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2007 HOUSE AGRICULTURE

HB 1420

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1420**

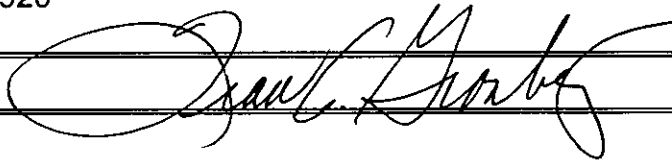
House Agriculture Committee

☐ Check here for Conference Committee

Hearing Date: 1—25--07

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Committee Clerk Signature



Minutes:

CHAIRMAN JOHNSON: Committee Members we will open HB 1420.

REPRESENTATIVE BRADENBURG: HB 1420 is a very important bill this session. It deals with animal agriculture. Our future is in our hands. We have lots of set backs. I am in the middle of the ethanol every session. Minnesota has ethanol plants They have large cities. We have tried to have animal feeder lots here but the North Dakota laws are too tough. Township and counties split over zoning. You have to have at least two employees. The standards of having a feed lot is we need the North Dakota Health Department to set standards. This is an important bill. Every session there is an issue. As these ethanol plants get geared up and the bio diesel plants in two to three to five years. A lot of people have said to me why does South Dakota have all these ethanol plants? No answer. Why does Minnesota have all these ethanol plants? There are a couple of reasons. One is that have load centers to deal with the ethanol to go to those cities that we don't have but yet another issue Is they animal feeding operations in South Dakota and Minnesota and they are probably years ahead of us in those issues. I think that is one of the issues that we need to start dealing with in NORTH DAKOTA. We have had people come and look at

our state to come and put in animal feeding operations and they left. They have decided not to stay here is because of the laws we have in this state and also because of the perception by some of groups in the state. I think those issues will come out during the testimony today. Something that bothers me is the Sierra Club. Sierra Club recommends strategy to block CAFO'S. There is an article written by Lon Tonneson in the Dakota Farmer, January 2007. It deals with a five step strategy from the Sierra Club to keep concentrated animal feed operations from locating near you. This information is printed verbatim from the web site www.sierraclub.org/factoryfarms/resources/strategirs.asp. Please see the passed out article by Lon Tonneson. In the end the Sierra Club will sue them.

CHAIRMAN JOHNSON: Representative Brandenburg, I am not going to have you take questions because of the people we have here to testify.

SENATOR ERBELE Dist 28: Good morning Mr Chairman and Committee Members. It is a privilege for me to be here before you today. I do stand in support of HB1420. I am a farmer and rancher myself and as I speak this morning my son should be running the feed wagon past our fence line feeding operation. I am in the Agriculture Committee and we are hearing the expansion of the biofuel bill which has many of the same players that you see here this morning. I see people from the dairy industry who are talking about colocating dairies by bio diesel and ethanol plants. The buzz word is renewable energy right now. It is a great industry in this state but we do have a market for ourby products. I just had a conversation with a person from the state mill and elevator.

Their profits are always in the by-products. The product they produce is usually a wash. Large meat packing plants will tell you that the meat that they put on the

show case is a break even for them. The state mill and elevator does well on by-products. Because I think we have a good system here. Our standards are adequate. This bill is just to clarify that those environmental issues need to be dealt with at a state level.

CHAIRMAN JOHNSON: We will take testimony for those in favor of 1420.

ROGER JOHNSON: Good morning Chairman Johnson and Committee members. My name is Roger Johnson, Agriculture Commissioner for the State of North Dakota. I am here today in support of the intent of HB1420 which is to provide livestock producers with consistent science based environmental zoning regulations within the state (testimony attached) While I support the intent of the bill, I don't think it is going to deal with the issues that we really need to deal with. We are not the only state dealing with these issues. Many states are facing the same problems.

REPRESENTATIVE BRANDENBURG: I have heard about the Wisconsin model, I don't completely understand it, but I think we need to have more discussion .

COMMISSIONER JOHNSON: When I get together with other commissioners In different states this is one of the first subjects we talk about. For a while it seemed like the popular thing to do was to developed friendly livestock counties. We had a number of states that had programs out there because there are a lot of folks out there that want livestock development. They ended up getting rid of livestock friendly counties because that was a place to go and protest. I don't know that that was very successful. I think that this is going to take a study group. Bring in lots of people and get their ideas. Decisions must be science based. I think that this is going to take a study bill.

REPRESENTATIVE BRANDENBURG: I really think that we should deal with this during this session. I don't disagree with your comments.

COMMISSIONER JOHNSON: Maybe you can find the time to work this out this session. The way this bill is written, I don't think it will solve the problem.

CHAIRMAN JOHNSON: Any others to offer support to this bill?

ERIC AASMUNDSTAD: N.D. FARM BUREAU PRESIDENT. (testimony attached) I am here to offer support for HB 1420.

REPRESENTATIVE HEADLAND: You stated in your testimony that you believe that this bill will establish the rules but we also have an attorney general's opinion, and I am just going to ask you the question. After our Agriculture Commissioner's testimony he put it in question. Do you believe that the counties and townships have authority by statute to establish environmental rules in regards to animal feeding operations?

ERIC AASMUNDSTAD: I am not an attorney. I will attempt to answer the question based on the advice we have been given and things we have read. We currently believe and our information tells us that the counties have the ability and the obligation to zone. They are limited to zoning the scope and nature and location. I can disagree with Commissioner Johnson that there is ambiguity in those words when we look at and the attorney general's opinion. There is someone from the Attorney General's office and he can answer these questions better than I can. They talk about using the size of the operation to determine its location. I think it is a pretty fair analogy that we would define scope to be the number of animals housed in a feeding operation. The nature would be the type. Whether it be hogs cattle or what have you. Location is a siting issue. The way we have had this

Interpreted for us in 1999 when those rules were changed. We are only talking about cattle feed lots. I do disagree with Commissioner John that this is a big step in getting the issue resolved.

REPRESENTATIVE BRANDENBURG: You live up in Ramsey County and you are quite familiar with the feeding operation that was trying to be set up in Ramsey County. My question is what happened there.

ERIC AASMUNDSTAD: I am not happy about what happened in Ramsey County. There is a lawsuit in Ramsey County on this subject. The zoning ordinance is 30 pages long. (that ordinance is not attached) Bonds are not available for cattle feeding lots. The operation in Ramsey County is about \$9,000,000.00. Banks in North Dakota will not loan this kind of money when they don't know whether you'll be operating in that area in five years. We believe the ordinance in Ramsey County as precluded the development of agriculture.

REPRESENTATIVE MUELLER: Does the health department get involved in deciding rules and issues? Where these things are going to be?

AASMUNDSTAD: There are people here from the health department that can answer these questions better than I can. The Health Department is involved in protecting the water in the state and also environmental issues. They are not going to allow the sighting of an operation of any type in a manner that's going to have an adverse effect on the waters of the state based on their scientific data.

REPRESENTATIVE MUELLER: The Health Department establishes the rules. The townships cite the locations. How do you separate them?

AASMUNDSTAD: It is hard to to get your arms around it. We still think the bill will get us a long way down the road of clearly letting the state set the rules when it comes to the environment.

RANDY LAMM: Hillsburo, N.D. farmer. I am the Kelso township zoning officer. I am here in support of HB 1420. Environmental regulations are best left with the Department of Health. They have the expertise and man power and the financial resources to regulate environmental issues. I don't want those responsibilities placed on our township. Most of township's budget is used to maintain our road system and this leaves very little for other things. I strongly ask you to pass HB1420.

GARRY HOFFMAN: Good morning, my name is Garry Hoffman. I represent the ND Dairy Coalition. The Dairy Coalition is a group of dairy producers, dairy processors, commodity groups and others related industries who want a strong dairy industry. I am here this morning to urge you to support HB 1420. I think it is a good step forward in clarifying the duties of the Health Department verses the responsibilities of the townships and the counties. I think the two will work together. Local decisions are good but should be left to their expertise..

RODNEY BROWN: Ramsey County. I am the Stevens Township Treasurer in Ramsey County. I think it is best for the state to regulate. The township does not have the finances to monitor environmental regulations. I support HB1420.

OLE JOHNSON: My name is Ole Johnson. I am a dairy producer from the Center ND area. I moved here a few years ago from Washington State. We have a large operation out there and it's getting bigger. I am for HB 1420 because I really believe the local community has supported us and wants us there. I don't know if the locals

can handle all of the scientific areas. I think it should be left to the Health Department. Please support HB 1420. We had lots of law suits in Washington. We have to protect the environment. We want to expand with another 100 head of cattle. I was able to call the Health Dept from Washington to find out what it would take to get a permit to operate a dairy here. It has to be a simple system.

JOHN PEYERL: My name is John Peyerl. I live in Ramsey County would strongly urge you to give this bill a do pass. (testimony attached)

DARYL LIES: FARMER/LIVESTOCK PRODUCER FROM DOUGLAS, N.D.

(testimony attached) I have a fear of extinction if we don't do something like HB 1420 can do.

JAMES GIBBIONS: My name is Jim Gibbons. I am from Cando, ND I am the mayor of Cando. I sit on the Towner county economic development board and I am also a hog producer. My wife and I own a 6,000 head farrowing barn. The last time I saw Representative Johnson was when he and I showered in and looked at the inside of the barn. I am not going anywhere. I have spent all of my life here. We need rules and regulations that we can understand and follow. With that I would urge you to support HB 1420.

DAVID PORSBORG: I am here representing the ND Pork Council. The ND Pork Council supports the intent of HB 1420 with the understanding that it does not affect local control.

WES KLEIN: My name is Wes Klein. I am from Mercer County which is one of the largest coal and industry producing counties in the state. This bill may be able to bring animal agriculture into the 21st century. We need clear definitions in order to grow animal agriculture in this state. I run a non-profit organization. My

Wife is the CEO. We have nine children. All of my children want to farm. Ethanol and agriculture go hand and hand. If you are going to have a viable ethanol industry in this state you have to have a viable agriculture industry. They go hand and hand. I would recommend a DO PASS ON HB 1420.

MIKE BELTZ: I am from Hillsboro, ND and am here today as the vice chairman of the ND AG. COALITION. On behalf of the Ag Coalition I urge you to support HB1420.

(testimony attached)

JERRY JEFFERS: My name is Jerry Jeffers. I am from Rhame, ND.

I am on the Bowman County Zoning board and have been for a number of years.

I am from that area where a lot of the oil impact money comes from. We also have one of the first concentrated hog operations to go in the state as well as large cattle feed lots and some smaller ones. (testimony attached) Please support HB1420.

WADE MOSER: ND STOCKMANS ASSOCIATION. For the last five years we have worked with the ND Health Department. On sighting issues. Once the counties or townships give approval on set backs every thing goes to the health department. I think they have done a very professional job. We have not always agreed with them but a lot of times when they bring science forward you can't argue with them. I don't think we need to duplicate services. We can work hand and hand. We just need more clarification.

CRAIG JAROLIMEK: I am a pork producer from Forest River, ND. I have been involved in the pork industry all of my life as well as my family. This is all about clarity as many have said. We support HB1420.

CHAIRMAN JOHNSON: Thank you Craig. With that if there is someone that wanted to testify on this bill that did have written testimony please leave it off with the clerk for the record. The Committee will take a ten minute break and then hear the opposition. We do have to be out of this room, by ten to twelve because there is another group that will be using this room.

CHAIRMAN JOHNSON: We will reopen the hearing and the Opposition will now be heard.

KEN TEUBNER: For the record my name is Ken Teubner. I am a Towner County Commissioner and the current President of the North Dakota Association of Counties. (testimony attached) Please give HB1420 a do not pass recommendation, and let local government work to encourage development in a thoughtful and reasonable manner. As a county commissioner, when elected we have to represent all the citizens in the county.

REPRESENTATIVE HEADLAND: Do you think that you currently have the authority to establish environmental regulations and rules?

TUEBNER: I am not on our zoning board in our county but I would suggest that the health would still do the permitting in that part of the ordinance that needs to be done.

REPRESENTATIVE HEADLAND: The way I am reading this bill is that this bill is trying to clarify that. I don't see where it is taking any authority as far as a sighting or any thing else from county officials or township officials.

TUEBNER: The biggest concern is that the door is cracked a little and pretty soon the door will be wide open and then the county will lose their opportunities.

REPRESENTATIVE BRANDENBURG: We have people in our county wanting to have

feed lots. They need leadership. I have county commissioners as well as township supervisors that are looking for direction and leadership in dealing with animal feeding operations because they want them and they want to make sure they are put in place right. My question to you is that do you feel that all the county commissioners and township supervisors completely understand what the health department and the location scope in nature in dealing with what this bill would do?

TUEBNER: I am not sure. The state health department would have input as to lagoons, etc.

REPRESENTATIVE FROELICH: Do you know how many townships and counties have set up zoning regulations and all the other things that go along with this. To work with livestock feeding deals, how many townships and counties have already done this.

TUEBNER: I am not sure. I think 60% of the townships in our county are zoned. In North Dakota, I would guess about half. I have not seen the number. We have two feeder lots in our county, there were no rules at that time. All people are not happy with the sighting. Every time I want to do something on my farm, I have to bow down to federal regulators. We are getting to have too many regulations.

REPRESENTATIVE VIG: Can you just describe the relationship with the Health Department? How cordial they are to work with?

TUEBNER: Personally I have not had a lot connection with the Health Department and I have never have had to work with them on any issues.

REPRESENTATIVE FROELICH: . You say it is

tiresome to get bogged down with regulations. . It is not perfect. There is no question about it. Now you follow the health department regulations. Now you don't have to worry about it.

LADD ERICKSON: MCLEAN COUNTY STATES ATTORNEY. I have worked on this feedlot issue extensively in the last few years. I maybe can answer some of the questions that were asked of the other speakers. I happen to stand here endorsing a lot of comments made by the supporters. I think Commissioner Johnson had some pretty sage advice in a lot of areas. We are in the middle of the ethanol expansion and we are having feed lot companies scoping our county. We have county officials on a feedlot committee to encourage feed lot development in our county and I have been asked to be on that. I am kind of an ex-official member in designing the large feed lot that is going to be brought in conjunction with our ethanol plant that is supported by Blue Flint and Great River energy and it is something that our county officials are trying to work with the industry on. In anticipation of the feed lot business coming in with bio diesel's and stuff like that we did do some changes in our ordinance. I want to make sure there is some clarification on what we are talking about. I looked what other counties are doing. I didn't even know townships were doing stuff like this. I don't think there are many that do. I am not aware where counties have set up separate environmental standards. Or have set separate health issues separate from the health department. You will see in McLain County ordinances and I will give a picture back home. Our ordinance has a web sight. They can get the ordinance on line. It is designed to be a one stop shopping ordinance. You don't have to go to the health department administrative code. You don't have to go to the federal CFR'S. You don't

have to do any of those things. If you just download our ordinance and you start from the beginning.

There is a misconception about all that stuff. The two areas that we think have to be addressed. When we did this feed lot ordinance update it was done with the industry and with the architects that are designing the feed lots that are going to be coming in McClain County. They had a lot of input how we do this. There are two areas that are deficient. One of them is state laws do not have setbacks from intermittent streams. We put a 300 foot setback in from intermittent streams with the variance ability.

Really a setback is a restriction. Clarification is important. We have a half mile setback for hog operations if there is a drainage that goes right by the hog operation.

We have to get back 300 feet so we can put a berm in there if the leak starts.

The biggest liability for local government on feed lots is the cost associated with their closure. The property eventually ends back on the county because it gets forfeited for taxes etc. It gets shut down. It's a huge problem in this whole industry. I took council from a study from the farm bureau in Penn. It cost about one hundred thousand to close them down. It was taxpayer money. It is a big problem. So what we did in our ordinance is we put in for some financial assurance through a letter of credit from the bank. The average feed lot lasts about ten years. Then the costs are stuck on local government. So what we did is look through the merits and demerits of the analysis that other states have done. We put in requirements that if you come in, you post a letter of credit, you get a surety bond. The groups that sell those surety bonds include the Farm Bureau, Farmers Union of ND,

and Ag related insurance companies. They can develop this industry here or we can get a letter credit from an insurance company. The bottom line is we wanted to make sure that these people come in and that we are good neighbors. It makes good sense to use what hard lessons have been learned in other places to incorporate that. I am concerned about the language in these bills, not necessarily what the committee has in mind. We can take other measures if there is an antiagriculture county. I can't imagine that. They need us so we need to work in partnership. The biggest problem under the current law in my opinion, is this reality, these are zoned agriculture. In zoned agriculture area the counties do not have the same sight approval ability as you do with a sub division is coming in residential. You can change the zoning. Everything is zoned agriculture. There is a economic problem with that because for 30 acres you are paying about 100 bucks a year in property taxes. But you are the most extensive user of the roads. Your neighbors property may have been devalued. The profits are going out of state. We have a serious issue with these being zoned agriculture. The sight approval ability of a local government is severely diminished.

So how to make up for that in the current law is the title eleven statute. A statute to create zoning regulations for feed lots that are still considered agriculture.

Then, what the counties do is enact some sight control type measures. I don't see this bill clarifying the issues. You have counties that are pro-feedlot development that are trying to work through this and not become a red herring.

I think the committee would do well to take a long view of this to keep them coming.

I think you should look at this from the long term. . Do a study. I ask that you reconsider the language more broadly than you are thinking. It does not do what you want it to.

CHAIRMAN JOHNSON: This bill will likely go to sub committee and maybe we could use you as a resource.

.REPRESENTATIVE BRANDENBURG: Don't you think that the health department has the knowledge and sound science to give guidance to help the townships, with sightings and the like.

L. ERICKSON: In its lowest common denominator this debate is not about the environment or the economy. It is about property rights.

REPRESENTATIVE HEADLAND: Would it be possible for you to provide us with written testimony as to how we address cleaning up the bill

L. ERICKSON: I would be very happy to work with the committee. I need an example of an environmental regulation. Water control regulation, air control regulation, that a county has enacted. I have not heard of one. I will be happy to work with you.

REPRESENTATIVE MUELLER: If there were others then what the state health department deals with, and you gave some examples, I guess counties should they choose to have the where with all to enforce that regulation

L. ERICKSON: Some of the supporters of the bill are valid. Counties and certainly townships.

They are not going to be getting into this stuff. Who would do it?

KEN YANTES: My name is Ken Yantes. I am the Executive Secretary of the North Dakota Township Officers. (testimony attached)

JOE LAWSON, Member of the planning committee from Ramsey County: We put together a committee to write regulations to protect the waters of Devils Lake and the land of Ramsey County and the health and welfare of Ramsey County. Our intentions were never to stop feeder lots. We have worked with the state health department but we also are protecting our population. The commission that I worked on felt that agriculture is essential to Ramsey County. What we wanted to do is allow agriculture to come into Ramsey County, that we would trust, that they would do what they said they were going to do. But we wanted to as a commission, we wanted to verify what the people and the developers were saying. Along the way, we worked hand in hand with the Health Dept. We used the state model as the back bone of our ordinance. We even developed a position as an animal director feeding operations that works hand in hand with the state health department. Along every avenue we worked with the state health department and professionals from NDSU that were telling us what we could do.

Our intent was never to outlaw feeding operations. I am opposed to HB1420.

REP HEADLAND: We have an article in front of us that says that you say that stronger enforcement is needed than what the state health dept provides. How many instances have there been where the state health dept hasn't done their job?

LAWSON: What they do not do is that they do not soil sample around the lagoon that's holding over 15M gallons of waste. They do not do soil samples out into the fields where is waste is being applied on a yearly basis. They do not have public participation on every permit for an application that comes into Ramsey County. Our ordinance requires participation of the public.

REP HEADLAND: What does public participation have to do with environmental science that the health dept provides? I don't understand the fit.

LAWSON: The public participation is every citizen's right.

We had a committee of nine members. We put two people on a committee that were against , two people in favor , one person who was a developer, and a neutral party. What we decided to do is we want an ordinance that would be broken into six areas, set backs, environmental issues, management plans, enforcement issues and Issues like financial assurances. Each person worked on an area and reported.

REPRESENTATIVE BRANDBURG: What you are doing in Ramsey County affects the whole state. I want a place at that table too so that is why we are here today. To talk about this so we can have a balance across the state. This is not just about Ramsey County. This is about the State of North Dakota. I hope you realize that.

LAWSON: Ok, I agree with you and what is being said by Ag Commissioner, I agree with what was said by the president of the farm bureau and I agree with you. This issue is about what level of government is the most effective and the most efficient. We have the interest of the people in DIST. 15 at heart. We are in the best position to make those kinds of judgments. We will work hand and hand with the state which our ordinance does.

REPRESENTATIVE HEADLAND: Would it be possible in your mind that a group such as yours, a zoning commission, could possibly make a decision based solely on emotion without any environmental standards if they chose to by giving you more regulatory authority over environmental issues then the state currently provides?

LAWSON: No.

RICHARD SCHLOSSER: I am here representing the members of North Dakota Farmers Union. I am here to testify in opposition of HB 1420. (testimony attached)

REPRESENTATIVE FROELICH: Do you think if we had different ordinances for hogs and for beef it would satisfy some of the needs that we are talking about here today?

SCHLOSSER: We don't get into those issues.

REPRESENTATIVE BRANDENBURG: Do you think the townships are able financially to take care of the issues of health and the environmental issues that the health dept. now takes care of? Do you think they are ready for that?

SCHLOSSER: We need to give them the opportunity. The right doesn't necessarily mean they are obligated.

TODD LEAK: I am a farmer from central part of Grand Forks County.

I have been involved with live stock all my life. I am president of the Grand Forks Farmers Union and a member of Dakota Resource Council. I live agriculture and I am for Agriculture. Do Not Pass HB 1420.

CHAIRMAN JOHNSON: WE WILL CLOSE THE HEARING ON HB 142

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. Sub Committee Meeting HB 1420

House Agriculture Committee

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Hearing Date: 2-6-07

Recorder Job Number: 2964

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Committee Clerk Signature

Minutes:

Chairman Headland: This is just an informational meeting for the sub committee's purposes.

We'd ask that you don't comment unless you're asked to comment. We are going to start off with the health department and a presentation from Mr. Glatt. First of all, maybe I should ask if there are any comments from the other sub committee members.

Rep Onstad: There are a couple of things that I hope will be addressed. One, it can be established from the opponents what is currently wrong with what we have in place now. Two is if HB1420 is to improve that situation, someone should tell me what it's doing to improve it. I guess that in those two situations I see some unintended consequences that are going to develop is HB1420 is passed.

Rep Brandenburg: When I introduced this bill I said this is a moving target and everyone in this room is going to have an impact as to how we are going to move forward with animal agriculture. I would ask everyone to keep an open mind and listen to the information that is presented. My goal is to come out with something that is good for animal agriculture and the state. We have no intention of doing something that is not good for animal agriculture.

Dave Glatt, Chief of the Environment Section of the ND Ag Dept: I would like to go over the history as well as some of the zoning regulations from 1999 to the present and talk about

some of the legislation that was passed to address this issue that seems to come up every couple of years. I would like to spend a couple of minutes to talk about the Health Department regulations. And if so inclined, to entertain some language, or proposed language that we could use to start the discussion. I did give you a packet of information and the first one starts with the model zoning ordinance. What I would address you to as to the history the first items on page 2 and 3 and it talks about the legal authority as it relates to what has been given by the legislature. The law does not allow political sub division to enact any regulations or restrictions that prohibit or prevent the use of land or buildings for farming or ranching or any of the normal instances of farming or ranching. The legislature defined farming and ranching to include livestock feeding. It gave counties and townships the authority to regulate the nature and scope of concentrated feeding operations permissible within their jurisdictions and to set reasonable standards based on the size of the operation to govern its location. The legislation also forbids townships and counties from banning concentrated feeding operations from their jurisdictions and from prohibiting the reasonable diversification or expansion of farming or ranching operations. The amendments give counties and townships authority to regulate the size, nature and location of feedlots subject to the limitations in the law. Also attached is the law itself and the appendix. The Health Department sees local zoning as an integral part of overall protection of the environment. It is necessary and has to be done and has to be done correctly. We support local zoning because how the land is used is best left to the local level. The Legislature tried to adjust that in 199 and soon after the Governor (Schafer) convened a task force to see how do we implement this overall zoning authority when looking at nature, scope and location and how does it tie into the environmental regulations. The group included industry, townships and counties, and some environmental groups. Thus came out the model zoning ordinance. It lays out a framework where we believe this can work. In 2005 we

addressed the issue again more in line as it related to odors. That was in Century Code 23 25-11. This is in the next handout. It deals with how do we deal with setbacks. Counties were not on the same page as related to setbacks. If the counties did not have mandatory setbacks taken care of this bill would do it. That lays it out in law regarding setbacks. The next handouts give a quick overview of the regulations of the Health Department. The latest regulations that were amended in 2003 pursuant to Federal Requirements of the Clean Water Act take a look at size of different operations. It has a section on permits as they relate to animal feeding operations. These handouts tell pretty well where we are with rules and regulations and the permitting process. Overall, zoning is a very important part to insure compatible use. We fully support local zoning.

Rep Brandenburg: I am wondering if you're going to go on and explain nature, scope and location. You said we might be able to define the better.

Glatt: I will have someone from the Attorney General's office that represents the Health Department answer that question. I have handed out an amendment to be considered.
(attached)

Rep Brandenburg: When you are looking at sighting, do you work with the local people in the townships?

Glatt: We do let the county and township know what is being proposed.

Chairman Headland: Can you give us more details on the explanation of scope?

Glatt: Scope means how large it is and how many animals are going to be allowed at that facility.

Rep Onstad: What regulations are we giving the counties and townships?

Lyle Witham, Office of the Attorney General: The Health Department regulations which are the regulations adopted under Chapter 6128. Those regulations have to comply with the clean

water act requirements that are dictated by the EPA. Then there is the authority given under 1133-02 and 5803-11 to townships and counties. The statutory authority that is given to townships and counties is in that language.

Rep Onstad: Right now statute gives three items to townships and counties. That is nature, scope and location. So in your amendments you are just defining them.

Witham: That's correct.

Rep Brandenburg: If I want to set up a feeding operation, does the Health Department run the show or does the township and the counties run the show?

Witham: It is a combined effort.

Wade Moser, ND Stockman's Association: I do like the idea of putting these definitions in and I think working with this over the last several sessions, it seems like it is always clear. But if we don't define it then someone else can interpret something in between. Our support of the bill was for clarification. Adding this language definitely would do that. I would like to back up the Health Department. It is a great process, we have been working with it for over five years.

Rep Johnson: Is there authority for local sub divisions to do bonding?

Witham: My guess is it's based on state law and political subdivisions have only the authority that the legislature has given them.

Robert Schlosser: Do the rules of the Health Department preclude the fact that you need to go out and do monitoring over certain structures?

Glatt: No, the monitoring comes about in several ways. One of them is public comment. If there is a significant amount of interest or concern regarding a certain location we will monitor. Local knowledge is helpful. Monitoring is not common, but we do require it from time to time.

Chairman Headland: We have some things to digest here and I would suggest that we meet tomorrow afternoon after session after you have had time to look at it and see if there is anything we can do to help or add.

Chairman Headland closed the committee meeting.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. **HB 1420**

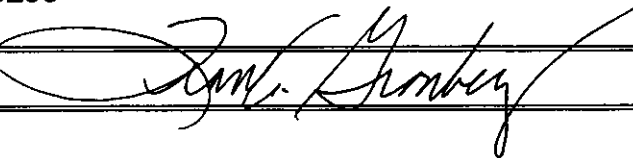
House Agriculture Committee

☐ Check here for Conference Committee

Hearing Date: 2-8-07

Recorder Job Number: **3235**

Committee Clerk Signature



Minutes:

Chairman Johnson opened the discussion on HB1420.

Rep Headland: The sub committee met and this is what we came up with. The Amendment defines the nature, scope and location. (amendment attached)

Rep Onstad: If you have the old bill in front of you, it removes the sections on page 2 that do not give the county any duties. And it removes the same part for the townships. The Health Dept says that language is not needed because there are statutes in place that identifies that. The Legislative Council recommended that we not define it, and then it becomes an ordinary term.

For all intents and purposes it does not change the counties and townships duties. They can still set their nature.

Chairman Johnson: Are these all the amendments?

Rep Headland: There is one more amendment. This was not an amendment that was decided in the sub committee. We did talk about a study. Part of the committee didn't want a study. I didn't want to put it into the original amendment, but I have it here to offer for this

committee. I wanted "may" in there instead of "shall". (The intern said "shall" is considered the new language and shall will be used instead of may.)

Rep Boe: Has there been some discussion of this study being done by the Ag Dept so that we don't need a fiscal note on it? I guess we don't need a fiscal note if the Council does it either.

Chairman Johnson: I would think that if the Legislative Council takes the study, the Ag Dept and the Health Dept and all interested parties would be part of the solution.

Rep Onstad: One of the things that was brought up in the subcommittee is impact on the infrastructure that is brought on the township or county if a large operation comes. It's not that clear whether that can be bonded. There is an impact on roads, etc. It wasn't clear how that can be addressed. The two things to be discussed are the impact on the infrastructure and whether or not a township or county can ask for bonding.

Chairman Johnson: Don't you think that it would be brought out in the study? Do you think it needs to be addressed separately?

Rep Brandenburg: I really think this study should be done in its own bill - separately. I am not going to support this bill. I think 1420 should be a clean bill and a resolution study should be called for.

Rep Onstad: I appreciate the amendment coming forward and I'm going to support it. The bill is one thing, but the study on there is secondary just to discuss the zoning. It does not make the bill dirty. It was quite evident in the discussion that this thing has to be looked at. It's an issue all across the state. There were a lot of things that were not answered during the discussion.

Chairman Johnson: Which one? We have two of them before us. I would like to deal with the first amendment. It changes the bill. Then we'll deal with the study resolution.

Rep Mueller: I would like clarification. This isn't the format. Where did these come from?

Rep Headland: They came from the Health Department and the AG's office.

Rep Mueller: My question is can we just adopt that, or do we need to take it to the Council?

Rep Kingsbury: How do the townships and counties feel about it?

Rep Headland: They were there and had the opportunity to voice their opinions.

Rep Headland: I would like to leave this as a clean bill and then have a study resolution defining all the issues that we want to study.

Chairman Johnson: We aren't talking about the study resolution amendment right now. We are discussing the first amendment. Do I have a motion on 1420 with the first amendment that was introduced?

Rep Brandenburg moved a Do Pass on the Amendment

Rep Onstad seconded the motion

Motion Passed on a Voice Vote

Rep Onstad: I want to further amend the amendment. On line 2 after townships, "an act to provide a legislative study" and then continue.

Rep Headland: We don't want to limit it to townships and counties. We want to study the whole ramifications of zoning.

Rep Brandenburg: If we adopt this amendment on zoning, all our work on 1420 is gone.

Page 4

House Agriculture Committee

Bill/Resolution No. HB 1420

Hearing Date: 2-8-07

Chairman Johnson: Why don't we go with 1420 as it is and take the time to write up a study resolution correctly? The bill has to go out tomorrow. The resolution has a week.

Rep Brandenburg moved a Do Pass on Amended HB 1420

Rep Onstad seconded the motion

(Yes) 10 (No) 2 (Absent) 1

Carrier: Rep Headland

Date:
Roll Call Vote #:

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

House **Agriculture**

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number HB 1420

Action Taken

Motion Made By

Seconded By

[illegible]

Total (Yes)

Absent

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

passer

Date: 2/8/07
Roll Call Vote #: 2

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

House Agriculture

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number HB 1920

Action Taken Do Pass As Amended

Motion Made By Brandenburg Seconded By Onstad

Representatives	Yes	No	Representatives	Yes	No
Chairman Dennis Johnson			Tracy Boe		
Vice Chair Joyce Kingsbury			Rodney Froelich		
Wesley Belter			Phillip Mueller		
Mike Brandenburg			Kenton Onstad		
Craig Headland			Benjamin Vig		
Brenda Heller					
John D Wall					
Gerry Uglem					

Total (Yes) 10 No 2

Absent 1

Floor Assignment Rep Headland

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1420: Agriculture Committee (Rep. D. Johnson, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (10 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING). HB 1420 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact section 11-33-02.1, a new section to chapter 11-33, section 58-03-11.1, and a new section to chapter 58-03 of the North Dakota Century Code, relating to regulations by a board of county commissioners and by a board of township supervisors; and to amend and reenact section 11-33-02, subdivision c of subsection 2 of section 23-25-11, and section 58-03-11 of the North Dakota Century Code, relating to the designation of districts by a board of county commissioners and to the establishment of districts by a board of township supervisors.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 11-33-02 of the North Dakota Century Code is amended and reenacted as follows:

11-33-02. Board of county commissioners to designate districts - Uniformity.

1. For any or all of the purposes designated in section 11-33-01, the board of county commissioners may divide by resolution all or any parts of the county, subject to section 11-33-20, into districts of such number, shape, and area as may be determined necessary, and likewise may enact suitable regulations to carry out the purposes of this chapter. These regulations must be uniform in each district, but the regulations in one district may differ from those in other districts. ~~A regulation or restriction may not prohibit or prevent the use of land or buildings for farming or ranching or any of the normal incidents of farming or ranching. For purposes of this section, "farming or ranching" means cultivating land for production of agricultural crops or livestock, or raising, feeding, or producing livestock, poultry, milk, or fruit. The term does not include producing timber or forest products, nor does the term include a contract whereby a processor or distributor of farm products or supplies provides grain, harvesting, or other farm services.~~
2. ~~A board of county commissioners may regulate the nature and scope of concentrated feeding operations permissible in the county; however, if a regulation would impose a substantial economic burden on a concentrated feeding operation in existence before the effective date of the regulation, the board of county commissioners shall declare that the regulation is ineffective with respect to any concentrated feeding operation in existence before the effective date of the regulation.~~
3. ~~A regulation may not preclude the development of a concentrated feeding operation in the county. A regulation addressing the development of a concentrated feeding operation in the county may set reasonable standards, based on the size of the operation, to govern its location.~~
4. ~~For purposes of this section, "concentrated feeding operation" means any livestock feeding, handling, or holding operation, or feed yard, where animals are concentrated in an area that is not normally used for pasture or for growing crops and in which animal wastes may accumulate, or in an area where the space per animal unit is less than six hundred square feet~~

~~[55.74 square meters]. The term does not include normal wintering operations for cattle. For purposes of this section, "livestock" includes beef cattle, dairy cattle, sheep, swine, poultry, horses, and fur animals raised for their pelts.~~

- ~~5. A board of county commissioners may not prohibit, through regulation, the reasonable diversification or expansion of a farming or ranching operation.~~
- ~~6. This chapter does not include any power relating to the establishment, repair, and maintenance of highways or roads.~~

SECTION 2. Section 11-33-02.1 of the North Dakota Century Code is created and enacted as follows:

11-33-02.1. Farming and ranching regulations - Requirements - Limitations - Definitions.

1. For purposes of this section:

- a. "Concentrated feeding operation" means any livestock feeding, handling, or holding operation, or feed yard, where animals are concentrated in an area that is not normally used for pasture or for growing crops and in which animal wastes may accumulate. The term does not include normal wintering operations for cattle.**
- b. "Farming or ranching" means cultivating land for the production of agricultural crops or livestock, or raising, feeding, or producing livestock, poultry, milk, or fruit. The term does not include:**
 - (1) The production of timber or forest products; or**
 - (2) The provision of grain, harvesting, or other farm services by a processor or distributor of farm products or supplies in accordance with the terms of a contract.**
- c. "Livestock" includes beef cattle, dairy cattle, sheep, swine, poultry, horses, bison, elk, fur animals raised for their pelts, and any other animals that are raised, fed, or produced as a part of farming or ranching activities.**
- d. "Location" means the setback distance between a structure, fence, or other boundary enclosing a concentrated feeding operation, including its animal waste collection system, and the nearest occupied residence, the nearest buildings used for nonfarm or nonranch purposes, or the nearest land zoned for residential, recreational, or commercial purposes. The term does not include the setback distance for the application of manure or for the application of other recycled agricultural material under a nutrient management plan approved by the department of health.**

2. For purposes of this section, animal units are determined as follows:

- a. One mature dairy cow, whether milking or dry, equals 1.33 animal units;**
- b. One dairy cow, heifer, or bull, other than an animal described in paragraph 1 equals 1.0 animal unit;**

- c. One weaned beef animal, whether a calf, heifer, steer, or bull, equals 0.75 animal unit;
 - d. One cow-calf pair equals 1.0 animal unit;
 - e. One swine weighing fifty-five pounds [24.948 kilograms] or more equals 0.4 animal unit;
 - f. One swine weighing less than fifty-five pounds [24.948 kilograms] equals 0.1 animal unit;
 - g. One horse equals 2.0 animal units;
 - h. One sheep or lamb equals 0.1 animal unit;
 - i. One turkey equals 0.0182 animal unit;
 - j. One chicken, other than a laying hen, equals 0.008 animal unit;
 - k. One laying hen equals 0.012 animal unit;
 - l. One duck equals 0.033 animal unit; and
 - m. Any livestock not listed in subdivisions a through l equals 1.0 animal unit per each one thousand pounds [453.59 kilograms] whether single or combined animal weight.
3. A board of county commissioners may not prohibit or prevent the use of land or buildings for farming or ranching and may not prohibit or prevent any of the normal incidents of farming or ranching.
4. A board of county commissioners may regulate the type and species of livestock in a concentrated feeding operation, the size of the concentrated feeding operation in animal units, and the location of the concentrated livestock feeding operation. However, if a regulation would impose a substantial economic burden on a concentrated feeding operation in existence before the effective date of the regulation, the board of county commissioners shall declare that the regulation is ineffective with respect to any concentrated feeding operation in existence before the effective date of the regulation.
5. A board of county commissioners may not preclude the development of a concentrated feeding operation in the county.
6. A board of county commissioners may not prohibit the reasonable diversification or expansion of a farming or ranching operation.
7. a. A board of county commissioners may establish high-density agricultural production districts in which setback distances for concentrated feeding operations and related agricultural operations are less than those in other districts.
- b. A board of county commissioners may establish, around areas zoned for residential, recreational, or nonagricultural commercial uses, low-density agricultural production districts in which setback distances for concentrated feeding operations and related agricultural

operations are greater than those in other districts; provided, the low-density agricultural production districts may not extend more than one and one-half miles [2.40 kilometers] from the edge of the area zoned for residential, recreational, or nonagricultural commercial uses.

- c. The setbacks provided for in this subsection may not vary by more than fifty percent from those established in subdivision a of subsection 7 of section 23-25-11.
- d. For purposes of this subsection, a "related agricultural operation" means a facility that produces a product or byproduct used by a concentrated feeding operation.

SECTION 3. A new section to chapter 11-33 of the North Dakota Century Code is created and enacted as follows:

Highways - Roads. This chapter does not include any power relating to the role of the board of county commissioners in the establishment, repair, or maintenance of highways or roads.

SECTION 4. AMENDMENT. Subdivision c of subsection 2 of section 23-25-11 of the North Dakota Century Code is amended and reenacted as follows:

- c. If a county or township has zoned or established a setback distance for an animal feeding operation which is greater than one-half mile [.80 kilometer] under either section ~~11-33-02 or 58-03-11~~ 11-33-02.1 or 58-03-11.1, or if the setback distance under subsection 7 is greater than one-half mile [.80 kilometer], measurements for compliance with the seven odor concentration units standard must be taken at the setback distance rather than one-half mile [.80 kilometer] from the facility under subdivision b, except for any residence, church, school, business, public building, park, or campground within the setback distance which was built or established before the animal feeding operation was established, unless the animal feeding operation has obtained an odor easement from the preexisting facility.

SECTION 5. AMENDMENT. Section 58-03-11 of the North Dakota Century Code is amended and reenacted as follows:

58-03-11. Establishment of zoning districts - Limitation—Scope of zoning regulations and restrictions Uniformity.

- ~~4.~~ For the purpose of promoting the health, safety, morals, or the general welfare, or to secure the orderly development of approaches to municipalities, the board of township supervisors may establish one or more zoning districts and within such districts may, subject to the provisions of chapter 54-21.3, regulate and restrict the erection, construction, reconstruction, alteration, repair, or use of buildings and structures, the height, number of stories, and size of buildings and structures, the percentage of lot that may be occupied, the size of courts, yards, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purposes. All such regulations and restrictions must be uniform throughout each district, but the regulations and restrictions in one district may differ from those in other districts. The board of township supervisors

may establish institutional controls that address environmental concerns with the state department of health as provided in section 23-20.3-03.1.

2. ~~A regulation or restriction may not prohibit or prevent the use of land or buildings for farming or ranching or any of the normal incidents of farming or ranching. For purposes of this section, "farming or ranching" means cultivating land for production of agricultural crops or livestock, or raising, feeding, or producing livestock, poultry, milk, or fruit. The term does not include producing timber or forest products, nor does the term include a contract whereby a processor or distributor of farm products or supplies provides grain, harvesting, or other farm services.~~
3. ~~A board of township supervisors may regulate the nature and scope of concentrated feeding operations permissible in the township; however, if a regulation would impose a substantial economic burden on a concentrated feeding operation in existence before the effective date of the regulation, the board of township supervisors shall declare that the regulation is ineffective with respect to any concentrated feeding operation in existence before the effective date of the regulation.~~
4. ~~A regulation may not preclude the development of a concentrated feeding operation in the township. A regulation addressing the development of a concentrated feeding operation in the township may set reasonable standards, based on the size of the operation, to govern its location.~~
5. ~~For purposes of this section, "concentrated feeding operation" means any livestock feeding, handling, or holding operation, or feed yard, where animals are concentrated in an area that is not normally used for pasture or for growing crops and in which animal wastes may accumulate, or in an area where the space per animal unit is less than six hundred square feet [55.74 square meters]. The term does not include normal wintering operations for cattle. For purposes of this section, "livestock" includes beef cattle, dairy cattle, sheep, swine, poultry, horses, and fur animals raised for their pelts.~~
6. ~~A board of township supervisors may not prohibit, through regulation, the reasonable diversification or expansion of a farming or ranching operation.~~
7. ~~Sections 58-03-11 through 58-03-15 do not include any power relating to the establishment, repair, and maintenance of highways or roads.~~

SECTION 6. Section 58-03-11.1 of the North Dakota Century Code is created and enacted as follows:

58-03-11.1. Farming and ranching regulations - Requirements - Limitations - Definitions.

1. For purposes of this section:
 - a. "Concentrated feeding operation" means any livestock feeding, handling, or holding operation, or feed yard, where animals are concentrated in an area that is not normally used for pasture or for growing crops and in which animal wastes may accumulate. The term does not include normal wintering operations for cattle.

- b. "Farming or ranching" means cultivating land for the production of agricultural crops or livestock, or raising, feeding, or producing livestock, poultry, milk, or fruit. The term does not include:
 - (1) The production of timber or forest products; or
 - (2) The provision of grain, harvesting, or other farm services by a processor or distributor of farm products or supplies in accordance with the terms of a contract.
 - c. "Livestock" includes beef cattle, dairy cattle, sheep, swine, poultry, horses, bison, elk, fur animals raised for their pelts, and any other animals that are raised, fed, or produced as a part of farming or ranching activities.
 - d. "Location" means the setback distance between a structure, fence, or other boundary enclosing a concentrated feeding operation, including its animal waste collection system, and the nearest occupied residence, the nearest buildings used for nonfarm or nonranch purposes, or the nearest land zoned for residential, recreational, or commercial purposes. The term does not include the setback distance for the application of manure or for the application of other recycled agricultural material under a nutrient management plan approved by the department of health.
2. For purposes of this section, animal units are determined as follows:
- a. One mature dairy cow, whether milking or dry, equals 1.33 animal units;
 - b. One dairy cow, heifer, or bull, other than an animal described in paragraph 1 equals 1.0 animal unit;
 - c. One weaned beef animal, whether a calf, heifer, steer, or bull, equals 0.75 animal unit;
 - d. One cow-calf pair equals 1.0 animal unit;
 - e. One swine weighing fifty-five pounds [24.948 kilograms] or more equals 0.4 animal unit;
 - f. One swine weighing less than fifty-five pounds [24.948 kilograms] equals 0.1 animal unit;
 - g. One horse equals 2.0 animal units;
 - h. One sheep or lamb equals 0.1 animal unit;
 - i. One turkey equals 0.0182 animal unit;
 - j. One chicken, other than a laying hen, equals 0.008 animal unit;
 - k. One laying hen equals 0.012 animal unit;
 - l. One duck equals 0.033 animal unit; and

- m. Any livestock not listed in subdivisions a through l equals 1.0 animal unit per each one thousand pounds [453.59 kilograms] whether single or combined animal weight.
3. A board of township supervisors may not prohibit or prevent the use of land or buildings for farming or ranching or any of the normal incidents of farming or ranching.
4. A board of township supervisors may regulate the type and species of livestock in a concentrated feeding operation, the size of the concentrated feeding operation in animal units, and the location of the concentrated livestock feeding operation. However, if a regulation would impose a substantial economic burden on a concentrated feeding operation in existence before the effective date of the regulation, the board of township supervisors shall declare that the regulation is ineffective with respect to any concentrated feeding operation in existence before the effective date of the regulation.
5. A regulation may not preclude the development of a concentrated feeding operation in the township.
6. A board of township supervisors may not prohibit the reasonable diversification or expansion of a farming or ranching operation.
7. a. A board of township supervisors may establish high-density agricultural production districts in which setback distances for concentrated feeding operations and related agricultural operations are less than those in other districts.
- b. A board of township supervisors may establish, around areas zoned for residential, recreational, or nonagricultural commercial uses, low-density agricultural production districts in which setback distances for concentrated feeding operations and related agricultural operations are greater than those in other districts; provided, the low-density agricultural production districts may not extend more than one and one-half miles [2.40 kilometers] from the edge of the area zoned for residential, recreational, or nonagricultural commercial uses.
- c. The setbacks provided for in this subsection may not vary by more than fifty percent from those established in subdivision a of subsection 7 of section 23-25-11.
- d. For purposes of this subsection, a "related agricultural operation" means a facility that produces a product or byproduct used by a concentrated feeding operation.

SECTION 7. A new section to chapter 58-03 of the North Dakota Century Code is created and enacted as follows:

Highways - Roads. Sections 58-03-11 through 58-03-15 do not include any power relating to the role of the board of township supervisors in the establishment, repair, or maintenance of highways or roads."

Renumber accordingly

2007 SENATE AGRICULTURE

HB 1420

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1420

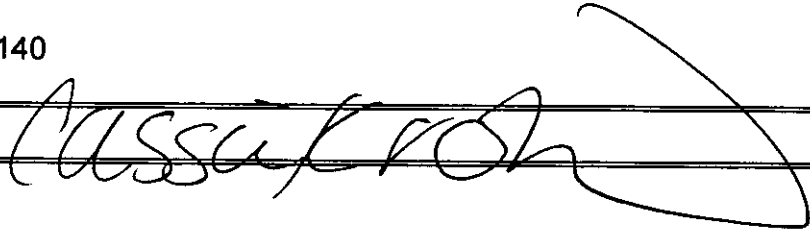
Senate Agriculture Committee

☐ Check here for Conference Committee

Hearing Date: March 15, 2007

Recorder Job Number: 5140

Committee Clerk Signature



Minutes:

Sen. Flakoll opened the hearing on HB 1420, a bill relating to the designation of districts by a board of county commissioners and to the establishment of districts by a board of township supervisors and the designation of districts by a board of county commissioners and to the establishment of districts by a board of township supervisors. Members (6) present, absent (1)-Sen. Taylor.

Rep. Brandenburg, district 28, testified in favor of the bill.

Rep. Brandenburg- This is a bill dealing with animal agriculture it has been worked on and changed and amended and a number of things done with it. This bill basically deals with location, nature, and scope and I think that it is important that we look at where animal agriculture is at and what we are doing with animal agriculture and where the future is going. I do think that before the session is over and before we leave that all parties concerned with this issue need to walk out of here with something that protects animal agriculture.

Rep. Headland, district 29, testified in favor of the bill.

Rep. Headland- I have an amendment that would just clean up a little language and doesn't change the bill what so ever. (walks committee through amendments 5:36- 7:15)

Sen. Heckaman- what was your reasons on page 4 striking lines 13-20, what are your reasons for changing that down into the 6 and 7?

Rep. Headland- sections 6 and 7 are current language that were put into code in the 1999 session and section 4 took and reworded that and it has some unintended consequences in the way that it was worded.

Sen. Erbele- so you are saying that we are just putting back what is currently in code we are really not changing it just going back to the original code?

Rep. Headland- that is correct.

Brain Kramer, NDFB, testified in favor of the bill. See attached testimony.

Sen. Klein- this will let the department of health be in charge of zoning or how does that relate to how the department of health will operate?

Brian Kramer- the bill references the health department and what their abilities are it refers to that section of code that deals with animal agriculture and the responsibilities of the health department. I don't believe that it changes anything as far as what the health department authorities are right now.

Roger Johnson, Senate Agriculture Commissioner, testified in favor of the bill. See attached testimony.

Allan Braaten, Barney, ND, testified in favor of the bill. See attached testimony.

Wes Klein, Rancher, testified in favor of the bill.

Wes Klein- I am here in support of this bill. I think that education and demographics are the most important when it comes to animal agriculture. My concern is a lack of education, lack of understanding of the issues around animal agriculture. I think that this bill gives real clarification and uniformity. I think that we need a clear definitions for our county

commissioners to help them understand which way we want animal agriculture to go and where we want to go in the state of ND.

Don Moore, testified in favor of the bill.

Don Moore- I stand in support of this bill.

Kent Albers, ND Ag Coalition, testified in favor of the bill. See attached testimony.

Dan Wogsland, NDGGA, testified in favor of the bill.

Dan Wogsland- We stand in support of this bill.

Jim Gibbens, farmer, testified in favor of the bill.

Jim Gibbens- I am a swine and grain farmer, I stand in support of this bill. I think that what we really need to expand our industry is to understand the environmental regulations and we need the expertise of the health department to help us understand that.

Sen. Klein- in your operations you are and have been sited by the health department, they have approved your location and tested the area and given you approval to build there?

Jim Gibbens- that is correct, I have 2 sites operating right now.

Sen. Heckaman- so if you are able to do this right now what more would this bill do for you?

Jim Gibbens- what this bill would do is that when we go to build something else there is always the question of what the impact is on the environment and how are you going to build there and so the township or the county is going to study these matters and I think that a lot of it is well intended and they don't have the expertise to do that.

Paul Ivesdal, farmer, testified in favor of the bill. See attached testimony.

Sen. Heckaman- are speaking to supporting the bill before the amendments came forward today or after or either?

Paul Ivesdal- I am in support both ways.

David Glatt, chief of the Environmental Health Section for the ND Department of Health, testified in favor of the bill. See attached testimony.

Sen. Flakoll- when you show your diagram here is it from the center point of the building?

David Glatt- yes.

Sen. Flakoll- have you had a chance to review the proposed amendments?

David Glatt- I have and have no objection to those.

Testimony was also submitted in favor of the bill by **Rodney Brown** and **Randy Lemm**, see attached testimony.

Kerry Schorrsch, farmer, testified in opposition to the bill.

Kerry Schorrsch- I am here to testify against this because I think that it does not support the little farmer. I think on this we would like local control rather than the state health department. I urge a do not pass.

Testimony was also submitted in opposition of the bill by **Harriet Bracken**, see attached testimony.

Sen. Flakoll closed the hearing.

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1420

Senate Agriculture Committee

☐ Check here for Conference Committee

Hearing Date: March 16, 2007

Recorder Job Number: 5222

Committee Clerk Signature

Caste/Crow

Minutes:

Sen. Flakoll opened the hearing on HB 1420.

Sen. Wanzek passed out proposed amendments for the committee to review, 70766.0203 and reviewed them with the committee.

Sen. Heckaman- I am still not happy with how this turned out I think that it changes the intent of the law rather than just clarifies it. The people that came in yesterday and testified to this bill testified to the bill that came over from the house. They were not testifying to the amendments that I think changes that substantially.

Sen. Wanzek- I am sure that no matter what we would do with this that not everyone could come to a total agreement.

Sen. Flakoll closed the discussion.

Sen. Wanzek motioned to move the amendments and was seconded by **Sen. Klein**, roll call vote 1: 6 yea, 1 nay, 0 absent. **Sen. Wanzek** motioned for a do pass as amended and was seconded by **Sen. Klein**, roll call vote 2: 6 yea, 1 nay, 0 absent. **Sen. Wanzek** was designated to carry the bill to the floor.

Roll Call Vote #:

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1120

Senate Agriculture

Committee

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Legislative Council Amendment Number

Action Taken

Move Amendments 70766-0203
11/20/2016

Motion Made By

Seconded By

Klein

[illegible]

Total (Yes) 6 No 1

Absent 0

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Roll Call Vote #:

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1420

Senate Agriculture

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken

Do Pass as Amended

Motion Made By

Wanzen

Seconded By

Klein

[illegible]

Total (Yes)

No

Absent

Floor Assignment

Sen. Wanzek

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1420, as engrossed: Agriculture Committee (Sen. Flakoll, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 1 NAY, 0 ABSENT AND NOT VOTING). Engrossed HB 1420 was placed on the Sixth order on the calendar.

Page 1, line 14, overstrike "section" and insert immediately thereafter "sections 11-33-02.1 and"

Page 3, line 7, remove the first underscored comma and remove the second underscored comma

Page 4, remove lines 13 through 20

Page 4, line 21, replace "5." with "4."

Page 4, line 23, replace "6." with "5."

Page 4, after line 24, insert:

- "6. A board of county commissioners may adopt regulations that establish different standards for the location of concentrated feeding operations based on the size of the operation and the species and type being fed.
7. If a regulation would impose a substantial economic burden on a concentrated feeding operation in existence before the effective date of the regulation, the board of county commissioners shall declare that the regulation is ineffective with respect to any concentrated feeding operation in existence before the effective date of the regulation."

Page 4, line 25, replace "7." with "8."

Page 6, line 6, after "54-21.3" insert "and section 58-03-11.1"

Page 8, line 1, remove the first underscored comma and remove the second underscored comma

Page 9, remove lines 7 through 14

Page 9, line 15, replace "5." with "4."

Page 9, line 17, replace "6." with "5."

Page 9, after line 18, insert:

- "6. A board of township supervisors may adopt regulations that establish different standards for the location of concentrated feeding operations based on the size of the operation and the species and type being fed.
7. If a regulation would impose a substantial economic burden on a concentrated feeding operation in existence before the effective date of the regulation, the board of township supervisors shall declare that the regulation is ineffective with respect to any concentrated feeding operation in existence before the effective date of the regulation."

Page 9, line 19, replace "7." with "8."

Page 9, line 28, remove "one and" and replace "miles [2.40 kilometers]" with "mile [0.80 kilometer]"

Renumber accordingly

2007 TESTIMONY

HB 1420

Johnson
Agriculture Commissioner
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**Testimony of Roger Johnson
Agriculture Commissioner
House Bill 1420
Agriculture Committee
Peace Garden Room
January 25, 2007**

Chairman Johnson and members of the House Agriculture Committee, I am Agriculture Commissioner Roger Johnson. I am here today in support of the intended purpose of HB 1420 which is to provide livestock producers with consistent science based environmental zoning regulations within the state.

The livestock industry is critically important to the state's economy as is the potential to increase livestock production. So any changes in zoning regulations have a potential to enhance or stifle increased livestock production.

This bill basically gives all environmental regulatory authority to the state health department. It is my belief that this is the right thing to do because it is the agency that has the expertise and staff to regulate livestock facilities when it comes to nutrient management plans, size, and design of waste confinement systems and the amount of land that is needed for manure management.

However, this bill does leave a lot of unanswered questions. The major issue is the loss of control to counties and townships that has been fundamental in our state government since our state's conception. Even though the bill clearly gives all jurisdiction to the state health department on environmental issues, there is a lack of clarity regarding some issues that can be considered environmental issues. For example, is a setback from an environmentally sensitive area, an environmental or siting or scope issue? Local authorities have always had control when it comes to zoning as it pertains to siting, setbacks and determining land use purpose. Does this infringe on their current authority to do so?

This bill needs to make sure that local control and state control are clearly defined in all areas. On the surface this bill appears to do so, but is that really the case? Last session House Bill 1291 was amended to address this same issue. We are at this hearing today because the language in that bill was not clear. Ramsey County asked for an Attorney General's opinion regarding whether their regulation was within the scope of state law. The Attorney General's opinion did not address the health department's authority over environmental regulations leaving us with this discussion today.

That is why I have reservations on the current language and SB 2331 (which is a similar bill in the Senate) as written. I want this issue to be concise and clear on what we are addressing. Without local government support of this issue we will again be addressing it in the future.

Other states have had the same problems that we are facing. Wisconsin has done a major overhaul of their zoning and siting regulations. I recommend that we look at what they have

done before we go down this path. I have included a copy of their laws and regulations for your review.

Again, Chairman Johnson and committee members, I urge that you take a hard look at this bill. We need to develop state policy regarding zoning that is consistent and science-based for our producers and at the same time does not diminish the local control that townships and counties need and want for siting and for the purpose of zoning. I would be happy to answer any questions you may have.



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House Agriculture Committee

January 25, 2007

North Dakota Farm Bureau

Testimony on House Bill 1420

Presented by, Eric Aasmundstad, president

Good morning Chairman Johnson and Agriculture Committee members. My name is Eric Aasmundstad I am a farmer from the Devils Lake area and the president of the North Dakota Farm Bureau. I am here today to speak in support of House Bill 1420.

HB1420 does not diminish a county or townships authority to zone. HB 1420 does bring clarity to where the authority rests regarding regulation of environmental health. It is our belief that this authority is expressly granted to the North Dakota Department of Health now, not the counties and townships.

Our policies clearly state our support for controlling zoning authority at the township level. Our policy further tells us that we need to work with the counties and townships when developing zoning ordinances.

"We believe zoning authority should be controlled at the township level when the townships choose to do so."

"We shall work with townships and counties to develop farmer-friendly, responsible zoning ordinances for animal agriculture."

As you can see Farm Bureau firmly believes in the power of counties and townships to zone and to practice their zoning authority consistent with NDCC 11-33-02 and 58-03-11. We believe that counties and townships have every right and an obligation to establish responsible setback distances for animal feeding operations.

We also believe that the State should have preemptive authority with regards to environmental regulation.

House Agriculture Committee

January 25, 2007

Testimony of Paul Becker

Ramsey County Farmer

Good Morning Chairman Johnson and members of the Agriculture Committee. My name is Paul Becker I am a Ramsey County resident, a board member in Northern Prairie EnviroFuels, and farm about 20 miles northeast of Devils Lake. I am submitting this testimony in favor of HB 1420. I apologize for not being able to be in attendance today for this hearing on such an important piece of legislation.

Your support of House Bill 1420 is crucial for moving agriculture forward in North Dakota. As a resident of Ramsey County I have been in the middle of a battle that has been going on for over 3 years. Initially I had no opinion on the CAFO's, after some research I could see why there is interest in their growth. There was a lot of inaccurate or out of date information brought up in this battle.

The buzz word all over the State is economic development. Animal agriculture is an area our fathers and grandfathers were involved in, but we thought they were too much work; we need to add value to the crops we are already growing. The past couple of years we have been shipped over 300,000 bu of corn up to Canada. They are offering us a \$.20/bu premium over our local market and paying all of the freight. That has amounted to nearly \$100,000 more income for our operation. If these CAFO's are built closer we could split the difference in freight and both gain. We have ethanol and biodiesel plants planning on locating in our area. We also need to have the livestock to feed the buy products to. We have been paying the railroad to haul our raw commodities to out of state markets; nearly all of our feed barley has been shipped to California. If there is not room in the rural parts of North Dakota for the large livestock operations, how can they exist on the west coast?

I also support clean air and water for all of North Dakota. We now have overwhelming scientific facts that prove the industry has become environmentally friendly. I have listened to the NDSU specialists who have facts supporting the animal industry and the benefits that can come with it. I have also listened to the State Health Department discuss their enforcement and oversight.

The problem we had in Ramsey County was the County Planning and Zoning Commission went in with an attitude of, how can we keep the CAFO's out. They needed to wonder, how we can make these CAFO's work. The local township had that idea, and followed the state regulations to successfully permit a CAFO. The law needs to be

written in a way that there is no gray area. County and Township Officials need to know what they can and cannot regulate. The State Health Department has been given the authority to regulate environmental issues, let them do their job. It needs to be clear where the jurisdictional lines are. Counties and Townships do not have the means or the dollars it would take to enforce such things. We also need to make this law for all counties across the State to make it equal for all farmers in every county.

I respectfully ask that you give House Bill 1420 a strong due pass recommendation for the future North Dakota's largest industry.

Paul Becker
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Crary, ND 58327-9228
701-398-3374 work
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Testimony in support of HB 1420
Gary Hoffman, executive director
North Dakota Dairy Coalition

Good morning

Mr. Chairman and members of the committee, my name is Gary Hoffman. I represent the North Dakota Dairy Coalition. The ND Dairy Coalition is a group of dairy producers, dairy processors, commodity groups and other related industries who have an interest in a healthy growing dairy industry.

I am here this morning to support HB 1420. I think it is a good step forward to enhance the duties of the ND Dept. of Health. As director of the Dairy Coalition, our mission is to increase the number of dairy cows in North Dakota. We do not want to compromise our environment in the process. This legislation will clarify who the contact is and what the rules are. The ND Dept. of Health has a Water Quality Division, a Waste Management Division and an Air Quality Division to name just a few. The Water Quality Division monitors ground water, surface water and waste water. The Waste Management Division monitors animal waste application based on nutrients applied and nutrients used. The Air Quality Division promotes clean air and initiates enforcement. They do an excellent job. I think they have all the bases covered. They have trained scientists on staff who know State regulations and EPA regulations. They work with air, water and waste management issues on a daily basis and are in a position to work with producers and consumers as needed. Who else in ND has the staff and resources available that we have at the Health Department? County and township boards can still regulate the nature and scope of animal operations but it's clear they don't have the expertise and the resources to regulate the technical aspects of protecting our environment.

As a representative of the Coalition and a landowner myself, I have more confidence in the environmental scientists at the Health Department than I do in the local coffee shop theories. Someone once said, "The best decisions are products of thorough scientific thinking." I agree, and I urge you to pass HB 1420.

Thank you

Testimony before ND House Agriculture Committee, HB1420

January 25, 2007

Todd Leake, Emerado, ND

(701) 594-4253 toddleake@polarcomm.com

In early 1997, in Grand Forks Co, near Larimore, construction on the Enviropork (Dakota Facilities LLP) hog farrowing facility began, without a special use permit from Grand Forks Co. Grand Forks Co. had at the time requirements for building permits. Enviropork had no permit. In July that same year, in what some might call a retroactive permit hearing on the nearly completed structure, a county zoning and planning hearing was conducted in the American Legion Hall in Larimore to a standing room only crowd. Amongst the citizen testimony was informational testimony from the State Dept. of Health. The Dept. of Health official told the Zoning Commission that it was not the responsibility of the Health Dept. to "site" the CAFO and that siting was the responsibility of Grand Forks Co. The Department of Health official stated that they "only worked with the site they were given" in the permit application.

In response to this, in Sept of 1997, the County began the process of drafting CAFO zoning regulations for discussion at Zoning and Planning public meetings. Over a period of three and one half years of meetings, a rough draft of regulations regarding CAFOs was crafted involving input many livestock producers, from the largest to some of the smallest livestock producers in the county. During this entire process Grand Forks Co. zoning and planning listened to livestock producer's concerns on various parts of the draft ordinance, and it was changed and redrafted until their concerns were addressed. The final ordinance was passed at a County Commission meeting in Jan.2000. This was the first County CAFO ordinance that was passed in the state; the process was fair, democratic and inclusive. Enviropork continues to operate, livestock production continues to be a healthy part of the ag economy in Grand Forks County. Grand Forks Co. government has established public, reasonable parameters for CAFO's to continue to profitably operate in the county while protecting drinking water aquifers, reservoirs and providing setbacks for schools, towns, state parks and residences.

- The North Dakota Dept. of Health does not site CAFOs, ND counties do site CAFOs
- The issue at hand in HB1420 is to remove any local responsibility or capacity of counties in ND to protect vital resources within the county that are necessary for continued public health and economic growth, in regard to the counties' and townships responsibility to properly site CAFO's.
- The State primacy in enforcing the Federal Clean Air Act, Clean Water Act, Safe drinking Water act, and Natural Resource Recovery Act does not preclude North Dakota counties from enacting local control to do the same, as long as the ordinances are as strict or stricter than the state
- How can anyone reasonably expect elected county officials to carry out their duty to site CAFOs without regard to health or environmental issues?

Testimony on House Bill 1420
House Agriculture Committee
January 25, 2007
Jerry Jeffers, Rhame NorthDakota

Good Morning Mr. Chairman and Committee Members.

My name is Jerry Jeffers from Rhame, and I am here to ask for your support of HB1420. I have been a member of the Bowman County Zoning Board now for several years. I come from the part of Bowman County where a lot of the oil impact moneys that help fund this state are produced. We also have one of the first concentrated hog feeding operations in this state in our county, a large cattle feedlot as well as several smaller ones, and as of a few months ago, granted the zoning variance for a multi-million dollar natural gas purification plant to be built. By the way this is a safe, environment-friendly plant in that it takes that gas from the fires you see AND SMELL and turns that into top quality, useable natural gas—eliminating the fires and the stink. I tell you all of this because I feel we have a pretty aggressive, forward-thinking zoning board. We have an excellent director who makes sure all the T's are crossed and the I's are dotted in the zoning request prior to the hearings. Our board is comprised of farmers and ranchers, business people, and folks who work for others. I'm sure that is the make-up of most of the zoning boards across the state.

Having told you that, I think that HB1420 is very important. We as zoning board members usually don't have the time, nor in most cases, the expertise to set the state health and environmental regulations needed for concentrated animal feeding operations or anything else like this natural gas purification plant that is in our county for that matter. So, in order for us to do our job which I feel is to 1.) enhance the economy in our area and sometimes the state, and 2.) See that the lifestyle of the citizens of the surrounding area isn't adversely effected, and 3.) Create conditions that ALL parties involved can come to an agreement on, a good, sound set of health and environment regulations set forth and enforced by the State Health

Department are crucial. If we as zoning board members and our commissioners can be sure that the State Health Department has taken care of the health and environmental issues, then we can concentrate on what we have the ability to do without fear of a suit or outside intervention, because BY LAW they have just taken most of the emotional issues out of the zoning process, leaving the nuts and bolt problems that we DO know something about and have local zoning guidelines for. This bill WILL NOT take that local zoning authority away from my board or any other zoning board in the state. But instead it clarifies who sets and regulates the health and environment regulations on CAFOs. So, for these reasons, I ask you to give a DO PASS on this House Bill #1420. Thank You for you kind attention.

House Agriculture Committee

January 25, 2007

Testimony of John Martinson

Edmore School Board/Farmer

Ramsey

Good Morning Chairman Johnson and members of the House Agriculture Committee. My name is John Martinson; I am President of the Farmers Union Oil Co of Edmore, Vice-President of the Edmore School Board, A Supervisor of Overland Township, and a farmer in Ramsey County. I am submitting this testimony in favor of HB 1420. I regret that I was not able to attend today's hearing on such an important piece of legislation.

Your support of HB 1420 is a very important step for agriculture in our state. It would send a message to groups that try to imply or just state out loud that our Sate Health Department is incompetent.

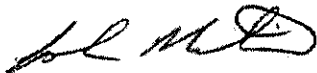
I was involved in what I would call "The Ramsey County Zoning Fiasco". I was asked to be on the zoning sub-committee with five or six other people. We were told our job was to review The Model Zoning Regulations and make recommendations to the Zoning Committee. We did what we were asked and at the next meeting one certain individual on the Zoning Committee did not like the recommendations. He then proceeded to write the zoning ordinance for Ramsey County himself with the help of the Dakota Resource Council, with little or no farmer input.

Now, in Ramsey County, we have an ordinance that provides not only zoning regulations, but also environmental regulations. We have a State Health Department to handle the environmental regulations so why not let them do their job. This bill would clarify that.

The farmers of our state are good stewards of the land because it is our life. Don't let outside interests dictate what direction agriculture will go in the future.

I strongly urge that you give HB 1420 a strong pass recommendation for North Dakota Agriculture.

Sincerely,



John Martinson

Testimony on House Bill 1420
Presented by
John Heaton,
Pleasant Hill Township, Kidder County
January 25, 2007

I am a township officer, a position, which I have held for about twenty years. I support HB 1420. As I read this bill I see nothing that will take any zoning authority from our townships. The township officers don't want to police the environmental regulations of our neighbors' feeding operations. We don't have the time or finances to do this. Nor do we have the time to keep up with all of the changes that are necessary to protect the environment.

If North Dakota won't support animal agriculture, then where is the future for our children? Support the economic future of our state, support HB 1420.

Thank for your time and attention, I would try to answer any questions.

- ☒ I am Paul Anderson representing the North Dakota Corn Growers Association from District 7.
- ☒ I am involved in animal feeding and crop production east of Harvey.
- ☒ Animal ag is still the Number One consumer of corn and its co-products.
- ☒ The number of livestock on feed directly affects each corn producer.
- ☒ Corn growers consider the passage of HB1420 a pertinent step in securing the integrity of air and water. ^{Instead of Local Biogas} It is not a ~~personal endorsement~~.
- ☒ In addition to being a cattle feeder, I also serve on the township board.
- ☒ This bill doesn't take the principles of local control away—it places the burden of health regulation with the health department, where it belongs.

I thank you for your attention and favor.

Are there any questions.

Paul L. Anderson

Testimony House Bill 1420
House Agriculture Committee
January 25, 2007
Daryl Lies, farmer/ livestock producer
Douglas, North Dakota

(Leese)

Good morning Mr. Chairman. My name is Daryl Lies, I am a farmer from the Douglas area and I am here in support of House Bill 1420.

As a livestock farmer I believe it is very important to have rules and regulations across the state that are uniform. If we are going to be serious about the renewable fuels industry we have to be serious about animal farms. The two go hand in hand, with out animals to feed the by-product to the ethanol plants are going be taking from the bottom line shipping this feed out of state. This makes them less profitable. If they don't profit we will not have them in North Dakota for long.

With out a uniform set of rules livestock farmers in North Dakota could well be exposed to hundreds of different sets of rules determined by nothing more than a line on a map. We have to embrace animal farming for the good of all of North Dakota as dollars derived from animals turn in the economy more times than tourism and the retail sectors combined. The bottom line is the more economic activity we have in rural North Dakota the more all of our state benefits from increased tax revenue. Our future depends on laws and regulations that are workable for agriculture. I believe the North Dakota Health Department is doing a good job of balancing this load. I would encourage a due pass on HB 1420. Thank you.

House Agriculture Committee
January 25, 2007
Testimony of Pam Brekke
Ramsey County Commissioner/Farmer

Good Morning Chairman Johnson and members of the Agriculture Committee. My name is Pam Brekke I am a county commissioner from Ramsey County and farm in the Edmore area. I am submitting this testimony in favor of HB 1420. I apologize for not being able to be in attendance today for this hearing on such an important piece of legislation.

Your support of House Bill 1420 is crucial for moving agriculture forward in North Dakota. As a County Commissioner in Ramsey County I have been in the middle of a battle that has been going on for 31/2 years. Communities should not be divided over anything concerning their future growth, especially when it involves the largest industry in North Dakota.

Unfortunately there is a small group of people who are supported by a very large check book and they hide behind the names of Dakota Resource Council, Sierra Club, Dakota Rural Action and many other "heart warming" titles. They have one agenda and that is to go back in time with a farm on every section of land, 12 milk cows, 25 hogs, 100 chickens and a white picket fence. Wouldn't we all love this, but the truth is, times have changed and so has farming. If our homesteading great-grand parents could see the advances we have made they would be speechless. The world of technology is not standing still and we in the Ag sector cannot be satisfied with the way things were 100 years ago.

The activists came into Ramsey County very quietly, not letting on that they were activists, and volunteered to be on boards and help "write" an animal feeding ordinance.

We now have an ordinance that is full of environmental regulations that we as County Commissioners cannot enforce. They were very organized and followed a specific strategy to stop any animal feeding operations from being built. We as commissioners were told many lies and one was that it was "our" ordinance and we could grant variances to it upon requests. When a request came to us, Dakota Resource Council was there reading the "fine print" and letting us know that we could not grant variances after all. Their scare tactics worked on enough commissioners that they had a majority in their pocket. As of today I am standing alone on the Ramsey County Commission in full support of North Dakota Agriculture.

I am also standing in support of clean air and water for all of North Dakota. The environmentalists use water and air quality as one of their big issues. They bring numbers to the table that come from mistakes that may have been made 20 years ago, before there where strict regulations in place. We now have overwhelming scientific facts that can prove the industry has become environmentally friendly. I have listened to the NDSU specialists who have all the facts on paper supporting the animal industry and the benefits that can come with it.

The problem we had in Ramsey County was the door was open for these groups to come in and challenge the law. If you have county officials that are not farmer friendly these groups will take control. The law needs to be written in a way that there is no gray area. County and Township Officials need to know what they can and cannot regulate. The State Health Department has been given the authority to regulate environmental issues, let them do their job. It needs to be clear where the jurisdictional lines are. Counties and Townships do not have the means or the dollars it would take to enforce such things. We also need to make this law for all counties across the State to make it equal for all farmers in every county. We have an operation that went up 5 miles from the Ramsey County line and our farmers are sitting here with their hands tied, patiently waiting for 3 1/2 years and watching the environmentalists control their elected county officials with scare tactics.

I respectfully ask that you give House Bill 1420 a strong due pass recommendation for the future North Dakota's largest industry.

Testimony To The
THE HOUSE AGRICULTURE COMMITTEE
Prepared January 25, 2007 by
Ken Teubner, NDACo President —
Towner County Commissioner

REGARDING HOUSE BILL 1420

Chairman Johnson and committee members, I am Ken Teubner, a Towner County Commissioner and the current President of the North Dakota Association of Counties. I thank you for the opportunity to address HB1420 on behalf of county government. County commissioners from across the State have reviewed this bill and directed me to indicate their strong opposition.

County commissioners are convinced that their county residents desire to have land use decisions made locally, not in Bismarck – made by locally elected leaders that they can hold accountable, not by bureaucrats. We believe that this law could be interpreted in a manner that would dramatically shift land use decision-making away from the citizens and toward a system over which they have little control.

The Legislature has limited the Health Department in the types of tools that they can use to ensure compliance with their rules – tools such as performance bonds. This bill proposes to relieve local government of their authority to do the same.

It must be remembered, that when large animal feeding operations are not properly sited; it can result in tax-forfeited property with clean-up costs funded by the neighboring tax payers. Do not be mistaken, county officials desire these developments – they can be very good for a county. They must however, be sited in the best possible location after all factors are considered.

Please give HB1420 a Do Not Pass recommendation, and let local government work to encourage development in a thoughtful and reasonable manner.

Testimony on HB1420 to the House Agriculture Committee

Mr. Chairman and Members of the House Agriculture Committee: My name is Ken Yantes I am the Executive Secretary of the North Dakota Township Officers Association and I represent over 6000 grassroots elected township officers I have come here today to oppose the passage of HB1420. After lengthy consultation with our State Board Directors; we feel that townships not should give up , through loss of local zoning, the ability to defend our neighbors, residents and friends

We are concerned with the potential loss of local controls and believe our forefathers had the same concern.

In article one, of the Declaration of our Rights, in our North Dakota Constitution it says, that one of our inalienable rights, in section #1, 'is possessing and protecting property and reputation; pursuing and obtaining safety and happiness. Zoning is land use control for the protection and happiness of our township residents.'

When legislation such as this, which seeks to reduce the power of the local governmental units to control themselves; I console myself in section #2 of the constitution which states that **all political power** is inherent in the people.

I don't think they meant that all power should be found at the state level.

I think they meant that some townships could have different conditions that warrant different local governing decisions.

HB1420 asks that townships and counties relinquish their authority to control air, water and

soil pollution to the State Department of Health. After this is done, we won't have any responsibility for legal enforcement of those controls, we are told, the **state does**.

At the present a township that chooses to avail themselves of a comprehensive zoning plan and develops an ordinance on confined animal feeding operations that is exactly the same as the State Health Department regulations; would have the same degree of state protection.

The big difference would be that the township would still have the authority to, set more stringent controls if the township residents were not happy with conditions.

It would be true that the legal responsibility for the more stringent regulations may open the door for legal defense efforts. Many of us believe that these efforts would be worth it to preserve the right to decide for ourselves with out state regulated controls.

"We the People, not we the power of state."

In order for this to prevail HB1420 must be defeated and full authority rest in the local grassroots government officials hands.

Please vote to kill HB1420.

North Dakota Farmers Union

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House Bill 1420
House Agriculture Committee

Chairman Johnson and Members of the House Agriculture Committee,

My name is Richard Schlosser; I am here representing the members of North Dakota Farmers Union. I am here to testify in opposition of House Bill 1420.

North Dakota Farmers Union believes that livestock production is essential to the economic well being of North Dakota. Our organization recognizes that sound environmental practices and family agriculture should work together for responsible development of livestock production that is vital to maintaining healthy agriculture.

Livestock waste is a resource that can provide essential nutrients for crops. However, large feeding operations that have concentrated volumes of waste can negatively impact our natural resources, public health, and neighboring livestock operations. Presently, North Dakota Century Code speaks to the powers of regulating concentrated feeding operations by counties and townships. The sections state that each political subdivision "...may regulate with respect to nature (type of livestock) and scope (size)." HB 1420 states that "...a regulation may not give to the county any duties or responsibilities regarding health or environmental issues associated with a concentrated feeding operation or with any other farming or ranching operation if the duties and responsibilities are placed on the state department of health." That begs the question, how will local entities establish ordinances dealing with scope and nature without referencing environment or health? HB 1420 negates the ability of local governments to regulate these facilities by limiting the counties ability to evaluate the health and environmental impact on the natural resources and citizens of their political subdivisions.

North Dakota Farmers Union supports a Health Department permitting process that addresses size, concern for surface and ground water contamination and allows for public comment. With that said, North Dakota should safeguard the right of political subdivisions to enact and enforce their own ordinances.

In closing, North Dakota Farmers Union believes that responsible livestock development can include the joint efforts of local zoning and the permitting process of the North Dakota Health Department. We urge a do not pass on House Bill 1420. Thank you.

HB 1420

North Dakota Planning Association Testimony

Committee Members,

State and federal courts have for over 100 years affirmed the right of local governments to enact zoning regulations on the basis of a comprehensive plan to protect the public health, safety and welfare. This has allowed local citizens to develop an overall strategy for community development that minimizes land use conflicts and maximizes the efficient use of local tax dollars in the service of these communities. The presumption of local government control over local issues is the very core of this concept of land use planning.

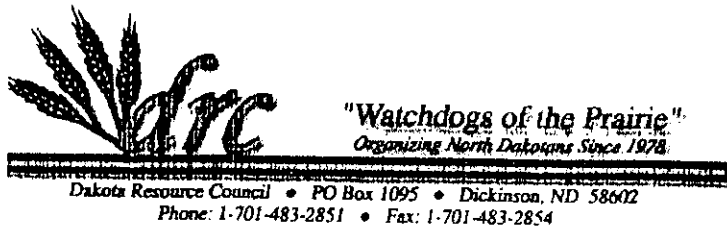
This bill, if enacted, will remove the ability of local governments to address land use issues at a local level. It will make the state department of health responsible for something it was not created to and cannot do, which is to enact local comprehensive plans.

This bill may in fact create another unfunded mandate where the decisions of a state or federal agency increase the local tax burden. Now issues relating to coordinated, appropriately-sited land development by local governments (such as the increased cost of road maintenance) may be lost.

The ability to address the whole gamut of local issues which may be part of decisions regarding the siting of animal feeding operations will be lost; instead, a single non-local perspective will be used to govern this decision.

Please vote "Do not pass" on HB 1420.

Joel Quanbeck, President



Testimony on HB 1420 to the House Committee on Agriculture January 25, 2006

Chairman Johnson and committee members my name is Barb Price and I am an organizer for Dakota Resource Council. DRC is an independent membership-based grassroots organization that has been working with North Dakotans since 1978 for the purpose of protecting their interests and rights. About half our members are active farmers and ranchers.

Dakota Resource Council recognizes that livestock production is very important to the economy of North Dakota. We believe that livestock production should be increased in North Dakota but not at the risk to the livelihood of family farmers and ranchers or to the detriment of the environment, health and economic well being of North Dakotans.

It has been explained to our members that this bill is just clarifying that counties and townships have the power to zone for "nature, scope and location" only in land use planning. Counties and townships can determine siting only of Concentrated Animal Feeding Operations (CAFOs) but have no power over the environmental aspects (such as set backs) and public health as it relates to CAFOs.

I want to spend some time looking at ND Century code and the Model Zoning Ordinance for Animal Feeding Operations to see what authority has been given to counties and township pertaining to CAFOs.

In ND Century Code 23-29 Solid Waste Management and Land Protection

Definitions #14 "Solid Waste," it states, "The term does not include:

a. Agricultural waste, including manures and crop residues, returned to the soil as fertilizer or soil conditioners;

In addition, ND Century Code 23-29-05. Local government ordinances, it states, "Any political subdivision of the state may enact and enforce a solid waste management ordinance if such ordinance is equal to or more stringent than this chapter and the rules adopted pursuant to this chapter. (See Attachments – page 1 – 3)

If manure from CAFOs is not included in the management of solid waste by the State Department of Health then it needs to be managed by the County Commissioners and/or Township Supervisors. It is clear from 23-29-05 that counties and townships have the authority to develop ordinances that are equal to or more restrictive than the state rules.

In 1999 Governor Schafer issued an Executive Order (1999-03) which directed the Department of Health to "... develop a model zoning regulations [for animal feeding operations] for the subdivisions to implement as they deem appropriate ... " As it turns out I was one of the members of the working group, as was the Executive Director of DRC, Mark Trechock.

The document that resulted from this working group became "A Model Zoning Ordinance for Animal Feeding Operations", March 2000. I am going to go through some of the pages in the above mentioned document to point out that the intent of the executive order and the development State Model Ordinance was specifically to give the counties and townships the power to write ordinances for CAFOs that included the power to plan for environmental and public health and safety issues. Included with this testimony is a copy of the Model Ordinance. (See attachments, pages 4- 25)

In the preamble of this document the purpose of the model ordinance, in part, states:

- Provide a reference, or model, for zoning and ordinances pertaining to concentrate feeding operations for use by the local governments across North Dakota.
- Remind local governments of their roles in protecting public safety and health and in planning the uses, conservation and protection of natural resources, including land for farming and ranching.

As we read this "... protecting public safety and health and in planning the uses, conservation and protection of natural resources ..." all refer to environmental and health issues that can be controlled by the counties and/or townships.

On page 2 of the Model Ordinance, page 5 in the attachments, on the next to last line of the page it states, "... Or any of the **normal** incidents of farming or ranching."

The first industrial-scale hog production facility sited in North Dakota was Enviropork, west of Larimore in Grand Forks County. The facility got its county permit during the 1997 Grand Forks flood. It received its state permit later that year. A law suit was filed by Jim Griffin and Keith Peterson, neighbors to Enviropork, contending that the state Health Department should have required Enviropork to get a solid waste permit for its lagoon, and also alleging numerous violations of the state odor standard and the facility's construction permit. (See page 26 - 27 of the attachments)

Judge Bruce E. Bohlmann ruled in the plaintiffs' favor on one element of the lawsuit in September 1998, saying Enviropork was "**not a farming operation**" but a "**pig factory**" and should be subject to the same laws as any waste facility. However, within a month, the State Health Council passed "emergency rules" exempting all animal waste from the state's solid waste disposal law. The rest of Griffin and Peterson's case was settled out of court.

In early 1999, state legislators passed three bills intended to provided assistance to industrial hog operations:

- SB 2366, which wrote the Health Council's "emergency rules" into Century Code;
- SB 2365, which weakened the state odor standard by preventing issuing an odor violation except at a residence or public area;
- HB 1054, which gave industrial hog facilities the same property tax exemptions as traditional farmers have for farm buildings.

However, the House defeated HB 1397, which would have taken away all county and township zoning authority over any agricultural practices. The primary supporters for all these bills were Farm Bureau of North Dakota, North Dakota Stockmen's Association and the North Dakota Pork Producers Council.

Going on to page 3 of the Model Ordinance, page 7 of the attachments, talks about the 1999 amendments to the law. It is stated that the legislature answered questions pertain whether counties and townships had zoning authority over CAFOs. The legislature **gave authority** to counties and townships to "regulate the nature and scope of CAFOs" and to "**set reasonable standards**, based on the size of the operation" to govern its location. In addition the amendments **gave counties and townships discretion to adopt their own standards** regulating the size, nature and location of feedlots. The amended law is provided in Appendix 1 of the Model Ordinance, pages of the attachments to this testimony.

Further on page 3 of the Model Ordinance under "Function of an Ordinance" the following is stated:

"If conflict in land use is to be constrained by **local governments** so as to protect the right to practice farming or ranching and to foster compatibility with nearby land use, **local government officials** choosing to adopt an ordinance for animal feeding operations **must**:

- Adopt separation distances (aka setbacks or reverse setbacks) that reflect quantifiable odor characteristics and odor dispersal.
- Identify those new land uses that do not conform to the objectives and policies for delineated agricultural areas so as to infringe on the rights of farming or ranching (not included in the model zoning ordinance for animal feeding operations).
- Identify those new and existing animal feeding operations that, due to size (e.g., number of animal units), present safety hazards, affect natural resources, affect surrounding areas or other means of infringing on the rights of others.

This is being accomplished in some of the township is Griggs county after 141 out of approximately 145 the residents from the Sutton and Glenfield communities signed a petition opposing the proposed Willow Grove Sow Farm. (Copies attached to testimony).

We can continue through the whole Model Ordinance and it is clear that counties and townships have the authority to determine environmental protections using setback requirements for odor and water protection and to protect public health and safety in their local jurisdictions.

There is nothing in current county and township zoning CAFO ordinances that circumvents the Department of Health rules and regulations or that would keep the counties or townships from going to the Health Depart for professional help either in setting up ordinances or in enforcing the ordinances that are put in place.

However, it is important to note that the State of North Dakota has not adopted into law any ordinances that pertain to Concentrated Animal Feeding Operations. Ideally, the Department of Health needs legislation directing it to regulate CAFOs land

application of waste even if the operator does not propose to discharge pollutants to the water of the state.

What we need are:

1. Standards for emergency response to a lagoon spill.
2. Operator funded trust fund for clean-up response to a lagoon spill.
3. Operator funded trust funds for clean up of abandoned operations.
4. Permitting of all CAFOs
5. Each permit must include a nutrient management plan prepared by a certified agriculture professional. Public notice and comment on permits, including input on nutrient management plans.
6. Self-Monitoring and record keeping to document compliance with nutrient management plan, with independent verification mechanism.
7. Civil and criminal enforcement remedies, including citizen suits, for violation of permit conditions, including excursions from nutrient management plans.
8. Vertical integrator liability for spills, clean ups, and operator violations.
9. If state takes this on, then counties and townships still need to be able to have zoning authority over siting, density, size, setbacks, and mitigating impacts on local community.
10. These are industrial facilities, therefore they need to be taxed.

DRC would also suggest the following questions be asked of the Department of Health:

1. How many inspectors are on staff? Are they full time or part time staff?
2. How many times a year is each facility inspected? How many are onsite inspections?
3. What specifically does each inspection consist of?

4. Is there a fiscal note to go with this bill? To cover all the time and manpower it will take to do the work of the counties and townships.

To conclude, Dakota Resource Council believes that local control must be preserved. County and township representative from other states that have allowed the state to take over control of CAFO ordinances and waste management have told us that "what ever we do, do not loose local control." Many of these counties and townships are now trying to get back local control.

There fore DRC would respectfully request a "Do Not Pass" recommendation from this committee.

Thank you for listening.

Testimony

House Bill 1420

Agriculture Committee

Thursday, January 25, 2007; 9 a.m.

North Dakota Department of Health

*Same
given to
Senate*

Good morning, Chairman Johnson and members of the House Agriculture Committee. My name is David Glatt, and I am chief of the Environmental Health Section for the North Dakota Department of Health. I am here today to provide information regarding the environmental regulation of confined animal feeding operations (CAFOs).

First, I want to make it clear that the department has historically supported local zoning and will do so in the future as authorized in state law.

The intent of my testimony today is to provide the committee with background information as it relates to the regulation of CAFOs in North Dakota. It is important to note the following:

- Animal feeding operations have been regulated by the North Dakota Department of Health since 1967. The decision to regulate animal feeding operations in the state was made long before the United States Environmental Protection Agency (EPA) acknowledged the potential impact feedlots could have on water quality. In part, because of the state's proactive approach, we have not seen the large-scale pollution problems observed in some other states.
- The North Dakota Department of Health CAFO regulation is based upon the requirements of the federal Clean Water Act as adopted by Congress to protect the nation's surface waters from contamination. In addition, the North Dakota CAFO regulations have been developed utilizing the expertise of the North Dakota Department of Health, Natural Resource Conservation Service (NRCS), North Dakota State University Agricultural Extension Service and the United States Environmental Protection Agency. Prior to adoption of the regulation, the department also provided opportunity for review and comment by the State Health Council, Environmental Protection Agency and the public.
- The department continues to evaluate the environmental impact of CAFOs and has collected evidence that livestock facilities complying with state regulations can operate with minimal impact on the environment. As an example, groundwater monitoring conducted at several facilities in response to public

concern did not indicate widespread or gross contamination of the near-surface aquifer as feared by some in the public.

To give you a brief synopsis of the complexity of the permitting process, the following is provided:

1. Each proposed new facility must be evaluated for appropriate site characteristics. For example, site-specific geology, location in relation to shallow groundwater and established residences, and proximity to surface water drainage must be evaluated. Proposed site locations that do not meet the appropriate siting criteria are rejected.
2. Each proposed facility must meet specific design standards that include requirements for manure/wastewater storage capacity and liner compaction. Liner compaction requirements for CAFOs exceed those required of municipal wastewater stabilization lagoons constructed in the state. In some cases, the installation of groundwater monitoring wells may be required.
3. Each new facility must develop nutrient management plans for review and approval by the department. Nutrient management plans must identify how manure will be put to beneficial use meeting approved application methods. Plans must also include how dead animals are properly handled and disposed.
4. After the department determines that a proposed facility meets the criteria established in rule, each draft permit is made available to the public for review and comment. State law also provides appropriate opportunity to challenge any determination made by the department.
5. If a permit is approved, the department conducts inspection of construction activities and, in fact, has required the removal and recompaction of manure storage pond liners that do not meet established specifications. Upon completion of construction activities, the department conducts annual inspections of the larger facilities for compliance with the appropriate environmental protection regulations.

It has been our experience, supported by field data, that the North Dakota Department of Health CAFO regulations are protective of the environment. They work to protect the environment because they have been developed through an open public review process, are based upon science and the law, and have been objectively applied throughout the state.

This concludes my testimony. I am happy to answer any questions you may have.

"We support a state pre-emption of environmental regulations with regard to local zoning of AFOs/CAFOs"

With this policy statement we are expressing our belief that the environmental rules and regulations governing animal feeding operations should be regulated by the North Dakota Department of Health as the state has the resources to carry out this task. Redundancy of these regulations is not needed at the township and county level of government. These policy statements do not contradict each other as they clearly address different issues.

In reading Attorney General Letter Opinion 2005-L-27 dated October 4, 2005 (attached) and after consultation with legal counsel we believe the State currently has clear jurisdiction in regulation of environmental health. The opinion clearly states; *"Counties, of course, have only the authority granted by statute."* By not referencing environmental health rules in NDCC 11-33-02 and 58-03-11 we believe the counties and townships are currently pre-empted from regulating environmental health issues as they pertain to AFO's.

We also have policy that supports consistency in regulation, *"We support reasonable and consistent environmental regulatory standards that balance the interests of producers and other citizens"*

With this policy we are recognizing the importance to agriculture and especially animal agriculture of having a consistent set of rules to play by throughout the state. We believe the rules developed by the North Dakota Department of Health, while rigorous, allow agriculture to grow as well as adequately protecting the air and water quality of North Dakota.

We believe that the future growth of animal agriculture is critical to the future economic health of North Dakota. Unfortunately there are many that would have agriculture fail to realize their own ideals. The talk of inhumane animal factories, rivers of manure, antibiotic resistant super germs, and the destruction of our communities are nothing more than scare tactics designed to turn the consuming public against modern agricultural practices. We cannot let those that groups that want to shackle agriculture dictate the future of this states largest industry. We can and we must stand up to this misinformation with determination if our industry is going to survive. You can start by passing HB 1420.

North Dakota has 53 counties and 1100 townships it is conceivable North Dakota could have as many different sets of rules for farmers and ranchers to play by if this bill is not passed. Can you imagine the nightmare this could create for a business trying to startup or locate in this state. The reality is they could not and would not. Consistency in the rules is absolutely imperative if we are going to build our livestock sector to the potential it has.

In North Dakota we have the space, the feed, and the work force that livestock enterprise need to exist. When you look at what is going on around us it is terribly disheartening to see the lack of activity in North Dakota. Take the hog industry for an example, we need have no worries about an over population of hogs. In Minnesota they average 138 hogs per square mile, South Dakota is at about 28 hogs per square mile and North Dakota is at 3.7 hogs per square mile. I think you could agree we have a ways to go before anyone need get to concerned about too many hogs in this state.

I had earlier mentioned the economic activity of rural North Dakota benefiting the entire state. Dollars generated by animal agriculture have a gross receipts multiplier of 4.49. That represents a turn over of these dollars in the economy greater than tourism and the retail sector combined. By feeding our beef calves here and adding just 300 pounds to them we would generate more than \$200,000,000.00 in the economy of North Dakota not figuring the multiplier effect. The point I am making is the impact of the livestock industry on our economy is nothing that can be ignored.

For all of the reasons I have been talking about and more we must give this industry the chance to grow and thrive in this state. The uniformity of rules that HB 1420 will provide is huge step in the right direction of making this a reality with out sacrificing local control of zoning. I respectfully ask that you give HB 1420 a Do Pass recommendation. Thank you.

Testimony on House Bill 1420
Presented by
Rodney Brown

Good morning, Mr. Chairman and members of the committee. My name is Rodney Brown and I am the Stevens Township Treasurer in Ramsey County. I support HB 1420.

The township does not have the finances available to monitor environmental regulations. So I think its better that the state is responsible for establishing these regulations.

Thank you for your time. I would try to answer any questions you may have.

Around Dakota Ag

Township, county split over zoning

By LON TONNESON

SETBACKS and odor aren't the cause of the clash between Ramsey County and Prospect Township over zoning and livestock development.

At issue are the county's requirements that a person with 1,000 or more animal units in a concentrated feeding operation:

- Resubmit the permit to the county for review every five years.

- Pay a \$4,000 annual fee.

- Agree to pay all reasonable costs in excess of the fee that the county incurs to monitor the site.

- Post a sufficient amount of money, but not less than \$100,000, to be used to clean up the site if the company goes out of business.

What's wrong

These and other measures completely block development of large, modern livestock operations in the county, says Pam Brekke, an Edmore, N.D., farmer and member of both the Ramsey County commission and Prospect Township board.

No one will invest millions in a hog barn or dairy or beef feedlot if the county can shut it down in five years, she says.

No one is willing to turn over his or her operating checkbook

Key Points

- Prospect Township says county went too far with zoning.

- At issue are new requirements for CAFOs.

- The county believes its ordinance is reasonable.



IN DISPUTE: Pam Brekke holds a copy of the Prospect Township zoning ordinance.

to the county. Permit holders have to pay for any monitoring or study a majority of the commissioners decides is reasonable.

Site closure bonds aren't even available to the industry. Asking companies to set aside \$100,000-plus in cash or credit is unreasonable and unnecessary, she says.

Brekke suspects that these provisions were designed to turn away developers without banning livestock feeding outright.

Much of the text of the ordinance apparently comes from an organization called GrassRoots Action Center for the Environment — a fact she learned after the county passed the ordinance, she says.

Among GRACE's many causes is opposition to farms that it defines as factory farms. GRACE helps members block factory-farm projects in their communities.

On its Web site in 2004, GRACE cheered passage of the Ramsey County zoning ordinance and noted that it had provided the text and research for the law, Brekke says. The references have since been removed.

Ramsey County commissioners were told that the county needed a tough law to protect Devils Lake from pollution, Brekke says, but that they could grant variances for applicants who wanted to build in places like Prospect Township, which is 45 miles from Devils Lake.

But when commissioners started talking about a real permit, they learned they could only grant variances on the setback requirements.

"I was misled," Brekke says.

Lawson: No restrictions on the right to farm

RAMSEY County's ordinance doesn't restrict anyone's right to farm, says Joe Lawson.

Nor does it prevent anyone from building a concentrated animal feeding operation.

The ordinance limits them to appropriate sites and gives the county the power and the money to make sure the operators comply with the regulation, he says.

Lawson, a retired Air Force pilot and retired farmer from Brocket, N.D., serves on the nine-member Ramsey County planning and zoning committee. He took the lead in writing the ordinance.

Lawson says Ramsey County needs stronger enforcement than what the state health department provides. In a written document to the planning commission, he describes those annual inspections as two- to three-hour on-site visits in which officials mostly check nutrient management plan documents.

Having a good plan on paper doesn't mean that it is

being followed, Lawson says.

"We need to verify that the spread areas are not becoming oversaturated with nitrates and phosphates."

Karl Rockeman, an environmental engineer with the state health department, says the department's two inspectors — a third is being hired — visit the state's 60 largest CAFOs an average of four times a year and check the sites and practices thoroughly. "We are not just checking paperwork," he says.

Ramsey County should require that a permit holder clean up a site when it is closed, Lawson continues. Owners of a limited-liability company are personally shielded from liability. At the end of the day, if a company isn't able to provide a performance bond or a standby letter of credit, the applicant probably doesn't have the financial ability to clean up, he says.

Lawson contends that the Ramsey County law is "more than reasonable. It only requires that the county be able

to verify that the permit holder does what he says he will do."

Majority rules

Ramsey County's zoning ordinance was crafted in open, public meetings, Lawson says. People interested in expanding or starting new livestock enterprises participated in the meetings. The nine-member planning committee also received help from livestock and zoning experts.

"Everyone had a place at the table," he says. Some didn't participate, but that was their choice.

The ordinance may have some text that came from the GrassRoots Action Center for the Environment, but Lawson says he looked at 40 different sources of information. The ordinance also has language from the state model ordinance and North Dakota State University recommendations.

The county commission passed the ordinance unanimously, and a majority still supports it today, Lawson points out.

Sierra Club recommends strategy to block CAFOs

By LON TONNESON

THE following is a five-step strategy from the Sierra Club to keep concentrated animal feeding operations from locating near you. The information is reprinted verbatim from the Web site, www.sierraclub.org/factoryfarms/resources/strategies.asp.

1) Use the public comment and review process.

Get on every mailing list possible: Division of Environmental Quality (state environmental agency), USDA/Natural Resources Conservation Service, EPA, Army Corps, county planning and zoning, and any other agency that may have to issue permits or review applications. Scrutinize the public notices and other information sent out on CAFOs — the info may be concealed or listed in such a way that it is not immediately apparent.

Follow up: Provide comments on water quality, air quality, socio-economic issues, whatever. You don't have to be an expert (although soon you will discover that you are becoming one); keep reminding the agencies that they are required not only to listen but to respond to citizens' comments. Get involved in state-level committees and agency working groups that are charged with issues related to water quality, air quality, or CAFOs. Push every button at every level.

Keep commenting and enlist others to join you. Let them know that you are not going away — this falls under the heading of "wearing them down." Sooner or later, you will begin to notice incremental changes in the way things are done, and if enough forces are gathered, the planning and zoning, health departments, and finally the state agencies will begin to respond positively — and may even turn down a permit or make conditions actually protective of the environment (which means that the applicant will likely withdraw).

2) Organize a friendly "letter from the neighbors."

If you learn that a CAFO is moving in or a landowner is about to become a contract grower, one tactic Missouri activists have used successfully is what is now known as the "neighbor letter." Quite simply, all of the adjacent and neighboring landowners send a letter to the company and the potential contract grower telling them that everyone is having their properties appraised; and will have the properties re-appraised nine months after hog production begins. The letter concludes by stating that the neighbors will sue the company and the grower for any loss of property values. The appraisals must be completed and the letter sent prior to the beginning of construction of the facilities.

3) Press for county health ordinances.

Most states won't let counties zone for "agricultural operations." Even though we all know that a CAFO is really an industrial operation, not a farm in any sense, legally these operations are still considered "agricultural." But, all counties have the authority, indeed the duty, to adopt ordinances to protect the public health and welfare, including protection from rank odors and noxious emissions. You and your allies can place pressure upon county commissioners to adopt such ordinances.

4) Use the "threatened or impaired watersheds" process.

Obtain from your state water regulatory agency or the EPA regional offices for your area a copy of the listing of all "impaired water bodies" or the "303(d) list" for your state. Every state has such a list. They can also provide you with a copy of the regulations that govern the impaired water bodies process. No new or expanded CAFOs are allowed to locate in the drainages of impaired water bodies unless very strict standards are met. If you know of such a new or expanding operation in an impaired water body, report this to the state agency, the regional office of EPA, and to the Sierra Club Clean Water Campaign.

5) Sue them.

This is not necessarily the last resort. In fact, just filing a lawsuit opens a lot of doors and lets everyone — the agencies, politicians and the CAFO owner or grower — know that you mean business. Suits can be filed under the "citizens suit" provisions of the federal Clean Air Act and Clean Water Act, and legal fees are recoverable (which is how your attorney will get paid). Lawsuits are easier and you are more likely to prevail if a group of plaintiffs files jointly. The problem with a lawsuit is that you may have to show that you have been harmed, which means waiting until after something negative has occurred. Recent cases, however, have prevailed on the basis of a "presumptive nuisance," which means that certain things can be presumed to be a nuisance and there is no need to wait until it happens.

Read more at www.sierraclub.org/factoryfarms/resources/strategies.asp.

Testimony on House Bill 1420

Presented by
John Peyerl

My name is John Peyerl and I have been a township officer for about 30 years in Coulee Township in Ramsey County.

Our township has no one available, nor could we stand the expense of monitoring the environmental regulations for animal feeding operations. I don't think we even have anyone available to provide that service.

I would be very comfortable with the State Health Department and their trained personnel to deal with the health and environmental issues. Their regulations are based on sound science, rather than pseudo-science injected by the people who have been invading our state with their scare tactics.

Modern animal agriculture demands more than forty acres, a mule and ma and pa feeding the chickens and slopping the hogs. I would strongly urge you to give this bill a "do pass"

Thank you for your time.

Testimony on House Bill 1420
Presented by
Rodney Brown

Good morning, Mr. Chairman and members of the committee. My name is Rodney Brown and I am the Stevens Township Treasurer in Ramsey County. I support HB 1420.

The township does not have the finances available to monitor environmental regulations. So I think its better that the state is responsible for establishing these regulations.

Thank you for your time. I would try to answer any questions you may have.



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Association
Red River Valley Sugarbeet
Growers

Testimony of Mike Beltz

North Dakota Ag Coalition

House Bill 1420

January 25, 2007

Chairman Johnson, members of the House Agriculture Committee:

I am Mike Beltz. I farm near Hillsboro and am here today as the vice chairman of the North Dakota Ag Coalition. On behalf of the Ag Coalition, I encourage your support of HB 1420.

For more than 20 years, the North Dakota Ag Coalition has provided a unified voice for North Dakota agricultural interests. Today, the Coalition is made up of 30 statewide organizations or associations that represent specific commodities or have a direct interest in agriculture. Through the Ag Coalition, these members seek to enhance the business climate for North Dakota's agricultural producers.

The Ag Coalition takes a position on a limited number of issues that have a significant impact on North Dakota's ag industry. HB 1420 is one of these issues, as it will impact feeding operations statewide and across species.

The Ag Coalition is in support of this bill as it seeks to clarify the intent that the North Dakota Department of Health will have regulation over health and environmental issues surrounding the development of feeding operations. The Department of Health has the resources and expertise to set and effectively administer these regulations. The bill will provide a consistent set of guidelines for feedlot operators statewide, while still allowing counties and townships zoning authority, which is their area of expertise.

This bill will help create uniform health and environmental regulations for feeding operations, thus simplifying the development process for North Dakota livestock producers.

Therefore, we encourage your support of HB 1420.

Overview of Changes To State Livestock Regulations

- Definitions
- Federal Requirements
- Updated Regulations
- Who must apply
- When must they apply
- How to apply
- Permitting process
- Other Regulations



Definitions

- **Animal Feeding Operation (AFO):** An operation is an AFO if the following conditions are met:
 - Animals are stabled or confined, and fed or maintained for a total of 45 days in any 12-month period.
 - Vegetative growth or post harvest residues are not sustained during the normal growing season in the lot or facility.
- **Concentrated Animal Feeding Operation (CAFO):** An AFO which is defined as a Large CAFO or designated as a CAFO in accordance with NDAC Section 33-16-03.1-04.

Large CAFOs

- Is an AFO that stables or confines equal to or over the following animal numbers.

- 700 mature dairy cows
- 1,000 veal calves
- 1,000 cattle (beef/dairy heifers, steers, bulls, cow/calf pairs)
- 2,500 swine (55 pounds or more)
- 10,000 swine (less than 55 pounds)
- 500 horses
- 10,000 sheep or lambs
- also numbers for chickens, turkeys, and ducks

Medium AFOs

- Is an AFO that stables or confines, or has between the following animal numbers:

- 200-699 mature dairy cattle
- 300-999 veal calves
- 300-999 cattle (beef/dairy heifers, steers, bulls, cow/calf pairs)
- 750-2,499 swine (55 pounds or more)
- 3,000-9,999 swine (less than 55 pounds)
- 150-499 horses
- 3,000-9,999 sheep or lambs
- also numbers for chickens, turkeys, and ducks

Medium AFOs Requiring a Permit

- And meets one or both of the following conditions:
 - Pollutants are discharged into waters of the U.S. through a man-made ditch, flushing system, or other similar man-made device or
 - Pollutants are discharged directly into waters of the U.S. 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.

Small AFOs

- Is an AFO that stables or confines, or has between the following animal numbers:
 - 1-199 mature dairy cattle
 - 1-299 veal calves
 - 1-299 cattle (beef/dairy heifers, steers, bulls, cow/calf pairs)
 - 1-749 swine (55 pounds or more)
 - 1-2,999 swine (less than 55 pounds)
 - 1-149 horses
 - 1-2,999 sheep or lambs
 - also numbers for chickens, turkeys, and ducks

Small AFOs Requiring a Permit

- An AFO which meets one or both of the following conditions and is not a medium AFO.
 - Pollutants are discharged into waters of the U.S. through a man-made ditch, flushing system, or other similar man-made device.
 - Pollutants are discharged directly into waters of the U.S. 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.
- AND is designated by the NDDH

Updated Regulations

- Animal Units no longer exists
- Combination of Animals no longer exists
- "No Potential to Pollute" was added
 - Does not include Large CAFO
- NMP can be kept on site with only certain information required to be sent to the department when submitting design plans
 - Exceptions: Large CAFO, daily haul, Phosphorous Index is in the very high range, or spreading on frozen ground

Updated Regulations

- Written agreements for spreading manure on acres which are owned or operated by a different entity which is not under the control of the facility
- Record retention is required for not less than 3 years from the date generated for state approved facilities and not less than 5 years from the date generated for NDPDES permitted CAFOs
- Permit requires renewal every 5 years

Every site looked @ geologically

Updated Regulations

- Capacity of containment facility increased to 270 days + 25 year 24 hour storm event
 - Except for Swine, Poultry, and Veal which is 270 days + 100year 24 hour storm event
- Geological investigation
- Laboratory tests of liner material or in-situ material regardless of size
- 18" liner allowable for certain areas

Updated Regulations (Large CAFO)

- NDPDES Permit Required
- Record Keeping and Retention
- Annual Reporting
- Requires containment, "No potential to Pollute" does not apply
 - Includes feed storage (ex. silage, potato waste, beet tailings)
- Department approved NMP
 - Soil and manure tests

Who Must Apply?

- Large CAFOs
- Medium AFOs which cause or are likely to cause pollution to waters of the state or are within 1/4 mile of surface waters of the state
- Medium AFOs which the department has determined to cause or are likely to cause pollution to waters of the state
- Small AFOs which the department has determined to cause or are likely to cause pollution to waters of the state

When must they apply?

- An existing CAFO shall submit a permit application by
 - **February 12, 2006**
- An existing medium AFO within ¼ mile of surface water shall submit a permit application by
 - **July 1, 2008**
- Compliance date set by the department

How to apply

- Applications and engineering assistance are available through the
 - Department of Health
 - www.health.state.nd.us/wq/AnimalFeedingOperations/AFOProgram.htm
 - Local NRCS Office
 - 319 Watershed Coordinator
- The Department is also available for on-site visits if requested.

Permitting Process

- The department receives the design, NMP, etc.
- Information is reviewed for completeness.
- If any information is incomplete the department will contact the producer, 319, or the local NRCS office.
- If or when information is complete the department will continue the review for compliance with state law.

Permitting Process (cont.)

- When the design meets state regulations a permit or public notice will be issued. (public notice is dependant on size of facility)
- The permit is not finalized until it is signed by both the producer and health department officials.
- Construction can begin.

New Legislation

- House Bill 1291
- Adopted into NDCC 23-25-11
- Effective Aug 1, 2005
 - Changed the odor laws
 - Changed the zoning for non-zoned counties

Odor Law

- City zoning or extraterritorial zoning
 - Residence established before the agricultural operation
 - Odor readings taken at property boundary
 - Agricultural operation established before residence
 - Odor readings taken 100 feet from residence but not less than 500 feet from property boundary
- Outside of city zoning authority
 - Residence established before the agricultural operation
 - Odor readings taken 100 feet from the residence
 - Agricultural operation established before residence
 - Odor readings taken at any point beyond one-half mile except for property owned by the operator of the facility

Odor Law

- If a county or township has zoned
 - If setback distance is greater than one-half mile, odor reading will be taken at that setback distance rather than one-half mile, except for residence which was established before the animal feeding operation, unless an odor easement is obtained.
- A permitted animal feeding operation may expand its permitted capacity by 25% on one occasion without triggering a higher setback distance.

Odor Law

- There may be limitations required by local zoning authority such as:
 - Setback requirements from
 - roads
 - residence
 - Special use permits.
- Check with City, Township or County for zoning requirements.

Dead Animal Disposal

- Death from most diseases, must be disposed within 36 hours by:
 - Burning
 - Burying with at least 4 feet of cover
 - Rendering by licensed rendering plant
 - Composting
 - Landfill
 - Method approved by State Veterinarian.
- Must NOT dispose of carcass along public highway, stream, lake or river.

Further Information

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CHAPTER 23-29
SOLID WASTE MANAGEMENT AND LAND PROTECTION

23-29-01. Finding of necessity. The legislative assembly of the state finds that:

1. The people of North Dakota have a right to a clean environment, and the costs of maintaining a clean environment through the efficient environmentally acceptable management of solid wastes should be borne by those who use such services.
2. Serious economic, management, and technical problems exist in the management of solid wastes resulting from residential, commercial, industrial, agricultural, and other activities carried on in said jurisdictions.
3. Inefficient and improper methods of managing solid wastes create serious hazards to the public health, result in scenic blights, cause pollution of air and water resources, cause accident hazards, increase rodent and insect disease vectors, have an adverse effect on land values, create public nuisances, and otherwise interfere with community life and development.
4. While the management of solid wastes is the responsibility of each person, problems of solid waste management have become a matter statewide in scope and concern, and necessitate state action through technical assistance and leadership in the application of new improved methods and processes to reduce the amount of solid wastes and unsalvageable materials and to promote environmentally acceptable and economical solid waste management.

23-29-02. Declaration of purpose. It is hereby declared to be the purposes of this chapter to:

1. Plan for and regulate the storage, collection, transportation, resource recovery, and disposal of solid wastes in order to protect the public health, safety, and welfare and to enhance the environment for the people of the state.
2. Establish and maintain a cooperative state program of planning and technical assistance for solid waste management.
3. Provide the authority to and require persons to plan and provide efficient, environmentally acceptable solid waste management.
4. Provide the authority for the review of plans and facilities for solid waste management.
5. Provide the authority to issue permits for the operation of solid waste management activities.
6. Promote the application of resource recovery systems which preserve and enhance the quality of air, water, and land resources.
7. Promote and assist in the development of markets for recovered and recycled materials.
8. Encourage by 1995 at least a ten percent reduction in volume of municipal waste deposited in landfills, by 1997 at least a twenty-five percent reduction, and by 2000 at least a forty percent reduction.

23-29-03. Definitions.

1. "Collection" means the aggregation of solid waste from the places at which the waste was generated.
2. "Department" means the state department of health.
3. "Disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste into or on any land or water, including ground water.
4. "Industrial waste" means solid waste, which is not a hazardous waste regulated under chapter 23-20.3, generated from the combustion or gasification of municipal waste and from industrial and manufacturing processes. The term does not include municipal waste or special waste.
5. "Infectious waste" means solid waste that may contain pathogens with sufficient virulence and in sufficient quantity that exposure of a susceptible human or animal to the solid waste could cause the human or animal to contract an infectious disease.
6. "Landfill" means a publicly or privately owned area of land where solid wastes are permanently disposed.
7. "Litter" means discarded and abandoned solid waste materials.
8. "Major appliance" means an air conditioner, clothes dryer, clothes washer, dishwasher, freezer, microwave oven, oven, refrigerator, stove, furnace, water heater, humidifier, dehumidifier, garbage disposal, trash compactor, or other similar appliance.
9. "Municipal waste" means solid waste that includes garbage, refuse, and trash generated by households, motels, hotels, and recreation facilities; by public and private facilities; and by commercial, wholesale, and private and retail businesses. The term does not include special waste or industrial waste.
10. "Open burning" means the combustion of solid waste without control of combustion air to maintain adequate temperature for efficient combustion, containment of the combustion reaction in an enclosed device to provide sufficient residence time and mixing for complete combustion, and control of the emission of the combustion products.
11. "Person" means any individual, corporation, limited liability company, partnership, firm, association, trust, estate, public or private institution, group, federal agency, political subdivision of this state or any other state or political subdivision thereof, and any legal successor, representative agent, or agency of the foregoing.
12. "Political subdivision" means a city, county, township, or solid waste management authority.
13. "Resource recovery" means the use, reuse, or recycling of materials, substances, energy, or products contained within or derived from municipal waste.
14. "Solid waste" means any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities. The term does not include:
 - a. Agricultural waste, including manures and crop residues, returned to the soil as fertilizer or soil conditioners; or

- b. Solid or dissolved materials in domestic sewage, or solid or dissolved material in irrigation return flows or industrial discharges that are point sources subject to permits under section 402 of the Federal Water Pollution Control Act, as amended [Pub. L. 92-500; 86 Stat. 816; 33 U.S.C. 1251 et seq.], or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended [68 Stat. 919; 42 U.S.C. 2011 et seq.].
- 15. "Solid waste management" means the purposeful systematic control of the storage, collection, transport, composting, resource recovery, land treatment, and disposal of solid waste.
- 16. "Special waste" means solid waste that is not a hazardous waste regulated under chapter 23-20.3 and includes waste generated from energy conversion facilities; waste from crude oil and natural gas exploration and production; waste from mineral and ore mining, beneficiation, and extraction; and waste generated by surface coal mining operations. The term does not include municipal waste or industrial waste.
- 17. "Storage" means the containment and holding of solid waste after generation for a temporary period, at the end of which the solid waste is processed for resource recovery, treated, disposed of, or stored elsewhere.
- 18. "Transport" means the offsite movement of solid waste.

23-29-04. Powers and duties of the department. The department shall have the responsibility for the administration and enforcement of this chapter. It shall have the power and its duties shall be to:

- 1. Administer the state solid waste management program pursuant to provisions of this chapter.
- 2. Provide technical assistance on request to political subdivisions of the state and cooperate with appropriate federal agencies in carrying out the duties under this chapter, and may, on request, provide technical assistance to other persons.
- 3. Encourage and recommend procedures for the utilization of self-financing solid waste management systems and intermunicipal agencies in accomplishing the desired objective of this chapter.
- 4. Promote the planning and application of resource recovery facilities and systems which preserve and enhance the quality of air, water, and all resources.
- 5. Serve as the official state representative for all purposes of the Federal Solid Waste Disposal Act [Pub. L. 89-272; 79 Stat. 997; 42 U.S.C. 3251 et seq.], as amended, and for other state or federal legislation to assist in the management of solid wastes.
- 6. Survey the solid waste management needs within the state and maintain and upgrade the North Dakota solid waste management plan.
- 7. Require any person or combinations thereof within the state to submit for review and approval a solid waste management plan to show that solid wastes will be disposed of in accordance with the provisions of this chapter.
- 8. Adopt and enforce rules governing solid waste management, in order to conserve the air, water, and land resources of the state; protect the public health; prevent environmental pollution and public nuisances; and enable the department to administer this chapter, the adopted solid waste management plan, and delegated federal programs.

9. Establish the procedures for permits governing the design, construction, operation, and closure of solid waste management facilities and systems.
10. Prepare, issue, modify, revoke, and enforce orders, after investigation, inspection, notice, and hearing, prohibiting violation of any of the provisions of this chapter or of any rules and regulations issued pursuant thereto, and requiring the taking of such remedial measures for solid waste management as may be necessary or appropriate to implement or effectuate the provisions and purposes of this chapter.
11. Adopt rules to establish categories and classifications of solid waste and solid waste management facilities based on waste type and quantity, facility operation, or other facility characteristics and to limit, restrict, or prohibit the disposal of solid wastes based on environmental or public health rationale.
12. Adopt rules to establish standards and requirements for each category of solid waste management facility.
13. Adopt rules to establish financial assurance requirements to be met by any person proposing construction or operation of a solid waste management facility sufficient to provide for closure and postclosure activities. Financial assurance requirements must include any or all of the following: insurance, trust funds, surety bonds, letters of credit, personal bonds, certificates of deposit, and financial tests or corporate guarantees.
14. Conduct an environmental compliance background review of any applicant for any permit requested after July 7, 1991. In conducting the review, if the department finds that an applicant for a permit has intentionally misrepresented or concealed any material fact from the department, or has obtained a permit by intentional misrepresentation or concealment of a material fact, has been convicted of a felony or pleaded guilty or nolo contendere to a felony involving the laws of any state or the federal government within three years preceding the application for the permit, or has been adjudicated in contempt of an order of any court enforcing the laws of this state or any other state or the federal government within three years preceding the application for the permit, the department may deny the application. The department shall consider the relevance of the offense to the business to which the permit is issued, the nature and seriousness of the offense, the circumstances under which the offense occurred, the date of the offense, and the ownership and management structure in place at the time of the offense.

23-29-05. Local government ordinances. Any political subdivision of the state may enact and enforce a solid waste management ordinance if such ordinance is equal to or more stringent than this chapter and the rules adopted pursuant to this chapter.

23-29-05.1. Littering and open burning prohibited - Penalty.

1. No person may discard and abandon any litter, furniture, or major appliances upon public property or upon private property not owned by that person, unless the property is designated for the disposal of litter, furniture, or major appliances and that person is authorized to use the property for that purpose.
2. No person may engage in the open burning of solid waste, unless the burning is conducted in accordance with rules adopted by the department.
3. A person violating this section is guilty of an infraction, except if the litter discarded and abandoned amounted to more than one cubic foot [0.0283 cubic meter] in volume or if the litter consisted of furniture or a major appliance, the offense is a class B misdemeanor.

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Chapter ATCP 51

LIVESTOCK FACILITY SITING

Subchapter I — Definitions and General Provisions

- ATCP 51.01 Definitions.
ATCP 51.02 Scope of this chapter.
ATCP 51.04 Animal units.
ATCP 51.06 Local approval of existing livestock facilities.
ATCP 51.08 Duration of local approval.

Subchapter II — Livestock Facility Siting Standards

- ATCP 51.10 Livestock facility siting standards; general.
ATCP 51.12 Livestock structures; location on property.

- ATCP 51.14 Odor and air emissions.
ATCP 51.16 Nutrient management.
ATCP 51.18 Waste storage facilities.
ATCP 51.20 Runoff management.

Subchapter III — Application and Approval

- ATCP 51.30 Application.
ATCP 51.32 Timely action on application.
ATCP 51.34 Granting or denying an application.
ATCP 51.36 Record of decision-making.

Note: This chapter is adopted under authority of ss. 93.07 (1) and 93.90 (2), Stats. This chapter interprets Wisconsin's livestock facility siting law, s. 93.90, Stats. According to the livestock facility siting law, a county, town, city or village ("political subdivision") may not prohibit or disapprove a new or expanded livestock facility of any size unless one of the following applies:

- The site is located in a zoning district that is not an agricultural zoning district.
- The site is located in an agricultural zoning district where the livestock facility is prohibited. A prohibition, if any, must be clearly justified on the basis of public health or safety. The livestock facility siting law limits exclusionary zoning based solely on livestock facility size.
- The proposed livestock facility violates a valid local ordinance adopted under certain state laws related to shoreland zoning, floodplain zoning, construction site erosion control or stormwater management.
- The proposed livestock facility violates a local building, electrical or plumbing code that is consistent with the state building, electrical or plumbing code for that type of facility.

The proposed livestock facility will have 500 or more "animal units" (or will exceed a lower permit threshold incorporated in a local zoning ordinance prior to July 19, 2003), and the proposed facility violates one of the following:

- A state livestock facility siting standard adopted by the department under this chapter.
 - A more stringent local ordinance standard enacted prior to the siting application. The more stringent local standard must be based on reasonable and scientifically defensible findings of fact, adopted by the local jurisdiction, which clearly show that the standard is necessary to protect public health or safety.
- Some, but not all, political subdivisions require local approval of new or expanded livestock facilities. The livestock facility siting law *does not require* local approval. But if local approval is required, the political subdivision must grant or deny approval based on this chapter. A political subdivision may *not* consider other siting criteria, or apply standards that differ from this chapter, except as provided in the livestock facility siting law or this chapter.

The department must review the livestock facility siting standards under this chapter at least once every 4 years (see s. 93.90 (2) (c), Stats.). The department will review the standards at least annually during the first 4 years of rule implementation. The department will track local siting applications and decisions (see s. ATCP 51.34 (5)), and will review that information at least monthly during the first year of rule implementation.

The livestock facility siting law includes the following statements of legislative intent:

"This [law] is an enactment of statewide concern for the purpose of providing uniform regulation of livestock facilities."

"...[T]he department shall consider whether [livestock facility siting standards] are all of the following:

- Protective of public health or safety.
- Practical and workable.
- Cost-effective.
- Objective.
- Based on available scientific evidence that has been subjected to peer review.
- Designed to promote the growth and viability of animal agriculture in this state.
- Designed to balance the economic viability of farm operations with protecting natural resources and other community interests.
- Usable by officials of political subdivisions."

Subchapter I — Definitions and General Provisions

ATCP 51.01 Definitions. In this chapter:

(1) "Adjacent" means located on land parcels that touch each other, or on land parcels that are separated only by a river, stream, or transportation or utility right-of-way.

(2) "Affected neighbor" means, for purposes of the odor score calculation under s. ATCP 51.14, a residence or high-use building

located within 2,500 feet of any livestock structure at a proposed livestock facility. "Affected neighbor" does not include a residence or high-use building owned by any of the following:

- (a) The livestock facility operator.
- (b) A person who affirmatively agrees to have the residence or high-use building excluded from the odor score calculation under s. ATCP 51.14.

Note: The odor score calculation under s. ATCP 51.14 is based, in part, on the proximity and density of "affected neighbors." See *Appendix A, worksheet 2*.

(3) "Animal lot" means a feedlot, barnyard or other outdoor facility where livestock are concentrated for feeding or other purposes. "Animal lot" does not include a pasture or winter grazing area. Two or more animal lots at the same livestock facility constitute a single animal lot, for purposes of this chapter, if runoff from the animal lots drains to the same treatment area under s. ATCP 51.20 (2) or if runoff from the animal lot treatment areas converges or reaches the same surface water within 200 feet of any of those treatment areas.

(4) "Animal unit" has the meaning that was given in s. NR 243.03 (3) as of April 27, 2004.

Note: See s. 93.90 (1m) (a), Stats., and s. ATCP 51.04. "Animal unit" equivalents, for different species and types of livestock, are shown in *Appendix A, worksheet 1 (animal units)*. The "animal unit" equivalents are based on s. NR 243.03 (3) as it existed on April 27, 2004 (the date on which the livestock facility siting law, 2003 Wis. Act 235, was published).

(5) "BARNY model" means the NRCS "Evaluation System to Rate Feedlot Pollution Potential," ARM-NC-17 (April 1982 version with modifications as of August 2005).

Note: The BARNY model is a commonly used computer model that predicts nutrient runoff from animal lots. Copies of the BARNY model are on file with the department, the secretary of state and the revisor of statutes. An Excel computer spreadsheet version is available at www.datcp.state.wi.us.

(6) "Bedrock" means the top of the shallowest layer of a soil profile that consists of consolidated rock material or weathered-in-place material, more than 50% of the volume of which will be retained on a 2 mm soil sieve.

(7) "Certified agricultural engineering practitioner" means an agricultural engineering practitioner who is certified under s. ATCP 50.46 with a rating under s. ATCP 50.46 (5) that authorizes the practitioner to certify every matter that the practitioner certifies under this chapter.

(8) "Cluster" means any group of one or more livestock structures within a livestock facility.

(9) "Complete application for local approval" means an application that contains everything required under s. ATCP 51.30 (1) to (4).

(10) "Department" means the Wisconsin department of agriculture, trade and consumer protection.

(11) "Direct runoff" has the meaning given in s. NR 151.015 (7).

Note: Under s. NR 151.015 (7), "direct runoff" means a discharge of a significant amount of pollutants to waters of the state resulting from any of the following practices:

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- (a) Runoff from a manure storage facility.
- (b) Runoff from an animal lot that can be predicted to reach surface waters of the state through a defined or channelized flow path or man-made conveyance.
- (c) Discharge of leachate from a manure pile.
- (d) Seepage from a manure storage facility.
- (e) Construction of a manure storage facility in permeable soils, or over fractured bedrock, without a liner designed according to s. NR 154.04 (3).

(12) "DNR" means the Wisconsin department of natural resources.

(13) "Expanded livestock facility" means the entire livestock facility that is created by the expansion, after May 1, 2006, of an existing livestock facility. "Expanded livestock facility" includes all livestock structures in the expanded facility, regardless of whether those structures are new, existing or altered.

Note: This chapter applies to local approvals of new or expanded livestock facilities that will have 500 or more animal units (or will exceed a lower permit threshold incorporated in a local zoning ordinance prior to July 19, 2003). See s. ATCP 51.02. Although this chapter covers all livestock structures in an "expanded livestock facility," existing structures are subject to less rigorous standards than new or expanded structures, and are completely exempt from certain requirements.

(14) "Expansion" means an increase in the largest number of animal units kept at a livestock facility on at least 90 days in any 12-month period. The acquisition of an existing livestock facility, by the operator of an adjacent livestock facility, does not constitute an "expansion" unless that operator increases the largest number of animal units kept at the combined livestock facilities on at least 90 days in any 12-month period.

Note: See s. ATCP 51.04.

(15) "Fine soil particles" means soil particles that pass through a # 200 soil sieve.

Note: See s. NR 151.002 (32).

(16) "High-use building" means any of the following buildings:

- (a) A residential building that has at least 6 distinct dwelling units.
- (b) A restaurant, hotel, motel or tourist rooming house that holds a permit under s. 254.64, Stats.
- (c) A school classroom building.
- (d) A hospital or licensed care facility.
- (e) A non-farm business or workplace that is normally occupied, during at least 40 hours of each week of the year, by customers or employed workers.

(17) "Karst feature" means an area or superficial geologic feature subject to bedrock dissolution so that it is likely to provide a conduit to groundwater. "Karst feature" may include caves, enlarged fractures, mine features, exposed bedrock surfaces, sinkholes, springs, seeps or swallets.

(18) "Livestock" means domestic animals traditionally used in this state in the production of food, fiber or other animal products. "Livestock" includes cattle, swine, poultry, sheep and goats. "Livestock" does not include equine animals, bison, farm-raised deer, fish, captive game birds, ratites, camelids or mink.

(19) "Livestock facility" means a feedlot, dairy farm or other operation where livestock are or will be fed, confined, maintained or stabled for a total of 45 days or more in any 12-month period. A "livestock facility" includes all of the tax parcels of land on which the facility is located, but does not include a pasture or winter grazing area. Related livestock facilities are collectively treated as a single "livestock facility" for purposes of this chapter, except that an operator may elect to treat a separate species facility as a separate "livestock facility."

Note: See definition of "related livestock facilities" in sub. (36) and "separate species facility" in sub. (38).

(20) "Livestock structure" means a building or other structure used to house or feed livestock, to confine livestock for milking, to confine livestock for feeding other than grazing, to store livestock feed, or to collect or store waste generated at a livestock facility. "Livestock structure" includes a barn, milking parlor, feed storage facility, feeding facility, animal lot or waste storage facility. "Livestock structure" does not include a pasture or winter

grazing area, a fence surrounding a pasture or winter grazing area, a livestock watering or feeding facility in a pasture or winter grazing area, or a machine shed or like facility that is not used for livestock.

(21) "Local approval" means an approval, required by local ordinance, of a new or expanded livestock facility. "Local approval" includes a license, permit, special exception, conditional use permit or other form of local authorization. "Local approval" does not include any of the following:

(a) An approval required by a political subdivision within the scope of its authority under s. 59.692, 59.693, 60.627, 61.351, 61.354, 62.231, 62.234 or 87.30, Stats.

Note: See s. 93.90 (3) (a) 3., Stats. The statutes listed in par. (a) pertain to shoreland zoning, floodplain zoning, construction site erosion control and stormwater management.

(b) An approval required under a local building, electrical or plumbing code, if the standards for approval are consistent with standards established under the state building, electrical or plumbing code for that type of facility.

Note: See s. 93.90 (3) (a) 4., Stats.

(22) "Local ordinance" or "local code" means an ordinance enacted by a political subdivision.

(23) "Manure" means excreta from livestock kept at a livestock facility. "Manure" includes livestock bedding, water, soil, hair, feathers, and other debris that becomes intermingled with livestock excreta in normal manure handling operations.

(24) "Minor alteration" of a livestock structure means a repair or improvement in the construction of an existing livestock structure that does not result in a substantially altered livestock structure.

(25) "Navigable waters" has the meaning given in s. 30.01 (4m), Stats.

(26) "New livestock facility" means a livestock facility that will be used as a livestock facility for the first time, or for the first time in at least 5 years. "New livestock facility" does not include an expanded livestock facility if any portion of that facility has been used as a livestock facility in the preceding 5 years.

Note: This chapter applies to local approvals of new or expanded livestock facilities that will have 500 or more animal units (or will exceed a lower permit threshold incorporated in a local zoning ordinance prior to July 19, 2003). See s. ATCP 51.02.

(27) "NRCS" means the natural resource conservation service of the United States department of agriculture.

(28) "Operator" means a person who applies for or holds a local approval for a livestock facility.

(29) "Pasture" means land on which livestock graze or otherwise seek feed in a manner that maintains the vegetative cover over all of the grazing or feeding area.

(30) "Person" means an individual, corporation, partnership, cooperative, limited liability company, trust or other legal entity.

(31) "Political subdivision" means a city, village, town or county.

(32) "Populate" means to add animal units for which local approval is required.

(33) "Property line" means a line that separates parcels of land owned by different persons.

(34) "Qualified nutrient management planner" means a person qualified under s. ATCP 50.48.

(35) "Registered professional engineer" means a professional engineer registered under ch. 443, Stats.

(36) "Related livestock facilities" means livestock facilities that are owned or managed by the same person, and related to each other in at least one of the following ways:

(a) They are located on the same tax parcel or adjacent tax parcels of land.

Note: A mere acquisition of a neighboring livestock facility does not constitute an "expansion" unless more animal units are added to the combined facilities.

See sub. (14).

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(b) They use one or more of the same livestock structures to collect or store manure.

(c) At least a portion of their manure is applied to the same landspreading acreage.

Note: Compare definition of "animal feeding operation" under s. NR 243.03 (2). "Related livestock facilities" are treated as a single livestock facility for purposes of local approval, except that a "separate species facility" may be treated as a separate livestock facility. See subs. (19) and (38).

(37) "Runoff" means storm water or precipitation including rain, snow, ice melt or similar water that moves on the land surface via sheet or channelized flow.

(38) "Separate species facility" means a livestock facility that meets all of the following criteria:

(a) It has only one of the following types of livestock, and that type of livestock is not kept on any other livestock facility to which the separate species facility is related under sub. (36):

1. Cattle.
2. Swine.
3. Poultry.
4. Sheep.
5. Goats.

Note: For purposes of par. (a), cattle and poultry are different "types" of livestock, but dairy and beef cattle are livestock of the same "type" ("cattle"). Milking cows, heifers, calves and steers (all "cattle") are livestock of the same "type." Turkeys, ducks, geese and chickens are livestock of the same "type" ("poultry").

(b) It has no more than 500 animal units.

(c) Its livestock housing and manure storage structures, if any, are separate from the livestock housing and manure storage structures used by livestock facilities to which it is related under sub. (36).

(d) It meets one of the following criteria:

1. Its livestock housing and manure storage structures, if any, are located at least 750 feet from the nearest livestock housing or manure storage structure used by a livestock facility to which it is related under sub. (36).
2. It and the other livestock facilities to which it is related under sub. (36) have a combined total of fewer than 1,000 animal units.

(39) "Site that is susceptible to groundwater contamination" means any of the following:

- (a) An area within 250 feet of a private well.
- (b) An area within 1,000 feet of a municipal well.
- (c) An area within 300 feet upslope or 100 feet downslope of a karst feature.
- (d) A channel with a cross-sectional area equal to or greater than 3 square feet that flows to a karst feature.
- (e) An area where the soil depth to groundwater or bedrock is less than 2 feet.
- (f) An area where none of the following separates the ground surface from groundwater and bedrock:
 1. A soil layer at least 2 feet deep that has at least 40% fine soil particles.
 2. A soil layer at least 3 feet deep that has at least 20% fine soil particles.
 3. A soil layer at least 5 feet deep that has at least 10% fine soil particles.

Note: See s. NR 151.015 (18).

(40) "Substantially altered" livestock structure means a livestock structure that undergoes a material change in construction or use, including any of the following material changes:

- (a) An increase in the capacity of a waste storage facility.
- (b) The addition of a liner to a waste storage facility.
- (c) An increase of more than 20% in the area or capacity of a livestock structure used to house, feed or confine livestock, or to store livestock feed.

(d) An increase of more than 20% in the number of animal units that will be kept in a livestock structure on at least 90 days in any 12-month period.

(41) "Unconfined manure pile" means a quantity of manure at least 175 cubic feet in volume that covers the ground surface to a depth of at least 2 inches, but does not include any of the following:

(a) Manure that is confined within a manure storage facility, livestock housing structure or barnyard runoff control facility.

(b) Manure that is covered or contained in a manner that prevents storm water access and direct runoff to surface water or leaching of pollutants to groundwater.

(42) "Waste" means manure, milking center waste and other organic waste generated by a livestock facility.

(43) "Waste storage facility" means one or more waste storage structures. "Waste storage facility" includes stationary equipment and piping used to load or unload a waste storage structure if the equipment is specifically designed for that purpose and is an integral part of the facility. "Waste storage facility" does not include equipment used to apply waste to land.

(44) "Waste storage structure" means a waste storage impoundment made by constructing embankments, excavating a pit or dugout, or fabricating a structure. "Waste storage structure" does not include equipment used to apply waste to land. For purposes of ss. ATCP 51.12 (2) and 51.14, "waste storage structure" does not include any of the following:

(a) A structure used to collect and store waste under a livestock housing facility.

(b) A manure digester consisting of a sealed structure in which manure is subjected to managed biological decomposition.

(45) "Waters of the state" has the meaning given in s. 283.01 (20), Stats.

(46) "Winter grazing area" means cropland or pasture where livestock feed on dormant vegetation or crop residue, with or without supplementary feed, during the period October 1 to April 30. "Winter grazing area" does not include any of the following:

(a) An area, other than a pasture, where livestock are kept during the period from May 1 to September 30.

(b) An area which at any time has an average of more than 4 livestock animal units per acre.

(c) An area from which livestock have unrestricted access to navigable waters of the state, such that the livestock access prevents adequate vegetative cover on banks adjoining the water.

(d) An area in which manure deposited by livestock causes nutrient levels to exceed standards in s. ATCP 51.16.

(47) "WPDES permit" means a Wisconsin pollutant discharge elimination system permit issued by DNR under ch. NR 243.

History: CR 05-014; cr. Register April 2006 No. 604, eff. 5-1-06.

ATCP 51.02 Scope of this chapter. (1) This chapter applies to local approvals of the following livestock facilities:

(a) A new or expanded livestock facility that will have 500 or more animal units.

(b) A new or expanded livestock facility that will exceed a lower size threshold, for a special exception or conditional use permit, if the threshold is expressed in terms of a specific number of animals or animal units and was incorporated in a local zoning ordinance prior to July 19, 2003.

Note: Some, but not all, political subdivisions require local approval of new or expanded livestock facilities. The livestock facility siting law *does not require* local approval. But *if* local approval is required, the political subdivision must grant or deny approval based on this chapter. A political subdivision may *not* consider other siting criteria, or apply standards that differ from this chapter, except as provided in the livestock facility siting law or this chapter.

A political subdivision may *not* require local approval for new or expanded livestock facilities smaller than 500 animal units, except as specifically authorized by the livestock facility siting law and this chapter. A political subdivision may apply a lower size threshold adopted by ordinance prior to July 19, 2003 *if that threshold is*

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expressed as a specific number of animals or animal units. A local threshold expressed in locally-defined "animal units" may meet this test, because it effectively indicates a specific number of animals, even if the local ordinance definition of "animal units" differs from the definition in this chapter. However, the local application and approval process must use the "animal units" definition in this chapter.

Local approvals under this chapter "run with the land." See s. ATCP 51.08. They normally continue to apply, despite changes in ownership, as long as subsequent owners do not violate the terms of the local approval. Some ordinances might require a *pro forma* permit transfer with each transfer of ownership, but that transfer may not ordinarily limit the scope of approval.

A livestock operator is *not* required to obtain local approval under this chapter for the construction, repair or improvement of livestock structures, unless the operator also adds "animal units" for which local approval is required (local building codes and manure storage ordinances may apply). However, a political subdivision may withdraw a local approval granted under this chapter if the livestock operator does any of the following (see s. ATCP 51.34 (4)):

- Without local authorization, alters the approved livestock facility in a way that materially violates the terms of the local approval.
- Alters the approved livestock facility so that the altered facility violates the standards in subch. II.

(2) This chapter does not apply to any of the following:

(a) Livestock facilities other than those in sub. (1) that require local approval.

(b) An approval required by a political subdivision within the scope of its authority under s. 59.692, 59.693, 60.627, 61.351, 61.354, 62.231, 62.234 or 87.30, Stats.

Note: See s. 93.90 (3) (a) 3., Stats. The statutes listed in par. (b) pertain to shoreland zoning, floodplain zoning, construction site erosion control and stormwater management.

(c) An approval required under a local building, electrical or plumbing code, if the standards for approval are consistent with standards established under the state building, electrical or plumbing code for that type of facility.

Note: See s. 93.90 (3) (a) 4., Stats.

History: CR 05-014; cr. Register April 2006 No. 604, eff. 5-1-06.

ATCP 51.04 Animal units. In this chapter, and in every local approval or application for local approval under this chapter, the number of animal units kept or authorized at a livestock facility means the maximum number of animal units that are or may be kept on at least 90 days in any 12-month period.

Note: This section accounts for normal day-to-day and seasonal variations in livestock numbers, as livestock are born, received, moved and marketed. See s. 93.90 (3) (f), Stats.

Under this chapter, an applicant for local approval must specify the number of "animal units" for which the applicant seeks authorization. If the application is approved, the approval authorizes that number of "animal units." The authorized number is the maximum number of "animal units" that may be kept on 90 or more days in any 12-month period. A livestock operator may not exceed that authorized number without further local approval.

"Animal unit" equivalents, for different species and types of livestock, are shown in Appendix A, *worksheet 1 (animal units)*. The "animal unit" equivalents are based on s. NR 243.03 (3) as it existed on April 27, 2004 (the date on which the livestock facility siting law, 2003 Wis. Act 235, was published). See s. 93.90 (1m) (a), Stats., and s. ATCP 51.01 (4).

History: CR 05-014; cr. Register April 2006 No. 604, eff. 5-1-06.

ATCP 51.06 Local approval of existing livestock facilities. (1) GENERAL. Except as provided in sub. (2), a local ordinance may not require local approval under this chapter for any of the following:

(a) A livestock facility that existed before May 1, 2006 or before the effective date of the local approval requirement.

(b) A livestock facility that the political subdivision has already approved. A prior approval for the construction of a livestock facility implies approval for the maximum number of animal units that the approved livestock facility was reasonably designed to house, except as otherwise clearly provided in the approval. Prior approval of a single livestock structure, such as a waste storage structure, does not constitute prior approval of an entire livestock facility.

Note: For example, if a political subdivision has already approved construction of a livestock facility that was reasonably designed to house up to 800 "animal units," that approval authorizes the operator to keep up to 800 "animal units" at that facility (even if the scope of approval is not explicitly stated in terms of "animal units").

(2) EXPANSIONS. A local ordinance may require local approval under this chapter for the expansion of a pre-existing or previously approved livestock facility under sub. (1) if the number of

animal units kept at the expanded livestock facility will exceed all of the following:

(a) The applicable size threshold for local approval under s. ATCP 51.02 (1).

(b) The maximum number previously approved or, if no maximum number was previously approved, a number that is 20% higher than the number kept on May 1, 2006 or on the effective date of the approval requirement, whichever date is later.

Note: Consider the following examples:

Example 1: Suppose that a local ordinance enacted after May 1, 2006 requires local approval for livestock facilities with 500 or more "animal units." "Local approval is not required" for a livestock facility that already has 600 "animal units" on the local ordinance effective date, unless the facility expands to more than 720 "animal units." The number of "animal units" kept on the ordinance effective date means the largest number kept on at least 90 days in the 12 months prior to the ordinance effective date (see s. 93.90 (3) (e), Stats.).

Example 2: Suppose that a local ordinance enacted prior to July 19, 2003 requires local approval of livestock facilities with 400 or more "animal units." An expansion from 200 "animal units" (existing facility) to 450 "animal units" (expanded facility) will require local approval, unless the political subdivision has already given its approval. If the political subdivision has already approved construction of a livestock facility that is designed to house up to 450 "animal units," the operator does not need further local approval unless the operator proposes to exceed 450 "animal units."

History: CR 05-014; cr. Register April 2006 No. 604, eff. 5-1-06.

ATCP 51.08 Duration of local approval. (1) Except as provided in sub. (2) or s. ATCP 51.34 (4), a local approval under this chapter:

(a) Runs with the land and remains in effect despite a change in ownership of the livestock facility or the land on which it is located.

Note: Some local ordinances may require a *pro forma* permit transfer with each transfer of ownership, but that transfer may not limit the scope of the prior approval.

(b) Remains in effect regardless of the amount of time that elapses before the livestock operator exercises the authority granted by the approval, and regardless of whether the livestock operator exercises the full authority granted by the approval.

Note: For example, if a livestock operator gets local approval under this chapter to expand from 400 "animal units" (existing) to 900 "animal units", the livestock operator may implement the approved expansion over a period of time chosen by the livestock operator. The operator does not lose the approval merely because the operator implements the expansion in gradual stages, or fails to expand by the full amount authorized. However, the operator must at least begin the expansion within 2 years, or face possible loss of approval. See sub. (2).

(2) A political subdivision may withdraw a local approval granted under this chapter unless the livestock operator does all of the following within 2 years after a local approval is granted:

(a) Begins populating the approved livestock facility.

(b) Begins construction on every new or expanded livestock housing structure, and every new or expanded waste storage structure, proposed in the application for local approval.

(3) If a local approval is appealed, the local approval is deemed to be granted for purposes of sub. (2) when the appeal is concluded. Withdrawal of a local approval under sub. (2) does not prevent a livestock operator from obtaining a new local approval under this chapter.

Note: A political subdivision should exercise sound judgment in deciding whether to withdraw a local approval under sub. (2). The political subdivision may consider extenuating circumstances, such as adverse weather conditions, that may affect an operator's ability to comply. A political subdivision should give the operator prior notice, and a reasonable opportunity to demonstrate compliance, before withdrawing a local approval.

History: CR 05-014; cr. Register April 2006 No. 604, eff. 5-1-06.

Subchapter II — Livestock Facility Siting Standards

ATCP 51.10 Livestock facility siting standards; general. (1) STATE STANDARDS APPLY. Except as provided in sub. (2) or (3), a political subdivision shall grant or deny local approvals covered by this chapter based on the standards in this subchapter.

(2) STATE STANDARDS INCORPORATED IN LOCAL ORDINANCE. Beginning on November 1, 2006, a political subdivision may not deny a local approval covered by this chapter unless the political subdivision incorporates by local ordinance the standards in this subchapter and the application requirements in subch. III. A local

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ordinance may incorporate the standards and application requirements by reference, without reproducing them in full.

Note: The livestock facility siting law, s. 93.90, Stats., limits the reasons for which a political subdivision may deny local approval. For the first 6 months after the effective date of this chapter, from May 1, 2006 to November 1, 2006, a political subdivision may deny local approval based on standards in this chapter without incorporating those standards by local ordinance. See sub. (1). But sub. (2) applies beginning on November 1, 2006.

(3) **MORE STRINGENT LOCAL STANDARDS.** A political subdivision may not apply local standards that are more stringent than the standards in this subchapter unless all of the following apply:

(a) The political subdivision is authorized to adopt the local standards under other applicable law.

(b) The political subdivision enacted the standards by local ordinance, before the livestock facility operator filed the application for local approval.

(c) The political subdivision enacted the standards based on reasonable and scientifically defensible findings of fact adopted by the political subdivision's governing authority.

(d) The findings of fact under par. (c) clearly show that the standards are needed to protect public health or safety.

Note: See s. 93.90 (3) (ar), Stats.

(4) **ORDINANCE PROVISIONS FILED WITH DEPARTMENT.** Within 30 days after a political subdivision enacts an ordinance provision under sub. (2) or (3), the political subdivision shall file a copy of the ordinance provision with the department. Failure to file the ordinance provision with the department does not invalidate the ordinance provision. The political subdivision shall file the ordinance provision, by mail, fax or e-mail, at the following applicable address:

Wisconsin Department of Agriculture,
Trade and Consumer Protection
Agricultural Resource Management Division
Bureau of Land and Water Resources
P.O. Box 8911
Madison, WI 53708-8911
Fax: (608) 224-4615
E-mail: ordinance@datcp.state.wi.us

History: CR 05-014: cr. Register April 2006 No. 604, eff. 5-1-06.

ATCP 51.12 Livestock structures; location on property. (1) **PROPERTY LINE AND ROAD SETBACKS; GENERAL.** Livestock structures shall comply with local ordinance requirements related to setbacks from property lines and public roads, except that no local setback requirement may do any of the following:

(a) Require a livestock structure to be set back more than 100 feet from any property line or public road right-of-way, except as provided in sub. (2), if the livestock facility will have fewer than 1,000 animal units.

(b) Require a livestock structure to be set back more than 200 feet from any property line, or more than 150 feet from any public road right-of-way, except as provided in sub. (2), if the livestock facility will have 1,000 animal units or more.

(c) Prevent the use of a livestock structure that was located within the setback area prior to the effective date of the setback requirement.

(d) Prevent the expansion of a livestock structure that was located within the setback area prior to the effective date of the setback requirement, other than an expansion toward the property line or public road to which the local setback applies.

Note: Many local jurisdictions have established basic property line and road setback requirements by ordinance. Setbacks vary depending on local circumstances, and often reflect years of local experience. Subsection (1) honors local setback requirements, provided that the setbacks do not exceed the limits specified in sub. (1).

(2) **MANURE STORAGE STRUCTURE; SETBACK.** A waste storage structure may not be located within 350 feet of any property line, or within 350 feet of the nearest point of any public road right-of-way, unless one of the following applies:

(a) The location of the waste storage structure complies with a local ordinance that specifies a shorter setback that is specific to waste storage facilities or waste storage structures.

(b) The waste storage structure existed prior to May 1, 2006. This paragraph does not authorize an expansion, toward a property line or public road right-of-way, of a waste storage structure that is located within 350 feet of that property line or public road right-of-way.

(c) The waste storage structure is a single new waste storage structure constructed no closer to the relevant property line or public road than a waste storage structure that existed on the same tax parcel prior to May 1, 2006, provided that the new structure is no larger than the existing structure and is located within 50 feet of the existing structure.

Note: See definition of "waste storage structure" in s. ATCP 51.01 (44).

(3) **NAVIGABLE WATERS AND WETLANDS.** A livestock facility shall comply with an applicable shoreland or wetland zoning ordinance that is enacted within the scope of authority granted under s. 59.692, 61.351 or 62.231, Stats.

Note: Essentially all navigable waters are now protected by ordinances that require building setbacks of 75 feet or more (depending on the ordinance). Zoning restrictions, if any, typically apply to new or enlarged structures. A zoning ordinance applies for purposes of sub. (3) if it is enacted within the scope of statutory authority under s. 59.692, 61.351 or 62.231, Stats., even if it is also enacted under other authority.

(4) **FLOODPLAIN.** A livestock facility shall comply with an applicable floodplain zoning ordinance that is enacted within the scope of statutory authority under s. 87.30, Stats.

Note: County or local zoning ordinances currently apply to many, but not all, waterways (not all waterways have mapped floodplains). Zoning restrictions, if any, typically apply to new or enlarged structures. A zoning ordinance applies for purposes of sub. (4) if it is enacted within the scope of statutory authority under s. 87.30, Stats., even if it is also enacted under other authority.

(5) **WELLS.** (a) Wells in a livestock facility shall comply with chs. NR 811 and 812.

(b) Except as provided in par. (c), new or substantially altered livestock structures shall be separated from existing wells by the distances required in chs. NR 811 and 812, regardless of whether the livestock facility operator owns the land on which the wells are located.

(c) Paragraph (b) does not prohibit the alteration of a livestock structure that existed on May 1, 2006, unless that alteration reduces the distance between the livestock structure and an existing well.

Note: DNR rules under chs. NR 811 and 812 spell out well construction and well location standards to protect water supplies. Violation of well setback requirements in ch. NR 811 or 812 may prevent use of a well. DNR may grant appropriate variances, as provided in chs. NR 811 and 812.

(6) **PRESUMPTION.** For purposes of local approval, a livestock facility is presumed to comply with this section if the application for local approval complies with s. ATCP 51.30.

Note: Under s. ATCP 51.30, an application must be complete, credible and internally consistent. The application must include an area map, a site map, and a certification that the livestock facility complies with this section (see Appendix A). A local approval is conditioned upon compliance in fact (see s. ATCP 51.34 (4)). The presumption in sub. (6) may be rebutted by clear and convincing evidence in the record (see s. ATCP 51.34 and 51.36).

History: CR 05-014: cr. Register April 2006 No. 604, eff. 5-1-06.

ATCP 51.14 Odor and air emissions. (1) **ODOR STANDARD.** Except as provided in subs. (2) to (4), a livestock facility shall have an odor score of at least 500. The operator shall calculate the odor score according to Appendix A, worksheet 2, or by using the equivalent spreadsheet provided on the department's website. An application for local approval shall include worksheet 2 or the spreadsheet output.

Note: The spreadsheet equivalent of Appendix A, worksheet 2 is available on the department's website at <http://www.datcp.state.wi.us/index>.

Odor score is based on predicted odor generation (based on size and type of livestock facility), odor practices, and the proximity and density of "affected neighbors." See Appendix A, worksheet 2.

An odor score is a predictive estimate. The standard in sub. (1) applies only for purposes of local livestock facility siting decisions under this chapter. Failure to comply with the standard in sub. (1) does not constitute evidence of a public or private nuisance, negligence, or a taking of property.

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Odor control practices may also control air pollution emissions. The department will work to coordinate odor and air emissions field research with DNR, the Wisconsin agricultural stewardship initiative (WASI), and the University of Wisconsin. The department will consider research results when it reviews this chapter at least once every 4 years (see s. 93.90 (2) (c), Stats.). As part of its review, the department will consult with an advisory committee that includes representatives of livestock producers, local government and environmental interests. The department will consider amendments to this rule, as appropriate, based on research findings.

(2) **EXEMPTIONS.** The odor standard in sub. (1) does not apply to any of the following livestock facilities unless the facility operator voluntarily completes and submits *worksheet 2* or the equivalent spreadsheet output with the operator's application for local approval:

- (a) A new livestock facility with fewer than 500 animal units.
- (b) An expanded livestock facility with fewer than 1,000 animal units.
- (c) A livestock facility in which all livestock structures will be located at least 2,500 ft. from the nearest affected neighbor.

Note: "Affected neighbors" (ATCP 51.01 (2)) are residences or "high-use buildings" (ATCP 51.01 (16)) other than those owned by the livestock operator or by persons who agree to be excluded from odor score calculations under sub. (1).

(3) **CLUSTERS.** If all of the livestock structures in a livestock facility are divided among 2 or more clusters, such that no cluster is located closer than 750 feet to any other cluster, an operator may choose to calculate an odor score under sub. (1) for each cluster rather than for the entire livestock facility. Each cluster shall comply with the odor standards in sub. (1).

Note: For example, a dairy operator can take advantage of sub. (3) if a proposed dairy facility includes a milking operation (cluster 1) and a heifer facility (cluster 2) located 800 feet from each other.

(4) **LOCAL DISCRETIONARY CREDIT.** (a) Notwithstanding sub. (1), a political subdivision may in its discretion approve a livestock facility with an odor score of less than 500, provided that the odor score is not less than 470.

(b) If a political subdivision exercises its discretionary authority under par. (a), its written decision under s. ATCP 51.34 (3) shall state the reason or reasons for that exercise of discretionary authority.

(c) The livestock facility siting review board may not review any of the following under s. 93.90 (5), Stats.:

- 1. A political subdivision's exercise, or refusal to exercise, discretionary authority under par. (a).
- 2. The adequacy of the political subdivision's stated reasons under par. (b) for exercising discretionary authority under par. (a).

Note: A political subdivision must approve a livestock facility that meets the odor standard under sub. (1), assuming that the facility meets other livestock facility siting standards under this chapter (see ATCP 51.34 (1)).

A political subdivision may not approve a livestock facility that fails to meet the odor standard under sub. (1), except that the political subdivision may exercise its discretionary authority under sub. (4) (a) in favor of an applicant if it chooses to do so. For example, a political subdivision may exercise its discretionary authority under sub. (4) (a) based on factors such as community tolerance, the applicant's near attainment of a standard, innovative odor control practices, local land use plans, or the applicant's past reputation for good management and community relations.

(5) **CREDITS FOR ODOR CONTROL PRACTICES.** In the calculation of predicted odor under sub. (1), an operator may claim credit for all of the following:

(a) Odor control practices, identified in *Appendix A, worksheet 2*, which the operator agrees to implement. For each odor control practice, the operator may claim a credit specified in *Appendix A, worksheet 2*.

(b) An odor control practice not identified in *Appendix A, worksheet 2* if the department pre-approves a credit for that practice. The operator shall claim the pre-approved credit according to the procedure specified in *Appendix A, worksheet 2*.

(c) An operator seeking department approval under par. (b) shall submit all of the following to the department in writing:

- 1. A clear description of the odor control practice for which the operator seeks an approved credit.
- 2. Scientific evidence to substantiate the efficacy of the odor control practice under relevant conditions.

(d) The department may approve a credit for an odor control practice under par. (b) if, in the department's opinion, there is adequate scientific evidence to show that under relevant conditions the practice will result in odor reduction commensurate with the approved credit. The department shall grant or deny the request within 90 days after the department receives the request.

Note: An odor control practice credit under sub. (5) is expressed, in the odor score calculation in *Appendix A, worksheet 2*, as a multiplier value (the lower the multiplier, the greater the benefit to the livestock operator).

(6) **FUTURE REFERENCE POINTS.** (a) Whenever an operator seeks local approval for the expansion of a livestock facility previously approved under this chapter, the operator may calculate an odor score under sub. (1) by reference to the same affected neighbors referenced in the odor score calculation for the prior local approval. The operator is not required to include, in the new odor score calculation, an affected neighbor that was not referenced in the odor score calculation for the prior local approval.

(b) Paragraph (a) applies regardless of any change in ownership of the livestock facility since the prior local approval, and regardless of the amount of time that has passed since the prior local approval, provided that the prior local approval has not been lawfully withdrawn for good cause under s. ATCP 51.08 (2) or 51.34 (4) (b).

Note: The odor score calculation in *Appendix A, worksheet 2* is partly based on the proximity and density of "affected neighbors" (see ATCP 51.01 (2)). An application for local approval documents those "affected neighbor" reference points. Subsection (6) protects an operator against the effects of encroaching development, without regulating that development directly.

A local government must keep a complete record of each local approval for at least 7 years, and must file with DATCP a copy of each approval (including the application on which it was based). The local government must also provide the livestock operator with documentation of the local approval, including the maps on which the approval was based (see s. ATCP 51.34 (3) (b)). The approved maps document the "odor score" reference points for purposes of sub. (6).

The livestock operator can record the local approval (including mapped "odor score" reference points) with the local register of deeds, and can convey the documentation to subsequent purchasers. In those ways, an operator can document previously-approved "odor score" reference points for purposes of a subsequent expansion.

(7) **PRESUMPTION.** For purposes of local approval, a livestock facility is presumed to comply with this section if the application for local approval complies with s. ATCP 51.30.

Note: Under s. ATCP 51.30, an application must be complete, credible and internally consistent. The application must include, among other things, a worksheet (or equivalent spreadsheet output) that shows compliance with this section. See *Appendix A, worksheet 2*. Local approval is conditioned upon compliance in fact (see s. ATCP 51.34 (4)). The presumption in sub. (7) may be rebutted by clear and convincing evidence in the record (see s. ATCP 51.34 and 51.36).

History: CR 05-014; cr. Register April 2006 No. 604, eff. 5-1-06.

ATCP 51.16 Nutrient management. (1) **NUTRIENT MANAGEMENT STANDARD.** (a) Except as provided in par. (c):

1. Land applications of waste from a livestock facility approved under this chapter shall comply with NRCS nutrient management technical standard 590 (September, 2005), except for sections V.A.2.b(2), V.D, V.E and VI.

Note: NRCS nutrient management technical standard 590 (September, 2005) is reprinted in *Appendix B*. The following sections of the reprinted standard do not apply for purposes of this chapter:

V.A.2.b(2), related to additional requirements imposed by local conservation plans.

V.D, related to additional criteria to minimize N and particulate air emissions.

V.E, related to additional criteria to protect the physical, chemical and biological condition of the soil.

VI, related to discretionary considerations.

2. A nutrient management checklist, shown in *Appendix A, worksheet 3, part C*, shall accompany an application for local approval. A qualified nutrient management planner, other than the livestock operator, shall answer each checklist question. The planner shall have reasonable documentation to substantiate each answer, but neither the planner nor the operator is required to submit that documentation with the checklist.

Note: A livestock operator is not required to submit a complete nutrient management plan with an application for local approval. Both the operator and the qualified nutrient management planner must sign the nutrient management checklist. See *Appendix A, worksheet 3, part C*.

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(b) A political subdivision may ask a nutrient management planner to submit the documentation that the planner relied upon to substantiate the planner's answer to one or more questions on the nutrient management checklist under par. (a) 2. The political subdivision may deny local approval if the planner's documentation does not reasonably substantiate the answer.

(c) Paragraph (a) does not apply to a livestock facility with fewer than 500 animal units unless the operator's ratio of acres to animal units, calculated according to *Appendix A, worksheet 3, part B*, is less than 1.5 for dairy and beef cattle, 1.0 for swine, 2.0 for sheep and goats, 2.5 for chickens and ducks, and 5.5 for turkeys.

Note: A waste and nutrient management worksheet (*Appendix A, worksheet 3*) must accompany every application for local approval. Among other things, the worksheet shows the operator's ratio of acres to animal units under par. (c).

Paragraph (c) is an exemption, not a requirement, for livestock facilities. If a livestock facility qualifies for exemption under par. (c), the operator is not required to submit a nutrient management checklist under par. (a). The ratios stated in par. (c) are based on the phosphorus content of manure from the respective livestock species.

(2) PRESUMPTION. For purposes of local approval, an operator is presumed to comply with sub. (1) if the application for local approval complies with s. ATCP 51.30.

Note: Under s. ATCP 51.30, an application must be complete, credible and internally consistent. The application must include, among other things, a waste and nutrient management worksheet (*Appendix A, worksheet 3*). The completed worksheet must include all of the following:

- The types and amounts of manure and other organic waste that the facility will generate when fully populated.
- The types and amounts of waste to be stored, the waste storage facilities and methods to be used, the duration of waste storage, and waste storage capacity.
- The final disposition of waste by landspreading or other means.
- The acreage currently available for landspreading.
- A map showing where waste will be applied to land.
- A nutrient management checklist if required under sub. (1).

Local approval is conditioned upon compliance in fact (see s. ATCP 51.34 (4)). The presumption in sub. (2) may be rebutted by clear and convincing evidence in the record (see ss. ATCP 51.34 and 51.36).

(3) NUTRIENT MANAGEMENT UPDATES. An operator may update nutrient management plans and practices as necessary, consistent with sub. (1) (a) 1.

Note: This subsection does not require an operator to file updates with a political subdivision, but neither does it limit local authority to request updates or monitor compliance with sub. (1) (a) 1. See s. ATCP 51.34 (4).

(4) EXEMPTION. This section does not apply if all of the following apply:

(a) The operator holds a WPDES permit for the same proposed livestock facility, and that permit is based on housing for a number of animal units that is equal to or greater than the number for which the operator seeks local approval.

(b) The operator submits a copy of the WPDES permit with the operator's application for local approval.

History: CR 05-014; cr. Register April 2006 No. 604, eff. 5-1-06.

ATCP 51.18 Waste storage facilities. (1) DESIGN, CONSTRUCTION AND MAINTENANCE; GENERAL. All waste storage facilities for a livestock facility shall be designed, constructed and maintained to minimize the risk of structural failure, and to minimize the potential for waste discharge to surface water or groundwater. A waste storage facility may not lack structural integrity or have significant leakage. An unlined earthen waste storage facility may not be located on a site that is susceptible to groundwater contamination.

Note: A "site that is susceptible to groundwater contamination" is defined in s. ATCP 51.01 (39).

(2) EXISTING FACILITIES. For purposes of local approval, an existing waste storage facility is presumed to comply with sub. (1) if a registered professional engineer or certified agricultural engineering practitioner certifies one of the following in the application for local approval:

(a) The facility is constructed of concrete or steel or both, was constructed within the last 10 years according to then-existing NRCS standards, and shows no apparent signs of structural failure or significant leakage.

(b) The facility was constructed within the last 3 years according to then-existing NRCS standards, and shows no apparent signs of structural failure or significant leakage.

(c) The facility was constructed according to NRCS standards that existed at the time of construction, is in good condition and repair, and shows no apparent signs of structural failure or significant leakage.

(d) The facility is in good condition and repair, shows no apparent signs of structural failure or significant leakage, and is located on a site at which the soils and separation distances to groundwater comply with *NRCS technical guide manure storage facility standard 313, table 1 (November, 2004)*.

(e) The facility is in good condition and repair, shows no apparent signs of structural failure or significant leakage, is located entirely above ground, and is located on a site at which the soils comply with *NRCS technical guide manure storage facility standard 313, table 5 (November, 2004)*.

Note: According to s. ATCP 51.30, an application for local approval must include a certification under sub. (2) for each existing waste storage facility. See *Appendix A, worksheet 4 (waste storage facilities)*.

(3) NEW OR SUBSTANTIALLY ALTERED FACILITIES. For purposes of local approval, a new or substantially altered waste storage facility is presumed to comply with sub. (1) if all of the following apply:

(a) The application for local approval includes design specifications for the facility.

(b) A registered professional engineer or certified agricultural engineering practitioner certifies that the design specifications comply with all of the following:

1. *NRCS technical guide manure storage facility standard 313 (November, 2004)*.

2. *NRCS technical guide manure transfer standard 634 (November, 2004)*.

Note: According to s. ATCP 51.30, an application for local approval must include the design specifications and certification to which sub. (3) refers. See *Appendix A, worksheet 4 (waste storage facilities)*.

(4) CLOSED FACILITIES. If a waste storage facility is closed as part of the construction or expansion of a livestock facility, the closure shall comply with *NRCS technical guide closure of waste impoundments standard 360 (December, 2002)*. A closure is presumed to comply with this subsection, for purposes of local approval, if the application for local approval includes the closure plan and certification required under s. ATCP 51.30.

Note: According to s. ATCP 51.30, an application for local approval must identify any waste storage facilities to be closed. The application must include a closure plan for each identified facility. A registered professional engineer or certified agricultural engineering practitioner must certify that the closure plan complies with *NRCS technical guide closure of waste impoundments standard 360 (December 2002)*. See *Appendix A, worksheet 4 (waste storage facilities)*.

Under s. NR 151.05 (3) and (4), an operator must normally close a manure storage facility if the facility has not been used for 24 months, or poses an imminent threat to public health, aquatic life or groundwater.

If a waste storage facility is abandoned or not properly closed, a political subdivision may seek redress under s. 66.0627 or 254.59, Stats., as appropriate.

(5) STORAGE CAPACITY. (a) The waste storage capacity of a livestock facility, not counting any excess storage capacity required for open waste storage facilities under par. (b), shall be adequate for reasonably foreseeable storage needs based on the operator's waste and nutrient management strategy under s. ATCP 51.16.

Note: Section ATCP 51.20 (5) prohibits overflow of waste storage facilities. See also ss. NR 151.08 (2) and ATCP 50.04 (1).

(b) An operator shall at all times maintain, in every open waste storage facility, unused storage capacity equal to the greater of the following volumes:

1. One foot multiplied by the top area of the storage facility.
2. The volume of rain that would accumulate in the manure storage facility from a 25-year 24-hour storm.

Note: The required excess storage capacity in par. (b), often called "freeboard storage," provides a safety factor to prevent manure storage overflow in the event of a major rain event.

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(c) The waste storage capacity of a livestock facility is presumed to comply with this subsection, for purposes of a local approval, if the application for local approval complies with s. ATCP 51.30.

Note: Under s. ATCP 51.30, an application must be complete, credible and internally consistent. An application must include a *waste and nutrient management worksheet* (worksheet 3, signed by the operator and a qualified nutrient management planner) and a *waste storage facility worksheet* (worksheet 4, signed by a registered professional engineer or certified agricultural engineering practitioner). *Worksheet 3* must identify waste storage needs, based on the operator's landspreading and waste disposal strategy. *Worksheet 3* must also show waste storage capacity, consistent with *worksheet 4*. Capacity must be adequate for reasonably foreseeable needs.

(6) **DEVIATION FROM DESIGN SPECIFICATIONS.** Local approval of a livestock facility does not authorize an operator to populate that approved livestock facility if the construction, alteration or closure of a waste storage facility deviates materially, and without express authorization from the political subdivision, from the design specifications or closure plan included in the application for local approval.

Note: A political subdivision may inspect waste storage facilities to verify that they are constructed according to specifications included in the application for local approval. This section *does not require or prohibit* local inspection. A deviation under sub. (6) does not invalidate a local approval, but does prevent the livestock operator from populating the approved livestock facility until the deviation is rectified or approved.

This chapter does not limit the application of local waste storage ordinances, except in connection with the approval of a new or expanded livestock facility. For example, if a livestock operator constructs a new waste storage structure without adding "animal units" for which local approval is required, the construction must comply with the local waste storage ordinance if any.

But if a livestock operator proposes to add "animal units" and construct a new waste storage structure, to create an "expanded livestock facility" for which local approval is required, the waste storage standards in this chapter are controlling. A political subdivision may not disapprove the expansion, except for reasons provided under this chapter.

(7) **EXEMPTION.** This section does not apply if all of the following apply:

(a) The operator holds a WPDES permit for the same proposed livestock facility, and that permit is based on housing for a number of animal units that is equal to or greater than the number for which the operator seeks local approval.

(b) The operator includes a copy of the WPDES permit with the operator's application for local approval.

History: CR 05-014; cr. Register April 2006 No. 604, eff. 5-1-06.

ATCP 51.20 Runoff management. (1) **NEW OR SUBSTANTIALLY ALTERED ANIMAL LOTS.** New or substantially altered animal lots shall comply with *NRCS technical guide wastewater treatment strip standard 635* (January, 2002).

(2) **EXISTING ANIMAL LOTS.** (a) The predicted average annual phosphorus runoff from each existing animal lot to the end of the runoff treatment area, as determined by the *BARNY* model, shall be less than the following applicable amount:

1. Fifteen pounds if no part of the animal lot is located within 1,000 feet of a navigable lake or 300 feet of a navigable stream.

2. Five pounds if any part of the animal lot is located within 1,000 feet of a navigable lake or 300 feet of a navigable stream.

Note: The *BARNY* model is a computer model that predicts nutrient runoff from animal lots. Copies of the *BARNY* model are on file with the department, the secretary of state and the revisor of statutes. An Excel spreadsheet version may be obtained from the NRCS Wisconsin website (engineering directory).

(b) Runoff from an animal lot may not discharge to any direct conduit to groundwater.

Note: See ss. NR 151.08 (4) and ATCP 50.04 (1). A direct conduit to groundwater may include, for example, a sinkhole.

(3) **FEED STORAGE.** (a) Feed storage shall be managed to prevent any significant discharge of leachate or polluted runoff from stored feed to waters of the state.

(b) If an existing paved area may be used, without substantial alteration, to store or handle feed with a 70% or higher moisture content:

1. Surface water runoff shall be diverted from entering the paved area.

2. Surface discharge of leachate from stored feed shall be collected before it leaves the paved area, if the paved area covers

more than one acre. Collected leachate shall be stored and disposed of in a manner that prevents discharge to waters of the state.

Note: Feed leachate is a potentially serious water pollutant. Paved areas include paved feed storage bunkers and handling areas. Collected leachate may, for example, be transferred to waste storage and applied to land at agronomic rates.

(c) A new or substantially altered feed storage structure, including any building, bunker, silo or paved area used for feed storage or handling, shall be designed, constructed and maintained to the following standards if it may be used to store or handle feed with a 70% or higher moisture content:

1. Surface water runoff shall be diverted from entering the feed storage structure.

2. Surface discharge of leachate shall be collected before it leaves the feed storage structure.

3. The top of the feed storage structure floor shall be at least 3 vertical feet from groundwater and bedrock.

4. If the feed storage structure covers more than 10,000 square feet, it shall have an effective subsurface system to collect leachate that may leak through the structure floor. The system shall consist of drainfill material, a tile drainage network, and an effective sub-liner as specified in *Appendix A, worksheet 5, section II.C*.

5. Collected leachate shall be stored and disposed of in a manner that prevents discharge to surface water or groundwater.

Note: Collected leachate may, for example, be transferred to waste storage and applied to land at agronomic rates.

(4) **CLEAN WATER DIVERSION.** Runoff from a livestock facility shall be diverted from contact with animal lots, waste storage facilities, paved feed storage areas and manure piles within 1,000 feet of a navigable lake or 300 feet of a navigable stream.

Note: See ss. NR 151.06 and ATCP 50.04 (1). Runoff may be diverted by means of earthen diversions, curbs, gutters, waterways, drains or other practices, as appropriate.

(5) **OVERFLOW OF WASTE STORAGE FACILITIES.** A livestock facility shall be designed, constructed and maintained to prevent overflow of waste storage facilities.

Note: Under s. ATCP 51.18 (5), waste storage capacity must be adequate to meet reasonably foreseeable storage needs, based on the operator's waste and nutrient management strategy under s. ATCP 51.16. See also ss. NR 151.08 (2) and ATCP 50.04 (1).

(6) **UNCONFINED MANURE PILES.** A livestock facility may not have any unconfined manure piles within 1,000 feet of a navigable lake or 300 feet of a navigable stream.

Note: See ss. NR 151.08 (3) and ATCP 50.04 (1).

(7) **LIVESTOCK ACCESS TO SURFACE WATERS OF THE STATE.** A livestock facility shall be designed, constructed and maintained to prevent unrestricted livestock access to surface waters of the state, if that access will prevent adequate vegetative cover on banks adjoining the water. This subsection does not prohibit a properly designed, installed and maintained livestock crossing or machinery crossing.

Note: See ss. NR 151.08 (5) and ATCP 50.04 (1).

(8) **PRESUMPTION.** For purposes of local approval, a livestock facility is presumed to comply with this section if the application for local approval complies with s. ATCP 51.30.

Note: Under s. ATCP 51.30, an application must be complete, credible and internally consistent. An applicant must submit a *runoff management worksheet* signed by the applicant and a registered professional engineer or certified agricultural engineering practitioner (see *Appendix A, worksheet 5*). The *worksheet* shows presumptive compliance with this section. Local approval is conditioned upon compliance in fact (see sub. (9) and s. ATCP 51.34 (4)). The presumption of compliance may be rebutted by clear and convincing evidence in the record (see ss. ATCP 51.34 and 51.36).

(9) **DEVIATION FROM DESIGN SPECIFICATIONS.** Local approval of a livestock facility does not authorize an operator to populate that approved livestock facility if the construction or alteration of an animal lot or feed storage structure deviates materially, and without express authorization from the political subdivision, from design specifications included in the application for local approval.

Note: A political subdivision may inspect animal lots or feed storage structures to verify that they are constructed according to specifications included in the application for local approval. This section *does not require or prohibit* local inspection.

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A deviation under sub. (9) does not invalidate a local approval, but does prevent the livestock operator from populating the approved livestock facility until the deviation is rectified or approved.

(10) **EXEMPTION.** This section does not apply if all of the following apply:

(a) The operator holds a WPDES permit for the same proposed livestock facility, and that permit is based on housing for a number of animal units that is equal to or greater than the number for which the operator seeks local approval.

(b) The operator includes a copy of the WPDES permit with the operator's application for local approval.

History: CR 05-014: cr. Register April 2006 No. 604, eff. 5-1-06.

Subchapter III — Application and Approval

ATCP 51.30 Application. (1) **GENERAL.** If local approval is required for a new or expanded livestock facility, a person seeking local approval shall complete and file with the political subdivision the application form shown in *Appendix A*. The application shall include all of the information required by *Appendix A* and attached *worksheets*, including any authorized modifications made by the political subdivision under sub. (2). The information contained in the application shall be credible and internally consistent.

(2) **LOCAL MODIFICATIONS.** A political subdivision may not alter the application form shown in *Appendix A* and attached *worksheets*, or require any additional information, except that a political subdivision may require information needed to determine compliance with local ordinance standards authorized under s. ATCP 51.10 (3) or 51.12 (1).

(3) **ADDITIONAL COPIES.** A political subdivision may require an applicant to submit up to 4 duplicate copies of the original application under sub. (1). Each duplicate copy shall include all of the *worksheets*, maps and other attachments included in the application, except that it is not required to include engineering design specifications.

Note: A political subdivision must file one duplicate copy of the final application and attachments with the department, within 30 days after the political subdivision grants or denies that application. See s. ATCP 51.34(5). If the political subdivision approves the application, the political subdivision must give the applicant a copy of the approved application, marked "approved." See s. ATCP 51.34 (3) (b). The applicant may wish to record this documentation with the register of deeds, and convey the documentation to any subsequent purchaser of the livestock facility. Among other things, documentation establishes "odor score" reference points for future expansions. See s. ATCP 51.14 (6).

(4) **LOCAL FEES.** (a) A political subdivision may charge an application fee established by local ordinance, not to exceed \$1,000, to offset the political subdivision's costs to review and process an application under sub. (1).

Note: Under s. 66.0628, Stats., any fee imposed by a political subdivision must bear a reasonable relationship to the service for which the fee is imposed.

(b) A political subdivision may not require an applicant to pay any fee, or post any bond or security with the political subdivision, except as provided in par. (a).

Note: If a waste storage facility is abandoned or not properly closed, a political subdivision may seek redress under s. 66.0627 or 254.59, Stats., and other law as appropriate. However, a political subdivision may not require an applicant for local approval to post any bond or security with the application.

(5) **COMPLETE APPLICATION.** Within 45 days after a political subdivision receives an application under sub. (1), the political subdivision shall notify the applicant whether the application contains everything required under subs. (1) to (4). If the application is not complete, the notice shall specifically describe what else is needed. Within 14 days after the applicant has provided everything required under subs. (1) to (4), the political subdivision shall notify the applicant that the application is complete. A notice of completeness does not constitute an approval of the proposed livestock facility.

Note: See s. 93.90 (4) (a), Stats.

(6) **NOTICE TO ADJACENT PROPERTY OWNERS.** Within 14 days after a political subdivision issues a notice under sub. (5), the political subdivision shall mail a completed written copy of the

notice in *Appendix C* to the recorded owner of each parcel of land that is adjacent to the proposed livestock facility. The political subdivision shall mail the notice by first class mail. A political subdivision may recover from the livestock facility operator, under sub. (4) (a), its reasonable cost to prepare and mail notices under this subsection. The sum of the costs charged to the livestock operator under this subsection and sub. (4) (a) may not exceed the maximum amount specified in sub. (4) (a). Failure to comply with the notice requirement under this subsection does not invalidate a political subdivision's approval of a proposed livestock facility, or create a cause of action by a property owner against the political subdivision.

History: CR 05-014: cr. Register April 2006 No. 604, eff. 5-1-06.

ATCP 51.32 Timely action on application. (1) **GENERAL.** Except as provided in sub. (2), a political subdivision shall grant or deny an application under s. ATCP 51.30 (1) within 90 days after the political subdivision gives notice under s. ATCP 51.30 (5) that the application is complete.

(2) **TIME EXTENSION.** (a) A political subdivision may extend the time limit in sub. (1) for good cause, including any of the following:

1. The political subdivision needs additional information to act on the application.

2. The applicant materially modifies the application or agrees to an extension.

(b) A political subdivision shall give an applicant written notice of any extension under par. (a). The notice shall state the reason for the extension, and shall specify the extended deadline date by which the political subdivision will act on the application.

Note: See s. 93.90(4) (d) and (e), Stats.

History: CR 05-014: cr. Register April 2006 No. 604, eff. 5-1-06.

ATCP 51.34 Granting or denying an application. (1) **GRANTING AN APPLICATION.** Except as provided in sub. (2), a political subdivision shall grant an application under s. ATCP 51.30 (1) if all of the following apply:

(a) The application complies with s. ATCP 51.30.

(b) The application contains sufficient credible information to show, in the absence of clear and convincing information to the contrary, that the proposed livestock facility meets or is exempt from the standards in subch. II. To the extent that a standard under subch. II vests discretion in a political subdivision, the political subdivision may exercise that discretion.

Note: See s. 93.90 (4) (d), Stats.

(2) **DENYING AN APPLICATION.** A political subdivision may deny an application under s. ATCP 51.30 if any of the following apply:

(a) The application fails to meet the standard for approval under sub. (1).

(b) The political subdivision finds, based on other clear and convincing information in the record under s. ATCP 51.36, that the proposed livestock facility fails to comply with an applicable standard under subch. II.

(3) **WRITTEN DECISION.** (a) A political subdivision shall issue its decision under sub. (1) or (2) in writing. The decision shall be based on written findings of fact included in the decision. The findings of fact shall be supported by evidence in the record under s. ATCP 51.36. Findings may be based on presumptions created by this chapter.

Note: The Wisconsin Livestock Facility Siting Law, s. 93.90, Stats., provides a new option for "aggrieved persons" to appeal a local livestock facility siting decision. The law does not limit any existing right that any person may have to challenge a local decision in court.

Under the Livestock Facility Siting Law, an "aggrieved person" may appeal a local decision to the state Livestock Facility Siting Review Board ("Board"). An "aggrieved person" means an applicant for local approval, or a person who resides or owns land within 2 miles of the proposed livestock facility.

An "aggrieved person" may appeal a political subdivision's decision within 30 days after the political subdivision issues the decision (or, if the "aggrieved person" pursues a local administrative appeal process, within 30 days after that process is

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complete). The "aggrieved person" may challenge the local decision on the grounds that it incorrectly applied livestock facility siting standards under this chapter, or violated the Livestock Facility Siting Law.

When an appeal is filed, the Board must notify the political subdivision. Within 30 days after the political subdivision receives this notice, it must file a certified copy of its decision making record under s. ATCP 51.36 with the Board. The Board must review the local decision based on the evidence in the local record (the Board will not hold a new hearing or accept new evidence). The Board must make its decision within 60 days after it receives the certified local record (it may extend the deadline for good cause).

If the Board determines that the challenge is valid, it must reverse the decision of the political subdivision. The Board's decision is binding on the political subdivision (once any court appeal of the decision is completed, or the appeal time lapses). If the political subdivision fails to comply with the Board's decision, an "aggrieved person" may bring a court action to enforce the Board's decision.

An "aggrieved person" or the political subdivision may appeal the Board's decision to circuit court. The circuit court must review the Board's decision based on the evidence in the local record.

(b) If a political subdivision grants an application for local approval, the political subdivision shall issue the local approval to the applicant in writing. The local approval shall include a duplicate copy of the approved application, marked "approved." The duplicate copy shall include all of the worksheets, maps and other attachments included in the application, except that it is not required to include engineering design specifications.

Note: A successful applicant may wish to record the approval documentation under par. (b) with the register of deeds, and convey the documentation to any subsequent purchaser of the livestock facility. Among other things, the documentation establishes "odor score" reference points for future expansions. See s. ATCP 51.14 (6).

(4) **TERMS OF APPROVAL.** An approval under sub. (1) is conditioned on the operator's compliance with subch. II and representations made in the application for approval. This chapter does not limit a political subdivision's authority to do any of the following:

- (a) Monitor compliance.
- (b) Withdraw an approval, or seek other redress provided by law, if any of the following apply:
 1. The operator materially misrepresented relevant information in the application for local approval.
 2. The operator, without authorization from the political subdivision, fails to honor relevant commitments made in the application for local approval. A political subdivision may not withhold authorization, under this subdivision, for reasonable changes that maintain compliance with the standards in subch. II.
 3. The livestock facility fails to comply with applicable standards in subch. II.

Note: A political subdivision should exercise sound judgment in deciding whether to take compliance action under sub. (4) (b). The political subdivision may consider extenuating circumstances, such as adverse weather conditions, that may affect an operator's ability to comply. A political subdivision may also consider the nature and seriousness of the violation, whether the violation was intentional or accidental, the operator's compliance history, consistency of enforcement, and whether the problem can be resolved without formal enforcement. Before taking compliance action, a political subdivision should give the operator notice and a reasonable opportunity to demonstrate compliance.

(5) **NOTICE TO DEPARTMENT.** (a) Within 30 days after a political subdivision grants or denies an application under this section, or withdraws an approval under sub. (4) (b) or s. ATCP 51.08 (2), the political subdivision shall do all of the following:

1. Give the department written notice of its action.

2. File with the department a copy of the final application granted or denied, if the political subdivision has granted or denied an application under this section. The copy shall include all of the worksheets, maps and other attachments included in the application, except that it is not required to include engineering design specifications.

3. File with the department a copy of the political subdivision's final notice or order withdrawing a local approval under sub. (4) (b) or s. ATCP 51.08 (2), if the political subdivision has withdrawn a local approval.

(b) A political subdivision shall submit the information required under pars. (a) and (b), by mail or fax, to the following address:

Wisconsin Department of Agriculture, Trade
and Consumer Protection
Agricultural Resource Management Division
Bureau of Land and Water Resources
P.O. Box 8911
Madison, WI 53708-8911
Fax (608) 224-4615

(c) Failure to comply with par. (a) or (b) does not invalidate a political subdivision's decision to grant or deny an application for local approval, or to withdraw a local approval.

History: CR 05-014; cr. Register April 2006 No. 604, eff. 5-1-06.

ATCP 51.36 Record of decision-making. A political subdivision shall keep a complete written record of its decision-making related to an application under s. ATCP 51.30. The political subdivision shall keep the record for at least 7 years following its decision. The record shall include all of the following:

- (1) The application under s. ATCP 51.30 (1), and all subsequent additions or amendments to the application.
- (2) A copy of any notice under s. ATCP 51.30 (5), and copies of any other notices or correspondence that the political subdivision issues in relation to the application.
- (3) A record of any public hearing related to the application. The record may be in the form of an electronic recording, a transcript prepared from an electronic recording, or a direct transcript prepared by a court reporter or stenographer. The record shall also include any documents or evidence submitted by hearing participants.

Note: Municipal law normally determines whether a hearing is required. See, generally, ch. 68, Stats.

- (4) Copies of any correspondence or evidentiary material that the political subdivision considered in relation to the application.
- (5) Minutes of any board or committee meeting held to consider or act on the application.

(6) The written decision required under s. ATCP 51.34 (3).

(7) Other documents that the political subdivision prepared to document its decision or decision-making process.

(8) A copy of any local ordinance cited in the decision.

History: CR 05-014; cr. Register April 2006 No. 604, eff. 5-1-06.

(2) **COLLECTION GRANTS.** The department may award a grant to a county for a chemical and container collection program. A grant under this subsection shall fund all or a part of the cost of a program. Costs eligible for funding include the cost of establishing a collection site for chemicals and chemical containers, the cost of transporting chemical containers to a dealer or distributor for refill and reuse or to a hazardous waste facility, as defined in s. 291.01 (8), and costs associated with the proper use and handling and disposal or recycling of chemicals and chemical containers. Grants shall be paid from the appropriation under s. 20.115 (7) (va).

(2m) **FARMER LIABILITY.** To the extent permitted under federal regulations, a county establishing a chemical and container collection program under sub. (2), in cooperation with the department, shall ensure that a farmer, as defined in s. 102.04 (3), who participates in the program is not liable for chemicals or chemical containers collected under the program after the farmer relinquishes control over the chemicals or chemical containers.

History: 1989 a. 335; 1991 a. 39; 1995 a. 227; 2003 a. 33.

Cross Reference: See also ch. ATPC 34, Wis. adm. code.

93.57 Household hazardous waste. The department shall administer a grant program to assist municipalities and regional planning commissions in creating and operating local programs for the collection and disposal of household hazardous waste.

History: 1985 a. 29; 1995 a. 227 s. 699; Stats. 1995 s. 299.41; 2001 a. 109; 2003 a. 33 s. 248.1s; Stats. 2003 s. 93.57.

Cross Reference: See also chs. ATPC 34 and NR 187, Wis. adm. code.

93.70 Conservation reserve enhancement program.

(1) The department may expend funds from the appropriation account under s. 20.866 (2) (wf) to improve water quality, erosion control and wildlife habitat through participation by this state in the conservation reserve enhancement program as approved by the secretary of the federal department of agriculture under 16 USC 3834 (f) (4).

(2) The department may not make a payment under sub. (1) to a person whose name appears on the statewide support lien docket under s. 49.854 (2) (b), unless the person provides to the department a payment agreement that has been approved by the county child support agency under s. 59.53 (5) and that is consistent with rules promulgated under s. 49.858 (2) (a).

History: 1999 a. 9; 2003 a. 33.

93.75 Payments to ethanol producers. (1) **ELIGIBILITY.** Beginning on July 1, 2001, the department shall administer a program under which the department makes payments to a person who produces ethanol if all of the following criteria are satisfied:

(a) The person produces in this state, within 12 months, over 10,000,000 gallons of ethanol or, during the first 12 months that the person produces ethanol in this state, a lesser amount of ethanol that is established by the department by rule.

(b) The person has been producing ethanol in this state for fewer than 60 months.

(c) The person purchases the substances from which the person produces ethanol from a local source, as defined by the department by rule.

(d) If construction of the ethanol production facility begins after July 27, 2005, a competitive bidding process is used for the construction of the ethanol production facility.

(2) **PAYMENTS.** The department shall pay a person who is eligible under sub. (1) at the rate of 20 cents per gallon for not more than 15,000,000 gallons of ethanol produced in this state within 12 months, except that if there are insufficient funds to make payments at this rate to all eligible persons the department shall prorate the payments.

(3) **RULES.** The department shall promulgate rules for the program under this section. The department shall include all of the following in the rules:

(a) The amount of ethanol that a person must produce within the first 12 months that the person produces ethanol in this state to be eligible for payments under this section.

(b) A definition of "local source" for the purposes of sub. (1) (c).

(c) A method for prorating payments under sub. (2).

(3m) **MONITORING.** (a) The department of transportation shall monitor the impact of ethanol sales in this state on the amount of federal moneys received by this state for highways and other surface transportation purposes, excluding federal moneys received for railroads.

(b) If the department of transportation determines, on or before December 31, 2003, that the amount of federal moneys received by this state for highways and other surface transportation purposes, excluding federal moneys received for railroads, is decreased due to ethanol sales in this state, the department of transportation shall notify the department of agriculture, trade and consumer protection of that determination not sooner than October 1, 2003, and not later than December 31, 2003.

(c) If the department of transportation determines, after December 31, 2003, and before January 1, 2005, that the amount of federal moneys received by this state for highways and other surface transportation purposes, excluding federal moneys received for railroads, is decreased due to ethanol sales in this state, the department of transportation shall notify the department of agriculture, trade and consumer protection of that determination not sooner than October 1, 2004, and not later than December 31, 2004.

(d) If the department of transportation determines, after December 31, 2004, and before January 1, 2006, that the amount of federal moneys received by this state for highways and other surface transportation purposes, excluding federal moneys received for railroads, is decreased due to ethanol sales in this state, the department of transportation shall notify the department of agriculture, trade and consumer protection of that determination not sooner than October 1, 2005, and not later than December 31, 2005.

(4) **SUNSET.** The department may not make a payment under this section after June 30, 2006, or the first day of the 6th month beginning after the department receives a notice under sub. (3m), whichever is sooner.

History: 1999 a. 55; 2005 a. 25.

93.80 Arsenic in wood. The department, jointly with the department of commerce, shall review scientific evidence to determine whether there is a substantial likelihood that wood treated with copper, chromium, and arsenic is harmful to the environment or to human health.

History: 2001 a. 16.

93.90 Livestock facility siting and expansion. (1) This section is an enactment of statewide concern for the purpose of providing uniform regulation of livestock facilities.

(1m) **DEFINITIONS.** In this section:

(a) "Animal unit" has the meaning given in s. NR 243.03 (3), Wis. Adm. Code.

(b) "Application for approval" means an application for approval of a livestock facility siting or expansion.

(c) "Board" means the livestock facility siting review board.

(d) "Expansion" means an increase in the number of animals fed, confined, maintained, or stabled.

(e) "Livestock facility" means a feedlot or facility, other than a pasture, where animals used in the production of food, fiber, or other animal products are or will be fed, confined, maintained, or stabled for a total of 45 days or more in any 12-month period. "Livestock facility" does not include an aquaculture facility.

(f) "Political subdivision" means a city, village, town, or county.

(2) DEPARTMENT DUTIES. (a) For the purposes of this section, the department shall promulgate rules specifying standards for siting and expanding livestock facilities. In promulgating the rules, the department may incorporate by cross-reference provisions contained in rules promulgated under ss. 92.05 (3) (c) and (k), 92.14 (8), 92.16, and 281.16 (3) and ch. 283. The department may not promulgate rules under this paragraph that conflict with rules promulgated under s. 92.05 (3) (c) or (k), 92.14 (8), 92.16, or 281.16 (3) or ch. 283.

(b) In promulgating rules under par. (a), the department shall consider whether the proposed standards, other than those incorporated by cross-reference, are all of the following:

1. Protective of public health or safety.
- 1m. Practical and workable.
2. Cost-effective.
3. Objective.
4. Based on available scientific information that has been subjected to peer review.
5. Designed to promote the growth and viability of animal agriculture in this state.
6. Designed to balance the economic viability of farm operations with protecting natural resources and other community interests.

7. Usable by officials of political subdivisions.

(c) The department shall review rules promulgated under par. (a) at least once every 4 years.

(d) The secretary shall appoint a committee of experts to advise the department on the promulgation of the rules under par. (a) and on the review of rules under par. (c).

(e) In addition to the rules under par. (a), the department shall promulgate rules that do all of the following:

1. Specify the information and documentation that must be provided in an application for approval in order to demonstrate that a livestock facility siting or expansion complies with applicable state standards under sub. (2) (a).

2. Specify the information and documentation that must be included in a record of decision making under sub. (4) (b).

(3) POLITICAL SUBDIVISION AUTHORITY. (a) Notwithstanding ss. 33.455, 59.03 (2) (a), 59.69, 60.10 (2) (i), 60.61, 60.62, 61.34 (1), 61.35, 62.11 (5), 62.23, 66.0415, 92.07 (2), 92.11, and 92.15 (3) (a), a political subdivision may not disapprove or prohibit a livestock facility siting or expansion unless at least one of the following applies:

1. The site is located in a zoning district that is not an agricultural zoning district.

2. The site is located in an agricultural zoning district in which the proposed new or expanded livestock facility is prohibited, subject to pars. (b) and (c).

3. The proposed new or expanded livestock facility violates an ordinance adopted under s. 59.692, 59.693, 60.627, 61.351, 61.354, 62.231, 62.234, or 87.30.

4. The proposed new or expanded livestock facility violates a building, electrical, or plumbing code that is consistent with the state building, electrical, or plumbing code for that type of facility.

5. The proposed new or expanded livestock facility will have 500 or more animal units and violates a state standard under sub. (2) (a).

6. The proposed new or expanded livestock facility will have 500 or more animal units and violates a requirement that is more stringent than the state standards under sub. (2) (a) if the political subdivision does all of the following:

a. Adopts the requirement by ordinance before the applicant files the application for approval.

b. Bases the requirement on reasonable and scientifically defensible findings of fact, adopted by the political subdivision, that clearly show that the requirement is necessary to protect public health or safety.

8. The proposed new or expanded livestock facility will have fewer than 500 animal units but will exceed a size threshold for requiring a special exception or conditional use permit that was incorporated into the political subdivision's ordinances before July 19, 2003, and the proposed new or expanded livestock facility violates a state standard under sub. (2) (a).

9. The proposed new or expanded livestock facility will have fewer than 500 animal units but will exceed a size threshold for requiring a special exception or conditional use permit that was incorporated into the political subdivision's ordinances before July 19, 2003, and the proposed new or expanded livestock facility violates a requirement that is more stringent than the state standards under sub. (2) (a) if the political subdivision does all of the following:

a. Adopts the requirement by ordinance before the applicant files the application for approval.

b. Bases the requirement on reasonable and scientifically defensible findings of fact, adopted by the political subdivision, that clearly show that the requirement is necessary to protect public health or safety.

(ae) A political subdivision that requires a special exception or conditional use permit for the siting or expansion of any of the following livestock facilities shall require compliance with the applicable state standards under sub. (2) (a) as a condition of issuing the special exception or conditional use permit:

1. A new or expanded livestock facility that will have 500 or more animal units.

2. A new or expanded livestock facility that will have fewer than 500 animal units but that will exceed a size threshold for requiring a special exception or conditional use permit that was incorporated into the political subdivision's ordinances before July 19, 2003.

(am) Notwithstanding par. (ae), a political subdivision may apply to a new or expanded livestock facility described in par. (ae) 1. or 2., as a condition of issuing a special exception or conditional use permit, a setback requirement that is less stringent than a setback requirement under sub. (2) (a) if the setback requirement is incorporated in the political subdivision's ordinances as a numerical standard.

(ar) Notwithstanding par. (ae) a political subdivision may apply to a new or expanded livestock facility described in par. (ae) 1. or 2., as a condition of issuing a special exception or conditional use permit, a requirement that is more stringent than the state standards under sub. (2) (a) if the political subdivision does all of the following:

1. Adopts the requirement by ordinance before the applicant files the application for approval.

2. Bases the requirement on reasonable and scientifically defensible findings of fact, adopted by the political subdivision, that clearly show that the requirement is necessary to protect public health or safety.

(b) Notwithstanding ss. 59.69, 60.61, 60.62, 61.35, and 62.23, a political subdivision may not prohibit a type of livestock facility in an agricultural zoning district based on number of animal units if livestock facilities of that type with fewer animal units are allowed in that zoning district, unless the political subdivision also has an agricultural zoning district in which livestock facilities of that type are permitted or conditional uses without respect to number of animal units.

(c) Notwithstanding ss. 59.69, 60.61, 60.62, 61.35, and 62.23, a political subdivision may not enact or enforce a zoning ordinance with a category of agricultural district in which livestock facilities are prohibited unless the political subdivision bases that prohibition on reasonable and scientifically defensible findings of fact, adopted by the political subdivision, that clearly show that the prohibition is necessary to protect public health or safety.

(d) Notwithstanding ss. 92.15 (4) and 281.16 (3) (e), a political subdivision that requires compliance with state standards under sub. (2) (a) as a condition of issuing a special exception or condi-

tional use permit for an expanded livestock facility is not required to determine that cost-sharing is available to the operator of the livestock facility for facilities or practices needed to comply with those standards if the livestock facility will have 500 or more animal units.

(c) Notwithstanding ss. 59.69, 60.61, 60.62, 61.35, and 62.23, a political subdivision may not enact a requirement that a person obtain a special exception or conditional use permit for the expansion of a livestock facility that exists when the requirement takes effect, except that a political subdivision may enact a requirement that a person obtain a special exception or conditional use permit for the expansion of a livestock facility that exists when the requirement takes effect if the requirement applies only when the number of animal units that the livestock facility will have after expansion will exceed by more than 20 percent the largest number of animal units that were at the livestock facility for at least 90 days in the 12-month period before the requirement takes effect.

(f) For the purposes of this subsection, the number of animal units that a livestock facility will have is the largest number of animal units that will be fed, confined, maintained, or stabled at the livestock facility on at least 90 days in any 12-month period.

(4) POLITICAL SUBDIVISION PROCEDURE. (a) No later than 45 days after a political subdivision receives an application for approval, the political subdivision shall notify the applicant whether the application for approval is complete and, if it is not complete, what information is needed to complete the application for approval. As soon as the applicant has provided all of the required information, the political subdivision shall notify the applicant that the application for approval is complete.

(b) A political subdivision shall make a record of its decision making on an application for approval, including a recording of any public hearing, copies of documents submitted at any public hearing, and copies of any other documents provided to the political subdivision in connection with the application for approval.

(c) A political subdivision shall base its decision on an application for approval on written findings of fact that are supported by the evidence in the record under par. (b).

(d) Except as provided in par. (e), a political subdivision shall approve or disapprove an application for approval no more than 90 days after the day on which it notifies the applicant that the application for approval is complete. If an applicant complies with the rules promulgated under sub. (2) (c) 1. and the information and documentation provided by the applicant is sufficient to establish, without considering any other information or documentation, that the application complies with applicable requirements for approval, the political subdivision shall approve the application unless the political subdivision finds, based on other clear and convincing information or documentation in the record, that the application does not comply with applicable requirements.

(e) A political subdivision may extend the time limit in par. (d) if the political subdivision needs additional information to determine whether to approve or deny the application for approval, if the applicant makes a material modification to the application for

approval, or for other good cause specified in writing by the political subdivision.

(5) REVIEW OF SITING DECISIONS. (a) In this subsection "aggrieved person" means a person who applied to a political subdivision for approval of a livestock facility siting or expansion, a person who lives within 2 miles of a livestock facility that is proposed to be sited or expanded, or a person who owns land within 2 miles of a livestock facility that is proposed to be sited or expanded.

(b) An aggrieved person may challenge the decision of a political subdivision on an application for approval on the grounds that the political subdivision incorrectly applied the state standards under sub. (2) (a) that are applicable to the livestock facility siting or expansion or violated sub. (3), by requesting the board to review the decision. An aggrieved person is not required to exhaust the political subdivision's administrative remedies before requesting review by the board. An aggrieved person shall request a review under this paragraph within 30 days after the political subdivision approves or disapproves the application for approval or, if the aggrieved person chooses to exhaust the political subdivision's administrative remedies, within 30 days after the final decision in the political subdivision's administrative review process.

(bm) Upon receiving a request under par. (b), the board shall notify the political subdivision of the request. The political subdivision shall provide a certified copy of the record under sub. (4) to the board within 30 days after the day on which it receives the notice.

(c) Upon receiving the certified copy of the record under par. (bm), the board shall determine whether the challenge is valid. The board shall make its decision without deference to the decision of the political subdivision and shall base its decision only on the evidence in the record under sub. (4) (b). In a case that involves the application of requirements related to water quality, the board shall consult with the department of agriculture, trade and consumer protection or with the department of natural resources concerning the application of the requirements related to water quality. The board shall make its decision within 60 days after the day on which it receives the certified copy of the record under par. (bm), except that the board may extend this time limit for good cause specified in writing by the board.

(d) If the board determines that a challenge is valid, the board shall reverse the decision of the political subdivision. The decision of the board is binding on the political subdivision, subject to par. (e). If a political subdivision fails to comply with a decision of the board that has not been appealed under par. (e), an aggrieved person may bring an action to enforce the decision.

(e) An aggrieved person or the political subdivision may appeal the decision of the board to circuit court. The filing of an appeal does not in itself stay the effect of a decision of the board.

(f) A circuit court to which a decision of the board is appealed under par. (e) shall review the decision of the board based on the evidence in the record under sub. (4) (b).

History: 2003 a. 235.

Cross Reference: See also ch. ATPC 51, Wis. adm. code.

A
MODEL ZONING ORDINANCE
FOR
ANIMAL FEEDING OPERATIONS

Developed by a
ZONING WORK GROUP
for Animal Feeding Operations

Final
March 2000

Facilitated by the



NORTH DAKOTA DEPARTMENT OF HEALTH
Environmental Health Section
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PREAMBLE

Public concern about odors produced by animal feeding operations and agricultural concern for rights to practice farming and ranching emerged within North Dakota during 1998. As remedies for these concerns, the 1999 North Dakota Legislative Assembly approved amendments to law that (1) limited the powers of local governments to prohibit or prevent the use of land or buildings for farming or ranching but allowed local governments to regulate the nature and scope of concentrated feeding operations, and (2) established a state standard for odors. The 1999 legislation was Senate Bills 2355 and 2365.

Subsequent to signing this legislation, Governor Edward T. Schafer issued Executive Order 1999-03, which reads in part:

The Department of Health shall . . . take steps reasonably necessary to protect the environment of the state of North Dakota, according to its responsibilities under law; and.

The Department shall establish a working group with interested political subdivisions, or their associations to develop model zoning regulations for the subdivisions to implement as they deem appropriate; . . .

The Department of Health arranged for and facilitated meetings of the work group and a committee of the work group. The work group was comprised of representatives of two livestock producer associations, three boards of county commissioners, two township officers associations, two city officers and the Department of Health. At times, several other people participated in meetings or assisted the work group, including county planners and land-use administrators.

This document is the product of the work group. It represents the consensus recommendation of the work group for zoning of concentrated feeding operations, sometimes referred to as feedlots or animal feeding operations. Its purpose is to:

- ☛ Provide a reference, or model, for zoning and ordinances pertaining to concentrated feeding operations for use by the local governments across North Dakota.
- ☛ Remind local governments of their roles in protecting public safety and health and in planning the uses, conservation and protection of natural resources, including land for farming and ranching.
- ☛ Foster uniform zoning ordinances for concentrated feeding operations among counties and townships. Since regional differences in population density, climate, and soil and water resources occur across the state, local governments can revise the model as appropriate.
- ☛ Avoid duplication among state environmental protection rules and local government zoning ordinances.

INTRODUCTORY COMMENTARY

A summary of the reasons for, and the content of, an ordinance for animal feeding operations.

DEVELOPER AWARENESS

As some counties or townships in North Dakota become increasingly urban, especially those that contain the larger population centers, there is a need to reduce the conflict between farms and ranches and rural property owners. Normal facets of farming and ranching must be recognized by new and potential rural property owners and developers who make these properties available for non-farming or non-ranching uses.

Counties and townships should consider preparing educational materials for potential property developers and buyers; the materials should explain that aspects of some normal activities of farming or ranching can be displeasing to non-farm or non-ranch occupants. For example, informational materials were developed by Spokane County and are available: "Code of the West: Agriculture, Access and Mother Nature." Long Range Planning Department, Public Works Building, 1116 W. Broadway, Spokane, WA.

Normal farming and ranching practices can create these conditions:

- ✓ Animal production can cause odors, flies and noise.
- ✓ Crop production can create road and field dust.
- ✓ Applications of fertilizers and pesticides are common.
- ✓ Slow-moving vehicles and extra-wide equipment are common on roadways.
- ✓ Early morning or late evening truck traffic or chemical applications can occur.

State law places limitations on the ability of people affected by agricultural operations to bring nuisance actions to limit or stop such activities. (See N.D.C.C. chapter 42-04.)

LEGAL AUTHORITY

The North Dakota legislature has given political subdivisions the authority to enact local zoning ordinances for the purpose of promoting health, safety, morals, public convenience, general prosperity and public welfare. (See, for example, N.D.C.C. § 11-33-01, which is the county zoning authority.) In general, however, the law does not allow political subdivisions to enact any regulation or restriction that prohibits or prevents "the use of land or buildings for farming or ranching or any of the normal incidents of farming or ranching." (See, for example, N.D.C.C. § 11-33-02, subsection 1.)

The 1999 amendments to the law addressed an important legal question: whether concentrated feeding operations were "industrial" operations over which counties and townships could exercise their traditional zoning authority, or whether they were "farming" operations over which political subdivisions had no zoning authority? The legislature answered this question. First, it defined farming and ranching to include livestock "feeding"; second, it gave counties and townships authority to "regulate the nature and scope of concentrated feeding operations" permissible within their jurisdictions and to "set reasonable standards, based on the size of the operation" to govern its location. The legislation also forbids counties and townships from banning concentrated feeding operations from their jurisdictions and from prohibiting the reasonable diversification or expansion of farming or ranching operations. The amendments give counties and townships discretion to adopt their own standards regulating the size, nature and location of feedlots subject to the limitations outlined above. The amended law is provided in Appendix I.

FUNCTION OF AN ORDINANCE

There appears to be a misunderstanding among many people in North Dakota as to how zoning functions. Many believe that, because rural areas beyond incorporated cities have historically been agricultural production areas, they are zoned agriculture and are entitled to protection from encroachment of non-agricultural land use. This is not the case. Zoning authorities maintain that farming and ranching areas are not protected from encroachment until they are delineated in comprehensive land-use plans. Comprehensive land-use plans are required by law before adoption of land-use ordinances. Apparently, most rural areas of the state are not covered by comprehensive land-use plans; therefore, there is no protection from encroachment by incompatible land use.

If conflict in land use is to be constrained by local governments so as to protect the right to practice farming or ranching and to foster compatibility with nearby land use, local government officials choosing to adopt an ordinance for animal feeding operations must:

- Adopt comprehensive land-use plans, which delineate land uses and specify land use objectives and policies.
- Adopt separation distances (aka setbacks or reverse setbacks) that reflect qualifiable or quantifiable odor characteristics and odor dispersal. (Compliance with the odor provisions of 1999 SB2365 is not a defense in nuisance litigation, N.D.C.C. chapter 42-01.)
- Identify those new land uses that do not conform to the objectives and policies for delineated agricultural areas so as to infringe on the rights of farming or ranching (not included in the model zoning ordinance for animal feeding operations).
- Identify those new and existing animal feeding operations that, due to size (e.g., number of animal units), present safety hazards, affect natural resources, affect surrounding areas or other means of infringing on the rights of others.

MODEL LAND-USE POLICY

State laws which allow zoning by local governments require comprehensive plans that contain land-use goals, etc. Suggested goals, objectives and policies - for inclusion in a comprehensive land-use plan as deemed appropriate - are provided.

LAND-USE COORDINATION

Development within the zoning jurisdiction of a city shall be determined by that city. Development within the zoning jurisdiction of a county or township that may affect property within a city's zoning limits should be reviewed cooperatively by the board of county commissioners or the township board and the city.

ENVIRONMENT AND PUBLIC SAFETY AND HEALTH

Goal: Develop, adopt and administer zoning ordinances that are consistent with the objectives and policies of this comprehensive land use plan.

Objective A: Manage new development.

Policy A1: Encourage rural residential development, as needed, to locate areas that are in non-productive for farming or ranching.

Policy A2: Protect farming or ranching from non-agricultural development of land uses that would hinder the operations or productivity of farming or ranching. A proposed change in land use should not cause conflict with existing farming or ranching.

Objective B: Promote conservation of natural resources.

Policy B1: Encourage development in ways that conserve natural and agricultural resources. Developments or land use should not pose unacceptable exploitation of natural and agricultural resources or unacceptable risk of polluting air, land or water.

Policy B2: Encourage programs and activities that reduce and control soil erosion and that prevent the growth and spread of weeds.

Objective C: Promote public safety and health.

Policy C1: Encourage programs and activities that discourage siting of development in a flood way or flood plain and that reduce and prevent air, soil or water pollution.

MODEL AFO ZONING ORDINANCE

A suggested zoning ordinance pertaining to animal feeding operations is provided for use by local governments as deemed appropriate. A summary of the work group's discussions that governed substance of this model ordinance is included in a subsequent chapter of this document.

This land-use ordinance for animal feeding operations includes the following sections.

1. General Provisions
 - 1.1 Definitions
 - 1.2 Equivalent Animal Numbers
 - 1.3 Environmental Provisions
 - 1.4 Enforcement
 - 1.5 Severability
2. Setback Requirements
 - 2.1 Water Resource Setbacks
 - 2.2 Odor Setbacks
3. Conditional Uses
 - 3.1 Permit Procedures
 - 3.2 Ownership Change
 - 3.3 Operational Change

1. GENERAL PROVISIONS

1.1 DEFINITIONS

Terms used in this ordinance have the same meaning as given by the laws and rules of the state of North Dakota, specifically chapter 33-16-03 of the North Dakota Administrative Code. The definitions for these terms and for additional terms (bold print) are:

"Animal feeding operation" means a place where: livestock have been, are, or will be confined, concentrated and fed for 45 or more days in any 12 month period; pasture, crops, or other vegetation are not normally managed or sustained for grazing during the normal growing season; and, animal waste or *manure* accumulates. This term does not include an *animal wintering operation*. Adjoining animal feeding operations under common ownership are considered to be one animal feeding operation, if they use common areas or systems for *manure* handling.

"Animal wintering operation" means the confinement of cattle or sheep used or kept for breeding purposes in a feedlot or sheltered area at any time between October 15 and May 15 of each production cycle under circumstances in which these animals do not obtain a majority of their feed and nutrients from grazing. The term includes the

weaned offspring of cattle and sheep, but it does not include (1) breeding operations of more than 1,000 animal units or (2) weaned offspring which are kept longer than 120 days and that are not retained for breeding purposes.

"Due process" involves two essential elements; (1) notice and (2) an opportunity for a hearing. The notice must adequately describe the potential action that might affect the person(s) being notified and it must provide the person(s) a reasonable time to respond. If the person(s) request(s) a hearing, the hearing must be fair and allow the person(s) to present relevant evidence and arguments.

"Existing" means in place and operating on the date this ordinance is effective.

"Livestock" means any animal raised for food, raw materials or pleasure, including, but not limited to, beef and dairy cattle, bison, sheep, swine, poultry and horses. Livestock also includes fur animals raised for pelts.

"Manure" means fecal material and urine from livestock, as well as animal-housing wash water, bedding material, rainwater or snow melt that comes in contact with fecal material or urine.

"Operator" means an individual or group of individuals, a partnership, a corporation, a joint venture, or any other entity owning or controlling one or more *animal feeding operations* or *animal wintering operations*.

"Shall" means that the requirement is mandatory, rather than optional.

"Surface water" means *waters of the state* located on the ground surface such as lakes, reservoirs, rivers and creeks.

"Waters of the state" means all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, and all other bodies or accumulations of water on or under the surface of the earth, natural or artificial, public or private, situated wholly or partly within or bordering upon the state, except those private waters that do not combine or effect a junction with natural surface or underground waters just defined.

1.2 EQUIVALENT ANIMAL NUMBERS

An "animal unit equivalent" is a unitless number developed from the nutrient and volume characteristics of *manure* for a specific *livestock* type. The term "animal units" is used to normalize the number of animals (e.g., head) for each specific *livestock* type which produce comparable bulk quantities of *manure*. The animal unit equivalents for types of *livestock* and the numbers of *livestock* for facility size thresholds of 300 animal units (a.u.), and so forth, are listed in the following table.

		Equivalent Numbers of the Livestock (hd) for Four Sizes (a.u.) of Animal Feeding Operations			
Livestock Type	Animal Unit Equivalent	300 a.u.	1,000 a.u.	2,000 a.u.	5,000 a.u.
1 horse	2.0	150 hd	500 hd	1,000 hd	2,500 hd
1 dairy cow	1.33	225	750	1,500	3,750
1 mature beef	1.0	300	1,000	2,000	5,000
1 beef feeder - finishing	1.0	300	1,000	2,000	5,000
1 beef feeder - backgrounding	0.75	400	1,333	2,667	6,667
1 mature bison	1.0	300	1,000	2,000	5,000
1 bison feeder	1.0	300	1,000	2,000	5,000
1 swine, > 55 lbs	0.4	750	2,500	5,000	12,500
1 goose or duck	0.2	1,500	5,000	10,000	25,000
1 sheep	0.1	3,000	10,000	20,000	50,000
1 swine, nursery	0.1	3,000	10,000	20,000	50,000
1 turkey	0.0182	16,500	55,000	110,000	275,000
1 chicken	0.01	30,000	100,000	200,000	500,000

1.3 ENVIRONMENTAL PROTECTION

The *operator* of a new facility for animal feeding is expected to locate, construct, operate and maintain the facility so as to minimize, reduce or abate effects of pollution on environmental resources and on public safety and health. The *operator* of an existing facility is expected to operate and maintain the facility so as to minimize, reduce or abate effects of pollution on environmental resources and on public safety and health. Each *operator* shall comply with applicable state laws and rules, including the laws and rules administered by the North Dakota Department of Health and with any permits granted by that department.

1.4 ENFORCEMENT

In the event of a violation of this ordinance or a judgement on a civil action by the North Dakota Department of Health, the local unit of government, after due process, can order cessation of a facility for animal feeding within a reasonable period of time and until such time as the *operator* corrects or abates the cause(s) of the violation. If the cause(s) of the

violation are not remedied within a reasonable period of time as set by the local unit of government, the permit may be revoked.

1.5 SEVERABILITY

If any paragraph, sentence, clause or phrase of this ordinance is for any reason held to be invalid or unconstitutional by a court of competent jurisdiction, such decision shall not affect the validity of the remaining portion of this ordinance .

2. SETBACK REQUIREMENTS

2.1 WATER RESOURCE SETBACKS

The *operator* of a new *animal feeding operation* that has more than 1,000 animal units shall not locate or establish that operation:

- A. Within a delineated source water protection area for a public water system. The source water protection areas for water supply wells include the entire wellhead protection area. For the *surface-water* intakes of public water systems, source water protection areas include all or portions of the surface water that supplies the water for the public water system, including all or portions of the surface-water's shoreline.
- B. (*The following provision is optional.* Within 1,200 feet (365.6 meters) of a private ground water well which is not owned by the *operator* or within 1,500 feet (457.1 meters) of a public ground water well which does not have a delineated source water protection area.)
- C. (*The following provision is optional.* Within 1,000 feet (304.7 meters) of surface water which is not included in a source water protection area.)

2.2 ODOR SETBACKS

The *operator* of a new facility for an *animal feeding operation* shall not locate that operation within the extra territorial zoning jurisdiction of an incorporated city.

An owner of property shall locate and establish a residence, business, church, school, public park or zone for residential use so as to provide a separation distance from any *existing animal feeding operation*. The separation distances, or setbacks, are listed in the following table. An owner of property who is an *operator* may locate the owner's residence or business within the setbacks.

Setback Distances for <i>Animal Feeding Operations</i>		
Number of Animal Units	Hog Operations	Other Animal Operations
fewer than 300	none	none
300 - 1000	0.50 mi (0.805 km)	0.50 mi (0.805 km)
1001 or more	0.75 mi (1.207 km)	0.50 mi (0.805 km)
2001 or more	1.00 mi (1.609 km)	0.75 mi (1.207 km)
5001 or more	1.50 mi (2.414 km)	1.00 mi (1.609 km)

The *operator* of a new *animal feeding operation* shall locate the site of that operation from existing residences, businesses, churches, schools, public parks and areas of property that are zoned residential so as to exceed the corresponding listed setback from these places.

If notified in writing by an *operator* of a planned future expansion of an *animal feeding operation*, the local unit of government may implement the corresponding odor setback for a temporary time period not to exceed two years, after which time the setback will remain in effect only if the expansion was completed.

A local unit of government may, upon recommendation of the zoning commission or land use administrator, increase or decrease a setback distance for a new *animal feeding operation* after consideration of the proposed operation's plans, if it determines that a greater or lesser setback distance is necessary or acceptable, respectively, based upon site conditions or demonstrable safety, health, environmental or public welfare concerns.

3. CONDITIONAL USES

3.1 PERMIT PROCEDURES

3.1.A. Applicability.

The *operator* of a new *livestock* facility or an *existing livestock* facility, which meets the definition of an *animal feeding operation* and which is a conditional (or special) use of land as listed below, shall apply for and obtain a conditional (or special) use permit.

1. A new *animal feeding operation* that would be capable of handling, or that expands to handle, more than 1,000 animal units is a conditional (or special) use of land.
2. An *existing animal feeding operation* that expands to handle more than 1,000 animal units is a conditional (or special) use of land.

Whenever the capacity of an *animal feeding operation* is expanded to handle more than 2,000 or 5,000 animal units, the *operator* shall apply for a new conditional (or special) use permit.

3.1.B. Procedure.

The local unit of government may practice any or all of the provisions in the following subparagraphs in harmony with the permitting process of its general zoning regulations.

1. Application for a conditional use (or special use) permit shall be submitted to the local unit of government for tentative approval. The local unit of government shall notify the Department of Health that it has received such application.
2. The local unit of government shall notify by certified mail all property owners having property within the corresponding odor setback distance of a proposed new *animal feeding operation*. This notification must occur within 21 days of receiving the application. The approval process utilized by the local unit of government may include at least one advertised public hearing.
3. Following tentative approval or denial of the application by the local unit of government, the applicant shall be notified by letter of the decision, including conditions imposed, if any.
4. The applicant shall then forward its application for a conditional (or special) use permit, together with the tentative approval by the local government, to the North Dakota Department of Health.
5. Following a review by the Department of Health of the operator's application for a state permit, the Department of Health will notify the local unit of government of its decision.
6. The conditional (or special) use permit will become final following the granting of a permit by the Department of Health.
7. A conditional (or special) use permit granted to the operator of a new animal feeding operation shall be put into use within twenty-four (24) months, or the permit shall lapse and the operator may re-apply.

3.1.C. Application Requirements.

The application for a conditional use (or special use) permit to operate a facility for an *animal feeding operation* shall include a scaled site plan. If the facility will handle more than 1,000 animal units, the scaled site plan shall be prepared by a registered land surveyor, a civil engineer or other person having comparable experience or qualifications. The local unit of government may require any or all of the following elements, or require additional elements,

in its site plan review process when needed to determine the nature and scope of the animal feeding operation.

1. Proposed number of animal units.
2. Total acreage of the site of the facility.
3. Existing and proposed roads and access ways within and adjacent to the site of the facility.
4. Surrounding land uses and ownership, if the operation will have the capacity to handle more than 1,000 animal units.
5. A copy of the permit application submitted by the applicant to the Department of Health.

3.2 OWNERSHIP CHANGE

An *operator* of a facility that includes an *animal feeding operation* having a permit granted by this ordinance shall notify the local unit of government of the sale, or the transfer of the ownership of that operation.

3.3 OPERATING CHANGE

An *operator* of a facility that includes an *animal feeding operation* having a permit granted by this ordinance shall notify the local unit of government of intent to include an alternate *livestock* type. The notice shall be given at least 120 days prior to the anticipated date of the change.

STATUTORY AUTHORITY FOR JOINT POWERS AGREEMENTS

Cooperative or Joint Administration by Counties and Townships of Authority to Regulate Concentrated Feeding Operations

N.D.C.C. § 54-40.3-01 allows counties, townships or other political subdivisions to enter into agreements with other political subdivisions for the cooperative or joint administration of any power or function authorized by law or assigned to one or more of them. Counties and townships may use this authority to pool resources, cut red tape, and make their services and functions more cost effective, timely, efficient and responsive.

The 1999 Legislature amended N.D.C.C. § 11-33-02 and N.D.C.C. § 58-03-11 to clarify the power and function of counties and townships to regulate animal feeding operations. Counties and townships may wish to explore the possibility of cooperative or joint regulation of concentrated feeding operations to avoid unnecessary duplication of these regulations and to satisfy the purpose and intent of N.D.C.C. § 11-33-02 and N.D.C.C. § 58-03-11.

1. Factors Relevant Under Amended Law.

The 1999 Legislature amended N.D.C.C. § 11-33-02 and N.D.C.C. § 58-03-11 to clarify that counties and townships may "regulate the nature and scope of concentrated [animal] feeding operations." These amendments are given under the "INTRODUCTORY COMMENTARY" of this document.

In implementation of the amended laws, counties and townships may find it easier to ensure there are places for the development of animal feeding operations within their jurisdictions and to ensure there are reasonable and consistent regulations governing the nature and scope of operations, if they adopt one regulation for both counties and townships. One way of doing this would be for townships to relinquish their zoning authority over concentrated feeding operations to counties. Another way would be to enter into an agreement for cooperative or joint administration.

2. Decision Choices for a Cooperative or Joint Administration Agreement.

Counties and townships can structure agreements for joint or cooperative regulation of animal feeding operations in several ways. The factors, which are relevant to determining whether a county or township should enter into a cooperative or joint administration agreement with other counties or townships, are listed in Appendix II. One factor is cost. Another is representation. A third is working out the details of such an agreement. There are almost endless ways of structuring such agreements. state agencies and county and township organizations may be willing to help if interest is shown.

CLOSING COMMENTARY

A summary of the prevailing work group discussion that governed the substance of the model zoning ordinance for animal feeding operations.

The work group acknowledges that many counties and townships within the state have constraints on the resources needed for effective administration of zoning and zoning ordinances. The work group also acknowledges that compliance with detailed requirements of zoning and zoning ordinances by many people who practice farming and ranching could be a significant burden. Thus, the work group endeavored to achieve a practical and functional model ordinance supported with a model land use policy (required by law).

A report titled "History of the Development of a Model Zoning Ordinance for Animal Feeding Operations" provides information about the work group and its meetings.

The work group recognizes that the model zoning ordinance likely does not accommodate all existing zoning preferences and provisions of local units of government across the state. Thus, the model ordinance may be amended by a local unit of government as deemed appropriate. A **summary** of the prevailing discussion governing the substance of the model ordinance is provided below.

ROLE OF THE ND DEPARTMENT OF HEALTH (DoH)

- ▶ Local units of government, as well as the livestock producers, prefer that the Department of Health shoulder responsibility for protection of natural resources from pollution via its rules for animal feeding operations, including land application of manure, without additional detail in a local ordinance for animal feeding operations.
- ▶ An ordinance for animal feeding operations should be consistent in choice and use of terms as applied or defined in state laws and rules.

PUBLIC WATER SYSTEM SOURCE WATER SETBACKS

- ▶ New animal feeding operations should avoid locating in areas which have been delineated for the protection of waters of the state, including both surface water and ground water, which are used as drinking water. The federal Safe Drinking Water Act requires EPA-approved state plans for the delineation of those waters-of-the-state used as water resources for public water systems. While the state plan for North Dakota does not prohibit location of new animal feeding operations within delineated areas, the best interests of the owners/operators of animal feeding operations and the owners of the public water systems are not served by siting these operations within delineated source water protection areas.

- ▶ Maps of delineated source water protection areas for public water systems are available on the World Wide Web.
- ▶ The model ordinance does not propose setbacks from those portions of flood plains that are not within delineated source water protection areas of Public Water Systems. Local governments should include a provision concerning land uses in flood plain areas.

ODOR SETBACKS

- ▶ The choices for separation distances (setbacks) for animal feeding operations were balanced with the state odor standard (1999 SB 2365, N.D.C.C. chapter 23-25). The state odor standard makes an odor concentration of seven or more odor concentration units a violation of the standard at distances greater than one-half mile. This standard applies to all animal feeding operations, regardless of the type of livestock or the number confined and fed by the operation.
- ▶ Reported information indicates that amount of odors produced by confined swine feeding operations are greater than amounts of odors produced by other livestock types. After odors are released from animal-housing or manure-storage structures, the atmosphere governs the downwind transport and dispersion of the odors.
- ▶ The strength of odors released into ambient air and transported from animal feeding operations depends upon the construction of the animal housing and manure storage units and the topography of the site, as well as the type and number of animals. There is no apparent threshold based solely on the numbers of animals at which the downwind odor possibly could become a troublesome issue.
- ▶ General zoning provisions usually establish setbacks for buildings and structures from roadways; thus, no specific roadway setback for animal feeding operations is necessary.
- ▶ A framework for odor easements should be developed by the local unit of government when deemed appropriate. state law indicates that odor easements can be obtained by the owners/operators of animal feeding operations from owners of other property located beyond one-half mile (subparagraph b of paragraph 2 of section 11 of N.D.C.C. chapter 23-25).

CONDITIONAL-USE SIZE THRESHOLD

- ▶ The state laws which allow zoning indicate that a local unit of government "... can not prohibit through regulation, the reasonable diversification or expansion of a farming or ranching operation." The interpretation of the words "prohibit" and

"reasonable" intertwine with selection of the appropriate regulatory (in the model ordinance) size threshold for animal feeding operations.

- ▶ The number of animal feeding operations that have been issued permits by the Department of Health is about 440. (The Department presently requires any livestock feeding operation with more than 200 animal units to obtain a permit, and it anticipates a rule change adjusting this threshold to 300 animal units so as to be consistent with federal regulation.) Currently, there are: about 80 operations with 300 or more animal units; nearly 60 operations with more than 500 animal units; and nearly 30 operations with more than 1,000 animal units. Based upon a recent survey, other livestock feeding operations may not have permits because the operators are unaware of the rule permit requirements. The total number of animal feeding operations is unknown.
- ▶ While a local permit requirement for animal feeding operations with less than 1,000 animal units would involve some paperwork, public hearings, etc., on the part of owners/operators, matters of public safety, health, and general public welfare should not be overlooked.
- Additional summary details of the work group's discussion of this issue are provided in Appendix I of the report titled "History of the Development of a Model Zoning Ordinance for Animal Feeding Operations."

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APPENDIX I

Legislative Revisions of Local Zoning Law

ROLE OF LOCAL GOVERNMENTS

Although the North Dakota's constitution (Article VII, section 6) and law (NDCC chapter 11-09.1) grant home rule authority to counties, the model language proposed herein assumes that local governments in the state have only those powers expressly granted, or reasonably implied in, the law.

The 1999 North Dakota Legislative Assembly increased protection of farming and ranching in the state by amending laws that allow a county and/or a township to divide, or zone, all or any parts of the county or township into districts. Section 11-33-02 of the North Dakota Century Code, which grants zoning authority to counties, now states:

1. For any or all of the purposes designated in section 11-33-01, the board of county commissioners may divide by resolution all or any parts of the county, subject to section 11-33-20, into districts of such number, shape, and area as may be determined necessary, and likewise may enact suitable regulations to carry out the purposes of this chapter. These regulations must be uniform in each district, but the regulations in one district may differ from those in other districts. A regulation or restriction may not prohibit or prevent the use of land or buildings for farming or ranching or any of the normal incidents of farming or ranching. For purposes of this section, "farming or ranching" means cultivating land for production of agricultural crops or livestock, or raising, feeding, or producing livestock, poultry, milk, or fruit. The term does not include producing timber or forest products, nor does the term include a contract whereby a processor or distributor of farm products or supplies provides grain, harvesting, or other farm services.
2. A board of county commissioners may regulate the nature and scope of concentrated feeding operations permissible in the county; however, if a regulation would impose a substantial economic burden on a concentrated feeding operation in existence before the effective date of the regulation, the board of county commissioners shall declare that the regulation is ineffective with respect to any concentrated feeding operation in existence before the effective date of the regulation.
3. A regulation may not preclude the development of a concentrated feeding operation in the county. A regulation addressing the development of a concentrated feeding operation in the county may set reasonable standards, based on the size of the operation, to govern its location.
4. For purposes of this section, "concentrated feeding operation" means any livestock feeding, handling, or holding operation, or feed yard, where animals are concentrated in an area that is not normally used for pasture or for growing crops and in which animal wastes may accumulate, or in an area where the space per animal unit is less than six hundred square feet [55.74 square meters]. The term does not include normal wintering operations for cattle. For purposes of this section, "livestock" includes beef cattle, dairy cattle, sheep, swine, poultry, horses, and fur animals raised for their pelts.
5. A board of county commissioners may not prohibit, through regulation, the reasonable diversification or expansion of a farming or ranching operation.

6. This chapter does not include any power relating to the establishment, repair, and maintenance of highways or roads.

COUNTY POWERS

First. state law allows, but does not require, boards of county commissioners to take action to promote safety, health and public welfare. Section 11-33-01 of the North Dakota Century Code states, in part:

For the purpose of promoting health, safety, morals, public convenience, general prosperity, and public welfare, the board of county commissioners of any county may regulate and restrict within the county, subject to section 11-33-20 and chapter 54-21.3, the location and the use of buildings and structures and the use, condition of use, or occupancy of lands for residence, recreation, and other purposes.

However, section 11-33-02, as quoted under the "Role of Local Governments" above, defines the scope of zoning regulations that pertain to farming or ranching and concentrated feeding operations.

Second. Zoning divides land into districts so as to enable compatible and adjoining land uses to co-exist in each district and to separate incompatible land uses from each other. Thus, a zoning ordinance consists of: (1) a map that divides the jurisdiction (county or township) into districts for classes of use, which typically are residential, recreational, commercial, industrial, agricultural and other; and (2) written conditions that establish criteria under which the land may be developed and used for the particular land use class. Section 11-33-02, as quoted earlier in this chapter, grants authority to county commissions to divide the county and to set reasonable standards, based upon size, to govern locations of concentrated feeding operations.

Third. A prerequisite for adopting a zoning ordinance is a comprehensive land use plan for the jurisdiction. Section 11-33-03 of the North Dakota Century Code states, in part:

These regulations shall be made in accordance with a comprehensive plan and designed for any or all of the following purposes:

1. To protect and guide the development of non-urban areas.
2. To secure safety from fire, flood, and other dangers.
5. To conserve and develop natural resources.

These regulations shall be made with a reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses. The comprehensive plan shall be a statement in documented text setting forth explicit goals, objectives, policies and standards of the jurisdiction to guide public and private development within its control.

TOWNSHIP POWERS

Sections 58-03-11, 58-03-12 and 58-03-13 of the North Dakota Century Code contain similar requirements, as described above, for townships that choose to establish zoning districts and regulate development.

APPENDIX II

Elements of a Cooperative or Joint Administration Agreement

N.D.C.C. § 54-40.3-01 provides:

- I. Any county, city, township, city park district, school district or other political subdivision of this state, upon approval of its respective governing body, may enter into an agreement with any other political subdivision of this state for the cooperative or joint administration of any power or function that is authorized by law or assigned to one or more of them. Any political subdivision of this state may enter into a joint powers agreement with a political subdivision of another state or political subdivision of a Canadian province if the power or function to be jointly administered is a power or function authorized by the laws of this state for a political subdivision of this state and is authorized by the laws of the other state or province. A joint powers agreement may provide for:
 - a. The purpose of the agreement or the power or function to be exercised or carried out.
 - b. The duration of the agreement and the permissible method to be employed in accomplishing the partial or complete termination of the agreement and for disposing of any property upon the partial or complete termination.
 - c. The precise organization, composition, and nature of any separate administrative or legal entity, including an administrator or a joint board, committee, or joint service council or network, responsible for administering the cooperative or joint undertaking. Two or more political subdivisions which enter into a number of joint powers agreements may provide a master administrative structure for the joint administration of any number of those agreements, rather than creating separate administrative structures for each agreement. However, no essential legislative powers, taxing authority, or eminent domain power may be delegated by an agreement to a separate administrative or legal entity.
 - d. The manner in which the parties to the agreement will finance the cooperative or joint undertaking and establish and maintain a budget for that undertaking. The parties to the agreement may expend funds pursuant to the agreement, use unexpended balances of their respective current funds, enter into a lease-option to buy and contract for deed agreements between themselves and with private parties, accumulate funds from year to year for the provision of services and facilities, and otherwise share or contribute property in accordance with the agreement in cooperatively or jointly exercising or carrying out the power or function. The agreement may include the provision of personnel, equipment, or property of one or more of the parties to the agreement that may be used instead of other financial support.
 - e. The manner of acquiring, holding, or disposing of real and personal property used in the cooperative or joint undertaking.

f. The acceptance of gifts, grants, or other assistance and the manner in which those gifts, grants, or assistance may be used for the purposes set forth in the agreement.

g. The process to apply for federal or state aid, or funds from other public and private sources, to the parties for furthering the purposes of the agreement.

h. The manner of responding for any liability that might be incurred through performance of the agreement and insuring against that liability.

i. Any other necessary and proper matters agreed upon by the parties to the agreement.

2. Any county, city, township, city park district, school district, or other political subdivision of this state may enter into an agreement in the manner provided in subsection 1 with any agency, board, or institution of the state for the undertaking of any power or function which any of the parties is permitted by law to undertake. Before an agreement entered into pursuant to this subsection is effective, the respective governing body or officer of the state agency, board, or institution must approve the agreement and the attorney general must determine that the agreement is legally sufficient.
3. An agreement made pursuant to this chapter does not relieve any political subdivision or the state of any obligation or responsibility imposed by law except to the extent of actual and timely performance by a separate administrative or legal entity created by the agreement. This actual and timely performance satisfies the obligation or responsibility of the political subdivision.

Thus, as defined by N.D.C.C. § 54-40.3-01, a cooperative or joint administration agreement relating to regulating concentrated animal feeding operations may contain the following elements:

1. The purpose of the agreement;
2. The duration of the agreement and procedure for termination;
3. The organization, composition and nature of its administering board;
4. Budget and financing;
5. Location and who will own or lease the property, if needed;
6. How to handle gifts, grants or other assistance, if needed or relevant;
7. The process to apply for federal or state aid, or other funds, if relevant;
8. Liability and insurance; and
9. Any other necessary and proper matters agreed upon by the parties to the agreement.



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Bringing ag home

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House Agriculture Committee

January 25, 2007

North Dakota Farm Bureau

Testimony on House Bill 1420

Presented by, Brian Kramer, Public Policy Director

Good morning Chairman Flakoll and Agriculture Committee members. I am Brian Kramer and I am representing North Dakota Farm Bureau in support of House Bill 1420.

Originally, House Bill 1420 sought to bring clarity to where the authority rests regarding regulation of environmental health. Now the bill provides for high-density and low-density agricultural districts and provides for varying setback distances for them. We agree with those provisions.

The bill defines animal units consistent with the state model zoning ordinance and defines "confined animal feeding operation", "farming and ranching", "livestock" and "location", which clarifies those terms and is another positive aspect of the legislation.

Our policies clearly state our support for controlling zoning authority at the township level. Our policy further tells us that we need to work with the counties and townships when developing zoning ordinances.

"We believe zoning authority should be controlled at the township level when the townships choose to do so."

"We shall work with townships and counties to develop farmer-friendly, responsible zoning ordinances for animal agriculture."

As you can see Farm Bureau firmly believes in the power of counties and townships to zone and to employ their zoning authority consistent with NDCC 11-33-02 and 58-03-11.

We believe that counties and townships have every right and an obligation to establish responsible setback distances for animal feeding operations.

We also believe that the State should have preemptive authority with regards to environmental regulation.

"We support a state pre-emption of environmental regulations with regard to local zoning of AFOs/CAFOs."

Unfortunately, the preemptive language was stricken from the bill. We would ask that you consider amending that language back into HB 1420.

We believe that the future growth of animal agriculture is critical to the future economic health of North Dakota. Unfortunately there are many that would have modern animal agriculture fail. The talk of inhumane animal factories, rivers of manure, antibiotic resistant super germs, and the destruction of our communities are nothing more than scare tactics designed to turn the consuming public against modern agricultural practices. We can and we must stand up to this misinformation with determination if our industry is going to survive. You can start by passing HB 1420.

The economic activity of rural North Dakota benefits the entire state. Dollars generated by animal agriculture have a gross receipts multiplier of 4.49. That represents a turn over of these dollars in the economy greater than tourism and the retail sector combined. By feeding our beef calves here and adding just 300 pounds to them we could generate more than \$200,000,000.00 in the economy of North Dakota not figuring the multiplier effect. The point I am making is the impact of the livestock industry on our economy is nothing that can be ignored.

For all of the reasons I have been talking about and more we must give this industry the chance to grow and thrive in this state. The uniformity of rules that HB 1420 will provide is huge step in the right direction of making this a reality with out sacrificing local control of zoning. I respectfully ask that you give HB 1420 a Do Pass recommendation. Thank you.

Roger Johnson
Agriculture Commissioner
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**Testimony of Roger Johnson
Agriculture Commissioner
House Bill 1420
Agriculture Committee
Roosevelt Park Room
March 15, 2007**

Chairman Flakoll and members of the Senate Agriculture Committee, I am Agriculture Commissioner Roger Johnson. I am here today in support of HB1420, which clarifies regulatory authority relating to livestock zoning and environmental regulation.

Livestock is nearly a \$1 billion industry in this state and is an important component of our state's economy. Changes in zoning regulations have the potential to enhance or to stifle increased livestock production. It is important that the state's environmental and zoning regulations relating to livestock are concise, consistent and uniform.

The growing renewable energy sector will produce an abundance of feed stocks, which in turn, will create many new opportunities for local livestock feeding. North Dakota is currently home to four operating ethanol facilities with a combined annual production capacity of 135.5 million gallons. Additional projects totaling 200 million gallons of production capacity have also been announced. Current estimates show that when all current and planned ethanol plants are up and

running, more than 1 million tons of dry distillers grains (DDGs) will be available for livestock feed.

The addition of a new canola-based biodiesel facility at Velva will also yield additional livestock feed in the form of meal. More than 450,000 tons of meal will be available from the Velva facility alone to feed cattle and other livestock.

HB 1420 aims to clarify the environmental regulatory authority of the State Health Department. The State Health Department is the agency that has the expertise and staff necessary to regulate livestock facilities with respect to nutrient management plans, size and design of waste confinement systems and land requirements for manure management.

This bill also clarifies issues relating to local control among the counties and townships. Without local government support of this issue, we will be facing it again in the future.

There are several other issues that may not get resolved this session, such as property tax issues and bonding requirements. We hope that these issues can be addressed in an interim study provided for in HCR 3061. You will have an opportunity to hear that resolution later today and I urge your support of that resolution.

Again, Chairman Flakoll and committee members, I urge a do pass on HB1420. I would be happy to answer any questions you may have.

Testimony to the Senate Agriculture Committee
On House Bill 1420
Presented by Allan Braaten

March 15, 2003

Good morning Chairman Flakoll and members of the Senate Agriculture Committee. I am Allan Braaten from Barney, North Dakota. I support House Bill 1420. I have grown corn on my farm in Richland County for nearly 60 years. As a past president of the North Dakota Corn Growers, I believe it is very important to have an outlet for corn as a livestock feed. The ethanol industry needs to have an outlet for their byproducts as well.

HB 1420 clarifies the authority of counties and townships to develop animal agriculture zoning rules. It provides the counties and townships the opportunity to set up agricultural districts, which will serve to lessen the controversy of these feeding operations.

The expansion of livestock feeding in our state will provide for economic growth in rural areas and North Dakota in general. For these reasons, I support HB 1420 and urge you to give a "Do Pass" recommendation on the bill.

Thank you.



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Pulse Growers
Association
Red River Valley Sugarbeet
Growers

Testimony of Kent Albers

North Dakota Ag Coalition

House Bill 1420

March 15, 2007

Chairman Flakoll, members of the Senate Agriculture Committee:

I am Kent Albers. I farm and ranch near Center and am here today as the chairman of the North Dakota Ag Coalition. On behalf of the Ag Coalition, I encourage your support of HB 1420.

For more than 20 years, the North Dakota Ag Coalition has provided a unified voice for North Dakota agricultural interests. Today, the Coalition is made up of 30 statewide organizations or associations that represent specific commodities or have a direct interest in agriculture. Through the Ag Coalition, these members seek to enhance the business climate for North Dakota's agricultural producers.

The Ag Coalition takes a position on a limited number of issues that have a significant impact on North Dakota's ag industry. HB 1420 is one of these issues, as it will impact the expansion of feeding operations statewide and across species.

The Ag Coalition supports this bill, as it seeks to advance North Dakota's animal agriculture opportunities through clarifications of such things as scope, nature and location and also provides uniform regulations among districts.

Simplifying the development process for North Dakota livestock operations is important to the agricultural industry's ability to grow and diversify at a time when increased opportunities for confined animal feeding operations are emerging.

It is for these reasons; we encourage your support of HB 1420.

Senate Agriculture Committee
Testimony of Paul Ivesdal on
House Bill 1420
March 15, 2007

Good morning Chairman Flakoll and members of the Committee. I am Paul Ivesdal from Ramsey County, Edmore, North Dakota. Our family has owned our farm since 1903. Approximately 4 years ago I informed the Ramsey County Commissioners of my intent to build a hog facility on my property located about 50 miles from the City of Devils Lake (see the attached map). We have been in a battle with most of the Ramsey County Commissioners for four years. We received our approval to build from the North Dakota Department of Health in June of 2005.

I attended a CAFO Owner/Operator Training session put on by NDSU Extension Service and North Dakota Department of Health on Tuesday, March 13th in Carrington. This was a very informational session, which I believe anyone, including township supervisors or county commissioners who demand higher standards than the Health Department, should be required to attend ... at least two sessions per year. Commissioners need to take the time to hear what the Health Department actually does and the expertise they have to protect all of us citizens.

NDSU experts, who live and work in this state, presented the session. Their information is based on sound science and research. After attending this session, I was reassured that the North Dakota Department of Health has the knowledge and the personnel available to regulate the environmental aspects of these facilities.

Each township and county needs consistent rules and regulations to work under. Farmers and ranchers deserve to be treated fairly and equitably. North Dakota citizens need assurance that our natural resources are being used wisely and that their quality of life is not compromised. This bill goes a long way toward meeting those needs. The

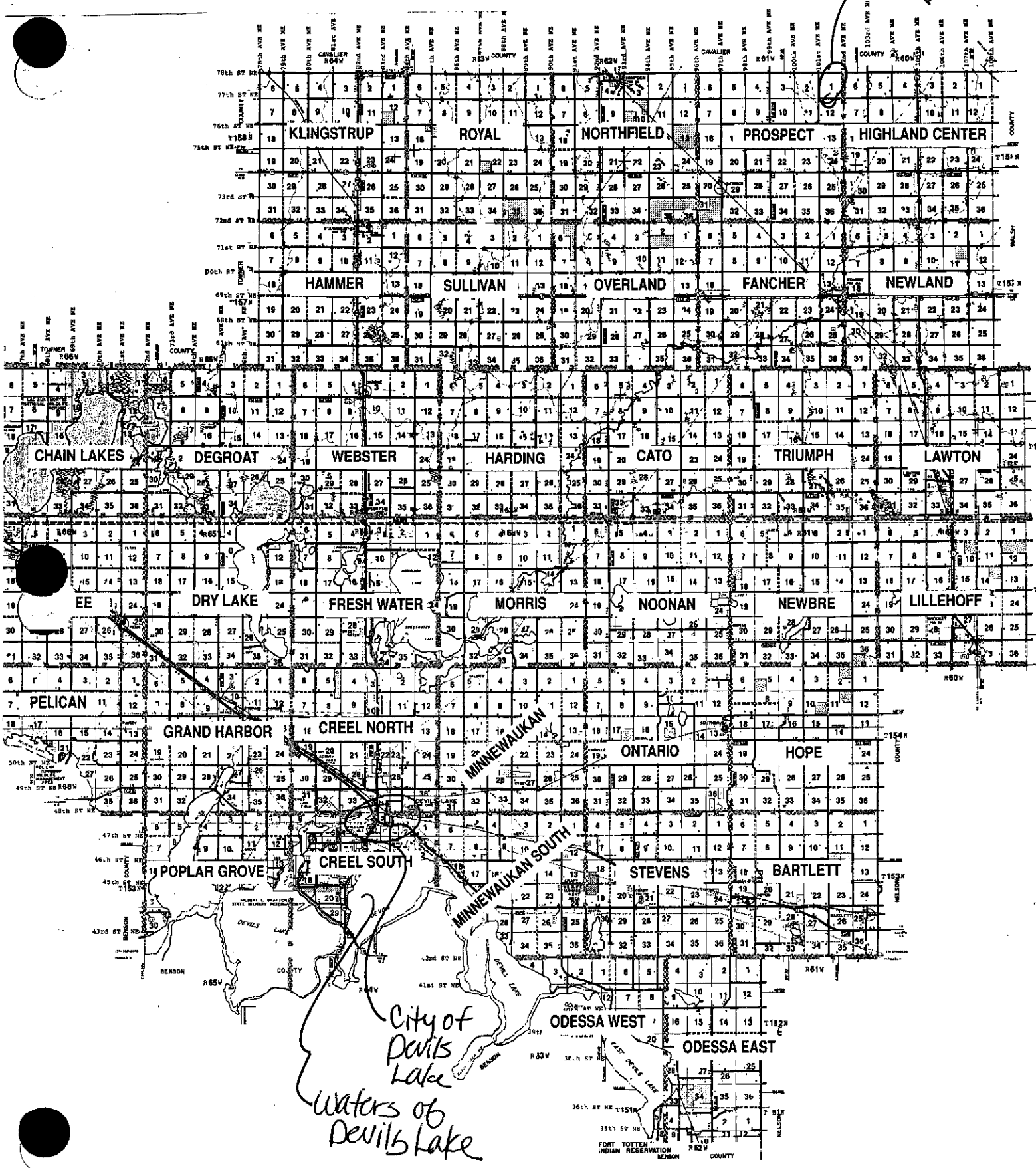
definitions included in HB 1420 provides the clarity, the authority to set up agricultural districts provides assurances and together they ensure fair and equitable treatment.

Animal agricultural can add diversity and added value to crops already here and will stimulate the rural economy. The biodiesel and ethanol plants are not going to be built without some assurances that there is a demand for at least some of their by-products.

Please support House Bill 1420 and provide clarity to the authority of townships and counties. Thank you.

Ramsey County

Hog Barn



ARTICLE 33-16

CONTROL, PREVENTION, AND ABATEMENT OF POLLUTION OF SURFACE WATER

Chapter	
33-16-01	North Dakota Pollutant Discharge Elimination System
33-16-01.1	Pretreatment Regulations
33-16-02	Standards of Water Quality for State of North Dakota [Repealed]
33-16-02.1	Standards of Quality for Waters of the State
33-16-03	Control of Pollution From Certain Livestock Enterprises [Repealed]
33-16-03.1	Control of Pollution From Animal Feeding Operations

CHAPTER 33-16-01

NORTH DAKOTA POLLUTANT DISCHARGE ELIMINATION SYSTEM

Section	
33-16-01-01	General - Definitions - Permit Effect - Incorporation by Reference
33-16-01-01.1	Additional Point Sources Subject to Regulation
33-16-01-02	Acquisition of Data
33-16-01-02.1	Requests for Variance
33-16-01-03	Receipt and Use of Federal Data
33-16-01-04	Transmission of Data to the Regional Administrator
33-16-01-05	Identity of Signatories to National Pollutant Discharge Elimination System Forms
33-16-01-06	Notice and Public Participation
33-16-01-07	Public Notice
33-16-01-07.1	Response to Comments
33-16-01-08	Fact Sheets
33-16-01-09	Notice to Government Agencies
33-16-01-10	Public Access to Information
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33-16-01-01. General - Definitions - Permit effect - Incorporation by reference.

1. **Authority.** The authority for this chapter relating to the control, prevention, and abatement of pollution of natural surface and underground waters is provided by North Dakota Century Code section 61-28-04.
2. **Scope and purpose.** This chapter establishes procedures governing the application for, and the issuance, denial, modification, and revocation of, permits for the discharge of pollutants into the waters of the state, as defined by subsection 6 of North Dakota Century Code section 61-28-02. The establishment of such procedures is required as a condition precedent to participation by North Dakota in the national pollutant discharge elimination system, pursuant to the provisions of section 402(b) of the Federal Water Pollution Control Act [33 U.S.C. 1251 et seq.].
3. **Definitions.** As used in this chapter, unless the context otherwise indicates:
 - a. "Administrator" means the administrator of the United States environmental protection agency.
 - b. "Applicable water quality standards" means all water quality standards to which a discharge is subject under the Federal Water Pollution Control Act and which have been:

- (1) Approved or permitted to remain in effect by the administrator following submission to the administrator pursuant to section 303(a) of the Federal Water Pollution Control Act; or
 - (2) Promulgated by the administrator pursuant to section 303(b) or (c) of the Federal Water Pollution Control Act.
- c. "Biological monitoring" means the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants:
- (1) By techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent; and
 - (2) At appropriate frequencies and locations.
- d. "Department" means the North Dakota state department of health.
- e. "Discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.
- f. "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.
- g. "Effluent standard" or "effluent limitation" means any restriction established by the department on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into the waters of the state. Such restrictions shall be at least as stringent as standards adopted by the administrator pursuant to the provisions of the Federal Water Pollution Control Act. Such restrictions shall include, but not be limited to, effluent limitations and applicable compliance schedules, standards of performance, toxic effluent standards and prohibitions, and pretreatment standards adopted by the administrator pursuant to the aforesaid Act.
- h. "EPA" means the United States environmental protection agency.
- i. "Industrial user" means a source of indirect discharge as defined in section 33-16-01.1-01.
- j. "Major facility" means any facility or activity subject to regulation under the national pollutant discharge elimination system which has been identified as a major facility by the regional administrator in conjunction with the department.

- k. "Minor discharge" means any discharge from a facility or activity which has not been identified as a major facility.
- l. "Municipality" means a city, county, district, association, or other public body created by or pursuant to state law and having jurisdiction over disposal of wastes, as the term is defined by subsection 2 of North Dakota Century Code section 61-28-02, or a designated and approved management agency under section 209 of the Federal Water Pollution Control Act.
- m. "National data bank" means a facility or system established or to be established by the administrator for the purposes of assembling, organizing, and analyzing data pertaining to water quality and the discharge of pollutants.
- n. "National pollutant discharge elimination system (NPDES)" means the national system for the issuance of permits under section 402 of the Federal Water Pollution Control Act of 1972 and includes any state or interstate program which has been approved by the administrator pursuant to section 402 of the Federal Water Pollution Control Act.
- o. "National pollutant discharge elimination system application" or "application" means the uniform national forms, including subsequent additions, revisions, or modifications duly promulgated by the administrator pursuant to the Federal Water Pollution Control Act, for application for a national pollutant discharge elimination system permit and any state form that has been approved for use by the administrator.
- p. "National pollutant discharge elimination system form" means any issued national pollutant discharge elimination system permit and any uniform national form developed for use in the national pollutant discharge elimination system and prescribed in regulations promulgated by the administrator and any state form that has been approved for use by the administrator.
- q. "National pollutant discharge elimination system permit" means any permit issued by the department pursuant to its authority under North Dakota Century Code section 61-28-04, and subsequent to approval by the administrator as described in subsection 5 of section 33-16-01-04.
- r. "National pollutant discharge elimination system reporting form" means the uniform national forms, including subsequent additions, revisions, or modifications duly promulgated by the administrator pursuant to the Federal Water Pollution Control Act, for reporting data and information pursuant to monitoring and other conditions

of national pollutant discharge elimination system permits and any state form that has been approved for use by the administrator.

- s. "Person" means the state or any agency or institution thereof, any municipality, political subdivision, public or private corporation, individual partnership, association, any agency or instrumentality of the United States government, or other entity, and includes any officer or governing or managing body of any municipality, political subdivision, or public or private corporation.
- t. "Pollutant" means "wastes" as defined in subsection 2 of North Dakota Century Code section 61-28-02, including dredged spoil, solid waste, incinerator residue, garbage, sewage, sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.
- u. "Refuse Act application" means the application for a permit under section 13 of the River and Harbor Act of 1899 [33 U.S.C. 407].
- v. "Regional administrator" means the regional administrator of region VIII of the environmental protection agency, which includes within its jurisdiction North Dakota.
- w. "Schedule of compliance" means a schedule of remedial measures, including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.
- x. "Toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation, or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions including malfunctions in reproduction, or physical deformations, in such organisms or their offspring.
- y. "Waters of the state" means all water included within the definitions given in subsection 6 of North Dakota Century Code section 61-28-02 or North Dakota Century Code section 61-01-01.

4. Effect of a permit.

- a. Except for any toxic effluent standards and prohibitions and standards for sewage sludge use or disposal, compliance with a

permit constitutes compliance with sections 301, 302, 307, 318, 403, and 405(a) and (b) of the Clean Water Act.

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

5. Incorporation by reference.

- a. The subchapters, parts, subparts, and appendices of title 40, Code of Federal Regulations, which are incorporated by reference into this chapter shall be treated as if they were published in full in this chapter. Unless otherwise specified, any incorporation by reference shall be as it exists on October 1, 2002.
- b. Any reference to "waters of the United States" or "waters of the U.S." in any incorporation by reference shall include "waters of the state" as defined in this section.

History: Amended effective October 1, 1989; October 1, 2002; December 1, 2004.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-01.1. Additional point sources subject to regulation.

1. The 40 Code of Federal Regulations, part 122.23, concentrated animal feeding operations, [40 CFR 122.23], as it exists on February 12, 2003, is incorporated into this chapter by reference. The department regulates livestock operations under chapter 33-16-03, including those which are not subject to this subsection.
2. The 40 Code of Federal Regulations, part 122.24, concentrated aquatic animal production facilities, [40 CFR 122.24] is incorporated into this chapter by reference.
3. The 40 Code of Federal Regulations, part 122.25, aquaculture projects, [40 CFR 122.25] is incorporated into this chapter by reference.
4. The 40 Code of Federal Regulations, part 122.26, storm water discharges, [40 CFR 122.26] is incorporated into this chapter by reference.
5. The 40 Code of Federal Regulations, part 122.27, silvicultural activities, [40 CFR 122.27] is incorporated into this chapter by reference.

History: Effective October 1, 2002; amended effective December 1, 2004.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-02. Acquisition of data.

1. Application for a national pollutant discharge elimination system permit. Any person who discharges any waste through a point source into a surface water or conducts any activity which requires a valid permit under North Dakota Century Code section 61-28-06 must file a completed national pollutant discharge elimination system application.
2. Any person who commences discharge of any waste through a point source into a surface water or conduct of any activity which requires a valid permit under North Dakota Century Code section 61-28-06 after the effective date of this chapter shall either:
 - a. File a completed national pollutant discharge elimination system application no less than one hundred eighty days prior to the day on which it is desired to commence operation of the waste disposal operation; or
 - b. File a completed national pollutant discharge elimination system application in sufficient time prior to the commencement of waste disposal operations to allow the department to ensure compliance with any applicable water quality standards and effluent standards and the requirements of sections 306 and 208(b) and (c) of the Federal Water Pollution Control Act.
3. Application requirements.
 - a. All applications must comply with 40 Code of Federal Regulations, part 122.21(f), which is incorporated into this chapter by reference.
 - b. Applications by manufacturing, commercial, mining, and silvicultural dischargers shall comply with 40 Code of Federal Regulations, part 122.21(g), which is incorporated into this chapter by reference.
 - c. Applications by manufacturing, commercial, mining, and silvicultural facilities that discharge only nonprocess wastewater shall comply with 40 Code of Federal Regulations, part 122.21(h), which is incorporated into this chapter by reference.
 - d. Applications by concentrated animal feeding operations and aquatic animal production facilities shall comply with 40 Code of Federal Regulations, part 122.21(i), as it exists on February 12, 2003, which is incorporated into this chapter by reference.
 - e. Applications from publicly owned treatment works shall comply with 40 Code of Federal Regulations, part 122.21(j), which is incorporated into this chapter by reference.

- f. Applications from new sources shall comply with 40 Code of Federal Regulations, part 122.21(k), which is incorporated into this chapter by reference.
4. The department may require whatever additional information is necessary to complete the processing of the application. No application will be processed by the department until all of the requested information is supplied and the application is complete.
5. When a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit.
6. Applicants shall keep records of all data used to complete permit applications and any supplemental information submitted with an application for a period of at least three years from the date the application is signed.

History: Amended effective October 1, 2002; December 1, 2004.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-02.1. Requests for variance.

1. Applicants for a national pollutant discharge elimination system permit may request a variance from otherwise applicable effluent limitations under the following provisions:
 - a. The 40 Code of Federal Regulations, part 122.21(m), variance requests by nonpublicly owned treatment works, [40 CFR 122.21(m)], which is incorporated into this chapter by reference;
 - b. The 40 Code of Federal Regulations, part 122.21(n), variance requests by publicly owned treatment works, [40 CFR 122.21(n)], which is incorporated into this chapter by reference; and
 - c. The 40 Code of Federal Regulations, part 122.21(o), expedited variance procedures and time extensions, [40 CFR 122.21(o)], which is incorporated into this chapter by reference.
2. The public notice for a draft permit for which a variance has been requested under section 316(a) of the Federal Water Pollution Control Act shall comply with the provisions of 40 Code of Federal Regulations, part 124.57(a), [40 CFR 124.57(a)], which is incorporated into this chapter by reference.

3. The 40 Code of Federal Regulations, part 124.62, decision on variances, [40 CFR 124.62] is incorporated into this chapter by reference.

History: Effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-03. Receipt and use of federal data.

1. The department shall receive national pollutant discharge elimination system applications and other relevant data collected by the regional administrator prior to North Dakota's participation in the national pollutant discharge elimination system. The procedure for such transmittal of data shall be set out in a formal agreement entered into by the department and the regional administrator.
2. No national pollutant discharge elimination system permits shall be issued by the department based upon any Refuse Act or national pollutant discharge elimination system application which the regional administrator has identified as incomplete or otherwise deficient until the department receives information sufficient to correct the deficiency to the satisfaction of the regional administrator.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-04. Transmission of data to the regional administrator. The department shall enter into a formal agreement with the regional administrator, setting out procedures for the following actions:

1. Transmittal to the regional administrator of a complete copy of any national pollutant discharge elimination system form received by the department.
2. Transmittal to the national data bank of a complete copy of any appropriate national pollutant discharge elimination system form received by the department.
3. Procedures for acting on the regional administrator's written waiver, if any, of the regional administrator's rights to receive copies of national pollutant discharge elimination system forms with respect to classes, types, and sizes within any category of point sources and with respect to minor discharges or discharges to particular navigable waters as such are defined by section 502(7) of the Federal Water Pollution Control Act, or parts thereof.
4. An opportunity for the regional administrator to object in writing to deficiencies in any national pollutant discharge elimination system

application or reporting form received by the regional administrator and to have such deficiency corrected. If the regional administrator's objection relates to a national pollutant discharge elimination system application, the department shall send the regional administrator any information necessary to correct the deficiency and, if the regional administrator so requests, shall not issue the national pollutant discharge elimination system permit until the department receives notice from the regional administrator that the deficiency has been corrected.

5. An opportunity for the regional administrator to identify any discharge which has a total volume of less than fifty thousand gallons [189250 liters] on every day of the year as a discharge which is not a minor discharge. If the regional administrator so identifies a discharge and notifies the department, the latter shall require the applicant for such discharge to submit additional national pollutant discharge elimination system application forms or any other information requested by the regional administrator in the regional administrator's notification to the department.
6. Procedures for the transmittal, if requested by the regional administrator, of copies of notice received by the department from publicly owned treatment works pursuant to subsection 4 of section 33-16-01-16.

General Authority: NDCC 61-28-04
Law Implemented: NDCC 61-28-04

33-16-01-05. Identity of signatories to national pollutant discharge elimination system forms.

1. Any national pollutant discharge elimination system application form or other document required to accompany the form when submitted to the department must be signed as follows:
 - a. In the case of corporations, by a principal executive officer of at least the level of vice president, or the officer's duly authorized representative, if such representative is responsible for the overall operation of the facility from which the discharge described in the national pollutant discharge elimination system form originates.
 - b. In the case of a partnership, by a general partner.
 - c. In the case of sole proprietorship, by the proprietor.
 - d. In the case of a municipal, state, federal, or other public facility, by either a principal executive officer or a ranking elected official.

2. All reports required by permits and other information requested by the department shall be signed by the person described in subsection 1 or that person's duly authorized representative. Authorization for a representative shall be submitted to the department in writing by the person described in subsection 1 and shall specify either an individual or a position having responsibility for the overall operation of the regulated facility.
3. If an authorization becomes invalid, a new authorization shall be submitted to the department prior to or together with any reports, information, or applications to be signed by an authorized representative.
4. Any person signing application forms, reports, or other information, 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."

History: Amended effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-06. Notice and public participation. In the formulation of tentative determinations and draft national pollutant discharge elimination system permits, including general permits:

1. The department will prepare a tentative staff determination, with respect to any completed national pollutant discharge elimination system application. Such tentative determinations shall include at least the following:
 - a. A proposed determination to issue or deny a national pollutant discharge elimination system permit for the discharge described in the application.
 - b. If the proposed determination is to issue a national pollutant discharge elimination system permit, the following additional tentative determinations shall be made:

- (1) Proposed effluent limitations, standards, and prohibitions, identified pursuant to section 33-16-01-13 for those pollutants proposed to be limited.
 - (2) If necessary, a proposed schedule of compliance, including interim dates and requirements, for meeting the proposed effluent limitations.
 - (3) Proposed permit conditions pursuant to sections 33-16-01-12 and 33-16-01-13.
 - (4) Proposed monitoring requirements pursuant to section 33-16-01-12.
 - (5) Proposed variances pursuant to section 33-16-01-02.1.
 - (6) A brief description of any other proposed special condition which will have a significant impact upon the discharge described in the national pollutant discharge elimination system application.
2. The department shall organize the tentative determinations prepared pursuant to subsection 1 into a draft national pollutant discharge elimination system permit for the discharge which is the subject of the application.

History: Amended effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-07. Public notice.

1. Public notice of every national pollutant discharge elimination system draft permit shall be circulated in a manner designed to inform interested and potentially interested persons of the proposed discharge and of the proposed determination to issue or deny a national pollutant discharge elimination system permit for the proposed discharge. Procedures for the circulation of public notice shall include at least the following:
 - a. Notice of a major facility permit or general permit shall be published in a daily or weekly newspaper within the area affected by the facility or activity.
 - b. Notice of all other permits shall be circulated within the geographical areas of the proposed discharge; such circulation may include any or all of the following:

- (1) Posting in the post office and public places of the municipality nearest the premises of the applicant in which the effluent source is located.
 - (2) Posting near the entrance to the applicant's premises and in nearby places.
 - (3) Publishing in local newspapers and periodicals, or, if appropriate, in a daily newspaper of general circulation.
 - (4) Any other method, including press releases, which will reasonably provide actual notice of the proposed action to the persons potentially affected.
- c. Notice shall be mailed to the following persons:
- (1) Any user identified in the permit application of a privately owned treatment works.
 - (2) Persons who are on the mailing list.
 - (3) Local governmental units which have jurisdiction over the area where the facility is proposed to be located and each state agency which has authority with respect to the facility's construction or operation.
- d. Notice, a copy of the permit application, the statement of basis or fact sheet if required by section 33-16-01-08, and the draft permit prepared pursuant to section 33-16-01-06 shall be mailed to the following persons:
- (1) The applicant, except for those national pollutant discharge elimination system general permits for which there is no applicant.
 - (2) Any other agency which is known to have issued or to be required to issue an environmental control permit for the same facility or activity.
 - (3) Federal and state agencies with jurisdiction over fish, shellfish, and wildlife resources, the advisory council on historic preservation, and the state historic preservation officers, including any affected states or Indian tribes.
 - (4) Any state agency responsible for plan development under sections 208(b)(2), 208(b)(4), and 303(e) of the Clean Water Act, the United States army corps of engineers, the United States fish and wildlife service, and the national marine fisheries service.

- e. The department shall add the name of any person or group upon request to the mailing list. The department shall also publish annually an invitation to be added to the mailing list.
2. The department shall provide a period of not less than thirty days following the date of the public notice during which time interested persons may submit their written views on the tentative determinations with respect to the national pollutant discharge elimination system application. All written comments submitted during the thirty-day comment period shall be retained by the department and considered in the formulation of its final determinations with respect to the national pollutant discharge elimination system application. The period for comment may be extended at the discretion of the department.
3. The contents of public notice of applications for a national pollutant discharge elimination system permit shall include at least the following:
 - a. Name, address, and telephone number of the agency issuing the public notice.
 - b. Name and address of each applicant and facility, except for public notices of general permits.
 - c. Brief description of each applicant's activities or operations which result in the discharge described in the national pollutant discharge elimination system application or draft general permit, e.g., municipal waste treatment plant, steel manufacturing, or drainage for mining activities.
 - d. Name of waterway to which each discharge is made and a short description of the location of each discharge on the waterway indicating whether such discharge is a new or an existing discharge. For general permits, the public notice shall include a description of the permit area.
 - e. A statement of the tentative determination to issue or deny a national pollutant discharge elimination system permit for the discharge described in the national pollutant discharge elimination system application.
 - f. A brief description of the procedures for the formulation of final determinations, including the thirty-day comment period required by subsection 2, the right to request a public hearing, and any other means by which interested persons may influence or comment upon those determinations.
9. Address and telephone number of the department, where interested persons may obtain further information or request a

copy of the draft permit prepared pursuant to section 33-16-01-06, request a copy of the fact sheet prepared pursuant to section 33-16-01-08, and inspect and copy national pollutant discharge elimination system forms and related documents.

- h. The date, time, and location of any public hearing or meeting which has been scheduled.

History: Amended effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-07.1. Response to comments. Upon issuance of any final permit, the department shall issue a response to comments which briefly describes and responds to all significant comments received during the public comment period, public hearing, or public meeting. The response shall specify each provision of the draft permit which has been changed and the reasons for each change and shall be available to the public.

History: Effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-08. Fact sheets.

1. The department shall prepare, and following public notice, shall send, upon request to any person, a fact sheet with respect to the application described in the public notice, when a draft permit is prepared in the following circumstances:
 - a. The draft permit is for a major facility or a general permit;
 - b. The draft permit incorporates a variance or requires an explanation pursuant to paragraph 3 of subdivision c of subsection 2; or
 - c. The draft permit is subject to widespread public interest or raises major issues.
2. The contents of such fact sheets shall include at least the following information:
 - a. A brief description of the facility or activity and, when appropriate, a sketch or detailed description of the location of the discharge or regulated activity described in the national pollutant discharge elimination system application.
 - b. The type and quantity of wastes, fluids, or pollutants which are proposed to be or are being discharged.

- c. The tentative determinations required under section 33-16-01-06, in addition to the following:
 - (1) A brief summary of the basis for the draft permit conditions, including references to applicable statutory or regulatory provisions.
 - (2) Any calculation or explanation of the derivation of specific effluent limitations and conditions, including a citation to the applicable effluent limitation guideline or performance standard, and reasons why they are applicable or an explanation of how the alternative effluent limitations were developed.
 - (3) When the draft permit contains limitations to control toxic pollutants, limitations on internal waste streams, limitations on indicator pollutants, or case-by-case limitations derived from technology-based treatment requirements, an explanation of the limitations' applicability.
- d. A brief citation, including a brief identification of the uses for which the receiving waters have been classified, of the water quality standards and effluent standards and limitations applied to the proposed discharge.
- e. Reasons why any requested variances or alternatives to required standards do or do not appear justified.
- f. When applicable, an explanation of the proposed method of regulating users of privately owned treatment works.
- g. A more detailed description of the procedures for the formulation of final determinations than that given in the public notice, including:
 - (1) The thirty-day comment period required by section 33-16-01-07 and the address where the comments will be received.
 - (2) Any procedures by which the public may participate in the formulation of the final determinations, including procedures for requesting a hearing pursuant to section 33-16-01-11.
- h. The name and telephone number of a person to contact for additional information.

3. The department shall add the name of any person or group upon request to a mailing list to receive copies of fact sheets.

History: Amended effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-09. Notice to government agencies. The state shall notify other appropriate government agencies of each complete application for a national pollutant discharge elimination system permit and shall provide such agencies an opportunity to submit their written views and recommendations.

1. The department shall ensure that a copy of each fact sheet prepared under the provisions of this chapter is mailed to the following parties:
 - a. Any other state whose waters might be affected by the issuance of a national pollutant discharge elimination system permit.
 - b. Any interstate agency having water quality authority over affected waters.
 - c. Any other appropriate federal, state, or local agency, including other appropriate public health agencies.
 - d. The appropriate district engineer of the United States army corps of engineers.
2. Each such governmental body listed in subsection 1 shall be given an opportunity to submit written recommendations concerning the proposed permit to the department.
 - a. Whenever a state makes recommendations concerning the proposed permit, and such recommendations are not incorporated into the final version of the permit, the department shall provide the recommending state with a written explanation for the failure to incorporate such recommendations.
 - b. Response to written comments provided by the corps of engineers during the comment period pursuant to section 33-16-01-06 shall conform to the following:
 - (1) If the corps of engineers advises that anchorage and navigation of any of the waters of the United States would be substantially impaired by the granting of a permit, the permit shall be denied and the applicant notified.
 - (2) If the corps of engineers advises that imposing specified conditions in the permit is necessary to avoid any substantial

impairment of anchorage or navigation, the department shall include the specified conditions in the permit.

- (3) Review or appeal of a permit denial or of conditions specified by the corps of engineers shall be made through the applicable procedures of the corps of engineers. If the conditions are stayed by a court of competent jurisdiction or by applicable procedures of the corps of engineers, those conditions shall be considered stayed in the national pollutant discharge elimination system permit for the duration of that stay.
- C. Whenever the United States fish and wildlife service, the national marine fisheries service, or any other state or federal agency with jurisdiction over fish, wildlife, or public health makes recommendations of specified permit conditions necessary to avoid substantial impairment of fish, shellfish, or wildlife resources, the department may include the specified conditions in the permit to the extent necessary to carry out the provisions of 40 Code of Federal Regulations, part 122.49, and of the Clean Water Act.
3. In appropriate cases, the department may consult with the United States corps of engineers or the United States fish and wildlife service before issuing a draft permit. The department may reflect these agencies' views in the statement of basis, the fact sheet, or the draft permit.
4. The department may enter into a written agreement with the appropriate district engineer of the United States army corps of engineers to provide for procedures which will ensure the transmission of all forms and information required by the corps, and procedures for the recording of any comment or objections the corps may have on a proposed permit. A copy of the agreement, if promulgated, shall be forwarded to the regional administrator.

History: Amended effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-10. Public access to information. In addition to the provisions of section 33-16-01-07, the department shall provide the following:

1. Facilities for the public inspection of all information relating to national pollutant discharge elimination system forms, including monitoring data, and a machine or device for the copying of those papers and documents at a reasonable fee.
2. A copy of any request for the confidential treatment of any information relating to a North Dakota pollutant discharge elimination system permit

application to the regional administrator, together with all information related to such request.

3. If the department determines that certain information should be accorded confidential status for reason of being a trade secret, it shall disclose such information to the administrator upon the latter's request; the administrator shall maintain the disclosed information in confidence, unless the administrator determines that such information, if made public, would not divulge methods or processes entitled to protection as trade secrets.
4. Information required by national pollutant discharge elimination system application forms may not be claimed confidential. This includes information submitted on the forms and any attachments used to supply information required by the form. In no case shall the name and address of any applicant or permittee, permit applications, permits, or effluent data be considered confidential by the department.

History: Amended effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-11. Hearings and notice.

1. A national pollutant discharge elimination system applicant, any affected state, any affected interstate agency, any affected country, the regional administrator, or any interested agency, person, or group of persons may request or petition the department for a public hearing with respect to national pollutant discharge elimination system applications. Any such request or petition for public hearing shall be filed in writing within the thirty-day period prescribed in subsection 2 of section 33-16-01-07 and shall indicate the interest of the person filing such request and the reasons why a hearing is warranted.
2. The department shall hold a hearing if it determines that there is a significant public interest, including the filing of requests or petitions for such hearing, in holding such a hearing. The department may also hold a hearing at its discretion for any other reason. Any hearing brought pursuant to this subsection shall be held in the geographical area of the proposed discharge or other appropriate area, in the discretion of the department and may, as appropriate, consider related groups of permit applications.
3. Public notice of any hearing held under this section shall be circulated at least as widely as was the notice of the national pollutant discharge elimination system application pursuant to section 33-16-01-07. Procedures for the circulation of public notice for hearings held under this section shall include at least the following:

- a. Notice shall be published in at least one newspaper of general circulation within the geographical area of the discharge.
 - b. Notice shall be sent to all persons and government agencies which received a copy of the notice or the fact sheet for the national pollutant discharge elimination system application.
 - c. Notice shall be mailed to any person or group upon request.
 - d. Notice shall also be given to all persons who submitted comments on the proposed national pollutant discharge elimination system permit pursuant to section 33-16-01-07.
 - e. Notice shall be effected pursuant to subdivision a at least thirty days in advance of the hearing.
4. The contents of public notice of any hearing held pursuant to this section shall include at least the following:
- a. Name, address, and telephone number of the agency holding the public hearing.
 - b. Name and address of each applicant whose application will be considered at the hearing, except in the case of draft general permits.
 - c. A brief description of the business conducted at the facility of the activity described in the permit application or draft permit.
 - d. Name of waterway to which each discharge is made and a short description of the location of each discharge on the waterway.
 - e. A reference to the date of previous public notices relating to the permit.
 - f. Information regarding the date, time, and location for the hearing.
 - g. The purpose of the hearing.
 - h. A concise statement of the issues raised by the persons requesting the hearing.
 - i. Address and telephone number of the premises at which interested persons may obtain further information, request a copy of each draft national pollutant discharge elimination system permit prepared pursuant to section 33-16-01-06, request a copy of each fact sheet prepared pursuant to section 33-16-01-08, and inspect

and copy national pollutant discharge elimination system forms and related documents.

- j. A brief description of the nature of the hearing, including the rules and procedures to be followed.

History: Amended effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-12. Terms and conditions of national pollutant discharge elimination system permits.

1. The following discharges into the waters of the state are prohibited:
 - a. Any radiological, chemical, or biological warfare agent or high-level radioactive waste.
 - b. Any discharge into the navigable waters that the secretary of the army acting through the chief of engineers finds would substantially impair anchorage and navigation.
 - c. Any discharge to which the regional administrator has objected in writing.
 - d. Any discharge from a point source which is in conflict with a plan or amendment thereto approved pursuant to section 208(b) of the Federal Water Pollution Control Act.
 - e. Any discharge requiring certification under section 401 of the Federal Water Pollution Control Act and 40 Code of Federal Regulations, part 124.53, for which the department has neither granted nor waived the certification.
 - f. Any discharge from a new source or new discharger which causes or contributes to the violation of applicable water quality standards, unless the owner or operator of the new source or new discharger demonstrates that:
 - (1) The existing dischargers to the stream segment are subject to compliance schedules designed to bring the stream segment into compliance; and
 - (2) Remaining pollutant load allocations are sufficient to allow for the discharge.
2. All national pollutant discharge elimination system permits shall contain, either expressly or by reference, the permit conditions listed in

40 Code of Federal Regulations, part 122.41, [40 CFR 122.41], which is incorporated into this chapter by reference.

3. National pollutant discharge elimination system permits shall contain all applicable permit conditions listed in 40 Code of Federal Regulations, part 122.42, [40 CFR 122.42], as it exists on February 12, 2003, which is incorporated into this chapter by reference.
4. National pollutant discharge elimination system permit conditions shall be established in compliance with 40 Code of Federal Regulations, part 122.43, [40 CFR 122.43], which is incorporated into this chapter by reference.
5. National pollutant discharge elimination system permits shall include requirements for recording and reporting of monitoring results in compliance with 40 Code of Federal Regulations, part 122.48, [40 CFR 122.48], which is incorporated into this chapter by reference.

History: Amended effective October 1, 2002; December 1, 2004.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-13. Application of effluent standards and limitations, water quality standards, and other requirements. All of the terms and conditions of any permit issued by the department will comply with the following requirements whenever applicable:

1. Effluent limitations as incorporated by reference in sections 33-16-01-30 and 33-16-01-31.
2. Standards of performance for new sources as incorporated by reference in section 33-16-01-31.
3. Effluent standards or prohibitions for toxic pollutants as incorporated by reference in section 33-16-01-29.
4. Pretreatment standards for the introduction of pollutants into treatment works as incorporated by reference in section 33-16-01-31.
5. Water quality standards, classifications, or effluent requirements established pursuant to North Dakota Century Code sections 61-28-04 and 61-28-05 if such standards and requirements are more stringent than those described in subsections 1 through 4.
6. Water quality standards and total maximum daily loads established pursuant to the authority and guidelines specified in the Federal Water Pollution Control Act and properly transmitted to the department.

7. Prior to the adoption of effluent limitations and standards by the administrator under the Federal Water Pollution Control Act, any such additional conditions as the department determines are necessary to carry out the provisions of that Act.
8. Any applicable regulations promulgated by the secretary of the department in which the coast guard is operating regulating the discharge of pollutants from vessels.
9. Any more stringent legally applicable requirements necessary to comply with a plan approved pursuant to section 208(b) of the Federal Water Pollution Control Act.
10. When an issued national pollutant discharge elimination system permit applies the effluent standards and limitations described in subsections 1 through 4, the department must state that the discharge authorized by the permit will not violate applicable water quality standards and must have prepared some explicit verification of that statement.
11. When an issued national pollutant discharge elimination system permit applies any more stringent effluent limitation based upon applicable water quality standards, a waste load allocation must be prepared to ensure that the discharge authorized by the permit is consistent with applicable water quality standards.
12. National pollutant discharge elimination system permits shall include limitations, standards, and other permit conditions in compliance with the requirements of 40 Code of Federal Regulations, part 122.44, [40 CFR 122.44], which is incorporated into this chapter by reference.

History: Amended effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-14. Effluent limitations in issued national pollutant discharge elimination system permits.

1. Any permit issued by the department shall specify average and maximum daily quantitative limitations for the level of pollutants in the authorized discharge in terms of weight or some other appropriate measure such as pH, temperature, or radiation. When it is at all appropriate the requirement is that the discharge must be expressed in terms of weight. The department may also impose additional quantitative limitations in terms of average or maximum concentration levels.
2. When applicable, permit conditions in national pollutant discharge elimination system permits shall be calculated in compliance with the

requirements of 40 Code of Federal Regulations, part 122.45, [40 CFR 122.45], which is incorporated into this chapter by reference.

3. The effluent quality for municipal wastes shall be that required by the department and shall be based on the following:
 - a. Municipal wastes shall receive a minimum of secondary treatment or equivalent in compliance with 40 Code of Federal Regulations, part 133, [40 CFR 133], which is incorporated by reference in section 33-16-01-30.
 - b. Wastes shall be effectively disinfected before discharge into state waters if such discharges cause violation of the bacteria criteria as set forth in the standards of water quality for the state of North Dakota, chapter 33-16-02.1. The effluent shall meet the water quality criteria for bacteria except as provided in subdivision c.
 - c. The effluent limitations specified under secondary treatment and bacteria criteria may be adjusted to reflect site-specific considerations as provided in the following:
 - (1) A five-day biochemical oxygen limit of twenty-five milligrams per liter (consecutive thirty-day average) may be applied in instances in which limits expressed in terms of secondary treatment standards would be impractical or deemed inappropriate to protect receiving waters.
 - (2) In certain instances, external circumstances or specific uses of the receiving waters make either attainment or application of the suspended solids or bacteria limitations an ineffective means of controlling water quality. For this reason, the department reserves the right to evaluate the application of these limitations on a case-by-case basis.
 - (3) The pH of natural ground waters and surface waters in some parts of the state (presently used for water supplies with or without treatment) are basic, and the stabilization process of wastewater treatment in lagoon systems can result in more alkaline (increased pH) water. Discharges from waste treatment facilities may exceed the upper pH limit of 9.0 provided in the secondary treatment standard due to these uncontrollable properties. Approval to discharge may be granted, providing the pH of the receiving water is not violated.
 - d. The department may require treatment in addition to that listed in this section if such waste discharges, made during low streamflows, cause violations of stream water quality standards or

have a detrimental effect on the beneficial uses of the receiving waters.

4. Industrial waste effluents shall meet all parameters of quality as set forth in section 33-16-01-13 and shall not violate North Dakota water quality standards.

History: Amended effective October 1, 2002; December 1, 2004.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-15. Schedules of compliance in issued national pollutant discharge elimination system permits.

1. With respect to any discharge which is not in compliance with applicable effluent standards and limitations, water quality standards, or other requirements listed in section 33-16-01-13, the permittee shall be required to take specific steps to achieve compliance with such applicable effluent standards and limitations, water quality standards, or other requirements:
 - a. In accordance with any applicable schedule of compliance contained in:
 - (1) Applicable effluent standards and limitations;
 - (2) If more stringent, water quality standards; or
 - (3) If more stringent, requirements listed in section 33-16-01-13; or
 - b. In the absence of any applicable schedule of compliance, within a reasonable period of time, as provided in subsection 13 of North Dakota Century Code section 61-28-04; provided, that such period shall be consistent with the guidelines and requirements of the Federal Water Pollution Control Act.
2. A permit issued to a new source, new discharger, or recommencing discharger may contain a compliance schedule, but only when necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three years before commencement or recommencement of the discharge. For a new source or new discharger, such requirements must also have been issued or revised prior to commencement of construction.
3. When the period of time for compliance specified in subsection 1 exceeds nine months, a schedule of compliance shall be specified in the permit which will set forth interim requirements and the dates for their achievement; in no event shall more than nine months elapse

between interim dates. If the time necessary for the completion of the interim requirements, such as the construction of a treatment facility, is more than nine months and is not readily divided into stages for completion, interim dates shall be specified for the submission of reports of progress toward completion of the interim requirement. For each national pollutant discharge elimination system permit schedule of compliance, interim dates and the final date for compliance shall, to the extent practicable, fall on the last day of the months of March, June, September, and December.

4. Either before or up to fourteen days following each interim date and the final date of compliance, the permittee shall provide the department with written notice of the permittee's compliance or noncompliance with the interim or final requirement.
5. On the last day of the months of February, May, August, and November, the department shall transmit to the regional administrator a list of all instances, as of thirty days prior to the date of such report, of failure or refusal of a permittee to comply with an interim or final requirement or to notify the department of compliance or noncompliance with each interim or final requirement of this section. Such list shall be available to the public for inspection and copying and shall contain at least the following information with respect to each instance of noncompliance:
 - a. Name and address of each noncomplying permittee.
 - b. A short description of each instance of noncompliance.
 - c. A short description of any actions or proposed actions by the permittee or department to comply or enforce compliance with the interim or final requirement.
 - d. Any details which tend to explain or mitigate an instance of noncompliance with an interim or final requirement.
6. If a permittee fails or refuses to comply with an interim or final requirement in a national pollutant discharge elimination system permit, such noncompliance shall constitute a violation of the permit for which the department may modify, suspend, or revoke the permit or take direct enforcement action.

History: Amended effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-16. Other terms and conditions of issued national pollutant discharge elimination system permits.

1. All discharges authorized by the national pollutant discharge elimination system permit shall be consistent with the terms and conditions of the permit; that facility expansions, production increases, or process modifications which result in new or increased discharge of pollutants must be reported by submission of a new national pollutant discharge elimination system application or, if such discharge does not violate effluent limitations specified in the national pollutant discharge elimination system permit, by submission to the department of notice of such new or increased discharges of pollutants; that the discharges of any pollutant more frequently than or at a level in excess of that identified and authorized by the permit shall constitute a violation of the terms and conditions of the permit.
2. A permit may be transferred by the permittee to a new owner or operator in either of the following ways:
 - a. The current permittee may request that the department modify or revoke and reissue the permit to identify the new permittee, and incorporate any other requirements as may be necessary under the Federal Water Pollution Control Act; or
 - b. The current permittee may notify the department in writing at least thirty days in advance of the proposed transfer date. The notice shall include a written agreement between the current and new permittees containing a specific date of transfer of permit responsibility, coverage, and liability between them. Unless the department notifies the current permittee that the permit will be transferred by modification or revocation and reissuance, the transfer will be effective on the date specified in the agreement.
3. A permit may be modified, suspended, or revoked in whole or in part during its term, or denied renewal, for cause, including the following:
 - a. Violation of any terms or conditions of the permit.
 - b. Obtaining a permit by misrepresentation or failure to disclose fully all relevant facts.
 - c. A change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge.
 - d. A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification, suspension, or revocation.

- e. If the department receives notice of a proposed permit transfer, the permit may be modified or revoked and reissued, but may not be suspended or denied renewal unless other cause exists.
4. The permittee shall permit an authorized representative of the department upon presentation of the representative's credentials:
- a. To enter upon permittee's premises in which an effluent source is located or in which any records are required to be kept under terms and conditions of the permit.
 - b. To have access to and copy any records required to be kept under terms and conditions of the permit.
 - c. To inspect any monitoring equipment or method required in the permit.
 - d. To sample any discharge of pollutants.
5. Publicly owned treatment works shall provide notice to the department in the following situations:
- a. Any new introduction of pollutants into such treatment works from a new source, if such source would be subject to the provisions of section 306 of the Federal Water Pollution Control Act and if such source was discharging such pollutants.
 - b. Except as to such categories and classes of point sources or discharges specified by the department, any new introduction of pollutants into such treatment works from a source which would be subject to the Act if such source were discharging pollutants.
 - c. Any substantial change in volume or character of pollutants being introduced into such treatment works by a source introducing pollutants into such works at the time of issuance of the permit.
- Such notice shall include information on (a) the quality and quantity of effluent to be introduced into such treatment works and (b) any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works.
- d. If the permit is for a discharge from a publicly owned treatment works, the permittee shall require any industrial user of such treatment works to comply with the requirements of sections 204(b), 307, and 308 of the Federal Water Pollution Control Act. As a means of ensuring such compliance, the permittee shall require of each industrial user subject to the requirements of

section 307 of that Act and shall forward a copy to the department periodic notice over intervals not to exceed nine months of progress toward full compliance with section 307 requirements.

- e. The permittee at all times shall maintain in good working order and operate as efficiently as possible any facilities or systems of control installed by the permittee to achieve compliance with the terms and conditions of the permit.
- f. If a toxic effluent standard or prohibition is established pursuant to section 307 of the Federal Water Pollution Control Act for a toxic pollutant which is present in the permittee's discharge, and if such standard or prohibition is more stringent than any limitation upon such pollutant in the national pollutant discharge elimination system permit, the department shall revise or modify the permit in accordance with such toxic effluent standard or prohibition and so notify the permittee.

History: Amended effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-17. Transmission to regional administrator of proposed national pollutant discharge elimination system permits. The department shall ensure that the regional administrator is provided with copies of all national pollutant discharge elimination system permits that are proposed to be issued by the department. Such procedures shall provide for at least the following:

- 1. Except as waived pursuant to subsection 4, the transmission by the department of any and all terms, conditions, requirements, or documents which are a part of the proposed permit or which affect the authorization by the proposed permit of the discharge of pollutants.
- 2. A period of time (up to ninety days) in which the regional administrator, pursuant to any right to object provided in section 402(d)(2) of the Federal Water Pollution Control Act, may comment upon, object to, or make recommendations with respect to the proposed permit.
- 3. Procedures for the department's acceptance or rejection of a written objection by the regional administrator.
- 4. Any written waiver by the regional administrator of the regional administrator's rights to receive, review, object to, or comment upon proposed national pollutant discharge elimination system permits for classes, types, or sizes within any category of point sources.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-18. Transmission to regional administrator of issued national pollutant discharge elimination system permits. A copy of every national pollutant discharge elimination system permit issued by the department will be sent to the regional administrator immediately following issuance along with any and all terms, conditions, requirements, or documents which are a part of such permit or which affect the authorization by the permit of the discharge of pollutants.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-19. Duration and review of national pollutant discharge elimination system permits. The 40 Code of Federal Regulations, part 122.46, "duration of permits" is incorporated into this chapter by reference.

1. Every permit issued by the department shall have a fixed term not to exceed five years. When the permittee has complied with section 33-16-01-20, but the department, through no fault of the permittee, fails to issue a new permit prior to the expiration of the previous permit, the department may extend the expired permit until the permit is reissued. Permits extended under this section remain fully effective and enforceable.
2. The department may issue any permit for a duration that is less than five years.

History: Amended effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-20. Reissuance of national pollutant discharge elimination system permits.

1. Any permittee who wishes to continue to discharge after the expiration date of the permittee's permit must file for reissuance of the permittee's permit at least one hundred eighty days prior to its expiration.
2. The request for reissuance of a permit shall be in letter form and contain, as a minimum, the following:
 - a. The permit number and date of issue.
 - b. Any past, present, or future changes in the effluent quantity or quality not reflected in the present permit conditions.
3. The department will review each permit to ensure that the following conditions exist:
 - a. The permittee is in compliance with or has substantially complied with all the terms, conditions, requirements, and schedules of

compliance of the expired national pollutant discharge elimination system permit.

- b. The department has up-to-date information on the permittee's production levels, permittee's waste treatment practices, nature, contents, and frequency of permittee's discharge, either pursuant to the submission of new forms and applications or pursuant to monitoring records submitted to the department by the permittee.
- c. The discharge is consistent with applicable effluent standards and limitations, water quality standards, and other legally applicable requirements listed in section 33-16-01-13, including any additions to, or revisions or modifications of, such effluent standards and limitations, water quality standards, or other legally applicable requirements during the term of the permit.
- d. The notice and public participation procedures set out in section 33-16-01-06 shall be followed for every reissuance under this chapter.
- e. Notwithstanding any other provision in this chapter, any point source the construction of which is commenced after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972 and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of the federal Internal Revenue Code of 1954, whichever period ends first.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-21. Monitoring, recording, and reporting.

- 1. Any discharge authorized by a national pollutant discharge elimination system permit may be subject to such monitoring requirements as may be reasonably required by the department pursuant to its authority under subsection 10 of North Dakota Century Code section 61-28-04.
- 2. Any discharge authorized by a national pollutant discharge elimination system permit which (a) is not a minor discharge, and (b) the regional administrator requests, in writing, be monitored, or (c) contains toxic pollutants for which an effluent standard has been established by the administrator pursuant to section 307(a) of the Act shall be monitored by the permittee for at least the following:
 - a. Flow (in gallons per day).

b. All of the following pollutants:

- (1) Pollutants (either directly or indirectly through the use of accepted correlation coefficients or equivalent measurements) which are subject to reduction or elimination under the terms and conditions of the permit.
 - (2) Pollutants which the director finds, on the basis of information available to the director, could have a significant impact on the quality of navigable waters.
 - (3) Pollutants specified by the administrator, in regulations issued pursuant to the Federal Water Pollution Control Act as subject to monitoring.
 - (4) Any pollutants in addition to the above which the regional administrator requests, in writing, be monitored.
3. Each effluent flow or pollutant required to be monitored pursuant to subsection 2 shall be monitored at intervals sufficiently frequent to yield data which reasonably characterizes the nature of the discharge of the monitored effluent flow or pollutant. Variable effluent flows and pollutant levels may be monitored at more frequent intervals than relatively constant effluent flows and pollutant levels which may be monitored at less frequent intervals.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-22. Recording of monitoring activities and results.

1. The results of any monitoring activity required pursuant to section 33-16-01-21 and subsection 10 of North Dakota Century Code section 61-28-04 shall be recorded and maintained for a period of not less than three years. This period of retention shall be extended during the course of any unresolved litigation regarding the discharge of pollutants by the permittee or when requested by the department or the regional administrator.
2. Any records of monitoring activities and results shall include for all samples:
 - a. The date, exact place, and time of sampling.
 - b. The date analyses were performed.
 - c. Who performed the analyses.
 - d. The analytical techniques or methods utilized.

- e. The results of such analysis.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-23. Reporting of monitoring results. Monitoring results obtained by a permittee shall be reported to the department in accordance with a reporting schedule prescribed by the department in the national pollutant discharge elimination system permit. In no case shall the required frequency of reporting be less than on an annual basis. Reports shall be submitted on the proper national pollutant discharge elimination system reporting form which will be supplied to the permittee by the department.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-24. Enforcement. The department shall evaluate all reports, notifications, and data submitted by a permittee in compliance with this chapter and shall investigate and follow up all apparent violations for possible enforcement action pursuant to North Dakota Century Code section 61-28-08. All such information received by the department, if forwarded to the regional administrator pursuant to the requirements of this chapter, shall constitute information available to the administrator for purposes of section 309 of the Federal Water Pollution Control Act.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-25. Modification, suspension, and revocation of national pollutant discharge elimination system permits.

1. The department may modify, suspend, or revoke any national pollutant discharge elimination system permit in whole or in part during its term for cause including, but not limited to, the causes listed in subsection 2 of section 33-16-01-16, or for failure or refusal of the permittee to carry out the requirements of subsection 3 of section 33-16-01-16.
2. The 40 Code of Federal Regulations, part 122.62(a), causes for modification, [40 CFR 122.62(a)] is incorporated into this chapter by reference.
3. Any such modification, suspension, or revocation by the department shall be governed by the procedures outlined in North Dakota Century Code section 61-28-07, and the following procedures:
 - a. Permit actions may be undertaken at the request of any interested person or upon the department's initiative. Permits may be modified, suspended, or revoked and reissued only for the reasons specified in subsections 1, 2, and 4.

- b. If the department tentatively decides to modify or revoke and reissue a permit, a draft permit incorporating the proposed changes shall be prepared pursuant to section 33-16-01-06. The department may request additional information from the permittee. If the permit is to be modified, the department may require the submission of an updated application. If the permit is to be revoked and reissued, the permittee shall submit a new application.
 - c. In a permit modification, only those conditions to be modified shall be reopened when the draft permit is prepared. All other aspects of the existing permit shall remain in effect for the duration of the unmodified permit. When a permit is revoked and reissued, the entire permit is reopened, but the permittee shall comply with all conditions of the existing permit until a new final permit is issued.
 - d. If the department tentatively decides to suspend a permit under subsection 3 of section 33-16-01-16, a notice of intent to terminate, a type of draft permit, shall be issued. The notice of intent to terminate shall be prepared pursuant to section 33-16-01-06.
- 4. The 40 Code of Federal Regulations, part 122.63, minor modifications of permits, [40 CFR 122.63] is incorporated into this chapter by reference. Such modifications are not subject to subsection 3.
 - 5. The department may, upon request of the permittee, revise or modify a schedule of compliance in an issued national pollutant discharge elimination system permit if it determines good and valid cause, such as an act of God, strike, flood, materials shortage, or other event over which the permittee has little or no control, exists for such revision and if within thirty days following receipt of notice from the department, the regional administrator does not object in writing. All revisions or modifications made pursuant to this section during the period ending thirty days prior to the date of transmission of such list shall be included in the list prepared by the director pursuant to subsection 4 of section 33-16-01-15.

History: Amended effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-26. Disposal of pollutants into wells, into publicly owned treatment works, or by land application.

- 1. Disposal of pollutants into wells that affect the waters of the state is prohibited, except as provided under an underground injection control authorization pursuant to chapter 33-25-01, or as provided in applicable regulations of the state industrial commission. Any permit issued for the disposal of pollutants into wells shall be issued in accordance with the procedures and requirements specified in the applicable regulations.

2. When part of a discharger's process wastewater is not subject to a national pollutant discharge elimination system permit because it is being disposed into a well, into a publicly owned treatment works, or by land application, applicable effluent standards and limitations shall be adjusted to reflect the reduced waste load. Permit effluent standards and limitations shall be calculated by one of the following methods:
 - a. 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 from that process shall be eliminated from the permit limit calculations.
 - b. In all other cases, effluent limitations shall be adjusted proportionally to the amount of wastewater to be diverted from discharge into waters of the state. Effluent limitations and standards may be further adjusted under subsection 4 of section 33-13-01-32 if the character or treatability of the pollutants is changed by the alternative disposal method.
 - c. Subdivisions a and b do not apply to the extent that promulgated effluent limitations guidelines control concentrations of pollutants but not mass or specify a different specific technique for adjusting effluent limitations to account for well injection, land application, or disposal into publicly owned treatment works.
3. This section shall not alter a discharger's obligation to comply with any more stringent applicable requirements in this chapter.

History: Amended effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-26.1. General permits.

1. **Coverage.** The department may issue a general permit in accordance with the following:
 - a. **Area.** The general permit will be written to cover a category of discharges described in the permit under subdivision b, except those covered by individual permits, within a designated area. The area will correspond to existing geographic or political boundaries or any other appropriate division or combination of boundaries.
 - b. **Sources.** The general permit may be written to regulate, within the designated area as described in subdivision a, categories of point sources if the sources all:
 - (1) Involve the same or substantially similar types of operations;

- (2) Discharge the same types of wastes;
 - (3) Require the same effluent limitations or operating conditions;
 - (4) Require the same or similar monitoring; and
 - (5) In the opinion of the department, are more appropriately controlled under a general permit than under individual permits.
- c. Storm water. The general permit may be written to regulate storm water point sources within the designated area as described in subdivision a.

2. Administration.

- a. General permits may be issued, modified, revoked and reissued, or terminated in accordance with applicable requirements of chapter 33-16-01.
- b. Requiring an individual permit.
 - (1) The department may require any person authorized by a general permit to apply for and obtain an individual North Dakota pollutant discharge elimination system permit. Any interested person may petition the director to take action under this paragraph. Cases when an individual North Dakota pollutant discharge elimination system permit may be required include the following:
 - (a) The discharge is a significant contributor of pollution as determined by the factors set forth in chapter 33-16-01;
 - (b) The discharger is not in compliance with the conditions of the general North Dakota pollutant discharge elimination system permit;
 - (c) A change has occurred in the availability of demonstrated technology or practices for the control or abatement of pollutants applicable to the point source;
 - (d) Effluent limitation guidelines are promulgated for point sources covered by the general North Dakota pollutant discharge elimination system permit;
 - (e) A North Dakota water quality management plan containing requirements applicable to such point sources is approved;

(f) Circumstances have changed since the time of the request to be covered so that the discharger is no longer appropriately controlled under the general permit or either a temporary or permanent reduction or elimination of the authorized discharge is necessary; or

(g) The requirements of subsection 1 are not met.

(2) 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 section 33-16-01-02 to the department with reasons supporting the request. The request must be submitted no later than ninety days after the notice by the department in accordance with section 33-16-01-07. The request must be processed under chapter 33-16-01. If the reasons cited by the owner or operator are adequate to support the request, the department may issue an individual permit.

(3) When an individual North Dakota pollutant discharge elimination system permit is issued to an owner or operator otherwise subject to a general North Dakota pollutant discharge elimination system permit, the applicability of the general permit to the individual North Dakota pollutant discharge elimination system permittee is automatically terminated on the effective date of the individual permit.

(4) A permittee, excluded from a general permit solely because the permittee already has an individual permit, may request that the individual permit be revoked. The permittee shall then request to be covered by the general permit. Upon revocation of the individual permit, the general permit shall apply to the source.

3. **Federal requirements.** The 40 Code of Federal Regulations, part 122.28, general permits, [40 CFR 122.28], as it exists on February 12, 2003, is incorporated into this chapter by reference.

History: Effective October 1, 1989; amended effective October 1, 2002; December 1, 2004.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-27. Other requirements - Conflicts of interest. Conflicts of interest shall comply with 40 Code of Federal Regulations, part 123.25(c), which is incorporated into this chapter by reference.

History: Amended effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-28. Appeal. Any person who has received notice of the final determination of the department to deny, suspend, or revoke the applicant's or permittee's national pollutant discharge elimination system application or permit shall have a right to petition the department for relief pursuant to North Dakota Century Code section 61-28-07.

History: Amended effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-29. Toxic pollutant effluent standards. The 40 Code of Federal Regulations, part 129, [40 CFR 129] is incorporated into this chapter by reference.

History: Effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-30. Secondary treatment regulations. The 40 Code of Federal Regulations, part 133, [40 CFR 133] is incorporated into this chapter by reference.

History: Effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-31. Effluent guidelines and standards. The 40 Code of Federal Regulations, subchapter N, with the exception of part 403, as it exists on February 12, 2003, is incorporated into this chapter by reference.

History: Effective October 1, 2002; amended effective December 1, 2004.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-01-32. Criteria and standards for the national pollutant discharge elimination system.

1. The 40 Code of Federal Regulations, part 125, subpart A - criteria and standards for imposing technology-based treatment requirements under sections 301(b) and 402 of the Act [40 CFR 125, subpart A] is incorporated into this chapter by reference.

2. The 40 Code of Federal Regulations, part 125, subpart B - criteria for issuance of permits to aquaculture projects [40 CFR 125, subpart B] is incorporated into this chapter by reference.
3. The 40 Code of Federal Regulations, part 125, subpart D - criteria and standards for determining fundamentally different factors under sections 301(b)(1)(A) and 301(b)(2)(A) and (E) of the Act [40 CFR 125, subpart D] is incorporated into this chapter by reference.
4. The 40 Code of Federal Regulations, part 125, subpart H - criteria for determining alternative effluent limitations under section 316(a) of the Act [40 CFR 125, subpart H] is incorporated into this chapter by reference.
5. The 40 Code of Federal Regulations, part 125, subpart I - criteria applicable to cooling water intake structures under section 316(b) of the Act [40 CFR 125, subpart I] is incorporated into this chapter by reference.
6. The 40 Code of Federal Regulations, part 125, subpart L - criteria and standards for imposing conditions for the disposal of sewage sludge under section 405 of the Act [40 CFR 125, subpart L] is incorporated into this chapter by reference.

History: Effective October 1, 2002.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

CHAPTER 33-16-03.1
CONTROL OF POLLUTION FROM ANIMAL FEEDING OPERATIONS

Section	
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33-16-03.1-01. Authority. The North Dakota state department of health has been authorized to provide and administer this chapter relating to the control of pollution from animal feeding operations under the provisions of North Dakota Century Code section 61-28-04.

History: Effective December 1, 2004.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-03.1-02. Scope and purpose. This chapter establishes procedures governing the application for, and the issuance, denial, modification, and revocation of, permits for animal feeding operations to maintain beneficial uses of and prevent degradation of quality of the waters of the state.

History: Effective December 1, 2004.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-03.1-03. Definitions. As used in this chapter, unless the context otherwise indicates:

1. "Animal feeding operation" means a lot or facility, other than an aquatic animal production facility, where the following conditions are met:
 - 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 days or more in any twelve-month period; and
 - 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.

2. "Bedding material" means an absorbent substance applied to dirt or concrete flooring systems, including wood shavings, wood chips, sawdust, shredded paper, cardboard, hay, straw, hulls, sand, and other similar, locally available materials.
3. "Best management practices" means schedules of activities, prohibitions of practices, conservation practices, maintenance procedures, and other management strategies to prevent or reduce the pollution of waters of the state. Best management practices also include treatment requirements, operating procedures, and practices to control production area and land application area runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.
4. "Concentrated animal feeding operation" means an animal feeding operation that is defined as a large concentrated animal feeding operation, as a medium concentrated animal feeding operation, or is a small or other type of animal feeding operation designated as a concentrated animal feeding operation in accordance with section 33-16-03.1-04. For purposes of determining animal numbers, two or more feeding operations under common ownership are considered 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. All concentrated animal feeding operations are required to obtain a North Dakota pollutant discharge elimination system permit pursuant to chapter 33-16-01.
5. "Department" means the North Dakota state department of health.
6. "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.
7. "Earthen storage pond" or "pond" means a topographic depression either below or above ground level, manmade excavation, or diked area formed primarily of earthen materials, although it may be lined with manmade materials or other seepage control materials, and used to store manure or process wastewater and runoff from the production area of a livestock facility.
8. "Engineer" means a professional engineer registered to practice in the state of North Dakota.
9. "Facility or livestock facility" has the same meaning as animal feeding operation or concentrated animal feeding operation.
10. "General permit" means a general North Dakota pollutant discharge elimination system permit or a general state animal feeding operation permit. This is a permit issued to cover multiple facilities of the same

or similar type, without requiring each facility to be covered under an individual permit.

11. "Large concentrated animal feeding operation" means any animal feeding operation that stables or confines as many as or more than the numbers of animals specified in any of the following categories:
 - a. Seven hundred mature dairy cows, whether milked or dry;
 - b. One thousand veal calves;
 - c. One thousand cattle other than mature dairy cows or veal calves. For purposes of this subdivision, "cattle" includes heifers, steers, bulls, and cow-calf pairs;
 - d. Two thousand five hundred swine, each weighing fifty-five pounds [24.95 kilograms] or more;
 - e. Ten thousand swine, each weighing less than fifty-five pounds [24.95 kilograms];
 - f. Five hundred horses;
 - g. Ten thousand sheep or lambs;
 - h. Fifty-five thousand turkeys;
 - i. Thirty thousand laying hens or broilers, if the animal feeding operation uses a liquid manure handling system;
 - j. One hundred twenty-five thousand chickens, other than laying hens, if the animal feeding operation uses other than a liquid manure handling system;
 - k. Eighty-two thousand laying hens, if the animal feeding operation uses other than a liquid manure handling system;
 - l. Thirty thousand ducks, if the animal feeding operation uses other than a liquid manure handling system; or
 - m. Five thousand ducks, if the animal feeding operation uses a liquid manure handling system.
12. "Litter" means a mixture of fecal material, urine, animal bedding material, and sometimes waste feed.
13. "Manure" or "livestock manure" means fecal material and urine, animal-housing wash water, bedding material, litter, compost, rainwater,

or snowmelt that comes in contact with fecal material and urine, and raw or other materials commingled with fecal material and urine or set aside for disposal.

14. "Manure handling system" means all of the water pollution control structures used at the production area of a livestock facility.
15. "Manure storage pond" means an earthen storage pond that stores liquid manure and process wastewater from indoor confined animal feeding operations.
16. "Manure storage structure" means any water pollution control structure used to contain or store manure or process wastewater. It includes earthen manure storage ponds; runoff ponds; concrete, metal, plastic, or other tanks; and stacking facilities.
17. "Medium animal feeding operation" means any animal feeding operation that stables or confines the numbers of animals specified within any of the following ranges:
 - a. Two hundred to six hundred ninety-nine mature dairy cows, whether milked or dry;
 - b. Three hundred to nine hundred ninety-nine veal calves;
 - c. Three hundred to nine hundred ninety-nine cattle other than mature dairy cows or veal calves. For purposes of this subdivision, "cattle" includes heifers, steers, bulls, and cow-calf pairs;
 - d. Seven hundred fifty to two thousand four hundred ninety-nine swine, each weighing fifty-five pounds [24.95 kilograms] or more;
 - e. Three thousand to nine thousand nine hundred ninety-nine swine, each weighing less than fifty-five pounds [24.95 kilograms];
 - f. One hundred fifty to four hundred ninety-nine horses;
 - g. Three thousand to nine thousand nine hundred ninety-nine sheep or lambs;
 - h. Sixteen thousand five hundred to fifty-four thousand nine hundred ninety-nine turkeys;
 - i. Nine thousand to twenty-nine thousand nine hundred ninety-nine laying hens or broilers, if the animal feeding operation uses a liquid manure handling system;
 - j. Thirty-seven thousand five hundred to one hundred twenty-four thousand nine hundred ninety-nine chickens, other than laying

hens, if the animal feeding operation uses other than a liquid manure handling system;

- k. Twenty-five thousand to eighty-one thousand nine hundred ninety-nine laying hens, if the animal feeding operation uses other than a liquid manure handling system;
 - l. Ten thousand to twenty-nine thousand nine hundred ninety-nine ducks, if the animal feeding operation uses other than a liquid manure handling system; or
 - m. One thousand five hundred to four thousand nine hundred ninety-nine ducks, if the animal feeding operation uses a liquid manure handling system.
18. "Medium concentrated animal feeding operation" means a medium animal feeding operation that meets either one of the following conditions:
- a. Pollutants are discharged into waters of the state through a manmade ditch, flushing system, or other similar manmade device; or
 - b. 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.
19. "North Dakota pollutant discharge elimination system permit" means the permit issued by the department pursuant to chapter 33-16-01 to a concentrated animal feeding operation that the department has determined will not cause, nor likely cause, pollution to waters of the state.
20. "Nutrient management plan" means a written description of the equipment, methods, and schedules by which:
- a. Manure, litter, and process wastewater is beneficially reused in an environmentally safe manner such as being applied to land at appropriate agronomic rates as nutrients or fertilizers; and
 - b. Water pollution and air pollution, including odors, are controlled sufficiently to protect the environment and public health.
21. "Open lot" means livestock pens, feeding, or holding areas at the production area of an animal feeding operation which are outside and not under roof, and where rain can fall directly on the lot area.

22. "Open manure storage structure" means an earthen pond or storage tank for holding liquid manure which is not covered so rainfall can fall directly into the pond or tank.
23. "Operation and maintenance plan" means a written description of the equipment, methods, and schedules for:
- a. Inspection, monitoring, operation, and maintenance of the animal feeding operation, including manure storage structures, water pollution control structures, and the production area; and
 - b. Controlling water pollution and air pollution, including odors, sufficient to protect the environment and public health.
- It includes emergency response actions for spills, discharges, or failure of a collection, storage, treatment, or transfer component.
24. "Operator" means an individual or group of individuals, partnership, corporation, joint venture; or any other entity owning or controlling, in whole or in part, one or more animal feeding operations.
25. "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.
26. "Pollutant" means wastes as defined in North Dakota Century Code section 61-28-02, including dredged spoil, solid waste, incinerator residue, garbage, sewage, sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.
27. "Process wastewater" means water directly or indirectly used in the operation of the animal feeding operation 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 animal feeding operation 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 material.
28. "Production area" means those areas of an animal feeding operation used for animal confinement, manure storage, raw materials storage, and waste containment. The animal confinement area includes open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milking rooms, milking centers, cattle yards, barnyards, medication pens, walkers, animal walkways, and stables. The manure

storage area includes lagoons, runoff ponds, storage sheds, stockpiles, under-house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes feed silos, silage bunkers, and bedding materials. The waste containment area includes settling basins, 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.

29. "Runoff" means rainwater or snowmelt that comes in contact with manure at an open lot or open manure storage area and, therefore, is defined as manure.
30. "Runoff pond" means an earthen storage pond that is used to collect and store runoff from an open lot or from a manure storage area.
31. "Seepage" means the volume of flow through a manure storage structure.
32. "Sensitive ground water area" means vulnerable hydrogeologic settings as determined by the department such as glacial outwash deposits or alluvial or aeolian sand deposits that are critical to protecting current or future underground sources of drinking water. Areas designated as sensitive ground water areas by the department include alluvial or aeolian sand deposits shown on Geologic Map of North Dakota (Clayton, 1980, North Dakota geological survey) and glacial drift aquifers listed in North Dakota Geographic Targeting System for Groundwater Monitoring (Radig, 1997, North Dakota state department of health), or most recent editions of these publications, with DRASTIC scores greater than or equal to 100 based on methodology described in DRASTIC: A Standardized System for Evaluating Groundwater Pollution Potential (Aller et al., 1987, United States environmental protection agency).
33. "Small animal feeding operation" means any animal feeding operation that stables or confines less than the numbers of animals specified for a medium animal feeding operation.
34. "Small concentrated animal feeding operation" means any animal feeding operation that stables or confines less than the numbers of animals specified for a medium animal feeding operation and is designated as a concentrated animal feeding operation in accordance with section 33-16-03.1-04.
35. "State animal feeding operation permit" means a permit issued by the department pursuant to this chapter to an animal feeding operation that the department has determined will not cause, nor likely cause, pollution to waters of the state.

36. "Surface water" means waters of the state that are located on the ground surface, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, and all other bodies or accumulations of water on the surface of the earth, natural or artificial, public or private.
37. "Unconfined glacial drift aquifer" means a glacial drift aquifer that does not have an impervious soil layer which acts to prevent or minimize movement of water into, through, or out of the aquifer.
38. "Water pollution control structure" means a structure built or used for handling, holding, transferring, or treating manure or process wastewater, so as to prevent it from entering the waters of the state. The term also includes berms, ditches, or other structures used to prevent clean water from coming in contact with manure.
39. "Water quality standards" means the water quality standards contained in chapter 33-16-02.1.
40. "Waters of the state" means all waters within the jurisdiction of this state, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, and all other bodies or accumulations of water on or under the surface of the earth, natural or artificial, public or private, situated wholly or partly within or bordering upon the state, except those private waters that do not combine or effect a junction with natural surface or underground waters just defined.

History: Effective December 1, 2004.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-03.1-04. Designation of concentrated animal feeding operations.

1. The department may designate any animal feeding operation as a concentrated animal feeding operation upon determining that it is a significant contributor of pollutants to waters of the state. In making this designation, the department shall consider the following factors:
 - a. The size of the animal feeding operation and the amount of wastes reaching waters of the state;
 - b. The location of the animal feeding operation relative to waters of the state;
 - c. The means of conveyance of animal wastes, manure, and process wastewater into waters of the state; and

- d. The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes, manure, and process wastewater into waters of the state.
2. No medium or small animal feeding operation shall be designated a concentrated animal feeding operation under this section unless the department has conducted an onsite inspection of the operation and determined that the operation should and could be regulated under chapter 33-16-01. In addition, no small animal feeding operation with numbers of animals below those established in subsection 17 of section 33-16-03.1-03 may be designated as a concentrated animal feeding operation unless:
 - a. Pollutants are discharged into waters of the state through a manmade ditch, flushing system, or other similar manmade device; or
 - b. Pollutants are discharged directly into waters of the state which originate outside the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

History: Effective December 1, 2004.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-03.1-05. Operations requiring a permit. The operator of an animal feeding operation shall apply for a permit as follows:

1. Any animal feeding operation that has been defined as a concentrated animal feeding operation in section 33-16-03.1-03 or designated a concentrated animal feeding operation under section 33-16-03.1-04 must obtain a North Dakota pollutant discharge elimination system permit pursuant to chapter 33-16-01.
2. Any medium animal feeding operation where manure or process wastewater from the operation causes or is likely to cause water pollution or those that are located within one-fourth mile [.40 kilometer] of a stream or surface water that contains water, except for infrequent periods of severe drought, must apply for a state animal feeding operation permit pursuant to this chapter or a "no potential to pollute" determination pursuant to section 33-16-03.1-06. Waters completely contained on an owner's property and which do not combine or effect a junction with natural surface or underground waters are not included.
3. A small animal feeding operation shall apply for a state animal feeding operation permit pursuant to this chapter when the department has determined that manure or process wastewater from the operation causes or is likely to cause water pollution.

4. An animal feeding operation which stables or confines animals, other than the types of animals specified in the definition of medium animal feeding operation, shall apply for a state animal feeding operation permit pursuant to this chapter when the department has determined that manure or process wastewater from the operation causes or is likely to cause water pollution.

History: Effective December 1, 2004.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-03.1-06. No potential to pollute determination.

1. The department, upon request, may make a case-specific determination that a livestock facility that is not a concentrated animal feeding operation has no potential to discharge pollutants to waters of the state and does not require a state animal feeding operation permit. The department shall review the determination at least every five years.
2. The department retains the authority to subsequently require a state animal feeding operation permit if circumstances at the facility change, if new information becomes available, or if there are other reasons for the department to determine that the operation has a potential to discharge pollutants into waters of the state.
3. No potential to pollute means the facility is located where there is:
 - a. No discharge of pollutants to ground water and no discharge of pollutants to surface water from a rainfall event that is less than or equal to a twenty-five-year, twenty-four-hour rainfall event; and
 - b. The facility follows a nutrient management plan for the utilization of manure and process wastewater that is consistent with this chapter.

History: Effective December 1, 2004.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-03.1-07. Permit application content and procedures.

1. Any new livestock facility or existing livestock facility that is proposing an increase in the number of livestock above the level allowed in the current permit or above the level at which a permit is required under section 33-16-03.1-05 shall apply for and obtain a state animal feeding operation permit or a North Dakota pollutant discharge elimination system permit prior to construction or expansion. Any livestock facility that is proposing to expand the production area, or update or change the manure handling system, and which requires a permit under section 33-16-03.1-05, shall apply for and obtain a state animal feeding

operation permit or a North Dakota pollutant discharge elimination system permit prior to construction.

2. An existing concentrated animal feeding operation shall submit a permit application pursuant to chapter 33-16-01 by February 12, 2006.
3. An existing medium animal feeding operation for which a permit is required as per section 33-16-03.1-05 shall submit a permit application pursuant to this chapter by July 1, 2008, or earlier if requested by the department when concerns of potential or actual pollution of waters of the state are documented.
4. Application forms for state animal feeding operation permits are available from the department. An operator shall furnish information requested by the department that is consistent with this chapter. The department will not process an application unless all of the necessary information is provided. The information within or attached to an application must include the following:
 - a. The owner's and operator's name and mailing addresses.
 - b. The facility's legal location and mailing address.
 - c. A topographic map of the area where the facility is or proposes to be located and showing the specific production area.
 - d. Specific information about the number, size, and type of animals proposed for the facility; the number of days per year animals will be handled; and the type of confinement (open or housed under roof).
 - e. The type of containment and storage (anaerobic lagoon, roofed storage shed, ponds, under-floor pits, aboveground storage tanks, underground storage tanks, concrete pad, impervious soil pad, water spreading system, other) and total capacity for manure, litter, and process wastewater storage (tons or gallons), or other measures to meet department requirements to prevent discharge of pollutants to waters of the state.
 - f. The total number of acres under control of the applicant and available for land application of manure, litter, or process wastewater.
 - g. Estimated amounts of manure, litter, and process wastewater generated per year (tons or gallons).
 - h. Estimated amounts of manure, litter, and process wastewater transferred to other persons per year (tons or gallons).

- i. Designs, including location, for all manure storage and water pollution control structures and site-specific background information as specified in the North Dakota Livestock Program Design Manual. Design plans developed by anyone other than the facility owner must be signed by the engineer who prepared or supervised the preparation of the plans under North Dakota Century Code chapter 43-19.1.
- j. Site-specific information on topography, surface water, ground water, and soil geology.
- k. A nutrient management plan or information related to a nutrient management plan as specified in subsections 4 and 5 of section 33-16-03.1-08.
- l. The signatures of individuals responsible for the animal feeding operation.
- m. A description of how dead animals will be handled and disposed of by the facility operator.

In preparing an application, the operator shall follow the North Dakota Livestock Program Design Manual.

The operator of an existing animal feeding operation may reference any information previously submitted to the department rather than resubmitting it. Existing information shall be updated if changes to the operation have been made since the prior application.

- 5. Permit conditions. The department may impose any conditions upon a state animal feeding operation permit to ensure proper operation of the facility to protect water and air quality, including:
 - a. Sampling, testing, and monitoring at or adjacent to the facility of manure, process wastewater, ground water, or runoff.
 - b. Steps to prevent the facility from causing exceedances of water quality standards or air quality standards and to minimize odors during land application of manure.
 - c. Recordkeeping and reporting.
 - d. Compliance schedules for upgrades at facilities to meet the requirements of this chapter.
- 6. If the department determines that the animal feeding operation will not cause nor likely cause pollution of waters of the state, either after upgrades are made or at its current status, and the department determines that it is not likely to exceed air quality standards, a

state animal feeding operation permit or a no potential to pollute determination will be issued.

7. If manure storage or water pollution control structures were required at the facility, the operator shall notify the department within thirty days of construction completion and provide certification from an engineer or the designer that construction of manure storage and water pollution control structures was completed according to designs provided with the application or to department-approved changes.
8. The permit shall be valid until its expiration date as long as the animal feeding operation is not materially changed or waters of the state are not impacted pursuant to chapter 33-16-02.1. If an operator plans to change the type or increase the number of animals or change the facility, including expanding barns or pens or changing manure storage or water pollution control structures, the operator shall inform the department in writing prior to implementation of these changes.
9. Expiration of permits. Every state animal feeding operation permit issued by the department shall have a fixed term not to exceed five years.
10. Renewal of permits. One hundred eighty days prior to the expiration of an existing permit, an application for permit renewal shall be submitted to the department for review. If an operator submits a complete application for a permit renewal at least one hundred eighty days prior to the expiration date, but the department, through no fault of the operator, fails to issue a new permit prior to the expiration of the previous permit, the department may extend the expired permit until the permit is reissued. All conditions and stipulations of permits extended under this subsection remain fully effective and enforceable.
11. Transfer of permits. The holder of a state animal feeding operation permit may transfer it by notifying the department in writing at least thirty days in advance of the proposed transfer date. The notice shall include a written agreement between the current and new owners or operators and contain a specific date for the permit transfer and the name and address of the individual responsible for compliance with the permit.
12. General permits. The department may issue a general state animal feeding operation permit covering similar facilities. Any general permit shall comply with all requirements of this chapter and shall identify criteria by which facilities may qualify for the general permit. Facilities that would qualify for a general permit shall apply to the department for coverage under the terms of the general permit. The department may grant a facility's request to construct and operate under a general permit or, at its discretion, issue an individual permit if circumstances warrant.

13. Confidentiality. If the department determines that certain information should be accorded confidential status for reason of being a trade secret, it shall disclose such information to the administrator upon the latter's request. The administrator shall maintain the disclosed information in confidence, unless the administrator determines that such information, if made public, would not divulge methods of processes entitled to protection as trade secrets.

History: Effective December 1, 2004; amended effective January 7, 2005.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-03.1-08. Facility requirements.

1. A livestock facility requiring a permit under this chapter 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 North Dakota Livestock Program Design Manual, best professional judgment, best management practices, and pursuant to the requirements of North Dakota Century Code chapter 61-28, this chapter, and the facility's state animal feeding operation permit.
2. All concentrated 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 North Dakota Livestock Program Design Manual, best professional judgment, best management practices, and pursuant to the requirements of North Dakota Century Code chapter 61-28, North Dakota Administrative Code chapter 33-16-01, this chapter, and the operation's North Dakota pollutant discharge elimination system permit.
3. Nutrient management plan. A nutrient management plan must be developed and a copy maintained onsite by the owner or operator of any livestock facility that land applies manure, litter, or process wastewater to cropland or grassland and is required to obtain a permit or a no potential to pollute determination pursuant to this chapter or chapter 33-16-01. These facilities must land apply manure litter or process wastewater in accordance with the current properly developed nutrient management plan. At a minimum the nutrient management plan must contain the following information:
 - a. Description of the land to which an operator has access for applying manure or process wastewater, or both, and adequate information to demonstrate that manure or process wastewater, or both, will be applied at agronomic rates. The agronomic rate for nitrogen must not exceed the plant utilization rate for the cropping year. Phosphorous must not be applied at rates exceeding the recommendations based on either the North Dakota phosphorous index, the North Dakota state university extension

- service soil tests, or other risk assessment methods approved by the department.
- b. The proposed method and timing of land application of manure and process wastewater.
 - c. The precautions that will be taken to:
 - (1) Prevent manure and process wastewater from reaching waters of the state or areas where they have the potential to impact waters of the state; and
 - (2) Minimize odors to residences and public areas where people are present during transport and land application of manure.
 - d. Other information specified in the North Dakota Livestock Program Design Manual.
4. Of the facilities identified in subsection 3, the following facilities must submit a copy of their current nutrient management plans to the department along with their application or design, or both, plans:
- a. Concentrated animal feeding operations;
 - b. Livestock facilities that plan to apply manure on frozen ground;
 - c. Livestock facilities with land that is designated for manure application and which also has soil phosphorous levels that meet or exceed the very high levels for crop production based on North Dakota state university extension service information;
 - d. Livestock facilities that daily haul and land apply manure; and
 - e. Livestock facilities that fail to comply with these rules or permit conditions.
5. Livestock facilities identified in subsection 3, which do not meet conditions in subsection 4, must submit to the department, along with their application or design, or both, plans, the following information:
- a. An indication that the facility has a nutrient management plan that meets the department requirements;
 - b. The name of the individual who developed the nutrient management plan and the organization with which that individual is affiliated;
 - c. The amount of land available for land application of manure;

- d. The type of crops or vegetation grown on this land;
 - e. The typical manure application rate for each crop or vegetation grown;
 - f. The method and timing of application;
 - g. The precautions used to prevent manure from reaching waters of the state; and
 - h. The precautions, if needed, used to minimize odors to residences and public areas where people are present during transport and land application of manure.
6. Manure storage structures. All livestock facilities requiring permits under chapter 33-16-01 and this chapter, which are constructed or expanded after the effective date of the respective rule, must meet the following requirements:
- a. All facilities regulated under this chapter shall have manure storage structures designed and constructed to store runoff from a twenty-five-year, twenty-four-hour rainfall event, except swine, chicken, turkey, and veal calf facilities which shall be designed and constructed to store runoff from a one hundred-year, twenty-four-hour rainfall event. In addition, all facilities shall collect and store all manure, process wastewater, and runoff for a minimum of two hundred seventy days. Overflows from a properly operated manure storage structure due to a chronic or catastrophic rainfall event in excess of those specified or seepage from the storage structure that is within the standards as specified in the North Dakota Livestock Program Design Manual are not considered violations of this chapter.
 - b. A ground water site assessment is required for all manure storage structures.
 - c. All manure storage structures must be designed and maintained to withstand natural forces, to prevent impacts to waters of the state, and minimize seepage.
 - d. All earthen storage ponds shall have a properly designed and constructed liner to minimize seepage, unless the department has determined a liner is not necessary based on site conditions.
 - e. Other manure storage structure requirements specified in the North Dakota Livestock Program Design Manual must be met.

- f. The department may specify additional design or monitoring requirements as needed to ensure facilities will satisfactorily prevent pollution to waters of the state.
- 7. Liquid storage facilities. All livestock facilities requiring permits under this chapter and all concentrated animal feeding operations requiring permits under chapter 33-16-01 which store liquid manure, process wastewater, or manure-contaminated runoff must meet the following requirements:
 - a. New facilities, expanding facilities significantly increasing their number of livestock, or those facilities that have not housed livestock within five years must not be located over an unconfined glacial drift aquifer unless approved by the department.
 - b. All livestock facilities requiring permits under chapter 33-16-01 or this chapter, which are constructed or expanded after the effective date of the respective rule, must be designed by the facility owner or designed by or under the direct supervision of an engineer. If designed by an engineer, all final drawings, specifications, plans, reports, or other engineering documents, when issued, shall be signed by the engineers or land surveyors who supervised the preparation of these documents under North Dakota Century Code chapter 43-19.1. After construction completion, an engineer or the designer shall certify that the construction was completed according to the design plan.
 - c. Other requirements specified in the North Dakota Livestock Program Design Manual.
- 8. Odor management. An operator shall manage a facility to minimize the impact of odors on neighboring residents and public areas and comply with the odor requirements of North Dakota Century Code section 23-25-11, North Dakota Administrative Code chapter 33-15-16, and the North Dakota Livestock Program Design Manual.
- 9. Best management practices. An operator of a livestock facility requiring a permit under this chapter or a concentrated animal feeding operation requiring a permit under chapter 33-16-01 is responsible for applying best management practices to ensure compliance with the requirements of this chapter and the permit and to prevent pollution of waters of the state. The best management practices used must be included in the design plans or in the nutrient management plan.
- 10. Additional requirements which the department may require for livestock facilities requiring permits under this chapter and concentrated animal feeding operations requiring permits under chapter 33-16-01. The department may:

- a. Require the operator to install and collect routine samples from monitoring wells to ensure that potentially usable ground water resources are not adversely impacted.
- b. Require odor control for manure storage and livestock housing areas and require steps to minimize odors to residences or public areas during transport and land application of manure.
- c. Based on site-specific conditions, specify additional design or monitoring requirements as needed to ensure the facility will satisfactorily prevent pollution of waters of the state.

History: Effective December 1, 2004; amended effective January 7, 2005.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-03.1-09. Recordkeeping and reporting requirements.

1. The operator of a livestock facility requiring a permit under this chapter shall record and maintain the following for a period of not less than three years:
 - a. Any sampling, testing, and monitoring results as required by this chapter or by the department;
 - b. Maintenance and inspection records for water pollution control structures;
 - c. Reports and data required by this chapter, the North Dakota Livestock Program Design Manual, and the permit; and
 - d. A copy of this permit.

The department may request an extension of the record retention period if a facility has failed to comply with these rules or permit conditions or during the course of any unresolved litigation regarding the discharge of pollutants by the operation. The information shall be provided to department representatives upon request. A concentrated animal feeding operation must keep records as required under chapter 33-16-01.

2. Reports shall be submitted to the department in accordance with the schedule prescribed and on the appropriate forms supplied by the department or in a manner specified by the department if required as a condition of the state animal feeding operation permit or the North Dakota pollutant discharge elimination system permit for concentrated animal feeding operations or based on site-specific conditions. Information requested may include sampling, testing, and monitoring

results; maintenance and inspection records; records related to facility operation; or nutrient management plan information or records.

History: Effective December 1, 2004; amended effective January 7, 2005.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-03.1-10. Enforcement and compliance.

1. The department shall evaluate all reports, notifications, and data submitted by an operator in compliance with this chapter and the state animal feeding operation permit. The department shall investigate all apparent violations for possible enforcement action pursuant to North Dakota Century Code section 61-28-08.
2. No person may knowingly make a false statement, representation, or certification in any application, record, report, plan, or other document filed or required under this chapter or the permit. No person may knowingly falsify, tamper with, or provide inaccurate information regarding a monitoring well or other device required under this chapter or the permit.
3. Operators of permitted facilities that are not operating properly shall update those facilities to achieve compliance with this chapter and the conditions of the permit within a timeframe approved by the department.
4. If the department finds that a facility, which has not been covered by a state animal feeding operation permit or a North Dakota pollution discharge elimination system permit within the last five years, is causing or is likely to cause pollution of waters of the state, or poses a significant threat to public health or safety, the operator will be notified that actions shall be taken to prevent the pollution.
5. Within one hundred twenty days following the notification described in subsection 4, the operator shall submit a compliance plan to prevent the facility from impacting waters of the state.
 - a. The compliance plan shall be prepared in accordance with the minimum requirements of this chapter and the North Dakota Livestock Program Design Manual. The plan shall contain adequate information to enable the department to determine whether the proposed measures will abate or prevent pollution of waters of the state. The operator also shall present a proposed schedule for plan implementation and completion.
 - b. If the compliance plan allows for operation of the facility in a manner that will not cause nor likely cause pollution of waters of the state, the department will issue a permit with a compliance schedule for construction. Approval of the permit shall be contingent upon any

changes which may be required by the department after its review of the proposed plan. The construction must be completed within the timeframe specified in the compliance schedule.

- c. If the approved compliance plan needs to be modified or amended during construction, the operator shall notify the department prior to making any modifications or amendments and they must be approved by the department.
6. If the department revokes a state animal feeding operation permit for cause, the operator can finish feeding the animals for up to one hundred twenty days from the date of revocation, provided public and environmental health are not threatened. The operator will not be allowed to bring any other animals into the facility until the requirements of the permit, this chapter, and the North Dakota Livestock Program Design Manual have been met as approved by the department.

History: Effective December 1, 2004.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-03.1-11. Departmental inspection. Authorized representatives of the department may request access to a facility site under authority of North Dakota Century Code section 61-28-04. The owner or operator of a livestock facility may request to see the representatives' credentials. Authorized representatives of the department shall be allowed:

1. To enter the facility site or area in which any records required to be kept under terms and conditions of the permit are stored;
2. To have access to and copy any records required to be kept under terms and conditions of the permit;
3. To inspect any monitoring equipment or water pollution control structures at the facility; or
4. To sample any discharge of pollutants.

The department representatives will abide by all security measures implemented by the owner or operator to protect the health and safety of the workers and the animals at the facility.

History: Effective December 1, 2004.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-03.1-12. Prohibited activities. It shall be unlawful for any person:

1. To feed any livestock on the ice cover of streams or lakes.

2. To create or maintain an immediate threat to human, public, or environmental health.
3. To dispose of an animal carcass along or in any stream, lake, river, or other surface water; to bury the carcass near any such surface water; to dispose of a carcass in an area that will discharge into waters of the state; to dispose of a carcass in any structure used to store or treat liquid manure, process wastewater, or storm water unless the department-approved system is designed for such a purpose; or to dispose of a carcass in a manner that is in violation of North Dakota Administrative Code article 33-20 or North Dakota Century Code chapter 36-14.
4. To cause pollution of waters of the state or to place or cause to be placed any wastes in a location where they are likely to cause pollution of waters of the state.
5. To discharge any pollutants into waters of the state thereby reducing the quality so as not to comply with the water quality standards established by the department, except facilities that are in compliance with subsection 6.
6. To discharge manure or process wastewater from a livestock facility except:
 - a. The overflow of a properly operated manure storage structure due to a chronic or catastrophic rainfall greater than a twenty-five-year, twenty-four-hour event or greater than a one hundred-year, twenty-four-hour event for swine, chicken, turkey, or veal calf facilities; or
 - b. Seepage from the manure storage structures that is within the standards as specified in the North Dakota Livestock Program Design Manual.

History: Effective December 1, 2004.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

33-16-03.1-13. Public participation.

1. If the department determines a significant degree of public interest exists regarding new or expanding facilities, it shall issue a public notice requesting comment on applications for both individual permits and general state animal feeding operation permits.
2. The department shall provide a period of not less than thirty days during which time interested persons may submit comments. The period of comment may be extended at the discretion of the department.

3. The public notice must be placed in the official county newspaper or other daily or weekly newspaper circulated in the area of the proposed animal feeding operation. In the case of draft general permits, the public notice will be placed in applicable official county newspapers. The department may also use any other reasonable means to provide the public notice information to parties potentially affected.
4. The public notice must include at least the following:
 - a. Name, address, and telephone number of the agency issuing the public notice.
 - b. Name and address of the applicant and a brief description of the application information, including the proposed location of the facility. The exception would be draft general permits for which there is no specific applicant.
 - c. The date, time, and location of any scheduled public meeting or hearing.
 - d. An explanation of how to view or obtain materials (e.g., copy of design plans) related to the application and the department's review.
 - e. An explanation of how to submit comments.
5. The department shall send copies of the public notice to the applicant and to local governmental entities which have jurisdiction over the area where the facility is located or is proposed to be located.
6. The department shall hold a public meeting or hearing as it deems appropriate to allow additional public input or to provide information to the public concerning the department's review of the facility.
7. In making its final decision on the application or draft permit, the department shall consider all comments submitted within a timeframe specified in the public notice and all comments received at any public hearing. Within twenty days of the close of the public comment period, the applicant, if any, may submit a written response to the public comments. The department shall consider the applicant's response in making its final decision.
8. Pursuant to the requirements of this chapter and within sixty days of the applicant's response to the public comments, the department shall make a final determination as to whether the permit should be approved, approved with conditions, or denied.
9. The department shall notify the applicant in writing of its final determination and provide to the applicant a copy of the final permit.

if issued. Upon request, other interested individuals may also obtain copies of the final permit.

10. Once finalized, information on general permits and their availability must be provided to potentially eligible or affected facilities.

History: Effective December 1, 2004; amended effective January 7, 2005.

General Authority: NDCC 61-28-04

Law Implemented: NDCC 61-28-04

NORTH DAKOTA LIVESTOCK PROGRAM

DESIGN MANUAL

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SECTION 1. INTRODUCTION

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 North Dakota Administrative Code (NDAC) Section 33-16-03.1-03. CAFOs and AFOs must be located, designed, built, maintained and operated to prevent the discharge of wastes into waters of the state as required by North Dakota Century Code (NDCC) Chapter 61-28, NDAC Chapter 33-16-01, and NDAC Chapter 33-16-03.1, and, to the extent practicable, consistent with the policies and guidelines of this manual, best professional judgment, and best management practices. The department may vary application of this design manual based on site-specific geological, hydrological, or environmental conditions, but only in ways that are consistent with the requirements of law, the policies set forth in this design manual, and best professional judgment.

All CAFOs are required to obtain a North Dakota Pollutant Discharge Elimination System (NDPDES) Permit pursuant to NDAC Chapter 33-16-01. Certain AFOs that are identified in NDAC Chapter 33-16-03.1 must obtain coverage under a State Animal Feeding Operation Permit or receive a "No Potential to Pollute" determination.

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). Statutory and rule requirements for animal feeding operations are set forth elsewhere in the North Dakota Century Code and the North Dakota Administrative Code.

Prior to amending or updating this manual, the department will solicit public comments.

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 occur 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.

The department reviews livestock facilities based on the specific site conditions and will follow the standards in this design manual for all applicable facilities. We understand, however, that there may be cases where some of the standards may not apply. If it is appropriate to deviate from these standards, the reasoning shall be explained and documented with the facility information.

Owners/operators are responsible for ensuring their facilities do not pollute waters of the state and do not exceed air quality standards. If a facility is detrimentally impacting waters of the state or air quality, the owner/operator will be required to make corrections to prevent such impacts, regardless of whether

the owner/operator followed the design manual when the facility was designed and constructed.

- If appropriate, the department may institute more stringent requirements to protect water quality and air quality.

An owner/operator is responsible for complying with the air pollution law found in NDCC Chapter 23-25 Air Pollution Control and the rules promulgated thereunder in NDAC Article 33-15 Air Pollution Control. Specifically applicable to CAFOs and AFOs are NDCC Section 23-25-11 Regulation of Odors - Rules and NDAC Chapter 33-15-16 Restriction of Odorous Air Contaminants.

An owner/operator is responsible for implementing Best Management Practices (BMPs) to ensure compliance with the applicable requirements of NDAC Chapter 33-16-01 and NDAC Chapter 33-16-03.1, the design manual and the conditions of the permit. The owner/operator shall include the BMPs that will be implemented in Operation and Maintenance (O&M) plans and the Nutrient Management Plan.

SECTION 2. GENERAL APPLICATION AND PERMITTING INFORMATION FOR ANIMAL FEEDING OPERATIONS

2.1. Objective

The objective of this section is to provide a description of the review process for livestock facilities which require permits pursuant to NDAC Chapter 33-16-01 and NDAC Chapter 33-16-03.1. In addition, it describes the information needed by the department to determine (1) whether a medium AFO (Definition 17) has "No Potential to Pollute" and (2) whether a small AFO (Definition 33) requires a permit.

2.2. Operations Requiring Permits

See NDAC Section 33-16-03.1-04 and NDAC Section 33-16-03.1-05.

Medium AFOs located within 1/4 mile of a stream or surface water that contains water, except for infrequent periods of severe drought, must submit an application for a state determination. Waters completely contained on an owner's property and which do not combine or effect a junction with natural surface or underground waters are not included. This is intended to be measured as a horizontal distance from any portion of the production area of a livestock facility to the nearest point of a stream or surface water of the state. USGS 7½ Minute Quadrangle maps may be used to assist producers in determining if waters are surface waters; however, these are only guides, and the surface water still needs to be assessed to determine its distance from the livestock facility.

Following are some guidelines to help producers determine whether manure or process wastewater from their operation causes or is likely to cause water pollution. If the facility is located on sandy soil, and has a usable well that is less than 30 feet deep, the department recommends that the well water be tested for bacteria and nitrates. If the test indicates high fecal bacteria or nitrates, further assistance may be needed to help determine if the livestock facility is the source.

If a livestock facility is located where manure or runoff from the livestock area reaches an adjacent wash or water way, and if during heavy rains or snow melt, water flows from this water way to a stream or surface water containing water, except for infrequent periods of severe drought, the facility is likely to cause water pollution and needs a state permit. Also if a livestock facility is located such that pollutants are discharged into waters of the state 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, the facility is likely to cause water pollution and needs a state permit.

2.3. Definition of Terms

The following definitions are taken from NDAC Section 33-16-03.1-03:

1. "Animal feeding operation" means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:
 - a. 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
 - 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.
2. "Bedding material" means an absorbent substance applied to dirt or concrete flooring systems, including wood shavings, wood chips, sawdust, shredded paper, cardboard, hay, straw, hulls, sand, and other similar, locally available materials.
3. "Best management practices" means schedules of activities, prohibitions of practices, conservation practices, maintenance procedures, and other management strategies to prevent or reduce the pollution of waters of the state. Best management practices also include treatment requirements, operating procedures, and practices to control production area and land application area runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.
4. "Concentrated animal feeding operation" means an animal feeding operation that is defined as a large concentrated animal feeding operation (Definition 11) or as a medium concentrated animal feeding operation (Definition 18), or is a small or other type of animal feeding operation designated as a concentrated animal feeding operation in accordance with section 33-16-03.1-04 (Designation of concentrated animal feeding operations). For purposes of determining animal numbers, two or more feeding operations under common ownership are considered 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. All concentrated animal feeding operations are required to obtain a North Dakota pollutant discharge elimination system permit pursuant to chapter 33-16-01.
5. "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.
6. "Department" means the North Dakota department of health.

7. "Earthen storage pond" or "pond" means a topographic depression either below or above ground level, man-made excavation, or diked area formed primarily of earthen materials (although it may be lined with man-made materials or other seepage control materials) and used to store manure, process wastewater and runoff from the production area of a livestock facility.
8. "Engineer" means a professional engineer registered to practice in the state of North Dakota.
9. "Facility or livestock facility" has the same meaning as animal feeding operation (Definition 1) or concentrated animal feeding operation (Definition 4).
10. "General permit" means a general North Dakota pollutant discharge elimination system permit or a general state animal feeding operation permit. This is a permit issued to cover multiple facilities of the same or similar type, without requiring each facility to be covered under an individual permit.
11. "Large concentrated animal feeding operation" means any animal feeding operation that stables or confines as many as or more than the numbers of animals specified in any of the following categories:
 - a. 700 mature dairy cows, whether milked or dry;
 - b. 1,000 veal calves;
 - c. 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;
 - d. 2,500 swine, each weighing 55 pounds or more;
 - e. 10,000 swine, each weighing less than 55 pounds;
 - f. 500 horses;
 - g. 10,000 sheep or lambs;
 - h. 55,000 turkeys;
 - i. 30,000 laying hens or broilers, if the animal feeding operation uses a liquid manure handling system;
 - j. 125,000 chickens (other than laying hens), if the animal feeding operation uses other than a liquid manure handling system;
 - k. 82,000 laying hens, if the animal feeding operation uses other than a liquid manure handling system;

- l. 30,000 ducks, if the animal feeding operation uses other than a liquid manure handling system; or
 - m. 5,000 ducks, if the animal feeding operation uses a liquid manure handling system.
- 12. "Litter" means a mixture of fecal material, urine, animal bedding material, and sometimes waste feed.
- 13. "Manure or livestock manure" means fecal material and urine, animal-housing wash water, bedding material, litter, compost, rainwater, or snow melt that comes in contact with fecal material and urine, and raw or other materials commingled with fecal material and urine or set aside for disposal.
- 14. "Manure handling system" means all of the water pollution control structures used at the production area of a livestock facility.
- 15. "Manure storage pond" means an earthen storage pond that stores liquid manure and process wastewater from indoor confined animal feeding operations.
- 16. "Manure storage structure" means any water pollution control structure used to contain or store manure or process wastewater. It includes, but is not limited to: earthen manure storage ponds; runoff ponds; concrete, metal, plastic, or other tanks; and stacking facilities.
- 17. "Medium animal feeding operation" means any animal feeding operation that stables or confines the numbers of animals specified 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 animal feeding operation uses a liquid manure handling system;
 - j. 37,500 to 124,999 chickens (other than laying hens), if the animal feeding operation uses other than a liquid manure handling system;
 - k. 25,000 to 81,999 laying hens, if the animal feeding operation uses other than a liquid manure handling system;
 - l. 10,000 to 29,999 ducks, if the animal feeding operation uses other than a liquid manure handling system; or
 - m. 1,500 to 4,999 ducks, if the animal feeding operation uses a liquid manure handling system.
18. "Medium concentrated animal feeding operation" means a medium animal feeding operation that meets either one of the following conditions:
- a. Pollutants are discharged into waters of the state through a man-made ditch, flushing system, or other similar man-made device; or
 - b. 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.
19. "North Dakota pollutant discharge elimination system permit" means the permit issued by the department pursuant to NDAC chapter 33-16-01 to a concentrated animal feeding operation that the department has determined will not cause, nor likely cause, pollution to waters of the state.
20. "Nutrient management plan" means a written description of the equipment, method(s) and schedule(s) by which (1) manure, litter and process wastewater is beneficially reused in an environmentally safe manner such as being applied to land at appropriate agronomic rates as nutrients or fertilizers, and (2) water pollution and air pollution (including odors) are controlled sufficiently to protect the environment and public health.
21. "Open lot" means livestock pens, feeding or holding areas at the production area of an animal feeding operation which are outside and not under roof, and where rain can fall directly on the lot area.
22. "Open manure storage structure" means an earthen pond or storage tank for holding liquid manure which is not covered so rainfall can fall directly into the

pond or tank.

23. "Operation and maintenance plan" means a written description of the equipment, methods, and schedules for: (1) inspection, monitoring, operation, and maintenance of the animal feeding operation (manure storage structures, water pollution control structures, and the production area); and (2) controlling water pollution and air pollution (including odors) sufficient to protect the environment and public health. It includes emergency response actions for spills, discharges or failure of a collection, storage, treatment, or transfer component.
24. "Operator" means an individual or group of individuals, partnership, corporation, joint venture, or any other entity owning or controlling, in whole or in part, one or more animal feeding operations.
25. "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.
26. "Pollutant" means "wastes" as defined in subsection 2 of North Dakota Century Code section 61-28-02, including dredged spoil, solid waste, incinerator residue, garbage, sewage, sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water.
27. "Process wastewater" means water directly or indirectly used in the operation of the animal feeding operation 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 animal feeding operation 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 material.
28. "Production area" means those areas of an animal feeding operation used for animal confinement, manure storage, raw materials storage, and waste containment. The animal confinement area includes, but is not limited to, open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milking rooms, milking centers, cattle yards, 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, 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.

29. "Runoff" means rainwater or snow melt that comes in contact with manure at an open lot or open manure storage area and, therefore, is defined as manure.
30. "Runoff pond" means an earthen storage pond that is used to collect and store runoff from an open lot or from a manure storage area.
31. "Seepage" means the volume of flow through a manure storage structure.
32. "Sensitive groundwater area" means vulnerable hydrogeologic settings as determined by the department such as glacial outwash deposits or alluvial or aeolian sand deposits that are critical to protecting current or future underground sources of drinking water. Areas designated as sensitive groundwater areas by the department include alluvial or aeolian sand deposits shown on Geologic Map of North Dakota (Clayton, 1980, North Dakota geological survey) and glacial drift aquifers listed in North Dakota Geographic Targeting System for Groundwater Monitoring (Radig, 1997, North Dakota department of health), or most recent editions of these publications, with DRASTIC scores greater than or equal to 100 based on methodology described in DRASTIC: A Standardized System For Evaluating Groundwater Pollution Potential (Aller et al, 1987, United States environmental protection agency).
33. "Small animal feeding operation" means any animal feeding operation that stables or confines less than the numbers of animals specified for a medium animal feeding operation (Definition 17).
34. "Small concentrated animal feeding operation" means any animal feeding operation that stables or confines less than the numbers of animals specified for a medium animal feeding operation (Definition 17) and is designated as a concentrated animal feeding operation in accordance with section 33-16-03.1-04.
35. "State animal feeding operation permit" means a permit issued by the department (pursuant to this chapter) to an animal feeding operation that the department has determined will not cause, nor likely cause, pollution to waters of the state.
36. "Surface water" means waters of the state that are located on the ground surface, including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, and all other bodies or accumulations of water on the surface of the earth, natural or artificial, public or private.

37. "Unconfined glacial drift aquifer" means a glacial drift aquifer that does not have an impervious soil layer which acts to prevent or minimize movement of water into, through, or out of the aquifer.
38. "Water pollution control structure" means a structure built or used for handling, holding, transferring, or treating manure or process wastewater, so as to prevent it from entering the waters of the state. The term also includes berms, ditches, or other structures used to prevent clean water from coming in contact with manure.
39. "Water quality standards" means the water quality standards contained in chapter 33-16-02.1.
40. "Waters of the state" (subsection 11 of North Dakota Century Code section 61-28-02.) means all waters within the jurisdiction of this state including all streams, lakes, ponds, impounding reservoirs, marshes, watercourses, waterways, and all other bodies or accumulations of water on or under the surface of the earth, natural or artificial, public or private, situated wholly or partly within or bordering upon the state, except those private waters that do not combine or effect a junction with natural surface or underground waters just defined.

2.4. True Pasture and Rangeland Operations

(See NDAC Section 33-16-03.1-05.)

Wintering operations were addressed in the previous North Dakota state livestock rules, by the U.S. Environmental Protection Agency and by local zoning ordinances. EPA chose not to define a winter feeding operation but instead chose to address it through the preamble to the federal livestock rules as follows: "First, EPA is reiterating that true pasture and rangeland operations are not considered AFOs, because operations are not AFOs where the animals are in areas such as pastures, croplands or rangelands that sustain crops or forage growth during the normal growing season. In some pasture-based operations, animals may freely wander in and out of particular areas for food or shelter; this is not considered confinement. However, pasture and grazing-based operations may also have confinement areas (e.g. feedlots, barns, pens) that may qualify as an AFO. Second, incidental vegetation in a clear area of confinement, such as a feedlot or pen, would not exclude an operation from meeting the definition of an AFO. Note that animals must be stabled or confined for at least 45 days out of any 12 month period to qualify the operation as an AFO." The state will follow the same directive to not consider true pasture and rangeland operations as AFOs; however, confinement areas of these operations may qualify as AFOs. These areas may be subject to regulation under NDAC Chapter 33-16-03.1 or NDAC Chapter 33-16-01 and the owner/operator may need to submit an application for a state animal feeding operation permit or obtain a "No Potential to Pollute" determination.

2.5. When to Submit an Application

Applications must be submitted to the department by owners or operators of livestock facilities that require a permit pursuant to NDAC Chapter 33-16-01 or NDAC Chapter 33-16-03.1. The owner/operator of the following facilities must submit an application and design plans, and must receive department approval prior to construction:

1. New livestock facilities or
2. Existing livestock facilities that are:
 - a. Increasing the number of livestock above the level allowed in the current permit or above the level where a permit is required,
 - b. Expanding the production area, or
 - c. Are updating or changing the manure handling system.

A preliminary application may be submitted before a facility is designed so the department can assist the owner/operator by evaluating information on the water resources in the area, reviewing siting requirements and identifying potential concerns. The final design plans for the manure handling system, including a Nutrient Management Plan, must then be submitted to the department for review.

If a facility design meets department construction and operation standards to prevent the discharge of pollution to waters of the state and to prevent an exceedance of air quality standards, a permit may be issued. If the department determines the design is not adequate, changes will be required before the design can be approved and a permit issued.

A public notice process (as described in NDAC 33-16-01) is required of CAFOs issued NDPDES permits.

For new or expanding facilities requiring a state permit, the department may issue a public notice requesting comment when there is significant degree of public interest. A significant degree of public interest exists when justifiable concerns of environmental impact are expressed.

When an owner or operator is considering a new site for a livestock facility, the department can provide general comments to assist in evaluating a potential site and understanding the requirements for manure handling systems.

An application for renewal of a permit or of a "No Potential to Pollute" determination shall be submitted 180 days prior to the expiration. The department will send out a reminder notice prior to the expiration date indicating the expiration date and informing

the owner/operator when a renewal must be submitted.

2.6. Criteria for a "No Potential to Pollute" Determination

Livestock facilities can receive a "No Potential to Pollute" determination from the department if they: (1) are not a CAFO, (2) are located where the facility has no discharge of pollutants to groundwater; (3) are located where their facility has no discharge of pollutants to surface water from a rainfall event less than or equal to a 25-year, 24-hour rainfall event; and (4) manage the manure so it will be utilized for crop production consistent with a nutrient management plan. To request this determination, the owner/operator must submit a signed and completed application with a written request for a "No Potential to Pollute" determination. The department will inspect the livestock facility site to determine if it has no potential to pollute. The facility also must keep a current Nutrient Management Plan that meets the department requirements on site and available for department review upon request.

Once the department determines that the livestock facility has "No Potential to Pollute," the facility will be subject to review at least once every five years to maintain this status. The department may make a determination to extend a "No Potential to Pollute" based solely on provided documentation, or it may decide to inspect facilities prior to renewing or extending a "No Potential to Pollute" determination.

2.6.1. The criteria for the department to make a "No Potential to Pollute" determination for livestock facilities that are not CAFOs are:

1. The livestock facility must not discharge pollutants to surface waters from a rainfall event that is less than or equal to a 25-year, 24-hour rainfall event. This includes spring runoff events, unless they are due to a 25-year, 24-hour rainfall event.
2. The livestock facility or area where manure is stored or is contained within must not be located over a sensitive ground water area where the on-site soil is predominately gravel, sand or silt;
3. The livestock facility must have a Nutrient Management Plan approved by the department; and
4. If a liquid manure storage structure is needed at the facility, it is not eligible for a "No Potential to Pollute" determination.

2.6.2. The following information will be kept on file by the department to justify a "No Potential to Pollute" determination for a livestock facility that is not a CAFO. The department will collect the information from the livestock facility owner or operator and from a site assessment:

1. The name of the livestock facility owner/operator and the legal location and mailing address;
2. The number and type of livestock and the number of days per year livestock are on site;
3. The size of the livestock facility including a sketch of the site showing the number and size of barns and the area of the feedlot or livestock lots;
4. The distance and slope to the nearest surface waters of the state (based on a topographic map);
5. The distance (straight-line and flow) to the nearest named waterway that runoff may potentially reach;
6. If runoff drains across crop or grassland before reaching waters of the state, a map showing the area throughout which runoff spreads before reaching a water of the state;
7. The watershed area located above the livestock facility from which clean water drains into or through the facility and comes in contact with manure, process wastewater, litter, or the livestock on site;
8. An indication if manure, process wastewater, litter, or runoff from the livestock facility drains or may drain onto neighboring property not owned by the facility;
9. A determination if manure, process wastewater, litter, or runoff from the livestock facility reaches waters of the state; and
10. An indication that the facility has a Nutrient Management Plan that meets the department requirements and general information on the Nutrient Management Plan, including the name of the individual who developed the Nutrient Management Plan and the organization with which he/she is affiliated, amount of land available for land application of manure, type of crops or vegetation grown on this land, typical manure application rate for each of the crops to be grown, method and timing of application, precautions used to prevent manure from reaching waters of the state and precautions used to minimize odors to residences or public areas where people are present during transport and land application of manure.

2.7. Criteria for Determining if a Small AFO Requires a Permit

Small AFOs must apply for and obtain a permit from the department if it is determined that manure, process wastewater, litter, or runoff is causing the discharge of pollutants into waters of the state. To make this determination, the department will inspect the

AFO to assess if it is, is likely to, or has discharged pollutants into waters of the state. If there is an impact, a permit will be required. The criteria that will be evaluated to determine if a small AFO requires a permit are:

1. The number of livestock and the number of days per year the livestock are on the site;
2. Whether the livestock are confined in or adjacent to surface water where there are no natural or manmade controls to keep runoff out of the surface water;
3. Whether the AFO is impacting or has impacted waters of the state or pollution is discharging to surface water (based on an assessment or testing water samples);
4. Whether the AFO has discharged to surface water from a rainfall event less than or equal to a 25-year, 24-hour rainfall event (based on an inquiry of the owner or operator); and
5. Whether the AFO is land applying manure in a manner that will keep it out of surface water and is utilizing the nutrients for crop production.

SECTION 3. SUBMITTING FINAL DESIGN PLANS

3.1. Objective

The final design plans for livestock facilities that require a permit under NDAC Chapter 33-16-01 or NDAC Chapter 33-16-03.1 shall show that manure, process wastewater and runoff can be properly contained and managed to prevent detrimental impacts to surface and ground water resources and meet air quality standards. Manure, process wastewater and runoff must be contained and stored as per the design criteria for animal manure systems in Section 5. At a minimum, the following information in Sections 3.2.1 through 3.2.5 shall be included in the design plans for livestock facilities that require a permit.

3.2. Information to be Included in Final Design Plans

3.2.1. Design plans which address:

1. Production areas of a livestock facility
 - a. Include provisions to minimize manure, process wastewater, and runoff from the production area and contain manure, process wastewater, and runoff on site until it can be properly utilized off site.
 - b. Specify dimensions of outside lots or barns for livestock. For outdoor lots, specify percentage slope of lots, total drainage area of livestock lots and any additional drainage area running through the livestock lots.
 - c. Indicate the volume of manure and wash water produced from confined facilities. For outdoor lots, indicate the runoff from a 25-year, 24-hour rainfall event or a 100-year, 24-hour rainfall event, depending on the type of operation, including runoff for the period of storage and any additional manure from the livestock lots.
 - d. Provide an overview of facility operation which relates to manure handling, including the collection, transfer and storage of manure on site, the type of livestock and the number of days per year livestock are on site.
 - e. Location and size of feed storage areas at the production area, the types of feed stored and if it is enclosed storage or stored outside.
2. Earthen Storage Ponds or Runoff Ponds
 - a. Specify dimensions of the structure including top and bottom dimensions of pond, relative elevation, side slopes, depth, volume, dimensions of

embankments, etc. A typical cross section of the pond and diversions is required along with a profile of any diversions, dikes and drainages.

- b. Specify provisions that will be used to meet seepage requirements such as the necessity of a liner. If a liner is needed, indicate type, construction specifications and testing used during and after construction to ensure integrity. Also include documentation that will be maintained to verify seepage requirements are met. Include any additional precautions and/or maintenance used to ensure pond and liner integrity around inlet areas, if the pond dries out, during pumping, and if vegetation growth occurs in the pond.
 - c. Provide soil boring location, relative elevation of borings, and boring logs based on the Unified Soil Classification System. In addition, note evidence of any past or present water tables or other soil features. A sample of the borrowed or in-situ material that will be used as a liner shall be verified by laboratory testing.
 - d. Provide designs for any inlet structures, including splash pads and an emergency spillway. Include information or designs for equipment used in the ponds for solids settling or transporting or agitating manure. In addition, include provisions to pump or lower the liquid level of the pond and designs for a marker to indicate the level at which the pond must be pumped so that it can store runoff and rainfall from the required rainfall event.
 - e. Provide an operation and maintenance plan for the pond detailing proper operation and maintenance to ensure it continues to operate as designed and listing specific items that need to be inspected and the frequency of the inspections.
3. Non-earthen Storage (Concrete, Metal, Wood, Composite, Etc.)
- a. Include all dimensions and any other pertinent information such as relative elevation of top and bottom; design of wall, floor and top; footer designs; rebar specifications; joint sealers or other specifications used to prevent seepage; testing during or after construction; etc.
 - b. Provide soil boring location, relative elevation and boring logs based on the Unified Soil Classification System. Note evidence of any past or present water tables or other soil features.
 - c. Provide an operation and maintenance plan for the structure detailing proper operation and maintenance to ensure it continues to operate as designed and listing specific items that need to be inspected and the

frequency of inspections.

4. Diversions and Embankments

- a. Specify dimensions of the structure, including top and bottom width, side slopes, depth, typical major cross sections, slope, channel profile elevation compared to ground level and flow velocity in diversion channels.
- b. Provide any site-specific conditions needed to ensure stability.
- c. Specify the maintenance required to ensure continued stability.
- d. Include the calculations used to estimate the peak flow in diversion channels, including watershed drainage area, average slope, soil type, vegetation in drainage area, runoff curve number, and maximum flow length.
- e. Include the calculations to show the stability of diversion channels at peak flow. If the drainage area is small, indicate that minimum diversion design is adequate to handle runoff.
- f. Provide specifications on any type of erosion control methods used in stabilizing channels, diversions, earthen storage ponds, etc. used during construction.
- g. Provide an operation and maintenance plan for the structures detailing proper operation and maintenance to ensure they continue to operate as designed and listing specific items that need to be inspected and the frequency of inspections.

5. Construction Specifications for Water Pollution Control Structures Including Excavation, Earth Fill, Liners, Concrete, and Pipelines

- a. Provide general construction information to ensure a stable structure (e.g., include the type of soil used for construction, compaction, moisture content, etc.).
- b. Specify construction requirements needed to ensure stability and quality construction (e.g., stripping and scarifying, lift thickness and compaction, grass seeding after construction, etc.).
- c. Include any testing done during or after construction to ensure stability of the structure.

- d. Designs, including location for all manure storage and water pollution control structures and site-specific background information as specified in the *"North Dakota Livestock Program Design Manual."* Design plans developed by anyone other than the facility owner must be signed by the engineer who prepared or supervised the preparation of the plans as per NDCC 43-19.1.

3.2.2. Nutrient Management Plans

1. The following facilities that require a Nutrient Management Plan pursuant to NDAC Chapter 33-16-01 or NDAC Chapter 33-16-03.1 must submit a copy of their current Nutrient Management Plan to the department along with their application and/or design plans which must include the information listed in Section 7:
 - a. CAFOs,
 - b. Livestock facilities that plan to apply manure on frozen ground;
 - c. Livestock facilities with land that is designated for manure application and which also has soil phosphorous levels that meet or exceed the very high levels for crop production based on NDSU Extension Service information;
 - d. Livestock facilities that daily haul and land apply manure; or
 - e. Livestock facilities which fail to comply with these rules or permit conditions.
2. Facilities that do not meet the conditions in item 1 must have a current Nutrient Management Plan kept on site. However, they only need to submit the following information to the department with their application and/or design plans:
 1. An indication that the facility has a nutrient management plan;
 - b. The name of the individual who developed the Nutrient Management Plan and the organization with which he/she is affiliated;
 - c. The amount of land available for land application of manure;
 - d. The type of crops or vegetation grown on this land;
 - e. The typical manure application rate for each crop;
 - f. The method and timing of application;

- g. The precautions used to prevent manure from reaching waters of the state; and
- h. The precautions used to minimize odors to residences or public areas where people are present during transport and land application of manure.

3.2.3. Time Line for Construction and Implementation for Existing Systems

Operators of existing facilities installing or updating the manure handling systems to comply with department requirements shall include a project time line if construction is not scheduled to be completed within one year after the application is submitted to the department. This time line shall indicate various phases of the construction to be completed and include an estimated date of completion for each phase. If construction is not completed in one year or a construction schedule cannot be met, the department shall be notified in writing with a new proposed construction schedule submitted prior to the end of the one year or the scheduled completion date.

3.2.4. Notice of Intent to be Covered Under Storm Water Permit

1. Construction activities at a livestock facility site disturbing 1 acre or more must be covered under a general permit for storm water discharges from construction activities (NDAC Chapter 33-16-01).
2. The livestock facility design plans must include a storm water pollution prevention plan detailing measures to control erosion and minimize pollution from construction sites.

3.2.5. Best Management Practices for Conservation

Identify appropriate site specific Best Management Practices for conservation to be implemented to control runoff of pollutants to waters of the state, both at the production area and at the land application areas. Practices identified in the Nutrient Management Plan can be referenced and do not have to be repeated.

SECTION 4. SITE SELECTION AND ASSESSMENT STANDARDS

4.1. Objective

This section describes the information required to evaluate the location of a new or expanding livestock facility. Site location is the single most important factor in protecting water and air quality resources from pollution due to livestock facilities. Adequate surface and subsurface information is necessary to limit the potential of new or expanding facilities to degrade water and air quality resources.

4.2. Site Selection Standards

Geologic and hydrologic conditions that control the movement of manure or waste water to surface water or ground water sources are preferred for new or expanding facilities. Upland sites underlain by low permeability soil and located away from surface water are ideal for minimizing the migration of pollutants to waters of the state. Facilities that are located at more sensitive sites typically require engineered improvements (e.g., above-ground storage tanks, synthetic or constructed clay liners) to meet department requirements to protect waters of the state.

The following site conditions shall be considered when evaluating the location of a livestock facility:

1. Proximity to surface water;
2. Surface and subsurface soil textures (e.g., the presence of sand lenses versus continuous clay layers);
3. Depth to ground water and distance to existing wells;
4. Surface topography; and
5. Distance to nearby residents, particularly in the prevailing downwind direction.

Site conditions shall be evaluated by the department during the permit application review process and shall be considered when developing permit conditions for a livestock facility.

4.2.1. General Requirements

New and expanding livestock facilities and manure storage areas shall be located a minimum horizontal distance of 100 feet from a public water supply well, 50 feet from a private water supply well, and 500 feet from any water supply well not owned by the facility where the topography is in a down-slope or down-gradient direction from the

livestock facility.

4.2.2. Additional Considerations

The location of storage structures for an animal manure system should be as close as practicable to the manure source. Open manure storage structures should be located so that the prevailing wind direction will not be toward nearby occupied areas. Consideration should also be given to topography, vegetative screening and building location to minimize visual or air quality impacts from an operation. Water supply wells at existing operations should be protected from animal waste impacts.

4.3. Site Assessment Standards

4.3.1. Scope of Site Assessment

The scope of a site assessment is dependent on the size and location of the proposed livestock facility. Larger facilities or those located in sensitive ground water areas generally require more information to adequately evaluate the site. Smaller facilities located in less sensitive ground water areas generally require less information. Contact the department with any site assessment questions.

The following operations require more detailed subsurface soil information.

1. Open-lot cattle facilities with greater than or equal to 2,000 animals, or where the production area is greater than or equal to 20 acres in size;
2. All other large CAFOs or existing operations expanding to large CAFO status; or
3. New or expanding facilities, which meet any of the following criteria:
 - a. The production area overlies or is located within 1 mile of a defined glacial drift aquifer (see attached Figure 1);
 - b. The production area overlies a sensitive ground water area, as defined by the department (see attached Figure 1);
 - c. Soils at the production area have sandy loam, loamy sand, sand or gravel textural classes as defined by Natural Resources Conservation Service (NRCS) soil survey maps;
 - d. A water supply well at the facility is screened at a depth within 30 feet of the ground surface;
 - e. The production area is within 1/4 mile of a neighboring private water

supply well, within 1/2 mile of a non-community public water supply well or within 1 mile of a community public water supply well; or

- f. The production area is located within a delineated wellhead or source water protection area (see attached Figure 2).

4.3.2. Site Assessment Requirements

Data regarding subsurface soil types shall be obtained by advancing soil borings, using a method that retrieves a relatively undisturbed soil sample, or by an alternative soil evaluation method that is approved by the department prior to site assessment. Subsurface soils shall be evaluated and logged to at least 10 feet below the base of the manure storage structure. There shall be a minimum of three soil evaluations in the manure storage structure area or one soil evaluation per acre of structure area, whichever is greater. In outdoor feedlot areas, there should be one additional soil evaluation per 10 acres of feedlot area, to a depth of at least 10 feet below ground surface. Soil evaluations should be spaced throughout the proposed facility to enable an accurate assessment of the subsurface geology. The department can provide assistance in locating appropriate drilling locations.

For facilities that meet any of the conditions in Section 4.3.1, soil borings are required for the evaluations. For other facilities, the assessment may be conducted using soil borings or by an alternative soil evaluation method that is approved by the department prior to site assessment. The subsurface soil shall be continuously logged, and the soil shall be classified using the Unified Soil Classification System (as outlined in ASTM D-2488) or the equivalent. Soil types shall be recorded in a soil boring log, along with soil colors, soil moisture conditions and the depth of any ground water encountered during drilling. The ground surface elevation at each boring or assessment location shall be obtained to evaluate the elevation in relation to the base of the manure storage structure. The elevation data shall either be reported in feet above mean sea level or referenced to an arbitrary site benchmark.

All soil borings that extend into an aquifer shall be completed and abandoned according to the requirements established in NDAC Chapter 33-18-02 (Ground Water Monitoring Well Construction Requirements). As defined in NDAC Chapter 33-18-01 "Water Well Construction and Water Well Pump Installation," an "aquifer" means a water-bearing formation that transmits water in sufficient quantities to supply a well. Soil borings completed above an aquifer must be abandoned according to the requirements of NDAC Chapter 33-18-02, Section 10 "Borehole and Monitoring Well Abandonment". Excavated or disturbed areas resulting from the use of alternative soil evaluation methods shall be filled with compacted soil to achieve permeability equal to or less than the surrounding geologic formation.

Depending on site geology or facility location, the department may require additional soil borings or deeper borings to adequately characterize soil and ground water.

Additional borings may be required at sites with complex subsurface geology, such as sites with rapid transitions from fine to coarse-textured soil.

SECTION 5. DESIGN CRITERIA FOR MANURE SYSTEMS

5.1. Objective

The objective is to provide the requirements that must be met for manure handling systems at livestock facilities subject to department review. The manure handling systems should enhance the operation and management of the livestock facility by effectively moving manure and runoff from the production area of the livestock facility to properly designed storage areas, thus protecting water quality and air quality. The volume of manure stored should be minimized as much as possible, and manure should not be allowed to drain on to neighboring land.

These design requirements are effective for all facilities with water pollution control structures that are constructed or updated after the effective date of NDAC Chapter 33-16-03.1.

5.2. Required Manure Storage

Manure storage structures for animal facilities shall be designed to store all of the following:

1. The volume of manure, process wastewater and runoff produced in 270 days or during the time between dates when the storage structure can reasonably be emptied, whichever is longer. Operators of storage structures that allow evaporation can subtract the evaporation to be expected from the structure using regional and local evaporation rates.
2. Rainfall on any open manure storage structure and runoff from open lots from a 25-year, 24-hour rainfall event. Swine, chicken, turkey and veal calf facilities shall be designed to contain rainfall on the open manure storage structure and runoff from the production area due to a 100-year, 24-hour rainfall event.
3. The volume of liquid or slurry that cannot be removed during pumping.
4. The volume of solids accumulated from an open lot system. It is recommended that a solids separator be designed into these systems to extend pond life and minimize the chance of damage to the liner.

For items 1 and 2, see attached Tables 1, 1A and 2. The volume of solids in item 4 shall be determined by a suitable method or by the following:

<u>Slope of Lot</u>	<u>Volume of Solids</u>
0-3.9 percent	17 cubic yards per acre of lot
4 -8 percent	50 cubic yards per acre of lot
over 8 percent	70 cubic yards per acre of lot

A marker shall be used to indicate the level at which the storage structure can contain the required storage volume, minus the rainfall and runoff from a 25-year, 24-hour rainfall event or a 100-year, 24-hour rainfall event for swine, chicken, turkey and veal calf facilities. When the liquid is above this marker, the level shall be lowered below this marker within a reasonable time period. Under normal weather conditions, this should occur within two weeks. In an earthen storage pond, a depth marker shall be installed in a manner not to jeopardize the integrity of the liner.

Livestock facilities requiring permits under NDAC Chapter 33-16-01 and NDAC Chapter 33-16-03.1 shall prevent the direct contact of animals at the production area with waters of the state to the extent applicable.

To comply with state and federal dairy regulations, human sewage waste shall not be mixed in any way with livestock manure on dairy facilities.

5.3. Earthen Storage Ponds

An earthen storage pond holds manure, process wastewater and runoff from the production area of a livestock facility. Narrow or L-shaped earthen storage ponds should be avoided. Square, rectangular or round ponds are most desirable.

Coverage under NDAC Chapter 33-16-01 or NDAC Chapter 33-16-03.1 and these standards does not preclude an owner or operator of a livestock facility from needing to comply with any other applicable federal, state and local requirements.

5.3.1. Design Requirements

The finished bottom of the earthen storage pond shall be a minimum of 2 feet above the seasonal high water table. In sensitive areas, greater separation distances may be required.

Earthen storage pond designs shall include a minimum of 1 foot of freeboard above the minimum design storage volume level measured to the lowest level of the embankment or overflow structure. Manure storage ponds, which are in excess of 300 feet in length at the top liquid surface area, require a minimum of 2 feet of freeboard unless the manure storage pond is covered.

Provisions shall be included to minimize solids entering the pond or to remove solids without damaging the liner or jeopardizing pond integrity. These can include, but are not limited to, solid separators or other methods to reduce the velocity so solids will settle out.

The earthen storage pond shall meet the conditions for soil formation and liners in Section 5.3.3 to minimize seepage and prevent instability.

The facility shall be maintained to prevent erosion.

5.3.2. Embankments for Ponds and Earthen Fill Material

Embankments refer to the side walls of an earthen storage pond that are constructed using earthen fill material. The applicable construction requirements for earthen fill listed below also apply to other components of the manure handling system, including clay liners, dikes, etc.

1. Construction Requirements for Earth Fill

- a. Earth fill used in embankments, clay liners, dikes, etc. shall be relatively impervious material and sufficiently compacted to form a stable structure and minimize seepage.
- b. Frozen soil shall not be used in the construction of embankments, and such structures shall not be constructed on frozen soil.
- c. Final design height of embankments shall be increased by the amount needed to ensure the design top elevation will be maintained after settling. Designs shall use a minimum of 5 percent settlement at the center line of the embankment.
- d. Vegetation and organic material shall be removed from areas where the embankment or earth fill will be placed. The embankment shall be tied into the mineral soil to prevent seepage between the interface. This may include, but is not limited to, scarification of the mineral soil prior to construction and/or the use of a core trench.
- e. Organic material shall not be used in the embankment core construction; however, suitable topsoil that is free of debris may be used as cover material on the outer slopes of the embankment.
- f. The side slopes on the inside embankment of an earthen storage pond shall not be steeper than 2 horizontal:1 vertical. On the outside, the slope shall not be steeper than 3 horizontal:1 vertical.
- g. Top width of embankments shall be wide enough to be stable and permit access of maintenance vehicles. The top width of embankments shall be a minimum of 10 feet.
- h. Embankments shall be seeded from the outside toe to the high water line. Perennial type, low growing, spreading grasses that are erosion resistant and can be mowed are desirable. Alfalfa and other deep-rooted plants are not acceptable since the roots can impair the water-holding capacity

of the structure.

5.3.3. Soil Formation and Liners

The bottom and side slopes of earthen storage ponds shall be properly sealed to prevent excess seepage. This can be done by using a properly constructed clay liner, bentonite, a geosynthetic liner or other equivalent liner material. If a facility can meet the conditions specified in Sections 5.3.7 and 5.3.8, the in-situ soil may be acceptable for pond construction without an additional liner.

Lined earthen storage ponds shall be designed to prevent impacts to waters of the state and designed such that seepage shall not exceed 1/16 inch per day at maximum operating depth over the life of the pond. In sensitive ground water areas, wellhead or source water protection areas, above glacial drift aquifers or in areas where manure from a pond is determined to be impacting waters, the department may require additional protective measures.

Provisions shall be used to prevent or minimize drying and cracking of constructed clay liners. Protective measures, such as placing top soil or sandy soil over the clay liner or keeping a minimum liquid level in the pond, can be used. If a soil cover layer is used, precautions must be taken to prevent weed growth that could damage the liner (e.g., spraying for weeds or by maintaining a shallow-rooted grass on the soil cover). Removal of manure or process wastewater from an earthen storage pond shall be accomplished in a manner that does not jeopardize the integrity of the liner.

5.3.4. Constructed Clay Liners

Constructed clay liners shall meet the conditions in item 1 and the construction specifications listed in item 2. Laboratory tests of the soils used for the liner must be completed to determine the Atterberg limits and sieve analyses showing the grain sizing and proctor density of the soils. An additional sample shall be analyzed for every 5,000 cubic yards and for every major soil change. These tests shall be provided to the department along with information on the locations where the soil samples were collected, including the depths at which the samples were collected. Management provisions must be specified to prevent the liner from drying and cracking.

1. Required conditions for constructed clay liners are liquid limit of 30 percent or greater, a plasticity index greater than 10 (a range from 15 to 30 is preferable) and 30 percent or more (preferably 50 percent or more) of the liner material shall pass through a # 200 mesh screen, as tested by ASTM D-2487.
2. Construction specifications for constructed clay liners:
 - a. The liner shall be a minimum of 2 feet thick after compaction;

- b. To achieve the desired thickness, the liner shall be placed in equal layers or lifts that are approximately 6 inches thick after compaction;
- c. Parallel lifts shall be used for side slopes. However, in the event that side slopes are steeper than 3 horizontal:1 vertical, horizontal lifts shall be used;
- d. In some sensitive areas, the department may require a thicker liner material or additional construction;
- e. In situations that do not meet any of the conditions listed in Section 4.3.1, the minimum thickness of liner after compaction shall be 18 inches;
- f. Rocks greater than 3 inches in diameter shall be removed from the liner material prior to compaction; and
- g. The moisture content shall be in the range of 1 percent dry of optimum to 3 percent wet of optimum.

5.3.5. Testing of Constructed Clay Liners

Constructed clay liners shall be tested to verify seepage. This can be done in one of three ways:

1. Completing a remolded permeability test, indicating the material can meet the seepage limits. The liner construction must meet or exceed the proctor density used in the remolded permeability test, and the liner must undergo moisture and density testing during construction to ensure the construction specifications are met;
2. Laboratory testing thin-walled tube samples of the liner; or
3. Conducting an on-site seepage test of the liner.

When the testing is done for permeability, Darcy's law can be used to determine the seepage rate at the maximum operating depth for a 24 or 18 inch liner, as appropriate.

If a remolded permeability test is used, testing for compaction and moisture must be completed during construction of the liner on the pond bottom and side slopes using ASTM standard testing methods. Testing shall be done by the project engineer or a professional soil testing firm. Holes or punctures created in the liner due to testing, such as those from nuclear density testing, shall be filled with clay or bentonite after testing to prevent seepage. A minimum of four tests for the first acre of pond surface area must be completed on each lift for density and moisture. For each additional acre of liner, two additional tests must be completed on each lift for density and moisture. A

maximum of two lifts can be tested at one time. Tests shall be randomly distributed over the entire liner area. Ponds that are less than 1.5 acres at the full level shall include testing on at least two sidewalls, while ponds that are more than or equal to 1.5 acres at the full level shall have testing on all four sidewalls.

The department will evaluate the proposed liner testing specified in the design plan and, based on site conditions, may require additional testing as deemed appropriate.

If permeability testing is performed on the constructed liner, it shall be conducted using either of the following methods:

1. An on-site permeability test using standard ASTM methods; or
2. Laboratory testing of thin-walled tube samples, provided proper ASTM methods of collection and testing are used.

If thin-walled tube samples are collected, they must be taken at a rate of one tube per acre of pond surface area or a minimum of two tubes per pond, whichever is greater. Each sample shall be laboratory tested for permeability using an ASTM D5084 or equivalent ASTM testing method. Holes left in the liner from the thin-walled tube samples shall be filled with clay or bentonite and compacted to prevent seepage. If on-site testing of the liner is proposed, the testing method and number of tests must be included in the design plans for departmental review.

Depending on site-specific conditions, the department may require additional testing of a pond liner to ensure seepage limits are being met.

5.3.6. In-situ Soils

If the conditions at the site meet criteria listed in Sections 5.3.7 and 5.3.8, a liner may not be required. Laboratory tests of the in-situ soils must be completed to determine the Atterberg limits and sieve analyses showing the grain sizing. These tests must be provided to the department and include the location and depth of the soil samples. The department understands that soil borings of in-situ soils are typically field classified. The department will require this soil boring information; however, the laboratory tests are used to verify the classification of the soils. Depending on soil and site characteristics, the department may also require a permeability test.

When required by the department, permeability testing shall be completed on the in-situ soils by:

1. An on-site permeability test using standard ASTM methods; or
2. Laboratory testing of thin-walled tube samples, provided proper ASTM methods of collection and testing are used.

If thin-walled tube samples are collected, they must be taken at a rate of two tubes per acre of pond surface area or a minimum of three tubes per pond, whichever is greater.

Each sample shall be laboratory tested for permeability using ASTM D-5084 or the equivalent. If on-site permeability tests are used, they shall be evenly distributed over the area of the liner. The type and number of tests must be specified in the design plans for review by the department. Holes left in the liner from the thin-walled tube samples shall be filled with compacted clay or bentonite.

5.3.7. Manure Storage Ponds

Manure storage pond refers to an earthen storage pond that stores liquid manure and process wastewater from indoor or roofed confined livestock facilities, not to a pond that stores only runoff from open lot livestock areas.

A liner is required for manure storage ponds unless the in-situ soil material is adequate to prevent excess seepage. If a livestock facility with a manure storage pond can meet all of the following conditions, a liner may not be required:

1. There is a continuous layer of soil classified as CL or CH (based on the Unified Soil Classification System), verified by laboratory testing using ASTM D-2487, below the manure storage pond bottom and side slopes. The soil layer must be at least 4 feet thick for ponds that hold up to 8 feet of manure, 6 feet thick for ponds that hold up to 10 feet of manure or 8 feet thick for ponds that hold up to 12 feet of manure;
2. The site is not located in a sensitive groundwater area as defined by the department or in a delineated wellhead or source water protection area (see attached Figures 1 and 2);
3. The volume of liquid manure to be stored at the production area, not including freeboard, is less than 2 million gallons (6 acre feet);
4. The pond is inspected for coarse textured soil after excavation and before earth fill is put in place; and

Any vegetation and organic material shall be removed from manure storage pond floors and side slopes up to the high water line, and the soil in the floor and side slopes must be scarified to a minimum depth of 6 inches and re-compacted to break up any fractures in the soil.

If coarse textured soils are discovered during construction, they shall be removed and a 2-foot clay liner installed in the area where coarse textured soil was encountered.

5.3.8. Runoff Ponds

Runoff ponds are earthen storage ponds that collect rain and runoff from open lot livestock facilities such as cattle feedlots.

The bottom and side slopes of runoff ponds shall be properly sealed to prevent seepage. In general, facilities that meet all of the following criteria may be allowed to use in-situ soil material to prevent excess seepage without an additional liner:

1. The site is not located in a sensitive groundwater area as defined by the department or in a delineated wellhead or source water protection area (see attached Figures 1 and 2);
2. There is a continuous layer of soil classified as CL or CH based on the Unified Soil Classification System, verified by laboratory testing using ASTM D-2487, below the pond bottom and side slopes. The soil layer must be at least 4 feet thick for ponds that hold up to 8 feet of water, 6 feet thick for ponds that hold up to 10 feet of water and 8 feet thick for ponds that hold up to 12 feet of water.

If coarse textured soils are discovered during construction, they shall be removed and a 2-foot clay liner installed in the area where the coarse textured soil was encountered.

5.3.9. Synthetic, Geosynthetic or Other Liners

Synthetic, geosynthetic or other liners shall be installed according to manufacturer specifications. Synthetic liners shall not be used alone, but must be used in conjunction with a self-sealing liner material or a leak detection system to protect against seepage in the event of a tear or puncture.

Minimum thickness for synthetic liner material:

Type	Minimum requirements
HDPE	40 mill thickness
LLDPE	40 mill thickness
PVC	30 mill thickness
GCL	0.75 pounds per square foot
EPDM	45 mill thickness

5.4. Non-earthen Manure Storage Structures

Non-earthen structures used to store liquid or slurry manure are usually constructed of

reinforced concrete or fabricated steel with fused glass or plastic lining.

The storage structures shall be designed to contain manure and accommodate equipment for loading, agitating and emptying.

All seams or joints shall be properly sealed to prevent leaking.

The storage structures shall be properly designed and constructed to:

1. Withstand all anticipated structural loads applied;
2. Prevent damage from livestock or maintenance equipment; and
3. Safely prevent humans and livestock from entering.

Steel and other corrodible material shall be covered with an adequate protective coating to prevent rust or corrosion.

A minimum of 6 inches shall be provided for freeboard at the top of the tank structure. For larger structures, more freeboard may be required.

Above-ground storage tanks shall have adequate footings extending below the anticipated frost depth.

Above-ground storage tanks shall have a leak detection system installed below the structure.

Tanks temporarily storing manure until it is transferred to a larger storage structure should be designed for a minimum holding time of three days.

5.4.1. Concrete Storage Tanks

Concrete structures shall be properly designed and constructed to ensure adequate strength and stability, minimize cracking and prevent any leaks. Designs shall conform to accepted standards such as:

1. Midwest Plan Service (MWPS-36) Concrete Manure Storage Handbook (1994 edition);
2. American Concrete Institute Standards 318-89 (Rev. 1992) Building Code Requirements for Reinforced Concrete; or
3. American Concrete Institute Standards 350R-89 and 350IR-93/AWWA (1994) Environmental Engineered Concrete Structures.

Storage tanks shall be designed to withstand all anticipated structural loads, including internal and external loads, hydrostatic uplift pressure, concentrated surface and impact loads, seasonal high water table pressure and frost or ice pressure.

Covers, top slabs and slats shall be designed to support the maximum load which can be applied by the size and type of equipment to be used at the site. In no case shall the live loading be less than 150 pounds per square foot.

Designs for concrete manure storage tanks shall document the loadings the tanks were designed to withstand (e.g., lateral loads, surcharge loads and, if applicable, tank cover loads). If a publically available design standard was used, such as a MWPS standard, indicate the specific standard used in the design, and the site conditions that were considered in the design.

5.4.2. Manure Stacking Facilities

Manure stacking facilities refer to surfaces that are relatively impervious where solid or semisolid manure is stacked or stored.

Handling manure in different phases may require a variety of designs to ensure all manure is stored. All runoff from the stacking facility shall be contained, and the structure shall be designed to prevent excess seepage.

Manure stacking facilities shall be constructed of durable material and designed to withstand internal or external pressures including hydrostatic uplift loads and imposed surface loads. The structure shall be designed to accommodate equipment for loading and emptying. Floors shall be moderately sloped away from the entrance.

5.5. Inlet, Outlet and Transfer Facilities

Inlet, outlet and transfer facilities refer to piping, valving, pumps, mobile tanks or any other equipment used to move manure from one location to another.

Equipment used for the transfer of manure shall be corrosion resistant and designed to protect against freezing and puncture from ice during winter conditions.

Splash pads or aprons made of concrete or riprap shall be used to prevent erosion of pond liners at inlet structures. Splash pads shall have a surface area of no less than 6 square feet.

Transfer pipes shall be sloped to allow for good drainage without plugging and have clean-out ports every 200 feet and at all junctions, or other provisions to clear blockages.

Provisions shall be made for backflow prevention, such as top loading into storage

structures or installing an air valve to prevent a siphon. Check valves used solely to prevent backflow shall not be used; however, they can be used in conjunction with other backflow prevention methods.

Manure storage structures shall have provisions which allow for emptying the manure from the structure. This may include access ramps or ports and may also require platforms for equipment such as pumps or agitation equipment. Only piping that allows for transfer to manure storage, hauling or spreading equipment shall be allowed. Earthen storage ponds shall have provisions for emptying that will prevent damage to the liner. Driving of pumps and equipment directly on the liner is not acceptable.

There shall be no outlet that can automatically release manure from the storage structure. Valves that are under pressure from manure storage structures shall be locked to prevent accidental discharge.

5.6. Diversions

Clean water diversions shall be used to ensure that clean water is diverted, as appropriate, from the production area (away from concentrated livestock areas and manure storage areas).

Dirty water diversions are used to route manure laden water and runoff to containment structures, and shall be designed and constructed to prevent an exceedance of applicable water quality standards.

Diversions shall be constructed of relatively impervious material and be adequately designed to form a stable structure. The diversion shall be designed to carry runoff from a 25-year, 24-hour rainfall event for the watershed that it drains and have, at a minimum, an additional 0.3 feet of freeboard. The ridge height of the diversion shall have a minimum settlement factor of 10 percent. The ridge shall have a minimum top width of 4 feet.

Side slopes should not be steeper than 3 horizontal:1 vertical, and slopes of 6 horizontal:1 vertical are recommended where diversions must be crossed with equipment.

The channel grade shall be designed such that the velocity will not cause excess erosion for the type of soil and planned vegetation or lining. The maximum acceptable channel velocity shall range from 2 feet per second for sandy soils with no vegetation to 3.5 feet per second for channels with high clay soils and vegetation.

Proper maintenance shall be used to maintain the diversion's ridge height, capacity, designed cross section, stabilizing vegetation and, if applicable, storage capacity.

5.7. Water Spreading

Water spreading systems are a method of containing and utilizing runoff from open lot livestock facilities.

The water spreading system shall, at a minimum, be able to contain the anticipated runoff volume from a 25-year, 24-hour rainfall event. Nutrients in the runoff shall be utilized by the crops grown within the water spreading area.

The nutrients in the runoff shall be evaluated based on sampling of the livestock lot runoff or on published values of nutrient concentration in runoff. These values can be found in sources such as the USDA NRCS Agricultural Waste Management Field Handbook, Table 4 -10a "Nitrogen Content of Cattle Feedlot Runoff."

The soils within the water spreading area shall be sampled for nitrogen and phosphorous prior to installation of the system. Soils shall be sampled at a minimum of once every three years of operation to determine if there is an excess buildup of nutrients in the soil, and the records shall be maintained on file.

If soils show a trend of high nutrient concentrations, or if ground water within the vicinity shows impacts attributable to the system, alternative measures to control the manure and runoff shall be implemented.

Sites located in a sensitive ground water area (see attached Figure 1) will be considered on a case-by-case basis for water spreading systems.

The system shall be designed to ensure: (1) the runoff is distributed over the water spreading area, and (2) nutrients are properly utilized. If the soils and topography are inadequate to ensure proper distribution of runoff and utilization of nutrients, the site is not acceptable.

5.8. Other Methods of Manure Treatment or Manure Handling Systems

Other methods of manure treatment or manure handling systems such as anaerobic lagoons, aerobic lagoons, anaerobic digesters, etc. will be reviewed on a case-by-case basis and based on industry standard specifications. The department shall be consulted on these systems prior to final design completion.

SECTION 6. OPERATION AND MAINTENANCE

6.1. Objective

Livestock facilities requiring a permit pursuant to NDAC Chapter 33-16-01 and NDAC Chapter 33-16-03.1 shall be operated and maintained so they continue to operate as designed. Particular attention shall be paid to: (1) the handling and storage of manure and process wastewater, (2) measures to prevent the unplanned release of manure, and (3) dead animal disposal. Chemicals and other contaminants handled on site shall not be disposed of in any manure storage or treatment system, unless it is designed for that purpose. In addition, specific records shall be maintained to document the implementation and management of the minimum elements needed for operation.

6.2. Required Operation, Maintenance and Inspections

1. CAFOs shall conduct the following routine visual inspections of the production area:
 - a. Weekly inspections of all storm water diversion devices, runoff diversion structures and devices channeling runoff to the manure storage structure;
 - b. Daily inspection of water lines, including drinking water or cooling water lines; and
 - c. Weekly inspections of the manure storage structures noting the level of liquid in the structure as indicated by the depth marker.
2. All open manure storage structures shall: (1) maintain a depth marker which clearly indicates the minimum capacity necessary to contain the runoff and direct precipitation from a 25-year, 24-hour rainfall event, or (2) a depth marker which clearly indicates the minimum capacity necessary to contain the runoff and direct precipitation from a 100-year, 24-hour rainfall event for swine, chicken, turkey and veal calf operations constructed after the effective date of NDAC chapters 33-16-01 and 33-16-01.1;
3. Any deficiencies discovered during the inspections listed in item 1 above shall be corrected as soon as possible;
4. Chemicals or other contaminants handled on site shall not be disposed of in a structure used for storage or treatment of manure, process wastewater or storm water unless it is specifically designed for that purpose; and
5. The operator of a livestock facility requiring a permit under this chapter or under NDAC 33-16-01 should maintain a rain gauge at the production area and record measurable rainfall events.

6.3. Utilization of Manure Other Than Land Application

1. If manure, litter or process wastewater is not land applied, it shall be either beneficially reused (e.g., as fuel for energy production, compost, etc.) or properly disposed of in a landfill.
2. CAFOs shall keep records of how the manure, litter, or process wastewater was reused or disposed. The records shall include the date, location, volume of manure and the method of reuse or disposal.
3. Manure is generally prohibited from being disposed of in a landfill; however, in certain circumstances, the department can allow for such disposal if the landfill owner agrees.

6.4. Dead Animal Disposal

Dead animals shall be disposed of in a manner acceptable to the Board of Animal Health and in accordance with NDCC Section 36-14-19 (attached). Dead animals shall be disposed of in areas that will not discharge into waters of the state and where they will not detrimentally impact air quality. Dead animals shall not be disposed of in any structure used to store or treat liquid manure, process wastewater, or storm water unless the department-approved system is designed for such a purpose.

6.5. Records Required to be Maintained

Each CAFO shall maintain on site complete copies of the information listed below and a copy of the most current nutrient management plan. These documents shall be made available to departmental personnel upon request. This information shall be maintained for a period of five years from the date created. The CAFO must make the following records available to the department for review upon request:

1. Records documenting the visual inspections (Section 6.2.1);
2. Weekly records of the depth of the manure and process wastewater in the liquid manure storage structure as indicated by the depth gauge in the storage structure;
3. Records documenting any actions taken to correct deficiencies (Section 6.2.3). 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 (Section 6.4);
5. Records documenting the current design of any manure storage structures, including solids accumulation volume, design treatment volume, total design

volume and the approximate number of days of storage capacity;

6. Records of the date, time and estimated volume of any overflow; and
7. Records documenting the land application of manure (Section 7.7).

6.6. Annual Reporting Requirements

The owner/operator of a CAFO shall submit an annual report to the department which includes:

1. The number and type of animals whether in open lots or confined 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);
2. Estimated amount of total manure generated in the previous 12 months (tons/gallons);
3. Estimated amount of total manure transferred to another party in the previous 12 months (tons/gallons);
4. Total number of acres for land application covered by the Nutrient Management Plan;
5. Total number of acres under control of the facility that were used for land application of manure in the previous 12 months;
6. Summary of all manure discharges from the production area that have occurred in the previous 12 months including date, time and approximate volume; and
7. A statement indicating whether the current version of the Nutrient Management Plan was developed or approved by a certified nutrient management planner.

6.7. Operation and Maintenance (O&M) Plans and Standard Operating Procedures (SOPs)

Operation and maintenance plans mean a written description of the equipment, methods and schedules for: (1) inspection, monitoring, operation and maintenance of the animal feeding operation (manure storage structures, water pollution control structures and the production area); and (2) controlling water pollution and air pollution including odors sufficient to protect the environment and public health. Standard operating procedures are instructions indicating the proper manner to complete a specific task.

1. CAFOs shall have written O&M plans for routine maintenance and inspections of the livestock manure handling system. These shall include, but are not limited to, manure storage structures, diversions, water pollution control structures, and transfer and land application equipment.

General site inspections should note any areas where seepage, erosion, rodent infestation or degradation may be occurring at all livestock manure handling system structures, diversions, and transfer and land application equipment.

The plans shall describe how manure will be sampled and tested.

2. The department may specify that a facility have written SOPs for other situations related to the proper operation of the manure handling system. The department may require SOPs for activities where a specific protocol is needed to ensure good quality or timely results, such as sampling or testing; or for situations where a facility has had problems or compliance issues due to lack of maintenance or improper operation. If required by the department, these SOPs may include, but are not limited to:

- a. The sampling and testing of any water wells or monitoring wells;
- b. Any testing necessary to determine if manure may be impacting waters of the state; and
- c. Any emergency procedures for an unplanned release of manure including an overflow or breach of a manure storage structure.

3. When required to be completed, SOPs shall include the following information:

- a. A description of the planned action;
- b. The equipment needed for each action and its availability;
- c. The frequency each action will be performed;
- d. Scheduled downtime for the facility, if any; and
- e. Any necessary prior arrangements with contractors.

SECTION 7. NUTRIENT MANAGEMENT PLANS

7.1. Objective

The objective of the Nutrient Management Plan is to ensure livestock manure, including bedding, litter, waste feed and process wastewater, and runoff from livestock areas is land applied to crop or grass land at a rate the nutrients will be utilized by the vegetation grown. The manure shall be handled in a manner so as not to impact waters of the state, exceed air quality standards while it is stored on site, and minimize odors to residences or public areas during land application.

The department understands the Nutrient Management Plan is based on estimated realistic yield goals which can vary depending on weather conditions. Manure and soil sampling as well as record keeping, are necessary to verify proper land application of manure.

7.2. General Conditions

1. Manure, process wastewater and runoff shall be collected and stored in such a manner that it will not:
 - a. Drain into surface waters, including lakes, streams, ditches, channels or other waterways that convey concentrated water flow;
 - b. Detrimentially impact groundwater; or
 - c. Cause air quality violations.

Manure collection and storage shall comply with the design requirements of Section 5.

2. Manure shall be transported in a manner where it will not leak or spill on to public roads or into areas where it could enter surface or ground water.
3. Manure shall be land applied at rates where the nutrients will be used by the crop grown. Land application shall not impact waters of the state and precautions shall be used to minimize odors to residences or public areas where people may be present.

7.3. Nutrient Management Plan Information

Facilities requiring a Nutrient Management Plan pursuant to NDAC Chapter 33-16-01 or NDAC Chapter 33-16-03.1 shall include the following information in their current Nutrient Management Plan:

1. The type of livestock, number of days per year they are on site, an estimate of the volume of manure generated, and the information on which the estimate was based;
2. A description of the manure handling at the facility, including how often manure is cleaned from the livestock areas and how and where manure may be temporarily stored;
3. An aerial photograph/map and a soil map of the site where manure is to be applied;
4. Fields where manure will be applied during frozen conditions shall be identified;
5. Current and/or planned plant production sequence or crop rotation;
6. Complete nutrient budget for nitrogen and phosphorous for the rotation or crop sequence that considers all potential sources of these nutrients;
7. Results of soil, plant, water, manure or organic by-product sample analysis. Nutrient planning shall be based on current soil and manure test results and developed in accordance with NDSU Extension Service guidance. Soil and manure tests are considered current if they are no older than three years for livestock facilities that require a Nutrient Management Plan or one year for CAFOs;
8. Quantify all nitrogen and phosphorus sources;
9. Recommended nitrogen and phosphorous rates, timing, method of application and incorporation;
10. The form of manure (liquid or solid) and the expected frequency of land application;
11. Location of sensitive areas or resources such as water ways, drainage ways, wellhead or source water protection areas, high water table areas, residences or public areas and the associated manure-handling or nutrient management restrictions;
12. Guidance for implementation, operation, maintenance and record keeping;
13. A field-specific assessment of the potential for nitrogen and phosphorous transport from the field to surface waters. The assessment shall address the form, source, amount, timing and method of application of nutrients on each field to achieve realistic production goals, while minimizing nitrogen and phosphorous movement to surface waters;

14. Precautions that will be used to prevent manure from impacting surface water, exceeding air quality standards while it is stored on site, and causing excess odors to nearby residences or public areas when manure is land applied;
15. A description of the land application manure records that will be maintained to document the minimum Nutrient Management Plan requirements are met;
16. Realistic yield goals for the crops in the rotation. These goals shall be established based on soil productivity information and historic yield data from the farm land or county wide average. If the yield goal exceeds NDSU Extension Service or NRCS recommendations or is 20 percent higher than county record or historical crop yield data, the reasons for the increased yield goal shall be documented. For new crops or varieties, industry yield recommendations may be used until documented yield information is available in the area of the facility;
17. BMPs implemented to manage nutrients as efficiently and effectively as possible; and
18. The name of the individual who developed the Nutrient Management Plan and the organization with which he/she is affiliated.

7.4. Sampling and Testing of Manure and Soil

1. Soil samples shall be collected and prepared according to NDSU Extension Service guidance. Laboratories shall use testing procedures accepted by NDSU to perform soil sample analyses.
2. Soil testing shall include analyses for soil organic matter, nitrogen, and phosphorous. If there is concern about heavy metals or salts, the department may require testing of the soil for these materials.
3. Manure samples shall be collected and prepared according to NDSU Extension Service guidance or industry standard methods, as approved by the department. Manure testing shall include analyses for nitrogen, ammonia, and phosphorous.
4. If the operator uses feed or feed additives with high concentrations of salts or heavy metals, the department may require the manure be tested for these materials. The same is true if there is a reasonable expectation that the manure might contain elevated salts, metals or other potentially harmful materials.
5. Manure to be land applied shall be sampled from each manure storage structure that holds manure from separate types of livestock or from similar types of livestock in different phases of growth.
6. Livestock facilities identified by the department as needing nutrient management

plans shall have their manure and the soil where manure is being applied tested in accordance with items 1-5 once every three years. CAFOs shall have their manure and the soil where manure is being applied tested in accordance with items 1-5 each year.

7.5. Application Rates to Meet Nutrient Requirements

1. The manure application rate shall not exceed the recommendations for nitrogen and phosphorous based on either the North Dakota Phosphorous Index (PI), as developed by the NRCS, or NDSU Extension Service recommendations based on soil testing.
2. The PI allows manure and other sources of nutrients to be applied at rates to meet the nitrogen needs of a crop if the PI rating is low or medium. If the PI is high, it allows manure and other sources of nutrients to be applied at rates to meet the phosphorous removal in the crop biomass. If the PI is very high, it requires that no manure be applied to that field. Manure shall not be applied to fields where the soil test phosphorous exceeds 125 parts per million (ppm) (250 lbs per acre).
3. Manure and other sources of nitrogen must not be applied at rates that exceed:
 - a. The recommended nitrogen application rate during the year of application; or
 - b. The estimated nitrogen removal in harvested plant biomass for legumes during the year of application.
4. Nutrient Management Plans shall contain a field-specific assessment of the potential for nitrogen and phosphorous transport from the field. The assessment for phosphorous can be done using the phosphorous screening tool and soil tests, or the PI assessment.
5. If sewage sludge is applied, the accumulation of potential pollutants (including arsenic, cadmium, chromium, copper, lead, nickel, mercury, selenium and zinc) in the soil shall be monitored in accordance with 40 Code of Federal Regulations, Parts 403 and 503, and any applicable state and local laws or regulations.

7.6. Precautions to Prevent Surface Water and Air Quality Impacts

1. When land applying manure, the operator shall use reasonable judgment and take adequate precautions to prevent surface water impacts and minimize odors to nearby residences and public areas. Land application shall not occur during rainfall events, except to prevent the catastrophic failure of a storage structure.

2. On land controlled by the operator, manure shall 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, unless:
 - a. A 35-foot wide vegetated buffer on which there are no applications of manure is used;
 - b. The facility's owner/operator demonstrates that a setback or buffer is not necessary because implementation of alternative conservation practices or field-specific conditions will provide pollutant reductions equal to or greater than the reductions achieved by the 100-foot setback.
3. When irrigating with manure or process wastewater, the application rate shall not exceed the estimated soil infiltration rate, or the nutrient requirements of the crop. Irrigation application rates shall be adjusted to avoid significant ponding of manure or process waste water in surface depressions or seasonal drainage ways.
4. Manure shall be injected or incorporated within eight hours if applied within 1/2 mile of an occupied residence (other than the owner's residence), building or public area where people may be present. The operator shall be required to inject or incorporate the manure into the soil if manure is applied in a manner such that it causes an odor reading, for two or more days within a 10-day period, (as measured with a scentometer) of 7 or greater within 100 feet of an occupied residence, building or public area. A plan to minimize excess odors will be required before future application of manure in this area.
5. Manure shall not be applied to frozen, snow covered or saturated soils if there is a likelihood of runoff. However, manure can be land applied during frozen conditions provided it is applied on land where runoff is contained and does not drain off during spring runoff. The department recommends operators consider land with slopes of less than 6 percent, where there is stubble or vegetative cover and less than 8 inches of snow on the ground surface. Conservation measures such as terraces, contour strips and reduced tillage effective at reducing runoff.
6. When manure is being land applied, the equipment operator shall periodically inspect equipment for leaks. This shall be done daily for trucks or tanks used to handle solid or liquid manure. For an umbilical cord system or irrigation system, a measurement device shall be used to continuously check pressure so leaks can be found and pumps shut down immediately.

7.7. Record Retention

1. Owners/operators of livestock facilities requiring a permit pursuant to NDAC

Chapter 33-16-01 and NDAC Chapter 33-16-03.1 shall maintain on site a copy of the Nutrient Management Plan, the facility design plan for the manure handling system and any other required information listed in items 2, 3 and 4 below. The plan and information shall be available to the department for review upon request.

2. CAFOs shall maintain complete copies of the following information on site for a minimum of five years from the date they are created:
 - a. The crops grown and expected realistic crop yields;
 - b. The date(s) manure, litter or process waste water is applied to each field;
 - c. Weather conditions at time of application and for 24 hours prior to and following application;
 - d. Test methods used to sample and analyze manure, litter, process wastewater and soil;
 - e. Results from the annual testing of the manure, litter, and process wastewater, and annual soil sample results for land where manure was applied that year;
 - f. An explanation of how the manure application rates were determined in accordance with the standards established by the department;
 - g. Calculations showing the total nitrogen and phosphorus to be applied to each field, including sources other than manure, litter or process wastewater;
 - h. Total amount of nitrogen and phosphorus actually applied to each field, including documentation of calculations for the total amount applied;
 - i. The method used to apply the manure, litter or process wastewater;
 - j. Inspection of manure application equipment including method, frequency, dates and repairs made if leaks were found; and
 - k. Setbacks, vegetated buffers or other alternative practices used when land applying manure near surface water or potential conduits to surface water.
3. If manure is transferred from a CAFO to other persons or entities not associated with the facility, the following conditions shall apply, and records shall be maintained:

- a. Owners/operators shall provide the recipient of the manure, litter or process wastewater with the most current nutrient analysis prior to transfer;
 - b. The analysis provided shall be consistent with the requirements of Section 7.4; and
 - c. The owners/operators of the CAFO shall retain records for five years after the transfer date documenting the recipient's name and address, the approximate amount of manure transferred, and the date the manure was transferred.
4. A livestock facility which is not a CAFO and requires departmental review under NDAC Chapter 33-16-03.1, shall maintain complete copies of the following information on site for a minimum of three years from the date created:
- a. The crops grown and realistic crop yields;
 - b. The date(s) and rates manure, litter or process wastewater is applied to each field;
 - c. Test results of manure, litter, and process wastewater, that are not more than three years old, and test results of the soil where manure was applied that are not more than three years old;
 - d. Setbacks, vegetated buffers or other alternative practices used when land applying manure near surface water or potential conduits to surface water.

7.8. Back-flow Prevention

Irrigation equipment used to apply manure shall have back-flow prevention to stop manure from siphoning back into the irrigation source water.

SECTION 8. GROUND WATER MONITORING

8.1. Objective

The department may require ground water monitoring at livestock facilities to:

1. Define the hydrogeologic characteristics of the site (e.g., ground water elevation, ground water flow direction, ground water quality); and
2. Evaluate potential impacts to ground water quality resulting from the facility's operations.

Questions regarding ground water sampling can be directed to the department. Additional information regarding well installation and ground water sampling is presented in the department's *Guidelines for Installing Ground Water Monitoring Wells at Confined Livestock Facilities* (North Dakota Department of Health, July 2001).

8.2. Ground Water Monitoring Program for Livestock Facilities

The department may require a ground water monitoring program be implemented for livestock facilities that meet any of the conditions listed in Section 4.3.1 and at sites where alternative manure-handling systems are used in lieu of containment ponds or structures (e.g., water spreading systems).

8.3. Ground Water Monitoring Plan

Facilities requiring ground water monitoring shall submit a Ground Water Monitoring Plan (GWMP) to the department for review and approval prior to commencement of animal feeding operations. The GWMP shall describe the proposed well locations, the SOPs that will be followed during well installation and sampling and the proposed analytical program.

8.4. Well Location and Installation

A ground water monitoring network for a livestock facility consists of wells on or near the site from which water samples can be collected to determine ground water elevation, flow direction and quality. The ground water monitoring network shall consist of a minimum of three wells. Generally, one well shall be located up gradient, and two wells shall be located down gradient of the facility's livestock and manure storage structures. Additional monitoring points may be required by the department to detect any changes in water quality resulting from a facility's operations.

All ground water monitoring wells shall be installed by a state-certified monitoring well or water well contractor and shall be constructed in accordance with NDAC Chapter 33-

18-02 (Ground Water Monitoring Well Construction Requirements). All monitoring wells shall be surveyed at:

1. The elevation of the ground surface at the well locations;
2. The elevations of the top of the well casing; and
3. The well locations in relation to each other and any livestock manure storage areas.

The elevation data shall either be reported in feet above mean sea level or referenced to an arbitrary site benchmark.

With prior department approval, ground water monitoring can be conducted by using existing on-site wells that supply water to the facility, provided information is available to evaluate whether or not the wells were constructed in a manner that will accomplish the objectives of this section.

8.5. Ground Water Monitoring Frequency and Sampling Parameters

8.5.1. Sample Frequency

To evaluate the background water quality for new facilities, a minimum of two sampling events shall be conducted prior to commencement of facility operations and on-site storage of livestock manure. A sampling event consists of one sample collected from each ground water monitoring well. The sampling events should be conducted at least two weeks apart, if feasible.

The ground water monitoring wells shall be sampled a minimum of two times per year while the facility is operating. The department may require more frequent sampling if necessary. For example, additional sampling may be required at sites located within a sensitive ground water area, when the wells are initially installed at a site (to determine background water quality) or when sample results indicate the facility may be impacting ground water. The department may specify the months during which sampling shall be done.

Following two years of monitoring, the department may consider reducing the sampling frequency if requested by the owner. The department will evaluate all ground water monitoring data prior to making such a determination.

8.5.2. Ground Water Sample Collection Procedures

Ground water samples shall be collected following department-approved SOPs, which include implementation of appropriate quality assurance and quality control (QA/QC) practices. The SOPs will be implemented to minimize the potential for cross-

contamination of monitoring wells, ensure the collection of a representative ground water sample, and establish a chain of custody to maintain sample integrity during transportation to a laboratory.

8.5.3. Required Analysis

Ground water samples shall be analyzed by a laboratory certified by the department's Division of Chemistry. At a minimum, all samples shall be analyzed for:

1. Nitrate plus nitrite as nitrogen;
2. Ammonia;
3. Total kjeldahl nitrogen;
4. Chloride;
5. Sulfate; and
6. Laboratory specific conductance.

Additional parameters may be required by the department, based on site characteristics, facility operations and the locations of potential ground water receptors.

8.6. Data Reporting Requirements

Data that is required by the department shall be submitted to the North Dakota Department of Health, Division of Water Quality, 1200 Missouri Avenue, Bismarck, ND 58506-5520.

8.6.1. Well Completion Report

Well logs and completion data shall be submitted to the department on monitoring well report forms provided by the State of North Dakota Board of Water Well Contractors. A map indicating the surveyed locations of the wells shall also be included. Well elevation data can be included on the map or submitted in tabular format.

8.6.2. Ground Water Sample Data

All ground water sampling data shall be reported to the department by the last day of the month following the month the samples were collected. For example, if the samples were collected in March, the results shall be submitted to the department by April 30. The ground water sampling data submitted to the department shall include, but is not limited to:

1. A map showing well locations;
2. Depth to ground water data;
3. Well sampling forms;
4. A discussion of any deviation from the approved GWMP; and
5. Laboratory analytical reports (including laboratory QA/QC documentation).

8.7. Action Limits

The department has established two types of action limits for potential impacts to groundwater. They are "increased monitoring action limit" and "maximum level action limit."

8.7.1. Definition of Established Action Limits

The "increased monitoring action limit" is 5 milligrams per liter above the average of the background samples for any of the following parameters: ammonia, total kjeldahl nitrogen and nitrate plus nitrite as nitrogen. The "increased monitoring action limit" for chloride or sulfate is 50 percent above the average of the background samples for either parameter.

The "maximum level action limit" is reached when three consecutive sample results are 10 milligrams per liter above the average of the background samples for ammonia and total kjeldahl nitrogen, or when three consecutive sample results are 10 milligrams per liter, or greater, for nitrate plus nitrite as nitrogen.

8.7.2. Exceedance of Established Action Limits

If a sample result from the monitoring wells exceeds any action limit, the department shall be notified by telephone within 48 hours. A written response shall be sent to the department within five working days. At a minimum, the information provided to the department shall include:

1. Completed well data sampling form;
2. Analytical results;
3. Description of monitoring well condition;
4. Date and time of sample collection; and

5. The name of the laboratory completing the analysis.

If one sample result of a groundwater monitoring well exceeds the increased monitoring action limit, an additional sample from that well shall be taken within 30 days. The department may also require samples from other wells. If three consecutive sample results exceed the increased monitoring action limit, the facility shall, within 30 days of the last sample date, submit for department approval a plan to locate the source and determine the extent of contamination. This plan shall include a proposed time schedule from start to finish. The assessment shall be conducted by a person or consulting firm experienced in comprehensive environmental impact assessments.

If the contamination source is determined to be at the facility site, a plan shall be developed to stop or reduce the contamination from impacting ground water. The plan shall also include a time schedule for implementation. This plan must be approved by the department and be submitted within 60 days of determining the source of contamination.

If the maximum level action limit is reached, the department may require the facility to remove all manure from the area which has been determined to be the source of contamination. The department may also require that no additional manure be placed in this area until steps have been taken to upgrade the facility and mitigate the source of contamination. This upgrade must be approved by the department.

8.8. Treatment of Contamination and Closure of Site

If a facility is causing contamination to ground water, the department may require remediation.

If a facility will be closed, the owner/operator shall submit to the department a plan outlining the steps to close the facility in an environmentally safe manner.

8.9. Record Retention

All records pertaining to ground water monitoring shall be kept on file for five years.

SECTION 9. CORRECTIVE ACTIONS FOR AN UNPLANNED RELEASE OF MANURE

9.1. Objective

The objective of this section is to identify the corrective actions that should be initiated to protect waters of the state in the event of an unplanned release of manure. An unplanned release is manure that is released to the environment in a manner which is not identified in the Nutrient Management Plan for proper handling of manure and which exceeds the rate of nutrient uptake by plants. This shall include manure that is spilled from manure storage areas or transfer equipment on or off the production area or land application area. Also included will be any release of manure impacting ground water and resulting in an exceedance of established action levels.

9.2. Unplanned Release of Manure to Ground Surface

If there is an unplanned release of manure on to the ground surface, the following priorities shall be followed in addressing and cleaning up the release:

1. Protect individuals from the loss of life or health;
2. Prevent manure from reaching waters of the state;
3. Contain manure until it can be properly utilized or disposed of;
4. Properly utilize or dispose of the manure; and
5. Clean and restore the release area as needed.

9.3. Emergency Action Plan

If directed by the department, a livestock facility shall develop an emergency action plan to address the unplanned release of waste. The plan shall include the SOPs for actions to take in the event of an unplanned release of manure from the storage area or transport equipment. The SOPs shall follow the priorities listed in Section 9.2 and include the following information:

1. The general locations where an unplanned release of manure is most likely to occur;
2. A description of the action to be taken;
3. The equipment needed for each action and its availability;

4. The names and addresses of contractors or individuals who may have equipment needed;
5. Any necessary prior arrangements that have been made or need to be made with contractors or equipment owners; and
6. The names and addresses of people who may need to be notified such as down stream land owners, contacts for down stream communities or public areas, local law enforcement agency, fire department, ambulance, emergency management and the department.

9.4. Department Notification of Unplanned Release of Manure

If manure is released where it could directly reach surface or ground water and exceed established action levels, or if the release could endanger human health or the environment, the department shall be notified as soon as possible but within 24 hours. Notification shall be made by calling 701-328-5210 during normal working hours or by calling the Division of Emergency Management at 1-800-472-2121 during non-working hours (including weekends and holidays).

Notification to the department shall include: date, time, location, volume of manure released and actions taken to contain, utilize or properly dispose of the manure. A written report with the above information shall also be submitted to the department within five days of the release, along with a description of the actions taken to prevent a similar release in the future.

An unplanned release of manure may require an assessment to determine if the release could endanger human health or the environment. Contact the department, the local health unit or the county emergency manager for assistance.

If the volume of manure released will not directly impact waters of the state and does not pose an immediate danger to human health or the environment, the department does not need to be notified; however, records must be kept of the release.

9.5. Record Retention

If there is an unplanned release of manure from a livestock facility which requires a permit under NDAC Chapter 33-16-01 or NDAC Chapter 33-16-03.1, records shall be kept which document the date, time, location, volume of manure released, and the action taken to contain the release, properly utilize or dispose of the manure and clean the site. The records shall be kept on site for a minimum of 3 years for AFOs and 5 years for CAFOs. CAFOs shall submit this information for each release to the department as a part of the annual report.

NDCC CHAPTER 36-14
CONTAGIOUS AND INFECTIOUS DISEASES GENERALLY

36-14-19. Disposition of carcass of animal dying from contagious or infectious disease.

Any animal which is found dead must be presumed to have died from a contagious or infectious disease until the contrary is shown unless another cause of death is apparent. The owner or person in charge of any domestic animal or nontraditional livestock which dies within this state from or on account of any contagious or infectious disease shall dispose of the carcass of such animal as follows:

1. If the animal died of anthrax, as determined by a licensed veterinarian, the carcass must be completely burned at the place where it died if possible. If the carcass must be moved, it may not be dragged over the ground but must be moved only on a suitable conveyor and all body openings in the carcass must be plugged with cotton saturated with a strong antiseptic solution.
2. If the carcass is of a hog which died from hog cholera or swine erysipelas, the same, with hide intact, must be burned within thirty-six hours or given to a licensed rendering plant within such time.
3. If the carcass is of an animal which has died of a disease other than is specified in subsections 1 and 2, or from any other cause, it must be burned, buried, composted, or given to a licensed rendering plant within thirty-six hours, or must be disposed of by a method approved by the state veterinarian. If the carcass is buried, it must be buried not less than four feet [1.22 meters] below the surface of the ground and covered with dirt to that depth. No carcass may be disposed of along any public highway or along any stream, lake, or river nor buried near or adjoining any such place.

The State Veterinarian and the Board of Animal Health can be contacted at 701-328-2655

TABLE 1

Rainfall and Runoff for 25-Year, 24-Hour Storm in North Dakota

Rainfall County (Inches)	Runoff in Inches		Rainfall County (Inches)	Runoff in Inches	
	Unpaved Lot	Paved Lot		Unpaved Lot	Paved Lot
Adams (3.8)	2.5	3.0	Mercer (3.8)	2.5	3.0
Barnes (4.0)	2.9	3.4	Morton (3.7)	2.6	3.1
Benson (3.8)	2.7	3.2	Mountrail (3.6)	2.5	3.0
Billings (3.5)	2.5	2.9	Nelson (3.9)	2.8	3.3
Bottineau (3.7)	2.6	3.1	Oliver (3.7)	2.6	3.1
Bowman (3.5)	2.5	2.9	Pembina (3.9)	2.8	3.3
Burke (3.5)	2.5	2.9	Pierce (3.7)	2.6	3.1
Burlingame (3.8)	2.7	3.2	Ramsey (3.8)	2.7	3.2
Cass (4.1)	3.0	3.5	Ransom (4.1)	3.0	3.5
Cavaller (3.8)	2.7	3.2	Renville (3.6)	2.5	3.0
Dickey (4.1)	3.0	3.5	Richland (4.2)	3.1	3.6
Divide (3.5)	2.5	2.9	Rolette (3.7)	2.6	3.1
Dunn (3.6)	2.5	3.0	Sargent (4.2)	3.1	3.6
Eddy (3.8)	2.7	3.2	Sheridan (3.7)	2.6	3.1
Emmons (3.9)	2.8	3.3	Sioux (3.8)	2.7	3.2
Foster (3.9)	2.8	3.3	Slope (3.5)	2.5	2.9
Golden Valley (3.5)	2.5	2.9	Stark (3.6)	2.5	3.0
Grand Forks (3.9)	2.8	3.3	Steele (4.0)	2.9	3.4
Grant (3.7)	2.6	3.1	Stutsman (3.9)	2.8	3.3
Griggs (3.9)	2.8	3.3	Towner (3.8)	2.7	3.2
Hettinger (3.6)	2.5	3.0	Traill (4.0)	2.9	3.4
Kidder (3.8)	2.7	3.2	Walsh (3.9)	2.8	3.3
LaMoure (4.0)	2.9	3.4	Ward (3.6)	2.5	3.0
Logan (3.9)	2.8	3.3	Wells (3.8)	2.7	3.2
McHenry (3.7)	2.6	3.1	Williams (3.5)	2.5	2.9
McIntosh (4.0)	2.9	3.4			
McKenzie (3.5)	2.5	2.9			
McLean (3.7)	2.6	3.1			

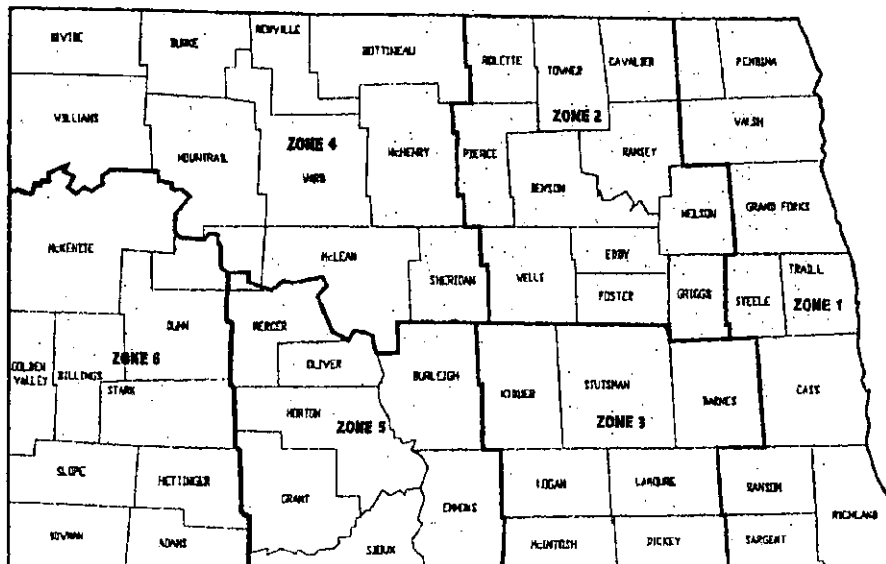
ND651.10(5)

(210-vi-AWMFH, ND Supplement 651.10, July 2003)

TABLE 1A**Rainfall and Runoff for 100-Year, 24-Hour Storm in North Dakota**

<u>County</u>	<u>Rainfall</u> <u>in Inches</u>	<u>Runoff in Inches</u>		<u>County</u>	<u>Rainfall</u> <u>in Inches</u>	<u>Runoff in Inches</u>	
		<u>Unpaved</u> <u>Lot</u>	<u>Paved</u> <u>Lot</u>			<u>Unpaved</u> <u>Lot</u>	<u>Paved</u> <u>Lot</u>
Adams	4.6	3.5	4.0	McLean	4.7	3.6	4.1
Barnes	5.1	4.0	4.5	Mercer	4.7	3.5	4.1
Benson	4.8	3.7	4.2	Morton	4.7	3.6	4.1
Billings	4.5	3.4	3.9	Mountrail	4.6	3.5	4.0
Bottineau	4.7	3.6	4.1	Nelson	4.9	3.8	4.4
Bowman	4.5	3.4	3.9	Oliver	4.7	3.6	4.1
Burke	4.6	3.4	4.0	Pembina	4.9	3.8	4.3
Burleigh	4.8	3.7	4.2	Pierce	4.8	3.6	4.2
Cass	5.2	4.1	4.6	Ramsey	4.9	3.7	4.3
Cavalier	4.8	3.7	4.3	Ransom	5.2	4.1	4.6
Dickey	5.2	4.0	4.6	Renville	4.6	3.5	4.0
Divide	4.5	3.4	3.9	Richland	5.4	4.3	4.8
Dunn	4.6	3.5	4.0	Rolette	4.7	3.6	4.2
Eddy	4.9	3.8	4.3	Sargent	5.3	4.2	4.7
Emmons	4.9	3.8	4.3	Sheridan	4.8	3.7	4.2
Foster	4.9	3.8	4.4	Sioux	4.8	3.7	4.2
Golden Valley	4.4	3.3	3.9	Slope	4.5	3.4	3.9
Grand Forks	5.0	3.9	4.4	Stark	4.6	3.5	4.0
Grant	4.7	3.6	4.1	Steele	5.3	4.2	4.7
Griggs	5.0	3.9	4.4	Stutsman	5.0	3.9	4.4
Hettinger	4.6	3.5	4.0	Towner	4.8	3.7	4.2
Kidder	4.9	3.7	4.3	Traill	5.1	4.0	4.5
LaMoure	5.1	4.0	4.5	Walsh	4.9	3.8	4.3
Logan	5.0	3.9	4.4	Ward	4.7	3.5	4.1
McHenry	4.7	3.6	4.1	Wells	4.8	3.7	4.2
McIntosh	5.0	3.9	4.4	Williams	4.5	3.4	3.9
McKenzie	4.5	3.4	3.9				

TABLE 2
Design Runoff Zones



RUNOFF (Inches)

Zone	Oct 15 - April 30	May	Jun	Jul	Aug	Sep	Oct	Yearly
1	0.7	0.5	0.8	0.9*	0.8	0.7	0.2	4.6
2	0.6	0.5	0.8*	0.7	0.6	0.6	0.2	4.0
3	0.6	0.5	0.7	0.8*	0.6	0.5	0.2	3.9
4	0.6	0.5	0.7*	0.7	0.5	0.5	0.1	3.6
5	0.4	0.5	0.7*	0.4	0.4	0.2	0.1	2.7
6	0.4	0.5	0.9*	0.5	0.4	0.3	0.1	3.1

*Note that for each zone, the October 15 to April 30 runoff value is less than that shown for either June or July. In Zone 6, the June runoff is more than twice that for October 15 to April 30. Therefore, if the October 15 to April 30 value is used, pumping will be required more often to have available capacity for the 25-year, 24-hour storm runoff.

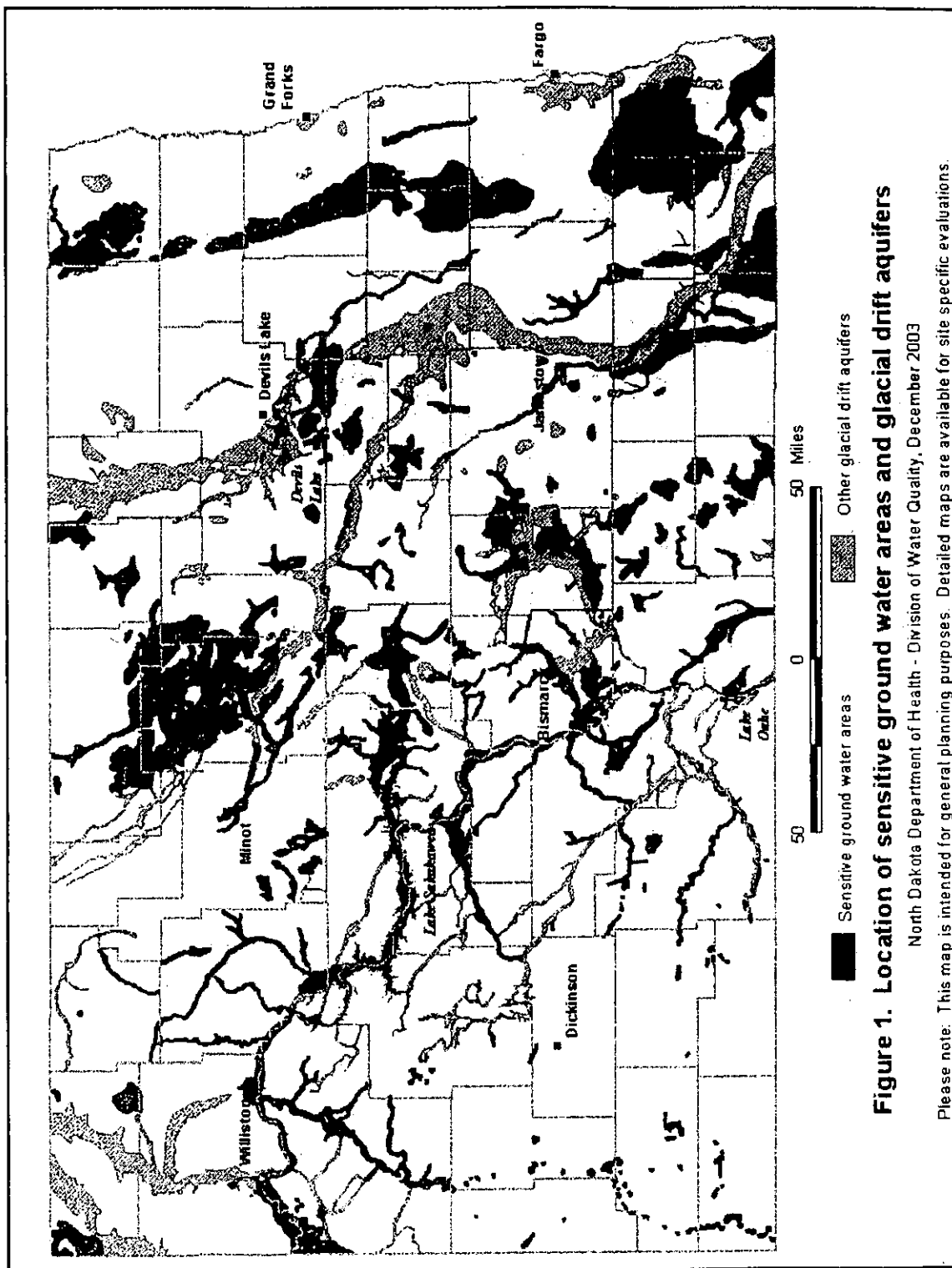
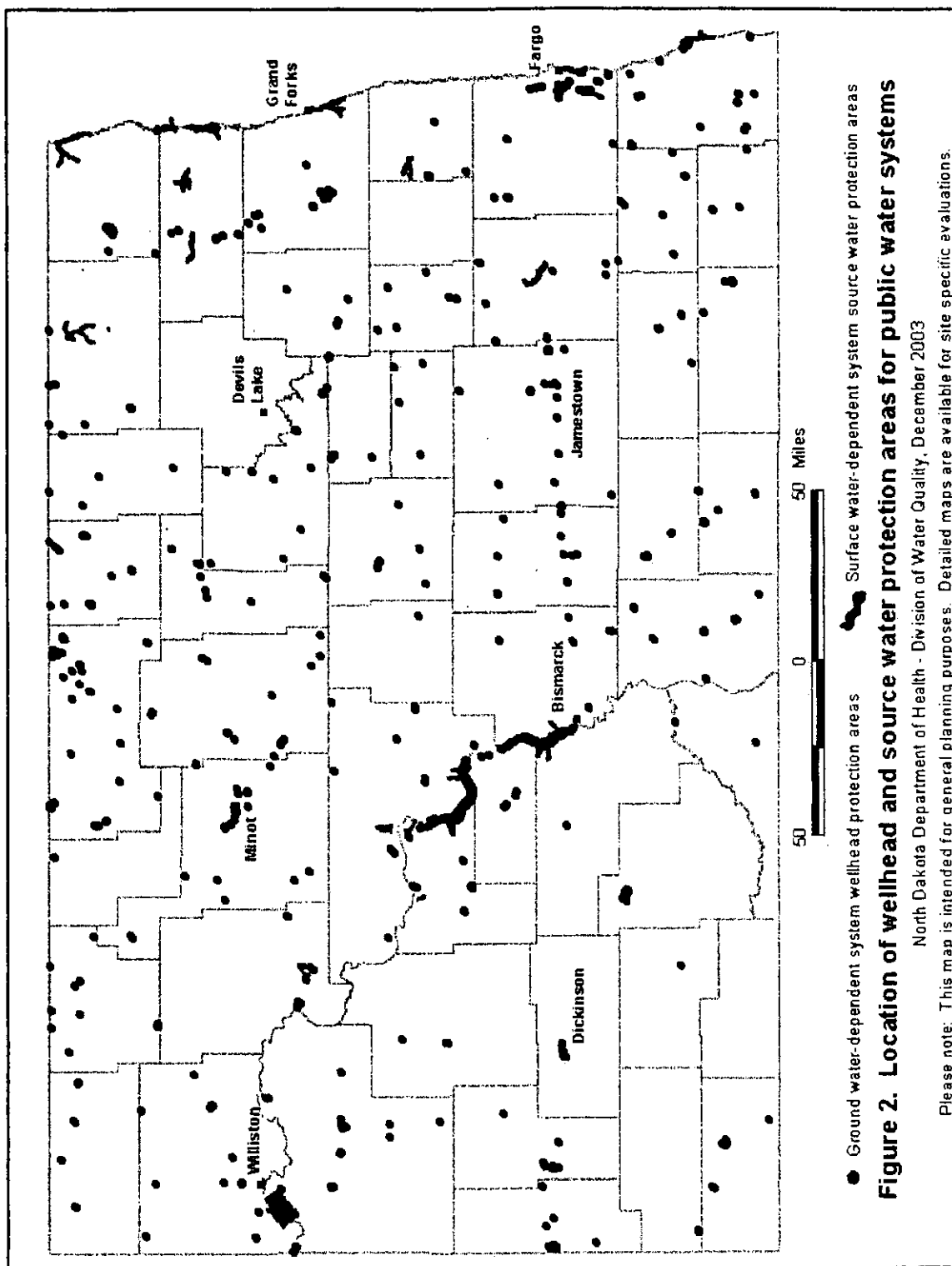


Figure 1. Location of sensitive ground water areas and glacial drift aquifers

North Dakota Department of Health - Division of Water Quality, December 2003

Please note: This map is intended for general planning purposes. Detailed maps are available for site specific evaluations.



1.5 Mile
Radius

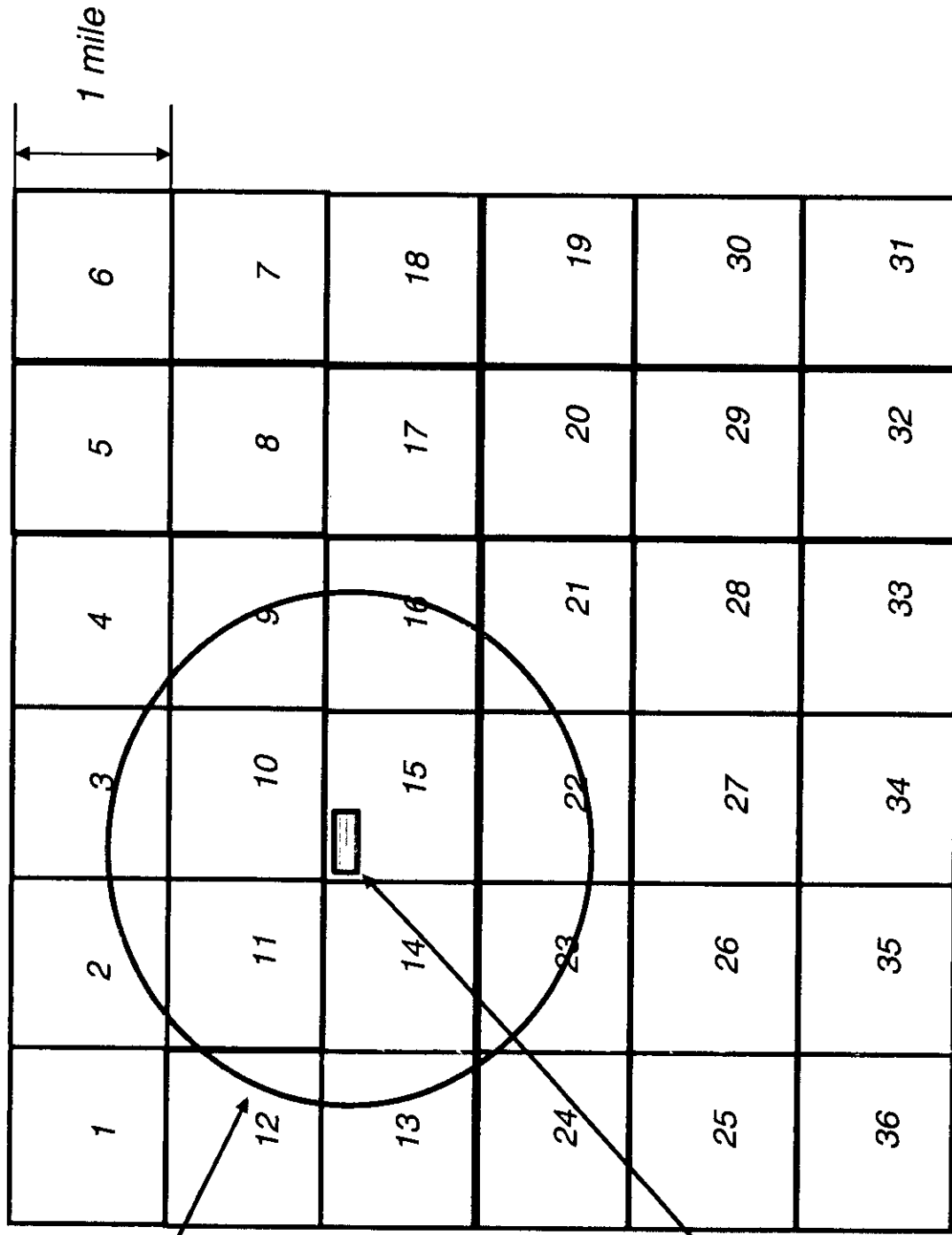
(4524 acres
of area)

1 township
(23,040 acres)

Proposed Swine
Operation
(12,500 head or
greater)

North

Not to
scale



MEMO

To: Senator Tim Flakoll, Chrm.
Senate Ag Committee

From: Rodney Brown

Re HB-1420

Date: March 13, 2007

I am writing to urge your support of HB-1420. The bill refers to ND Dept. of Health rules for environmental regulation of animal feeding operations. The lack of consistency in environmental regulation is a drawback to the development of animal feeding in North Dakota. The State Health Department will provide consistent, reliable regulatory standards.

Thank you for your consideration of this matter.

Rodney Brown

Rodney Brown
4288 93rd Ave. NE
Crary, ND 58327-9305
District 15

Testimony on House Bill 1420
Presented by
Randy Lemm,
Kelso Township Zoning Officer
January 25, 2007

Good morning Chairman Johnson and members of the House Agriculture Committee. As the Kelso township zoning officer, I am in support of HB 1420.

I think township zoning authority will be enhanced by this bill. We will be able to establish the location of animal feeding operations in our township and, if we so choose create agricultural production districts. This could be very positive for more urban areas of the state.

Most of our township's budget is used to maintain our road system. This leaves very little for other expenditures. I believe the most critical issues surrounding zoning for animal agriculture involve environmental controls. Environmental regulation of animal feeding operations is best left with the Department of Health. They have expertise, manpower and the financial resources to regulate environmental issues. I don't want that responsibility placed on our township. I would encourage the Senate Agriculture Committee to amend that language back into HB 1420.

I strongly encourage the committee to give a "Do Pass" on HB 1420. Thank you for the opportunity to express my views.

My name is Harriet Bracken, President for Citizens Against Factory Farms (CAFF). I live in Leeds, ND and I'm writing this in regard to HB 1420..Citizens Against Factory Farms (CAFF) realizes that animal agriculture is and always has been important to North Dakota's economy and **we support responsible animal agriculture**. CAFOs/hog factories are not the answer, especially when they refuse to be bonded or take responsibility for pollution, cleaning up lagoons, and building sites when they move on in about ten years.

In CAFF's opinion HB 1420 was introduced because Viking Feeders and the Farm Bureau failed to get Ramsey county to gut the zoning ordinance the Ramsey County Zoning Board spent much time and effort to put into place in order to protect the Devils Lake Basin. The Ramsey County ordinance also attempts to protect the soil, water, air and health of citizens of Ramsey County from pollution caused by Concentrated Animal Feeding Operations (CAFOs)/hog factories. The pollution caused by CAFOs/hog factories to waterways and the environment are well documented if one takes the time and effort to check out this issue. Townships and Counties are in the best position to monitor CAFOs/hog factories regarding environment and health issues as they are the ones most affected.

Rep. Dennis Johnson, Chairman of the House Ag Committee, stated in an interview on KZZY Radio that if the State Health Dept is to take over this job that the Health Dept. would need more staff for inspectors and more funding. Is this being done in this bill? CAFF would suggest that funding be put in place to help Counties and Townships deal with these problems on a "as need basis", or **maybe those making the mess should be responsible for cleaning it up.**

In 2001 the Dickinson Research Extension Center did "An Economic Analysis of Swine Rearing Systems For North Dakota". They compared CAFOs, Hoop Barns and Open Pens. All things considered they found that the **Hoop Barns** system showed the **greatest profit** of 6.63% over the CAFO and that Open Pens came in next at 4.7%. Why so much hype that CAFOs/hog factories are the "salvation" of pork production?? **Are we being sold a "pig in a Poke"?**

There is also hype that because of new bio-diesel and ethanol projects that there is a need to use the grain by-products and CAFOs/hog factories could use these. It is CAFF's understanding that these grains are not a good feed source for hogs as they are too rich and can only be used as a small portion of the feed rations..


In Nov. 2006 Manitoba put a ban on any new or expansion of CAFO'/hog factories because of waterways and environmental pollution. What does this tell us? It is our opinion that in order to protect our water, soil, air and the health of our citizens **Townships and Counties must be allowed**

to retain the right to regulate CAFOs/hog factories in the areas of health and environment, as well as siting.

CAFF also believes **there does need to be more study and public input** on all issues surrounding CAFOs/hog factories including social and financial affect on the rural communities . This is an issue **that we can't get wrong** if we want to retain the **quality of life we enjoy in North Dakota**.

In closing we urge that you recommend a **DO NOT PASS** for HB 1420 or at the very least move it on for more study.

Sincerely yours,



Harriet Bracken,

President of Citizens Against Factory Farms,
PO Box 237, Leeds ND 58346
Phone 701-4662738

**AUDITOR'S OFFICE
DIVIDE COUNTY, NORTH DAKOTA
P.O. BOX 49
CROSBY, ND 58730
GAYLE JASTRZEBSKI, AUDITOR
Phone (701) 965-6351**

TO : ND Legislative Session

**ATTN: District #2 House of Representatives &
District #2 Senator
House Ag Committee
Senate Ag Committee**

FAX : 701-328-1997

DATE: February 7, 2007

FROM : Divide County Commissioners

FAX : 701-965-4370

COMMENTS: Attached find the do not pass resolution on HB 1420 & SB2331

RESOLUTION Divide County Commissioners request a DO NOT Pass for HB 1420

WHEREAS, Divide County Planning and Zoning Commission and County Commissioners may/did developed said ordinance using the power and authority granted to them by the NDCC 11-33-02.2; and

WHEREAS, ND Century Code 23-29 states that the term "Solid Waste " does not include:

- a. Agricultural waste, including manures and crop residues, returned to the soil as fertilizer or soil conditioners; and

WHEREAS, manure from CAFOs is not included in the management of solid waste by the State Department of Health then it needs to be managed by the County Commissioners and/or Township Supervisors.

WHEREAS, Divide County Planning and Zoning Commission and County Commissioners may/did develop an ordinance equal to or more stringent than State rules as allowed by NDCC 23-29-05; and

WHEREAS, Divide County Planning and Zoning Commission and County Commissioners may/did develop said ordinance following the "A Model Zoning Ordinance for Animal Feeding Operations", March 2000 which was developed under the direction by the 1999 Executive Order (1999-03) Governor Schafer issued an which directed the Department of Health to develop said Model ordinance; and

WHEREAS, part of zoning rules are to regulate odor and water setbacks of large concentrated animal feeding operations to protect the environment and health of said county stated in above stated NDCC and State Model Ordinance;

NOW, THEREFORE, BE IT RESOLVED that the North Dakota State House of Representatives vote "DO NOT PASS" on HB 1420.

Dated at Crosby, ND this 2 day of Feb, 2007 by Divide County Commissioners

Print Name

Address/Phone number

Signature

Gerald Brady	11160 106 th ST NW	Crosby ND 58730	<i>Gerald Brady</i>
Doug Graupe	PO Box 237,	Crosby ND 58730	<i>Doug Graupe</i>
Tim Selle	9875 132 nd AVE NW	Fortuna ND 58744	<i>Tim Selle</i>