

NORTH DAKOTA
DEPARTMENT OF HEALTH
Departmental Memorandum

TO: File

FROM: Division of Water Quality

RE: Comments on Proposed Amendments and Adoption of Administrative Rules Relating to the Control of Pollution from Animal Feeding Operations

Bismarck, ND

DATE: May 4, 2018

On February 20, 2018, the North Dakota Department of Health ("department") held a public hearing to allow the public to submit information concerning the proposed amendments of N.D. Admin Code ch. 33-16-03.1 and the adoption of N. D. Admin Code ch. 33.1-16-03.1.

The purpose of the proposed amendments to Control of Pollution from Animal Feeding Operations, N. D. Admin. Ch. 33-16-03.1, is to update the department's rules to provide clarification and reflect the change in U. S. Environmental Protection Agency rules regarding which animal feeding operations require a National Pollutant Discharge Elimination System ("NPDES") permit. The department implements this permitting program in the state – referred to as the North Dakota Pollutant Discharge Elimination System ("NDPDES") permitting program – under rules located in N.D. Admin. Code ch. 33-16-01. The department is revising the NDPDES rules in a separate rulemaking. The need to update the department's rules was highlighted in *Coon v. North Dakota Department of Health*, 2017 ND 215.

In addition, pursuant to Senate Bill No. 2327, the department's Environmental Health Section Chief is proposing to adopt the department's rules relating to the Control of Pollution from Animal Feeding Operations N.D. Admin. Code ch. 33-16-03.1 as the North Dakota Department of Environmental Quality's rules in N.D. Admin. Code ch. 33.1-16-03.1, with minor changes primarily to reflect the creation of the new agency. Comments regarding rules being transferred from the North Dakota Department of Health to the new North Dakota Department of Environmental Quality that are not being changed substantively from existing code are beyond the scope of this proceeding because the transfer of authority is mandated by S.B. 2327. However, where appropriate, the department has provided responses to aid the public's understanding of these rules.

The department has also sought public comment on corresponding proposed amendments to the North Dakota Livestock Program Design Manual ("NDLPDM"). Because most animal feeding operations require only a state permit under N.D. Admin. Code ch. 33-16-03.1, the NDLPDM is being revised to focus on N.D. Admin. Code ch. 33-16-03.1 to avoid confusion. A discharging facility must also obtain a NDPDES permit and should refer to N.D. Admin. Code ch. 33-16-01 for NDPDES permitting requirements.

A Notice of Intent to Amend and Adopt Administrative Rules and Notice of Public Hearing on the proposed rules was issued and posted on the department's web page as well as printed in the county papers of record. The public notice identified the purpose of the public notice, changes proposed by the department, where to obtain additional information regarding the proposed rules,

where written comments could be directed, as well as the purpose and location of the scheduled public hearing.

Below are summaries of the written and oral comments received. Although there are specific responses to each comment, the document should be read in its entirety with the understanding that a response to one comment may be applicable to additional comments. Following the close of the comment period, the Department contacted specific commenters for clarification on some of their more detailed comments.

1. Comment: Concern about the “North Dakota Livestock Program Design Manual” (NDLPDM) Section 2.5 item 2, “A public notice process (as described in North Dakota Administrative Code (NDAC) 33-16-01) is required of CAFO’s issued NDPDES permits” has been struck from the Manual. This must remain in the Manual to retain any trust with the public you serve.

Department Response: This item is being removed from the NDLPDM because the NDLPDM is being revised to focus on state permits required under N.D. Admin. Code ch. 33-16-03.1. Public notice of a draft NDPDES permit is still required in NDAC 33-16-01-07.

2. Comment: Concern about the NDLPDM Section 2.6. Section 2.6 is essentially going to be eliminated including the statement, “The facility also must keep a current Nutrient Management Plan that meets the department requirements on-site and available for department review upon request”.

Department Response: The requirements in the NDLPDM section 2.6 “Criteria for a “No Potential to Pollute” Determination” is proposed to be struck out in its entirety. The items to be struck out only apply to section 2.6 and thus will not lessen the authority of the department. The requirement for a permitted facility to develop and maintain a nutrient management plan is outlined at NDAC 33.1-16-03.1-08(3).

3. Comment: Concern that the NDLPDM Section 6.6 was totally eliminated, contained many subpoints addressing the reporting of Nutrient Management Plan parameters. Basically, what the Department is proposing to do is to delete all requirements that the owner or operator of a CAFO would have to submit an annual report such on animal numbers, amount of manure generated, manure transferred to another party, number of acres of manure application, summary of manure discharges and whether or not the current version of the Nutrient Management Plan was developed or approved by a certified nutrient management planner.

Department Response: For CAFOs requiring a NDPDES permit, the annual reporting requirements for the NDPDES program are being updated and incorporated by reference [40 CFR 122.23] in NDAC 33-16-01 in a separate rulemaking. For CAFOs requiring a state permit under NDAC 33-16-03.1, the facility must maintain records in accordance with NDAC 33-16-03.1-09. These records are not to be submitted annually unless specifically requested by the department.

4. Comment: Concern for the NDLPDM Section 2.3, sub-point number 40 eliminates the “Waters of the State” definitions. Why has this been eliminated?

Department Response: To avoid confusion and eliminate redundancy, the department is removing definitions from NDAC 33-16-03.1 and the NDLPDM where those terms are already defined in NDCC 61-28-02, including “waters of the state,” which is defined in NDCC 61-28-02(15). The NDCC 61-28-02 definitions apply to the terms used in the rules and NDLPDM. Not repeating definitions already contained in the North Dakota Century Code is consistent with the Legislative Council’s Administrative Rules Drafting Manual.

5. Comment: In the NDLPDM section 7.3, sub-point number ten adds additional text including the last sentence saying, “Maximum amount of manure, litter, and process wastewater to be land applied at least once each year”. The words “at least” imply that the maximum amount of manure can be applied every year and more than once each year. Sub-point number fifteen in that same section requires land application records to be maintained, but if they are not required to be reported to the North Dakota Department of Health. Who will ever review them?

Department Response: The additional text in the NDLPDM section 7.3.10 was added so a more detailed nutrient management plan (NMP) can be developed. The words “at least” have been removed and a more detailed description of when manure can be applied has been formulated. The new sentence reads as, “For example, the application of manure can vary from once-a-year, every other year, or twice a year depending on the nutrient utilization of the crop and the amount of nutrients already present in the soil.”. The comment regarding Section 7.3.15 is beyond the scope of this proceeding because the department is not proposing any revisions to Section 7.3.15. The department requests and reviews records on an as-needed basis.

6. Comment: The NDLPDM section 7.5 identifies nitrogen and phosphorus as the two nutrients that require application rate monitoring. Sub-point number two states, that “The PI allows manure and other sources of nutrients to be applied at rates to meet nitrogen needs of a crop if the PI is ‘low or medium’”. This section is completely inadequate. The process of disposing of the manure is the greatest area of concern for pollution. The North Dakota Department of Health must remove all references to the Phosphorus Index from the Design Manual.

Department Response: the department is not proposing any revisions to NDLPDM section 7.5.2, so this comment is beyond the scope of this proceeding. The department continues to believe the PI is an adequate tool to assess possible phosphorous loss.

7. Comment: In closing, I would like to encourage the North Dakota Department of Health to seek the expertise available at the state’s two research universities. Making decisions without all of the pertinent information typically results in a bad decision.

Department Response: The Department does utilize other organizations for expert information such as North Dakota State University, the Natural Resources Conservation Service, and the American Concrete Institute.

8. Comment: In the NDLPDM page ten, section 2.2, Operations Requiring Permits- paragraph beginning “medium and small AFOs must apply...Why is this written in an “after the fact” determination? Why would the NDDH wait until there was a problem or an environmental impact with the facility? If all AFO’s are required to submit a permit it will save departmental resources and prevent possible damage to the environment and exposure to the people of North Dakota that the Department is dedicated to serve and protect.

Department Response: Not all AFOs are subject to obtaining a state permit. This section is written to accommodate those situations when a non-permitted facility would need to obtain permit coverage. The department does not agree that permitting all facilities would save departmental resources or substantially increase environmental health. Permitting all AFOs in the state would require the permitting of thousands of facilities, including many facilities that do not impact water quality.

9. Comment: In the NDLPDM section 4.4 is a completely new addition to the manual. The second to the last sentence in the second paragraph states that, “A copy of a livestock facility’s zoning approval or application to the department”. Why would you use such a compromising word as “should”, this has to be changed to “must”. It must be included. With this new section, the North Dakota Department of Health must require the local authorities approval prior to their taking action of their own on the approval and permitting of a facility.

Department Response: In the NDLPDM section 4.4 was added to help provide some clarity in zoning and odor setbacks. Zoning requirements and situations vary, and this language gives the department needed flexibility to address all circumstances that may arise. Regardless of when zoning approval is provided to the department, the facility must comply with local zoning requirements.

10. Comment: Concern about the deletion of “Discharge of a pollutant and discharge of pollutants each means any addition of any pollutant to the waters of the state from any source, including the disposal of pollutants into wells.” This is located in the NDLPDM section 2.3 or in NDAC 33-16-03.1-03 definition of “Discharge of a pollutant” and “discharge of pollutants”.

Department Response: The definition is being deleted as it is already addressed in NDCC 61-28-02, which defines “discharge” and “wastes”. Please see the response to comment 4 for additional explanation on the reasons the department is removing definitions of terms already defined in the North Dakota Century Code.

11. Comment: In the NDLPDM on page 33, section 5 it is stated that animals that have not been weaned from their mother are part of the mother in terms of animal units. This is a concern. Piglets should be counted separately.

Department Response: This language confirms the department's longstanding interpretation of how to calculate animal units for purposes of determining setback distances under N.D.C.C. § 23-25-11. As is common practice, unweaned piglets are not counted separately from the farrowing sow. For example, in National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176-01, 7192 (Feb. 12, 2003), EPA stated, "In situations where immature animals (e.g. heifers and swine) are confined with mature animals, the immature animals are not counted for purposes of determining whether an AFO is defined as a CAFO based on the number of mature animals." Also, Minnesota's statutes and rules use similar language to North Dakota and its agencies similarly interpret them to not require counting unweaned piglets. See Minn. R. 7020.0300(5) (listing animal units but not specifying sows with litters); Minn. Pollution Control Agency and Department of Agriculture, The Minnesota Livestock Producer's Guide to Feedlot Rules 4 (2008)¹ (animal unit calculations worksheet noting that only swine "separated from sow" are counted)."

12. Comment: Concern that rebar corrosion within concrete structures is not being addressed under Article 5.4.

Department Response: According to the NDLPDM, Section 5.4.1 Concrete Storage Tanks, as required by NDAC § 33-16-03.1-08, there is a list of accepted sources of standards regarding concrete structures. The design plans, design calculations, and specifications prepared by a registered professional engineer must conform to the guidelines set forth by the standards listed in Section 5.4.1. These standards allow the use of uncoated rebar where that rebar has sufficient coverage of concrete as referenced in section 7.7.5 "Corrosive environments" located in "Building Code Requirements for Reinforced Concrete (ACI 318-89) and Commentary - ACI 318R-89".

13. Comment: Concern about manure spreaders being exempt from any odor violations while spreading manure and/or applying to the land in accordance with a Nutrient Management Plan approved by the Department. Manure spreaders should be monitored by the state for odor violations.

Department Response: Under NDCC 23-25-11(4), a person is exempt from NDCC 23-25-11 odor restrictions while spreading or applying animal manure or other recycled agricultural material to land in accordance with a department-approved nutrient management plan.

14. Comment: Concern that the North Dakota Department of Health is loosening its regulations for the benefit of CAFOs.

¹ Available at www.mda.state.mn.us/animals/feedlots/~media/Files/animals/feedlotrulesguide.pdf

Department Response: Thank you for your comment. The proposed amendments are to make the rules consistent with revisions to federal rules and provide clarity. Please see the introduction for additional information.

15. Comment: On page 73 item 9.5, dealing with the request that information about unplanned manure releases be submitted to the Department has been eliminated. Why has it been eliminated?

Department Response: The manual is being updated to focus on the state permit requirements in NDAC 33-16-03.1, which do not require an annual report but do require the facility to report unplanned releases to the department in accordance with NDAC 33-16-2.1-11.

16. Comment: Concern that there are no standards in the Manual protecting residents and worker, who come in contact with toxic gasses released when manure comes in contact with rebar.

Department Response: Please refer to the response to comment 12 in regards to rebar coverage. With proper construction any exposure of rebar with manure should not take place. However, in circumstances where a resident feels there is excessive exposure the department would follow NDCC 23-25 and any other rules to mitigate the site. In regards to worker safety, this is beyond the scope of the rulemaking process.

17. Comment: Concern about who enforces and protects individuals living nearby a field when manure is applied too close to their home or over applied on a field.

Department Response: The department has enforcement authority for this in regards to all AFO and CAFO facilities.

18. Comment: The Spirit Lake Tribe requests further consultation on the proposed Grand Prairie Ag operation as well as future operations within the Tribe's jurisdictional boundaries.

Department Response: Concerns regarding a specific proposed facility are beyond the scope of this rulemaking. But, the department will make every effort to apprise the Spirit Lake Tribe of environmental issues.

19. Comment: Replace Shall with Should-The manure application rate expressed in pounds of nitrogen and phosphorus should not exceed the recommendations of nitrogen and phosphorus based on either the ND PI as developed by the NRCS, or NDSU extension service recommendations based on soil testing.

Department Response: The department concurs with this comment and will not change NDLPDM section 7.5.1 with a should and will keep it shall.

20. Comment: Odor management should be in place at these facilities from day one, not after there is a complaint.

Department Response: Odor is first addressed in the design and development of a facility. However, there may be times when odor becomes an issue after construction which would then need to be addressed under NDCC 23-25-11.

21. Comment: Why are these changes being made to the Manual? Who requested the changes? What is the justification for making these changes?

Department Response: The department is updating the manual for clarification and to reflect the changes being made to NDAC 33-16-03.1 and NDAC 33-16-01. The department is proposing to clarify the rules to be consistent with current federal rules and provide clarity. The need for the rule revisions (and corresponding revisions to the NDLPDM) was made apparent in a recent North Dakota Supreme Court decision, *Coon v. North Dakota Department of Health*, 2017 ND 215. These rule changes were not requested by any outside party.

22. Comment: Strongly opposed to the regulation changes and opposed to the proposed hog farm in Devils Lake.

Department Response: Concerns regarding a specific proposed facility are beyond the scope of this rulemaking.

23. Comment: The proposed changes would allow corporate farms to not be liable if manure spills occur. Tax payers would have to cover the damages.

Department Response: The proposed changes in no way change or lessen the liability of a facility owner or operator for manure spills.

24. Comment: Odor management should be conducted by the Health Department twice a year. Not when there is a problem. The facility should be required to document odor readings on a monthly basis and submit readings to the Health Department.

Department Response: Odor evaluations are conducted at some level for every inspection and then for any complaint received by the department. The department and the facility must comply with NDCC 23-25-11 and NDAC 33-15-16 when addressing odor complaints.

25. Comment: The North Dakota Soybean Growers Association applauds the efforts of the ND Department of Environment Quality to update the regulations related to animal agriculture in North Dakota. We thank the NDDEQ for adopting the appropriate Federal regulations to help make animal agriculture a safe and sustainable part of ND agriculture, while minimizing confusion and conflicting regulation.

Department Response: Thank you for your comment.

26. Comment: The ND Corn Growers Association supports the proposed changes by the North Dakota Department of Health Water Quality Division.

Department Response: Thank you for the comment.

27. Comment: We agree that all offspring from any animal grown in our state should be counted as (one) along with their mother not as a separate animal unit. In regards to odor rules and setbacks the ND Department of Health has done an excellent job protecting our state and its resources. As producers we should only be required to develop and install a odor management plan if there is an odor problem found by the Department and a plan can be implemented specially for that operation.

Department Response: Thank you for the comment.

28. Comment: NDAC 33-16-03.1-03, Page 2, #4-This definition lacks clarity. It references NDAC 33-16-03.1-04 but this offers little clarity as to what the definition of CAFO is. Is there a more descriptive way to define CAFO?

Department Response: For more detail, please see the definition of “animal feeding operation” in subsection 1 the definitions of different types of CAFOs in subsections 9, 16, and 31 of NDAC 33-16-03.1-03.

29. Comment: NDAC 33-16-03.1-04, Page 8, #1 and 2- Why are only small AFO’s included here?

Department Response: The department is proposing to amend NDAC 33-16-03.1-04 to refer to only small animal feeding operations as facilities which can be designated to obtain a state permit. Only small facilities are included here because all large facilities are already defined as CAFOs, NDAC 33-16-03.1-02(9), and all medium facilities that discharge are already defined as CAFOs, NDAC 33-16-03.1-03(16). Small facilities that discharge are designated as CAFOs on a case-by-case basis under this rule.

30. Comment: NDAC 33-16-03.1-08, Page 15, #2-Is the definition of ‘properly developed’ considered to be a, b, c & d in that section? So as long as a facility has the minimum that is considered a “properly developed” NMP? Or are the components of a “properly developed” NMP found in the Design Manual? Is so, can you reference that in this section (aside from “d. Other information specified in the ND LPDM.”)?

Department Response: A nutrient management plan is required to contain the items in NDAC 33-16-03.1-08(2). If this requirement is met then the nutrient management plan is a “properly developed” plan. NDAC 33-16-03.1-08(2)(d) references the NDLPDM and section 7 lays out the components of a complete nutrient management plan.

31. Comment: NDAC 33-16-03.1-13, Page 23, #1-What is the definition of “significant revisions”? And who makes that determination?

Department Response: Due to comments the department has amended NDAC 33-16-03.1(13)(1) to better define what triggers a public notice. The word “significant” was replaced with NDAC 33-16-03.1-(13)(1)(b) which defines “significant” as: 1) A greater

than 10 percent reduction in the acres available for land application; 2) The addition of surface or subsurface drainage; or 3) A change in the method of manure application. This change should address the issues and help clarify what is required to trigger a public notice.

32. Comment: In the NDLPDM, Page 33, #5- “The residence does not need to be occupied, but must be habitable.” What is the definition of habitable? Who will determine the definition of habitable? Will the definition of habitable be included in the NDLPDM section 2.3 Definition of Terms?

Department Response: “Habitable” does not need to be defined, as the plain and ordinary meaning is self-explanatory. The Merriam-Webster dictionary defines habitable as “capable of being lived in; suitable for habitation.” The department will determine whether a residence is habitable by evaluating as a whole various factors, which may include structural soundness, access, security, water supply, heating, electricity, sanitary facilities, sanitary conditions and protection from the elements.

33. Comment: Please do the right thing. Do not let that huge hog operation ruin the town of Buffalo and the state. Do not let them or similar businesses get a foothold in the state to do what they want—to exploit and damage ND.

Department Response: Concerns regarding specific permitted facilities and general concerns about allowing animal feeding operations in the state are beyond the scope of this rulemaking. NDAC 33-16-03.1 and 33.1-16-03.1 are intended to address environmental concerns caused by animal feeding operations.

34. Comment: I am strongly opposed to the changes you are proposing to the NDDOH Regulations. This smacks of special treatment for the proposed Devils Lake corporate hog operation.

Department Response: Concerns regarding a specific proposed facility are beyond the scope of this rulemaking. As explained in other responses, the department is proposing these revisions to be consistent with federal rules and provide clarity – not to provide special treatment to any facility.

35. Comment: In NDAC 33-16-03.1-06 and the ND Livestock Program Design Manual Section 2.6.1, Subsection 1-10 No potential to pollute determination-We disagree with the repeal of this section. This section, if administered accordingly, would provide ND beef producers the clarity they seek to know if they are in compliance of or subject to any animal feeding operation regulations.

Department Response: The “No Potential to Pollute Determination” when first enacted was part of the 2003 federal rule as published in the Federal Register 68 FR 7175. The department is removing the “No Potential to Pollute Determination” to be consistent with the federal rules as compiled in the CAFO Final Rule dated July 30, 2012. The Department may use other non-regulatory methods to provide compliance assistance to producers.

36. Comment: NDAC 33-16-03.1-07, Section 11-We ask for more clarification on the reference to using North Dakota Century Code 44-04 and whether or not the same level of confidentiality can be assured to livestock producers with this change.

Department Response: The department amended this section to increase transparency on how open records requests are handled. The department must comply with NDCC 44-04 in regards to open records requests.

37. Comment: In NDAC 33-16-03.1-10-The reference to new or expanding facilities requiring a state permit and the department's discretion in requiring a public comment period when "there is a significant degree of public interest" is not slated to change at this time, but we think it should be considered to be. "Significant public interest" is far different than the science-based decision-making that North Dakota's environmental regulations should be rooted in.

Department Response: The department is not proposing to make substantive changes to this portion of the rule, so this comment is beyond the scope of this proceeding.

38. Comment: NDAC 33-16-03.1-13-What is a "significant revision" to the nutrient management plan, and who makes that determination? We support this reference being defined in the Administrative Code if it is going to be used.

Department Response: Please refer to the response to Comment 31.

39. Comment: In the NDLPDM section 4.4, Subsection 5-We disagree with the agency in establishing regulations based on residences that are "habitable" instead of those being "occupied," which is what is used in practice now. Without a definition, "habitable" is a very subjective term, and could grossly expand what is considered a residence.

Department Response: The department considered using occupied but felt this would not provide protections for residents that may be away from their homes for an extended period of time, such as for an extended vacation or hospitalization, or homes in the process of being sold or transferred. Please refer to response for comment number 32.

40. Comment: In the NDLPDM section 5.4.3 Short-term Stockpiles-We are concerned about these references and need more clarification on what qualifies as a short-term stockpile. Also, are there exemptions for composting in pens or time periods allowed for short-term storage until the manure is hauled? Also, does this only apply to permitted AFOs, and will it affect existing beef cattle operations that aren't designated as an AFO?

Department Response: All manure storage is already defined as part of the production area in NDAC 33-16-3.1-03. The NDLPDM section 5.4.3 describes both engineering and management practices that can be used to ensure manure stockpiles do not violate NDCC 61-28 by impacting surface or groundwater. This section refers to solid and semi-solid manure stockpiles outside of areas used for confining livestock such as pens. The criteria listed in NDLPDM 5.4.3 will be used for review of plans prior to obtaining a

state permit, however all manure stockpiles must comply with NDCC 61-28. A statement will be added to the beginning of NDLPDM 5.4.3 to clarify its applicability.

41. Comment: In the NDLPDM section 6.6 Annual Reporting Requirements-We agree with the agency in removing this requirement.

Department Response: Thank you for the comment.

42. Comment: In the NDLPDM section 6.7 Odor Control-We need more clarity as to how manure is to be stockpiled “correctly” in order to reduce odors.

Department Response: The department considers “correctly” stockpiled manure to be those stockpiles that will not contribute to pollutants being discharged to waters of the state or those that will violate NDCC 23-25 in regards to odor.

43. Comment: In the NDLPDM section 7.3, Subsection 10- We need more clarity and a definition as to what the “maximum amount of manure, litter and process wastewater to be land applied at least once each year” is.

Department Response: The “maximum amount of manure, litter and process wastewater to be land applied at least once each year” is the amount determined in a properly developed nutrient management plan. Also refer to the response to comment 5.

44. Comment: Regarding NDAC 33-16-03.1-13; we would suggest changing the word “shall” to “may”, knowing from experience a ‘significant degree of public interest’ may not be based on concerns of local neighbors or stakeholders, but rather is generated artificially by outside interests opposed to livestock production regardless of operational size.

Department Response: The word “shall” is not part of an amended section and thus is not open for comment.

45. Comment: For new operations, if the applicant has an engineered design and business plan which fits all the state technical and scientific requirements it would be appropriate to expedite the permitting process and we believe this could be done without endangering public interests.

Department Response: Thank you for your comment. Expediting permits is not part of this rulemaking process and will not be addressed at this time.

46. Comment: Proposed Revision to NDAC § 33-16-03.1-7 (12)-The Department has proposed revising NDAC § 33-16-03.1-7 (12) to interpret NDCC § 23-25-11 (7)(c) as not including unweaned young except for cow/calf pairs. This interpretation is directly at odds with the scheme set up in the statute. This change has been labelled a clarification, but it is an attempt to override the legislature’s intent.

Department Response: Please refer to response for comment 11.

47. Comment: Status of the Livestock Design Manual- It is questionable whether the Department can require compliance with standards that it declares are not legally enforceable. The Department should clarify which portions of the Design Manual with which it will require compliance and insert them into the administrative regulations or simply adopt it formally in its entirety as a rule through this process.

Department Response: As stated in section 1 of the NDLPDM “The *North Dakota Livestock Program Design Manual* (design manual) establishes guidelines for use by the North Dakota Department of Health (department) in the review and permitting process for concentrated animal feeding operations (CAFOs) and animal feeding operations (AFOs), as defined by the North Dakota Administrative Code (NDAC) Section 33-16-03.1-03.” This section also states ...”to the extent practicable, consistent with the policies and guidelines of this manual, best professional judgement, and best management practices.” Another part of this section states “The guidelines this design manual sets forth are explanatory in nature, *and do not have the force and effect of law*, NDCC § 28-32-01(11)(k).” There are numerous parts in the manual that indicate the manual does not have the effect of law. The design manual states “Where the words “shall” or “must” are used the guideline is one where the department believes an enforceable requirement under the relevant environmental statutes or rules will likely be violated if this guideline is not implemented. Where the word “should” is used, the guideline is a recommendation of the department that is less critical to avoiding violations of relevant environmental statutes and rules.”

48. Comment: Trigger for Notice and Comment Procedure of NDAC § 33-16-03.1-13 (1)- The Department should mandate a notice and comment procedure that incorporates subsections 2-5 of NDAC § 33-16-03.1 and require the additional procedures of subsection 6 upon a determination whether the degree of public interest warrants a public meeting or informational hearing.

Department Response: The department does not believe that revising NDAC 33-16-03.1-13(1) to be a mandate for all facilities would be a wise use of its resources.

49. Comment: Animal unit calculations- The state should require identification of the numbers of unweaned animals in the permit application and require the applicant to incorporate those numbers into waste volume, nutrient management plans, and mortality calculation.

Department Response: Animal units are only used for compliance with NDCC 23-25-11. Manure generation, building design, and any other item is calculated by number of head and percent loss where appropriate.

50. Comment: Definition of manure and mortality management- The proposed definition of manure must specifically exclude livestock mortality to reflect the strong statements in the Design Manual.

Department Response: Since there was not substantive change to the definition of “manure,” the comment is outside the scope of the rulemaking. The department believes that the definition of manure is consistent with the discussion of mortality management in the NDLPDM. The department is looking to maintain consistency with the federal definition of manure which does not specifically exclude livestock mortality. NDAC 33-16-3.1-12 (3) prohibits the disposal of a carcass in manure or process wastewater structures unless designed for that purpose.

51. Comment: Definition of process wastewater and mortality management- The proposed definition does not address contamination from livestock mortality storage and/or treatment facilities located at the facility. Mortality stored in disposal bins can bloat and leak bodily fluids.

Department Response: Mortality and those fluids from mortality are included within the definition of “Pollutant” in NDAC 33-16-03.1-03(24). Mortality is addressed in the NDLPDM in section 6.4 “Livestock Mortality Disposal”.

52. Comment: Definition of runoff and mortality management- The definition for runoff does not acknowledge the problem of contaminated stormwater runoff from the mortality storage and/or treatment areas (mortality compost).

Department Response: Thank you for your comment. Since there was no substantive change to the definition of “runoff” the comment is outside the scope of the rulemaking. Composting structures are designed to contain stormwater that comes into contact with the compost area. As this runoff is considered a pollutant, it is required to be contained to prevent the discharge to waters of the state. On a case by case basis for times when composting is done outside of a structure many factors come into play which will provide protection of waters of the state and be in accordance with NDCC 36-14-19 and NDCC 61-28.

53. Comment: Definition of small, medium, and large concentrated animal feeding operations- The Department should draw a bright line in its nomenclature to distinguish those livestock facilities that are under federal jurisdiction-the federally defined concentrated animal feeding operation or CAFO- and those that are not.

Department Response: The distinction for a facility being covered by state or federal rules in accordance with NDAC 33-16-03.1 or NDAC 33-16-01 is the type of permit the facility would be issued. So the distinction is the type of permit issued to the facility, “State” or “NDPDES” or both.

54. Comment: Definition of North Dakota Livestock Program Design Manual- This new definition does not accurately describe all of the uses of the Manual; it only describes the use by the department.

Department Response: The definition is correct in how the manual is used by the department when going through the review process.

55. Comment: Designation of concentrated animal feeding operations- This section should be called “designation of a small AFO as a CAFO” because that is all this section does once the changes are made.

Department Response: Thank you for your comment. The Department has determined that the current section title is accurate.

56. Comment: Operations required to apply for a permit- Changing ‘or’ to ‘and’ makes this section less protective because now both conditions must occur before a medium AFO would be required to have a permit.

Department Response: Changing “or” to “and” in NDAC 33-16-03.1-05(2) is only changing the requirement for a medium animal feeding operation to obtain a permit. NDAC 33-16-03.1-05(3) was amended to incorporate the change described above. The same environmental protection is maintained with these changes.

57. Comment: Permit application content and procedures-manure transfer to third parties- North Dakota AFO rules do not adequately address how the environment and public health will be protected when large-scale feeding operations choose third party manure disposal.

Department Response: Even though NDAC 33-16-03.1 does not directly regulate third party transfers, these transfers still need to maintain compliance with NDCC 23-25-11, which addresses odor issues, and NDCC 61-28-06, which prohibits pollution of state waters.

58. Comment: In the NDLPDM - Animal mortality disposal- This section of the rule should specify that animal mortality numbers must include the unweaned dead in order to accurately count and track all mortalities at animal feeding operations.

Department Response: Thank you for your comment. There was no substantive change to section 6.4 “Livestock Mortality Disposal” and so your comment is outside the scope of the rulemaking. The department’s rules are geared to address the proper handling and composting of animal mortality.

59. Comment: Permit conditions - this section does not mention what actions at the facility would definitely trigger the department to institute any or all of the four subparagraphs a through d.

Department Response: NDAC 33-16-03.1-07(3)(a)-(d) are tools the department can use to strengthen environmental compliance when formulating a facility’s permit. Because each facility can have its own set of dynamic requirements, the department relies on experience and the review process to ensure each permit is protective of the environment.

60. Comment: NDAC 33-16-03.1-07-The question that needs to be asked is how does the Department determine that the facility is not likely to exceed air quality standards without

requiring the operator to provide estimates of air emissions for particulates, volatile organic compounds, ammonia, and hydrogen sulfide in the permit application?

Department Response: The air quality rules establish allowable levels for hydrogen sulfide, ammonia and odors from CAFOs. The department has reviewed a detailed study conducted by the Iowa Department of Natural Resources. This study reviewed actual operations and assessed air quality impacts of ammonia, hydrogen sulfide and odor concentrations near large CAFOs. Further, the department conducted an extensive review of the proposed Rolling Green Family Farms facility near Buffalo, ND. Based on the reviews of both operating CAFOs and the expected impacts from a proposed CAFO, it is the opinion of the AQ Division that emissions from CAFOs are expected to comply with the allowable levels given the required setback distances. If a facility is found to exceed the allowable levels established by the rules, the department will require measures to bring operations into compliance.

61. Comment: Confidentiality- Perhaps the regulations would benefit from a more narrow citation that focuses on the subject of confidentiality related to the facility information.

Department Response: Several sections in NDCC 44-04, which contains North Dakota's open records laws, address confidentiality, so this citation is appropriate. This subsection simply recognizes that the department is required to comply with all of the open records laws.

62. Comment: Facility requirements- The entire paragraph is proposed to be removed purportedly to cull out references to the NDPDES permit. However, only the last line relates to the NDPDES permit. The remainder of the paragraph is very useful language and should be kept for its value as an overarching concept that " all animal feeding operations must be located, designed, built, maintained, and operated to limit or prevent pollution of or the discharge of pollutants into waters of the state consistent with the ND Livestock Program Design Manual, best professional judgement, best management practices, and this Chapter.

Department Response: The items referenced in this comment are covered in NDAC 33-16-03.1-08(1).

63. Comment: Nutrient management plan- there are several paragraphs that refer to subsection 3 or subsection 4 that do not appear to have been changed to correlate with the new numbering of the subsections.

Department Response: The department has noted these items and will make corrections.

64. Comment: Public Participation- The first paragraph remains nonsensical in this rule-making. It is good to add the language about the nutrient management plan, but the rest of the paragraph needs to be fixed. How could there be a significant degree of public interest unless there is first a public notice of proposed permit approval?

Department Response: The department does not have concerns with the current language. Experience has shown that, in instances where there is significant public interest in a proposed facility, this will occur prior to the department finishing the review process. Public interests can be spurred by local involvement during the zoning, conditional use permit, or other items needed at the local level.

65. Comment: In the NDLPDM section 2.6 Criteria for “No Potential to Pollute” Determination- This section is completely removed in the body of the manual so the title should be removed from the Table of Contents.

Department Response: The department concurs with this statement and will make this change.

66. Comment: It’s not clear if the Department (a) doesn’t think it has the authority to make a Design Manual have the full effect and force of law; (b) unknowingly is making the Design Manual have the full effect and force of law by using the words “must and shall”; or (c) it is making sure that no one considers the Design Manual to have the full effect and force of law even if that is the document the operator “must” use and “shall” use according to just about every important aspect of the rule.

Department Response: Refer to response to comment 47.

67. Comment: Design Manual for AFOs but not NDPDES CAFOs- The proposed changes to the Design Manual appear to mimic the changes to the AFO rule in that all references to the federal CAFO permitting program are eliminated. This begs the question-what manual will be used to evaluate NPDES permits for CAFOs.

Department Response: NDAC 33-16-01-01.1(1) incorporates 40 CFR 122.23 “Concentrated Animal Feeding Operations” by reference. The National Pollutant Discharge Elimination System regulations do not require the production of a manual to implement the rule.

68. Comment: As stated in the NDLPDM the distance above seasonal high water table- It makes more sense to require a greater separation distance between the bottom of the liquid storage facility and the seasonal high groundwater table than the mere two feet of separation required for dry or dryer waste storage and/or earthen barn floors.

Department Response: The department is not proposing to change the distance at this time but would take this into consideration if a study or other scientifically peer reviewed literature would indicate the need to decrease the two-foot separation distance from liquid storage facilities.

69. Comment: Seepage rate of 1/16 inch per day- The Design Manual should be very clear that millions of gallons of manure wastewater seeping into the subsurface below an earthen storage pond is a serious risk to ground water. The manual should require the operator to estimate the seepage volume and determine the mass loading of pollutants

in that seepage volume so that a comparison can be made to ground water quality standards.

Department Response: Thank you for your comments. However, they are beyond the scope of the rulemaking because the department is not proposing to change this language. The NDLPDM section 5.3.3 addressed the seepage rate of 1/16 inch per day.

70. Comment: In the NDLPDM section 5.4 - other manure structures - It is not clear if this would be the freeboard requirement for deep pit swine manure structures where the concrete tank is located below the slatted floor of the swine barn. If so, it should be noted that the ventilation requirements for the pit fans is at least one foot of air space to insure proper function of the pit fan. There should also be consideration of one foot of sludge accumulation in deep pits due to the difficulty is removing all the solids during pump-out.

Department Response: Thank you for your comments. However, they are beyond the scope of the rulemaking because the department is not proposing to change this language. Installation of equipment like pit fans should be in accordance with manufacturer's requirements to ensure proper operation. Deep pits are to be maintained to ensure structural integrity and the requirement of 270 days of storage as described in NDAC 33-16-03.1-08(5).

71. Comment: In the NDLPDM section 5.4.3 - Manure stockpiles- The AFO rule does not contain a definition of 'stockpile' so it is not clear if the manual is referring only to solid manure stockpiling or if it includes liquid manure as well.

Department Response: Additional language was added to the beginning of NDLPDM Sect 5.4.3 to clarify this section refers to solid and semi solid stockpiles outside of the confinement area. Liquid manure storage structures must continue to meet the requirements of sections 5.3.1 - 5.3.9. Also see response to comment 40.

72. Comment: Livestock Mortality Disposal- There is no guidance in NDCC Section 36-14-19 with respect to the proper location, design, construction, operation or maintenance of livestock mortality disposal systems, such as mortality compost or incineration.

Department Response: NDCC 36-14-19 is implemented by the North Dakota Department of Agriculture. Please contact the Department of Agriculture with questions regarding NDCC 36-14-19.

73. Comment: It does not seem right nor fair to consider changing rules so as to impair the ability of North Dakotans to obtain information about how hog waste will be disposed of and how it has impacted the bodies of water in our state.

Department Response: NDCC 44-04 contains North Dakota's open records laws and generally ensures that anyone who wishes to know what the department has on file for a particular facility is able to have access to those records allowed under NDCC 44-04.

