Public Comments on Proposed Modification of NPDES Permit # IDG010000

Compiled November 13, 2024

This document includes all comments received during the public comment period for EPA's proposed modification of the NPDES General Permit for Concentrated Animal Feeding Operations (CAFOs) in Idaho Excluding Tribal lands (Permit Number: IDG010000) from June 6 through July 8, 2024.

Comments were received from:

- AgPROfessionals – Developers of Agriculture (AgPRO)
- Idaho Dairymen's Association (IDA)
- Idaho Cattle Association (ICA)
- South Dakota Department of Agriculture and Natural Resources
- Food & Water Watch, Snake River Waterkeeper, Center for Biological Diversity, Center for Food Safety

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AGPROfessionals
DEVELOPERS OF AGRICULTURE

July 1, 2024

U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue, Suite 155
Seattle, WA 98101

Subject: Public Comments on Proposed Modification to NPDES General Permit for Concentrated Animal Feeding Operations in Idaho

Dear Sir or Madam,

AGPROfessionals and our technical team appreciate the opportunity to provide comments on the proposed modifications to the National Pollutant Discharge Elimination System (NPDES) General Permit for Concentrated Animal Feeding Operations (CAFOs) in Idaho. We are submitting this letter to address specific language in the proposed permit, particularly concerning the requirements for the operation and maintenance of wastewater and manure storage structures.

As licensed Professional Engineers in Idaho working for AGPROfessionals, we have extensive experience in CAFO and environmental engineering. Our firm specializes in providing comprehensive engineering solutions for agricultural operations, ensuring compliance with environmental regulations while promoting sustainable and economically viable practices. Our collective expertise and hands-on experience in designing, evaluating, and managing wastewater and manure storage systems make us well-qualified to comment on the proposed permit modifications.

Comments on Section III.A.2(ii)

The proposed language in Section III.A.2(ii) of the permit requires permittees to ensure the proper operation and maintenance of each wastewater and manure storage structure by evaluating compliance with NRCS Appendix 10D and IDAPA 02.04.14.030.01. While this requirement is well-intentioned, the prescribed methods for evaluation should be within the NRCS Appendix 10D and IDAPA 02.04.14.030.01. However, listing rule numbers in the NPDES where they could change in the future creates administrative challenges. If necessary, they should be incorporated by reference and not specific rule numbers. We recommend updating the language to state that the seepage rate from an impoundment shall not exceed 1 x 10^-6 cm/sec. The conditions under which these evaluations must be performed align with industry standards and practical considerations for Idaho CAFO operators.

Evaluation Methods

The provision allows for evaluations to be conducted by a Professional Engineer, geologist, hydrogeologist, or another qualified individual, or by completing the Washington NRCS Engineering Technical Note #23, January 2013 (Appendix D). We support the inclusion of qualified professionals in these evaluations. However, the requirement to use the Washington NRCS Engineering Technical Note #23 is not appropriate for Idaho's specific conditions and regulatory framework. Idaho's CAFO operators should be allowed to rely on NRCS standards tailored to Idaho and existing testing parameters that are widely accepted and used across the United States.

Comments on Section III.A.2(iii)

The proposed requirement for a subsurface discharge monitoring plan (SDMP) for each wastewater or manure storage structure introduces additional complexity and cost. While monitoring for subsurface discharges is important for the environment, the specifications in Section III.A.2(iii) could impose significant financial burdens on CAFO operators without necessarily providing corresponding environmental benefits.

Subsurface Discharge Monitoring Plan (SDMP)

We propose that the requirement for an SDMP should be based on evidence of risk rather than a blanket requirement for all structures. Specifically, we recommend that:

1. Once the initial liner has been installed, tested, and verified by a professional, continual inspection of the liner should be performed by on-site operators and documented. This maintenance plan includes visual inspections for erosion, weed/large tap root vegetation, or rodent burrowing on clay liners instead of a discharge monitoring plan.
2. During the cleaning of impoundments, additional documentation and verification that the liner was protected during the cleaning should be included. If the liner has not been disturbed, it can be certified as still meeting the minimum seepage requirements of 1 x 10^-6 cm/sec.

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Liner Specifications

The liner specifications mentioned should adhere to NRCS standards and the industry-accepted permeability rate of 1 x 10^-6 cm/sec. This standard is extensively tested and validated, providing reliable environmental protection without undue financial strain on CAFO operators. The imposition of double-liner standards, as practiced in Washington, is neither practical nor economically feasible for Idaho operations. Double-liner construction is estimated at approximately $4 per square foot. AGPRO evaluated pond capacity needs for an open lot of 2400 cow dairy with dry cows, but not additional support stock. It was estimated they would need approximately three ponds and 47 million gallons of storage. The cost for a compacted 12" clay liner would be approximately $360,000 if clay is available on-site, if the double-liner is needed it would be approximately $1.7 million dollars. On a per milk cow basis, this is $150/cow for clay liner vs. $1,680/cow for double synthetic liner with leak detection system. Engineers and regulatory bodies should work with clear and achievable standards rather than broad statements like "the pond cannot leak," which can lead to ambiguous interpretations and compliance challenges.

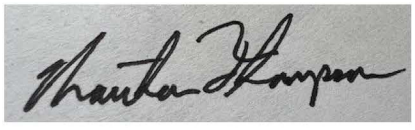
In conclusion, we advocate for modifications that reflect practical and scientifically sound practices that ensure environmental protection while considering the economic viability of CAFO operations in Idaho. We recommend the following adjustments to the proposed language:

1. Allow the use of Idaho-specific NRCS standards and existing national testing parameters for evaluating storage structures.
2. Create a liner maintenance inspection plan which could include standard operating procedures for operations to protect the liner during cleaning. Regular inspections of the liner should also be done by the operator to ensure the liner does not show any signs of deformity.
3. Maintain liner specifications consistent with the 1 x 10^-6 cm/sec permeability standard.

We appreciate the opportunity to provide these comments and urge the EPA to consider these recommendations to achieve a balanced and effective regulatory framework.

Sincerely,

Chad TeVelde, PE



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Monday, July 08, 2024

U.S. Environmental Protection Agency, Region 10
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Via email to epar10wd-npdes@epa.gov and peak.nicholas@epa.gov

Re: **Public Comments on IDG010000**

To Whom it May Concern,

This office represents the Idaho Dairymen's Association ("IDA"), an organization that represents the interests of dairy producers within the state of Idaho. The dairymen of Idaho, and IDA, have for many years enjoyed a working relationship with EPA Region 10 and its staff. IDA hopes to maintain this relationship for many years to come, and appreciates the opportunity to comment on the proposed modifications. Please accept the following as the comments of IDA in response to the Proposed Modification to NPDES General Permit for Concentrated Animal Feeding Operations in Idaho, permit no. IDG010000.

Section III.A.2(ii) Comments – Evaluating Compliance of Wastewater and Manure Storage Structures

Section III.A.2(ii) requires permittees to ensure the proper operation and maintenance of each wastewater and manure storage structure by evaluating compliance with NRCS Appendix 10D and IDAPA 02.04.14.030.01. However, it goes on to require that if deficiencies are identified, then the permittee must identify measures to address those deficiencies via (a) engaging a professional engineer, geologist, hydrogeologist, or another qualified individual; or (b) by completing the Washington NRCS Engineering Technical Note #23. IDA suggests that subsections (a) and (b) of section III.A.2(ii) be stricken so that it reads as follows:

(ii) The permittee must ensure the proper operation and maintenance of each wastewater and manure storage structure by evaluating compliance with NRCS Appendix 10D and IDAPA 02.04.14.030.01. If the evaluation of the wastewater or manure storage structures identifies deficiencies in the operation or maintenance of the structures, the permittee must identify measures to address those deficiencies in its NMP. ~~This evaluation must be completed in one of the following ways:~~

~~(a) By a Professional Engineer, geologist, hydrogeologist, or another qualified individual, in which case the NMP must include the results of the evaluation; or~~

~~(b) By completing the Washington NRCS Engineering Technical Note #23, January 2013 (Appendix D), in which case the NMP must include the results of the evaluation.~~

IDA's proposed change above allows for flexibility in compliance evaluations and common-sense cost saving measures when appropriate. For example, some deficiencies may be readily apparent to the eye, and may not require the expense of a professional engineer, geologist, hydrogeologist, or another qualified individual to assess, which would enable permittees to save money when appropriate. Furthermore, Washington NRCS Engineering Technical Note #23 should not be included as a resource whatsoever, as it was not developed to address Idaho's specific conditions and regulations. Instead, Idaho permittees should rely on NRCS standards tailored to Idaho, in addition to generally accepted testing parameters that are used across the United States. This section mandates compliance with Idaho's regulations and requires that permittees identify measures to address any deficiencies in its NMP—the permit should not go one step further and dictate specifically how to identify those deficiencies and mandate costly assessments by engineers, geologists, or hydrogeologists when they are not always needed, and should not refer permittees to a resource that has not been developed to address Idaho's specific conditions. Permittees should be allowed some latitude and discretion in determining how to identify and rectify deficiencies in a cost-efficient manner, while keeping in mind that if they do not do so properly, they do so at the risk of violating their permit and the Clean Water Act, which involve serious ramifications.

Section III.A.2(iii) Comments – Subsurface Discharge Monitoring Plan

The subsurface discharge monitoring program proposed in this section is inconsistent with Idaho regulations, is outside the regulatory authority of the EPA without evidence of an actual discharge, is unworkable, and is cost prohibitive. Most Idaho dairymen have earthen containment structures constructed in accordance with Idaho's regulations on the same, which allow for a permeability rate of 1 x 10^-6 cm/sec. This regulatory acceptable permeability rate has been extensively tested and accepted by industry experts as a way to protect the environment in a cost-efficient manner.

However, because of this regulation and industry accepted standard, no professional engineer, geologist, hydrogeologist, or other qualified individual will certify that earthen manure storage structures have absolutely no permeability. Even when evaluating a concrete, steel, or double-layer synthetic lined containment structure, it is still highly doubtful that an engineer will certify that there is absolutely no permeability or leaks of any kind—who would want to put their name to that kind of absolute certification? Therefore, this effectively leaves two options for permittees under this section: (1) maintain a subsurface discharge monitoring plan, or (2) install concrete, steel, or double-layer synthetic liners in all manure containment structures, which would be extremely cost prohibitive, especially in light of the low profit margins that dairymen have been struggling with for some time now, resulting from an extended period of high feed costs and low milk prices.

Furthermore, the requirement for a permittee to maintain a subsurface discharge monitoring plan is impermissible and outside the scope of EPA's regulatory authority because the EPA is attempting to regulate a waste containment structure's "potential to discharge." EPA's use of the term "subsurface discharge" as used in this proposed modified section is imprecise and states a legal conclusion. Even though there may be a small and regulatorily acceptable amount of permeability of a containment structure liner, it does not necessarily mean that an actual "discharge" into a water of the United States is occurring as defined by the Clean Water Act. Therefore, the EPA is effectively trying to regulate a containment structure's "potential to discharge" under this proposed modification, which is impermissible under well-established case law on this issue. Courts have made clear that the EPA may only regulate actual discharges, and not a CAFO's potential to discharge or proposal to discharge. *Nat'l Pork Producers Council v. United States EPA*, 635 F.3d 738, 751 (5th Cir. 2011). The 2008 rule relating to NPDES permits for CAFOs proposed by the EPA that was struck down by the court in that case defined a CAFO that "proposed" to discharge as "a CAFO designed, constructed, operated, and maintained in a manner such that the CAFO will discharge. Pursuant to [that] definition, CAFOs propose to discharge regardless of whether the operator wants to discharge or is presently discharging." *Id.* at 750. Interestingly, the EPA seems to be attempting to do the very same thing in the currently proposed rule, by requiring a subsurface discharge monitoring program and insinuating that just because a waste containment structure has the potential to discharge, that it is discharging. This is impermissible and outside the scope of EPA's regulatory authority, as described by the case law set forth above.

IDA proposes that this new proposed section be stricken in the general permit and replaced by a new section which references Idaho specific regulations and NRCS standards, and national testing parameters for acceptable permeability rates.

Thank you for the opportunity to provide these comments. We urge the EPA to consider these comments carefully and incorporate them into the final draft of the permit.

Very truly yours,

David P. Claiborne
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Submitted electronically via:

Public Comments on IDG010000/epar10wd-npdes@epa.gov.

Mr. Nicholas Peak
United States Environmental Protection Agency
Region 10
1200 Sixth Avenue, Suite 155 Seattle, Washington 98101-3188

Re: The Idaho Cattle Association Comments on IDG010000

The Idaho Cattle Association (ICA) is pleased to submit comments regarding the Use of Electronic Identification (EID) Tags as Official Identification in Cattle and Bison. The ICA has over 1,000 members representing Idaho's cattle producers across all sectors of the industry and is Idaho's only cattle trade association. The membership represents nearly all of the cattle in our state that would be impacted by this proposed policy.

The ICA and our members would like you to recognize the permit modifications below and our comments on the segments available for comment.

Nutrient Management Plan Content

Section III.A.2.a)(iii) of the draft permit modification reads as follows:

(iii) The permittee must include a subsurface discharge monitoring plan to identify and monitor any subsurface discharges from each wastewater or manure storage structure in accordance with the specifications in Section IV.D.6. The NMP must include the subsurface discharge monitoring plan and the results of all subsurface monitoring from each wastewater and manure storage structure. The permittee must develop a subsurface discharge monitoring plan as part of the NMP unless the exceptions in (a) or (b) below are met:

(a) Each wastewater or manure storage structure must be evaluated by a Professional Engineer, geologist, hydrogeologist or another qualified individual documenting that each wastewater or manure storage structure does not have a subsurface discharge to Waters of the United States.

(b) Confirm, and maintain documentation in NMP, that each wastewater and manure storage structure is constructed of concrete or steel, or with a double-layer synthetic liner with leak detection, and is properly operated and maintained in accordance with III.A.2.a.ii.

This section should clearly state that it is only in reference subsurface discharge to Waters of the United States *through groundwater with a direct hydrological connection to Waters of the United States* as that is the only type of subsurface discharge that the EPA has jurisdiction over. It should also acknowledge that compliance with Appendix 10D and IDAPA 02.04.14.030.01. prevents such a discharge through liner requirements that vary based on siting considerations that include: underlying soil permeability; the

presence or large voids or fractured bedrock; distance to wells and streams; location in regards to a recharge area for a sole surface aquifer; and minimum separation requirements for high water tables, bed rock, gravel, and permeable soils. It should also be noted that the liner requirements in both Appendix 10D and IDAPA 02.04.14.030.01 are more stringent than the liner requirements for wastewater treatment facilities under IDAPA 58.01.16 – Wastewater Rules.

We propose Section III.A.2.a)(iii) be modified as follows (underlined text is added), which aligns with the NPDES General Permit for Discharges from CAFOs in New Mexico (NMG010000) issued by the EPA in 2016 (Part III.D.1 and Part 1.b.).

(iii) The permittee must include a subsurface discharge monitoring plan to identify and monitor any subsurface discharges from each wastewater or manure storage structure in accordance with the specifications in Section IV.D.6. The NMP must include the subsurface discharge monitoring plan and the results of all subsurface monitoring from each wastewater and manure storage structure. The permittee must develop a subsurface discharge monitoring plan as part of the NMP unless the exceptions in (a) or (b) below are met:

(a) Each wastewater or manure storage structure must be evaluated by a Professional Engineer, geologist, hydrogeologist or another qualified individual documenting that each wastewater or manure storage structure does not have a subsurface discharge to Waters of the United States through groundwater with a direct hydrological connection to Waters of the United States. Wastewater and manure storage structures that have been constructed and maintained in accordance with the liner requirements in NRCS Appendix 10D and IDAPA 02.04.14.030.01. and Part III.B shall be considered to prevent such a discharge provided that documentation of compliance is maintained in the NMP for each wastewater and manure storage structure.

(b) Confirm, and maintain documentation in the NMP, that each wastewater and manure storage structure is constructed of concrete or steel, or with a double-layer synthetic liner with leak detection, and is properly operated and maintained in accordance with III.A.2.a.ii.

Thank you once again for the opportunity to engage I the process and please not that Idaho and its cattle industry are working to ensure the protection of Idaho, our resources and our industry.

Respectfully,

Cameron Mulrony
Executive Vice President
Idaho Cattle Association

DEPARTMENT of AGRICULTURE and NATURAL RESOURCES
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July 2, 2024

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Transmitted by Email to epar10wd-npdes@epa.gov

Subject: Comments on Proposed Modification to the NPDES General Permit for Concentrated Animal Feeding Operations in Idaho

Dear Mr. Peak:

Please find below the South Dakota Department of Agriculture and Natural Resources' (DANR) comments on the proposed modification to the NPDES General Permit for Concentrated Animal Feeding Operations in Idaho.

1. DANR supports the removal of Section II.B.9.a. in the proposed general permit as long as flood or furrow irrigation is uniformly distributed, or any non-uniform distribution of nutrients is accounted for in the nutrient management plan.

2. DANR supports the inspection requirements in the modification of Section II.9.b. (now section II.9.a.) in the proposed general permit but has concerns with samples being required even if they are not representative of the regulated activity on the field under the control of the producer. Three examples where required samples are unlikely to be representative: 1) Where a drainage begins in a larger upstream commercially fertilized area outside the nutrient management plan and crosses a smaller NMP field, 2) A NMP field naturally sloped to receive sheet runoff from an adjacent upgradient non-NMP field on a downgradient part of the NMP field, and 3) Field tile draining area(s) outside a NMP field that outlet on the downgradient edge of the NMP field. Samples collected in these instances are unlikely to be representative of the regulated land application activity and sample results cannot prove discharge is coming from the land application field. DANR also has concerns that the required instream sampling may not provide meaningful information and will be costly to producers.

3. Modification of various elements of the nutrient management plan (Section III.A.2.a.)

    - Based on our experience determining whether manure containment structures are located over a shallow aquifer, DANR foresees the subsurface no discharge evaluation and documentation requirement in Section III.A.2.a)(iii)(a) will be highly difficult to scientifically determine. DANR urges EPA to consider including an exclusion for structures a certain distance from navigable waters and including a timeframe to complete this evaluation after permit issuance for any existing permitted

operations. Additionally, it is unclear how any subsurface discharge will be addressed, permit limits developed, and the discharge be monitored.

- Section III.A.2.a)(iii)(b) addresses the operation and maintenance of manure storage structures constructed of concrete or steel, or with a double-layer synthetic liner with leak detection. DANR's experience indicates EPA should also address the design, construction, and construction administration of these structures as that will be just as important if not more important than their operation and maintenance.

Thank you for the opportunity to provide comments.

Sincerely,

Troy Roth, P.E.
Administrator
Livestock Services Program

CENTER FOR
FOOD SAFETY

July 8, 2024

Mr. Caleb Shaffer
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Mr. Nicholas Peak
Agriculture Advisor
EPA Region 10
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Via email to epar10wd-npdes@epa.gov

Re: Public Comments on IDG010000, second modification

Mr. Shaffer and Mr. Peak,

Food & Water Watch, Snake River Waterkeeper, the Center for Biological Diversity, and the Center for Food Safety (collectively, "Commenters") respectfully submit these comments on the second proposed modification to the National Pollutant Discharge Elimination System

("NPDES") General Permit for Concentrated Animal Feeding Operations ("CAFOs") in Idaho, Permit No. IDG010000 ("Idaho Permit" or "the Permit").

Commenters appreciate and support EPA's proposals to strengthen the Idaho Permit's monitoring requirements to improve accountability at permitted CAFOs. As explained in our written comments responding to the first proposed modification of the Permit,[1] CAFOs in Idaho and across the country pose serious threats to water quality and public health. Ensuring that the Permit's effluent limitations are enforceable and that best management practices have the intended water quality outcomes requires comprehensive, representative monitoring and reporting.

While Commenters support the improvements to the modified Permit, we must also identify several shortcomings. As explained in more detail below, we request EPA address the following problems in the Final Permit:

1. Inadequately rigorous and well-tailored maintenance and inspection regime for concrete, steel, or double-lined sythentic wastewater or manure storage structures with leak detection when no Subsurface Discharge Monitoring Plan ("SDMP") is required;
2. Tailoring the individuals qualified to determine whether a CAFO structure has a subsurface discharge to WOTUS;
3. Insufficient guidance to ensure that SDMPs are effective and produce representative compliance data;
4. Removal of Washington Technical Note #23;
5. Tailoring the individuals qualified to conduct operation and maintenance evaluations and subsurface discharge determinations;
6. Prohibit pollution stockpiling on production area corrals and drylots;
7. Guidance to ensure that visual monitoring of land application areas generates data that is representative of the monitored activity;
8. Monitoring of subsurface discharges at land application areas;
9. Reinstatement of the prohibition on land applying to surface irrigated fields, or in the alternative, specifically identify such fields' return flow conduits as discharge location needing visual monitoring; and
10. Public reporting of monitoring data.

With these improvements, Commenters believe the Idaho Permit will meet the minimum mandates of the Clean Water Act and EPA's regulations.

I. CAFOs Are Designed to Discharge Pollutants into Local Waters

As explained in our prior public comments and incorporated by reference here, CAFOs pose major threats to water quality due to their physical structures and operational processes. CAFOs are designed to depart from the age-old relationship where available acreage for forage

[1] Food & Water Watch et al., Public Comments on IDG010000 (Sept. 1, 2023), available at: https://www.epa.gov/system/files/documents/2023-09/R10-NPDES-Idaho-CAFO-GP-IDG010000-Draft-Permit-Mod-Public-Comments-2023.pdf.

acts as a limiting pressure on how many animals a producer can raise at any one time. Instead, the purpose of CAFOs is to confine more animals in one place than would otherwise be feasible and bring feed to the animals from external sources, leading to an accumulation of waste beyond what the local landscape can accommodate.[2] Consequently, CAFOs can and do discharge pollution into local waters.

In fact, as we have explained, CAFO wastewater and manure "lagoons" are designed to continuously seep pollutants to the subsurface. Commenters' expert quantified seepage allowed by the Permit and concluded that it amounts to "over 3 million gallons of polluted wastewater seeping out from each acre of lagoon every year, year after year."[3] And considering that most CAFOs have between 2 and 10 acres of these lagoons and many CAFOs are sited within a single watershed or above a single groundwater feature, this pollution is clearly degrading Idaho water quality and cannot be ignored. Additionally, many CAFOs stockpile manure, silage, and other materials in piles or silos with direct ground contact.[4] These areas also leach pollutants into groundwater at rates that likely far exceed the 1×10^{-6} $cm^3/cm^2/sec$ storage structure standard.

Land application areas similarly pose serious, ongoing risks of pollution discharges. Disposing of CAFO waste onto fields is an inherently risky activity.[5] Different land application areas may present different conditions and particular risks, but the aggregated disposal of large quantities of CAFO waste onto fields across a watershed presents a significant risk to water quality that requires careful management and oversight. These discharges include direct discharges and/or runoff to surface waters as well as indirect subsurface discharges. Commenters' expert report highlighted the propensity of land application areas to produce significant nitrate plumes in underlying groundwater that flows toward surface waters.[6] In light of these inherent risks and what Commenters believe are ongoing, undetected discharges from Idaho CAFOs' land application activities, the Permit's prohibition on all dry weather discharges from land application areas requires comprehensive monitoring to establish compliance.

II. Production Areas

Commenters appreciate EPA's efforts to strengthen the monitoring requirements in the Permit. We support those improvements. Below, we also identify additional improvements needed to bring the Permit into compliance with the Clean Water Act and EPA's CAFO regulations. These include more rigorous inspection and maintenance regimes for section III.A.2.a.iii.b structures, limiting the qualified individuals who can make determinations, more guidance on what SDMPs must include, removal of Tech Note 23, and ensuring that CAFOs do not stockpile pollution in corrals or other holding pens.

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[2] *See* EPA, Office of Water, EPA 820-R-13-002, Literature Review of Contaminants in Livestock and Poultry and Implications for Water Quality at 11 (July 2013).
[3] Food & Water Watch et al., *supra* note 1, at 11.
[4] *Id.* at Exh. A pg. 7 (Erickson Expert Opinion).
[5] *See* EPA, Risk Assessment Evaluation for Concentrated Animal Feeding Operations (May 2004); Food & Water Watch et al., *supra* note 1, at 9–11.
[6] Food & Water Watch et al., *supra* note 1, at 27.

a. Requiring a Subsurface Discharge Monitoring Plan Is Appropriate and Necessary for CAFO Production Areas with Discharging Infrastructure

Commenters support inclusion of proposed section III.A.2.a.iii.b, which would require permitted CAFOs to prepare and implement a Subsurface Discharge Monitoring Plan ("SDMP") unless each wastewater or manure storage structure is "constructed of concrete or steel, or with a double-layer synthetic liner with leak detection, and is properly operated and maintained in accordance [with the Permit's structural evaluation requirement]." On the other hand, Commenters have concerns with section III.A.2.a.iii.a, which would allow a CAFO to avoid preparation of a subsurface discharge monitoring plan if "a Professional Engineer, geologist, hydrogeologist or another qualified individual" documents "that each wastewater or manure storage structure does not have a subsurface discharge." We first explain our support for section III.A.2.a.iii.b and then our concerns with section III.A.2.a.iii.a below.

We support inclusion of section III.A.2.a.iii.b because unlike less protective ways of storing CAFO wastewater and manure, concrete lined impoundments, above ground steel tanks, and double-layer synthetically lined structures with leak detection can be designed to be liquid tight, or essentially impervious. Commenters' support for EPA's approach is premised on that being the standard the Permit requires.[7] Only when a CAFO maintains its wastewater and manure in liquid tight structures can an inpection regime (*i.e.*, operation and maintenance compliance) fulfill the representative monitoring requirement because in that circumstance the inspection is designed to confirm, in fact, a zero discharge rate from the structure. But to confirm the complete containment of pollutants and avoid the need for a SDMP requires sufficiently rigorous and tailored inspections.

Rigorous, sufficiently frequent, and well-tailored inspection and maintenance regimes are necessary to ensure liner materials are retaining their structural integrity and preventing all discharges. Relatedly, such regimes are necessary to produce the representative monitoring data that the Clean Water Act requires CAFOs to report. For example, CAFOs must conduct inspections of steel and concrete structures to ensure structural integrity. The Permit must require inspection not only while the structures are being used to impound waste, but more importantly, after cleanouts when the entire impoundment surface can be thoroughly inspected. CAFOs must follow all inspection regimes necessary to ensure that double-layer synthetic liners with leak detection systems are operating properly, undamaged during cleanout, and capable of detecting breaches or failure of the primary liner.

As written, however, the Permit does not identify rigorous and well-tailored maintenance and inspection of these types of structures, leaving open the likelihood that these inspection practices will not be "in effect, monitoring requirements" as recognized by the Ninth Circuit

[7] *See* NRCS, 522-CPS (May 2016), https://www.nrcs.usda.gov/sites/default/files/2022-09/Pond_Sealing-Liner-Concrete-522-CPS-May-2016.pdf.

Court of Appeals.[8] For example, without inspecting the integrity of concrete liners on a regular basis and during clean outs to ensure settling or other effects have not compromised the structure's impervious design, subsurface discharge monitoring would still be necessary to ensure compliance. As Appendix 10D notes, concrete has advantages but is also susceptible to failure due to settling or chemical exposure.[9] Where EPA intends inspection regimes to fulfill the Clean Water Act's monitoring mandate, the Permit needs to contain or incorporate by reference sufficient detail so that CAFOs' inspection of these structures ensures zero seepage.

The Permit requires CAFOs to use new section III.A.2.a.ii to establish that concrete, steel, or double-layer synthetic lined systems with leak detection are properly operated and maintained. But that section's core requirement is "compliance with NRCS Appendix 10D and IDAPA 02.04.14.030.01."[10] NRCS Appendix 10D is intended as guidance for impoundments with clay or amendment-treated soil liners. Concrete, steel, or other more protective systems are discussed in Appendix 10D only as alternative systems an operator may consider when lower discharge rates are desired. It does not provide a comprehensive inspection regime for these types of structures.[11] Likewise, IDAPA 02.04.14.030.01(c) merely states that "concrete or synthetic liners must be constructed to ASAE and Appendix 10D specifications." These are not sufficient guidelines to allow regulators or the public to ascertain whether structures are "properly operated and maintained" such that no SDMP is needed.

Commenters request that EPA instead incorporate by reference relevant NRCS Conservation Practice Standards, other technically appropriate documents, and manufacturers' design and operation standards as the necessary guidelines for monitoring whether these structures are properly functioning. Relevant NRCS standards include Code 521 (Pond Sealing or Lining, Geomembrane or Geosynthetic Clay Liner)[12] and Code 522 (Pond Sealing or Lining – Concrete).[13] EPA should consult with NRCS to identify the best resources to incorporate that will ensure the proper operation and maintenance of steel tanks and those types of double-layer synthetic liner system with leak detection not addressed by Code 521. These resources, in addition to any manufacturers' operation and maintenance guidelines, must ensure effective inspection such that the CAFO can accurately report no seepage and thus no subsurface discharges.

Commenters have serious concerns about the adequacy of section III.A.2.a.iii.a, which allows a CAFO to avoid preparation of a SDMP if "a Professional Engineer, geologist,

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[8] *Food & Water Watch v. EPA*, 20 F.4th 506, 516 (2021) (finding that visual inspections of certain production area features can be considered monitoring so long as they "ensure compliance with the Permit's" effluent limitations).
[9] App'x 10D at 9.
[10] Permit at 12.
[11] "Guidance on [synthetic liners, concrete-lined excavated ponds, concrete above-ground tanks, and above-ground steel tanks] is contained in other chapters of the [Animal Waste Management Field Handbook]." Appendix 10D at 3.
[12] NRCS, 521-CPS (Aug. 2023) (in particular addressing leak detection systems), https://www.nrcs.usda.gov/sites/default/files/2023-08/521_NHCP_CPS_Pond_Sealing_or_Lining_Geomembrane_or_Geosynthetic_Clay_Liner_2022.pdf.
[13] NRCS, 522-CPS (May 2016), https://www.nrcs.usda.gov/sites/default/files/2022-09/Pond_Sealing-Liner-Concrete-522-CPS-May-2016.pdf. As noted above, EPA should clarify that the standards in Code 522 for "liquid tight" structures is the standard required by the Permit for these and the other more protective structures. *See id.* at 1.

hydrogeologist or another qualified individual" documents "that each wastewater or manure storage structure does not have a subsurface discharge to [WOTUS]." Only certain individuals will be qualified to make such a determination; others will not even if they have some experience with CAFOs. Not all "Professional Engineers" have the necessary expertise to make determinations involving hydrogeological analysis, and the catchall "another qualified individual" creates far too much ambiguity. These are questions that require expertise in and understanding of specific seepage rates, soil composition and depth, aquifer transference, and other hydrogeologic features in Idaho. Commenters request that EPA limit III.A.2.a.iii.a as follows:

> "Each wastewater or manure storage structure must be evaluated by an individual or individuals with the expertise necessary to determine that each wastewater or manure storage structure does not have a subsurface discharge to Waters of the United States. This expertise includes at a minimum an understanding of specific seepage rates, soil hydrology, hydrogeology, groundwater flow and transference, and any other specialized knowledge needed to assess site-specific characteristics in relation to Waters of the United States."

While Commenters appreciate that EPA may wish to avoid the appearance that it is regulating potential, in addition to actual, discharges, the record here establishes that Idaho CAFOs are causing subsurface discharges that are the functional equivalent of a direct discharge to the Snake River or its tributaries.[14] Thus, EPA has the evidentiary basis to regulate these actual discharges. Since this provision is already limited to the universe of wastewater and manure storage structures *designed to leak*, the assessment must be targeted at the characteristics of the underlying hydrogeology receiving that continuous seepage.

Alternatively, EPA could consider requiring a qualified individual to make this determination by ascertaining where the relevant groundwater flow discharges to WOTUS and then requiring the CAFO to sample at that point of discharge or "at a point that provides a sample that is representative."[15] Such sampling showing that groundwater is free of CAFO contaminants downgradient of an existing CAFO could justify avoidance of a SDMP.[16] Either way, the Permit must require a scientifically-based, reliable, and accurate report prepared by a truly qualified individual for an Idaho CAFO to avoid the SDMP requirement.[17]

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[14] Food & Water Watch et al., *supra* note 1, at 11–13 (explaining that the significant majority of CAFOs are sited above highly vulnerable aquifers intimately connected to the Snake River).

[15] *See* Permit at 23 (section IV.D.3).

[16] Commenters note that this would only be an appropriate methodology for legacy CAFOs, not new or expanding CAFOs as downgradient sampling would ascertain pollutant discharges at some point in time after discharging to groundwater from the CAFO production area began; thus, these data would not be representative until a new or expanding CAFO began operations and started discharging to groundwater and that flow transported the pollutants to the sampling location.

[17] Outside of Idaho, a similar approach is justified and EPA or state regulators should establish rebuttable presumptions that CAFOs need to develop and implement SDMPs anywhere CAFOs are sited above vulnerable groundwater that is connected to surface waters. In many places across the country, groundwater and surface waters are fundamentally interconnected. There can be no reasonable disagreement that CAFO wastewater and manure

b. The Permit Should Provide More Detail on What SDMPs Must Include

As discussed in our prior comments, the Permit lacks detail needed to ensure that monitoring plans are effective and produce data that are representative of the monitored activity. This remains the case in this second modification and is arguably even more important now that the Permit would require SDMPs more broadly. EPA and its state agency partners have experience in this area, and EPA should pull from that experience here. For example, EPA can look to the Quality Assurance Project Plan developed for the groundwater monitoring network in the Lower Yakima Valley of Washington State.[18] Commenters also provided expert guidance on this need for greater detail in preparing SDMPs in our prior comments and reiterate those here.[19]

c. Commenters Support Improved Operation and Maintenance Requirements for Wastewater and Manure Storage Structures, but Technical Note 23 Is Not an Appropriate Tool

As Commenters have stressed, not only do wastewater and manure storage structures have a designed seepage rate, they are also prone to damage or wear that will compromise their structure and lead to even higher seepage rates. Damage from heavy equipment, roots, freeze-thaw cycles, erosion from influent, burrowing animals, or desiccation can all deteriorate the integrity of these structures. With that reality in mind, Commenters support inclusion of section III.A.2.a.ii in that it requires CAFOs to ensure proper maintenance of each structure in light of current conditions, not merely design specs at the time of construction. As applied to structures with designed seepage rates such as earthen-lined lagoons, this is an important tool for catching catastrophic failures but will not displace the need for a SDMP. As applied to the section III.A.2.a.iii.b structures, we discuss the need for improved guidance above but support EPA's approach in general.

That said, Commenters strongly oppose use of Washington NRCS Engineering Technical Note #23, January 2013 ("Tech Note 23") as an appropriate tool under section III.A.2.a.ii.b. To start, Tech Note 23 itself clearly states that it "should not be construed to provide **ANY** regulatory certainty from State regulatory agencies" and that "[t]he assessments in this technical

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storage structures with designed seepage rates are point sources of pollution that have been documented to contaminate groundwater resources in different hydrogeologic contexts. *See Lower Yakima Valley Groundwater*, EPA, https://www.epa.gov/wa/lower-yakima-valley-groundwater; Todd Rosenstock et al., *Agriculture's Contribution to Nitrate Contamination of California Groundwater (1945-2005)*, J. ENVT'L QUAL. 895, 904 (May 2014); *Kinnard Farms Case*, CLEAN WISCONSIN, https://www.cleanwisconsin.org/our-work/legal-action/kinnard-farms-case/; *Lower Umatilla Basin Groundwater*, EPA, https://www.epa.gov/or/lower-umatilla-basin-groundwater#:~:text=Summary,in%20the%20Lower%20Umatilla%20Basin; *Southeast Minnesota Groundwater*, EPA, https://www.epa.gov/mn/southeast-minnesota-groundwater; *IEC and 12 Environmental Groups Petition EPA to Protect Drinking Water for Iowans*, IOWA ENVT'L COUNCIL (Apr. 16, 2024), https://www.iaenvironment.org/newsroom/water-and-land-news/iec-and-12-other-organizations-petition-the-epa-for-emergency-action-pursuant-to-the-safe-drinking-water-act. Therefore, the appropriate starting point should be that CAFOs managing wastewater or manure in areas or structures with an allowable seepage rates are discharging facilities that require a SDMP.

[18] Dept. of Ecology, State of Washington, Quality Assurance Project Plan: Lower Yakima Valley Groundwater Management Area (GWMA) Ambient Groundwater Monitoring Network (June 2021), https://apps.ecology.wa.gov/publications/documents/2103106.pdf.

[19] Food & Water Watch et al., *supra* note 1, at Exh. A pgs. 8–9.

note are qualitative in nature and are not intended to quantify seepage amounts occurring from existing [waste storage ponds]."[20] In fact, the Washington Department of Agriculture takes the position that Tech Note 23 "does not measure seepage" and "is not the right tool for determining compliance."[21] Therefore, while Tech Note 23 may provide helpful qualitative assessments, it does not accomplish the central task of confirming that a wastewater or manure storage structure is meeting the zero discharge effluent limitation despite an allowed specific seepage rate of 1 x 10^{-6} $cm^3/cm^2/sec$.

Therefore, Commenters request that EPA strike section III.A.2.a.ii.b entirely. We are unaware of an alternate tool that is reliable, that is designed to assess subsurface seepage, and that does not require a professional engineer to complete.

Finally, Commenters request that EPA limit the list of individuals allowed to conduct the section III.A.2.a.ii.a compliance evaluation. As proposed, the Permit allows a "Professional Engineer, geologist, hydrogeologist, or another qualified individual" to conduct and document the evaluation. Commenters do not understand how a geologist alone, for example, would be qualified to conduct this evaluation which centers on the engineering aspects of a structure's integrity. For this reason, EPA should limit this list of acceptable evaluators to "a Professional Engineer or another qualified individual with sufficient experience in the construction, operation, and maintenance of wastewater and manure storage structures."

d. EPA Must Include a Safeguard Against Confinement Areas Becoming Default Manure Storage

Lastly, EPA must ensure that CAFO production areas that receive manure but may not meet the definition of "wastewater or manure storage structure" are not allowed to become default manure stockpiling areas to avoid the use of structures that could trigger additional subsurface discharge monitoring requirements. Commenters are primarily concerned with animal confinement areas such as corrals and drylots where manure and other pollutants can accumulate. EPA dealt with a similar concern in the Lower Yakima Valley of Washington as part of its consent agreements with dairy operations contaminating groundwater resources in that region.[22] Commenters request a similar approach here; EPA should include appropriate restrictions on manure stockpiling or ponding at cow pens, dry lots, corrals, et cetera in the Permit, including regular cleaning of manure accumulation for appropriate storage or land application, prohibitions on ponding in these areas, and any other measures EPA finds necessary to protect against this possible loophole.

Without this safeguard, Commenters question whether the Permit will be able to satisfy the Clean Water Act's monitoring mandate for the production area zero discharge effluent limitation. Allowing CAFOs to shift pollutants to *less* monitored parts of the production area as a

[20] Tech Note 23 at 1, 3.
[21] *See* Letter from Patrick Capper, Washington State Department of Agriculture, to Jean Mendoza, Friends of Toppenish Creek (Dec. 17, 2021) (included here as Attachment A).
[22] *In the Matter of Yakima Valley Dairies*, Docket No. SDWA-10-2013-0080 (executed Mar. 19, 2013), https://nationalaglawcenter.org/wp-content/uploads/2015/07/AOC_yakima_valley_dairies_march2013.pdf (requiring improved management of manure in cow pens as well and minimizing ponding in those areas).

reaction to EPA *strengthening* the Permit is obviously unacceptable and contrary to EPA's intent.

III. Land Application Areas

Commenters support EPA's expansion of land application monitoring. Conducting monitoring at all land application fields is necessary from a practical perspective and is legally mandated by the Clean Water Act and EPA's regulations. As with SDMPs for production areas, we ask that EPA provide more guidance on how to conduct land application monitoring. We also reiterate our request for subsurface discharge monitoring or analogous monitoring at land application areas.

Before getting into specifics, Commenters request a minor terminology change to section II.B.9.a of the Permit. This section currently states that visual monitoring is required at the downgradient edge of a land application field as well as "any other potential discharge locations." We are concerned that "potential discharge locations" is inaccurate and could open the Permit to potential industry challenge on the basis that it is regulating beyond the scope of EPA's authority. This is an unnecessary risk. We request that this quoted text change to "other discharge features" because, but for the protections required by the Permit, features such as tile drains, ditches, surface irrigation return flow, and other conveyances are *actual discharge* locations that transport CAFO pollutants off fields and into WOTUS. Therefore, monitoring those locations is not monitoring for a potentiality, it is monitoring actual discharge locations to ascertain compliance and efficacy of the management practices intended to reduce that discharge rate to zero.

a. Requiring Visual Monitoring of All Land Application Areas for Direct Discharges to Surface Waters Is Appropriate and Necessary

Commenters support Section II.B.9.a of the proposed Permit, requiring visual monitoring of all land application fields during and after application activities. Visual monitoring to verify compliance with the Permit's no dry weather discharge effluent limitation, or trigger the Permit's sampling and analysis requirements in the event of an unauthorized discharge, is a framework Commenters believe can effectively determine whether a CAFO has an above ground discharge in violation of the Permit. EPA is correct to require such monitoring at all land application areas because land application is inherently risky, especially in agricultural areas like the Snake River valley where fields are typically surrounded by networks of ditches, canals, and other conduits to WOTUS. "Courts routinely find that land application systems, spray head sprinklers, and trucks constitute point sources when used to spread treated wastewater and manure on land."[23] Furthermore, CAFO waste contains a plethora of pollutants that can behave differently on landscapes and in waterways than a nutrient like phosphorus, making nutrient-only assessment tools like INTRA (the tool proposed for use in the first modified Permit) especially limiting when used by a CAFO.[24]

[23] *Parris v. 3M Co.*, 595 F. Supp. 3d 1288, 1322 (N.D. Ga. 2022).
[24] *See* Literature Review of Contaminants in Livestock and Poultry and Implications for Water Quality, *supra* note 2.

While supportive, we also request two improvements to ensure that this monitoring regime for above ground discharges is effective in practice. First, Commenters recommend EPA require CAFOs to develop a visual monitoring plan and integrate the plan into its permit coverage. Permittees should identify a monitoring plan for each land application area that identifies where monitoring will occur, whether the field has any discharge locations in addition to the downgradient edge of the field, and whether there are any conservation practices such as buffers or setbacks and how those will be visually monitored to ensure they are working as intended. We suggest adding this as a new permit section so that the field-specific monitoring plans are available for agency and public review alongside the CAFO's land application practices and locations subject to the monitoring.

Second, EPA needs to provide guidance on how to conduct visual monitoring that is representative of a given field. For example, a large application area may have a substantial length of downgradient edge plus tile drain outlets or other specific discharge features, more than a single person, or some monitoring technologies, could monitor effectively. Are operators free to visually monitor a *portion* of a field as representative of the overall activity, or not? If so, how should operators think about ensuring that inspection points are appropriate and will generate representative data? EPA has options here, but greater clarity is needed for operators to encourage integrity and accuracy in monitoring data.

Commenters suggest that EPA require the land application monitoring plans requested above describe the methodology used to determine representative monitoring locations. Leaving these critical details to guesswork or vulnerable to manipulation by operators could severely undermine the visual monitoring approach and result in unrepresentative data (thereby rendering the entire monitoring approach unable to satisfy the Clean Water Act and EPA's regulations). Requiring this plan to be prepared in advance and included in a CAFO's public notice for permit coverage would allow regulators and the public to review the plan, require improvements, or deny permit coverage if plans are not representative of the monitored activity.

b. The Permit Continues to Lack Monitoring for Subsurface Discharges from Land Application Areas

While Commenters are happy to see improvements to the above-ground monitoring for land application areas, the Permit still lacks any monitoring for subsurface discharges from land application areas. While EPA recognizes the need for such monitoring when CAFO waste is stored in leaky impoundments or on bare earth, it also should recognize that land application of CAFO waste is as much or more of a threat to water quality. CAFOs must monitor land application areas for subsurface discharges to ensure compliance with the Permit's effluent limitations.

As we explained before, land application areas need their own SDMPs or, at a minimum, "soil moisture probes or lysimeter monitoring is necessary both to ensure CAFOs are not causing discharges via groundwater and to provide valuable feedback about agronomic rates that actually comply with EPA's regulations requiring that CAFOs ensure appropriate agronomic utilization

of nutrients."[25] We reiterate that request here: the Permit must require subsurface discharge monitoring for land application areas as well or, at a minimum, soil moisture monitoring for liquid manure applications to ensure that moisture is not penetrating below the root zone.

c. Surface Irrigated Fields Prohibition

Commenters supported a prohibition on land application to surface irrigated fields as such systems are necessarily going to carry CAFO pollutants off a field as return flow if a tailwater reuse or similar system is not used.[26] Commenters recommend that EPA reinstate the prohibition but qualify it and allow land application to such fields only when a return flow/tailwater capture system is in place.

If EPA does not reinstate this prohibition, Commenters request that return flow conduits from surface irrigated fields be explicitly included in the "other potential discharge locations" (although changed to "other discharge features" as noted above) that necessitate visual monitoring, found at section II.B.9.a. Including this and requiring reporting of those monitoring results should help ensure that surface irrigated fields that discharge to surface waters by design are not used for CAFO land application or are retrofitted to avoid the problem EPA identified when including this prohibition in the prior version of the Permit.

IV. Monitoring and Evaluation Data Must Be Reported to Ensure Compliance

Just as other industrial sectors are required to submit Discharge Monitoring Reports, the Permit here should require covered CAFOs to report all monitoring and inspection data to state regulators and EPA. As we explained in our prior comments, publicly reporting these data is essential to facilitate compliance checks and enforcement when necessary. Commenters reiterate our request that the Permit require CAFOs to report all monitoring results, including well tests, soil moisture probe data, lysimeter readings, grab sample analysis, and/or visual monitoring results as applicable. In the case of visual monitoring, records should include a log of who or what conducted the monitoring, where it was conducted, what specific activity and equipment was monitored, and the results of the monitoring, including analytical results as required by section IV.E of the Permit when applicable. If no discharge occurs over the reporting period, visual monitoring results stating as much serve the same function as a Discharge Monitoring Report listing "no discharge" for a monitoring period.[27]

Commenters request that EPA establish a reporting schedule so that permitted CAFOs submit Discharge Monitoring Reports on a periodic basis in relation to the intensity of the monitored activity. For example, during a CAFO's land application season (which may cover multiple seasons of the year), the permittee should submit DMRs within 30 days of the land application activity. Similarly, a CAFO should submit monitoring results within 30 days of lagoon cleanouts or other potentially compromising event under their SDMP or, for those that

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[25] Food & Water Watch et al, *supra* note 1, at 27.
[26] *See* Robert L. Smathers et al., *Economics of Surface Irrigation Systems*, Bull. No. 779, UNIVERSITY OF IDAHO, https://objects.lib.uidaho.edu/uiext/uiext24451.pdf.
[27] *See* EPA, Discharge Monitoring Report Template, https://www.epa.gov/sites/default/files/2015-09/documents/dmr.pdf.

are determined to not need a SDMP, within 30 days of a qualified professional's completion of the operation and maintenance inspection as discussed above to confirm liquid tight containment. In addition, CAFOs must include these data in the Annual Report specifically for compliance monitoring and evaluations.

The Annual Report currently has a section for reporting discharges from production areas, but it only asks for the date, time, and approximate volume of a discharge. This section needs to be expanded to include the full suite of production area monitoring required under the Permit. For example, lab results for samples should be reported for total Kjeldahl nitrogen (TKN), nitrate nitrogen, nitrite nitrogen, total phosphorus, *E. coli*, fecal coliform, and five-day biochemical oxygen demand (BOD5). CAFOs should be required to include all data collected as part of a SDMP. Additionally, any changes to the operation and maintenance evaluation submitted with a CAFO's NMP should be disclosed in the Annual Report, including how any infirmities have been remedied.

Finally, the Annual Report has no analogous section for land application discharges. Commenters request that EPA include a new section in the Annual Report to capture all land application monitoring data.

V. Conclusion

For these reasons, Commenters strongly support the improvements EPA has made to the second modified Idaho Permit. But the Permit still falls short in several important ways. Commenters ask that EPA continue its positive trend and make the additional improvements outlined herein to ensure that the Idaho Permit complies with the Clean Water Act and acts as an effective template for stronger, more accountable CAFO permits across the country.

Sincerely,

Tyler Lobdell
Dani Replogle
Food & Water Watch

Hannah Connor
Center for Biological Diversity

F.S. "Buck" Ryan
Snake River Waterkeeper

Amy van Saun
Center for Food Safety

Attachment A

STATE OF WASHINGTON
DEPARTMENT OF AGRICULTURE
P.O. Box 42560 • Olympia, Washington 98504-2560 • (360) 902-1800

Ms. Jean Mendoza
Executive Director, Friends of Toppenish Creek
3142 Signal Peak Road
White Swan, WA 98952

December 17, 2021

Dear Ms. Mendoza,
Thank you for your letter on December 8, 2021 expressing concern over the accuracy of the lagoon and waste storage pond (WSP) assessments that you requested on November 6, 2021 through a public disclosure request. The Washington State Department of Agriculture (WSDA) submitted all Technical Note 23 assessments (TN23) for the Klompe/Frieslandia dairies.

When your request was fulfilled, the following narrative accompanied the records you requested:

> "WSDA Dairy Nutrient Management Program has minimal confidence in the accuracy of the attached reports. Since initial assessments were conducted in 2015, multiple issues with the aquifer susceptibility rating used as part of the risk analysis, as well as finding accurate information on depth to groundwater and seasonal high groundwater. At this point, WSDA does not consider the information contained in the attached reports useful, based on the inaccurate information, and the fact that the assessments were not conducted or completed by a Natural Resources Conservation Service (NRCS) engineer, or someone with NRCS job approval authority."

As you have identified in your December 8, 2021 letter, the information in the TN23s that you received is inaccurate. You received multiple copies of TN23s with the same evaluation date because we tried to correct quantitative information where we had identified inaccuracies. However, not all data has been corrected due to our limited access to some quantitative information. We also lack authority to complete and sign the final TN23s which requires the signature of a NRCS engineer, or someone with NRCS job approval.

In August 2021, WSDA's Dairy Nutrient Management Program (DNMP) communicated directly with you via email after you made an inquiry about the accuracy of the TN23 assessments conducted by DNMP at the Klompe/Frieslandia dairies. Below is a summary of that email:

- Only permitted CAFOs are required to have a TN23 assessment completed.
- DNMP cannot complete assessments as they require a NRCS engineer or someone with NRCS job approval authority to complete and sign the TN23 assessments.
- TN23 is not intended to be a regulatory tool for making a compliance determination.

- DNMP acknowledged that there were errors in the TN23 assessment conducted by our staff which resulted in inaccurate risk categories assigned to the WSPs associated with the Klompe/Frieslandia dairies.
- DNMP intended to cease conducting TN23 assessments based on limited access to accurate date to complete the quantitative portion of the assessment, and the lack of authority to complete the TN23.

DNMP has communicated concerns over their use of the TN23 assessment tool and the accuracy of the information contained within to Friends of Toppenish Creek, within WSDA, the Washington State Department of Ecology's (Ecology) Concentrated Animal Feeding Operation section, and with Washington Natural Resources Conservation Services (NRCS). After discussions with multiple agencies, DNMP determined that they would no longer conduct TN23s due to lack of accurate information available necessary to conduct an accurate assessment, as well as the lack of job approval authority within the team.

In 2017, Ecology incorporated TN23 into the Concentrated Animal Feeding Operation (CAFO) permit, requiring a TN23 assessment to be conducted on all WSPs at facilities within two years of receiving a CAFO permit. Initially, DNMP conducted some of the TN23s for permitted facilities but those TN23s were not completed by someone with job approval authority from NRCS. Some permitted facilities chose to have licensed engineers conduct the TN23s for their WSPs. For a list of TN23s completed for CAFO permitted facilities, use Ecology's Water Quality Permitting and Reporting Information System: https://apps.ecology.wa.gov/paris/PermitLookup.aspx. To date, only permitted CAFOs with one or more WSPs are required to have a TN23 assessment conducted.

The TN23 document states on its cover page, "The NRCS assessment should not be construed to provide **ANY** regulatory certainty from State regulatory agencies." When DNMP began use of the TN23, it was with the intent to provide technical assistance to dairy producers, and to identify and prioritize WSPs that may require further evaluation. Since implementing this work in the Lower Yakima Valley, DNMP has determined that the TN23 evaluation tool is best conducted by NRCS, and when conducted by DNMP, its use for determining risk has limited value. As such, DNMP does not intend to conduct TN23 assessments itself. If completed by a licensed engineer, the TN23 can be a valuable risk assessment and prioritization tool for the CAFO permit, but because it does not measure seepage, it is not the right tool for determining compliance. For the purposes of making a compliance determination, engineering evaluations including the TN23 should be conducted by a licensed engineer. Regulatory evaluations of WSPs should limit the amount of subjective information used in a compliance determination and ensure that data is accurate and of high quality.

As discussed above, DNMP does not have access to essential information, nor the authority to complete the TN23 WSP Assessments.

Sincerely,

Patrick Capper, Deputy Director
Washington State Department of Agriculture