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PART IV:

ENVIRONMENTAL PROTECTION AGENCY

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NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

**Concentrated Animal Feeding
Operations**

ENVIRONMENTAL PROTECTION AGENCY

[40 CFR Parts 124, 125]

[FRL 454-4]

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM AND STATE PROGRAM ELEMENTS NECESSARY FOR PARTICIPATION

Concentrated Animal Feeding Operations

On December 22, 1972, regulations were promulgated and published in the *FEDERAL REGISTER* (37 FR 28290) establishing a new Part 124, Guidelines for State Program Elements Necessary for Participation in the National Pollutant Discharge Elimination System (NPDES), the national water discharge permit program. Comments received in response to these regulations and to proposed NPDES application forms, proposed in the *FEDERAL REGISTER* on December 5, 1972, (37 FR 25898) indicated a need to consider the desirability of attempting to extend the permit system to all point sources conceivably covered by the broad definitional framework established by the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq (FWPCA). EPA's intent to consider (1) further comments with respect to the NPDES application form for agricultural dischargers, Short Form B, and (2) exclusions from the permit system, particularly for agricultural and silvicultural sources, was noticed in the *FEDERAL REGISTER* on December 29, 1972 (37 FR 28765).

On May 3, 1973, EPA proposed a revised Short Form B for agricultural dischargers (38 FR 10960) and proposed classes and categories of silvicultural and agricultural activities which would not be subject to NPDES permit requirements.

On May 22, 1973, regulations establishing policies and procedures for issuance of NPDES permits by the Federal government were promulgated and published (38 FR 13528) at Part 125. In the May 22 publication, § 125.4, entitled Exclusions, provided that NPDES permits were not required for discharges from separate storm sewers composed entirely of storm runoff uncontaminated by industrial or commercial activity.

Subsequently, on July 5, 1973, after receiving information, statistics, and advice from other Federal agencies, State officials, and agricultural and environmental groups in response to the May 3, 1973, proposal, EPA issued notice of the availability of the final agricultural application Short Form B and published an amendment to § 125.4 (38 FR 18000). This amendment provided for an expansion of the exclusions in that section, eliminating categories of small concentrated animal feeding operations and certain agricultural and silvicultural activities from the permit requirement. On that date EPA also amended Part 124 by adding a new § 124.11, Exclusions. This section authorized the States to make the same exclusions as provided for in the amended Part 125 regulations. These exclusions did not operate, however, to exempt point sources within the excluded

categories from compliance with applicable effluent limitations or other standards established under the FWPCA (38 FR 18001-02). In addition, the EPA Regional Administrator or the Director of a State water pollution control agency could override the exclusions by identifying individual sources as significant contributors of pollution. Once so identified, significant contributors of pollution were required to apply for and comply with NPDES permits. 40 CFR 124.11(h) (5), 125.4(h) (5) (1975).

In promulgating the July 5 regulations, EPA stated its belief that while some point sources within the excluded categories may be significant contributors of pollution which should be regulated consistent with the purposes of the FWPCA, it would be administratively difficult if not impossible, given Federal and State resource levels, to issue individual permits to all such point sources. In addition, the Agency stated that regulation through the use of site-specific NPDES permits was not appropriate for most of the small sources covered by the exemptions. Essentially, these regulations providing for exemptions were based upon EPA's view (a view which it continues to maintain is correct) that most sources within the exempted categories present runoff-related problems not susceptible to the conventional NPDES permit program, including effluent limitations. EPA's position was and continues to be that most rainfall runoff is more properly regulated under section 208 of the FWPCA, whether or not the rainfall happens to collect before flowing into navigable waters. Agricultural and silvicultural runoff, as well as runoff from city streets, frequently flows into ditches or is collected in pipes before discharging to a stream. EPA contends that most of these sources are nonpoint in nature and should not be covered by the NPDES permit program.

In this way exercise of limited administrative discretion in excluding these basically nonpoint sources from the permit program is the best means for achieving the Congressional intent consistent with the language of the FWPCA. Even if these runoff sources were considered to be point sources, the FWPCA does not unambiguously require that all point sources obtain an NPDES permit. Section 301 states that the discharge by any person from a point source is unlawful "except as in compliance with" section 402. Section 402 states that "the Administrator may * * * issue a permit for the discharge of any pollutant [from a point source]." This language requires every point source discharger to comply with the permit program (including any necessary administrative exclusions) established by the administrator under section 402; but this language does not require the Administrator to establish a program under which permits will be issued to every point source, including point sources which collect runoff pollution.

The Natural Resources Defense Council (NRDC) challenged this exercise of the Administrator's discretion in a law-

suit filed in the Federal District Court for the District of Columbia. The District Court ruled in favor of NRDC ["NRDC v. Train", 396 F. Supp. 1393, 7 ERC 1881 (D.D.C. 1975)] and on June 10, 1975, issued a final order requiring EPA to propose and promulgate regulations "extending the NPDES permit system to include all point sources" in the concentrated animal feeding operation, separate storm sewer, agricultural and silvicultural categories. Under the terms of the order EPA must propose regulations relating to storm sewers and concentrated animal feeding operations by November 10, 1975, and promulgate such regulations by March 10, 1976. Similarly, regulations extending the permit system to point source discharges in the agriculture and silviculture categories must be proposed by February 10, 1976 and promulgated by June 10, 1976.

As part of the effort to carry out the requirements of the court order EPA solicited and received information, statistics and advice from other Federal agencies, State and local officials, trade associations, agricultural and environmental groups and interested members of the public. Six public meetings were held in Washington, Boston, Chicago, Omaha and Dallas to consider the storm sewer and concentrated animal feeding operation categories. At each of these meetings, significant opposition was voiced to the development of an expanded permit system within the NPDES program as it has been administered to date. Such opposition came from persons representing both potential permittees and permit issuing agencies. In general, these individuals and organizations stated that expansion of the NPDES program to the previously excluded categories of point sources must not be carried out so as to require the issuance of individual permits to all affected dischargers. Many commenters pointed out that such a program would require a massive commitment of resources, both by the dischargers and by the issuing agencies, which would not be commensurate with the modest pollution reduction gained from the program. They also emphasized that numerical effluent limitations are inappropriate for pollution abatement from most of these point sources, and they urged EPA to consider alternative pollution control processes and methods as a basis for any proposed permit system. Finally, several commenters strongly recommended that EPA reconsider the explicit legislative history of the FWPCA concerning agricultural nonpoint sources and adapt the proposed regulations to the language from that history.

Taking these comments, as well as the legislative history, the statutory language, the "NRDC v. Train" decision, and the technical data available on feedlots into consideration, the Agency has explored several regulatory approaches for developing a permit program for concentrated animal feeding operations. The programs investigated included a comprehensive, all encompassing individual permit program, a

program of permit by regulation, and a program of permit by registration. In each of these programs, the costs, the benefits, the complexity of administration, and the economic impact have been weighed, as well as the effectiveness of the program in abating pollution from animal feeding operations. In proposing these regulations today the Agency has selected a regulatory approach which EPA considers the most appropriate and which has the most support in the legislative history.

EPA realizes that because of multiple variables of numbers and types of animals confined, and local geographical, topological and meteorological data, ideally most animal feeding operations should be considered individually to determine whether or not each such operation is concentrated and therefore requires a permit. However, given present State and Federal resource levels, such site-specific determinations of animal feeding operations would be impractical, if not impossible. In addition, such site-specific determinations would create considerable uncertainty in the agricultural community as to who should apply for a permit. Thus, EPA is following the express guidance of the Court in "NRDC v. Train" and the legislative history of the FWPCA ("A Legislative History of the Water Pollution Control Act Amendments of 1972", January 1972, pp. 1298-99) in proposing these regulations to minimize site-specific determinations.

The proposed regulations delineate the scope of the NPDES permit program by carefully defining the term "concentrated animal feeding operation." Any facility falling within the definition of "concentrated animal feeding operation" is a point source pursuant to these regulations and must apply for and obtain an NPDES permit.

This proposed regulation is based on the "NRDC v. Train" decision in which the court provided guidance for this approach. The court specifically directed the Agency "to refine and elaborate on terms such as 'concentrated animal feeding operation.' The very nature of this term requires that Agency discretion be exercised to determine what is encompassed within its scope." 396 F. Supp. 1393, 1401 (1975). This discussion recognizes that section 502(14) of the FWPCA includes "concentrated animal feeding operation" within the definition of point source, but does not define the term "concentrated animal feeding operation." When such a term is left undefined, the Administrator within his discretion may define it based on all facts and information available to him.

In the Agency's effort to reach a sound definition of concentrated animal feeding operation it became evident that numerous factors are relevant to whether a facility in which animals are stabled and fed should fall within the scope of that term: (1) The proximity of the feeding operation to a navigable water; (2) the numbers and types of animals confined in the operation; (3) the means of conveyance of the animal wastes and process waste waters into the navigable

waters; (4) the slope of the land on which the operation is located; (5) the amount of vegetation sustained within the confines of the feeding operation; (6) the amount of rainfall in the geographic area in which the operation is located; (7) the time period during which the animals are stabled or confined and fed; and (8) other similar factors relative to the likelihood or frequency of discharge of pollutants into navigable waters.

The most precise regulatory system might be based on a formula in which each of the above factors was assigned particular weight. On a case-by-case basis, the characteristics of each animal feeding operation would be computed into that formula for a determination whether the facility was "concentrated" and therefore subject to the NPDES permit program. At this time, however, the data is not available to the Agency with which such a precise formula can be constructed. Even if such a formula could be constructed it would be so complex that permitting authorities, whether State or regional, as well as feedlot operators would find it difficult to apply.

Therefore, the Administrator has determined that the need for a basic national standard and a practical administrative approach calls for the establishment of definite criteria for the term "concentrated animal feeding operation." In setting the criteria, using the discretion recognized by the court in "NRDC v. Train," the Administrator has relied greatly upon the intent of Congress with respect to agricultural sources. In discussing the intent of Congress with regard to the concept of "point source" as it related to concentrated animal feeding operations, Senator Edmund Muskie, Chairman of the then Air and Water Pollution Subcommittee of the Senate Committee on Public Works, set forth the following guidance:

First. If a man-made drainage ditch, flushing system or other such device is involved and if measurable waste results and is discharged into water, it is considered a 'point source.'

Second. Natural runoff from confined livestock and poultry operations are not considered a 'point source' unless the following concentrations of animals are exceeded: 1,000 beef cattle; 700 dairy cows; 290,000 broiler chickens; 180,000 laying hens; 55,000 turkeys; 4,500 slaughter hogs; 35,000 feeder pigs; 12,000 sheep or lambs; 145,000 ducks.

Third. Any feedlot operation which results in the direct discharge of wastes into a stream which traverses the feedlot are considered point sources without regard to the number of animals involved.

Leg. Hist. pp. 1298-1299.

Thus, the proposed regulations define "concentrated animal feeding operation" in terms of three criteria: the number of animals confined in the operation (obviously a determinant of the amount of pollutants produced); the location of the operation relative to a water body; or the presence of a man-made drainage ditch, flushing system, or other man-made device which discharges wastes directly into a stream. If any one of these three criteria apply to a particular animal feeding operation, the facility will

be required to apply for and obtain a permit. A permit, however, is not required even for those feeding operations which have more than the number of animals specified if the only time a discharge of pollutants into navigable waters occurs is during a 25 year, 24 hour rainfall event.

There is, in addition, one further provision in the proposed regulations which may be invoked by the permitting authority to require the owner or operator of an animal feeding operation to obtain a permit. Even if the feeding operation meets none of the three generally-applicable criteria for defining a "concentrated animal feeding operation" the facility may have to apply for a permit upon a specific determination that it is a concentrated animal feeding operation. This provision is incorporated into the proposed regulations to assure that where one or more of the many factors discussed above, but not specified as generally-applicable in the regulations, is significant, a permit may be required regardless of the numbers of animals, the distance from stream or the lack of a man-made ditch or flushing system. In other words, this provision is a mechanism for a case-by-case determination that particular animal feeding operations are concentrated and therefore point sources subject to regulation.

These regulations are presented in proposed form so that further information, data, and discussion may be received before final adoption. Although the Administrator has made a preliminary determination that the numbers represent a rational cut-off level and one strongly supported by Senator Muskie's statement of Congress' intent, the numbers were originally proposed approximately four years ago. Further information since that time has not suggested that these numbers are inappropriate, but the Agency is seeking any data which might supply information as to whether other numbers might be more representative of an appropriate cut-off level for assessing which feeding operations are "concentrated" facilities.

It must be emphasized that these regulations do not automatically require applications for permits from every owner or operator of a concentrated animal feeding operation point source. Before a permit is required there must be a "discharge of a pollutant" from the point source into "navigable waters." If there is no discharge from a particular operation which is a point source, there is no need for a permit. As stated above, the proposed regulations provide that no permit is required for any concentrated animal feeding operation which discharges pollutants only in the event of a 25 year, 24 hour rainfall event. In addition, although there may be a discharge of a pollutant from a point source, no permit is required if such a discharge does not reach navigable waters. The term "navigable waters" is broadly defined in the FWPCA and is interpreted in detail by the NPDES regulations at 40 CFR 125.1(p).

The effect of these regulations following promulgation and final publication,

upon State NPDES programs will be that those NPDES States which have enacted legislation or adopted regulations embodying the earlier exclusions will be required to amend their statutes or regulations so as to be consistent with Federal law and the decision of the District Court.

As noted above, in addition to proposing these regulations for concentrated animal feeding operations, EPA is also proposing regulations relating to storm sewers and will in the future propose regulations concerning the application of the permit system to agricultural and silvicultural activities, as required by the court order. Because EPA believes that many point sources within these previously excluded categories are not susceptible to regulation by effluent limitations and are not appropriate subjects for Federal regulation, EPA is seeking relief in the courts. Therefore, EPA has urged the Department of Justice to appeal the decision of the District Court in "NRDC v. Train."

The basic provisions of the proposed regulations, as well as the implementation strategy for the proposed permit system, are described below.

PROPOSED REGULATIONS FOR CONCENTRATED ANIMAL FEEDING OPERATIONS

CONTENT OF REGULATIONS

(1) The exclusion of small concentrated animal feeding operations from the NPDES permit program is deleted from §§ 124.11 and 125.4.

(2) The definition of the term "animal confinement facility" is deleted from §§ 124.1 and 125.1.

(3) Provisions for the issuance of permits for pollution control from concentrated animal feeding operations are found in an amended Subpart I of Part 124 and a new Subpart F of Part 125, both Subparts entitled "Special Programs."

(4) New sections, §§ 124.82 and 125.51, Concentrated Animal Feeding Operations, are added. These sections would establish a permit system substantially similar to that currently being administered under the NPDES. This program is developed from the guidance provided by Senator Edmund Muskie, Chairman of the then Air and Water Pollution Subcommittee of the Senate Committee on Public Works, during the Senate debate on the FWPCA. Senator Muskie was asked by Senator Dole from Kansas, a major agricultural State, to clarify the "terms 'point source' and 'non-point source'—especially as related to agriculture." Senator Muskie responded by stating the "present policy with respect to the identification of agricultural point sources," and listed three factors to determine the definition of a point source. These three factors—(1) presence of a man-made drainage ditch, flushing system, or other similar device, (2) presence of certain numbers and types of animals, and (3) presence of navigable waters within the confined area—are included in the definition of "concentrated animal feeding operation" in this program. (Legislative History, pp. 1298 and 1299). Ex-

cept for those operations which have discharges of pollutants only as a result of a 25 year, 24 hour rainfall event, concentrated animal feeding operations within this definition would be required to apply for a permit. The required permit application would be NPDES Short Form — (to be added) which must be submitted by March 10, 1977. In addition, permit applications would be required from those owners or operators of animal feeding operations designated by the permit issuing agencies as concentrated animal feeding operations, taking several factors into consideration to make such designation. Finally, the administrative procedures of this alternative would be the same as the permit system established pursuant to Subparts A through K of Part 124 and Subparts A through E of Part 125.

STRATEGY OF REGULATIONS

This proposed regulation conforms with the express guidance stated by Senator Muskie, which is the most explicit statement of Congressional intent on the issue of agricultural point sources. Senator Muskie's response to Senator Dole's concern that "(m)ost sources of agricultural pollution are generally considered to be non-point sources," indicates that he was in agreement with Senator Dole. Thus, this program incorporates the Senators' intent and establishes a permit program similar to that currently administered. Permits for those operations within the definition of concentrated animal feeding operation would be issued on an individual basis, including individual notice, opportunity for a public hearing, and individual responsibility for compliance. Because this permit program closely parallels the permit program established pursuant to Parts 124 and 125, the administration of this approach would require no new procedures. Permits would be based upon effluent guidelines.

By using Senator Muskie's identification of point sources, those concentrated animal feeding operations below the cut-offs and outside the definition suggested by the Senator are excluded from EPA's jurisdiction over point sources except in the case where the Regional Administrator or the Director of a State water pollution control agency designates an animal feeding operation as a concentrated animal feeding operation. Thus, this program should enable EPA and NPDES States to regulate all appropriate sources in the concentrated animal feeding operation category which were identified as point sources by the Senate debate.

REQUEST FOR COMMENTS

Interested persons may participate in this rule-making by submitting written comments to Legal Branch, Water Enforcement Division, Office of Water Enforcement, EN-338, Environmental Protection Agency, Washington, D.C. 20460. Comments upon all aspects of the proposed regulation are solicited; in particular comments are desired concerning the technical definition of "concentrated animal feeding operation" and other definitions; the scope of the regulations;

the purpose of the regulations, including the water quality benefits to be gained as contrasted with the costs to the affected owners and operators; the technical numbers used in defining the terms, setting procedural limitations, and requiring pollution control; the administrative procedures for issuing individual permits; and the resource implications of imposing requirements upon both permittees and permit issuing agencies.

In the event comments are in the nature of criticisms as to the adequacy of data which are available, or which may be relied upon by the Agency, comments should identify and, if possible, provide any additional data which may be available and should indicate why such data are essential to the development of the regulations. In the event comments address the approach taken by the Agency in establishing this regulation, EPA solicits suggestions as to what alternative approach should be taken and why and how this alternative better satisfies the requirements of the court order.

A copy of all public comments will be available for inspection and copying at the EPA Public Information Reference Unit, Room 2922, Rear Library-Mall, Waterside Mall, 401 M Street, SW., Washington, D.C. 20460. The EPA information regulation, 40 CFR Part 2, provides that a reasonable fee may be charged for copying. All comments received on or before January 5, 1976 will be considered.

(Secs. 304, 402, 501 Federal Water Pollution Control Act Amendments of 1972. (86 Stat. 816 et seq., Pub. L. 92-500 33 U.S.C. 1251 et seq.)

Dated: November 13, 1975.

JOHN QUARLES,
Acting Administrator.

PART 124—STATE PROGRAM ELEMENTS NECESSARY FOR PARTICIPATION IN THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

Part 124 of Title 40 of the Code of Federal Regulations, setting forth State program elements necessary for participation in the National Pollutant Discharge Elimination System, is proposed to be amended as follows:

Subpart A—General

§ 124.1 [Amended]

1. Section 124.1 is amended by deleting paragraph (u) and by relettering paragraph (v) to (u).

Subpart B—Prohibition of Discharges of Pollutants

§ 124.11 [Amended]

2. Paragraph (h) of § 124.11 is amended by deleting subparagraphs (1) and (2); by redesignating subparagraphs (3), (4), and (5) to (2), (3), and (4) respectively; and by adding a new subparagraph (1) as follows: "(1) Discharges from concentrated animal feeding operations."

Subpart I—Special Programs

§ 124.80 [Redesignated]

3. Subpart I of Part 124 is amended by deleting the title "Disposal of Pollutants

into Wells" and by adding a new title to read as set forth above and by redesignating § 124.80 as 124.81.

4. Subpart I of Part 124 is amended by adding a new § 124.82, *Concentrated animal feeding operations*, as follows:

§ 124.82 Concentrated animal feeding operations.

(a) *Definitions.* For the purpose of this subpart:

(1) The term "animal feeding operation" means a lot or facility (other than an aquatic animal production facility) within which animals have been or will be stabled or confined and fed or maintained for an aggregate of 45 days or more at any time in any 12-month period, and crops, vegetation or forage growth are not sustained in the area of confinement.

(2) The term "concentrated animal feeding operations," other than as provided in paragraph (c) of this section, means only those animal feeding operations where:

(i) Without regard to the numbers and types of animals confined, measurable wastes are discharged into navigable waters through a man-made drainage ditch, flushing system or other similar man-made device; or

(ii) Without regard to the numbers and types of animals confined, measurable wastes are discharged directly into navigable waters which originate outside of and traverse the operation; or

(iii) More than the following numbers and types of animals are confined:

- (A) 1,000 slaughter and feeder cattle,
- (B) 700 mature dairy cattle (whether milked or dry cows),
- (C) 4,500 slaughter hogs,
- (D) 35,000 feeder pigs,
- (E) 12,000 sheep or lambs,
- (F) 55,000 turkeys,
- (G) 180,000 laying hens, or
- (H) 290,000 broiler chickens, and

Provided, however, That no animal feeding operation identified in this paragraph (a)(2)(iii) of this section is a concentrated animal feeding operation if it only discharges pollutants into navigable waters in the event of a 25 year, 24 hour rainfall event, as defined by the National Weather Service in Technical Paper Number 40 "Rainfall Frequency Atlas of the United States," May 1961, and subsequent amendments, or equivalent Regional or State rainfall probability information developed therefrom.

COMMENT.—The legislative history of the FWPCA indicates that those agricultural sources not within the above definition are presumptively nonpoint sources and therefore are not under the jurisdiction of the permit program. Thus, those animal feeding operations without measurable wastes discharged from a man-made drainage ditch, flushing system or other similar device; without a direct discharge into navigable waters traversing the operation; and with fewer than the cutoff numbers enumerated above are nonpoint sources, unless otherwise designated by the Director pursuant to § 124.82(c) as proposed below.

(3) The term "man-made" means constructed by man for the purpose of transporting wastes.

(b) *Application for a permit.* (1) Any person discharging or proposing to discharge pollutants from a concentrated animal feeding operation shall file an application with the Director by March 10, 1977.

(2)(i) Each application must be filed on a Short Form—(to be added) and completed in accordance with the instructions provided with such form.

(ii) In addition to the information required in the Short Form—(to be added) the Director may require any applicant to submit such other information as the Director deems necessary to proceed with the issuance of the permit.

(c) *Case-by-case designation of concentrated animal feeding operations.* Notwithstanding any other provision of this section, the Director or the Regional Administrator may designate as a concentrated animal feeding operation any animal feeding operation not otherwise falling within the definition provided in paragraph (a)(2) of this section. In making such designation the Director or the Regional Administrator shall consider the following factors:

(1) The size of the animal feeding operation and the amount of, wastes reaching navigable waters;

(2) The location of the animal feeding operation relative to navigable waters;

(3) The means of conveyance of animal wastes and process waste waters into navigable waters;

(4) The slope, vegetation, rainfall, and other factors relative to the likelihood or frequency of discharge of animal wastes and process waste waters into navigable waters; and

(5) Other such factors relative to the significance of the pollution problem sought to be regulated.

COMMENT.—See 40 CFR 412.11(c) for the definition of "process waste water."

PART 125—NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

Part 125 of Title 40 of the Code of Federal Regulations, setting forth policies and procedures for the Environmental Protection Agency's administration of its role in the National Pollutant Discharge Elimination System, is proposed to be amended as follows:

Subpart A—General

§ 125.1 [Amended]

1. Section 125.1 is amended by deleting paragraph (ii) and by redesignating paragraph (jj) as (ii).

§ 125.4 [Amended]

2. Paragraph (j) of § 125.4 is amended by deleting subparagraphs (1) and (2); by redesignating subparagraphs (3), (4) and (5) as (2), (3) and (4) respectively; and by adding a new subparagraph (1) as follows: (1) Discharges from concentrated animal feeding operations.

Subpart F—Special Programs

3. Part 125 is amended by adding a new Subpart F, Special Programs, consisting of § 125.51 to read as follows:

§ 125.51 Concentrated animal feeding operations.

(a) *Definitions.* For the purpose of this subpart:

(1) The term "animal feeding operation" means a lot or facility (other than an aquatic animal production facility) within which animals have been or will be stabled or confined and fed or maintained for an aggregate of 45 days or more at any time in any 12 month period, and crops, vegetation or forage growth are not sustained in the area of confinement.

(2) The term "concentrated animal feeding operations," other than as provided in paragraph (c) of this section, means only those animal feeding operations where:

(i) Without regard to the numbers and types of animals confined, measurable wastes are discharged into navigable waters through a man-made drainage ditch, flushing system or other similar man-made device; or

(ii) Without regard to the numbers and types of animals confined, measurable wastes are discharged directly into navigable waters which originate outside of and traverse the operation; or

(iii) More than the following numbers and types of animals are confined:

- (A) 1,000 slaughter and feeder cattle,
- (B) 700 mature dairy cattle (whether milked or dry cows),
- (C) 4,500 slaughter hogs,
- (D) 35,000 feeder pigs,
- (E) 12,000 sheep or lambs,
- (F) 55,000 turkeys,
- (G) 180,000 laying hens, or
- (H) 290,000 broiler chickens, and

Provided, however, That no animal feeding operation identified in this paragraph (a)(2)(iii) of this section is a concentrated animal feeding operation if it only discharges wastes into navigable waters in the event of a 25 year, 24 hour rainfall event, as defined by the National Weather Service in Technical Paper Number 40 "Rainfall Frequency Atlas of the United States," May 1961, and subsequent amendments, or equivalent Regional or State rainfall probability information developed therefrom.

COMMENT.—The legislative history of the FWPCA indicates that those agricultural sources not within the above definition are presumptively nonpoint sources and therefore are not under the jurisdiction of the permit program. Thus, those animal feeding operations without measurable wastes discharged from a man-made drainage ditch, flushing system or other similar device; without a direct discharge into navigable waters traversing the operation; and with fewer than the cutoff numbers enumerated above are nonpoint sources, unless otherwise designated by the Regional Administrator pursuant to § 125.51(c) as proposed below.

(3) The term "man-made" means constructed by man for the purpose of transporting wastes.

(b) *Application for permit.* (1) Any person discharging or proposing to discharge pollutants from a concentrated animal feeding operation shall file an application with the Regional Administrator by March 10, 1977.

PROPOSED RULES

(2) (i) Each application must be filed on a Short Form—(to be added) and completed in accordance with the instructions provided with such form.

(ii) In addition to the information required in the Short Form—(to be added) the Regional Administrator may require any applicant to submit such information as the Regional Administrator deems necessary to proceed with the issuance of the permit.

(c) *Case-by-case designation of concentrated animal feeding operations.*

Notwithstanding any other provision of this section, the Regional Administrator may designate as a concentrated animal feeding operation any feeding operation not otherwise falling within the definition provided in paragraph (a) (2) of this section. In making such designation the Regional Administrator shall consider the following factors:

(1) The size of the animal feeding operation and the amount of wastes reaching navigable waters;

(2) The location of the animal feeding operation relative to navigable waters;

(3) The means of conveyance of animal wastes and process waste waters into navigable waters;

(4) The slope, vegetation, rainfall, and other factors relative to the likelihood or frequency of discharge of animal wastes and process waste waters into navigable waters; and

(5) Other such factors relative to the significance of the pollution problem sought to be regulated.

COMMENT.—See 40 CFR 412.11(c) for the definition of "process waste water."

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