued thereunder.

~~2.24.~~ 2.25. "Interstate agency" means an agency of two (2) or more states, including West Virginia, established ~~on or under~~ by an agreement or compact approved by Congress, or any other agency of two (2) or more states, including West Virginia, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator under the CWA and its regulations.

~~2.25.~~ 2.26. "Major facility" means any facility or activity classified as such by the Regional Administrator in conjunction with the Chief.

~~2.26.~~ 2.27. "Maximum daily discharge Limitation" means the highest allowable daily discharge.

~~2.27.~~ 2.28. "Municipality" means a city, town, borough, county, parish, district, association, or other public body created by or under State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or a designated and approved management agency under § 208 of the CWA.

~~2.28.~~ 2.29. "Municipal separate storm sewer system" ("MS4") means :

~~2.28.a.~~ 2.29.a. A conveyance or system of conveyances, including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains; and

~~2.28.b.~~ 2.29.b. Owned or operated by a State, city, town, county, district, association or other public body created pursuant to State law having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes; and

~~2.28.c.~~ 2.29.c. Designated or used for collecting or conveying storm water; and

~~2.28.d.~~ 2.29.d. Which is not a combined sewer; and

~~2.28.e.~~ 2.29.e. Which is not a part of a Publicly Owned Treatment Works ("POTW").

~~2.28.f.~~ 2.29.f. The MS4 is determined by the Chief to require NPDES permit coverage under the criteria established pursuant to 40 C.F.R. §122.32.

~~2.29.~~ 2.30. "National Pollutant Discharge Elimination System" ("NPDES") means the national program for issuing, denying, modifying, revoking and reissuing, suspending, revoking, monitoring, and enforcing permits and imposing and enforcing pretreatment requirements under §§307, 318, 402, and 405 of the CWA, including any approved State program.

~~2.30.~~ 2.31. "National Pretreatment Standard" means any regulation containing pollutant discharge limitations promulgated by EPA in accordance with §307(b) and (c) of the Clean Water Act that applies to indirect discharges. This term includes prohibitive discharge limits and local limits established pursuant to 40 C.F.R. §403.5.

~~2.31.~~ 2.32. "New discharger" means any building, structure, facility, or installation:

~~2.31.a.~~

~~2.31.a.1. From which there is or may be a discharge of pollutants that did not commence the discharge prior to August 13, 1979;~~

~~2.31.a.2. Which has never received a finally effective NPDES permit for discharges at that site; and~~

~~2.31.a.3. Which is not a new source.~~

2.32.a. From which there is or may be a discharge of pollutants that did not commence prior to August 13, 1979;

2.32.b. That has never received a finally effective NPDES Permit for discharges at that site; and

2.32.c. That is not a new source.

~~2.31.b.~~ 2.32.d. This definition includes an indirect discharger that commences discharging into waters of the State after August 13, 1979. It also includes any existing mobile point source that ~~beings~~ begins discharging at a location for which it does not have an existing permit.

~~2.32.~~ 2.33. "New source" means any building, structure, facility or installation from which there is or may be a discharge of pollutants, the construction of which commenced:

~~2.32.a.~~ 2.33.a. After promulgation of standards of performance under §306 of the CWA that are applicable to the source; or

~~2.32.b.~~ 2.33.b. After proposal of standards of performance in accordance with §306 of the CWA that are applicable to such source, but only if the standards are promulgated in accordance with §306 of the CWA within one hundred twenty (120) days of their proposal.

~~2.33.~~ 2.34. "Owner or operator" means the owner or operator of any facility or activity subject to regulation under this series. "Owner" owns or holds title to the facility. "Operator" is any person, firm or company who has

responsibility for the overall operation of a facility or activity subject to regulation, but does not include any employee, agent or independent contractor of the person with responsibility for the overall operation of a facility subject to regulation.

~~2.34.~~ 2.35. "Pass-through" means an indirect discharge that exits the POTW into waters of the State in quantities or concentrations that, alone or in conjunction with a discharge or discharges from other sources, is a cause of a violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of a violation).

~~2.35.~~ 2.36. "Permit" means an authorization issued by the Chief to implement the requirements of this series.

~~2.36.~~ 2.37. "POTW" means a "Publicly Owned Treatment Works."

~~2.37.~~ 2.38. "Point source" means any discernible, confined, and discrete conveyance, including, but not limited to, any pipe, ditch, channel, tunnel, conduit, concentrated animal feeding operation, well, discrete fissure, container, rolling stock or vessel or other floating craft from which pollutants are or may be discharged.

~~2.38.~~ 2.39. "Primary Industry Category" means any industry category listed in Appendix A of this rule pursuant to §307(a) of the CWA.

~~2.39.~~ 2.40. "Privately Owned Treatment Works" means any device or system that is:

~~2.39.a.~~ 2.40.a. Used to treat wastes other than the owner's waste; and

~~2.39.b.~~ 2.40.b. Not a POTW.

~~2.40.~~ 2.41. "Process wastewater" means any water that, during manufacturing or processing, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, by-product, or waste product.

~~2.41.~~ 2.42. "Proposed permit" means a State NPDES permit prepared after the close of the comment period (and, when applicable, any public hearing) that is sent to EPA for review before final issuance by the Chief.

~~2.42.~~ 2.43. "Publicly Owned Treatment Works" ("POTW") means any treatment works owned by the State or any political subdivision thereof, any municipality or any other public entity for the treatment of pollutants. This definition includes sewers, pipes or other conveyances only if they convey wastewater to a POTW providing treatment.

~~2.43.~~ 2.44. "Real Time Water Quality Control" means the establishment of an effluent limitation that is based upon a stream-flow-to-discharge-flow ratio, determined by the known characteristics of the stream and the discharge.

~~2.44.~~ 2.45. "Recommencing discharger" means a source that recommences discharge after terminating operations.

~~2.45.~~ 2.46. "Regional Administrator" means the Regional Administrator of Regional Office (III) of the Environmental Protection Agency or ~~an~~ his or her authorized representative.

~~2.46.~~ 2.47. "Schedule of compliance" means a schedule of remedial measures in a permit, including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and the State Act and regulations.

~~2.47.~~ 2.48. "Secondary Industry Category" means any industry category that is not a primary industry category.

~~2.48.~~ "Secretary" ~~as used in this series is the Secretary of the Army.~~

2.49. "Sewage from vessels" means human body wastes and the wastes from toilets and other receptacles intended to receive or retain body wastes that are discharged from vessels and regulated under §312 of the CWA.

2.50. "Sewage sludge" means the solids, residues, and precipitate separated from or created in sewage by the unit processes of a treatment works. "Sewage" as used in this definition means any wastes, including wastes from humans, households, commercial establishments, industries, and storm water runoff that are discharged to or otherwise enter a treatment works.

2.51. "Site" means the land or water area where any facility or activity is physically located or conducted, including adjacent land used in connection with the facility or activity.

2.52. "State" means the State of West Virginia.

2.53. "State Act" or "State Law" means the West Virginia Water Pollution Control Act, W. Va. Code §§22-11-1, et seq.

2.54. "Storm water" means storm water runoff, snow melt runoff, surface runoff, and drainage.

2.55. "Total dissolved solids" ("TDS") means the total dissolved filterable solids as determined by the use of the method specified in 40 C.F.R. §136.

2.56. "Toxic pollutant" means any pollutant listed as toxic under §307(a)(1) of the CWA.

2.57. "Variance" means any mechanism or provision under §§301 or 316 of the CWA, under 40 C.F.R. §125, or in the applicable effluent limitations guidelines that allow modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of the CWA. This includes provisions that allow the establishment of alternative limitations based on fundamentally different factors or on §§301(c), 301(g), 301(h), 301(I) and 316(a) of the CWA where appropriate.

2.58. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of

vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

### §47-10-3. Permits.

3.1. Permit requirement - no person shall discharge pollutants from a point source into State waters except as authorized pursuant to by a State NPDES permit. A NPDES permit issued pursuant to this series shall be deemed to be a permit issued in accordance with ~~Section 5 of the State Act~~ W. Va. Code §22-11-4.

3.2. Specific exclusions from NPDES permits.

3.2.a. It is recognized that the Federal NPDES program excludes certain discharges from ~~needing the requirement of~~ a NPDES permit (although other Federal permits may be necessary) and that the State Act, in certain instances, is broader in scope than the Federal NPDES program. The discharge of dredged or fill material into navigable waters of the United States, for example, does not need a Federal NPDES permit; rather a 404 permit from the United States Army Corps of Engineers is required. The State Act regulates discharges into all waters of the State including groundwater; the Federal NPDES program, on the other hand, regulates discharges into a less inclusive category of waters. In addition, the State Act requires permits for construction of a disposal system or part thereof and the discharge of pollutants into the State's waters; the Federal NPDES program, however, does not require permits for the construction of the facility, but rather just for the discharge of pollutants from a point source into waters of the United States. Finally, the Natural Streams Preservation Act, ~~W. VA. Code §22-11-1 et seq.~~ W. Va. Code §22-13-1, et seq., requires a separate permit to modify any of the ~~protected~~ streams designated protected by the Legislature.

3.2.b. The following discharges do not require a NPDES permit; however, the specification of exclusions under ~~subdivision subsection~~ subsection 3.2.a of this ~~section~~ rule shall not relieve any person of any requirement imposed

by the State Act or regulations, including State Act permitting requirements.

3.2.b.1. Any discharge of sewage from vessels, effluent from properly functioning marine engines, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel. This exclusion does not apply to rubbish, trash, garbage, or other such materials discharged overboard or to other discharges when the vessel is operating in a capacity other than a means of transportation, such as when used as an energy or mining facility, a storage facility or when secured to a storage facility, or when secured to the bed of the water or waters of the State for the purpose of mineral or oil exploration or development.

3.2.b.2. Discharges of dredged or fill material into waters of the State that are regulated under §404 of the CWA.

3.2.b.3. The introduction of pollutants into publicly or privately owned treatment works except as the Chief may otherwise require under ~~subdivision~~ subsection 6.3.k. below. Plans or agreements to switch to this method of disposal in the future do not relieve dischargers of the obligation to have and comply with permits until all discharges of pollutants into waters of the State are eliminated.

3.2.b.4. Any introduction of pollutants from non-point source agricultural and silvicultural activities, including runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in ~~subsection~~ subsection 13.1 below, discharges from concentrated aquatic animal production facilities as defined in ~~subsection~~ subsection 13.2 below, and discharges from silvicultural point sources as defined in ~~subsection~~ subsection 13.5 below.

3.2.b.5. Water, gas or other material that is injected into a well either to facilitate production of oil or gas or for disposal purposes and is approved by the State Office of Oil and Gas pursuant to applicable State law.

3.2.b.6. Return flows from irrigated agriculture.

3.2.b.7. Any discharge in compliance with the instructions of an On-Scene Coordinator pursuant to 40 C.F.R. §1510 (The National Oil and Hazardous Substance Pollution Plan) or 33 C.F.R. §153.10(e) (Pollution by Oil and Hazardous Substances).

3.2.c. When issuing permits required under the State Act but not required by NPDES, the Chief may follow the procedures set forth in this series.

### 3.3. NPDES permits issued by EPA.

3.3.a. The Chief shall adopt as permits issued under the State Act all NPDES permits that have been issued by the Regional Administrator and ~~taken~~ made effective prior to the effective date of this series that are transferred by the Regional Administrator and accepted by the Chief for administration and enforcement.

3.3.b. Acceptance of a NPDES permit from the Regional Administrator shall not supersede any permit previously issued under the State Act. All provisions of both permits shall be in force; except, in the event of a conflict, the more stringent provisions shall apply. Such permits shall be deemed consolidated and considered as a single permit for the purposes of reporting, administration and enforcement.

3.3.c. Those unexpired permits previously issued under the State Act shall be revoked by the Chief whenever a new NPDES permit is issued for the same facility under this series. The issuance of the new permit shall constitute cause for revocation under the State Act. Any unexpired NPDES permit issued by the ~~United States~~ EPA shall not be enforceable by the Chief upon the issuance of a NPDES permit under this series.

### 3.4. Effect of a permit.

3.4.a. Except for any toxic effluent standards and prohibitions imposed ~~under~~ by §307 of the CWA, compliance with a permit during its term constitutes compliance for

purposes of enforcement with under §§01, 302, 306, 307, 318, 403 and 405 of the CWA. In addition, one who is in compliance with the terms and conditions of a permit shall not be subject to criminal prosecution under ~~Section 19 of the State Act~~ W. Va. Code §22-11-19 for pollution recognized and authorized by such permit. However, a permit may be revoked, suspended, revoked and reissued or modified during its term for cause as set forth in section 9 of this rule.

3.4.b. The issuance of a permit does not convey any property rights of any sort or any exclusive privilege.

### 3.5. Duration and transferability of permits.

3.5.a. Permits shall be effective for a fixed term not to exceed five (5) years.

3.5.b. A permit may be extended by the Chief for a period not to exceed eighteen (18) months beyond its expiration date, if the applicant has made a timely and complete application for permit reissuance. Timeliness of an application for permit reissuance is governed by subsection 4.3 of this rule. A complete application, for purposes of this extension, shall mean that the required number of copies of the application were submitted, including the permit application fee required by the ~~Division of Environmental Protection's~~ legislative rule 47 C.S.R. 26, and the application forms were signed as required ~~under~~ by subsection 4.6 of this rule. Completion, as set forth in this section, shall not preclude the Chief from requesting additional information from the applicant during the subsequent substantive review and does not result in the imposition of the regulatory time frame established in ~~subdivision~~ subsection 4.2.f. below. When a permit is issued, the extended permit, if still effective, is automatically void.

3.5.c. Transfer of permits - Permits may be transferred from a permittee to another person by either modifying an existing permit or by an automatic transfer under subsection 3.5.d of this ~~section~~ rule. In transferring a permit from a permittee to another person, the Chief shall

determine that the proposed permittee has all necessary permit responsibility.

3.5.d. Any permit may be automatically transferred to a new permittee if:

3.5.d.1. The current permittee notifies the Chief on the forms prescribed by the Chief at least thirty (30) days in advance of the proposed transfer date in ~~paragraph~~ subdivision 3.5.d.2 of this section rule;

3.5.d.2. The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of the permit and explaining the extent of permit responsibility, coverage, and liability between them; and

3.5.d.3. The Chief does not notify the existing permittee and the proposed new permittee of his or her intent to require the transfer through permit modification or to require that a new application be filed rather than agreeing to the transfer of the permit or his denial of the transfer request. If this notification is not received by the permittee and proposed new permittee within thirty (30) days after the Chief's receipt of the permittee's notice under ~~paragraphs~~ subdivisions 3.5.d.1 and 3.5.d.2 above, then the transfer is effective on the date specified in the agreement required by ~~paragraph~~ subdivision 3.5.d.2 of this section rule.

3.6. Prohibitions - No permit may be issued:

3.6.a. When the conditions of the permit do not provide for compliance with the applicable requirements of the CWA and State Act.

3.6.b. By the Chief where the Regional Administrator has objected to issuance of the permit.

3.6.c. When, in the judgment of the Secretary of the U.S. Army Corps of Engineers, anchorage and navigation in or on any waters of the State would be substantially impaired by the discharge.

3.6.d. For the discharge of any radiological, chemical, or biological warfare agent or high-level radioactive waste.

3.6.e. For any discharge inconsistent with a plan or plan amendment approved under §208(b) of the CWA.

3.6.f. To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment that does not meet applicable water quality standards or is not expected to meet those standards even after the application of the effluent limitations required by §§301(b)(1)(A) and 301(B)(1)(B) of the CWA, and for which the State or interstate agency has performed a pollutant load allocation for the pollutants to be discharged, must demonstrate before the close of the public comment period that:

3.6.f.1. There are sufficient remaining pollutant load allocations to allow for the discharge; and

3.6.f.2. The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards.

#### §47-10-4. Application for Permits.

4.1. Duty to apply.

4.1.a. Any person who discharges or proposes to discharge pollutants and who does not have an effective permit, except persons covered by general permits and persons excluded under subsection 3.2 above, shall submit a complete application in the manner and on a form prescribed by the Chief, in accordance with the following paragraphs, and accompanied by the filing fee as prescribed in 47 C.S.R. 26.

4.1.b. When a facility or activity is owned by one person but is operated by another, the application should be submitted by the operator. The Chief may require documentation

of the permit responsibility and liability of the owner and operator and may propose and issue the permit to either ~~one (1) or both~~ the owner ~~and or the operator or both~~, but only after notice to both the owner and operator; or, the Chief may deny the permit until the responsible party or parties apply for the permit.

#### 4.2. Completeness.

4.2.a. For the purposes of this section, the term "Chief" includes ~~an~~ his or her authorized representative except in ~~subdivision~~ subsection 4.2.f. below.

4.2.b. The Chief shall not begin the processing of a permit before receiving a complete application.

4.2.c. The Chief shall review every application for completeness in not more than ninety (90) days. Upon completing the review, the Chief shall notify the applicant in writing whether the application is complete. If the application is incomplete, the Chief shall list the information necessary to make the application complete. When the application is for an existing source, the Chief shall specify in the request for supplemental information a date for submitting the necessary information. The Chief shall notify the applicant that the application is complete upon receiving this information.

4.2.d. If an applicant fails or refuses to submit the requested supplemental information, the permit application may be denied and appropriate enforcement action may be taken under the applicable provisions of the State Act.

4.2.e. The application shall be considered complete on the date on which the Chief notifies the applicant to that effect as provided in ~~subdivision~~ subsection 4.2.c of this section rule.

4.2.f. The Chief shall have not more than ninety (90) days to act upon the completed application unless EPA has filed a written objection; ~~except however~~, this limitation may be extended by the period of time granted by the Chief under ~~paragraph~~ subdivision 12.1.b.1 and subdivision subsection 12.4.a of this rule.

4.2.g. For a period of one (1) year after the effective date of this rule, the time period for completeness under ~~subdivision~~ subsection 4.2.c above and time period for acting upon a completed application under ~~subdivision~~ subsection 4.2.f above may be extended by the Chief when necessary, but in no case shall the combined time periods under these ~~paragraphs~~ provisions exceed two hundred forty (240) days.

4.3. Time to apply - Any person proposing a new discharge shall submit an application at least one hundred eighty (180) days prior to commencing construction of the facility, unless permission for a shorter time period has been granted by the Chief. Any person with an existing permit shall submit a new application at least one hundred eighty (180) days before the expiration date of the existing permit, unless permission for a shorter time period has been granted by the Chief. Any person proposing to abandon a facility under W. Va. Code §22-11-8(b)(6) shall apply for and obtain a permit as required by that section at least one hundred eighty (180) days prior to abandonment.

#### 4.4. Information required from applicant(s).

4.4.a. All applicants shall provide the Chief a complete application in the manner and on a form prescribed by the Chief. The form may require information in addition to that specified in this section.

4.4.a.1. The activities conducted by the applicant that require it to obtain permits.

4.4.a.2. The name, mailing address, and location of the facility for which the application is submitted.

4.4.a.3. Up to four (4) Standard Industrial Classification (SIC) codes that best reflect the principal products or services provided by the facility.

4.4.a.4. The operator's name, address, telephone number, ownership status (including the name and address of the owner if different), and status as Federal, State, private, public or other entity.

4.4.a.5. Other relevant permits as defined in 40 C.F.R. §122.21(f)(6).

4.4.a.6. A topographic map (or other map drawing if a topographic map is unavailable) drawn to a reasonable scale and extending at least one (1) mile beyond the site, depicting the facility and each of its intake and discharge structures; each of its hazardous waste treatment, storage, or disposal facilities; each well where fluids from the facility are injected underground; and those wells, springs, other surface water bodies, and drinking water wells listed in public records or otherwise known to the applicant in the map area.

4.4.a.7. A brief description of the nature of the business.

4.4.b. Existing sewage, manufacturing, commercial, mining and silvicultural dischargers shall also provide the following information to the Chief, using application forms provided by the Chief:

4.4.b.1. Outlet location. The latitude and longitude to the nearest second and the name and alphanumeric designation of the immediate receiving stream or river mile point where applicable.

4.4.b.2. Line drawing. A line drawing of the water flow through the facility, with a water balance showing operations contributing wastewater to the effluent and treatment units. Similar processes, operations, or production areas may be indicated as a single unit, labeled to correspond to the more detailed identification under ~~paragraph subdivision~~ subdivision 4.4.b.3 of this ~~section rule~~. The water balance must show approximate average flows at intake and discharge points and between units, including treatment units. If a water balance cannot be determined, the applicant may provide instead a pictorial description of the nature and amount of any sources of water and any collection and treatment measures.

4.4.b.3. Average flows and treatment. A narrative identification of each type of process, operation, or production area

that contributes wastewater to the effluent for each outlet, including process wastewater, cooling water, sewage, and storm water runoff (including material storage area runoff), the average flow that each wastewater contributes, and a description of the treatment, if any, each wastewater receives, including the ultimate disposal of any solid or fluid wastes other than by discharge. Process, operations or production areas may be described in general terms (for example, "dye-making reactor," "distillation tower"). For a privately owned treatment works, this information may include the identity of each user of the treatment works.

4.4.b.4. Intermittent flows. If any of the discharges described in ~~paragraph subdivision~~ subdivision 4.4.b.3 of this ~~section~~ above are intermittent or seasonal, a description of the frequency, duration and flow rate of each discharge occurrence, except for storm water runoff, spillage or leaks.

4.4.b.5. Maximum production. If an effluent guideline promulgated under §304 of the CWA applies to the applicant and is expressed in terms of production (or other measure of operation), a reasonable measure of the applicant's actual production reported in the units used in the applicable effluent guideline. The reported measure must reflect the actual production of the facility as required by ~~subdivision subsection~~ subsection 7.2.a. below.

4.4.b.6. Improvements. If the applicant is subject to any present requirements or compliance schedules for construction, upgrading or operation of waste treatment equipment, an identification of the abatement project and a listing of the required and projected final compliance dates.

4.4.b.7. Effluent characteristics. Information on the discharge of pollutants is specified in this paragraph. When "quantitative data" for a pollutant is required, the applicant must collect a sample effluent and analyze it for the pollutant in accordance with analytical methods approved under 40 C.F.R. §122.21(g)(7) and 40 C.F.R. §136. When no analytical method is approved, the applicant may use any suitable method but must provide a

description of the method. When an applicant has two (2) or more outlets with substantially identical effluents, the Chief may allow the applicant to test only one (1) outlet and report that the quantitative data also applies to the substantially identical outlet. The requirements in paragraphs 4.4.b.7.C and 4.4.b.7.D of this section rule that an applicant must believe pollutants to be present does not apply to pollutants present in a discharge solely as the result of their presence in intake water; however, an applicant must report such pollutants as present. The Chief may require that grab samples or composite samples be used for particular pollutants. An applicant is expected to "know or have reason to believe" that a pollutant is present in an effluent based on an evaluation of the expected use, production or storage of the pollutant or on any previous analyses for the pollutant. For example, any pesticide manufactured by a facility may be expected to be present in contaminated storm water runoff from the facility.

4.4.b.7.A. Every applicant must report quantitative data for every outlet for the following parameters relating to pollutants, unless the prescribed form indicates that such data is not necessary:

~~4.4.b.7.A.1. — Every applicant must report quantitative data for every outlet for the following parameters relating to pollutants unless the prescribed form indicates that such data is not necessary:~~

~~4.4.b.7.A.1.a. — Bio-chemical oxygen demand (BOD);~~

~~4.4.b.7.A.1.b. — Chemical oxygen demand;~~

~~4.4.b.7.A.1.c. — Total organic carbon;~~

~~4.4.b.7.A.1.d. — Total suspended solids;~~

~~4.4.b.7.A.1.e. — Ammonia (as N);~~

~~4.4.b.7.A.1.f. — Temperature (both winter and summer); and~~

~~4.4.b.7.A.1.g. — pH.~~

4.4.b.7.A.1. Biochemical oxygen demand (BOD);

4.4.b.7.A.2. Chemical oxygen demand;

4.4.b.7.A.3. Total organic carbon;

4.4.b.7.A.4. Total suspended solids;

4.4.b.7.A.5. Ammonia (as N);

4.4.b.7.A.5. Temperature (both winter and summer); and

4.4.b.7.A.5. pH.

~~4.4.b.7.A.2. 4.4.b.7.B.~~ At the applicant's request, the Chief may waive the reporting requirements for particular point sources or for a particular industry category for one (1) or more of the pollutants listed in ~~part paragraph 4.4.b.7.A.1. of this section above,~~ if the applicant has demonstrated that such a waiver is appropriate because information adequate to support issuance of a permit can be obtained with less stringent requirements.

4.4.b.7.B.C. Each applicant with processes in one (1) or more primary industry category (*see* Appendix A) contributing to a discharge must report quantitative data for the following pollutants in each outlet containing process wastewater:

4.4.b.7.B.C.1. The organic toxic pollutants in the fractions designated in Table I of Appendix D C (~~July 1, 1985~~) for the applicant's industrial category or categories; and Provided, further, that testing and reporting for the base/neutral fraction in the Once-Through Cooling Water, Fly Ash, and Bottom Ash Transport Water process wastestreams of the Steam Electric Power Plant industrial category

shall not apply. Table II of Appendix ~~D C~~ (July 1, 1985) lists the organic toxic pollutants in each fraction. The fractions result from the sample preparation required by the analytical procedure that uses gas chromatography/mass spectrometry. A determination that an applicant falls within a particular industrial category for the purposes of selecting fractions for testing is not conclusive as to the applicant's inclusion in that category for any other purposes.

4.4.b.7.~~B.C.2.~~ The pollutants listed in Table III of Appendix ~~D C~~ (July 1, 1985) (the toxic metals, cyanide, and total phenols).

4.4.b.7.~~C.D.~~ Reporting of quantitative data shall be as follows:

4.4.b.7.~~C.D.1.~~ Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in Table IV of Appendix ~~D C~~ (July 1, 1985) (certain conventional and nonconventional pollutants) is discharged from each outlet. If an applicable effluent limitations guideline either directly limits the pollutant or, by its express terms, indirectly limits the pollutant through limitations on an indicator or upon a specific request by the Chief for certain Table IV pollutants at the issuance of the application, or at such later time as provided in ~~paragraph subdivision~~ 4.4.b.12 of this rule, the applicant must report quantitative data. For every pollutant discharged that is not so limited in an effluent limitations guideline or specifically requested by the Chief, the applicant must either report quantitative data or briefly describe the reasons the pollutant is expected to be discharged.

4.4.b.7.~~C.D.2.~~ Each applicant must indicate whether it knows or has reason to believe that any of the pollutants listed in Table II or Table III of Appendix ~~D C~~ (July 1, 1985) (the toxic pollutants and total phenols) for which quantitative data are not otherwise required under ~~subparagraph~~ 4.4.b.7.~~BC~~ of this section above is discharged from each outfall. For every pollutant expected to be discharged in concentrations of ten parts per billion (10 ppb) or greater, the applicant must report quantitative

data. ~~For Where~~ acrolein, acrylonitrile, 2,4 dinitrophenol, or 2-methyl-4,6 dinitrophenol, ~~where any of these four (4) pollutants~~ are expected to be discharged in concentrations of one hundred parts per billion (100 ppb) or greater, the applicant must report quantitative data. For every pollutant expected to be discharged in concentrations less than ten parts per billion (10 ppb) or, in the case of acrolein, acrylonitrile, 2, 4 dinitrophenol, and 2-methyl-4,6 dinitrophenol, in concentrations less than one hundred parts per billion (100 ppb), the applicant must either submit quantitative data or briefly describe the reasons the pollutant is expected to be discharged. An applicant qualifying as a small business under ~~paragraph~~ subdivision 4.4.b.8 of this section rule is not required to analyze for pollutants listed in Table II of Appendix ~~D C~~ (July 1, 1985) (the organic toxic pollutants).

4.4.b.7.~~D.E.~~ Each applicant must indicate whether it knows or has reason to believe that any of the pollutants in Table V of Appendix ~~D C~~ (July 1, 1985) (certain hazardous substances and asbestos) are discharged from each outlet. For every pollutant expected to be discharged, the applicant must briefly describe the reasons the pollutant is expected to be discharged and report quantitative data it has for any pollutant.

4.4.b.7.~~E.F.~~ Each applicant, except sewage facilities, must report qualitative data generated using a screening procedure not calibrated with analytical standards for 2, 3, 7, 8-tetrachlorodibenzo-p-dioxin (TCDD) if it:

4.4.b.7.~~E.F.1.~~ Uses or manufactures 2, 4, 5-trichlorophenoxy acetic acid (2, 4.5-t); 2-(2,4,5-trichlorophenoxy) propanoic acid (Silvex,2,4,5,TP); 2-(2,4,5-trichlorophenoxy) ethyl 2, 2-dichloropropionate (Erbon); 0, 0-dimethyl 0-(2,4,5-trichlorophenyl) phosphorathiate (Ronnel); 2,4-5-trichlorophenol (TCP); or hexachlorophene (HCP); or

4.4.b.7.~~E.F.2.~~ Knows or has reason to believe that TCDD is or may be present in an effluent.

4.4.b.8. Small business exemption. An applicant that qualifies as a small business under one (1) of the following criteria is exempt from the requirements ~~in parts of paragraphs 4.4.b.7.B-1C or 4.4.b.7.C-1D~~ of this ~~section~~ rule to submit quantitative data for the pollutants listed in Table II of Appendix ~~D C~~ (July 1, 1985) (the organic toxic pollutants):

4.4.b.8.1. For coal mines, a probable total annual production of less than one hundred thousand (100,000) tons per year.

4.4.b.8.1.2. For all other applicants, gross total annual sales averaging less than one hundred thousand dollars (\$100,000) per year.

4.4.b.9. Used or manufactured toxics. A listing of any toxic pollutant that the applicant ~~does~~ uses or manufactures or expects that it will use or manufacture during the next five (5) years ~~use of manufacture~~ as an intermediate or final product or byproduct.

4.4.b.10. Biological toxicity tests. An identification of any biological toxicity tests that the applicant knows or has reason to believe have been made within the last three (3) years on any of the applicant's discharges or on a receiving water in relation to a discharge.

4.4.b.11. Contract analyses. If a contract laboratory or consulting firm performed any of the analyses required by ~~paragraph subdivision~~ 4.4.b.7 of this ~~section~~ rule, the identity of each laboratory or firm and the analyses performed.

4.4.b.12. Additional information. In addition to the information reported on the application form, applicants shall provide to the Chief, at his or her request, such other information as the Chief may reasonably require to assess the discharges of the facility and to determine whether to issue a NPDES permit. The additional information may include additional quantitative data and bioassays to assess the relative toxicity to aquatic life of the discharges and requirements to determine the cause of the toxicity.

4.4.c. New and existing concentrated animal feeding operations and concentrated aquatic animal production facilities shall provide the following information to the Chief, using the application form provided by the Chief:

4.4.c.1. For concentrated animal feeding operations:

~~4.4.c.1.A. The type and number of animals in open confinement and housed under roof.~~

~~4.4.c.1.B. The number of acres used for confinement feeding.~~

~~4.4.c.1.C. The design basis for the runoff diversion and control system, if one exists, including the number of acres of contributing drainage, the storage capacity, and the design safety factor.~~

4.4.c.1.A. The name of the owner or operator;

4.4.c.1.B. The facility location and mailing addresses;

4.4.c.1.C. Latitude and longitude of the entrance to the production area;

4.4.c.1.D. A topographic map of the geographic area in which the CAFO is located, showing the specific location of the production area in lieu of the requirements of subdivision 4.4.a.6 of this rule;

4.4.c.1.E. Specific information about the number and type of animals at issue (i.e. beef cattle, broilers, layers, swine weighing fifty-five (55) pounds or more, swine weighing less than fifty-five (55) pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, etc.) and whether such animals are in open confinement or housed under roof;

4.4.c.1.F. The type of containment and storage (i.e. anaerobic lagoon, roofed storage shed, storage ponds, under-floor pits, above-ground storage tanks, below-ground storage tanks, concrete pad, impervious soil pad,

etc.) and its total capacity for manure, litter, and/or process wastewater storage, measured in tons or gallons;

4.4.c.1.G. The total number of acres under control of the applicant available for land application of manure, litter and/or process wastewater;

4.4.c.1.H. The estimated amount of manure, litter, and/or process wastewater generated per year, measured in tons or gallons;

4.4.c.1.I. The estimated amount of manure, litter, and/or process wastewater transferred to other persons per year, measured in tons or gallons; and

4.4.c.1.J. A nutrient management plan that, at a minimum, satisfies the requirements of subsection 13.1.h below, including, for all CAFOs subject to 40 C.F.R. §412(C) or (D), the requirements of 40 C.F.R. §412.4(c), as applicable.

4.4.c.2. For concentrated aquatic animal production facilities:

4.4.c.2.A. The maximum daily and average monthly flow from each outlet;

4.4.c.2.B. The number of ponds, raceways, and similar structures;

4.4.c.2.C. The name of the receiving water and the source of intake water.

4.4.c.2.D. For each species of aquatic animal, the total yearly and maximum harvestable weight;

4.4.c.2.E. The calendar month of maximum feeding and the total mass of food fed during that month; and

4.4.c.2.F. Any other information the Chief may reasonably require.

4.4.d. Variance requests by non-POTWs. A discharger that is not a publicly owned treatment works (POTW) may request a

variance from otherwise applicable effluent limitations under any of the following statutory or regulatory provisions within the times specified ~~in this paragraph~~ herein:

4.4.d.1. Fundamentally different factors. A request for a variance based on the presence of "fundamentally different factors" from those on which the effluent limitations guideline was based shall be made by the close of the public comment period ~~under provided for~~ in subsection 12.1 below. The request shall explain how the requirements of 40 C.F.R. Part 125, Subpart D have been met.

4.4.d.2. Nonconventional pollutants. A request for a variance from the best available technology (BAT) requirements of CWA §301(b)(2)(F) pollutants (commonly called "nonconventional pollutants") pursuant to §301(c) of the CWA because of the economic capability of the owner or operator, or pursuant to §301(g) of the CWA because of certain environmental considerations, when those requirements were based on effluent limitation guidelines, must be made by:

4.4.d.2.A. Submitting an initial request to the Regional Administrator ~~as well as~~ and to the Chief stating the name of discharger, the permit number, the outlet number(s), the applicable effluent guideline, and whether the discharger is requesting a ~~Section CWA §301(c)~~ Section CWA §301(G) modification or both. This request must have been filed not later than:

4.4.d.2.A.1. September 25, 1978 for a pollutant that is controlled by a BAT effluent guideline promulgated before December 27, 1977; or

4.4.d.2.A.2. Two hundred seventy (270) days after promulgation of an applicable effluent limitation guideline for guidelines promulgated after December 28, 1977.

4.4.d.2.B. Submitting a completed request no later than the close of the public comment period ~~under provided for in~~ subsection 12.1 of this rule, demonstrating that

the applicable requirements of 40 C.F.R. §125 have been met.

4.4.d.2.C. Requests for variance from effluent limitations not based on effluent limitation guidelines need only comply with subparagraph 4.4.d.2.B of this section rule and need not be preceded by an initial request under subparagraph 4.4.d.2.A of this section.

4.4.d.3. Delay in construction of POTW. An extension under CWA §301(i)(2) of the statutory deadlines in §§301(b)(1)(A) or (B)(1)(C) based on delay in completion of a POTW into which the source is to discharge must have been requested on or before June 26, 1978 or one hundred eighty (180) days after the relevant POTW requested an extension under paragraph subdivision 4.4.e.1 of this section below, whichever is later, but in no event may this date have been later than December 24, 1978. The request shall explain how the requirements of 40 C.F.R. Part 125, Subpart J have been met.

4.4.d.4. Innovative technology. An extension under CWA §301(k) from the statutory deadline of §301(b)(2)(A) for best available technology based on the use of innovative technology may be requested no later than the close of the public comment period under provided for in subsection 12.1 of this rule for the discharger's initial permit requiring compliance with §301(b)(2)(A). The request shall demonstrate that the requirements of 40 C.F.R. §125 have been met.

4.4.d.5. Water quality related effluent limitations. A modification under CWA §302(b)(2) of the requirements under of §302(a) for achieving water quality related effluent limitations may be requested no later than the close of the public comment period under provided for in subsection 12.1 on the permit from which the modification is sought.

4.4.d.6. Thermal discharge. A variance under CWA §316(a) for the thermal component of any discharge must be filed with a timely application for a permit under this section rule, except that if thermal effluent limitations are established under CWA §402(a)(1) or are

based on water quality standards, the request for a variance may be filed by the close of the public comment period under provided for in subsection 12.1 below. A copy of the request as required under by 40 C.F.R. Part 125, Subpart H shall be sent to the Chief as required under that section.

4.4.e. Variance requests by POTWs. A discharger that is a publicly owned treatment works (POTW) may request a variance from otherwise applicable effluent limitations under either of the following statutory provisions as specified in this paragraph:

4.4.e.1. Delay in construction. An extension under CWA §301(i)(1) of the statutory deadlines in CWA §§301(b)(1)(B) or (b)(1)(C) based on delay in the construction of the POTW must have been requested on or before June 26, 1978.

4.4.e.2. Water quality based effluent limitation. A modification under CWA §302(b)(2) of the requirements under §302(a) for achieving water quality based effluent limitations shall be requested on the permit from which the modification is sought no later than the close of the public comment period under provided for in subsection 12.1 of this rule. on the permit from which the modification is sought.

4.4.f. Expedited variance procedures and time extensions:

4.4.f.1. Notwithstanding the time requirements in subdivisions subsections 4.4.d and 4.4.e of this section above, the Chief may notify a permit applicant before a draft permit is issued that the draft permit will likely contain limitations that are eligible for variance. In the notice, as a condition of consideration of any potential variance request, the Chief may require the applicant as a condition of consideration of any potential variance request to submit a request explaining how the requirements of 40 C.F.R. §125 applicable to the variance have been met. and The Chief may also require it's the request's submission within a specified reasonable time after receipt of the notice. The notice may be sent before the permit application

has been submitted. The draft or final permit may contain the alternative limitations that may become effective upon final grant of the variance.

4.4.f.2. A discharger who cannot file a complete request required under subparagraphs 4.4.d.2.B or 4.4.d.2.C of this section rule may request an extension. The extension may be granted or denied at the discretion of the Chief. Extensions shall be no more than six (6) months in duration.

4.5. Record keeping. The applicant shall keep records of all data used to complete permit applications and any supplemental information submitted for a period of at least three (3) years from the date the application is signed.

4.6. Signatories to permit applications and reports.

4.6.a. Applications. All permit applications shall be signed as follows:

4.6.a.1. For a corporation: by a responsible corporate officer. For the purpose of this section, a responsible corporate officer means:

4.6.a.1.A. A president, secretary, treasurer, or vice-president of the corporation in charge of a principle business function or any other person who performs similar policy or decision making functions for the corporation; or

4.6.a.1.B. The manager of one (1) or more manufacturing, production, or operating facilities employing more than two hundred fifty (250) persons or having gross annual sales or expenditures exceeding twenty-five million dollars (\$25,000,000) (~~in second-quarter 1980 dollars~~), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

NOTE: The Chief does not require specific assignments or delegations of authority to responsible corporate officers identified in subparagraph 4.6.a.1.A. The Chief

will presume that these responsible corporate officers have the requisite authority to sign permit applications unless the corporation has notified the Chief to the contrary. Corporate procedures governing authority to sign permit applications may provide for assignment or delegation to applicable corporate positions under subparagraph 4.6.a.1.B rather than to specific individuals.

4.6.a.2. For a partnership or sole proprietorship: by a general partner or the proprietor respectively; or

4.6.a.3. For a municipality, State, Federal or other public agency: by either a principal executive officer or ranking elected official. For purposes of this section, a principal executive officer of a Federal agency includes:

4.6.a.3.A. The chief executive officer of the agency; or

4.6.a.3.B. A senior executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., Regional Administrator of EPA.)

4.6.b. Reports. All reports required by permits and other information requested by the Chief shall be signed by a person described in ~~subdivision subsection 4.6.a of this section~~ or by a duly authorized representative of that person. A person is a duly authorized representative only if:

4.6.b.1. The authorization is made in writing by a person described in ~~subdivision subsection 4.6.a of this section~~ above;

4.6.b.2. The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of a well or a well field, superintendent or position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. A duly authorized representative may thus be either a named individual or any individual occupying a named position; and

4.6.b.3. The written authorization is submitted to the Chief.

4.6.c. Changes to authorization. If an authorization under ~~subdivision~~ subsection 4.6.b of this section above is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of ~~subdivision~~ subsection 4.6.b of this section must be submitted to the Chief prior to or together with any reports, information, or applications to be signed by an authorized representative.

4.6.d. Certification. Any person signing a document under ~~subdivisions~~ subsections 4.6.a or 4.6.b of this section rule shall make the following certification:

“I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.”

4.7. Filing fee. For all NPDES permits, the filing fees required ~~under~~ by 47CSR26 shall apply as though fully set forth herein.

#### **§47-10-5. Conditions Applicable to All Permits.**

The following conditions apply to all permits. All conditions shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these rules must be given in the permit.

##### 5.1. Duty to comply:

5.1.a. The permittee must comply with all conditions of this permit. Permit noncompliance constitutes a violation of the CWA and State Act and is grounds for enforcement action, for permit modification, revocation and reissuance, suspension or revocation, or for denial of a permit renewal application.

5.1.b. The permittee shall comply with all effluent standards or prohibitions established under §307(a) of the CWA for toxic pollutants within the time provided in the regulations that establish these standards or prohibitions, even if the permit has not yet been modified to incorporate the requirement.

5.2. Duty to reapply. If the permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the permittee must apply for a new permit at least one hundred eighty (180) days prior to expiration of the permit.

5.3. Need to halt or reduce activity not a defense. 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.

5.4. Duty to mitigate. The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit that has a reasonable likelihood of adversely affecting human health or the environment.

5.5. Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) that are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. Unless otherwise required by Federal or State law, this provision requires the operation of back-up auxiliary facilities or similar systems that are installed by the permittee only when the operation is necessary to achieve compliance with the conditions of the permit. For domestic waste

treatment facilities, waste treatment operators as classified by the rules promulgated by the State Division of Health Rules authorized under Public Health Laws, W. Va. Code '16-1 Bureau for Public Health pursuant to W. Va. Code §16-1-1, et seq. will be required, except that in circumstances where the domestic waste treatment facility is receiving any type of industrial waste, the Chief may require a more highly skilled operator.

5.6. Permit actions. This permit may be modified, revoked and reissued, suspended, or revoked for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or revocation or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

5.7. Property rights. This permit does not convey any property rights of any sort or any exclusive privilege.

5.8. Duty to provide information. The permittee shall furnish to the Chief, within a reasonable specified time, any information that the Chief may request to determine whether cause exists for modifying, revoking and reissuing, suspending or revoking this permit, or to determine compliance with this permit. The permittee shall also furnish to the Chief, upon request, copies of records required to be kept by this permit.

5.9. Inspection and entry. The permittee shall allow the Chief or ~~an~~ his or her authorized representative, upon presentation of credentials and other documents as may be required by law, to:

5.9.a. Enter upon the permittee's premises ~~in which~~ where an effluent source or activity is located or where records must be kept under the conditions of this permit;

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

5.9.c. Inspect at reasonable times any facilities, equipment (including monitoring and

control equipment), practices, or operations regulated or required under this permit; and

5.9.d. Sample or monitor at reasonable times for the purpose of assuring permit compliance or as otherwise authorized by the State Act, any substances or parameters at any location.

#### 5.10. Monitoring and records:

5.10.a. Monitoring must be conducted according to test procedures approved under 40 C.F.R. §136 as in effect ~~October 8, 1991~~ April 25, 2007, unless other test procedures have been specified in the permit.

5.10.b. Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

5.10.c. The permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original chart recordings for continuous monitoring instrumentation, copies of all reports required by the permit, and records of all data used to complete the application for this permit for a period of at least three (3) years from the date of the sample, measurement, report or application. This period may be extended by request of the Chief at any time.

5.10.d. Records of monitoring information shall include:

5.10.d.1. The date, exact place, and time of sampling or measurements;

5.10.d.2. The individual(s) who performed the sampling or measurements;

5.10.d.3. The date(s) analyses were performed;

5.10.d.4. The individual(s) who performed the analyses; if a commercial laboratory is used, the name and address of the laboratory;

5.10.d.5. The analytical techniques or methods used; and

5.10.d.6. The results of such analyses.

5.10.e. Monitoring results shall be reported on DMRs and at the intervals specified elsewhere in the permit.

5.10.f. If the permittee monitors any pollutant at any monitoring point specified in the permit more frequently than required by the permit, using approved test procedures or as specified in the permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the DMR.

5.10.g. Calculations for all limitations that require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the Chief in the permit.

5.10.h. The permittee shall not knowingly render inaccurate any monitoring device required to be used under this permit.

5.11. Signatory requirement. All applications, reports or information submitted to the Chief shall be signed and certified as required in subsection 4.6 of this rule.

#### 5.12. Reporting requirements:

5.12.a. Planned changes. The permittee shall give notice to the Chief of any planned physical alterations or additions to the permitted facility that may affect the nature or quantity of the discharge and of any planned changes in the method of operating the facility that may affect the nature or quantity of the discharge. Notice is required when:

5.12.a.1. The alteration or addition to a permitted facility may meet one (1) of the criteria for determining whether a facility is a new source ~~in pursuant to subdivision~~ subsection 13.7.b below; or

5.12.a.2. The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants that are subject neither to effluent limitations in the permit nor

to the notification requirements ~~under of subdivision~~ subsection 5.12.f below.

5.12.b. Anticipated noncompliance. The permittee shall give advance notice to the Chief of any planned changes in the permitted facility or activity that may result in noncompliance with permit requirements.

5.12.c. Transfers. This permit is not transferable to any person except after notice to the Chief. The Chief 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.

5.12.d. Compliance schedules. Reports of compliance or noncompliance or any progress reports on interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than fourteen (14) days following each schedule date.

#### 5.12.e. Immediate reporting:

5.12.e.1. The permittee shall report any noncompliance that may endanger public health or the environment immediately after becoming aware of the circumstances by using the Office of Water Resources' Emergency Notification Number 1-800-642-3074. A written submission shall be provided within five (5) days of the time the permittee becomes aware of the circumstances. The written submission shall contain a description of the noncompliance and its cause; the period of noncompliance, including exact dates and times, and if the noncompliance has not been corrected, the anticipated time it is expected to continue; and steps taken or planned to reduce, eliminate and prevent recurrence of the noncompliance.

5.12.e.2. The following shall also be reported immediately:

5.12.e.2.A Any unanticipated bypass that exceeds any effluent limitation in the permit;

5.12.e.2.B. Any upset that exceeds any effluent limitation in the permit; and

5.12.e.2.C. Violation of a maximum daily discharge limitation for any of the pollutants listed by the Chief in the permit to be reported immediately. This list shall include any toxic pollutant or hazardous substance or any pollutant specifically identified as the method to control a toxic pollutant or hazardous substance.

5.12.e.3. The Chief may waive the written report on a case-by-case basis if the oral report has been received in accordance with the above.

5.12.e.4. Compliance with the requirements of ~~paragraph subsection~~ 5.12.f of ~~this section~~ below shall not relieve a person of compliance with 47 C.S.R. 11.

5.12.f. In addition to the above reporting requirements, all existing manufacturing, commercial, and silvicultural dischargers must notify the Chief in writing as soon as they know or have reason to believe:

5.12.f.1. That any activity has occurred or will occur that would result in the discharge, on a routine or frequent basis, of any toxic pollutant that is not limited in the permit if that discharge will exceed the highest of the following "Notification Levels:"

5.12.f.1.A. One hundred micrograms per liter (100 ug/1);

5.12.f.1.B. Two hundred micrograms per liter (200 ug/1) for acrolein and acrylonitrile; five hundred micrograms per liter (500 ug/1) for 2,4-dinitrophenol and for 2-methyl-4,6-dinitrophenol; and one milligram per liter (1 mg/1) for antimony;

5.12.f.1.C. Five (5) times the maximum concentration value reported for that pollutant in the permit application in accordance with ~~paragraphs~~ subdivisions 4.4.b.7 or 4.4.b.9 above; and

5.12.f.1.D. The level established by the Chief in accordance with subdivision 6.3.g.5 below.

5.12.f.2. That any activity has occurred or will occur that would result in any discharge (on a non-routine or infrequent basis) of a toxic pollutant that is not limited in the permit, if that discharge will exceed the highest of the following "Notification Levels:"

5.12.f.2.A. Five hundred micrograms per liter (500 ug/1);

5.12.f.2.B. One milligram per liter (1 mg/1) for antimony;

5.12.f.2.C. Ten (10) times the maximum concentration value reported for that pollutant in the permit application in accordance with subdivision 4.4.b.7 above; or

5.12.f.2.D. The level established by the Chief in accordance with subdivision 6.3.g.5 below.

5.12.f.3. That they have begun or expect to begin to use or manufacture as an intermediate or final product or by-product of any toxic pollutant that was not reported in the permit application under ~~paragraph~~ subdivision 4.4.b.9 above and that will result in the discharge on a routine or frequent basis of that toxic pollutant at levels that exceed five (5) times the detection limit for that pollutant under approved analytical procedure.

5.12.f.4. That they have begun or expect to begin to use or manufacture as an intermediate or final product or by-product of any toxic pollutant that was not reported in the permit application under subdivision 4.4.b.9 above and that will result in the discharge on a non-routine or infrequent basis of that toxic pollutant at levels that exceed ten (10) times the detection limit for that pollutant under approved analytical procedure.

5.12.g. Other noncompliance. The permittee shall report all instances of noncompliance not reported under the above paragraphs at the time monitoring reports are

submitted. The reports shall contain the information listed in ~~paragraph~~ subdivision 5.12.e.1 of this section rule.

5.12.h. Other information. Where the permittee becomes aware that it failed to submit any relevant facts in a permit application or submitted incorrect information in a permit application or in any report to the Chief, it shall promptly submit such facts or information.

### 5.13. Bypass:

#### 5.13.a. Definitions:

5.13.a.1. "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility.

5.13.a.2. "Severe Property Damage" means substantial physical damage to property, damage to the treatment facilities that causes them to become inoperable, or substantial and permanent loss of natural resources that can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

5.13.b. Bypass not exceeding limitations. The permittee may allow any bypass to occur that does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation. These bypasses are not subject to the provisions of subdivisions subsections 5.13.c and 5.13.d of this section rule.

#### 5.13.c. Notice:

5.13.c.1. If the permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least ten (10) days before the date of the bypass; and

5.13.c.2. If the permittee does not know in advance of the need for a bypass, notice shall be submitted as required in ~~paragraph~~ subdivision 5.12.e.2 of this section rule.

#### 5.13.d. Prohibition of bypass:

5.13.d.1. Bypass is permitted only under the following conditions, and the Chief may take enforcement action against a permittee for bypass, unless:

5.13.d.1.A. Bypass was unavoidable to prevent loss of life, personal injury, or severe property damage;

5.13.d.1.B. There were no feasible alternatives to the bypass, such as the use of auxiliary treatment facilities, retention of untreated wastes, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate backup equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass that occurred during normal periods of equipment downtime or preventive maintenance; and

5.13.d.1.C. The permittee submitted notices as required under ~~subdivision~~ subsection 5.13.c of this section above.

5.13.d.2. The Chief may approve an anticipated bypass after considering its adverse effects if the Chief determines that it will meet the three (3) conditions listed above in ~~paragraph~~ subdivision 5.13.d.1 of this section above.

### 5.14. Upset.

5.14.a. Definition. "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.

5.14.b. Effect of an upset. An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based effluent limitations if the requirements of ~~subdivision~~ subsection 5.14.c of this section rule are met. No determination made during administrative review of claims that noncompliance was caused by upset and

before an action for noncompliance is final administrative action subject to judicial review.

5.14.c. Conditions necessary for a demonstration of upset. A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs or other relevant evidence that:

5.14.c.1. An upset occurred and that the permittee can identify the cause(s) of the upset;

5.14.c.2. The permitted facility was ~~at the time~~ being properly operated at the time of the upset;

5.14.c.3. The permittee submitted notice of the upset as required in subdivision 5.12.e.2 of this section ~~rule~~; and

5.14.c.4. The permittee complied with any remedial measures required ~~under~~ by subsection 5.4 above.

5.14.d. Burden of proof. In any enforcement proceeding, the permittee seeking to establish the occurrence of an upset has the burden of proof.

5.15. Removed substances. Where removed substances are not otherwise covered by the terms and conditions of this permit or another existing permit issued by the Chief, any solids, sludges, filter backwash or other pollutants removed in the course of treatment or control of wastewaters that are intended for disposal within the State shall be disposed of only in a manner and at a site subject to the approval by the Chief. If such substances are intended for disposal outside the State or for reuse (*i.e.* as a material used for making another product, which in turn has another use), the permittee shall notify the Chief in writing of the proposed disposal or use of such substances, the identity of the prospective disposer or users, and the intended place of disposal or use, as appropriate.

#### **§47-10-6. Establishing Permit Conditions.**

6.1. In addition to conditions required in all permits, the Chief shall establish conditions in permits as required on a case-by-case basis to provide for and assure compliance with all applicable requirements of the CWA and the State Act and regulations. An applicable requirement is a State or Federal or interstate compact, statutory or regulatory requirement that takes effect prior to final administrative disposition of a permit, or any requirement that takes effect prior to the modification or revocation and reissuance of a permit.

6.2. In the permit review and planning process, or upon the request of a permit applicant or permittee, the Chief may utilize Real Time Water Quality Control on a case-by-case basis when establishing permit conditions when the applicant demonstrates that the use of Real Time Water Quality Control will not violate water quality standards. In order to facilitate a determination or assessment of the applicability of Real Time Management Control, the Chief may require a permit applicant or permittee to submit such information as deemed necessary.

6.3. Each permit shall include conditions meeting the following requirements when applicable:

6.3.a. Technology-based effluent limitations and standards based on effluent limitations and standards under §301 of the CWA, new source performance standards promulgated under §306 of the CWA, case-by-case effluent standards determined under §402(a)(1) of the CWA, or a combination of the two (2) in accordance with 40 C.F.R. §125.3(c). For new sources or new dischargers, these technology based limitations and standards are subject to the provisions of ~~subdivision~~ section 13.7 below (protection period).

6.3.b. Other effluent limitations and standards under §§301,302,303, 307, 318, and 405 of the CWA. If any applicable toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is promulgated under §307(a) of the CWA for a toxic pollutant and that standard or prohibition is more stringent

than any limitation on the pollutant in the permit, the Chief shall institute proceedings under these rules to modify or revoke and reissue the permit to conform to the toxic effluent standard or prohibition. The provisions of 40 C.F.R. §129 are hereby incorporated by reference.

6.3.c. For any discharger within a primary industry category (*see* Appendix A), the requirements of §307(a)(2) of the CWA as follows:

6.3.c.1. After June 30, 1981, any permit issued shall include effluent limitations and a compliance schedule to meet the requirements of §§301(b)(2)(A), (C), (D), (E) and (F) of the CWA, whether or not applicable effluent limitations guidelines have been promulgated or approved. These permits may include a condition stating that if an applicable standard or limitation is promulgated under §§301(b)(2)(C) and (D), 304(b)(2), and 307(a)(2) and that effluent standard or limitation is more stringent than any effluent limitation in the permit or controls a pollutant not listed in the permit, the permit shall be promptly modified or revoked and reissued to conform to that effluent standard or limitation.

6.3.d. Any more stringent requirements necessary to achieve water quality standards established pursuant to the CWA or the State Act and regulations, including requirements of other affected States. Nothing in this section precludes the application of Real Time Water Quality Control in achieving water quality standards.

6.3.e. Any requirements necessary to ensure consistency with the requirements of a Water Quality Management Plan approved by EPA under §208(b) of the CWA.

6.3.f. For toxic pollutants, limitations established under ~~subdivisions~~ subsections 6.3.a, 6.3.b or 6.3.c ~~of this section~~ above to control pollutants meeting the criteria listed in ~~paragraph~~ subdivision 6.3.f.1 ~~of this section~~ below. Limitations will be established in accordance with ~~paragraph~~ subdivision 6.3.f.2 ~~of this section~~. An explanation of the development

of these limitations shall be included in the fact sheet, if any:

6.3.f.1. Limitations must control all toxic pollutants that:

6.3.f.1.A. The Chief determines are or may be discharged at a level greater than the level that can be achieved by the technology-based treatment requirements appropriate to the permittee; or

6.3.f.1.B. The discharger does or may use or manufacture as an intermediate or final product or by-product.

6.3.f.2. The requirement that the limitations control the pollutants meeting the criteria of ~~paragraph~~ subdivision 6.3.f.1 ~~of this section~~ above will be satisfied by:

6.3.f.2.A. Limitations on those pollutants; or

6.3.f.2.B. Limitations on other pollutants that, in the judgment of the Chief, will provide the necessary treatment of the pollutants.

6.3.g. Notification level. A "Notification Level" that exceeds the notification level of ~~subdivision~~ subsection 5.1.f above, upon a petition from the permittee or on the Chief's initiative. This new notification level may not exceed the level that can be achieved by the technology-based treatment requirements appropriate to the permittee.

6.3.h. Monitoring requirements. In addition to the requirements set out in ~~subsection~~ 5.10 above, the following monitoring requirements:

6.3.h.1. To assure compliance with permit limitations, requirements to monitor:

6.3.h.1.A. The mass (or other measurement specified in the permit) for each pollutant limited in the permit;

6.3.h.1.B. The volume of effluent discharged from each outlet;

6.3.h.1.C. Other measurements as appropriate, including pollutants in internal waste streams under ~~subsection 7.9 below~~; pollutants in intake water for net limitations under ~~subsection 7.8 below~~; frequency, rate of discharge, etc., for noncontinuous dischargers under ~~subsection 7.5 below~~; and pollutants subject to notification requirements under ~~subdivision subsection 5.12.f above~~; and

6.3.h.1.D. According to test procedures approved ~~under by~~ 40 C.F.R. §136 for the analyses of pollutants having approved methods under that section, and according to a test procedure specified in the permit for pollutants with no approved methods.

6.3.h.2. Requirements to report monitoring results with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.

6.3.h.3. When appropriate and as determined by the Chief, requirements concerning the proper use, maintenance, and installation ~~when appropriate as determined by the Chief~~ of monitoring equipment or methods, including biological monitoring methods ~~when appropriate as determined by the chief~~.

6.3.i. Best management practices to control or abate the discharge of pollutants when:

6.3.i.1. Authorized under §304(e) of the CWA for the control of toxic pollutants and hazardous substances from ancillary activities;

6.3.i.2. Numeric effluent limitations are infeasible; or

6.3.i.3. The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA.

6.3.j. Reissued permits.

6.3.j.1. Except as provided in ~~paragraph~~ subdivision 6.3.j.2 of this section rule,

when a permit is renewed or reissued, interim limitations, standards or conditions must be at least as stringent as the final limitations, standards or conditions in the previous permit, unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance.

6.3.j.2. When effluent limitations were imposed under §402(a)(1) of the CWA in a previously issued permit and these limitations are more stringent than the subsequently promulgated effluent guidelines, this paragraph shall apply unless:

6.3.j.2.A. The discharger has installed the treatment facilities required to meet the effluent limitations in the previous permit and has properly operated and maintained the facilities, but has nevertheless been unable to achieve the previous effluent limitations. In this case the limitations in the reissued permit may reflect the level of pollutant control actually achieved, but shall not be less stringent than required by the subsequently promulgated guidelines;

6.3.j.2.B. The subsequently promulgated effluent guidelines are based on best conventional pollutant control technology pursuant to §301(b)(2)(E) of the CWA;

6.3.j.2.C. The circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit modification or revocation and reissuance; or

6.3.j.2.D. There is increased production at the facility that results in significant reduction in treatment efficiency, in which case the permit limitations will be adjusted to reflect any decreased efficiency resulting from increased production and raw waste loads, but in no event shall permit limitations be less stringent than those required by subsequently promulgated standards and limitations.

6.3.k. Privately owned treatment works. For a privately owned treatment works, any conditions expressly applicable to any user, as a limited co-permittee, that may be necessary in the permit issued to the treatment works to ensure compliance with applicable requirements of the CWA and the State Act. Alternatively, the Chief may issue separate permits to the treatment works and to its users or may require a separate permit application from any user. The Chief's decision to issue a permit with no conditions applicable to any user, to impose conditions on one (1) or more users, to issue separate permits, or to require separate applications, and the basis for that decision shall be stated in the fact sheet for the draft permit for the treatment works, if any.

6.3.l. Grants. Any conditions imposed in grants made by the Administrator to POTWs under §§201 and 204 of the CWA that are reasonably necessary for the achievement of effluent limitations under §301 of the CWA.

6.3.m. Sewage sludge. Requirements under §405 of the CWA governing the disposal of sewage sludge from publicly owned treatment works, in accordance with any applicable rules.

6.3.n. Navigation. Any conditions that the Secretary considers necessary to ensure that navigation and anchorage will not be substantially impaired.

6.3.o. Any alternative effluent limitations or standards may be incorporated where warranted by "fundamentally different factors," pursuant to 40 C.F.R. §125.30, et seq.

#### §47-10-7. Calculating NPDES Conditions.

7.1. Outlets and discharge points. All permit effluent limitations, standards, and prohibitions shall be established for each outlet or discharge point of the permitted facility, except as otherwise provided under subdivision subsection 6.3.i and subsection 7.8 of this section rule.

#### 7.2. Production-based limitations:

7.2.a. In the case of sewage facilities, permit limitations, standards, or prohibitions shall be calculated based on design flow.

7.2.a.1. Except in the case of sewage facilities, or as provided, in ~~subparagraph 7.2.a.2.B of this section below,~~ calculation of any permit limitations, standards, or prohibitions that are based on production (or other measure of operation) shall be based not upon the designed production capacity but rather upon a reasonable measure of actual production of the facility. For new sources or new dischargers, actual production shall be estimated using projected production. The time period of the measure of production shall correspond to the time period of the calculated permit limitation; for example, monthly production shall be used to calculate average monthly discharge limitations.

7.2.a.2. Where production-based limitations, standards or prohibitions apply, the Chief may include a condition establishing alternate permit limitations, standards or prohibitions based upon anticipated increased or decreased production levels, not to exceed maximum production capability.

~~7.2.a.2.A. Where production-based limitations, standards or prohibitions apply, the Chief may include a condition establishing alternate permit limitations, standards, or prohibitions based upon anticipated increased (not to exceed maximum production capability) or decreased production levels.~~

~~7.2.a.2.B. 7.2.a.3. If the Chief establishes permit conditions under subparagraph 7.2.a.2.A of this section above:~~

7.2.a.2.B.1. 7.2.a.3.A. The permit shall require the permittee to notify the Chief at least two (2) business days prior to the month in which the permittee expects to operate at a level higher than the lowest production level identified in the permit. The notice shall specify the anticipated level and the period during which the permittee expects to operate at the alternate level. If the notice covers more than one (1) month, the notice shall specify the reasons for the anticipated production level increase. New

notice of discharge at alternate levels is required to cover a period or production level not covered by prior notice or, if during two (2) consecutive months otherwise covered by a notice, the production level at the permitted facility does not in fact meet the higher level designated in the notice.

~~7.2.a.2.B.2.~~ 7.2.a.3.B. The permittee shall comply with the limitations, standards, or prohibitions that correspond to the lowest level of production specified in the permit, unless the permittee has notified the Chief under ~~paragraph 7.2.b.B.(b)(A) of this section~~, in which case the permittee shall comply with the lower of the actual level of production during each month or the level specified in the notice.

~~7.2.a.2.B.3.~~ 7.2.a.3.C. The permittee shall submit with the DMR the level of production that actually occurred during each month and the limitations, standards, or prohibitions applicable to that level of production.

7.2.b. In the case of facilities and activities providing services and where water usage is not related to a product, limitations, standards, and prohibitions shall be based upon water usage. For those facilities covered by ~~46CSR1, sections 3 and 4~~ 47CSR1 §§3 and 4, those requirements shall also be considered in these determinations.

7.3. Metals. All permit effluent limitations, standards, or prohibitions for a metal shall be expressed in terms of "total recoverable metal" as defined in ~~46CSR1, section 2~~ 40 C.F.R. §136.3, unless:

7.3.a. An applicable effluent standard or limitation has been promulgated under the CWA and specifies the limitation for the metal in the dissolved or valent or total form; or

7.3.b. In establishing permit limitations on a case-by-case basis, it is necessary to express the limitation on the metal in the dissolved or valent or total form in order to carry out the provisions of the CWA; or

7.3.c. All approved analytical methods for the metal inherently measure only its dissolved form (e.g. hexavalent chromium).

7.4. Continuous discharges. For all continuous discharges, all permit effluent limitations, standards, and prohibitions, including those necessary to achieve water quality standards, shall ~~unless impracticable~~ be stated as maximum daily and average monthly discharge limitations, unless impracticable.

7.5. Noncontinuous discharges. Discharges that are not continuous shall be particularly described and limited, considering the following factors as appropriate:

7.5.a. Frequency;

7.5.b. Total mass;

7.5.c. Maximum rate of discharge of pollutants during the discharge; or

7.5.d. Prohibition or limitation of specified pollutants by mass, concentration, or other appropriate measure.

7.6. Mass limitations:

7.6.a. All pollutants limited in permits shall have limitations, standards, or prohibitions expressed in terms of mass except:

7.6.a.1. For pH, temperature, radiation, or other pollutants that cannot appropriately be expressed by mass;

7.6.a.2. When applicable standards and limitations are expressed in terms of other units of measurement; or

7.6.a.3. If, in establishing permit limitations on a case-by-case basis, limitations expressed in terms of mass are infeasible because the mass of the pollutant discharged cannot be related to a measure of operation and permit conditions ensure that dilution will not be used as a substitute for treatment.

7.6.b. Pollutants limited in terms of mass additionally may be limited in terms of

other units of measurement, and the permit shall require the permittee to comply with both limitations.

#### 7.7. Pollutants in intake water.

7.7.a. Upon request of the permittee, technology-based effluent limitations or standards shall be adjusted to reflect credit for pollutants in the permittee's intake water, if:

7.7.a.1. The applicable effluent limitations and standards specifically provide that they shall be applied on a net basis; or

7.7.a.2. The permittee demonstrates that the control system it proposes or uses to meet applicable technology-based limitations and standards would, if properly installed and operated, meet the limitations and standards in the absence of pollutants in the intake waters.

7.7.b. Credit for generic pollutants such as biochemical oxygen demand (BOD) or total suspended solids (TSS) should not be granted unless the permittee demonstrates that the constituents of the generic measure in the effluent are substantially similar to the constituents of the generic measure in the intake water or unless appropriate additional limits are placed on process water pollutants either at the outlet or elsewhere.

7.7.c. ~~Not shall~~ Effluent limitations or standards shall not be calculated on a "net" basis for permittees whose intake water comes from underground water systems.

7.7.d. Credit shall be granted only to the extent necessary to meet the applicable limitation or standard, up to a maximum value equal to the influent value. Additional monitoring may be necessary to determine eligibility for credits and compliance with permit limits.

7.7.e. Credit shall be granted only if the permittee demonstrates that the intake water is drawn from the same body of water into which the discharge is made. The Chief may waive this requirement if he finds that no environmental degradation will result.

7.7.f. This section does not apply to the discharge of raw water clarifier sludge generated from the treatment of intake water.

7.8. Internal waste streams. When permit effluent limitations or standards imposed at the point of discharge are impractical or infeasible, effluent limitations or standards for discharges of pollutants may be imposed on internal waste streams before mixing with other waste streams or cooling water streams. In those instances, the monitoring requirements ~~under subdivision of subsection~~ 6.3.h above shall also be applied to the internal waste streams.

7.9. Disposal of pollutants into wells, into POTWs, or by land application:

7.9.a. When part of a discharger's process wastewater is not being discharged into waters of the State because it is disposed into a well, into a POTW or by land application, thereby reducing the flow or level of pollutants being discharged into waters of the State, applicable effluent standards and limitations for the discharge in a NPDES permit shall be adjusted to reflect the reduced raw waste resulting from such disposal. Effluent limitations and standards in the permit shall be calculated by one (1) of the following methods:

7.9.a.1. If none of the waste from a particular process is discharged into waters of the State, and effluent limitations guidelines provide separate allocation for wastes from that process, all allocations for the process shall be eliminated from calculation of permit effluent limitations or standards.

7.9.a.2. In all cases other than those described in ~~paragraph subdivision~~ 7.9.a.1 of this section above, effluent limitations shall be adjusted by multiplying the effluent limitation derived by applying effluent limitation guidelines to the total waste stream by the amount of wastewater flow to be treated and discharged into waters of the State, and dividing the result by the total wastewater flow. Effluent limitations and standards so calculated may be further adjusted to make them more stringent if discharges to wells, publicly owned treatment

works, or by land application change the character or treatability of the pollutants being discharged to receiving waters.

7.9.b. ~~Subdivision~~ Subsection 7.9.a of ~~this section~~ above shall not apply to the extent that promulgated effluent limitations guidelines:

7.9.b.1. Control concentrations of pollutants discharged but not mass; or

7.9.b.2. Specify a different specific technique for adjusting effluent limitations to account for well injection, land application, or disposal into POTWs.

7.9.c. ~~Subdivision~~ Subsection 7.9.a of ~~this section~~ above does not alter a discharger's obligation to meet any more stringent requirements established under sections 5 and 6 of this series.

#### §47-10-8. Schedules of Compliance.

8.1. General. The permit may, when appropriate, specify a schedule of compliance leading to compliance with the CWA and State Act and rules:

8.1.a. Any schedule of compliance shall require compliance as soon as possible, but in no case later than an applicable statutory deadline. In the case of permit conditions based on water quality standards established after July 1, 1977, a schedule of compliance may be used that shall assure that the discharge will not cause a violation of applicable water quality standards.

8.1.b. The first NPDES permit issued to a new source or a new discharger shall contain a schedule of compliance only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three (3) years before commencement of the relevant discharge. For recommencing dischargers, a schedule of compliance shall be available only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three (3) years before recommencement of discharge.

8.1.c. Interim dates. If a permit establishes a schedule of compliance that exceeds one (1) year from the date of permit issuance, the schedule shall set forth interim requirements and the dates for their achievement:

8.1.c.1. The time between interim dates shall not exceed one (1) year.

8.1.c.2. If the time necessary for completion of any interim requirement is more than one (1) year and is not readily divisible into stages for completion, the permit shall specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

8.2. Alternative schedules of compliance. A permit applicant or permittee may cease conducting regulated activities rather than continue to operate and meet permit requirements as follows:

8.2.a. If the permittee decides to cease conducting regulated activities at a given time within the term of a permit that has already been issued:

8.2.a.1. The permit may be modified to contain a new or additional schedule leading to timely cessation of activities; or

8.2.a.2. The permittee shall cease conducting permitted activities before noncompliance with any interim or final compliance schedule requirement already specified in the permit.

8.2.b. If the decision to cease conducting regulated activities is made before issuance of a permit ~~whose~~ the term of which will include the termination date, the permit shall contain a schedule leading to termination that will ensure timely compliance with applicable requirements for compliance not later than the statutory deadline.

8.2.c. If the permittee is undecided whether to cease conducting regulated activities,

the Chief may issue or modify a permit to contain two (2) schedules as follows:

8.2.c.1. Both schedules shall contain an identical interim deadline requiring a final decision on whether to cease conducting regulated activities no later than a date that ensures sufficient time to comply with applicable requirement in a timely manner if the decision is to continue conducting regulated activities;

8.2.c.2. One (1) schedule shall lead to timely compliance with applicable requirements and compliance no later than the statutory deadline;

8.2.c.3. The second schedule shall lead to cessation of regulated activities by a date that will ensure timely compliance with applicable requirements or compliance no later than the statutory deadline; and

8.2.c.4. Each permit containing two (2) schedules shall include a requirement that, after the permittee has made a final decision ~~under paragraph~~ pursuant to subdivision 8.2.c.1 of this section rule, it shall follow the schedule leading to compliance if the decision is to cease conducting regulated activities.

8.2.d. If the applicant's or permittee's decision to cease conducting regulated activities shall be evidenced by a firm public commitment satisfactory to the Chief.

**§47-10-9. Modification, Revocation and Reissuance, Suspension and Revocation of Permits.**

9.1. Actions by the Chief.

9.1.a. Permits may be modified, revoked and reissued, suspended or revoked either at the request of any interested person or upon the Chief's initiative. Permits may only be modified, revoked and reissued, suspended or revoked for the reasons specified in this section. When a permit is modified, only the conditions subject to modification are reopened. All other conditions of the permit shall remain in effect for the duration of the permit. All requests

under this section shall be in writing submitted to the Chief citing facts or reasons supporting the request and indicating under which subsection the request is being made. If a permit modification is being requested ~~under~~ pursuant to an emergency declared by the Chief, an affidavit signed by a person meeting the requirements of ~~subsection 4.6 above~~ attesting to the emergency shall be filed with the request. The Chief may require additional information, and in the case of a major modification, may require submission of a new permit application. For a reissuance under ~~subdivision~~ subsection 9.2.b or subsection 9.3 below, the Chief shall require submission of a new permit application.

9.1.b. If the Chief decides the request is not justified, he or she shall send the requestor a brief written response giving the reasons for the decision. Denials of such requests are not subject to public notice, comment, or hearings.

9.1.c. Permit modifications shall be governed as follows:

9.1.c.1. If the Chief tentatively decides to modify or revoke and reissue a permit and the modification is not made ~~under~~ pursuant to subsection 9.5 below, he or she shall prepare a draft permit ~~under~~ in accordance with section 10 of this rule and shall follow the public notice procedures in section 12. The Chief may request additional information and, in the case of a modified permit, may require the submission of an updated permit application. In the case of revoked and reissued permits, the Chief shall require the submission of a new application.

9.1.c.2. In a permit modification under this section, only those conditions to be modified shall be reopened when a new draft permit is prepared. ~~All other conditions of the existing permit are prepared.~~ All other conditions of the existing permit shall remain in effect for the duration of the permit. When a permit is revoked and reissued under this section, the entire permit is reopened just as if the permit had expired and was being reissued. During any revocation and reissuance proceeding, the permittee shall comply with all conditions of the existing permit until a new final permit is reissued.

9.2. Causes for modification or permittee requested reissuance of permits.

9.2.a. Minor modifications. Permits may be modified by the Chief for any good cause as defined in subsection 9.4 of this section ~~below~~ and, unless such cause is specified in the following subsection 9.2.b, modification does not require the preparation of a draft permit or the public notice procedures of sections 10 and 12 respectively.

9.2.b. Modifications. The following are causes for modification, but not reissuance, of a permit (unless the permittee requests or agrees) and require the preparation of a draft permit ~~under in accordance with~~ section 10 and the public notice procedures of section 12 ~~of this rule~~, unless an emergency is declared by the Chief. If the permittee requests or agrees, then the following causes can be reason for a permit reissuance, which will open the entire permit for comment and change.

9.2.b.1. Alterations. There are material and substantial alterations or additions to the permitted facility or activity that justify the application of permit conditions that are different or absent in the existing permit, including the acceptance of wastes from an indirect discharger ~~under pursuant to~~ section 14 of this rule.

9.2.b.2. Information. The Chief has received new information. Permits may be modified during their terms for this cause only if information was not available at the time of permit issuance (other than revised rules, guidance, or test methods), which would have justified the application of different permit conditions at the time of issuance. For NPDES general permits, this cause shall include any information indicating that cumulative effects on the environment are unacceptable.

9.2.b.3. New rules. The standards or rules on which the permit was based have been changed by promulgation of amended standards or rules or by judicial decision after the permit was issued. Permits may be modified during their terms for this cause only as follows:

9.2.b.3.A. For promulgation of amended standards or rules when:

9.2.b.3.A.1. The permit condition to be modified was based on a promulgated rule, effluent limitation guideline, new source performance standard, pretreatment standard, or water quality standard;

9.2.b.3.A.2. The State has revised, withdrawn or modified that portion of the rule, effluent limitation guideline, new source performance standard, pretreatment standard, or water quality standard on which the permit condition was based; and

9.2.b.3.A.3. A permittee requests modification within ninety (90) days after the State Register notice of the action on which the request is based.

9.2.b.3.B. For judicial decisions, when a court of competent jurisdiction has remanded and stayed State or Federal promulgated rules, if the remand and stay concern that portion of the rules on which the permit condition was based.

9.2.b.4. Modification and extension of compliance schedules:

9.2.b.4.A. The Chief determines good cause exists for extension of a compliance schedule, such as an act of God, strike, flood or materials shortage or other event over which the permittee has little or no control and for which there is no reasonably available remedy.

9.2.b.4.B. To modify a schedule of compliance to reflect the time lost during construction of an innovation or alternative facility, in the case of a POTW that has received a grant under §202(a)(3) of the CWA for one hundred percent (100%) of the costs to modify or replace facilities constructed with a grant for innovative or alternative wastewater technology under §202(a)(2).

9.2.b.4.C. In no case shall a compliance schedule be modified to extend

beyond an applicable CWA statutory deadline for compliance.

9.2.b.5. Transfer of a permit under ~~subdivision~~ subsection 3.5.c above.

9.2.b.6. When the permittee has filed a timely request for a variance under CWA §§301(c), 301(g), 301(l), 309(k), or for “fundamentally different factors” after compliance with the procedures of ~~subsection~~ 10.2 below, as applicable.

9.2.b.7. When required to incorporate an applicable CWA §307(a) toxic effluent standard or prohibition.

9.2.b.8. When required by the “Reopener” conditions in a permit, which are established in the permit under ~~subdivision~~ subsection 6.3.c of this rule or 40 C.F.R. §403.10(e).

9.2.b.9. Upon request of a permittee who qualifies for effluent limitations on a net basis under ~~subsection~~ 7.7 above.

9.2.b.10. When a discharger is no longer eligible for net limitations, as provided in ~~subdivision~~ subsection 7.2.a above.

9.2.b.11. As necessary ~~under~~ in accordance with 40 C.F.R. §403.8(e) (compliance schedule for development of pretreatment programs).

9.2.b.12. When the level of discharge of any pollutant that is not limited in the permit exceeds the level that can be achieved by the technology-based treatment requirements appropriate to the permittee.

9.2.b.13. When the permittee begins or expects to begin to use or manufacture as an intermediate or final product or by-product any toxic pollutant that was not reported in the permit application.

9.2.b.14. Upon failure of the Chief to notify another State ~~as required by subsection 12.1~~ whose waters may be affected by a

discharge from this State, as required by section 12.1 of this rule.

9.2.b.15. A determination that the permitted activity endangers human health or the environment and cannot be regulated to acceptable levels by a permit modification.

9.2.b.16. Any of the reasons cited in ~~subsection~~ 9.4 below.

9.2.b.17. When the permittee’s effluent limitations were imposed under §402(a)(1) of the CWA and the permittee demonstrates operation and maintenance costs that are totally disproportionate from the operation and maintenance costs considered in the development of a subsequently promulgated effluent limitations guideline, but in no case may the limitations be made less stringent than the subsequent guideline.

9.2.b.18. To correct technical mistakes, such as errors in calculation or mistaken interpretations of law made in determining permit conditions.

9.2.b.19. When the discharger has installed the treatment technology considered by the permit writer in setting effluent limitations imposed under §402(a)(1) of the CWA and has properly operated and maintained the facilities, but nevertheless has been unable to achieve those effluent limitations. In this case, the limitations in the modified permit may reflect the level of pollution control actually achieved, but shall not be less stringent than required by a subsequently promulgated effluent limitations guideline.

9.2.b.20. Upon request by the permittee, following final adoption by the Board of amendments to its rules consistent with changes in EPA rules adopted as a result of the legal challenge to EPA rules in the case of *Natural Resources Defense Council v. EPA*, No. 80-1607 and consolidated cases, or other cases challenging EPA’s NPDES rules, a permit may be reopened for the limited purpose of changing any conditions that were based upon rules that have subsequently been so amended, provided

that the request is made within six (6) months of adoption of the new rules.

9.3. Reissuance. When a permit is reissued under this subsection, the entire permit is reopened, just as if the permit has expired. Reissuance requires a draft permit ~~under~~ in accordance with section 10 and the public notice procedures of section 12 ~~of this rule~~. Processing of a reissuance application does not exempt the permittee from compliance with any permit term or condition. The following are causes for reissuance:

9.3.a. Cause exists for revocation under subsection 9.4 ~~below~~ and the Chief determines reissuance is appropriate.

9.3.b. The permit was issued prior to July 1, 1974 and has no expiration date.

9.4. Suspension and revocation of permits.

9.4.a. The following are causes for revocation or suspension of a permit or for denying a permit renewal application:

9.4.a.1. Noncompliance by the permittee with any condition of the permit; or

9.4.a.2. The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant facts at any time; or

9.4.a.3. A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or revocation; or

9.4.a.4. A change in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit.

9.4.b. If the Chief tentatively decides to suspend or revoke a permit, he or she shall issue a notice of intent to suspend or revoke. A notice of intent to suspend or revoke a permit is a type of draft permit that follows the same procedures

as any draft prepared under section 10 and shall fulfill the requirements of notice ~~required~~ under Section 12 of ~~the State Act~~ this rule.

9.5. Minor modifications of permits. Upon the consent of the permittee, the Chief may modify a permit to make the corrections or allowances for changes in the permitted activity listed in this section without preparing a draft permit pursuant to section 10 or following the ~~procedures of section 12, or notice~~ procedures in Section 12 of ~~the State Act~~ this rule. Minor modifications may only:

9.5.a. Correct typographical errors.

9.5.b. Require more frequent monitoring or reporting by the permittee.

9.5.c. Change in interim compliance date in a schedule of compliance, provided the new date is not more than one hundred twenty (120) days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement.

9.5.d. Allow for a change in ownership or operational control of a facility where the Chief determines that no other change in the permit is necessary, provided that any forms prescribed by the Chief, including a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees, have been submitted to the Chief.

9.5.e. Change the construction schedule for a discharger that is a new source. No such change shall affect a discharger's obligation to have all pollution control equipment installed and in operation prior to discharge.

9.5.f. Delete a point source outlet when the discharge from that outlet is terminated and does not result in discharge of pollutants from other outlets except in accordance with permit limits.

9.5.g. Allow disposal system equipment substitution when the substituted equipment would not require new or different permit conditions.

9.5.h. Allow rerouting of discharge lines when the rerouted line would not discharge to a different receiving stream and would not require new or different permit conditions.

9.5.i. Allow relocation of elements of treatment facilities or disposal systems when the relocation would not require new or different permit conditions (for example, relocation due to topography or equipment failures).

9.5.j. Allow the addition of wastes from indirect dischargers ~~under paragraph pursuant to subdivision 14.2.b.2 below.~~

9.5.k. Incorporate substantial modifications of POTW pretreatment programs after approval is granted in accordance with the procedures of 40 C.F.R. §403.18.

#### §47-10-10. Draft Permits.

##### 10.1. Administration.

10.a. Once an application is complete, the Chief shall tentatively decide whether to prepare a draft permit or to deny the application.

10.b. If the Chief tentatively decides to issue a general permit, he or she shall prepare a draft general permit ~~under subdivision in accordance with subsection 10.1.c of this section below.~~

10.c. If a draft permit is to be prepared by the Chief, it shall contain the following information:

10.c.1. All conditions under sections 5 and 6 above;

10.c.2. All compliance schedules;

10.c.3. All monitoring requirements; and

10.c.4. Effluent limitations, standards, prohibitions and conditions and all variances that are to be included.

10.d. All draft permits shall be provided to permittees, shall be accompanied by a fact sheet if required under section 11 of this rule, and shall be publicly noticed and available for public comment in accordance with section 12.

##### 10.2. Decision on variances.

10.2.a. The Chief may grant or deny requests based on 40 C.F.R. §125 and concurrence with EPA for the following variances:

10.2.a.1. Extensions under CWA §302(I) based on delay in completion of a publicly owned treatment works;

10.2.a.2. After consultation with the Regional Administrator, extensions under CWA §301(k) based on the use of innovative technology; or

10.2.a.3. Variances under CWA §316(a) for thermal pollution.

10.2.b. The Chief may deny, forward to the Regional Administrator with a written concurrence, or submit to EPA without recommendation a completed request for:

10.2.b.1. A variance based on the presence of "fundamentally different factors" from those on which an effluent limitations guideline was based;

10.2.b.2. A variance based on the economic capability of the applicant ~~under pursuant to CWA §301(c);~~ or

10.2.b.3. A variance based upon certain water quality factors ~~under listed in CWA §301(g).~~

10.2.c. The Regional Administrator may deny, forward, or submit to the EPA Deputy Assistant Administrator for Water Enforcement with a recommendation for approval a request for a variance ~~listed in subdivision that has been forwarded by the Chief in accordance with subsection 10.2.b of this section above that is forwarded by the chief.~~

10.2.d. The EPA Deputy Assistant Administrator for Water Enforcement may approve or deny any variance request submitted ~~under subdivision pursuant to subsection 10.2.c of this section above. if the Deputy Assistant Administrator approves the variance.~~ Any public notice of a draft permit for which a variance or modification has been approved or denied shall identify the applicable procedures for appealing that decision under 40 C.F.R. §124.64.

#### §47-10-11. Fact Sheet.

11.1. A fact sheet shall be prepared for every draft permit for a major facility or activity, for every general permit, for every draft permit that incorporates a variance, and for every draft permit that the Chief finds is the subject of widespread public interest or raises major issues. The fact sheet shall briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. The Chief shall send this fact sheet to the applicant, to the persons required by subsection 12.1.e of this rule to receive notice and, on request, to any other person ~~and to the persons required under subdivision 12.1.e.~~

11.2. When a term or condition of the final permit differs from the draft permit, the Chief shall prepare a statement of basis that briefly describes each change from the changes in the draft permit and the reasons for them. The statement of basis shall be sent to the applicant and, on request, to any other person.

11.3. The fact sheet shall include, when applicable:

11.3.a. A brief description of the type of facility or activity that is the subject of the draft permit.

11.3.b. The type and quantity of wastes, fluids, or pollutants that are proposed to be or are being discharged.

11.3.c. A brief summary of the basis for the draft permit conditions, including references to applicable statutory or regulatory provisions.

11.3.d. Reasons why any requested variances or alternatives to required standards do or do not appear justified.

11.3.e. A description of the procedures for reaching a final decision on the draft permit including:

11.3.e.1. The beginning and ending dates of the comment period ~~under subsection 12.1~~ and the address where comments will be received, in accordance with section 12 of this rule;

11.3.e.2. Procedures for requesting a hearing and the nature of that hearing; and

11.3.e.3. Any other procedures by which the public may participate in the final decision.

11.3.f. Name and telephone number of a person to contact for additional information.

11.3.g. Any calculations or other necessary explanation of the derivation from specific effluent limitations and conditions, including a citation to the applicable effluent limitation guideline or performance standard provisions and reasons why they are applicable or an explanation of how the alternate effluent limitations were developed.

11.3.h. When the draft permit contains any of the following conditions, a full and documented explanation of the reasons ~~by~~ why such conditions are appropriate:

11.3.h.1. Limitations to control toxic pollutants under ~~subdivision~~ subsection 6.3.f above;

11.3.h.2. Limitations on internal waste streams under ~~subsection 7.8~~ above;

11.3.h.3. Limitations on indicator pollutants under 40 C.F.R. §125.3(g);

11.3.h.4. For every permit to be issued to a privately owned treatment works, an explanation of the Chief's decision on regulation

of users ~~under~~ subdivision pursuant to subsection 6.3.k above;

11.3.h.5. Conditions ~~under~~ subdivision listed in subsection 6.3.d above; or

11.3.i. When appropriate, a sketch or detailed description of the location of the discharge described in the application.

## §47-10-12. Public Comment, and Hearings and Effective Date of Permit.

### 12.1. Public notice.

#### 12.1.a. Scope:

12.1.a.1. Public notice shall be given that the following actions have occurred:

12.1.a.1.A. A draft permit has been prepared; and

12.1.a.1.B. A hearing has been scheduled ~~under~~ subsection 12.3 of this rule.

12.1.a.2. Public notices may describe more than one (1) permit or permit action.

#### 12.1.b. Timing;

12.1.b.1. Public notice of the preparation of a draft permit shall allow at least thirty (30) days for public comment. Upon request of the permittee, the public comment period will be extended for an additional thirty (30) days. Further extension of the comment period may be granted by the Chief for good cause shown, but in no case may the further extension exceed an additional thirty (30) days.

12.1.b.2. Public notice of a public hearing shall be given at least thirty (30) days before the hearing. Public notice of the hearing may be given at the same time as public notice of the draft permit and the two (2) notices may be combined.

12.1.c. Methods. Public notice shall be given by the following methods:

12.1.c.1. By mailing a copy of a notice to the following persons (any person otherwise entitled to receive notice under this ~~paragraph~~ subsection may waive his or her right to receive notice for any classes and categories of permits):

12.1.c.1.A. The applicant;

12.1.c.1.B. Any other State or Federal agency that the Chief knows has issued or is required to issue a permit for the same facility or activity under any of the following Federal programs: RCRA, UIC, 404 and PSD;

12.1.c.1.C. Federal, State, and interstate agencies with jurisdiction over fish, wildlife resources, public health, the Historic Preservation Unit of the State Division of Culture and History, and other appropriate government authorities, including any affected states and ~~including~~ the United States Army Corps of Engineers;

12.1.c.1.D. Any State agency responsible for plan development under CWA §§308(b)(2), 208(b)(4) or 303(e);

12.1.c.1.E. Any user identified in the permit application of a privately owned treatment works;

12.1.c.1.F. Persons on a mailing list developed by:

12.1.c.1.F.1. Including those who request in writing to be on the list;

12.1.c.1.F.2. Soliciting persons for "area lists" from participants in past permit proceedings in that area; and

12.1.c.1.F.3. Notifying the public of the opportunity to be put on the mailing list through periodic publication in the public press and in such publications as regional and State funded newsletters or environmental bulletins. The Chief may update the mailing list from time to time by requesting written indication of continued interest from those listed. The Chief may delete from the list the

name of any person who fails to respond to such a request.

12.1.c.1.G. Any unit of local government having jurisdiction over the area where the facility is proposed to be located.

12.1.c.2. By the Chief publishing the public notice as a Class I legal advertisement in a qualified newspaper with the largest circulation for the county where the discharge will occur. The cost of the publication will be borne by the applicant who must send a certificate of publication to the ~~Division~~ Chief within twenty (20) days after publication.

12.1.c.3. Any other method reasonably calculated to give actual notice of the action in question to the persons potentially affected by it, including press releases or any other forum or medium to elicit public participation.

#### 12.1.d. Contents:

12.1.d.1. All public notices. All public notices issued under this part shall contain the following minimum information:

12.1.d.1.A. Name and address of the office processing the permit action for which notice is being given;

12.1.d.1.B. Name and address of the permittee or permit applicant and, if different, of the facility or activity regulated by the permit, except in the case of general permits;

12.1.d.1.C. A brief description of the business conducted at the facility or activity described in the permit application or in the draft permit when there is no application;

12.1.d.1.D. Name, address and telephone number of a person from whom interested persons may obtain further information, including copies of the draft permit or draft general permit, fact sheet, and application;

12.1.d.1.E. A brief description of the comment procedures required by

subsections 12.2 and 12.3 below and the time and place of any hearing that will be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled) and other procedures by which the public may participate in the final permit decision; and

12.1.d.1.F. A general description of the location of each existing or proposed discharge point and the name of the receiving water. For draft general permits, this requirement will be satisfied by a map or description of the permit area.

12.1.d.2. Public notices for hearings. In addition to the requirements of ~~paragraph subdivision~~ subdivision 12.1.d.1. ~~of this section above~~, public notice of a hearing shall contain the following information:

12.1.d.2.A. Reference to the date of previous public notices relating to the permit;

12.1.d.2.B. Date, time, and place of the hearing; and

12.1.d.2.C. A brief description of the nature and purpose of the hearing, including the applicable rules and procedures.

12.1.d.3. Special requirements. Public notice of a draft permit for a discharge where a CWA §316(a) request has been filed shall include:

12.1.d.3.A. A statement that the thermal component of the discharge is subject to effluent limitations under CWA §§301 or 306 and a brief description, including a quantitative statement, of the thermal effluent limitations proposed under §§301 or 306;

12.1.d.3.B. A statement that a §316(a) request has been filed, that alternative less stringent effluent limitations may be imposed on the thermal component of the discharge under §316(a), and a brief description, including a quantitative statement of the alternative effluent limitations, if any, included in the request; and

12.1.d.3.C. If the applicant has filed an early screening request ~~under~~ pursuant to 40 C.F.R. §125.72 for a CWA §316(a) variance, a statement that the applicant has submitted such a plan.

12.1.e. In addition to the general public notice described in ~~paragraph~~ subdivision 12.1.d.1 ~~of this section above~~, all persons identified in paragraphs 12.1.c.1.A, 12.1.c.1.B, ~~subparagraphs~~ 12.1.c.1.C, 12.1.c.1.D, and 12.1.c.1.G of this section shall be mailed a copy of the fact sheet, if any, and notification of where to inspect or how to receive a copy of the draft permit and application.

12.2. Public comments and requests for public hearings. During the public comment period provided under ~~subsection~~ 12.1 ~~above~~, any interested person may submit written comments on the draft permit and may request a public hearing if no public hearing has already been scheduled. A request for a public hearing shall be in writing and shall state the nature of the issues proposed to be raised in the hearing. All comments shall be considered in making the final decision and shall be answered as provided in ~~subsection~~ 12.4 ~~below~~.

### 12.3. Public hearings.

12.3.a. The Chief shall hold a public hearing whenever he or she finds, on the basis of requests, a significant degree of public interest on issues relevant to the draft permit(s). The Chief also may hold a public hearing at his or her discretion whenever, for instance, such a hearing might clarify one (1) or more issues involved in the permit decision.

12.3.b. Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing ~~under~~ subdivision pursuant to subsection 12.1.b ~~above~~ shall automatically be extended to ten (10) days after the close of any public hearings under this section.

12.3.c. A tape recording or written transcript of the hearing shall be made available to the public upon request.

12.4. Reopening of the public comment period.

12.4.a. If any data, information or arguments submitted during the public comment period raise substantial new questions concerning a permit, if as a result of comments submitted by someone other than the permittee, or if the Chief determines to revise any condition of the permit that had been sent to initial public notice, the Chief shall take one (1) or more of the following actions:

12.4.a.1. Prepare a new draft permit, appropriately modified ~~under~~ in accordance with section 10 of this rule;

12.4.a.2. Prepare a revised fact sheet ~~under~~ pursuant to section 11 above and reopen the comment period under this section; or

12.4.a.3. Reopen or extend the comment period under subsection 12.1 to give interested persons an opportunity to comment on the information or arguments submitted.

12.4.b. Comments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening. The public notice shall define the scope of the reopening.

### 12.5. Response to comments.

12.5.a. At the time that any final permit is issued, the Chief shall issue a response to comments. This response shall:

12.5.a.1. Specify which provisions, if any, of the draft permit have been changed in the final permit decision and the reasons for the change; and

12.5.a.2. Briefly describe and respond to all significant comments on the draft permit raised during the public comment period or during any hearing.

12.5.b. The response to comments shall be delivered to any person who commented or any person who requests the same.

12.6. Public comment by government agencies.

12.6.a. If during the comment period for a draft permit, the District Engineer of the United States Army Corps of Engineers advises the Chief in writing that anchorage and navigation of any of the waters of the State would be substantially impaired by the granting of a permit, the permit shall be denied and the applicant so notified. If the District Engineer advises the Chief that imposing specified conditions upon the permit is necessary to avoid any substantial impairment of anchorage or navigation, then the Chief shall include the specified conditions in the permit. Review or appeal of denial of a permit under this section or of conditions specified by the District Engineer shall be made through the applicable procedures of the Corps of Engineers and may not be made under the provisions of this ~~part~~ rule. If the conditions are stayed by a court of competent jurisdiction or by applicable procedures of the Corps of Engineers, those conditions shall be stayed in the State NPDES permit for the duration of that stay.

12.6.b. If during the comment period, any other State or Federal agency with jurisdiction over fish, wildlife, or public health advises the Chief in writing that the imposition of specified conditions upon the permit is necessary to avoid substantial risk to public health or impairment of fish, shellfish or wildlife resources, the Chief may include the specified conditions in the permit to the extent they are determined necessary to carry out the provisions of the CWA and the State Act.

12.6.c. In appropriate cases the Chief may consult with one (1) or more of the agencies referred to in this section before issuing a draft permit. ~~and may reflect their views in the fact sheet or the draft permit~~ The views of those agencies may be reflected in the fact sheet or draft permit.

12.7. Public access to information.

12.7.a. Any information (except effluent data, application forms, and information in permits) submitted pursuant to these rules may be claimed as confidential by the submitter. Any such claim must be asserted at the time of submission in the manner prescribed on the application form or, in the case of other submissions, by stamping the words "CONFIDENTIAL BUSINESS INFORMATION" on each page containing such information. If no claim is made at the time of submission, the Chief may make the information available to the public without further notice.

12.7.b. Any information claimed to be confidential shall be forwarded to the Regional Administrator for his or her concurrence in any determination of confidentiality.

12.7.c. Such information shall be subject to appropriate Federal regulations governing confidentiality.

12.8. Issuance and effective date of permit.

12.8.a. After the close of the public comment period ~~under subsection 12.2~~ on a draft permit, the Chief shall issue a final permit decision. The Chief shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. This notice shall include reference to the procedures for appealing the decision. For the purposes of this section, a final permit decision means a final decision to issue, deny, modify, revoke and reissue, or terminate a permit.

12.8.b. A final permit decision shall become effective not less than thirty (30) days after the date of notice of the decision ~~under subdivision pursuant to subsection 12.8.a of this section above.~~

#### §47-10-13. Special NPDES Programs.

13.1. Concentrated animal feeding operations.

13.1.a. ~~Permit requirement. Concentrated animal feeding operations are~~

point sources subject to the NPDES permit program.

13.1.b. Definitions:

13.1.b.1. "Animal Feeding Operation" means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

13.1.b.1.A. Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of forty five (45) days or more in a twelve (12) month period, and

13.1.b.1.B. Crops, vegetation forage growth, or post harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

13.1.b.2. Two (2) or more animal feeding operations under common ownership are considered, for the purposes of this rule, 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.

13.1.b.3. "Concentrated Animal Feeding Operation" means an "Animal Feeding Operation" which meets the criteria in Appendix B, or which the chief designates under subdivision 13.1.c of this section.

13.1.c. Case by case designation of concentrated animal feeding operations:

13.1.c.1. The chief may designate any animal feeding operation as a concentrated animal feeding operation upon determining that it is a significant contributor of pollution to the waters of the State. In making this designation the chief shall consider the following factors:

13.1.c.1.A. The size of the animal feeding operation and the amount of wastes reaching waters of the State;

13.1.c.1.B. The location of the animal feeding operation relative to waters of the State;

13.1.c.1.C. The means of conveyance of animal wastes and process wastewaters into waters of the State;

13.1.c.1.D. The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes and process wastewaters into waters of the State; and

13.1.c.1.E. Other relevant factors.

13.1.c.2. No animal feeding operation with less than the numbers of animals set forth in Appendix B shall be designated as a concentrated animal feeding operation unless:

13.1.c.2.A. Pollutants are discharged into the waters of the State through a man made ditch, flushing system, or other similar man made device; or

13.1.c.2.B. Pollutants are discharged directly into the waters of the State which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

13.1.c.3. A permit application shall not be required from a concentrated animal feeding operating designated under this paragraph until the chief has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program.

13.1.a. Concentrated animal feeding operations (CAFOs), as defined in subsection 13.1.b. or designated in accordance with subsection 13.1.c. of this rule, are point sources subject to NPDES permitting requirements as provided herein. Once an animal feeding operation is defined as a CAFO for at least one (1) type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, or process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

13.1.b. Definitions applicable to this section:

13.1.b.1. "Animal feeding operation" ("AFO") means a lot or facility, other than an aquatic animal production facility, where the following conditions are met:

13.1.b.1.A. Animals other than aquatic animals have been, are or will be stabled or confined and fed or maintained for a total of forty-five (45) days or more in any twelve (12) month period, and

13.1.b.1.B. Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

13.1.b.2. "Concentrated animal feeding operation" ("CAFO") means an AFO that is defined or designated as a Large CAFO or as a Medium CAFO by the terms of this rule. Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation if they adjoin each other or if they use a common area or system for the disposal of wastes.

13.1.b.3. "Land application area" means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied.

13.1.b.4. "Large concentrated animal feeding operation" ("Large CAFO") means an AFO that:

13.1.b.4.A. Stables or confines as many as or more than the number of animals specified in any of the following categories:

13.1.b.4.A.1. Seven hundred (700) mature dairy cows, whether milked or dry;

13.1.b.4.A.2. One thousand (1,000) veal calves;

13.1.b.4.A.3. One thousand (1,000) cattle other than mature dairy cows or veal calves. Cattle includes, but is not limited to, heifers, steers, bulls and cow/calf pairs;

13.1.b.4.A.4. Two thousand five hundred (2,500) swine, each weighing fifty-five (55) pounds or more;

13.1.b.4.A.5. Ten thousand (10,000) swine, each weighing less than fifty-five (55) pounds;

13.1.b.4.A.6. Five hundred (500) horses;

13.1.b.4.A.7. Ten thousand (10,000) sheep or lambs;

13.1.b.4.A.8. Fifty-five thousand (55,000) turkeys;

13.1.b.4.A.9. Thirty thousand (30,000) laying hens or broilers, if the AFO uses a liquid manure handling system;

13.1.b.4.A.10. One hundred twenty-five thousand (125,000) chickens other than laying hens, if the AFO uses other than a liquid manure handling system;

13.1.b.4.A.11. Eighty-two thousand (82,000) laying hens, if the AFO uses other than a liquid manure handling system;

13.1.b.4.A.12. Thirty thousand (30,000) ducks, if the AFO uses other than a liquid manure handling system; or

13.1.b.4.A.13. Five thousand (5,000) ducks, if the AFO uses a liquid manure handling system); and

13.1.b.4.B. Either one of the following conditions is met:

13.1.b.4.B.1. Pollutants are discharged into waters of West Virginia through a man-made ditch, flushing system or other similar man-made device; or

13.1.b.4.B.2. Pollutants are discharged directly into waters of West Virginia that originate outside of and pass over, across or through the facility or otherwise come into direct contact with the animals confined in the operation.

13.1.b.5. "Manure" is defined to include manure, bedding, compost and raw materials or

other materials commingled with manure or set aside for disposal.

13.1.b.6. "Medium concentrated animal feeding operation" ("Medium CAFO") means an AFO that:

13.1.b.6.A. Stables or confines the type and number of animals that fall within the following ranges:

13.1.b.6.A.1. Two hundred (200) to six hundred ninety-nine (699) mature dairy cows, whether milked or dry;

13.1.b.6.A.2. Three hundred (300) to nine hundred ninety-nine (999) veal calves;

13.1.b.6.A.3. Three hundred (300) to nine hundred ninety-nine (999) cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;

13.1.b.6.A.4. Seven hundred fifty (750) to two thousand four hundred ninety-nine (2,499) swine, each weighing fifty-five (55) pounds or more;

13.1.b.6.A.5 Three thousand (3,000) to nine thousand nine hundred ninety-nine (9,999) swine, each weighing less than fifty-five (55) pounds;

13.1.b.6.A.6. One hundred fifty (150) to four hundred ninety-nine (499) horses;

13.1.b.6.A.7. Three thousand (3,000) to nine thousand nine hundred ninety-nine (9,999) sheep or lambs;

13.1.b.6.A.8. Sixteen thousand five hundred (16,500) to fifty-four thousand nine hundred ninety-nine (54,999) turkeys;

13.1.b.6.A.9. Nine thousand (9,000) to twenty-nine thousand nine hundred ninety-nine (29,999) laying hens or broilers, if the AFO uses a liquid manure handling system;

13.1.b.6.A.10. Thirty-seven thousand five hundred (37,500) to one hundred twenty-four thousand nine hundred ninety-nine (124,999) chickens other than laying hens, if the

AFO uses other than a liquid manure handling system;

13.1.b.6.A.11. Twenty-five thousand (25,000) to eight-one thousand nine hundred ninety-nine (81,999) laying hens, if the AFO uses other than a liquid manure handling system;

13.1.b.6.A.12. Ten thousand (10,000) to twenty-nine thousand nine hundred ninety-nine (29,999) ducks, if the AFO uses other than a liquid manure handling system; or

13.1.b.6.A.13. One thousand five hundred (1,500) to four thousand nine hundred ninety-nine (4,999) ducks, if the AFO uses a liquid manure handling system; and

13.1.b.6.B. Either one of the following conditions is met:

13.1.b.6.B.1. Pollutants are discharged into waters of West Virginia through a man-made ditch, flushing system or other similar man-made device; or

13.1.b.6.B.2. Pollutants are discharged directly into waters of West Virginia that originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

13.1.b.7. "Process wastewater" means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning or flushing pens, barns, manure pits or other AFO facilities; direct contact swimming, washing, or spray-cooling of animals; or dust control. Process wastewater also includes any water that comes into contact with any raw materials, products or byproducts, including manure, litter, feed, milk, eggs or bedding.

13.1.b.8. "Production area" means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns,

free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under-house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions that separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility and any area used in the storage, handling, treatment, or disposal of mortalities.

13.1.b.9. "Small concentrated animal feeding operation" ("Small CAFO") means an AFO that is designated as a CAFO and is not a Medium CAFO as defined above.

13.1.c. The appropriate authority (i.e., Chief or Regional Administrator or both, as specified in subdivision 13.1.c.1. below) may designate any AFO as a CAFO upon determining that it is a significant contributor of pollutants to the waters of West Virginia.

13.1.c.1. CAFO designations shall be made by the Chief. The Regional Administrator may also designate CAFOs, but only where the Regional Administrator has determined that one or more pollutants in the AFO's discharge contributes to an impairment in a downstream or adjacent State or Indian country water that is impaired for that pollutant.

13.1.c.2. In making this designation, the Chief or the Regional Administrator shall consider the following factors:

13.1.c.2.A. The size of the AFO and the amount of waste reaching the waters of West Virginia;

13.1.c.2.B. The location of the AFO relative to the waters of West Virginia;

13.1.c.2.C. The means of conveyance of animal wastes and process wastewaters into the waters of West Virginia;

13.1.c.2.D. The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes, manure, and process wastewaters into the waters of West Virginia; and

13.1.c.2.E. Other relevant factors.

13.1.c.3. No AFO shall be designated under this section unless the Chief or the Regional Administrator has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program. In addition, no AFO with numbers of animals below those established in subdivision 13.1.b.6 of this rule may be designated as a CAFO unless:

13.1.c.3.A. Pollutants are discharged into the waters of West Virginia through a manmade ditch, flushing system or other similar manmade device; or

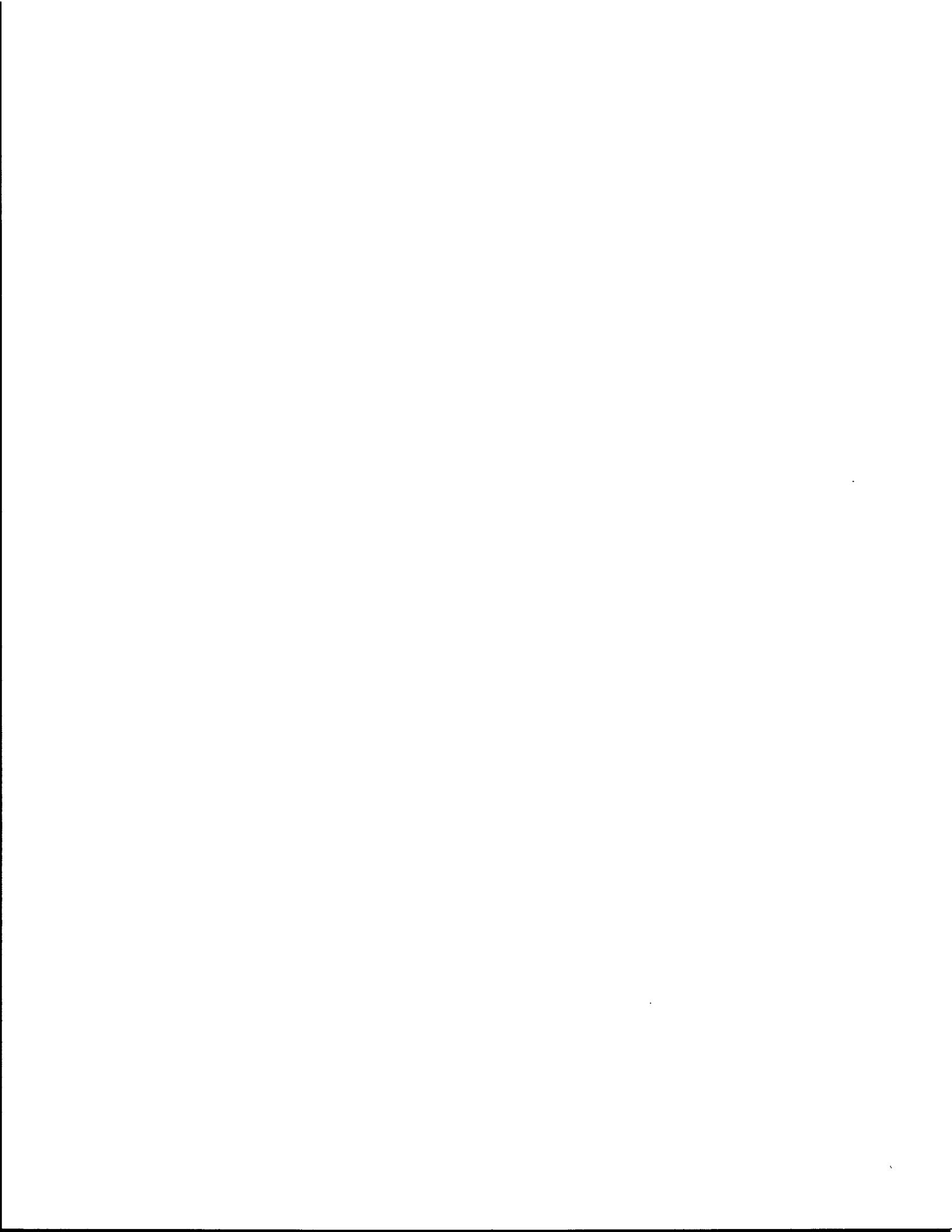
13.1.c.3.B. Pollutants are discharged directly into the waters of West Virginia that originate outside of the facility and pass over, across or through the facility or otherwise come into direct contact with the animals confined in the operation.

#### 13.1.d. Permit Requirement

13.1.d.1. The owner or operator of a CAFO must apply for an individual NPDES permit if the CAFO discharges or proposes to discharge into the waters of West Virginia. A CAFO proposes to discharge if it is designed, constructed, operated or maintained such that a discharge will occur.

13.1.d.2. A permit application for an individual permit must include the information specified in subdivision 4.4.c.1 above.

13.1.e. Land application discharges from a CAFO are subject to NPDES requirements. The discharge of manure, litter or process wastewater to waters of West Virginia from a CAFO as a result of the application of manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water



discharge as provided in 33 U.S.C. § 1362(14). For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural storm water discharge.

13.1.e.1. For unpermitted Large CAFOs, a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of the CAFO shall be considered an agricultural storm water discharge only where the manure, litter or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in paragraphs 13.1.h.1.A through 13.1.h.1.I below.

13.1.e.2. Unpermitted Large CAFOs must maintain documentation specified in paragraph 13.1.h.1.I. below, either on site or at a nearby office or otherwise make such documentation readily available to the Chief or Regional Administrator upon request.

13.1.f. Any CAFO that is required to seek permit coverage under subdivision 13.1.d.1. of this rule must seek coverage when the CAFO proposes to discharge.

13.1.f.1. New sources. The owner or operator of a new source must seek to obtain coverage under a permit at least one hundred eighty (180) days prior to the time that the CAFO commences operation.

13.1.f.2. Expansion of AFO to CAFO. For other operations (e.g. resulting from an increase in the number of animals), as soon as possible, but no later than ninety (90) days after becoming defined as a CAFO.

13.1.f.3. Operations that are designated as CAFOs. For an operation designated as a CAFO in accordance with subsection 13.1.c. above, the owner or operator must seek to obtain

a permit no later than ninety (90) days after receiving notice of the designation.

13.1.g. Duty to Maintain Permit Coverage. No later than one hundred eighty (180) days before the expiration of the permit, or as provided by the Chief, any permitted CAFO must submit an application to renew its permit in accordance with subdivision 4.4.c.1 of this rule, unless the CAFO will not discharge or propose to discharge upon expiration of the permit.

13.1.h. Additional conditions applicable to NPDES permits issued to CAFOs. Any permit issued to a CAFO must include the following:

13.1.h.1. Requirement to implement a nutrient management plan. Any permit issued to a CAFO must include a requirement to implement a nutrient management plan (NMP) that, at a minimum, contains BMPs necessary to meet the requirements of this section and applicable effluent limitations and standards, including those specified in 40 C.F.R. §412. The NMP must, to the extent applicable:

13.1.h.1.A. Ensure adequate storage of manure, litter, and process wastewater, including procedures to ensure proper operation and maintenance of the storage facilities;

13.1.h.1.B. Ensure proper management of mortalities (i.e. dead animals) to make certain 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;

13.1.h.1.C. Ensure that clean water is diverted, as appropriate, from the production area;

13.1.h.1.D. Prevent direct contact of confined animals with waters of West Virginia;

13.1.h.1.E. Ensure that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater or storm water storage or treatment system, unless such system is specifically

designed to treat such chemicals and other contaminants:

13.1.h.1.F. Identify appropriate site-specific conservation practices to be implemented, including as appropriate buffers or equivalent practices to control runoff of pollutants into the waters of West Virginia;

13.1.h.1.G. Identify protocols for appropriate testing of manure, litter, process wastewater, and soil;

13.1.h.1.H. Establish protocols to land-apply manure, litter and/or process wastewater in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter and/or process wastewater; and

13.1.h.1.I. Identify specific records that will be maintained to document the implementation and management of the minimum elements described hereinabove.

13.1.h.2. Recordkeeping requirements.

13.1.h.2.A. The permittee must create, maintain for five (5) years, and make available to the Chief upon request the following records:

13.1.h.2.A.1. All applicable records identified in paragraph 13.1.h.1.I above;

13.1.h.2.A.2. In addition, all CAFOs subject to 40 C.F.R. §412 must comply with the recordkeeping requirements of 40 C.F.R. §412.37(b) and (c) and 40 C.F.R. §412.47(b) and (c).

13.1.h.2.B. A copy of the CAFO's site-specific NMP must be maintained on site and made available to the Chief upon request.

13.1.h.3. Requirements relating to the transfer of manure or process wastewater to other persons. Prior to transferring manure, litter or process wastewater to other persons, Large CAFOs must provide the recipient of the manure, litter or process wastewater with the most current nutrient analysis. The analysis provided must be consistent with the

requirements of 40 C.F.R. §412. Large CAFOs must retain for five (5) years records of the recipient's name and address, approximate amount of manure, litter or process wastewater transferred, and the date of the transfer.

13.1.h.4. Annual reporting requirements for CAFOs. The permittee must submit an annual report to the Chief, which must include:

13.1.h.4.A. The number and type of animals, as listed in paragraphs 13.1.b.4 and 13.1.b.6 above, whether in open confinement or housed under roof;

13.1.h.4.B. The estimated amount of total manure, litter and/or process wastewater generated by the CAFO in the previous twelve (12) months, measured in tons or gallons;

13.1.h.4.C. The estimated amount of total manure, litter and/or process wastewater transferred to another person by the CAFO in the previous twelve (12) months, measured in tons or gallons;

13.1.h.4.D. The total number of acres of land application covered by the NMP developed in accordance with this rule;

13.1.h.4.E. The total number of acres under the control of the CAFO that were used for land application of manure, litter and/or process wastewater in the previous twelve (12) months;

13.1.h.4.F. A summary of all manure, litter and/or process wastewater discharges from the production area in the previous twelve (12) months, including date, time, and approximate volume;

13.1.h.4.G. A statement indicating whether the current version of the CAFO's NMP was developed or approved by a certified nutrient management planner; and

13.1.h.4.H. The actual crop(s) planted and actual yield(s) for each field, the actual nitrogen and phosphorus content of the manure, litter and/or process wastewater, the results of calculations conducted in accordance with subparagraphs 13.1.h.5.A.2 and 13.1.h.5.B.4 below, and the amount of manure,

litter and/or process wastewater applied to each field during the previous twelve (12) months; and, for any CAFO that implements a NMP that addresses rates of application in accordance with paragraph 13.1.h.5.B of this rule, the results of any soil testing for nitrogen or phosphorus taken during the preceding twelve (12) months, the data used in calculations conducted in accordance with subparagraph 13.1.h.5.B.4 below, and the amount of any supplemental fertilizer applied during the previous twelve (12) months.

13.1.h.5. Terms of the NMP. Any permit issued to a CAFO must require compliance with the terms of the CAFO's site-specific NMP. The terms of the NMP are the information, protocols, BMPs, and other conditions determined by the Chief to be necessary to meet the requirements of subdivision 13.1.h.1 above. The terms of the NMP with respect to protocols for land application of manure, litter or process wastewater required by paragraph 13.1.h.1.H above and, if applicable, 40 C.F.R. §412.4(c), must include the fields available for land application; field-specific rates of application, properly developed in accordance with paragraphs 13.1.h.5.A through 13.1.h.5.B below, to ensure appropriate agricultural utilization of the nutrients in the manure, litter and/or process wastewater; and any timing limitations identified in the NMP concerning land application on the fields available for such use. The terms must address rates of application using one of the following two approaches, unless the Chief specifies that a certain approach must be used:

13.1.h.5.A. Linear approach. An approach that expresses rates of application as pounds of nitrogen and phosphorus, according to the following specifications:

13.1.h.5.A.1. The terms include maximum application rates from manure, litter and/or process wastewater for each year of permit coverage for each crop identified in the NMP, in chemical forms determined to be acceptable to the Chief, in pounds per acre per year for each field to be used for land application, and certain factors necessary to determine such rates. At a minimum, the factors

that are terms must include: the outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field; the crops to be planted in each field or any other uses of a field, such as pasture or fallow fields; the realistic yield goal for each crop or use identified for each field; the nitrogen and phosphorus recommendations from sources specified by the Chief for each crop or use identified for each field; credits for all nitrogen in the field that will be plant-available; consideration of multi-year phosphorus application; and accounting for all other additions of plant-available nitrogen and phosphorus to the field. In addition, the terms include the form and source of manure, litter and/or process wastewater to be land-applied; the timing and method of land application; and the methodology by which the NMP accounts for the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied.

13.1.h.5.A.2. Large CAFOs that use this approach must calculate the maximum amount of manure, litter and/or process wastewater to be land-applied at least once each year, using the results of the most recent representative manure, litter and/or process wastewater tests for nitrogen and phosphorus taken within twelve (12) months of the date of land application.

13.1.h.5.B. Narrative rate approach. An approach that expresses rates of application as a narrative rate of application that results in the amount in tons or gallons of manure, litter and/or process wastewater to be land-applied, according to the following specifications:

13.1.h.5.B.1. The terms include maximum amounts of nitrogen and phosphorus derived from all sources of nutrients for each crop identified in the NMP, in chemical forms determined to be acceptable to the Chief, in pounds per acre for each field, and certain factors necessary to determine such amounts. At a minimum, the factors that are terms must include: the outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field; the crops to be planted in each field or any other uses of a field, such as pasture or fallow fields (including

alternative crops identified in subparagraph 13.1.h.5.B.2 below); the realistic yield goal for each crop or use identified for each field; and the nitrogen and phosphorus recommendations from sources specified by the Chief for each crop or use identified for each field. In addition, the terms include the methodology by which the NMP accounts for the following factors when calculating the amounts of manure, litter and/or process wastewater to be land applied: results of soil tests conducted in accordance with protocols identified in the NMP required by paragraph 13.1.h.1.G of this rule; credits for all nitrogen in the field that will be plant-available; the amount of nitrogen and phosphorus in the manure, litter and/or process wastewater to be applied; consideration of multi-year phosphorus application; accounting for all other additions of plant-available nitrogen and phosphorus to the field; the form and source of manure, litter, and process wastewater; the timing and method of land application; and volatilization of nitrogen and mineralization of organic nitrogen.

13.1.h.5.B.2. The terms of the NMP include alternative crops identified in the CAFO's NMP that are not in the planned crop rotation. Where a CAFO includes alternative crops in its nutrient management plan, the crops must be listed in field, in addition to the crops identified in the planned crop rotation for that field, and the NMP must include realistic crop yield goals and the nitrogen and phosphorus recommendations from sources specified by the Chief for each crop. Maximum amounts of nitrogen and phosphorus from all sources of nutrients and the amounts of manure, litter and/or process wastewater to be applied must be determined in accordance with the methodology described in subparagraph 13.1.h.5.B.1 above.

13.1.h.5.B.3. For CAFOs using this approach, the following projections must be included in the NMP submitted to the Chief, but are not terms of the NMP the CAFO's planned crop rotations for each field for the period of permit coverage; the projected amount of manure, litter and/or process wastewater to be applied; projected credits for all nitrogen in the field that will be plant-available; consideration of multi-year phosphorus application; accounting for all other additions of plant-available nitrogen and phosphorus to the field;

and the predicted form, source, and method of application of manure, litter and/or process wastewater for each crop. Timing of application for each field, insofar as it concerns the calculation of rates of application, is not a term of the NMP.

13.1.h.5.B.4. CAFOs that use this approach must calculate maximum amounts of manure, litter and/or process wastewater to be land-applied at least once each year, using the methodology required by subparagraph 13.1.h.5.B.1 above, before land-applying manure, litter and/or process wastewater and must rely on the following data:

13.1.h.5.B.4.a. A field-specific determination of soil levels of nitrogen and phosphorus, including for nitrogen a concurrent determination of nitrogen that will be plant-available consistent with the methodology required by subparagraph 13.1.h.5.B.1 above, and for phosphorus, the results of the most recent soil test conducted in accordance with soil testing requirements approved by the Chief; and

13.1.h.5.B.4.b. The results of most recent representative manure, litter and/or process wastewater tests for nitrogen and phosphorus, taken within twelve (12) months of the date of land application, in order to determine the amount of nitrogen and phosphorus in the manure, litter and/or process wastewater to be applied.

13.1.h.6. Changes to a NMP. Any permit issued to a CAFO must require the following procedures to apply when a CAFO owner or operator makes changes to the NMP previously submitted to the Chief:

13.1.h.6.A. The CAFO owner or operator must provide the Chief with the most current version of the its NMP and identify changes from the previous version, except that the results of calculations made in accordance with the requirements of subparagraphs 13.1.h.5.A.2 and 13.1.h.5.B.4 of this rule are not subject to the requirements of subdivision 13.1.h.6.

13.1.h.6.B. The Chief must review the revised NMP to ensure that it meets the requirements of this section and applicable

effluent limitations and standards, including those specified in 40 C.F.R. §412, and must determine whether the changes to the NMP necessitate revision to the terms of the NMP incorporated into the permit issued to the CAFO. If revision to the terms of the NMP is not necessary, the Chief must notify the CAFO owner or operator and, upon such notification, the CAFO may implement the revised NMP. If revision to the terms of the NMP is necessary, the Chief must determine whether such changes are substantial changes as described in paragraph 13.1.h.6.C below.

13.1.h.6.B.1. If the Chief determines that the changes to the terms of the NMP are not substantial, the Chief must make the revised NMP publicly available and include in it the permit record, revise the terms of the NMP, notify the owner or operator, and inform the public of any changes to the terms of the NMP that are incorporated into the permit.

13.1.h.6.B.2. If the Chief determines that the changes to the terms of the NMP are substantial, the Chief must notify the public and make the proposed changes and the information submitted by the CAFO owner or operator available for public review and comment. The process for public comments, hearing requests, the hearing process, if a hearing is held, and revisions to the CAFO's permit must follow the procedures applicable to draft permits set forth in sections 10 and 12 above. Once the Chief incorporates the revised terms of the NMP into the permit, the Chief must notify the owner or operator and inform the public of the final decision concerning revisions to the terms and conditions of the permit.

13.1.h.6.C. Substantial changes to the terms of a NMP incorporated as terms and conditions of a permit include, but are not limited to:

13.1.h.6.C.1. Addition of new land application areas not previously included in the CAFO's NMP. Except that if the land application area that is being added to the NMP is covered by terms of a NMP incorporated into an existing NPDES permit in accordance with the requirements of subdivision 13.1.h.5 above, and the CAFO owner or operator applies

manure, litter and/or process wastewater on the newly added land application area in accordance with the existing field-specific permit terms applicable to the newly added land application area, such addition of new land would be a change to the new CAFO owner or operator's NMP, but not a substantial change for purposes of this section;

13.1.h.6.C.2. Any changes to the field-specific maximum annual rates for land application as set forth paragraph 13.1.h.5.A above, and to the maximum amounts of nitrogen and phosphorus derived from all sources for each crop as set forth in 13.1.h.5.B above;

13.1.h.6.C.3. Addition of any crop or other uses not included in the terms of the CAFO's NMP and corresponding field-specific rates of application expressed in accordance with subsection 13.1.h.5 of this rule; and

13.1.h.6.C.4. Changes to site-specific components of the CAFO's NMP, where such changes are likely to increase the risk of nitrogen and phosphorus transport to the waters of West Virginia.

13.2. Concentrated aquatic animal production facilities.

13.2.a. Permit requirement. Concentrated aquatic animal production facilities, as defined in this section, are point sources subject to the permit program.

13.2.b. Definition. "Concentrated Aquatic Animal Production Facility" means a hatchery, fish farm, or other facility that meets the criteria set forth in Appendix C B below or that the Chief designates as such under subdivision pursuant to subsection 13.2.c of this section below.

13.2.c. Case-by-case designation of concentrated aquatic animal production facilities:

13.2.c.1. The Chief may designate any warm or cold water aquatic animal production facility as a concentrated aquatic animal production facility upon determining that

it is a significant contributor of pollution to the waters of the State. In making this designation, the Chief shall consider the following factors:

13.2.c.1.A. The location and quality of the receiving waters of the State;

13.2.c.1.B. The holding, feeding, and production capacities of the facility;

13.2.c.1.C. The quantity and nature of the pollutants reaching waters of the State;

13.2.c.1.D. The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes and process wastewaters into waters of the state; and

13.2.c.1.E. Other relevant factors.

13.2.d. A permit application shall not be required from a concentrated aquatic animal production facility designated under this ~~paragraph~~ section until the Chief has conducted on-site inspection of the facility and has determined that the facility should and could be regulated under the permit program.

### 13.3. Aquaculture projects.

13.3.a. Permit requirements. Discharges into aquaculture projects, as defined in this section, are subject to the permit program ~~through pursuant to~~ §318 of CWA.

#### 13.3.b. Definitions:

13.3.b.1. "Aquaculture Project" means a defined managed water area that uses discharges of pollutants into that designated area for the maintenance or production of harvestable freshwater plants or animals.

13.3.b.2. "Designated Project Area" means the portions of the waters of the State within which the permittee or permit applicant plans to confine the cultivated species, using a method or plan or operation (including, but not limited to, physical confinement) which, on the

basis of reliable scientific evidence, is expected to ensure that specific individual organisms comprising an aquaculture crop will enjoy increased growth attributable to the discharge of pollutants and will be harvested within a defined geographic area.

### 13.4. Separate storm sewers.

13.4.a. Permit requirement. Separate storm sewers, as defined in this section, are point sources subject to the permit program. Separate storm sewers may be permitted either individually or under a general permit. A permit for discharges into the waters of the State from a separate storm sewer covers all conveyances that are a part of the separate storm sewer system, even though there may be several owners or operators of these conveyances. However, discharges into separate storm sewers from point sources that are not part of the separate storm sewer systems may also require a permit.

#### 13.4.b. Definition:

13.4.b.1. "Separate Storm Sewer" means a conveyance or system of conveyances (including pipes, conduits, ditches, and channels) primarily used for collecting and conveying storm water runoff and that is either:

13.4.b.1.A. Located in an urbanized area as ~~designed~~ determined by the United States Bureau of the Census ~~according to the criteria in 39 FR 15202 (May 1, 1974) in the 1990 Decennial Census;~~ or

13.4.b.1.B. Not located in an urbanized area but designated under ~~subdivision subsection~~ 13.4.c of this section rule.

13.4.b.2. Except as provided in ~~paragraph subdivision~~ 13.4.b.3 of this section below, a conveyance or system of conveyances operated primarily for the purpose of collecting and conveying storm water runoff that is not located in an urbanized area and has not been designated by the Chief under ~~subdivision subsection~~ 13.4.c of this section below is not considered a point source and is not subject to the provisions of this series.

13.4.b.3. Conveyances that discharge process wastewater or storm water runoff contaminated by contact with wastes, raw material, or pollutant-contaminated soil from land or facilities used for industrial or commercial activities, into waters of the State or into separate storm sewers are point sources subject to the requirements of this series, but are not separate storm sewers for purposes of this section. As used in this paragraph, the term "wastes" does not include sand, silt and gravel.

13.4.b.4. Whether a system of conveyances is or is not a separate storm sewer for purposes of this section shall have no bearing on whether the system is eligible for funding under Title 2 of the CWA.

13.4.c. Case-by-case designation of separate storm sewers. The Chief may designate a storm sewer not located in an urbanized area as a separate storm sewer. This designation may be made to the extent allowed or required by EPA-promulgated effluent guidelines for point sources in the separate storm sewer category or when:

13.4.c.1. A Water Quality Management plan under §208 of the CWA that contains requirements applicable to such point sources is approved; or

13.4.c.2. The Chief determines that a storm sewer is a significant contributor of pollution to the waters of the State. In making this determination, the Chief shall consider the following factors:

13.4.c.2.A. The location of the discharge with respect to waters of the State;

13.4.c.2.B. The size of the discharge;

13.4.c.2.C. The quantity and nature of the pollutants reaching waters of the State; and

13.4.c.2.D. Other relevant factors.

### 13.5. Silvicultural activities.

13.5.a. Permit requirement. Silvicultural point sources, as defined in this section, are point sources subject to the permit program.

#### 13.5.b. Definitions:

13.5.b.1. "Silvicultural Point Source" means any discernible, confined, and discrete conveyance related to rock crushing, gravel washing, log sorting or log storage facilities that are operated in connection with silvicultural activities and from which pollutants are discharged into waters of the State. The term does not include non-point source silvicultural activities such as nursery operations, site preparation, reforestation and subsequent cultural treatment, thinning, prescribed burning, pest and fire control, harvesting operations, surface drainage, or road construction and maintenance from which there is natural runoff. However, some of these activities (such as stream crossing for roads) may involve point source discharges of dredged or fill material that may require a CWA §404 permit.

13.5.b.2. "Rock Crushing and Gravel Washing Facilities" means facilities that process crushed and broken stone, gravel, and riprap.

13.5.b.3. "Log Sorting and Log Storage Facilities" means facilities whose discharges result from the holding of unprocessed wood, for example, logs or roundwood with bark or after removal of bark held in self-contained bodies of water (mill ponds or log ponds) or stored on land where water is applied intentionally on the logs (wet decking).

#### 13.6. General permits.

13.6.a. Coverage. The Chief may issue a general permit in accordance with the following:

13.6.a.1. Area. The general permit shall be written to cover a category of discharges described in the permit under ~~paragraph~~

subdivision 13.6.a.2 ~~of this section below~~, except those covered by individual permits, within a geographic area. The area shall correspond to existing geographic or political boundaries, such as:

13.6.a.1.A. Designated planning areas under §§208 and 303 of the CWA;

13.6.a.1.B. Sewer districts or sewer authorities;

13.6.a.1.C. City, county, or state political boundaries;

13.6.a.1.D. State highway systems;

13.6.a.1.E. Standard metropolitan statistical areas, as defined by the United States Office of Management and Budget; and

13.6.a.1.F. Any other appropriate division or combination of boundaries.

13.6.a.2. Sources. The general permit may be written to regulate, within the area described in ~~paragraph subdivision~~ subdivision 13.6.a.1 of this section above, either:

13.6.a.2.A. Separate storm sewers; or

13.6.a.2.B. A category of point sources other than separate storm sewers, if the sources all:

13.6.a.2.B.1. Involve the same or substantially similar types of operations;

13.6.a.2.B.2. Discharge the same types of wastes;

13.6.a.2.B.3. Require the same effluent limitations or operating conditions;

13.6.a.2.B.4. Require the same or similar monitoring; and

13.6.a.2.B.5. In the opinion of the Chief, are more appropriately controlled under a general permit than under individual permits.

#### 13.6.b. Administration:

13.6.b.1. In general. General permits may be modified, revoked and reissued, suspended or revoked in accordance with the applicable requirements of section 9 of this series.

13.6.b.2. Requiring an individual permit:

13.6.b.2.A. The Chief may require any person authorized by a general permit to apply for and obtain an individual permit. Any interested person may petition the Chief to take action under this subparagraph. Cases where an individual permit may be required include the following:

13.6.b.2.A.1. The discharger is a significant contributor of pollution as determined by the factors set forth in ~~paragraph subdivision~~ subdivision 13.4.c.2 above;

13.6.b.2.A.2. The discharger is not in compliance with the conditions of the general permit;

13.6.b.2.A.3. A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the point source;

13.6.b.2.A.4. Effluent limitation guidelines are promulgated for point sources covered by the general permit; or

13.6.b.2.A.5. A Water Quality Management Plan containing requirements applicable to such point sources is approved.

13.6.b.2.B. The Chief may require any owner or operator authorized by a general permit to apply for an individual permit as provided in subparagraph 13.6.b.2.A of this

~~section rule~~ only if the owner or operator has been notified in writing that a permit application is required. This notice shall include a brief statement of the reasons for this decision, an application form, a statement setting a time for the owner or operator to file the application, and a statement that on the effective date of the individual permit the general permit as it applies to the individual permittee shall automatically terminate. The Chief may grant additional time upon request of the applicant.

13.6.b.2.C. Any owner or operator authorized by a general permit may request to be excluded from the coverage of the general permit by applying for an individual permit. The owner or operator shall submit an application ~~under~~ pursuant to section 4 of this rule, with reasons supporting the request, to the Chief no later than ninety (90) days after the general permit notice, in accordance with subsection 12.1 above.

13.6.b.3. Upon issuance of a general permit, the Chief shall cause to be published a notice of issuance as a Class I legal advertisement in a qualified daily or weekly newspaper within the geographical area affected by the subject of the permit, and by any other means reasonably calculated to give notice of issuance to the persons affected by it.

### 13.7. New sources and new discharges.

#### 13.7.a. Definitions:

13.7.a.1. "Site," "New Source," and "New Discharger" are defined in section 2 above.

13.7.a.2. "Source" means any building, structure, facility or installation from which there is or may be a discharge of pollutants.

13.7.a.3. "Existing Source" means any source that is not a new source or a new discharger.

13.7.a.4. "Facilities or Equipment" means buildings, structures, process or production equipment or machinery that form a

permanent part of the new source and that will be used in its operation, if these facilities or equipment are of such value as to represent a substantial commitment to construct. It excludes facilities or equipment used in connection with feasibility, engineering, and design studies regarding the source of water pollution treatment for the source.

#### 13.7.b. Criteria for new source determination.

13.7.b.1. Except as otherwise provided in an applicable new source performance standard, a source is a "new source" if it meets that definition of "new source" in section 2 of this rule, and

13.7.b.1.A. It is constructed at a site at which no other source is located; or

13.7.b.1.B. It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or

13.7.b.1.C. Its processes are substantially independent of an existing source at the same site. In determining whether these processes are substantially independent, the Chief shall consider such factors as the extent to which the new facility is integrated with the existing plant and the extent to which the new facility is engaged in the same general type of activity as the existing source.

13.7.b.2. A source meeting the requirements of subparagraphs 13.7.b.1.A, 13.7.b.1.B or 13.7.b.1.C of this section above is a new source only if a new source performance standard is independently applicable to it. If there is no such independently applicable standard, the source is a new discharger (*see*, section 2).

13.7.b.3. Construction on a site at which an existing source is located results in a modification subject to section 9 of this rule, rather than a new source or a new discharger, if the construction does not create a new building, structure, facility or installation meeting the criteria of subparagraphs 13.7.b.1.B or

13.7.b.1.C ~~of this section above~~, but otherwise alters, replaces, or adds to existing process or production equipment.

13.7.b.4. Construction of a new source as defined ~~under~~ in section 2 has commenced if the owner or operator has:

13.7.b.4.A. Begun, or caused to begin as part of a continuous on-site construction program:

13.7.b.4.A.1. Any placement, assembly or installation of facilities or equipment; or

13.7.b.4.A.2. Significant site preparation work, including clearing, excavation or removal of existing buildings, structures or facilities that is necessary for the placement, assembly or installation of new source equipment; or

13.7.b.4.B. Entered into a binding contractual obligation for the purchase of facilities or equipment which is intended to be used in its operation within a reasonable time. Options to purchase or contracts that can be terminated or modified without substantial loss and contracts for feasibility engineering and design studies do not constitute a contractual obligation under this paragraph.

13.7.c. Effect of compliance with new source performance standards:

13.7.c.1. Except as provided in ~~subparagraph subdivision 13.7.c.2 of this section below~~, any new discharger, the construction of which commenced after October 18, 1972, or new source that meets the applicable promulgated new source performance standards before the commencement of discharge may not be subject to any more stringent new source performance standards or to any more stringent technology-based standards under §301(b)(2) of the CWA for the shortest of the following periods:

13.7.c.1.A. Ten (10) years from the date that construction is completed;

13.7.c.1.B. Ten (10) years from the date the source begins to discharge process or other non-construction related wastewater; or

13.7.c.1.C. The period of depreciation or amortization of the facility for the purposes of §§167 or 169 (or both) of the Internal Revenue Code of 1954.

13.7.c.2. The protection from more stringent standards of performance afforded by ~~paragraph 13.7.c.1 of this section the above subdivision~~ does not apply to:

13.7.c.2.A. Additional or more stringent permit conditions that are not technology based; for example, conditions based on water quality standards or toxic effluent standards or prohibitions under §307(a) of the CWA; or

13.7.c.2.B. Additional permit conditions controlling pollutants that are listed as toxic ~~under~~ in §307(a) of the CWA and that are not controlled by new source performance standards. This includes permit conditions controlling pollutants other than those identified as toxic pollutants or hazardous substances, when control of these pollutants has been specifically identified as the method to control the toxic pollutants or hazardous substances.

13.7.c.3. When a NPDES permit ~~issued to a source with a "Protection Period" is issued to a source under paragraph in accordance with subdivision 13.7.c.1 of this section above~~, it will expire on or after the expiration of the protection period. Such permit shall require the owner or operator of the source to comply with the requirements of §301 and any other applicable requirements of the CWA immediately upon the expiration of the protection period. No additional period for achieving compliance with these requirements shall be allowed, except when necessary to achieve compliance with requirements promulgated less than three (3) years before the expiration of the protection period.

13.7.c.4. The owner or operator of a new source, a new discharger that commenced discharge after August 13, 1979, or a

recommencing discharger shall install, have in operating condition, and "Start Up" all pollution control equipment required to meet the conditions of its permit before beginning to discharge. Within the shortest feasible time, not to exceed ninety (90) days, the owner or operator must meet all permit conditions.

13.7.c.5. After the effective date of new source performance standards, it shall be unlawful for any owner or operator of any new source to operate the source in violation of those standards applicable to the source.

#### §47-10-14. Pretreatment Program.

14.1. All indirect dischargers and POTW's shall comply with the requirements of the Clean Water Act and the regulations at 40 C.F.R. §403 promulgated there under.

14.1.a. Prohibited discharges. Pollutants introduced into POTWs by indirect dischargers shall not cause pass-through or interference. These general prohibitions apply to all indirect dischargers. The following pollutants may not be introduced into a POTW:

14.1.a.1. Pollutants that create a fire or explosion hazard in the POTW, including but not limited to waste streams with a closed cup flashpoint of less than one hundred forty degrees (140°) Fahrenheit or sixty degrees (60°) Centigrade using the test methods specified in 40 C.F.R. §261.21;

14.1.a.2. Pollutants that cause corrosive structural damage to the POTW, and in no case discharges with pH lower than 5.0, unless the works is specifically designed to accommodate such discharges;

14.1.a.3. Solid or viscous pollutants in amounts that will cause obstruction to the flow in sewers or other interference with the operation of the POTW;

14.1.a.4. Any pollutant, including oxygen-demanding pollutants (BOD, etc.) released in a discharge of such volume or strength that, singly or by interaction with other

pollutants, as to would cause interference in the POTW;

14.1.a.5. Heat in amounts that will inhibit biological activity in the POTW resulting in interference, but in no case heat in such quantities that the temperature at the treatment works influent exceeds one hundred four degrees (104°) Fahrenheit or forty degrees (40°) Centigrade, unless the works is designed to accommodate such heat;

14.1.a.6. Petroleum oil, non-biodegradable cutting oil or products of mineral oil origin in amounts that will cause interference or pass-through;

14.1.a.7. A daily pollutant loading in excess of that allowed by the individual control mechanism with the POTW or by Federal, State, or local law;

14.1.a.8. Pollutants that result in the presence of toxic gases, vapors or fumes within the POTW in a quantity that may cause acute worker health and safety problems;

14.1.a.9. Any trucked or hauled pollutants, except at discharge points designated by the POTW.

14.1.b. Categorical standards. In addition to the prohibited discharges listed in ~~subdivision 14.1.a~~ above, any indirect discharger that is subject to a Categorical Pretreatment Standard established ~~under~~ in 40 C.F.R. Chapter I, Subchapter N and 40 C.F.R. §403.6 shall comply with the specific requirements of such standards and shall also comply with applicable requirements of 40 C.F.R. §403.12.

14.2. POTW reporting and permit requirements.

14.2.a. Existing indirect discharges to publicly owned treatment works. Any publicly owned treatment works accepting non-domestic wastes from indirect dischargers shall report to the Chief the names of indirect dischargers, quantity and characteristics of indirect discharges, and any other information or data deemed necessary by the Chief to evaluate the

discharge with regard to its impact on the permittee's capacity to meet all applicable State and Federal requirements on treatment, water quality standards, effluent limitations, and reliable operation and maintenance of the treatment works and with regard to compliance with National Pretreatment Standards.

14.2.b. Proposed indirect discharges to publicly owned treatment works. A publicly owned treatment works contemplating acceptance of new or increased non-domestic wastewater from an indirect discharger shall file an application to modify its permit and shall provide such information and data as deemed necessary by the Chief to evaluate the discharge with regard to its impact on the permittee's capability to meet all applicable State and Federal requirements on treatment, water quality standards, effluent limitations, reliable operation and maintenance of the treatment works, and with regard to compliance with National Pretreatment Standards.

14.2.b.1. Those proposed indirect discharges considered by the Chief to be significant indirect discharges ~~or considered by the chief~~ to be a significant increase or to have potential for significant impact on the existing or planned POTW can be incorporated into the POTW's permit only by modification in accordance with subsection 9.2 above.

14.2.b.2. Those proposed indirect discharges considered by the Chief to have no significant increase or impact on the existing or planned publicly owned treatment works may be incorporated into the POTW's permit by minor modification in accordance with subsection 9.5 above.

14.2.b.3. Those publicly owned treatment works that have developed and received approval of a POTW Pretreatment Program in accordance with subdivision subsection 14.4.a of this rule are exempt from the requirements of this section.

14.3. Reporting requirement for indirect dischargers. Indirect dischargers currently discharging or proposing to discharge into a POTW shall be required to submit to the Chief

~~of the Office of Water Resources~~ the information required in 40 C.F.R. §403.12. The Chief may require additional information. The Chief shall insure compliance with pretreatment standards by indirect dischargers.

#### 14.4. Local POTW pretreatment program.

14.4.a. POTWs are required to develop and submit a local pretreatment program in accordance with 40 C.F.R. §403 if the total design flow of the treatment facility is greater than five million gallons per day (5) MGD). POTWs with total design flow less than five (5) MGD may be required to develop and submit a pretreatment program if the Chief determines that circumstances warrant such development. Such programs shall be incorporated into the permit issued to the POTWs. All POTWs required to have a program must have an approved pretreatment program no later than July 1, 1983. POTWs identified as being required to develop a POTW pretreatment program after July 1, 1983 shall develop and submit such a program not later than one (1) year after written notification of such identification from the Chief. After obtaining the Chief's approval of a POTW Pretreatment Program, the POTW shall implement the approved program in accordance with all requirements of 40 C.F.R. §403.

14.4.b. When a local program is not required under subdivision subsection 14.4.a of this section above, the Chief shall administer and enforce the pretreatment program in accordance with the provisions of this section.

14.5. Variances from categorical standards for indirect dischargers. Indirect dischargers may apply to the Chief for variances from categorical pretreatment standards if factors relating to such users are fundamentally different from the factors considered during development of a categorical pretreatment standard applicable to that discharger. The Chief shall act upon variances in accordance with 40 C.F.R. §403.

#### **§47-10-15. Federal Effluent Limitations Guidelines and Standards Incorporation.**

15.1. The provisions of 40 C.F.R. Chapter 1, Subchapter N, Parts 400-471 are hereby incorporated by reference.

15.2. (Reserved.)

#### §47-10-16. Enforcement.

16.1. General. The provisions of this series may be enforced by all of the applicable provisions of the State Act, including:

16.1.a. Orders issued by the Chief in accordance with ~~sections 11, 12, 15 and 19 of the State Act~~ W. Va. Code §§22-11-11, 22-11-12, 22-11-15, and 22-11-19;

16.1.b. Civil penalties and injunctive relief in accordance with ~~Section 22 of the State Act~~ W. Va. Code §22-11-22; and

16.1.c. Criminal penalties in accordance with ~~Section 24 of the State Act~~ W. Va. Code §22-11-24.

16.2. Citizen participation. The Chief shall provide for public participation in enforcement by the following:

16.2.a. Investigating and providing a written response to all signed, written complaints from citizens;

16.2.b. Not opposing intervention by any citizen when permissive intervention is authorized by statute or rule; and

16.2.c. Publishing notice in a newspaper of general circulation in the county in which the discharge is located at least thirty (30) days prior to the final settlement of any civil action or consent order issued by the Board. This notice will identify the person discharging, the specific enforcement action to be taken, and the name and address where information on the proposed settlement can be obtained. The Chief shall consider all comments received during the thirty (30) day period.

#### §47-10-17. Conflict of Interest.

17.1. Members of the Environmental Quality Board shall be bound by the conflict of interest requirements contained in W. Va. Code §22B-1-11

17.2. The Chief ~~of the Office of Water Resources~~ shall not be a person who receives, or has during the previous two (2) years received, a significant portion of his or her income directly or indirectly from permit holders or applicants for a permit.

17.2.a. For the purposes of this section:

17.2.a.1. "Significant portion of income" means ten percent (10%) or more of gross personal income for a calendar year, except that it means fifty percent (50%) or more of gross personal income for a calendar year if the recipient is over sixty (60) years of age and is receiving that portion under retirement, pension or similar arrangement.

17.2.a.2. "Permit holders or applicants for a permit" does not include any department or agency of the State.

17.2.a.3. "Income" includes retirement benefits, consultant fees, and stock dividends.

17.2.b. For the purposes of this section, income is not received "directly or indirectly from permit holders or applicants for a permit" when it is derived from mutual fund payments or from other diversified investments for which the recipient does not know the identity of the primary sources of income.

#### §47-10-18. Conflicting Provisions.

In the event of any inconsistency or conflict between any provision of this section and any provisions of 47 C.S.R. 11, the provisions of this section shall control.

**Appendix A – NPDES Primary Industry Categories**

## Industry Category

Adhesives and Sealants  
Aluminum Forming  
Auto and Other laundries  
Battery Manufacturing  
Coal Mining  
Coil Coating  
Copper Forming  
Electrical and Electronic Components  
Electroplating  
Explosives Manufacturing  
Foundries  
Gum and Wood Chemicals  
Inorganic Chemicals Manufacturing  
Iron and Steel Manufacturing  
Leather Tanning and Finishing  
Mechanical Products Manufacturing  
Nonferrous Metals Manufacturing  
Ore Mining  
Organic Chemicals Manufacturing  
Paint and Ink Formulation  
Pesticides  
Petroleum Refining  
Pharmaceutical Preparations  
Photographic Equipment and Supplies  
Plastics Processing  
Plastic and Synthetic Materials Manufacturing  
Porcelain Enameling  
Printing and Publishing  
Pulp and Paper Mills  
Rubber Processing  
Soap and Detergent Manufacturing  
Steam Electric Power Plants  
Textile Mills  
Timber Products Processing

### **Appendix B—Criteria for Determining a Concentrated Animal Feeding Operation**

~~—An animal feeding operation is a concentrated animal feeding operation for purposes of subsection 13.1 if either of the following criteria are met:~~

~~—(a) More than the number of animals specified in any of the following categories are confined:~~

- ~~—(1) 1,000 slaughter and feeder cattle,~~
- ~~—(2) 700 mature dairy cattle (whether milked or dry cows),~~
- ~~—(3) 2,500 swine each weighing over 25 kilograms (approximately 55 pounds),~~
- ~~—(4) 500 horses,~~
- ~~—(5) 10,000 sheep or lambs,~~
- ~~—(6) 55,000 turkeys,~~
- ~~—(7) 100,000 laying hens or broilers (if the facility has continuous overflow watering),~~
- ~~—(8) 30,000 laying hens or broilers (if the facility has a liquid manure handling system),~~
- ~~—(9) 5,000 ducks, or~~
- ~~—(10) 1,000 animal units; or~~

~~—(b) More than the following number and types of animals are confined:~~

- ~~—(1) 300 slaughter or feeder cattle,~~
- ~~—(2) 200 mature dairy cattle (whether milked or dry cows),~~
- ~~—(3) 750 swine each weighing over 25 kilograms (approximately 55 pounds),~~
- ~~—(4) 150 horses,~~
- ~~—(5) 3,000 sheep or lambs,~~
- ~~—(6) 16,500 turkeys,~~
- ~~—(7) 30,000 laying hens or broilers (if the facility has continuous overflow watering),~~
- ~~—(8) 9,000 laying hens or broilers (if the facility has a liquid manure handling system),~~
- ~~—(9) 1,500 ducks, or~~
- ~~—(10) 300 animal units;~~

~~—and either one of the following conditions are met: pollutants are discharged into navigable waters through a man made ditch, flushing system or other similar man made device; or pollutants are discharged directly into waters of the State which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.~~

~~—Provided, however, that no animal feeding operation is a concentrated animal feeding operation as defined above if such animal feeding operation discharges only in the event of a twenty five (25) year, 24 hour storm event.~~

~~—The term "animal unit" means a unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over twenty five (25) kilograms (approximately fifty five (55) pounds) multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses multiplied by 2.0.~~

~~—The term "man-made" means constructed by man and used for the purpose of transporting wastes.~~

### Appendix ~~C~~ B – Criteria for Determining a Concentrated Aquatic Animal Production Facility

A hatchery, fish farm, or other facility is a concentrated aquatic animal production facility for purposes of subsection 13.2 if it contains, grows, or holds aquatic animals in either of the following categories:

(a) Cold water fish species or other cold water aquatic animals in ponds, raceways or other similar structures that discharge at least thirty (30) days per year, but ~~does not including~~:

(1) Facilities that produce less than nine thousand ninety (9,090) harvest weight kilograms (approximately twenty thousand (20,000) pounds) of aquatic animals per year; and

(2) Facilities that feed less than two thousand two hundred seventy-two (2,272) kilograms (approximately five thousand (5,000) pounds) of food during the calendar month of maximum feeding.

(b) Warm water fish species or other warm water aquatic animals in ponds, raceways or other similar structures that discharge at least thirty (30) days per year, but ~~does not including~~:

(1) Closed ponds that discharge only during periods of excess runoff; or

(2) Facilities that produce less than forty-five thousand four hundred fifty-four (45,454) harvest weight kilograms (approximately one hundred thousand (100,000) pounds) of aquatic animals per year.

“Cold water aquatic animals” include, but are not limited to, the Ameiuride, Centrarchidae and Cyprinidae families of fish (*e.g.*, ~~respectfully~~ respectively, catfish, sunfish and minnows).

## Appendix D C -- Permit Testing Requirements

Table I -- Testing Requirements for Organic Pollutants by Industrial Category for Existing Dischargers

Industrial category	GC/MS fraction 1			
	Volatile	Acid	Base/ neutral	Pesticide
Adhesives and Sealants	(*)	(*)	(*)	.....
Aluminum Forming	(*)	(*)	(*)	.....
Auto and Other Laundries	(*)	(*)	(*)	(*)
Battery Manufacturing	(*)	.....	(*)	.....
Coil Coating	(*)	(*)	(*)	.....
Copper Forming	(*)	(*)	(*)	.....
Electric & Electronic Components	(*)	(*)	(*)	(*)
Electroplating	(*)	(*)	(*)	.....
Explosives Manufacturing	.....	(*)	(*)	.....
Foundries	(*)	(*)	(*)	.....
Gun and Wood Chemicals	(*)	(*)	(*)	(*)
Inorganic Chemicals Manufacturing	(*)	(*)	(*)	.....
Iron & Steel Manufacturing	(*)	(*)	(*)	.....
Leather Tanning and Finishing	(*)	(*)	(*)	(*)
Mechanical Products Manufacturing	(*)	(*)	(*)	.....
Nonferrous Metals Manufacturing	(*)	(*)	(*)	(*)
Ore Mining	(*)	(*)	(*)	(*)
Organic Chemicals Manufacturing	(*)	(*)	(*)	(*)
Paint and Ink Formulation	(*)	(*)	(*)	(*)
Pesticides	(*)	(*)	(*)	(*)
Petroleum Refining	(*)	(*)	(*)	(*)
Pharmaceutical Preparations	(*)	(*)	(*)	.....
Photographic Equipment & Supplies	(*)	(*)	(*)	(*)
Plastic and Synthetic Materials Manufacturing	(*)	(*)	(*)	(*)
Plastic Processing	(*)	.....	.....	.....
Porcelain Enameling	(*)	.....	(*)	(*)
Printing and Publishing	(*)	(*)	(*)	(*)
Pulp and Paper Mills	(*)	(*)	(*)	(*)
Rubber Processing	(*)	(*)	(*)	.....
Soap and Detergent Manufacturing	(*)	(*)	(*)	.....
Steam Electric Power Plants	(*)	(*)	(*)	.....
Textile Mills	(*)	(*)	(*)	(*)
Timber Products Process Processing	(*)	(*)	(*)	(*)

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1 The toxic pollutants in each fraction are listed in Table II

\* Testing required.

## Appendix D C - Continued

Table II -- Organic Toxic Pollutants in Each of Four Fractions in Analysis by Gas Chromatography/Mass Spectroscopy (GS/MS)

## Volatiles

1V	acrolein
2V	acrylonitrile
3V	benzene
5V	bromoform
6V	carbon tetrachloride
7V	chlorobenzene
8V	chlorodibromomethane
9V	chloroethane
10V	2-chloroethylvinyl ether
11V	chloroform
12V	dichlorobromomethane
14V	1,1-dichloroethane
15V	1,2-dichloroethane
16V	1,1-dichloroethylene
17V	1,2-dichloropropane
18V	1,2-dichloropropylene
19V	ethylbenzene
20V	methyl bromide
21V	methyl chloride
22V	methylene chloride
23V	1,2,2,2-tetrachloroethane
24V	tetrachloroethylene
25V	toluene
26V	1,2-trans-dichloroethylene
27V	1,1,1-trichloroethane
28V	1,1,2-trichloroethane
29V	trichloroethylene
31V	vinyl chloride

## Acid Compounds

1A	2-chlorophenol
2A	2,4-dichlorophenol
3A	2,4-dimethylphenol
4A	4,6-dinitro-o-cresol
5A	2,4-dinitrophenol
6A	2-nitrophenol
7A	4-nitrophenol
8A	p-chloro-m-cresol
9A	pentachlorophenol
10A	phenol
11A	2,4,6-trichlorophenol

## Appendix D C - Continued

## Base/Neutral

1B	acenaphthene
2B	acenaphthylene
3B	anthracene
4B	benzidine
5B	benzo(a)anthracene
6B	benzo(a)pyrene
7B	3,4-benzofluoranthene
8B	benzo(ghi)perylene
9B	benzo(K)fluoranthene
10B	bis(2-chloroethoxy)methane
11B	bis(2-chloroethyl)ether
12B	bis(2-chloroisopropyl)ether
13B	bis(2-ethylhexyl)phthalate
14B	4-bromophenyl phenyl ether
15B	butylbenzyl phthalate
16B	2-chloronaphthalene
17B	4-chlorophenyl phenyl ether
18B	chrysene
19B	dibenzo(a,h)anthracene
20B	1,2-dichlorobenzene
21B	1,3-dichlorobenzene
22B	1,4-dichlorobenzene
23B	3,3'-dichlorobenzidine
24B	diethyl phthalate
25B	dimethyl phthalate
26B	di-n-butyl phthalate
27B	2,4-dinitrotoluene
28B	2,6-dinitrotoluene
29B	di-n-octyl phthalate
30B	1,2-diphenylhydrazine (as azobenzene)
31B	fluoranthene
32B	fluorene
33B	hexachlorobenzene
34B	hexachlorobutadiene
35B	hexachlorocyclopentadiene
36B	hexachloroethane
37B	indeno(1,2,3-cd)pyrene
38B	isophorone
39B	naphthalene
40B	nitrobenzene
41B	N-nitrosodimethylamine
42B	N-nitrosodi-n-propylamine
43B	N-nitrosodiphenylamine
44B	phenanthrene
45B	pyrene
46B	1,2,4-trichlorobenzene

## Appendix D C - Continued

## Pesticides

1P	aldrin
2P	alpha-BHC
3P	beta-BHC
4P	gamma-BHC
5P	delta-BHC
6P	clordane
7P	4,4'-DDT
8P	4,4'-DDE
9P	4,4'-DDD
10P	dieldrin
11P	alpha-endosulfan
12P	beta-endosulfan
13P	endosulfan sulfate
14P	endrin
15P	endrin aldehyde
16P	heptachlor
17P	heptachlor epoxide
18P	PCB-1242
19P	PCB-1254
20P	PCB-1221
21P	PCB-1232
22P	PCB-1248
23P	PCB-1260
24P	PCB-1016
25P	toxaphene

## Table III – Other Toxic Pollutants: Metals, Cyanide, and Total Phenols

Antimony, Total  
 Arsenic, Total  
 Beryllium, Total  
 Cadmium, Total  
 Chromium, Total  
 Copper, Total  
 Lead, Total  
 Mercury, Total  
 Nickel, Total  
 Selenium, Total  
 Silver, Total  
 Thallium, Total  
 Zinc, Total  
 Cyanide, Total  
 Phenols, Total

**Appendix D C - Continued****Table IV -- Conventional and Nonconventional Pollutants required to be Tested by Existing Dischargers If Expected to be Present**

Bromide  
 Chloride  
 Chlorine, Total Residual  
 Color  
 Fecal Coliform  
 Fluoride  
 Nitrate-Nitrite  
 Nitrogen, Total Organic  
 Oil and Grease  
 Phosphorus, Total  
 Radioactivity  
 Sulfate  
 Sulfide  
 Sulfite  
 Surfactants  
 Aluminum, Total  
 Barium, Total  
 Boron, Total  
 Cobalt, Total  
 Iron, Total  
 Magnesium, Total  
 Molybdenum, Total  
 Manganese, Total  
 Tin, Total  
 Titanium, Total

**Table V -- Toxic Pollutants and Hazardous Substances Required to be Identified by Existing Dischargers if Expected to be Present****Toxic Pollutants**

Asbestos

**Hazardous Substances**

Acetaldehyde  
 Allyl alcohol  
 Allyl chloride  
 Amyl acetate  
 Aniline  
 Benzonitrile  
 Benzyl chloride  
 Butyl acetate  
 Butylamine  
 Captan

## Appendix D C - Continued

Carbaryl	Furfural
Carbofuran	Guthion
Carbon disulfide	Isoprene
Chlorpyrifos	Isopropanolamine
Coumaphos	Kelthane
Cresol	Kepone
Crotonaldehyde	Malathion
Cyclohexane	Mercaptodimethur
Strychnine	Methoxychlor
Cyclohexane	Methyl mercaptan
2,4-D(2,4-Dichlorophenoxy acetic acid)	Methyl methacrylate
Diazinon	Methyl parathion
Dicamba	Mevinphos
Dichlobenil	Mexacarbate
Dichlone	Monoethyl amine
2,2-Dichloropropionic acid	Monomethyl amine
Dichlorvos	Naled
Diethyl amine	Napthenic acid
Dimethyl amine	Nitrotoluene
Dinitrobenzene	Parathion
Diquat	Phenolsulfanate
Disulfoton	Phosgene
Diuron	Propargite
Epichlorohydrin	Propylene oxide
Ethanolamine	Pyrethrines
Ethion	Quinoline
Ethylene diamine	Resorcinol
Ethylene dibromide	Strontium
Formaldehyde	

**PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**

**Authority:** The Clean Water Act, 33 U.S.C. 1251 *et seq.*

**§ 122.21 Application for a permit (applicable to State programs, see § 123.25).**

**(a) Duty to apply.**

(1) Any person who discharges or proposes to discharge pollutants or who owns or operates a “sludge-only facility” whose sewage sludge use or disposal practice is regulated by part 503 of this chapter, and who does not have an effective permit, except persons covered by general permits under § 122.28, excluded under § 122.3, or a user of a privately owned treatment works unless the Director requires otherwise under § 122.44(m), must submit a complete application to the Director in accordance with this section and part 124 of this chapter. The requirements for concentrated animal feeding operations are described in § 122.23(d).

**(2) Application Forms:**

(i) All applicants for EPA-issued permits must submit applications on EPA permit application forms. More than one application form may be required from a facility depending on the number and types of discharges or outfalls found there. Application forms may be obtained by contacting the EPA water resource center at (202) 260-7786 or Water Resource Center, U.S. EPA, Mail Code 4100, 1200 Pennsylvania Ave., NW., Washington, DC 20460 or at the EPA Internet site [www.epa.gov/owm/npdes.htm](http://www.epa.gov/owm/npdes.htm). Applications for EPA-issued permits must be submitted as follows:

(A) All applicants, other than POTWs and TWTDS, must submit Form 1.

(B) Applicants for new and existing POTWs must submit the information contained in paragraph (j) of this section using Form 2A or other form provided by the director.

(C) Applicants for concentrated animal feeding operations or aquatic animal production facilities must submit Form 2B.

*[The remainder of § 122.21(a) through (h) is not specific to CAFOs and, therefore, is not included here.]*

(i) Application requirements for new and existing concentrated animal feeding operations and aquatic animal production facilities. New and existing concentrated animal feeding operations (defined in § 122.23) and concentrated aquatic animal production facilities (defined in § 122.24) shall provide the following information to the Director, using the application form provided by the Director:

(1) For concentrated animal feeding operations:

- (i) The name of the owner or operator;
- (ii) The facility location and mailing addresses;
- (iii) Latitude and longitude of the production area (entrance to production area);
- (iv) A topographic map of the geographic area in which the CAFO is located showing the specific location of the production area, in lieu of the requirements of paragraph (f)(7) of this section;
- (v) Specific information about the number and type of animals, whether in open confinement or housed under roof (beef cattle, broilers, layers, swine weighing 55 pounds or more, swine weighing less than 55 pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, other);
- (vi) The type of containment and storage (anaerobic lagoon, roofed storage shed, storage ponds, underfloor pits, above ground storage tanks, below ground storage tanks, concrete pad, impervious soil pad, other) and total capacity for manure, litter, and process wastewater storage(tons/gallons);
- (vii) The total number of acres under control of the applicant available for land application of manure, litter, or process wastewater;
- (viii) Estimated amounts of manure, litter, and process wastewater generated per year (tons/gallons);

(ix) Estimated amounts of manure, litter and process wastewater transferred to other persons per year (tons/gallons); and

(x) A nutrient management plan that at a minimum satisfies the requirements specified in § 122.42(e), including, for all CAFOs subject to 40 CFR part 412, subpart C or subpart D, the requirements of 40 CFR 412.4(c), as applicable.

*[The remainder of § 122.2 is not specific to CAFOs and, therefore, is not included here.]*

**§ 122.23 Concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25).**

(a) *Scope.* Concentrated animal feeding operations (CAFOs), as defined in paragraph (b) of this section or designated in accordance with paragraph (c) of this section, are point sources, subject to NPDES permitting requirements as provided in this section. Once an animal feeding operation is defined as a CAFO for at least one type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

(b) Definitions applicable to this section:

(1) *Animal feeding operation* (“AFO”) means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

(i) 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.

(2) *Concentrated animal feeding operation* (“CAFO”) means an AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section. Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes.

(3) The term *land application area* means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied.

(4) *Large concentrated animal feeding operation* ("Large CAFO"). An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:

- (i) 700 mature dairy cows, whether milked or dry;
- (ii) 1,000 veal calves;
- (iii) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;
- (iv) 2,500 swine each weighing 55 pounds or more;
- (v) 10,000 swine each weighing less than 55 pounds;
- (vi) 500 horses;
- (vii) 10,000 sheep or lambs;
- (viii) 55,000 turkeys;
- (ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;
- (x) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;
- (xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;
- (xii) 30,000 ducks (if the AFO uses other than a liquid manure handling system); or
- (xiii) 5,000 ducks (if the AFO uses a liquid manure handling system).

(5) The term *manure* is defined to include manure, bedding, compost and raw materials or other materials commingled with manure or set aside for disposal.

(6) *Medium concentrated animal feeding operation* ("Medium CAFO"). The term Medium CAFO includes any AFO with the type and number of animals that fall within any of the ranges listed in

paragraph (b)(6)(i) of this section and which has been defined or designated as a CAFO. An AFO is defined as a Medium CAFO if:

(i) The type and number of animals that it stables or confines falls within any of the following ranges:

- (A) 200 to 699 mature dairy cows, whether milked or dry;
- (B) 300 to 999 veal calves;
- (C) 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;
- (D) 750 to 2,499 swine each weighing 55 pounds or more;
- (E) 3,000 to 9,999 swine each weighing less than 55 pounds;
- (F) 150 to 499 horses;
- (G) 3,000 to 9,999 sheep or lambs;
- (H) 16,500 to 54,999 turkeys;
- (I) 9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system;
- (J) 37,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;
- (K) 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system;
- (L) 10,000 to 29,999 ducks (if the AFO uses other than a liquid manure handling system); or
- (M) 1,500 to 4,999 ducks (if the AFO uses a liquid manure handling system); and

(ii) Either one of the following conditions are met:

- (A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or
- (B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(7) *Process wastewater* means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.

(8) *Production area* means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

(9) *Small concentrated animal feeding operation* ("Small CAFO"). An AFO that is designated as a CAFO and is not a Medium CAFO.

(c) *How may an AFO be designated as a CAFO?* The appropriate authority (i.e., State Director or Regional Administrator, or both, as specified in paragraph (c)(1) of this section) may designate any AFO as a CAFO upon determining that it is a significant contributor of pollutants to waters of the United States.

(1) Who may designate?

(i) *Approved States.* In States that are approved or authorized by EPA under Part 123, CAFO designations may be made by the State Director. The Regional Administrator may also designate

CAFOs in approved States, but only where the Regional Administrator has determined that one or more pollutants in the AFO's discharge contributes to an impairment in a downstream or adjacent State or Indian country water that is impaired for that pollutant.

(ii) *States with no approved program.* The Regional Administrator may designate CAFOs in States that do not have an approved program and in Indian country where no entity has expressly demonstrated authority and has been expressly authorized by EPA to implement the NPDES program.

(2) In making this designation, the State Director or the Regional Administrator shall consider the following factors:

- (i) The size of the AFO and the amount of wastes reaching waters of the United States;
- (ii) The location of the AFO relative to waters of the United States;
- (iii) The means of conveyance of animal wastes and process waste waters into waters of the United States;
- (iv) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes manure and process waste waters into waters of the United States; and
- (v) Other relevant factors.

(3) No AFO shall be designated under this paragraph unless the State Director or the Regional Administrator has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program. In addition, no AFO with numbers of animals below those established in paragraph (b)(6) of this section may be designated as a CAFO unless:

- (i) Pollutants are discharged into waters of the United States through a manmade ditch, flushing system, or other similar manmade device; or
- (ii) Pollutants are discharged directly into waters of the United States which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(d) *Who must seek coverage under an NPDES permit?*

(1) *Permit Requirement.* The owner or operator of a CAFO must seek coverage under an NPDES permit if the CAFO discharges or proposes to discharge. A CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur. Specifically, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit. If the Director has not made a general permit available to the CAFO, the CAFO owner or operator must submit an application for an individual permit to the Director.

(2) *Information to submit with permit application or notice of intent.* An application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.

(e) Land application discharges from a CAFO are subject to NPDES requirements. The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14). For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

(1) For unpermitted Large CAFOs, a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural

utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi) through (ix).

(2) Unpermitted Large CAFOs must maintain documentation specified in § 122.42(e)(1)(ix) either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

(f) *When must the owner or operator of a CAFO seek coverage under an NPDES permit?*

Any CAFO that is required to seek permit coverage under paragraph (d)(1) of this section must seek coverage when the CAFO proposes to discharge, unless a later deadline is specified below.

(1) *Operations defined as CAFOs prior to April 14, 2003.* For operations defined as CAFOs under regulations that were in effect prior to April 14, 2003, the owner or operator must have or seek to obtain coverage under an NPDES permit as of April 14, 2003, and comply with all applicable NPDES requirements, including the duty to maintain permit coverage in accordance with paragraph (g) of this section.

(2) *Operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date.* For all operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date, the owner or operator of the CAFO must seek to obtain coverage under an NPDES permit by February 27, 2009.

(3) *Operations that become defined as CAFOs after April 14, 2003, but which are not new sources.* For a newly constructed CAFO and for an AFO that makes changes to its operations that result in its becoming defined as a CAFO for the first time after April 14, 2003, but is not a new source, the owner or operator must seek to obtain coverage under an NPDES permit, as follows:

(i) For newly constructed operations not subject to effluent limitations guidelines, 180 days prior to the time CAFO commences operation;

(ii) For other operations (*e.g.*, resulting from an increase in the number of animals), as soon as possible, but no later than 90 days after becoming defined as a CAFO; or

(iii) If an operational change that makes the operation a CAFO would not have made it a CAFO prior to April 14, 2003, the operation has until February 27, 2009, or 90 days after becoming defined as a CAFO, whichever is later.

(4) *New sources.* The owner or operator of a new source must seek to obtain coverage under a permit at least 180 days prior to the time that the CAFO commences operation.

(5) *Operations that are designated as CAFOs.* For operations designated as a CAFO in accordance with paragraph (c) of this section, the owner or operator must seek to obtain coverage under a permit no later than 90 days after receiving notice of the designation.

(g) *Duty to Maintain Permit Coverage.* No later than 180 days before the expiration of the permit, or as provided by the Director, any permitted CAFO must submit an application to renew its permit, in accordance with § 122.21(d), unless the CAFO will not discharge or propose to discharge upon expiration of the permit.

(h) *Procedures for CAFOs seeking coverage under a general permit.*

(1) CAFO owners or operators must submit a notice of intent when seeking authorization to discharge under a general permit in accordance with § 122.28(b). The Director must review notices of intent submitted by CAFO owners or operators to ensure that the notice of intent includes the information required by § 122.21(i)(1), including a nutrient management plan that meets the requirements of § 122.42(e) and applicable effluent limitations and standards, including those specified in 40 CFR part 412. When additional information is necessary to complete the notice of intent or clarify, modify, or supplement previously submitted material, the Director may request such information from the owner or operator. If the Director makes a preliminary determination that the notice of intent meets the requirements of §§ 122.21(i)(1) and 122.42(e), the Director must notify the public of the Director's proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's nutrient management plan, and the draft terms of the nutrient management plan to be incorporated into the permit. The process for submitting public comments and hearing requests, and the hearing process if a request for

a hearing is granted, must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Director may establish, either by regulation or in the general permit, an appropriate period of time for the public to comment and request a hearing that differs from the time period specified in 40 CFR 124.10. The Director must respond to significant comments received during the comment period, as provided in 40 CFR 124.17, and, if necessary, require the CAFO owner or operator to revise the nutrient management plan in order to be granted permit coverage. When the Director authorizes coverage for the CAFO owner or operator under the general permit, the terms of the nutrient management plan shall become incorporated as terms and conditions of the permit for the CAFO. The Director shall notify the CAFO owner or operator and inform the public that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(2) *For EPA-issued permits only.* The Regional Administrator shall notify each person who has submitted written comments on the proposal to grant coverage and the draft terms of the nutrient management plan or requested notice of the final permit decision. Such notification shall include notice that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(3) Nothing in this paragraph (h) shall affect the authority of the Director to require an individual permit under § 122.28(b)(3).

(i) *No Discharge Certification Option.*

(1) The owner or operator of a CAFO that meets the eligibility criteria in paragraph (i)(2) of this section may certify to the Director that the CAFO does not discharge or propose to discharge. A CAFO owner or operator who certifies that the CAFO does not discharge or propose to discharge is not required to seek coverage under an NPDES permit pursuant to paragraph (d)(1) of this section, provided that the CAFO is designed, constructed, operated, and maintained in accordance with the requirements of paragraphs (i)(2) and (3) of this section, and subject to the limitations in paragraph (i)(4) of this section.

(2) Eligibility Criteria. In order to certify that a CAFO does not discharge or propose to discharge, the owner or operator of a CAFO must document, based on an objective assessment of the conditions at the CAFO, that the CAFO is designed, constructed, operated, and maintained in a manner such that the CAFO will not discharge, as follows:

(i) The CAFO's production area is designed, constructed, operated, and maintained so as not to discharge. The CAFO must maintain documentation that demonstrates that:

(A) Any open manure storage structures are designed, constructed, operated, and maintained to achieve no discharge based on a technical evaluation in accordance with the elements of the technical evaluation set forth in 40 CFR 412.46(a)(1)(i) through (viii);

(B) Any part of the CAFO's production area that is not addressed by paragraph (i)(2)(i)(A) of this section is designed, constructed, operated, and maintained such that there will be no discharge of manure, litter, or process wastewater; and

(C) The CAFO implements the additional measures set forth in 40 CFR 412.37(a) and (b);

(ii) The CAFO has developed and is implementing an up-to-date nutrient management plan to ensure no discharge from the CAFO, including from all land application areas under the control of the CAFO, that addresses, at a minimum, the following:

(A) The elements of § 122.42(e)(1)(i) through (ix) and 40 CFR 412.37(c); and

(B) All site-specific operation and maintenance practices necessary to ensure no discharge, including any practices or conditions established by a technical evaluation pursuant to paragraph (i)(2)(i)(A) of this section; and

(iii) The CAFO must maintain documentation required by this paragraph either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

(3) Submission to the Director. In order to certify that a CAFO does not discharge or propose to discharge, the CAFO owner or operator must complete and submit to the Director, by certified mail

or equivalent method of documentation, a certification that includes, at a minimum, the following information:

- (i) The legal name, address and phone number of the CAFO owner or operator (see § 122.21(b));
- (ii) The CAFO name and address, the county name and the latitude and longitude where the CAFO is located;
- (iii) A statement that describes the basis for the CAFO's certification that it satisfies the eligibility requirements identified in paragraph (i)(2) of this section; and
- (iv) The following certification statement: "I certify under penalty of law that I am the owner or operator of a concentrated animal feeding operation (CAFO), identified as [Name of CAFO], and that said CAFO meets the requirements of 40 CFR 122.23(i). I have read and understand the eligibility requirements of 40 CFR 122.23(i)(2) for certifying that a CAFO does not discharge or propose to discharge and further certify that this CAFO satisfies the eligibility requirements. As part of this certification, I am including the information required by 40 CFR 122.23(i)(3). I also understand the conditions set forth in 40 CFR 122.23(i)(4), (5) and (6) regarding loss and withdrawal of certification. I certify under penalty of law that this document and all other documents required for this certification were prepared under my direction or supervision and that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons directly involved in gathering and evaluating the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."; and
- (v) The certification must be signed in accordance with the signatory requirements of 40 CFR 122.22.

(4) Term of Certification. A certification that meets the requirements of paragraphs (i)(2) and (i)(3) of this section shall become effective on the date it is submitted, unless the Director establishes an effective date of up to 30 days after the date of submission. Certification will remain in effect for five

years or until the certification is no longer valid or is withdrawn, whichever occurs first. A certification is no longer valid when a discharge has occurred or when the CAFO ceases to meet the eligibility criteria in paragraph (i)(2) of this section.

(5) Withdrawal of Certification.

(i) At any time, a CAFO may withdraw its certification by notifying the Director by certified mail or equivalent method of documentation. A certification is withdrawn on the date the notification is submitted to the Director. The CAFO does not need to specify any reason for the withdrawal in its notification to the Director.

(ii) If a certification becomes invalid in accordance with paragraph (i)(4) of this section, the CAFO must withdraw its certification within three days of the date on which the CAFO becomes aware that the certification is invalid. Once a CAFO's certification is no longer valid, the CAFO is subject to the requirement in paragraph (d)(1) of this section to seek permit coverage if it discharges or proposes to discharge.

(6) Recertification. A previously certified CAFO that does not discharge or propose to discharge may recertify in accordance with paragraph (i) of this section, except that where the CAFO has discharged, the CAFO may only recertify if the following additional conditions are met:

(i) The CAFO had a valid certification at the time of the discharge;

(ii) The owner or operator satisfies the eligibility criteria of paragraph (i)(2) of this section, including any necessary modifications to the CAFO's design, construction, operation, and/or maintenance to permanently address the cause of the discharge and ensure that no discharge from this cause occurs in the future;

(iii) The CAFO has not previously recertified after a discharge from the same cause;

(iv) The owner or operator submits to the Director for review the following documentation: a description of the discharge, including the date, time, cause, duration, and approximate volume of the discharge, and a detailed explanation of the steps taken by the CAFO to permanently address

the cause of the discharge in addition to submitting a certification in accordance with paragraph (i)(3) of this section; and

(v) Notwithstanding paragraph (i)(4) of this section, a recertification that meets the requirements of paragraphs (i)(6)(iii) and (i)(6)(iv) of this section shall only become effective 30 days from the date of submission of the recertification documentation.

(j) *Effect of certification.*

(1) An unpermitted CAFO certified in accordance with paragraph (i) of this section is presumed not to propose to discharge. If such a CAFO does discharge, it is not in violation of the requirement that CAFOs that propose to discharge seek permit coverage pursuant to paragraphs (d)(1) and (f) of this section, with respect to that discharge. In all instances, the discharge of a pollutant without a permit is a violation of the Clean Water Act section 301(a) prohibition against unauthorized discharges from point sources.

(2) In any enforcement proceeding for failure to seek permit coverage under paragraphs (d)(1) or (f) of this section that is related to a discharge from an unpermitted CAFO, the burden is on the CAFO to establish that it did not propose to discharge prior to the discharge when the CAFO either did not submit certification documentation as provided in paragraph (i)(3) or (i)(6)(iv) of this section within at least five years prior to the discharge, or withdrew its certification in accordance with paragraph (i)(5) of this section. Design, construction, operation, and maintenance in accordance with the criteria of paragraph (i)(2) of this section satisfies this burden.

**§ 122.28 General permits (applicable to State NPDES programs, see § 123.25).**

*[The first part of § 122.28 ((a) through (b)(2)) is not specific to CAFOs and, therefore, is not included here.]*

[§ 122.28(b)(2) *Authorization to discharge, or authorization to engage in sludge use and disposal practices*](ii) The contents of the notice of intent shall be specified in the general permit and shall require the submission of information necessary for adequate program implementation, including

at a minimum, the legal name and address of the owner or operator, the facility name and address, type of facility or discharges, and the receiving stream(s). General permits for storm water discharges associated with industrial activity from inactive mining, inactive oil and gas operations, or inactive landfills occurring on Federal lands where an operator cannot be identified may contain alternative notice of intent requirements. All notices of intent shall be signed in accordance with § 122.22. Notices of intent for coverage under a general permit for concentrated animal feeding operations must include the information specified in § 122.21(i)(1), including a topographic map.

*[§ 122.28(b)(2)(iii) through (vi) is not specific to CAFOs and, therefore, is not included here.]*

(vii) A CAFO owner or operator may be authorized to discharge under a general permit only in accordance with the process described in § 122.23(h).

*[The remainder of § 122.28 is not specific to CAFOs and, therefore, is not included here.]*

**§ 122.42 Additional conditions applicable to specified categories of NPDES permits (applicable to State NPDES programs, see § 123.25).**

*[The first part of § 122.42 ((a) through (d)) is not specific to CAFOs and, therefore, is not included here.]*

(e) *Concentrated animal feeding operations (CAFOs)*. Any permit issued to a CAFO must include the requirements in paragraphs (e)(1) through (e)(6) of this section.

(1) *Requirement to implement a nutrient management plan*. Any permit issued to a CAFO must include a requirement to implement a nutrient management plan that, at a minimum, contains best management practices necessary to meet the requirements of this paragraph and applicable effluent limitations and standards, including those specified in 40 CFR part 412. The nutrient management plan must, to the extent applicable:

(i) Ensure adequate storage of manure, litter, 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;
- (iii) Ensure that clean water is diverted, as appropriate, from the production area;
- (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, litter, process wastewater, or storm water storage or treatment system unless specifically designed to treat such chemicals and other contaminants;
- (vi) 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;
- (vii) Identify protocols for appropriate testing of manure, litter, process wastewater, and soil;
- (viii) Establish protocols to land apply manure, litter or process wastewater in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater; and
- (ix) Identify specific records that will be maintained to document the implementation and management of the minimum elements described in paragraphs (e)(1)(i) through (e)(1)(viii) of this section.

*(2) Recordkeeping requirements.*

- (i) The permittee must create, maintain for five years, and make available to the Director, upon request, the following records:
  - (A) All applicable records identified pursuant paragraph (e)(1)(ix) of this section;
  - (B) In addition, all CAFOs subject to 40 CFR part 412 must comply with record keeping requirements as specified in § 412.37(b) and (c) and § 412.47(b) and (c).
- (ii) A copy of the CAFO's site-specific nutrient management plan must be maintained on site and made available to the Director upon request.

(3) *Requirements relating to transfer of manure or process wastewater to other persons.* Prior to transferring manure, litter or process wastewater to other persons, Large CAFOs must provide the recipient of the manure, litter or process wastewater with the most current nutrient analysis. The analysis provided must be consistent with the requirements of 40 CFR part 412. Large CAFOs must retain for five years records of the date, recipient name and address, and approximate amount of manure, litter or process wastewater transferred to another person.

(4) Annual reporting requirements for CAFOs. The permittee must submit an annual report to the Director. The annual report must include:

- (i) The number and type of animals, whether in open confinement or housed under roof (beef cattle, broilers, layers, swine weighing 55 pounds or more, swine weighing less than 55 pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, other);
- (ii) Estimated amount of total manure, litter and process wastewater generated by the CAFO in the previous 12 months (tons/gallons);
- (iii) Estimated amount of total manure, litter and process wastewater transferred to other person by the CAFO in the previous 12 months (tons/gallons);
- (iv) Total number of acres for land application covered by the nutrient management plan developed in accordance with paragraph (e)(1) of this section;
- (v) Total number of acres under control of the CAFO that were used for land application of manure, litter and process wastewater in the previous 12 months;
- (vi) Summary of all manure, litter and process wastewater discharges from the production area that have occurred in the previous 12 months, including date, time, and approximate volume;
- (vii) A statement indicating whether the current version of the CAFO's nutrient management plan was developed or approved by a certified nutrient management planner; and
- (viii) The actual crop(s) planted and actual yield(s) for each field, the actual nitrogen and phosphorus content of the manure, litter, and process wastewater, the results of calculations conducted in accordance with paragraphs (e)(5)(i)(B) and (e)(5)(ii)(D) of this section, and the

amount of manure, litter, and process wastewater applied to each field during the previous 12 months; and, for any CAFO that implements a nutrient management plan that addresses rates of application in accordance with paragraph (e)(5)(ii) of this section, the results of any soil testing for nitrogen and phosphorus taken during the preceding 12 months, the data used in calculations conducted in accordance with paragraph (e)(5)(ii)(D) of this section, and the amount of any supplemental fertilizer applied during the previous 12 months.

(5) *Terms of the nutrient management plan.* Any permit issued to a CAFO must require compliance with the terms of the CAFO's site-specific nutrient management plan. The terms of the nutrient management plan are the information, protocols, best management practices, and other conditions in the nutrient management plan determined by the Director to be necessary to meet the requirements of paragraph (e)(1) of this section. The terms of the nutrient management plan, with respect to protocols for land application of manure, litter, or process wastewater required by paragraph (e)(1)(viii) of this section and, as applicable, 40 CFR 412.4(c), must include the fields available for land application; field-specific rates of application properly developed, as specified in paragraphs (e)(5)(i) through (ii) of this section, to ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater; and any timing limitations identified in the nutrient management plan concerning land application on the fields available for land application. The terms must address rates of application using one of the following two approaches, unless the Director specifies that only one of these approaches may be used:

(i) *Linear approach.* An approach that expresses rates of application as pounds of nitrogen and phosphorus, according to the following specifications:

(A) The terms include maximum application rates from manure, litter, and process wastewater for each year of permit coverage, for each crop identified in the nutrient management plan, in chemical forms determined to be acceptable to the Director, in pounds per acre, per year, for each field to be used for land application, and certain factors necessary to determine such rates. At a minimum, the factors that are terms must include: the outcome

of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field; the crops to be planted in each field or any other uses of a field such as pasture or fallow fields; the realistic yield goal for each crop or use identified for each field; the nitrogen and phosphorus recommendations from sources specified by the Director for each crop or use identified for each field; credits for all nitrogen in the field that will be plant available; consideration of multi-year phosphorus application; and accounting for all other additions of plant available nitrogen and phosphorus to the field. In addition, the terms include the form and source of manure, litter, and process wastewater to be land-applied; the timing and method of land application; and the methodology by which the nutrient management plan accounts for the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied.

(B) Large CAFOs that use this approach must calculate the maximum amount of manure, litter, and process wastewater to be land applied at least once each year using the results of the most recent representative manure, litter, and process wastewater tests for nitrogen and phosphorus taken within 12 months of the date of land application; or

(ii) *Narrative rate approach.* An approach that expresses rates of application as a narrative rate of application that results in the amount, in tons or gallons, of manure, litter, and process wastewater to be land applied, according to the following specifications:

(A) The terms include maximum amounts of nitrogen and phosphorus derived from all sources of nutrients, for each crop identified in the nutrient management plan, in chemical forms determined to be acceptable to the Director, in pounds per acre, for each field, and certain factors necessary to determine such amounts. At a minimum, the factors that are terms must include: the outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field; the crops to be planted in each field or any other uses such as pasture or fallow fields (including alternative crops identified in accordance with paragraph (e)(5)(ii)(B) of this section); the realistic yield goal for each crop or use identified

for each field; and the nitrogen and phosphorus recommendations from sources specified by the Director for each crop or use identified for each field. In addition, the terms include the methodology by which the nutrient management plan accounts for the following factors when calculating the amounts of manure, litter, and process wastewater to be land applied: results of soil tests conducted in accordance with protocols identified in the nutrient management plan, as required by paragraph (e)(1)(vii) of this section; credits for all nitrogen in the field that will be plant available; the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied; consideration of multi-year phosphorus application; accounting for all other additions of plant available nitrogen and phosphorus to the field; the form and source of manure, litter, and process wastewater; the timing and method of land application; and volatilization of nitrogen and mineralization of organic nitrogen.

(B) The terms of the nutrient management plan include alternative crops identified in the CAFO's nutrient management plan that are not in the planned crop rotation. Where a CAFO includes alternative crops in its nutrient management plan, the crops must be listed by field, in addition to the crops identified in the planned crop rotation for that field, and the nutrient management plan must include realistic crop yield goals and the nitrogen and phosphorus recommendations from sources specified by the Director for each crop. Maximum amounts of nitrogen and phosphorus from all sources of nutrients and the amounts of manure, litter, and process wastewater to be applied must be determined in accordance with the methodology described in paragraph (e)(5)(ii)(A) of this section.

(C) For CAFOs using this approach, the following projections must be included in the nutrient management plan submitted to the Director, but are not terms of the nutrient management plan: the CAFO's planned crop rotations for each field for the period of permit coverage; the projected amount of manure, litter, or process wastewater to be applied; projected credits for all nitrogen in the field that will be plant available; consideration of multi-year phosphorus application; accounting for all other additions of plant available

nitrogen and phosphorus to the field; and the predicted form, source, and method of application of manure, litter, and process wastewater for each crop. Timing of application for each field, insofar as it concerns the calculation of rates of application, is not a term of the nutrient management plan.

(D) CAFOs that use this approach must calculate maximum amounts of manure, litter, and process wastewater to be land applied at least once each year using the methodology required in paragraph (e)(5)(ii)(A) of this section before land applying manure, litter, and process wastewater and must rely on the following data:

(1) a field-specific determination of soil levels of nitrogen and phosphorus, including, for nitrogen, a concurrent determination of nitrogen that will be plant available consistent with the methodology required by paragraph (e)(5)(ii)(A) of this section, and for phosphorus, the results of the most recent soil test conducted in accordance with soil testing requirements approved by the Director; and

(2) the results of most recent representative manure, litter, and process wastewater tests for nitrogen and phosphorus taken within 12 months of the date of land application, in order to determine the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied.

(6) *Changes to a nutrient management plan.* Any permit issued to a CAFO must require the following procedures to apply when a CAFO owner or operator makes changes to the CAFO's nutrient management plan previously submitted to the Director:

(i) The CAFO owner or operator must provide the Director with the most current version of the CAFO's nutrient management plan and identify changes from the previous version, except that the results of calculations made in accordance with the requirements of paragraphs (e)(5)(i)(B) and (e)(5)(ii)(D) of this section are not subject to the requirements of paragraph (e)(6) of this section.

(ii) The Director must review the revised nutrient management plan to ensure that it meets the requirements of this section and applicable effluent limitations and standards, including those specified in 40 CFR part 412, and must determine whether the changes to the nutrient management plan necessitate revision to the terms of the nutrient management plan incorporated into the permit issued to the CAFO. If revision to the terms of the nutrient management plan is not necessary, the Director must notify the CAFO owner or operator and upon such notification the CAFO may implement the revised nutrient management plan. If revision to the terms of the nutrient management plan is necessary, the Director must determine whether such changes are substantial changes as described in paragraph (e)(6)(iii) of this section.

(A) If the Director determines that the changes to the terms of the nutrient management plan are not substantial, the Director must make the revised nutrient management plan publicly available and include it in the permit record, revise the terms of the nutrient management plan incorporated into the permit, and notify the owner or operator and inform the public of any changes to the terms of the nutrient management plan that are incorporated into the permit.

(B) If the Director determines that the changes to the terms of the nutrient management plan are substantial, the Director must notify the public and make the proposed changes and the information submitted by the CAFO owner or operator available for public review and comment. The process for public comments, hearing requests, and the hearing process if a hearing is held must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Director may establish, either by regulation or in the CAFO's permit, an appropriate period of time for the public to comment and request a hearing on the proposed changes that differs from the time period specified in 40 CFR 124.10. The Director must respond to all significant comments received during the comment period as provided in 40 CFR 124.17, and require the CAFO owner or operator to further revise the nutrient management plan if necessary, in order to approve the revision to the terms of the nutrient management plan incorporated into the CAFO's permit. Once the Director incorporates the

revised terms of the nutrient management plan into the permit, the Director must notify the owner or operator and inform the public of the final decision concerning revisions to the terms and conditions of the permit.

(iii) Substantial changes to the terms of a nutrient management plan incorporated as terms and conditions of a permit include, but are not limited to:

(A) Addition of new land application areas not previously included in the CAFO's nutrient management plan. Except that if the land application area that is being added to the nutrient management plan is covered by terms of a nutrient management plan incorporated into an existing NPDES permit in accordance with the requirements of paragraph (e)(5) of this section, and the CAFO owner or operator applies manure, litter, or process wastewater on the newly added land application area in accordance with the existing field-specific permit terms applicable to the newly added land application area, such addition of new land would be a change to the new CAFO owner or operator's nutrient management plan but not a substantial change for purposes of this section;

(B) Any changes to the field-specific maximum annual rates for land application, as set forth in paragraphs (e)(5)(i) of this section, and to the maximum amounts of nitrogen and phosphorus derived from all sources for each crop, as set forth in paragraph (e)(5)(ii) of this section;

(C) Addition of any crop or other uses not included in the terms of the CAFO's nutrient management plan and corresponding field-specific rates of application expressed in accordance with paragraph (e)(5) of this section; and

(D) Changes to site-specific components of the CAFO's nutrient management plan, where such changes are likely to increase the risk of nitrogen and phosphorus transport to waters of the U.S.

(iv) *For EPA-issued permits only.* Upon incorporation of the revised terms of the nutrient management plan into the permit, 40 CFR 124.19 specifies procedures for appeal of the permit

decision. In addition to the procedures specified at 40 CFR 124.19, a person must have submitted comments or participated in the public hearing in order to appeal the permit decision.

**§ 122.62 Modification or revocation and reissuance of permits (applicable to State programs, see § 123.25)**

*[§ 122.62(a)(1) through (16) is not specific to CAFOs and, therefore, is not included here.]*

*[§122.62(a) Causes for modification](17) Nutrient Management Plans.* The incorporation of the terms of a CAFO's nutrient management plan into the terms and conditions of a general permit when a CAFO obtains coverage under a general permit in accordance with §§ 122.23(h) and 122.28 is not a cause for modification pursuant to the requirements of this section.

*[The remainder of § 122.62 is not specific to CAFOs and, therefore, is not included here.]*

**§ 122.63 Minor modification of permits.**

*[§ 122.63(a) through (g) is not specific to CAFOs and, therefore, is not included here.]*

(h) Incorporate changes to the terms of a CAFO's nutrient management plan that have been revised in accordance with the requirements of § 122.42(e)(6).

**PART 412—CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFO) POINT**

**SOURCE CATEGORY**

**Authority:** 33 U.S.C. 1311, 1314, 1316, 1317, 1318, 1342, and 1361.

**§ 412.1 General applicability.**

This part applies to manure, litter, and/or process wastewater discharges resulting from concentrated animal feeding operations (CAFOs). Manufacturing and/or agricultural activities which may be subject to this part are generally reported under one or more of the following Standard Industrial Classification

(SIC) codes: SIC 0211, SIC 0213, SIC 0214, SIC 0241, SIC 0251, SIC 0252, SIC 0253, SIC 0254, SIC 0259, or SIC 0272 (1987 SIC Manual).

**§ 412.2 General definitions.**

As used in this part:

- (a) The general definitions and abbreviations at 40 CFR part 401 apply.
- (b) *Animal Feeding Operation (AFO)* and *Concentrated Animal Feeding Operation (CAFO)* are defined at 40 CFR 122.23.
- (c) *Fecal coliform* means the bacterial count (Parameter 1) at 40 CFR 136.3 in Table 1A, which also cites the approved methods of analysis.
- (d) *Process wastewater* means water directly or indirectly used in the operation of the CAFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other CAFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs, or bedding.
- (e) *Land application area* means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter, or process wastewater from the production area is or may be applied.
- (f) *New source* is defined at 40 CFR 122.2. New source criteria are defined at 40 CFR 122.29(b).
- (g) *Overflow* means the discharge of manure or process wastewater resulting from the filling of wastewater or manure storage structures beyond the point at which no more manure, process wastewater, or storm water can be contained by the structure.
- (h) *Production area* means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal

walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

(i) *Ten (10)-year, 24-hour rainfall event, 25-year, 24-hour rainfall event, and 100-year, 24-hour rainfall event* mean precipitation events with a probable recurrence interval of once in ten years, or twenty five years, or one hundred years, respectively, as defined by the National Weather Service in Technical Paper No. 40, "Rainfall Frequency Atlas of the United States," May, 1961, or equivalent regional or State rainfall probability information developed from this source.

(j) *Analytical methods*. The parameters that are regulated or referenced in this part and listed with approved methods of analysis in Table 1B at 40 CFR 136.3 are defined as follows:

- (1) Ammonia (as N) means ammonia reported as nitrogen.
- (2) BOD5 means 5-day biochemical oxygen demand.
- (3) Nitrate (as N) means nitrate reported as nitrogen.
- (4) Total dissolved solids means nonfilterable residue.

(k) The parameters that are regulated or referenced in this part and listed with approved methods of analysis in Table 1A at 40 CFR 136.3 are defined as follows:

- (1) Fecal coliform means fecal coliform bacteria.
- (2) Total coliform means all coliform bacteria.

### **§ 412.3 General pretreatment standards.**

Any source subject to this part that introduces process wastewater pollutants into a publicly owned treatment works (POTW) must comply with 40 CFR part 403.

**§ 412.4 Best management practices (BMPs) for land application of manure, litter, and process wastewater.**

(a) *Applicability.* This section applies to any CAFO subject to subpart C of this part (Dairy and Beef Cattle other than Veal Calves) or subpart D of this part (Swine, Poultry, and Veal Calves).

(b) *Specialized definitions.*

(1) *Setback* means a specified distance from surface waters or potential conduits to surface waters where manure, litter, and process wastewater may not be land applied. Examples of conduits to surface waters include but are not limited to: Open tile line intake structures, sinkholes, and agricultural well heads.

(2) *Vegetated buffer* means a narrow, permanent strip of dense perennial vegetation established parallel to the contours of and perpendicular to the dominant slope of the field for the purposes of slowing water runoff, enhancing water infiltration, and minimizing the risk of any potential nutrients or pollutants from leaving the field and reaching surface waters.

(3) *Multi-year phosphorus application* means phosphorus applied to a field in excess of the crop needs for that year. In multi-year phosphorus applications, no additional manure, litter, or process wastewater is applied to the same land in subsequent years until the applied phosphorus has been removed from the field via harvest and crop removal.

(c) *Requirement to develop and implement best management practices.* Each CAFO subject to this section that land applies manure, litter, or process wastewater, must do so in accordance with the following practices:

(1) *Nutrient Management Plan.* The CAFO must develop and implement a nutrient management plan that incorporates the requirements of paragraphs (c)(2) through (c)(5) of this section based on a field-specific assessment of the potential for nitrogen and phosphorus transport from the field and that addresses the form, source, amount, timing, and method of application of nutrients on each field to

achieve realistic production goals, while minimizing nitrogen and phosphorus movement to surface waters.

(2) *Determination of application rates.* Application rates for manure, litter, and other process wastewater applied to land under the ownership or operational control of the CAFO must minimize phosphorus and nitrogen transport from the field to surface waters in compliance with the technical standards for nutrient management established by the Director. Such technical standards for nutrient management shall:

- (i) Include a field-specific assessment of the potential for nitrogen and phosphorus transport from the 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, while minimizing nitrogen and phosphorus movement to surface waters; and
- (ii) Include appropriate flexibilities for any CAFO to implement nutrient management practices to comply with the technical standards, including consideration of multi-year phosphorus application on fields that do not have a high potential for phosphorus runoff to surface water, phased implementation of phosphorus-based nutrient management, and other components, as determined appropriate by the Director.

(3) *Manure and soil sampling.* Manure must be analyzed a minimum of once annually for nitrogen and phosphorus content, and soil analyzed a minimum of once every five years for phosphorus content. The results of these analyses are to be used in determining application rates for manure, litter, and other process wastewater.

(4) *Inspect land application equipment for leaks.* The operator must periodically inspect equipment used for land application of manure, litter, or process wastewater.

(5) *Setback requirements.* Unless the CAFO exercises one of the compliance alternatives provided for in paragraph (c)(5)(i) or (c)(5)(ii) of this section, manure, litter, and process wastewater may not be applied closer than 100 feet to any down-gradient surface waters, open tile line intake structures, sinkholes, agricultural well heads, or other conduits to surface waters.

- (i) Vegetated buffer compliance alternative. As a compliance alternative, the CAFO may substitute the 100-foot setback with a 35-foot wide vegetated buffer where applications of manure, litter, or process wastewater are prohibited.
- (ii) Alternative practices compliance alternative. As a compliance alternative, the CAFO may demonstrate that a setback or buffer is not necessary because implementation of alternative conservation practices or field-specific conditions will provide pollutant reductions equivalent or better than the reductions that would be achieved by the 100-foot setback.

### **Subpart A-Horses and Sheep**

#### **§ 412.10 Applicability.**

This subpart applies to discharges resulting from the production areas at horse and sheep CAFOs. This subpart does not apply to such CAFOs with less than the following capacities: 10,000 sheep or 500 horses.

#### **§ 412.12 Effluent limitations attainable by the application of the best practicable control technology currently available (BPT).**

(a) Except as provided in 40 CFR 125.30 through 125.32, and subject to the provisions of paragraph (b) of this section, any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BPT: There shall be no discharge of process waste water pollutants to navigable waters.

(b) Process waste pollutants in the overflow may be discharged to navigable waters whenever rainfall events, either chronic or catastrophic, cause an overflow of process waste water from a facility designed, constructed and operated to contain all process generated waste waters plus the runoff from a 10-year, 24-hour rainfall event for the location of the point source.

**§ 412.13 Effluent limitations attainable by the application of the best available technology economically achievable (BAT).**

(a) Except as provided in 40 CFR 125.30 through 125.32 and when the provisions of paragraph (b) of this section apply, any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BAT: There shall be no discharge of process waste water pollutants into U.S. waters.

(b) Whenever rainfall events cause an overflow of process wastewater from a facility designed, constructed, operated, and maintained to contain all process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the point source, any process wastewater pollutants in the overflow may be discharged into U.S. waters.

**§ 412.14 [Reserved]**

**§ 412.15 New source performance standards (NSPS).**

(a) Except as provided in paragraph (b) of this section, any new source subject to this subpart must achieve the following performance standards: There must be no discharge of process wastewater pollutants into U.S. waters.

(b) Whenever rainfall events cause an overflow of process wastewater from a facility designed, constructed, operated, and maintained to contain all process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the point source, any process wastewater pollutants in the overflow may be discharged into U.S. waters.

**Subpart B-Ducks**

**§ 412.20 Applicability.**

This subpart applies to discharges resulting from the production areas at dry lot and wet lot duck CAFOs.

This subpart does not apply to such CAFOs with less than the following capacities: 5,000 ducks.

**§ 412.21 Special definitions.**

For the purposes of this subpart:

(a) *Dry lot* means a facility for growing ducks in confinement with a dry litter floor cover and no access to swimming areas.

(b) *Wet lot* means a confinement facility for raising ducks which is open to the environment, has a small number of sheltered areas, and with open water runs and swimming areas to which ducks have free access.

**§ 412.22 Effluent limitations attainable by the application of the best practicable control technology currently available (BPT).**

(a) Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart shall achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the (BPT):

Regulated parameter	Maximum daily <sup>1</sup>	Maximum monthly average <sup>1</sup>	Maximum daily <sup>2</sup>	Maximum monthly average <sup>2</sup>
BOD <sub>5</sub> .....	3.66	2.0	1.66	0.91
Fecal coliform.....	( <sup>3</sup> )	( <sup>3</sup> )	( <sup>3</sup> )	( <sup>3</sup> )

<sup>1</sup> Pounds per 1000 ducks.

<sup>2</sup> Kilograms per 1000 ducks.

<sup>3</sup> Not to exceed MPN of 400 per 100 ml at any time.

(b) [Reserved]

**§ 412.25 New source performance standards (NSPS).**

(a) Except as provided in paragraph (b) of this section, any new source subject to this subpart must achieve the following performance standards: There must be no discharge of process waste water pollutants into U.S. waters.

(b) Whenever rainfall events cause an overflow of process wastewater from a facility designed, constructed, operated, and maintained to contain all process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the point source, any process wastewater pollutants in the overflow may be discharged into U.S. waters.

**§ 412.26 Pretreatment standards for new sources (PSNS).**

(a) Except as provided in 40 CFR 403.7 and in paragraph (b) of this section, any new source subject to this subpart must achieve the following performance standards: There must be no introduction of process waste water pollutants to a POTW.

(b) Whenever rainfall events cause an overflow of process wastewater from a facility designed, constructed, operated, and maintained to contain all process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the point source, any process wastewater pollutants in the overflow may be introduced to a POTW.

**Subpart C-Dairy Cows and Cattle Other Than Veal Calves**

**§ 412.30 Applicability.**

This subpart applies to operations defined as concentrated animal feeding operations (CAFOs) under 40 CFR 122.23 and includes the following animals: mature dairy cows, either milking or dry; cattle other than mature dairy cows or veal calves. Cattle other than mature dairy cows includes but is not limited to heifers, steers, and bulls. This subpart does not apply to such CAFOs with less than the following capacities: 700 mature dairy cows whether milked or dry; 1,000 cattle other than mature dairy cows or veal calves.

**§ 412.31 Effluent limitations attainable by the application of the best practicable control technology currently available (BPT).**

Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BPT:

(a) For CAFO production areas. Except as provided in paragraphs (a)(1) through (a)(2) of this section, there must be no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. from the production area.

(1) Whenever precipitation causes an overflow of manure, litter, or process wastewater, pollutants in the overflow may be discharged into U.S. waters provided:

(i) The production area is designed, constructed, operated and maintained to contain all manure, litter, and process wastewater including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event;

(ii) The production area is operated in accordance with the additional measures and records required by § 412.37(a) and (b).

(2) Voluntary alternative performance standards. Any CAFO subject to this subpart may request the Director to establish NPDES permit effluent limitations based upon site-specific alternative technologies that achieve a quantity of pollutants discharged from the production area equal to or less than the quantity of pollutants that would be discharged under the baseline performance standards as provided by paragraph (a)(1) of this section.

(i) Supporting information. In requesting site-specific effluent limitations to be included in the NPDES permit, the CAFO owner or operator must submit a supporting technical analysis and any other relevant information and data that would support such site-specific effluent limitations within the time frame provided by the Director. The supporting technical analysis must include calculation of the quantity of pollutants discharged, on a mass basis where appropriate, based on a site-specific analysis of a system designed, constructed, operated, and maintained to contain all

manure, litter, and process wastewater, including the runoff from a 25-year, 24-hour rainfall event. The technical analysis of the discharge of pollutants must include:

(A) All daily inputs to the storage system, including manure, litter, all process waste waters, direct precipitation, and runoff.

(B) All daily outputs from the storage system, including losses due to evaporation, sludge removal, and the removal of waste water for use on cropland at the CAFO or transport off site.

(C) A calculation determining the predicted median annual overflow volume based on a 25-year period of actual rainfall data applicable to the site.

(D) Site-specific pollutant data, including N, P, BOD5, TSS, for the CAFO from representative sampling and analysis of all sources of input to the storage system, or other appropriate pollutant data.

(E) Predicted annual average discharge of pollutants, expressed where appropriate as a mass discharge on a daily basis (lbs/day), and calculated considering paragraphs (a)(2)(i)(A) through (a)(2)(i)(D) of this section.

(ii) The Director has the discretion to request additional information to supplement the supporting technical analysis, including inspection of the CAFO.

(3) The CAFO shall attain the limitations and requirements of this paragraph as of the date of permit coverage.

(b) For CAFO land application areas. Discharges from land application areas are subject to the following requirements:

(1) Develop and implement the best management practices specified in § 412.4;

(2) Maintain the records specified at § 412.37 (c);

(3) The CAFO shall attain the limitations and requirements of this paragraph by December 31, 2006.

**§ 412.32 Effluent limitations attainable by the application of the best conventional pollutant control technology (BCT).**

Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BCT:

(a) For CAFO production areas: the CAFO shall attain the same limitations and requirements as § 412.31(a).

(b) For CAFO land application areas: the CAFO shall attain the same limitations and requirements as § 412.31(b).

**§ 412.33 Effluent limitations attainable by the application of the best available technology economically achievable (BAT).**

Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BAT:

(a) For CAFO production areas: the CAFO shall attain the same limitations and requirements as § 412.31(a).

(b) For CAFO land application areas: the CAFO shall attain the same limitations and requirements as § 412.31(b).

**§ 412.34 [Reserved]**

**§ 412.35 New source performance standards (NSPS).**

Any new point source subject to this subpart must achieve the following effluent limitations representing the application of NSPS:

(a) For CAFO production areas. The CAFO shall attain the same limitations and requirements as § 412.31(a)(1) and § 412.31(a)(2).

(b) For CAFO land application areas: The CAFO shall attain the same limitations and requirements as § 412.31(b)(1) and § 412.31(b)(2).

(c) The CAFO shall attain the limitations and requirements of this paragraph as of the date of permit coverage.

(d) Any source subject to this subpart that commenced discharging after April 14, 1993, and prior to April 14, 2003, which was a new source subject to the standards specified in § 412.15, revised as of July 1, 2002, must continue to achieve those standards for the applicable time period specified in 40 CFR 122.29(d)(1). Thereafter, the source must achieve the standards specified in § 412.31(a) and (b).

**§ 412.37 Additional measures.**

(a) Each CAFO subject to this subpart must implement the following requirements:

(1) *Visual inspections.* There must be routine visual inspections of the CAFO production area. At a minimum, the following must be visually inspected:

(i) Weekly inspections of all storm water diversion devices, runoff diversion structures, and devices channelling contaminated storm water to the wastewater and manure storage and containment structure;

(ii) Daily inspection of water lines, including drinking water or cooling water lines;

(iii) Weekly inspections of the manure, litter, and process wastewater impoundments; the inspection will note the level in liquid impoundments as indicated by the depth marker in paragraph (a)(2) of this section.

(2) *Depth marker.* All open surface liquid impoundments must have a depth marker which clearly indicates the minimum capacity necessary to contain the runoff and direct precipitation of the 25-year, 24-hour rainfall event. In the case of new sources subject to effluent limitations established pursuant to § 412.46(a)(1) of this part, all open surface manure storage structures associated with such sources must include a depth marker which clearly indicates the minimum capacity necessary to

contain the maximum runoff and direct precipitation associated with the design storm used in sizing the impoundment for no discharge.

(3) *Corrective actions.* Any deficiencies found as a result of these inspections must be corrected as soon as possible.

(4) *Mortality handling.* Mortalities must not be disposed of in any liquid manure or process wastewater system, and must be handled in such a way as to prevent the discharge of pollutants to surface water, unless alternative technologies pursuant to § 412.31(a)(2) and approved by the Director are designed to handle mortalities.

(b) *Record keeping requirements for the production area.* Each CAFO must maintain on-site for a period of five years from the date they are created a complete copy of the information required by 40 CFR 122.21(i)(1) and 40 CFR 122.42(e)(1)(ix) and the records specified in paragraphs (b)(1) through (b)(6) of this section. The CAFO must make these records available to the Director and, in an authorized State, the Regional Administrator, or his or her designee, for review upon request.

- (1) Records documenting the inspections required under paragraph (a)(1) of this section;
- (2) Weekly records of the depth of the manure and process wastewater in the liquid impoundment as indicated by the depth marker under paragraph (a)(2) of this section;
- (3) Records documenting any actions taken to correct deficiencies required under paragraph (a)(3) of this section. Deficiencies not corrected within 30 days must be accompanied by an explanation of the factors preventing immediate correction;
- (4) Records of mortalities management and practices used by the CAFO to meet the requirements of paragraph (a)(4) of this section.
- (5) Records documenting the current design of any manure or litter storage structures, including volume for solids accumulation, design treatment volume, total design volume, and approximate number of days of storage capacity;
- (6) Records of the date, time, and estimated volume of any overflow.

(c) *Recordkeeping requirements for the land application areas.* Each CAFO must maintain on-site a copy of its site-specific nutrient management plan. Each CAFO must maintain on-site for a period of five years from the date they are created a complete copy of the information required by § 412.4 and 40 CFR 122.42(e)(1)(ix) and the records specified in paragraphs (c)(1) through (c)(10) of this section. The CAFO must make these records available to the Director and, in an authorized State, the Regional Administrator, or his or her designee, for review upon request.

- (1) Expected crop yields;
- (2) The date(s) manure, litter, or process waste water is applied to each field;
- (3) Weather conditions at time of application and for 24 hours prior to and following application;
- (4) Test methods used to sample and analyze manure, litter, process waste water, and soil;
- (5) Results from manure, litter, process waste water, and soil sampling;
- (6) Explanation of the basis for determining manure application rates, as provided in the technical standards established by the Director.
- (7) Calculations showing the total nitrogen and phosphorus to be applied to each field, including sources other than manure, litter, or process wastewater;
- (8) Total amount of nitrogen and phosphorus actually applied to each field, including documentation of calculations for the total amount applied;
- (9) The method used to apply the manure, litter, or process wastewater;
- (10) Date(s) of manure application equipment inspection.

#### **Subpart D-Swine, Poultry, and Veal Calves**

##### **§ 412.40 Applicability.**

This subpart applies to operations defined as concentrated animal feeding operations (CAFOs) under 40 CFR 122.23 and includes the following animals: swine; chickens; turkeys; and veal calves. This subpart does not apply to such CAFOs with less than the following capacities: 2,500 swine each weighing 55 lbs.

or more; 10,000 swine each weighing less than 55 lbs.; 30,000 laying hens or broilers if the facility uses a liquid manure handling system; 82,000 laying hens if the facility uses other than a liquid manure handling system; 125,000 chickens other than laying hens if the facility uses other than a liquid manure handling system; 55,000 turkeys; and 1,000 veal calves.

**§§ 412.35–412.42 [Reserved]**

**§ 412.43 Effluent limitations attainable by the application of the best practicable control technology currently available (BPT).**

Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BPT:

(a) For CAFO production areas.

(1) The CAFO shall attain the same limitations and requirements as § 412.31(a)(1) through (a)(2).

(2) The CAFO shall attain the limitations and requirements of this paragraph as of the date of permit coverage.

(b) For CAFO land application areas.

(1) The CAFO shall attain the same limitations and requirements as § 412.31(b)(1) and (b)(2).

(2) The CAFO shall attain the limitations and requirements of this paragraph by December 31, 2006.

**§ 412.44 Effluent limitations attainable by the application of the best conventional pollutant control technology (BCT).**

Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BCT:

(a) For CAFO production areas: the CAFO shall attain the same limitations and requirements as § 412.43(a).

(b) For CAFO land application areas: the CAFO shall attain the same limitations and requirements as § 412.43(b).

**§ 412.45 Effluent limitations attainable by the application of the best available technology economically achievable (BAT).**

Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BAT:

(a) For CAFO production areas: the CAFO shall attain the same limitations and requirements as § 412.43(a).

(b) For CAFO land application areas: the CAFO shall attain the same limitations and requirements as § 412.43(b).

**§ 412.46 New source performance standards (NSPS).**

Any new source subject to this subpart must achieve the following effluent limitations representing the application of NSPS:

(a) For CAFO production areas. There must be no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. from the production area, subject to paragraphs (a)(1) through (a)(3) of this section.

(1) Any CAFO subject to this subpart may request that the Director establish NPDES permit best management practice effluent limitations designed to ensure no discharge of manure, litter, or process wastewater based upon a site-specific evaluation of the CAFO's open surface manure storage structure. The NPDES permit best management practice effluent limitations must address the CAFO's entire production area. In the case of any CAFO using an open surface manure storage structure for which the Director establishes such effluent limitations, "no discharge of manure, litter, or process wastewater pollutants," as used in this section, means that the storage structure is designed, operated, and maintained in accordance with best management practices established by

the Director on a site-specific basis after a technical evaluation of the storage structure. The technical evaluation must address the following elements:

(i) Information to be used in the design of the open manure storage structure including, but not limited to, the following: minimum storage periods for rainy seasons, additional minimum capacity for chronic rainfalls, applicable technical standards that prohibit or otherwise limit land application to frozen, saturated, or snow-covered ground, planned emptying and dewatering schedules consistent with the CAFO's Nutrient Management Plan, additional storage capacity for manure intended to be transferred to another recipient at a later time, and any other factors that would affect the sizing of the open manure storage structure.

(ii) The design of the open manure storage structure as determined by the most recent version of the National Resource Conservation Service's Animal Waste Management (AWM) software. CAFOs may use equivalent design software or procedures as approved by the Director.

(iii) All inputs used in the open manure storage structure design including actual climate data for the previous 30 years consisting of historical average monthly precipitation and evaporation values, the number and types of animals, anticipated animal sizes or weights, any added water and bedding, any other process wastewater, and the size and condition of outside areas exposed to rainfall and contributing runoff to the open manure storage structure.

(iv) The planned minimum period of storage in months including, but not limited to, the factors for designing an open manure storage structure listed in paragraph (a)(1)(i) of this section. Alternatively the CAFO may determine the minimum period of storage by specifying times the storage pond will be emptied consistent with the CAFO's Nutrient Management Plan.

(v) Site-specific predicted design specifications including dimensions of the storage facility, daily manure and wastewater additions, the size and characteristics of the land application areas, and the total calculated storage period in months.

(vi) An evaluation of the adequacy of the designed manure storage structure using the most recent version of the Soil Plant Air Water (SPAW) Hydrology Tool. The evaluation must include all

inputs to SPAW including but not limited to daily precipitation, temperature, and evaporation data for the previous 100 years, user-specified soil profiles representative of the CAFO's land application areas, planned crop rotations consistent with the CAFO's Nutrient Management Plan, and the final modeled result of no overflows from the designed open manure storage structure. For those CAFOs where 100 years of local weather data for the CAFO's location is not available, CAFOs may use a simulation with a confidence interval analysis conducted over a period of 100 years. The Director may approve equivalent evaluation and simulation procedures.

(vii) The Director may waive the requirement of (a)(1)(vi) for a site-specific evaluation of the designed manure storage structure and instead authorize a CAFO to use a technical evaluation developed for a class of specific facilities within a specified geographical area.

(viii) Waste management and storage facilities designed, constructed, operated, and maintained consistent with the analysis conducted in paragraphs (a)(1)(i) through (a)(1)(vii) of this section and operated in accordance with the additional measures and records required by § 412.47(a) and (b), will fulfill the requirements of this section.

(ix) The Director has the discretion to request additional information to support a request for effluent limitations based on a site-specific open surface manure storage structure.

(2) The production area must be operated in accordance with the additional measures required by § 412.47(a) and (b).

(3) Provisions for upset/bypass, as provided in 40 CFR 122.41(m)-(n), apply to a new source subject to this provision.

(b) For CAFO land application areas: the CAFO shall attain the same limitations and requirements as § 412.43(b)(1).

(c) The CAFO shall attain the limitations and requirements of this paragraph as of the date of permit coverage.

(d) Any source subject to this subpart that commenced discharging after April 14, 1993, and prior to April 14, 2003, which was a new source subject to the standards specified in § 412.15, revised as of July 1,

2002, must continue to achieve those standards for the applicable time period specified in 40 CFR 122.29(d)(1). Thereafter, the source must achieve the standards specified in § 412.43(a) and (b).

(e) Any source subject to this subpart that commenced discharging after April 14, 2003, and prior to **[insert date of 60 days after date of publication]**, which was a new source subject to the standards specified in § 412.46(a) through (d) in the July 1, 2008, edition of 40 CFR part 439, must continue to achieve those standards for the applicable time period specified in 40 CFR 122.29(d)(1).

**§ 412.47 Additional measures.**

(a) Each CAFO subject to this subpart must implement the requirements of § 412.37(a).

(b) Each CAFO subject to this subpart must comply with the record-keeping requirements of § 412.37(b).

(c) Each CAFO subject to this subpart must comply with the record-keeping requirements of § 412.37(c).