

Permit Changes and Response to Comments
Large Dairy Concentrated Animal Feeding Operation WPDES General Permit

April 4, 2011

A number of editorial and typographical error changes have been made to the permit. To reflect the delay in permit issuance, the permit effective date and expiration date have been modified to April 4, 2011 and March 31, 2016, respectively.

During the public comment period, the Department of Natural Resources (“the Department”) received over 150 comments on the Large Dairy Concentrated Animal Feeding Operation (CAFO) WPDES General Permit (“the General Permit”) and associated Environmental Assessment (EA). The following is a summary of significant comments and any significant changes which have been made in the terms and conditions set forth in the draft permit and a response to US EPA comments.

Comment #1: Referral to the Wisconsin Department of Justice (WDOJ) should not be a barrier to eligibility for General Permit coverage – a referral is not a conviction and does not prove that any wrongdoing actually occurred. In most cases, the ultimate result of a referral to WDOJ is a civil judgment against the farmer – this restriction is already accounted for in the first bullet point.

Response: Partial change made (pg. 1, sub. 1.2). The permit language has been modified such that only unresolved referrals to the WDOJ prohibit coverage under the General Permit for an operation that is seeking permit coverage for the first time. Referrals that result in a civil or criminal conviction are addressed in other portions of the sub. 1.2. Referrals that do not result in a conviction do not prohibit coverage under the General Permit.

Comment #2: There were a number of comments expressing concern about Notices of Violation (NOV) or citations being used as a basis for denying coverage under the General Permit. Comments indicated that environmental citations and NOV’s can be issued based on the suspicion of a violation, they are only a notice not a conviction, and they are issued on a discretionary basis, and potentially inconsistent manner, which is unfair. Receiving an NOV in no way rises to the seriousness of having a civil judgment entered as part of a settlement with the WDOJ. Comments indicated that if a citation or NOV remains a barrier to eligibility, the time period should be reduced from 36 months to 12 months or 6 months. Also, a comment indicated that if citations or NOV’s remain a barrier to General Permit coverage, the Department should publish for public review and comment its internal policy to explain when Department staff may/must issue an environmental citation or NOV.

Response: Partial change made (pg. 1, sub. 1.2). The Department agrees that the timeframe for prohibiting coverage under the General Permit should be reduced and has reduced the timeframe from 36 to 24 months. In addition, the Department has limited this coverage prohibition by specifying that it only applies to operations that do not currently have a permit if the owner or operator did not implement corrective measures identified in the citation or Notice of Violation.

Comment #3: There were a number of comments that objected to requiring operations to have 180 days of storage prior to receiving coverage under the General Permit and receiving permission to populate to 1,000 AU or more. Comments indicated that this could create issues with agricultural lenders who are unlikely to finance a project without proof of profitability/recoverability which may include ability to expand to 1,000 AUs or more and generate revenue. While NR 243.17(4) does allow a facility to lawfully reduce from 180 days to 150 days of storage, this provision provides no comfort for the farm expanding for the first time over 1,000 AU, as many of these farms haul manure on a daily or weekly basis. Such farms typically have between 2 and 30 days of storage, and would not have nearly 150 days of storage allowed by NR 243.17(4) or the 180 days of storage required for General Permit eligibility. One comment indicated that the list of operations not covered will make the General Permit unimplementable.

Response: Partial change made (pg. 1, sub. 1.2 and pg. 24, sub. 5.2.6). Ch. NR 243 outlines the requirements for having 180 days of storage for liquid manure. To address this comment, sub. 1.2 of the General Permit now references applicable section of the code (s. NR 243.15(3)(i) or (j), whichever is applicable).

In addition, sub. 5.2.6 has been added to the permit to include allowances for construction schedules (also allowed under s. NR 243.14(3)) as part of the coverage process under the General Permit. The added language reads as follows:

5.2.6 Construction Schedules

The Department may require a construction schedule for designed structures (e.g., manure storage, feed storage runoff control) as a condition of the Department’s nutrient management plan approval prior to granting coverage under this general permit. The permittee shall include the construction schedule in its nutrient management plan. The construction schedule included in the nutrient management plan is an enforceable requirement of this permit.

NOTE: The construction schedule will be public noticed, and subject to public comment, as part of the Department's notice of intent to grant permit coverage and the notice of availability of an operation's nutrient management plan that is required prior to granting coverage under this general permit.

This language will also allow the Department to include construction schedules for other structures where needed to ensure compliance with permit conditions and make the permit more implementable. The construction schedule will be subject to public comment as part of the nutrient management plan and does not delay compliance requirements with discharge limitations under the WPDES permit.

Comment #4: A number of comments objected to the proposed restrictions for non-permanent feed storage, referencing a lack of specific authority to impose these restrictions or stating that the Department has never regulated non-permanent feed storage areas and has not identified any particular environmental need for such requirements. A comment challenged the Department to identify water quality problems or other documented environmental issues associated with this type of contained storage that would necessitate or otherwise justify this new regulatory burden.

Response: Partial change made (pg. 3, sub. 3.3.1). Discharges from feed storage areas, including non-permanent feed storage areas, are considered to be part of the production area and are subject to NPDES/WPDES regulation. The Department has authority to include requirements in WPDES permits that are intended to protect water quality and promote compliance with discharge limitations contained in WPDES permits. The Department has included requirements for non-permanent feed storage areas in individual permits. Leachate and runoff from feed storage, whether in a feed bunker or silage bag, can be high in BOD and other pollutants and, if improperly managed, can result in impacts to waters of the state.

In response to comments, the siting and operational requirements now reference NRCS Standard 629, which outlines requirements for non-permanent feed storage areas. The language in NRCS Standard 629 is very similar to the requirements contained in the public noticed version of the General Permit, except that NRCS Standard 629 allows the use of silage bags on Hydrologic Soil Group A (which consists chiefly of deep, well to excessively-drained sand or gravels). Operations that plan to use alternative siting and operational criteria must receive written Department approval prior to use.

Comment #5: 3.7.3 Additional Nutrient Management Plan Requirements. One of the more common environmental concerns was the need for the Department to review and address site specific concerns about potential impacts from CAFOs, particularly in areas where karst topography is present. A number of these comments stated that individual permits should be used to regulate these operations.

Response: Some changes have been made in response to this comment (pg. 15, sec. 3.7.3). In general, under ch. NR 243, the Department has limited authority to require case-by-case best management practices. Ch. NR 243 and permits issued under this authority already have requirements designed to address issues such as karst topography as well as a number of other potential surface and groundwater concerns. The following language, which reflects authority contained in ch. NR 243, has been added to the permit to address the potential need to include additional land application practices as part of the nutrient management plan approval process.

As part of the nutrient management plan approval process, the Department may require that the permittee implement additional practices in accordance with s. NR 243.14(10). The permittee shall include these additional practices in the nutrient management plan and implement them.

RESPONSE TO EPA COMMENTS

Comment #6: Section 2, Public notice of proposed decision to grant coverage under the General Permit. Section 2 of the permit specifies the process for coverage to be granted to applicants seeking coverage under the permit, but does not describe the process the Department will follow to provide public notice of proposed coverage under the permit. The fact sheet accompanying the draft permit describes this process. Consistent with the process described in 40 CFR 122.23(h), the permit should be revised to clarify the public notice process the Department will follow in granting coverage under the permit, including the length of the public comment period.

Response: Change made (pg. 1, sec. 2). The following note was added to the General Permit:

NOTE: The Department shall public notice its intent to grant coverage to an operation and the availability of an operation's nutrient plan and follow the public participation procedures contain in subchapters I and II of ch. NR 203, Wis. Adm. Code, as part of the process of covering an operation under this general permit.

Comment #7: Section 3.4.4 states that the permittee is required to collect and analyze samples of *land applied* manure and wastewater (emphasis added). While section 3.5 makes clear that sampling shall be conducted at manure or process wastewater storage or production facilities, this provision should be revised to clarify that samples should be of manure or process wastewater *to be* land applied (emphasis added).

Response: Change made (pg. 5, sec. 3.4.4). The language change has been incorporated into this subsection.

Comment #8: Section 3.7 Nutrient Management. This section requires permittees to ensure that manure and process wastewater is land applied or disposed of in compliance with the permit, the approved nutrient management plan and NR 243. Under 40 CFR 122.42(e)(1), permits for CAFOs must include requirements for permittees to implement nutrient management plans with specific elements. While the permit establishes limits and conditions to implement the requirements in 122.42(e)(1), it does not appear to require nutrient management plans to address all of the specified elements, for example the practices the permittee will follow to ensure proper management of mortalities, or how it will ensure confined animals do not come in direct contact with waters of the U.S. The permit should be revised to require permittees to address, either through the nutrient management plan or some other means, the required elements in 122.42(e)(1).

Response: Some changes have been made in response to this comment (pg. 13, sec. 3.6). Most issues related to 40 CFR 122.42(e)(1) are addressed via the Department's plan approval process for designed structures addressing the handling and storage of manure and process wastewater and associated issues (e.g., clean water diversions, production area restrictions on cattle access). Non-production area cattle access may be allowed in accordance with sec. 3.6 of the General Permit (CAFO outdoor vegetated areas). Language has been added to the General Permit referencing the definition of CAFO outdoor vegetated areas contained in "ancillary service and storage" in s. NR 243.03 which clarifies that CAFO outdoor vegetated areas are not part of a CAFO's production area.

Requirements for testing manure, process wastewater and soil requirements under 40 CFR 122.42(e)(1) are specified in s. NR 243.19(1) and sec. 3.4.4 of the permit. Record keeping requirements are contained in s. NR 243.19(2) and sec. 5.2.10 of the permit.

The Department believes that permit restrictions in sec. 5.2.4 on mortality disposal and requirements to record the date and method of carcass disposal are adequate and do not require additional information to be submitted as part of an operation's nutrient management plan. The Department addresses these issues as part of its review process for plans and specifications for production area structures. US EPA CAFO rules address these issues as part of the nutrient management plan.

Comment #9: The permit should also clarify that the nutrient management plan approved with a permittee's application and approved by the Department is a part of the permit, and that failure to implement the nutrient management plan as approved is a violation of the permit.

Response: Change made (pg. 13, sec. 3.7). The following language has been added to the first paragraph of sec. 3.7.: *Failure to comply with the requirements of a nutrient management plan developed and approved by the Department in accordance with this permit and s. NR 243.14, is a permit violation.*

Comment #10: Section 3.7 Nutrient management. This section includes a discussion of how the Department will handle proposed amendments to nutrient management plans, and indicates that 1) amendments are subject to review and approval by the Department, and that 2) some amendments may be subject to formal public notice procedures. Consistent with 40 CFR 122.42(e)(6), the Department should clarify which types of amendments would be considered substantial changes necessitating public notice, and that other changes to terms of nutrient management plans would be reviewed and approved consistent with the procedures in 122.42(e)(6)(ii).

Response: No change made. The Department intends on clarifying which amendments are considered substantial changes subject to public notice via formal revisions to ch. NR 243, Wis. Adm. Code.

Comment #11: Section 3.7 Nutrient management. In addition, this language implies that annual review and amendment of the nutrient management plan by the permittee may account for all necessary changes to the nutrient management plan that occur or that need to be submitted to the Director. The permit should be revised to clarify that while amendments may be summarized in an annual nutrient management plan update, proposed amendments to nutrient management plans must be submitted to the Department for review and approval prior to implementation of the amendments.

Response: Change made (pg. 14, sec. 3.7). Language has been added to sec. 3.7 clarifying that changes to a nutrient management plan, including changes proposed as part of an annual update, must be reviewed and approved by the Department.

Comment #12: 3.7.1 Prohibition on surface application prior to forecasted precipitation. It is our understanding that nutrient management plans developed in accordance with NR 243.14 will incorporate factors such as the probability of precipitation and the amount of precipitation likely to result in runoff, to specify the conditions under which the permittee may not surface apply manure and process wastewater. Such factors should be clarified in the permit to establish clear, enforceable conditions under which CAFO waste may not be applied prior to forecasted precipitation.

Response: No change made. The Department has been requiring that permittees identify storm events and probability of these events as part of their nutrient management plan to comply with this requirement as part of the nutrient management plan approval process, which is then subject to public review and comment. The Department is working to develop better guidance and information for permittees on how to comply with this requirement.

Comment #13: Section 5.2.10 Reporting Requirements. This provision requires permittees to submit Quarterly and Annual Reports in accordance with NR 243.19(3). NR 243.19(3) requires submittal of the information required by the Annual Reporting requirements for CAFOs under 122.42(e)(4)(i) – (vii). It is unclear whether permittees are required to submit certain of the information specified in 122.42(e)(4)(viii). The permit should be revised as necessary to require the information specified in 122.42(e)(4)(viii).

Response: No change made. The Department contends that the monitoring, record keeping and reporting requirements in accordance with sec. 5.2.10 of the permit which references s. NR 243.19, requires submittal of information in compliance with 40CFR 122.42(e)(4)(viii).

The following public comments did not result in changes to the General Permit.

Comment #14: There were a number of comments that generally supported agriculture and its importance to Wisconsin and people.

Response: Comment noted.

Comment #15: There were a number of comments that supported additional research regarding agricultural related impacts and best management practices.

Response: Comment noted.

Comment #16: There were some comments that expressed concern about the Department's efforts to educate the public and inform in-state and out-of-state landowners on topics such as the General Permit and obtain input from citizens. A commenter indicated that they would like to see state agencies fully explain the potential impacts of what they are proposing before they hold listening sessions. Other comments expressed concern that sessions were held during the day which discourages public participation.

Response: The Department took many actions to inform the citizens of Wisconsin about the General Permit. This included noticing the Department's intent to issue the General Permit in 12 major newspapers across the state, holding five informational hearings at various locations throughout the state, developing a website with the proposed General Permit, fact sheet and EA for the permit and having an extended public comment period of almost two months.

With regard to the times at which hearings are held, we hear concerns about both day and night hearings. Our experience is that day hearings are very well attended.

Comment #17: Given the knowledge and tools available to consultants, the Department should let certified consultants make the call as to whether the land can handle manure in order to avoid slowing up and stifling the process with unnecessary added time constraints.

Response: Part of the Department's statutory responsibility is to review plans submitted by consultants. This review is important for the producer and public to ensure that designs comply with state standards and protect water quality. The Department recognizes that delays in reviewing plans is a concern of the industry and has and will continue to take steps to promote process efficiencies.

Comment #18: There should be a certification program for producers that shows they can manage a CAFO.

Response: The Department does not have authority to require a producer certification program.

Comment #19: Water quality should be monitored before and after operation to ensure baseline data versus operational data can be compared. It seems misplaced that the Department has no authority through the WPDES to do such sampling.

Response: Comment noted.

Comment #20: The General Permit does not conflict with the Dane County Water Quality Plan. We support the reporting, monitoring, nutrient management and other conditions of the permit.

Response: Comment noted.

Comment #21: A number of comments, primarily industry commenters, supported the General Permit because it would streamline the permit process and allow the limited Department staff to focus less on paperwork and more on in-field compliance inspections or operations that need to be pushed in the correct direction, resulting in better environmental protection.

Response: Comment noted.

Comment #22: Comments state that Wisconsin regulates livestock and dairy farms using the toughest environmental regulations in the nation. Neither the EPA nor any other state has regulations as stringent. The General Permit reflects those regulations and does not reduce environmental protection.

Response: Comment noted.

Comment #23: Referencing the fact that Wisconsin is the last state to use general permits for CAFOs, a number of comments support the General Permit because it has been used in other states for CAFOs as well as other industries in Wisconsin (municipal treatment plants, dredging operations, etc.)

Response: Comment noted.

Comment #24: A number of comments supported the General Permit because it gets operations under permits that include strict standards and saves permittees time and money by streamlining the permit process, which are better spent on environmental protection and reduces the likelihood that they will be vulnerable to lawsuits. A comment indicated that farms need to be allowed to expand and modernize, while abiding by the rules and regulations, but not be hindered by needless rules and regulations. A number of these comments came from current CAFOs who felt the permit process took too long. A comment indicated that the Department is not prepared to react quickly to submittals during the permit process.

Response: Comment noted.

Comment #25: Some industry representatives indicated support for increased fees, although one producer indicated that other things in the Department need to be looked at since their tax dollars go towards the process too.

Response: Comment noted.

Comment #26: A number of producer comments supported the General Permit based on statements that the permit will allow Department resources to be used for field work and site visits and address impacts from smaller-scale farms, rather than paperwork and bureaucracy and will streamline the permit process.

Response: Comment noted.

Comment #27: There were some non-industry comments that supported the General Permit if the General Permit allowed the Department to do more monitoring of permitted operations or supported limited use of the General Permit for large dairy farms with good compliance record in protecting water quality.

Response: Comment noted.

Comment #28: A number of comments discussed reasons CAFOs expand including (1) to improve their quality of life, (2) increased ability to adopt technologies and management systems that do all that is possible to protect the environment while offering superior quality comfort to dairy cattle, (3) increased ability to compete, and (4) to comply with environmental regulation.

Response: Comment noted.

Comment #29: A number of comments discussed the benefits of CAFOs including (1) the jobs providing by expanding operations (2) that they provide the milk needed for cheese plants in Wisconsin and that (3) fewer larger farms allows for better Department oversight.

Response: Comment noted.

Comment #30: A number of comments indicated that they believed that CAFOs do a good job either because they are subject to some of the most restrictive/protective requirements in the country, have Department oversight, and/or because they also depend on a clean environment.

Response: Comment noted.

Comment #31: There were a number of comments asking that the Department better address impacts from smaller-scale livestock operations.

Response: The Department has a number of federal, state, and local agency partners in the state of Wisconsin that implement a number of regulatory and voluntary programs to protect water quality. Implementation of some of these regulations are contingent on providing producers at least 70% cost-sharing. While staffing limitations and restrictions on the availability of cost-sharing present challenges, over time, the use of permits for CAFOs, local livestock ordinances, cost-share programs for livestock operations and voluntary implementation of best management by producers provide a strong foundation for addressing impacts from livestock operations of any size.

Comment #32: Comments stated that smaller farms are very unfriendly to the environment and should be required to meet some of the more basic standards.

Response: State and federal law both have more stringent requirements for larger-scale farms than smaller-scale farms. Department rules reflect this.

Comment #33: A number of comments spoke in defense of the industries involvement in the regulatory process indicating that documents such as the DNR/DATCP (Department of Agriculture, Trade and Consumer Protection)/DBA (Dairy Business Association) Memorandum of Understanding (MOU) are beneficial, stating that nobody “strongarms” the Department and that the media is trying to sell papers when it discusses industry input into the process.

Response: Comment noted.

Comment #34: I believe the General Permit will provide a more transparent process for the applicant and the public as our producers seek to expand.

Response: Comment noted.

Comment #35: A number of comments expressed concern that issuance of the General Permit represented the interests of larger-scale farming operations and the Dairy Business Association, not citizen interests. Some comments referenced the DNR/DATCP/DBA MOU as representative of this concern and point to the fact that the Department has not denied any CAFO permits in recent years.

Response: The requirements of the General Permit reflect the requirements of ch. NR 243, Wis. Adm. Code, the Department’s code regulating all CAFOs. Ch. NR 243 was developed with input of producers and their representatives, public advocacy groups, various state and federal agencies, and the state legislature. The permit, reflecting code requirements, outlines the restrictions by which a CAFO operates within the state of Wisconsin.

While the dairy industry supports the use of the General Permit, the Department also supports the General Permit as a means to streamline the permit process so it can focus on monitoring permit compliance. With limited staff resources, process efficiencies must be pursued in order to meet the needs of regulated operations to have a streamlined, predictable process, and members of the public that want proper oversight of these operations.

Comment #36:The role of the Department is to protect the environment and the public interest, not to work to promote factory farms. It is against the Department’s mission to protect the environment to permit CAFOs.

Response: The way that the Department fulfills its mission is through promulgating rules and issuing permits that protect water quality and public health. The General Permit is consistent with the water quality protection rules for CAFOs.

Comment #37: A number of comments were against CAFOs and/or the General Permit based on; (1) animal welfare concerns; (2) economic concerns (they aren’t profitable, they put small dairies out of business, impacts on tourism); (3) potential and actual impacts to the environment (groundwater, e coli poisoning) by CAFOs or agriculture in general as well as impacts to people in the community (e.g., human health, property values, etc.); (4) concerns that the General Permit will increase the potential of these impacts. Some comments requested a moratorium on CAFOs in WI.

Response: Of the issues raised in the comment above, the only ones that can be addressed via the WPDES permit program are those related to water quality. In most cases, the requirements contained in the General Permit will be the requirements that apply to any CAFO operation, whether they are covered under an individual or general permit. Both general and individual permits reflect the requirements contained in ch. NR 243, Wis. Adm. Code. In limited instances where the Department determines that additional requirements beyond those contained in the General Permit are needed to protect water quality for an operation with 5720 animal units or fewer, an individual permit will be issued. Additional requirements may also be required of an operation covered under the General Permit as part of the nutrient management plan approval process in accordance with s. NR 243.14(10). (see the response to comment #5).

Comment #38: A number of comments were opposed to the General Permit because it would reduce substantive citizen input on permits and Environmental Assessments and would limit public comment only to a CAFO's nutrient management plan. Preserving local input into the permitting process, results in tailoring any proposed generic plan in favor of one specific to the area or even having the permit denied based upon the local and regional geology and water flows. Comments strongly supported the need for a local hearing/input prior to the issuance of any CAFO WPDES permit, not a hearing at some regional hub or in Madison.

Response: See comment #37 regarding tailoring CAFO nutrient management plans based on locally identified issues.

Under federal NPDES CAFO regulations, the Department must public notice the coverage of an operation under the General Permit and the operation's nutrient management plan. Members of the public can request a hearing and hearings would be held in the area of the operation as they are currently held.

Comment #39: While the General Permit does not foreclose opportunity to issue individual permits, it decreases the likelihood of issuance.

Response: The comment is correct. See the response to comment #37.

Comment #40: Based on the history of the Department, a number of comments were skeptical that the Department will dedicate more time to enforcement once the General Permit is issued. Some comments recommended a written plan/citizen MOU to ensure that more time will be dedicated to enforcement.

Response: The Department understands the skepticism expressed in the comments. However, given current staffing limitations, if there is going to be any opportunity to increase compliance monitoring efforts, permit processing efficiencies are needed.

Comment #41: There were a number of comments that expressed concerns about the streamlining of the WPDES permit process for CAFOs because it would increase the number of CAFOs which would, in turn, decrease the ability for the Department to oversee permit compliance.

Response: The Department questions whether the lack of a general permit is limiting the number of CAFOs in the state of Wisconsin. It is possible that some operations may be more likely to expand to CAFO size based on the existence of a streamlined general permit process; however, overall farm economics (e.g., milk price) more likely determines farm expansions. Generally, increases in the number of CAFOs, regardless of the existence of a general permit, without corresponding increases in Department staff to oversee these operations decreases the capacity of the Department to conduct compliance monitoring efforts.

Comment #42: Comments expressed concerns that they do not trust CAFOs to self-inspect.

Response: Combined with periodic Department inspections and review of submitted reports, self inspections have been a standard component of the WPDES/NPDES permit program. Falsification of information related to self inspections is a criminal action and represents a significant incentive to accurately report information to the Department. Also, Department staff do conduct periodic compliance inspections.

Comment #43: Streamlining the permit process to get permits out the door faster for its own sake is unwise without bolstering the agency's capacity to manage increasing workload. The industry should help support the regulatory apparatus necessary to a high-functioning and environmentally responsible dairy industry. The General Permit should not become the basis for permitting livestock farms unless and until there are fees that support agency staffing commensurate with the workload.

Response: Changes to the fee structure for the CAFO WPDES permit program would require that the state legislature change state statute. The Department does not have authority to change CAFO fees via changes to its administrative codes.

The issue of General Permit workload is addressed in the response to comment #41.

Comment #44: A number of these commentors believe that given the potential increase in CAFOs and current lack of inspection/enforcement, that the Department shouldn't issue the General Permit until an increase in application fees (currently 0\$) and annual fees (currently \$345) was approved by the state legislature so that the Department could properly staff the CAFO permit program. Comments compared CAFO fees to municipal treatment plants (e.g., Wisconsin Rapids, which produces roughly an equivalent amount of pollutant potential as a 700 cow dairy CAFO, has annual WPDES permit costs \$19,000). Others recommended an increase in fee regardless of the issuance of the General Permit. Recommended fees ranged from an application fee of at least \$1,500-\$2,000, coupled with an annual

fee at the rate of \$0.50 to \$1 per animal unit/head. Annual fees should range from \$350 for the smallest permitted CAFO to \$5,750 for the largest.

Response: See response to comment #43.

Comment #45: In addition to the need to get more Department resources for oversight, a number of commentors stated that CAFO fees should fully fund the Department's CAFO WPDES permitting, monitoring and inspection permit program, not taxpayers.

Response: See response to comment #43.

Comment #46: The General Permit does not adequately address problematic factors such as air quality, traffic, road weight limits, noise, odor and fees.

Response: The Department does not have authority to address these issues via either a general or individual CAFO WPDES permit.

Comment #47: The General Permit will not free up Department staff time to do more inspections. A comment indicated that most of the time in processing a CAFO permit is reviewing nutrient management plans and plans and specifications, which will not change as a result of issuing the General Permit. Also, the Department will need to spend more time on public noticing nutrient management plan modifications. Centralization of functions could save Department staff time instead of issuing the General Permit.

Response: The estimated time savings per permit is expected to be a minimum of 16 hours (time saved in drafting a permit and associated Environmental Assessment), which depending on the permit, is approximately a 20% reduction in CAFO permit processing. 16 hours represents approximately the time that is needed to prepare and complete a compliance inspection. The Department estimates it will process 25 new CAFO permit applications per year. The time savings using the General Permit would potentially allow for 25 compliance inspections. Whether the Department is able to dedicate all of this time to CAFO inspections depends on available staff resources and other potential workload demands.

Comment #48: We control municipal treatment plants/septic systems closer than CAFOs.

Response: Whether the Department's oversight of municipal treatment plants or other industries is greater than CAFOs is a subjective statement. The underlying concept of the WPDES permit program, regardless of the type of operation, is protection of the waters of the state of Wisconsin. It is accurate to say that the WPDES permit requirements are different for municipal/industrial operations than for CAFOs. This is based in large part on the different requirements for these operations under the Clean Water Act and the technologies employed by these different sectors. Municipal/industrial WPDES requirements are largely based on the concept of treat and discharge. CAFO WPDES requirements are based on the concept of storage and land application, with discharges only occurring in very limited circumstances. All WPDES permits have requirements for self-inspections, monitoring and reporting, although these requirements are unique to each industry.

Comment #49: If CAFOs are covered under the General Permit, they will pay no fee.

Response: This comment is incorrect. Currently under s. 283.31(8), any CAFO holding a WPDES permit must pay an annual fee of \$345.

Comment #50: A number of comments requested that the Department improve its current CAFO permit program by signing onto a citizen's group Memorandum of Understanding, as the Department did with Dairy Business Association, that would ensure stronger enforcement of the law, improved transparency, and increased communication between your agency and rural stakeholders. For example, the public deserves access to a current and accurate database of current CAFO locations, nutrient management plan documents and maps, owners, management firms, Department inspection dates, annual reports, violation histories and settlements, and pending CAFO permit applications.

Response: The Department agrees that better access to CAFO information would be beneficial to the citizens of Wisconsin, regardless of the existence of the General Permit or a citizen MOU. However, development of such a system is contingent on staff and monetary resources to develop and maintain such a system. This information is currently available and can be reviewed at Department regional offices.

Comment #51: The Department should implement a disease monitoring program for food animals to allow 48-hour trace-back of those animals through aspects of their production, in a fully integrated and robust national database.

Response: The Department does not have authority nor resources to establish such a program.

Comment #52.: The Department should ban the non-therapeutic use of antimicrobials in food animal production to reduce the risk of antimicrobial resistance to medically important antibiotics and other microbials.

Response: The Department does not have authority to ban the use of antimicrobials as part of the WPDES permit program.

Comment #53.: A number of comments referenced a need for stricter air regulations for large CAFOs due to odor and air emissions concerns.

Response: The Department does not have authority to address air/odor issues via the WPDES permit program. Information on the Department's air program's efforts to address these issues can be found and at <http://dnr.wi.gov/air/agWaste.html> and the Department's Environmental Assessment for the General Permit at <http://dnr.wi.gov/runoff/ag/permits.htm> (click on the "General Permits" tab).

Comment #54.: A couple of comments reference support for smaller farms, CSA and organic farmers rather than CAFOs and wondered why the Department and other state agencies are not supporting these types of operations.

Response: Department rules are not meant to signal a preference of a certain size or type of operations over another. They are meant to protect water quality regardless of size or type of operation.

Comment #55.: A couple of comments asked why CAFO owners are not required to have a bond to protect for cleanup of the pollution or well contamination.

Response: The Department does not have authority to require CAFOs to put up a bond.

Comment #56.: A couple of comments expressed concern that some large CAFOs expand without first obtaining permits.

Response: The comment is correct. The Department evaluates each situation where this arises to determine the appropriate enforcement response.

Comment #57.: Some comments stated that the Department should prohibit construction at a CAFO until the permit process is completed. If CAFOs begin construction, there's increased pressure to make sure the Department issues a permit.

Response: Any time a CAFO expands prior to receipt of all approvals or permits, it is taking a risk because approvals or permits may require changes at an operation that can be costly. That said, the WPDES permit program does allow CAFO structures to be built prior to permit issuance. However, for reviewable structures, the owner or operator must obtain a plan and specification approval prior to construction.

Comment #58.: The state has already taken away local control under the Livestock Siting Law. Streamlining trends have forced local governments to go to court.

Response: The Livestock Siting Law does not impact the Department's authority to regulate CAFOs. Citizens can challenge the Department's decision to convey coverage under the General Permit.

Comment #59.: The Department's effort to eliminate the "front-end" paperwork with the General Permit so that they have more time for enforcement on the back end fails to disclose the impacts of the project on the local community (the Environmental Assessment). This flies in the face of the concept of *consent of the governed*, a bedrock principle of democracy. And citizens must be fully informed to make meaningful decisions, which is called *informed consent*. Regulators every year who make environmental permitting decisions with little or no effort to obtain the informed consent of the people who reside in the affected communities.

Response: The Department went through an extensive public participation process as part of the rule process for ch. NR 243 which outlines the regulations for CAFOs. In addition, members of the public will receive notice and can comment on the Department's decision to cover an operation under the General Permit and the operation's nutrient management plan. The level and process of public involvement is dictated by state/federal law. The Department has also produced a statewide EA for issuance of the General Permit, and made this EA available for public review. Some citizens disagree with these prescribed processes.

Permit Conditions

Comment #60.: The Draft Permit is far from a "no-discharge" permit because it recognizes, and indeed authorizes, the discharge of pollutants to waters of the state by the permittee from land application and animal production areas. Because the permit authorizes a discharge, under the Clean Water Act, the Department must:

- Perform an antidegradation review to determine whether the new discharges authorize a lowering of water quality in receiving waters.

- Include water quality-based effluent limitations (WQBELs) as necessary to ensure compliance with water quality standards.

Response: The primary purpose of antidegradation is to evaluate, through the permit issuance process, whether permit-authorized discharges of pollutants from new or increased point sources will degrade (“significantly lower”) water quality in surface waters, and if so, whether the significant lowering of water quality is necessary to accommodate important social or economic development. Antidegradation was taken into consideration in the General Permit as follows:

Potential production area discharges: A new CAFO seeking coverage under the General Permit will accommodate economic development. Unlike industrial or municipal point source facilities, however, the effluent limitation for a CAFO production area is essentially a zero discharge limitation. Specifically, CAFOs are prohibited from discharging to navigable waters, except in the event precipitation causes an overflow from a properly designed structure in the production area and the permittee has complied with the inspection, maintenance and record-keeping requirements in s. NR 243.19. In the very unlikely event an **authorized** discharge were to occur, the permit requires that the discharge must still assure compliance with water quality standards and moreover, the General Permit states that for new or increased discharges to an ERW or ORW, there can't be any significant lowering of water quality. Since the permit prohibits a significant lowering of water quality (and the discharge cannot alter the background water quality of an ERW/ORW) the alternatives analysis and data required in s. NR 207.04(1)(b) is not required.

Land Application Area Discharges: As for the land application areas, the CAFO permit establishes application restrictions and best management practices designed to keep pollutants on the land. Through permit coverage, all land application activities must be done in conformance with a nutrient management plan. In most cases, once a parcel of cropland comes under a chapter NR 243 based nutrient management plan, there will likely be a reduction of pollutant runoff from that parcel of land. This is due to the fact that a cropland not previously covered under a nutrient management plan will, through permit coverage, become subject to more (water quality) protective management practices required by the WPDES permit program.

Moreover, under federal and state regulations, any discharges of pollutants that come off a field after compliance with the best management practices and other permit terms are classified as agricultural storm water discharges - nonpoint source pollution. Since antidegradation review in ch. NR 207 only applies to point source pollution and does not apply to nonpoint source pollution, the antidegradation review procedures are not applicable to any residual runoff of pollutants from land application areas that may occur after implementation of the best management practices and compliance with other land application requirements in the permit.

As for WQBELs for the production area, as stated above, for any authorized discharge, the permit requires compliance with state water quality standards and ground water standards. As for WQBELs for land application discharges, the Department cannot apply WQBELs to agricultural storm water runoff.

Comment #61: The Draft Permit contains insufficient surface and groundwater monitoring requirements.

Response: The General Permit reflects the best management practices in ch. NR 243 designed to protect surface water and groundwater quality. The Department does not have authority to require surface water quality monitoring as part of the WPDES permit. Groundwater monitoring is not a typical requirement for either an individual or general permit. If the Department determines groundwater monitoring is required for a given operation, the Department would issue an individual permit.

Section 1.1.- Operation Covered

Comment #62: To avoid inconsistent use of the General Permit among regional staff, the General Permit should include language that when a farm meets the requirements, the Department is required to give the farm the General Permit.

Response: It is the Department's intent to use the General Permit in the vast majority of instances where operations meet the General Permit's eligibility requirements. However, there may be instances where general permit coverage is not appropriate and the Department reserves the right to use an individual permit where necessary to protect water quality.

Comment #63: There were a number of comments in support of the 5,720 AU (4,000 animals) General Permit threshold. Reasons for support include (1) this size allows farmers in Wisconsin to remain competitive by scaling up in size to take advantage of economies of scale, (2) this allows multiple generations of family farmers to work together without the capital cost of acquiring separate operations (3) allowing farms with 4,000 cows to maintain General Permit coverage will keep more farms covered under the General Permit, thereby promoting the purposes of the General Permit

– one of which is to allow the Department resources to be used for more field work and site visits rather than more paperwork and bureaucracy.

Response: Comment noted.

Comment #64: Comments against the 5720 AU/4000 head threshold were concerned that the threshold was too high and noted that only the largest 5% of Wisconsin’s 194 existing CAFOs would be required to obtain site-specific Individual Permits. This inappropriately allows the use of unprotective general permits. A comment recommended the Department should lower the size cap to 2,500 head/4,000 animal units.

Response: The Department does not agree that general permits are unprotective. They are every bit as protective as an individual permit. The General Permit still provides for review of plans and specifications for production facilities and review of nutrient management plans which are the most important aspects of ensuring environmental protections. The number of animals at a particular facility has far less bearing on environmental risk than do properly designed and constructed production facilities and a properly designed and implemented nutrient management plan. The Department still has the ability to require an individual permit if necessary.

Section 1.2-Operations not Covered

Comment #65: Criminal violations and civil judgments should only remove general permit eligibility if the violations resulted in substantial harm or imminent threat to public health or the environment. This revision would provide a meaningful connection between general permit coverage eligibility and the purpose and intent of the WPDES permit program.

Response: The Department believes that violations referenced in this comment often indicate compliance issues that cannot be appropriately addressed by the standard conditions of a general permit. In practice, operations with these types of issues would be issued an individual permit until they have established a track record of compliance.

Comment #66: The General Permit should not be available where waste storage facilities are located, or land application will occur, in watersheds either known by the Department to be impaired, or listed on the current § 303(d) list, for phosphorus, sediment, or bacteria (Permit Section 1.1)

Nutrients, sediment, and bacteria are among the most prevalent pollutants in our surface waters, and they also happen to be the primary pollutants discharged by Large CAFOs. A huge number of surface waters in Wisconsin are listed on the §303(d) list for these three pollutants or are otherwise known to be impaired for these pollutants. Because general permits, by their very nature, cannot be drafted or subsequently modified to include “[a]ny more stringent limitations . . . [n]ecessary to meet federal or state water quality standards,” see Wis. Stat. § 283.31(3)(d), their use in impaired watersheds is inappropriate and unlawful.

Response: Production area restrictions address potential discharges to impaired waters. For land application, under ch. NR 243, the required nutrient management plan Best Management Practices should reduce discharges to impaired waters compared to a field not regulated under ch. NR 243.

Comment #67: A comment supported the requirement that farms have 180 days storage of manure since it does solve a lot of potential problems. While it may cause economic stress on the farm, the comment stated that days of not managing nutrients are over.

Response: Comment noted.

Section 3.1-Production Area Limitations

Comment #68: The Draft Permit includes a rather ambiguous provision that authorizes, in some circumstances, a discharge to surface waters so long as the discharge “complies with surface water quality standards.” Permit Section 3.1. While we support the inclusion of this provision, on its own it is insufficient to identify to the permittee and the public what the applicable discharge limitations or water quality standards actually are. The Department should revise the permit to identify the applicable water quality standards, and should then include in the permit itself the applicable effluent limitations (including numeric effluent limitations where necessary to achieve water quality standards). These water quality based effluent limitations (“WQBELs”) are a necessary addition to the technology-based requirements included in NR 243, for they allow the Department to take the water quality needs of the specific receiving waters into consideration when crafting WPDES permit terms and conditions. The Draft General Permit does not include any such WQBELs, nor does it include a method for ensuring compliance with water quality standards beyond the vague and potentially unenforceable “comply with water quality standards” directive.

Response: Inclusion of numeric WQBELs is impractical for CAFOs given that their potential discharges are non-discrete (i.e., not from a defined channel or pipe) and episodic (i.e., precipitation drive). The Department does calculate numeric limits for CAFOs where the CAFO is proposing an alternative treatment technology with an end of pipe

discharge (see NR 243.13(2)(b)); however, these types of discharges are not covered under the General Permit and would be regulated under an individual permit.

Comment #69: The Draft General Permit, Section 3.1, includes the following language: “For all new or increased discharges to an ORW or ERW, any pollutant discharged shall not exceed existing levels of the pollutant immediately upstream of the discharge site.” This language is vague, and does not reflect the requirement in Wis. Admin. Code § NR 207.03(3) to set actual effluent limitations “equal to the background levels of these substances, upstream of, or adjacent to, the discharge site unless it is determined that for Great Lakes system waters, such limitations would result in significant lowering of water quality[.]” *See also id.* § NR 207.03(4)(b) (applicable to ERWs).

Furthermore, as written, the phrase “existing levels” in section 3.1 is almost meaningless. The Department should specify whether that refers to the concentration of the pollutant discharged (which may be the most logical reading of this provision) or whether it refers to the total mass loading of a given pollutant.

The General Permit must specify maximum levels of discharges as required by Wis. Stat. § 283.31(5) (Permit Section 3.1) which states that “each [WPDES] permit issued by the Department . . . [shall] specify maximum levels of discharges . . . developed from the permittee’s reasonably foreseeable projection of the maximum frequency or maximum level of discharge resulting from the production increases or process modifications during the term of the permit.”

Response: The permit does specify a maximum level of discharge allowed in narrative form which is implemented through required Best Management Practices. The production area restriction language in the General Permit is consistent with the language in individual permits and the requirement that a discharge can’t exceed water quality standards.

Comment #70: We object to the paragraphs in Section 3.1 that purport to require exempt agricultural stormwater discharges to comply with wetland and water quality standards. These provisions of the General Permit conflict with NR 243.03(2) and NR 243.13(2) and should be removed from the General Permit to avoid inconsistencies within the CAFO WPDES permit program.

Response: Section 3.1 outlines restrictions for the CAFO (animal) production areas and the “no discharge” requirement that applies to the production area. “Agricultural storm water discharge,” defined in ch. NR 243.03(2), is used in the context of allowable discharge from land application areas, not the production area. The term, “agricultural storm water discharges” does not apply to the production area.

Comment #71: We object to the language that states, “A permittee may not discharge any pollutants from the production area to a 303(d) listed surface water if the pollutants discharged are related to the cause of the impairment, unless the discharge is allowed under an EPA approved TMDL.” This language is based on requirements in NR 212 (“Waste load allocated water quality related effluent limitations”), which was promulgated pursuant to Wis. Stat. § 283.31(3)(d) and which requires any WPDES permit issued by the Department to comply with TMDLs. It is inappropriate to include this generic language in the General Permit because, before the Department can require a WPDES permit holder to comply with a TMDL, it must first promulgate the TMDL and appropriate WQBELs for the specific waterbody at issue. *See* Wis. Stat. § 281.15. The generic 303(d) discharge prohibition should be removed from the General Permit.

Response: This language is not based on the requirements in ch. NR 212. It is based on the requirement in s. 283.31(3)(d)3, Stats. Furthermore, the Department is not required to promulgate the TMDLs by rule. TMDLs are based on water quality standards which are already promulgated in rules. The rulemaking requirement in s. 281.15, Stats., applies to the promulgation of water quality standards themselves, not the development of TMDLs that are based on those standards. The applicable statutory provision regarding the development of TMDLs is found in s. 283.31(3)(d)3., Stats., which states that TMDLs shall be developed pursuant to the Department’s continuing planning process (not rulemaking).

Section 3.7 – Nutrient Management

Comment #72: Nutrient management plans under the General Permit would continue the practice of allowing CAFOs to apply 15% more nutrients than actual crop yield averages, because the NRCS 590 standard permit this. This practice defies both science and common sense, and virtually guarantees excess nutrients will find their way into surface and ground water over time.

Response: The Department disagrees that setting yield goals 15% above actual crop averages virtually guarantees excess nutrients will enter surface or groundwater over time. Delivery of nutrients to surface or groundwater from crop

fields is based upon a host of factors (e.g., crop rotation, tillage, soil concentration of P and N, timing and methods of manure or commercial fertilizer application, use of soil conservation practices, weather events, etc., etc.). Nutrient delivery is not exclusively determined by crop yield goal averages set in nutrient management plans.

In addition, the NRCS 590 standard allows both CAFO and non-CAFO farms to base a nutrient management plan upon yield goals that are attainable under average growing conditions via multi-year documented yields. Yield goals should not be higher than 15% above the previous 3-5 year average (NRCS 590 V.A.1.b). With respect to CAFO's, the Department reviews yield goals set in a nutrient management plan for compliance with NRCS 590 criteria, as NR 243 incorporates the 590 technical standard by reference. After review, the Department has found the yield goals in nearly all CAFO nutrient management plans to be set using a yield range vs. specific yield number + 15%. The yield ranges selected typically cover both average yield and average yield + 15%. The yield ranges selected also reflect the yield goal ranges found within UW Crop Recommendations (A2809) for both Nitrogen and Phosphorus.

Section 3.7.3 – Additional Nutrient Management Plan requirements

Comment #73: The General Permit will not protect our water quality from CAFO pollution. Phosphorus allowance on many fields can be as high of a p-index of 6, which means the potential for phosphorus runoff to surface water is “high.” The Department should limit manure application to fields with a p-index of 2 or lower in order to protect surface water and meet federal clean water standards.

Response: The Department disagrees that it should limit manure application to fields with a P-index (PI) of 2 or lower in order to protect surface water and meet federal clean water standards. The current performance standard (P-index of six or less) is appropriate for several reasons: (1) For some fields, it may be impossible to meet a PI of 2 due to field factors alone, whether or not they receive CAFO manure or nutrients from some other source. (2) The P-index is a nutrient management planning tool that employs many conservative assumptions regarding how much P can be delivered from field to nearby perennial surface waters. The conservative assumptions (e.g., field uniformity based upon NRCS dominant critical soil/slope and corresponding risk for soil erosion, tillage options set to reflect higher soil disturbing range, direct land connection to surface waters from field edge to stream, larger soil particles have equal risk for reaching reach surface waters), make the P Index over-estimate P delivery risk/loading to perennial surface water streams. The result from this approach is that the actual amount of P delivered from field to perennial surface waters is likely much less than what the P Index predicts. (3) There also is no basis for determining that the potential runoff to surface waters from fields with a PI of 6 is “high.” While it is fair to say that a field with a PI of 6 has a higher potential P delivery than a field with a PI of 2, no Wisconsin water quality studies have confirmed that a PI of 6 is “high.” In accordance with the state agricultural performance standards, NRCS Standard 590, and NR 243, a rotational (or 4-year P-Index for CAFO fields with soil test P>100 ppm) PI of 6 or less is deemed acceptable.

Section 3.7.8 – Spreading site submittals

Comment #74: A number of comments indicated that the provision should be revised as follows: “The addition of new landspreading sites may be considered a permit modification under § 283.53, Stats.” This revision would allow the Department flexibility in implementing the 2008 federal CAFO Rule.

Response: Under the federal CAFO rule, the addition of new landspreading sites is considered a permit modification.

Section 3.8 and 5.2.9 (now 5.2.10) – Monitoring/Reporting

Comment #75: CAFOs rely on limited reporting and monitoring, and typically only submit an annual compliance report. Other WPDES-permitted sources must extensively monitor their waste and submit monthly reports to the Department.

Response: The requirements of the General Permit reflect the requirements of ch. NR 243, Wis. Adm. Code, the Department’s code regulating all CAFOs. Ch. NR 243 was developed with input of producers and their representatives, public advocacy groups, various state and federal agencies, and the state legislature. Except for a very limited number of individual permits, the monitoring and reporting requirements for CAFOs covered under an individual or general permit are the same.