

Mr. Gary Millington
Department of Environmental Protection
Bureau of Water Facilities Regulation
MS 3545
2600 Blair Stone Road
Tallahassee, FL 32399-2400

December 1, 2005

Re: Comments on draft regulations for animal feeding operations and draft generic permit for animal feeding operations

Dear Mr. Millington:

These comments are submitted on behalf of the Natural Resources Defense Council, Inc. ("NRDC"), Clean Water Network of Florida, Earthjustice and other groups listed at the bottom of the letter. We have four main concerns about the draft regulations and draft generic permit for animal feeding operations.

1. CAFOs should not be exempt from permitting requirements.
2. Setback distances need to be strengthened and consistent.
3. All waste storage facilities must be lined, all AFOs and CAFOs must have groundwater monitoring plans, perform groundwater monitoring, and be held to enforceable groundwater quality standards in the terms of their permits.
4. The generic permit should not cover all medium AFOs.

Below, we provide detailed comments on the draft regulations and draft generic permit.

Chapter 62-670 Wastewater Permitting Requirements for Animal Feeding Operations

Exemptions from Permitting

The draft regulations require all CAFOs to get a NPDES permit and a state permit unless exempted. We support requiring all CAFOs to obtain both NPDES and state permits. Indeed, all CAFOs are designed to discharge (production area designed to discharge in case of 25-year, 24-hour storm) and should not be exempt from NPDES and state permit requirements. In addition, CAFO land application areas are sites of likely or actual discharges, and as a result, CAFOs that land apply waste must obtain NPDES and state permits.

As we stated above, all CAFOs discharge and should not be exempt from permitting requirements. However, in the event that DEP disagrees and insists on developing a process for

exempting individual CAFOs from NPDES and state permitting requirements, DEP should explicitly outline the process that a facility would have to go through in order to be determined to be exempt from either NPDES or state permitting requirements. Instead, DEP's draft regulations provide that Large CAFOs may seek an exemption from the requirement to obtain a NPDES permit in accordance with 62-620.100(3)(t), F.A.C., which references 40 C.F.R. § 122.23(a)-(f). DEP's regulations should not reference these provisions of the Code of Federal regulations for three reasons. First, it is confusing. Second, DEP has been ordered by a court to "require all dairy AFOs in the state maintaining more than 700 mature cattle to apply for NPDES permits or to demonstrate that the facility is entitled to any applicable exemption from permitting..." *Save Our Suwannee v. DEP*, No. 2001-CA-001266, *7 (2004), *aff'd*, *DEP v. Save Our Suwannee*, No. 1D04-1258 (1st DCA 2005). Third, the provisions in the Code of Federal Regulations related to demonstrating no potential to discharge were vacated by the U.S. Court of Appeals for the Second Circuit in *Waterkeeper v. EPA*, 399 F.3d 486 (2005) and U.S. EPA is currently revising those regulations.

It is virtually impossible that any CAFO operating in the state of Florida would properly be exempt from permitting requirements. In order to be exempt, a CAFO would need to affirmatively demonstrate to DEP that it had not discharged in the past, is not designed to discharge under any storm event or chronic rainfall, and does not land apply. The public must be notified and have an opportunity to comment in the event that an individual CAFO seeks an exemption from NPDES or state permitting requirements.

Applying for NPDES Coverage

DEP's regulations must require CAFOs to submit their nutrient management plans (NMPs) at the time they apply for their NPDES permits. These NMPs must be reviewed and approved by DEP, made available to the public for comment at the time DEP provides public notice of the draft permit, and incorporated as terms of the NPDES permit. The current draft regulations refer to the provisions of the Code of Regulations that have been vacated on this issue by the Second Circuit in *Waterkeeper*. EPA is revising its regulations to reflect the Second Circuit's ruling that in order to be consistent with the requirements of the Clean Water Act, NMPs must be reviewed and approved by permitting authorities, made available to the public for comment before the NPDES permit is issued, and incorporated as terms of the NPDES permit. DEP's draft regulations indicate that all AFOs seeking individual permit coverage must submit a NMP. The regulations should be revised to clearly indicate that all AFOs and CAFOs must submit a NMP with their individual permit application or NOI to be covered by a generic permit.

Design and Operation Requirements

Studies have shown that all waste lagoons should be expected to leak. Yet, the draft regulations only require lining lagoons in certain circumstances (lagoons located over class F-I, G-I, or G-II ground waters, in aquifers used for public water supply, which are unconfined and have highly permeable soil types, or karst areas having solution features or fractures). All lagoons should be lined to protect groundwater resources.

The draft regulations fail to include the federal requirements for new sources of poultry, veal and swine operations. DEP should revise the regulations to include the zero discharge standard for new poultry, veal, and swine operations. It is inappropriate to provide for any discharge exemption for large storm events, i.e. new chicken operations cannot have discharges from production area under any circumstances.

We support prohibiting land application of waste when the groundwater table is high. However, DEP should not sanction waste application to prevent lagoon overflow in such circumstances because land application of waste under conditions will pollute surface and groundwaters and cause fish kills. Rather, operators must be required to properly manage their waste storage facilities in order to prevent environmental damage. Furthermore, waste should not be land applied during precipitation events or within 24 hours of a forecasted precipitation event.

Setback distances

The setback distances in the draft regulations are not consistent and appear to be arbitrary. New or expanded facilities have the ability to design their sites to reduce and minimize pollution. As a result, new or expanded facilities and their land application areas should have setbacks of 1000 feet from drinking water supplies and surface waters. For existing facilities, land application areas should not be performed closer than 500 feet from surface waters and onsite or offsite drinking water wells. The proposed 75 feet setback for new or expanded facilities and land application areas from existing onsite drinking water wells is not sufficient to protect public health and conflicts with other standards. Furthermore, there is no reason to provide for shorter setbacks for onsite versus offsite drinking water wells. The proposed 50-foot setback for dairies located within Lake Okeechobee watershed between land application areas and surface waters is insufficient. Lake Okeechobee is impaired by nutrients and to be consistent with Florida's antidegradation policy, which provides that "[p]articular consideration shall be given to the protection from further enrichment of waters which are presently high in nutrient concentrations or sensitive to further nutrient concentrations and sensitive to further nutrient loadings," Rule 62-302.300(13), F.A.C., DEP must require larger setbacks for land application of animal waste in the Lake Okeechobee watershed.

Groundwater monitoring and plans

The draft regulations seem to limit requirement for groundwater monitoring plans to facilities that apply for individual permits. This is not the legal standard. All AFOs and CAFOs must have groundwater monitoring plans and be held to enforceable groundwater standards in their permits. The court's decision in *Save Our Suwannee* made it clear that DEP cannot rely on the Suwannee River Basin Partnership as an alternative to requiring dairies, regardless of size, to obtain permits that require groundwater monitoring to ensure that groundwater quality standards are met. DEP has no basis for only requiring facilities that obtain individual permits, i.e. large dairies, to monitor groundwater. We support groundwater monitoring for pH, temperature, total phosphorus, ortho phosphate, specific conductance, total nitrate, nitrate, and fecal coliform for all regulated AFOs and CAFOs. The limits must parallel drinking water standards, i.e. 10mg/L nitrate and be fully enforceable as terms of NPDES and state permits.

Generic Permit for discharges from dairies

We reiterate our comments on the draft regulations with respect to land application of waste, setback distances, and operation and maintenance. We are very concerned that the draft generic permit does not include any requirements designed to protect groundwater. The draft permit neither requires liners to prevent waste seepage to groundwater, nor any groundwater monitoring. DEP must revise the draft generic permit to require facilities to line their lagoons, develop groundwater monitoring plans and to be held accountable for compliance with groundwater quality standards, particularly the 10 mg/L standard for nitrate. The permit must be revised to include groundwater limits as enforceable terms in the generic permit.

In addition, the generic permit should not cover all medium AFOs. DEP should require facilities with past compliance problems to obtain individual permits in order to provide the neighbors and concerned citizens an opportunity to be involved in the permitting process. Furthermore, DEP may not issue a generic permit that covers all medium AFOs under Florida's antidegradation policy. *Ohio Valley Environmental Coalition v. Horinko*, 279 F. Supp. 2d 732 (S.D. W. Va. 2003). According to Florida's antidegradation policy:

[E]xcessive nutrients (total nitrogen and total phosphorus) constitute one of the most severe water quality problems facing the State. It shall be the Department's policy to limit the introduction of man-induced nutrients into waters of the State. Particular consideration shall be given to the protection from further enrichment of waters which are presently high in nutrient concentrations or sensitive to further nutrient concentrations and sensitive to further nutrient loadings ... Pollution which causes or contributes to new violations of water quality standards or to continuation of existing violations is harmful to the waters of this State and shall not be allowed. Waters having water quality below the criteria established for them shall be protected and enhanced...If the Department finds that a new or existing discharge will reduce the quality of the receiving waters below the classification established for them or violate any Department rule or standard, it shall refuse to permit the discharge.

Rule 62-302.300, F.A.C.

For waters designated as "Tier II", DEP is required to ensure public participation in the issuance of permits and to make site-specific determinations of water quality impacts in reviewing those permit applications (or notices of intent for coverage under a general permit). 40 C.F.R. 131.12(a)(2); *Ohio Valley*, 279 F.Supp.2d at 759-63. In *Ohio Valley*, an environmental group challenged the EPA's approval of the West Virginia Department of Environmental Protection's antidegradation implementation procedures for their failure to ensure site-specific water quality review and public participation in the issuance of general NPDES permits and Clean Water Act 404 permits on Tier II waters. *Id.* at 763. The court found that "EPA has not explained how the

type of review called for in § 131.12(a)(2), which is location-specific and requires public participation, can be done on a statewide or nationwide basis.” *Id.* The court was skeptical that the required antidegradation review could be done at the general permitting stage, and found that EPA’s approval of West Virginia’s regulations to be arbitrary and capricious. *Id.*

As a result, DEP cannot do an antidegradation analysis except on a site-specific basis and in keeping with public participation requirements. Facilities that apply waste in watersheds that are impaired by nutrients, bacteria, or other pollutants found in AFO wastes or draining into Outstanding Florida Waters cannot be regulated under a generic permit. Moreover, because DEP has failed to perform an antidegradation analysis for the proposed generic permit, the antidegradation review exemption in 62-302.300(18) does not apply to facilities that would be covered by the generic permit.

The draft generic permit also must provide for an opportunity for the public to review site-specific NMPs prior to the facility receiving authorization to operate pursuant to the generic permit.

Florida law requires EPA to approve generic permits pursuant to 62-670.710(3), F.A.C. However, the draft fails to indicate whether EPA has approved the draft generic permit.

Conclusion

We urge you to revise the draft regulations and draft generic permit to meet legal requirements and to protect Florida’s surface waters, drinking water supplies, and public health. We would like to meet with you to discuss our concerns in more detail.

Sincerely,

Linda Young
Clean Water Network of Florida, Inc.

Melanie Shepherdson
NRDC

David Guest
Earthjustice

Glenn Compton
ManaSota-88

Loye Barnard
Save Our Suwannee

Jeff Mitchell
Conservation Alliance of St. Lucie County

30 additional groups signed on to this letter by the time it was resubmitted on January 4, 2006.