OAH 65-2200-30761
Revisor RD 4109

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed Amendments to Rules Governing Animal Feedlots, Permits and Certifications, and Permit Fees, Minnesota Rules, Chapter 7020, 7001 and 7002

REPORT OF THE ADMINISTRATIVE LAW JUDGE

This matter came before Administrative Law Judge Ann C. O'Reilly for hearings on September 9, 2013. The hearings were held at the Minnesota Pollution Control Agency, Room 4-1, St. Paul, Minnesota, and remotely by Videoconference at the Minnesota Pollution Control Regional Offices in Brainerd, Detroit Lakes, Mankato, Marshall, Rochester, Willmar, and St. Paul (overflow) Room 1-1. The first hearing convened at 2:00 p.m. and continued until everyone had an opportunity to be heard concerning the proposed amendments to the rules. The second hearing commenced at 7:00 p.m.; however, no members of the public appeared at the second hearing and the hearing concluded at approximately 7:30 p.m.

The hearings and this Report are part of a rulemaking process governed by the Minnesota Administrative Procedure Act.[1] The legislature designed the rulemaking process to ensure that state agencies have met all of the requirements that Minnesota law specifies for adopting rules. Those requirements include assurances that the proposed rules are in compliance with Minn. R. 1400.2100, are necessary and reasonable, and fulfill all relevant substantive and procedural requirements imposed on the agency by rule or law. The rulemaking process also includes a hearing when 25 or more persons request one or when ordered by the agency. The hearing is intended to allow the agency and the Administrative Law Judge reviewing the proposed rules to hear public comment regarding the impact of the proposed rules and what changes might be appropriate.

Kevin Molloy, Rules Coordinator, represented the Minnesota Pollution Control Agency (MPCA or Agency) at the hearing. The members of the Agency's hearing panel included Kim Brynildson, Technical Lead/Principal Engineer; Samantha Adams, Pollution Control Specialist (Detroit Lakes); Wayne Cords, Supervisor East Feedlots (Mankato); George Schwint, Principal Engineer; and Ann Cohen, Assistant Attorney General. Approximately 35 individuals attended the hearing. Twenty-one individuals attended the hearing in Room 4-1 at MPCA's St. Paul location; five individuals attended the hearing via videoconference in St. Paul Room 1-1; three individuals attended the hearing via videoconference at the Detroit Lakes location; five individuals attended the

[1] Minn. Stat. §§ 14.131 through 14.20.

hearing via videoconference at the Rochester location; and one individual attended the hearing at the Mankato location. There were no attendees at the satellite locations in Brainerd, Marshall or Willmar.[2]

The MPCA received 80 written comments on the proposed rules prior to the hearing.[3] After the hearing, the Administrative Law Judge kept the administrative record open for an additional 20 calendar days, until September 30, 2013, to allow interested persons and the MPCA to submit written comments. Thereafter, the record remained open for an additional five business days, until October 7, 2013, to allow interested persons and the MPCA to file a written response to any comments received during the initial comment period.[4] Approximately 32 written comments were received before, during, and after the hearing, along with two responses from the MPCA. To aid the public in participating in this matter, comments were posted on the MPCA website shortly after they were received. The hearing record closed on October 7, 2013. The Chief Administrative Law Judge extended the time period for issuance of the Administrative Law Judge's Report on this rule until November 18, 2013.

NOTICE

The MPCA must make this Report available for review by anyone who wishes to review it for at least five working days before the MPCA takes any further action to adopt final rules or to modify or withdraw the proposed rules. If the MPCA makes changes in the rules other than those recommended in this report, it must submit the rules, along with the complete hearing record, to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

Because the Administrative Law Judge has determined that the proposed rules are defective in certain respects, state law requires that this Report be submitted to the Chief Administrative Law Judge for her approval. If the Chief Administrative Law Judge approves the adverse findings contained in this Report, she will advise the MPCA of actions that will correct the defects, and the MPCA may not adopt the rules until the Chief Administrative Law Judge determines that the defects have been corrected. However, if the Chief Administrative Law Judge identifies defects that relate to the issues of need or reasonableness, the MPCA may either adopt the actions suggested by the Chief Administrative Law Judge to cure the defects or, in the alternative, submit the proposed rules to the Legislative Coordinating Commission for the Commission's advice and comment. The MPCA may not adopt the rules until it has received and considered the advice of the Commission. However, the MPCA is not required to wait for the Commission's advice for more than 60 days after the Commission has received the MPCA's submission.

If the MPCA elects to adopt the actions suggested by the Chief Administrative Law Judge and make no other changes; and the Chief Administrative Law Judge determines that the defects have been corrected, it may proceed to adopt the rules. If

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[2] Ex. 22.
[3] Ex. 13 (This number includes 67 form letters requesting a hearing.)
[4] *See* Minn. Stat. § 14.15, subd. 1.

the MPCA makes changes in the rules other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, it must submit copies of the rules showing its changes, the rules as initially proposed, and the proposed order adopting the rules to the Chief Administrative Law Judge for a review of those changes before it may adopt the rules in final form.

After adopting the final version of the rules, the MPCA must submit them to the Revisor of Statutes for a review of their form. If the Revisor of Statutes approves the form of the rules, the Revisor will submit certified copies to the Administrative Law Judge, who will then review them and file them with the Secretary of State. When they are filed with the Secretary of State, the Administrative Law Judge will notify the MPCA, and the MPCA will notify those persons who requested to be informed of their filing.

SUMMARY OF CONCLUSIONS

The Agency has established that it has the statutory authority to adopt the proposed rules, and that the rules are necessary and reasonable, with the exception of proposed Rules 7020.2003, subp. 1; 7020.2003, subp. 2; 7020.0300, subp. 14a; 7020.0300, subp. 17; 7020.0300, subp. 18B; 7020.0300, subp. 27; 7020.0405, subp. 1A; 7020.0405, subp. 1B; 7020.0405, subp. 5; 7020.0505, subp. 2A; 7020.0505, subp. 5; 7020.2100, subp. 1D; and 7020.2100, subp. 2, as detailed below.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

I. NATURE OF THE PROPOSED RULES

1. The MPCA regulates the collection, transportation, storage, processing, and disposal of animal manure and wastewater, and issues permits for animal feedlots. A "feedlot" is defined by Minn. R. 7020.0300, subp. 3, as:

> a lot or building or combination of lots and buildings intended for the confined feeding, breeding, raising, or holding of animals and specifically designed as a confinement area in which manure may accumulate, or where the concentration of animals is such that a vegetative cover cannot be maintained within the enclosure. For purposes of these parts, open lots used for the feeding and rearing of poultry (poultry ranges) shall be considered to be animal feedlots. Pastures shall not be considered animal feedlots under these parts.

2. Because of the manure produced, most feedlots use some form of storage area for liquid and solid manure.[5]

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[5] *Id.*

3. Although certain feedlots have the potential to affect air quality, the principal environmental concern associated with feedlots is water quality.[6] When managed correctly, manure is a valuable resourc, used to fertilize crops.[7] If it is not managed correctly, it can result in polluted water and can be a threat to human health.[8]

4. According to the MPCA, the goal of feedlot regulation is to ensure that: (1) manure generated at feedlots or in manure storage areas (MSAs) does not discharge into surface or ground water; and (2) manure is applied to cropland at an appropriate rate and time so that nutrients and other possible contaminants do not enter streams, lakes, and groundwater.[9]

5. Discharges of pollutants from feedlots are regulated by both federal and state permitting laws. The federal permits are called National Pollutant Discharge Elimination System (NPDES) permits and state permits are called State Discharge System (SDS) permits. A more thorough explanation of these permits and the legislative history related to these permits is discussed in the "Background for NPDES and SDS Permits" section below.

6. The MPCA is proposing to amend Minnesota Rules chapters 7001 and 7002 governing permit requirements and exemptions; and chapter 7020 governing animal feedlots. The stated purpose of the amendments is to bring the rules into alignment with recent changes made to state statute and federal regulations regarding NPDES permitting requirements. The MPCA asserts that the proposed amendments to chapter 7020 are necessary in order to conform to statutory changes by the legislature in 2011, as well as to changes in the law brought about by federal court rulings. In particular, in response to recent federal court rulings and in accord with Minn. Stat. § 116.07, subd. 7c (2011), the MPCA proposes to now only require NPDES permits "as required by federal law," unless a facility owner requests that an NPDES permit be issued.[10]

7. The MPCA is also proposing changes to "remove obsolete rule requirements, address other statutory changes, and provide clarification to certain existing rules, including Minn. R. 7001 and 7002."[11]

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[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*; *See* Minn. R. 7020.0200.
[10] Ex. 3 at p. 1.
[11] *Id.*

II. PROCEDURAL REQUIREMENTS OF CHAPTER 14

8. The Minnesota Administrative Procedure Act[12] and the rules of the Office of Administrative Hearings[13] set forth certain procedural requirements that are to be followed during agency rulemaking.

9. On December 19, 2011, the MPCA published a Request for Comments on Possible Amendments to Rules Governing Animal Feedlots, Minnesota Rules 7020. The Request for Comments was published at 36 Minn. Reg. 685 (Dec. 19, 2011).[14]

10. By letter dated May 20, 2013, the MPCA notified the Commissioner of the Department of Agriculture of its intent to amend rules governing animal feedlots and enclosed a copy of the proposed rule changes, in compliance with Minn. Stat. § 14.111.[15]

11. By letter dated May 20, 2013, the MPCA asked the Commissioner of Minnesota Management & Budget to evaluate the fiscal impact and benefits of the proposed rules on local units of government, as required by Minn. Stat. § 14.131.[16] Michelle Mitchell, Executive Budget Officer for Minnesota Management & Budget, provided comments regarding the proposed rule amendments in a memorandum dated June 5, 2013.[17]

12. In her memorandum, Ms. Mitchell noted that she had reviewed the MPCA's proposed rule amendments and SONAR, and evaluated the fiscal impact and benefits of the proposed rules with respect to local governments.[18] Ms. Mitchell concluded that there is:

> a potential cost to the 54 counties that have been delegated authority to issue certain permits to smaller feedlots. These counties include most of those with significant numbers of feedlots.[19]

13. Ms. Mitchell noted that in both delegated and non-delegated counties, county representatives are the main point of contact for feedlot owners.[20] MPCA estimates the impact of the proposed rule changes on counties will largely be additional time spent responding to questions.[21] Ms. Mitchell further noted that that there is an additional cost for delegated counties issuing construction permits on feedlots with

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[12] The provisions of the Act relating to agency rulemaking are codified in Minn. Stat. §§ 14.001-14.47.
[13] The rules governing rulemaking proceedings are set forth in Minnesota Rules part 1400.2000 through 1400.2240.
[14] Ex. 1.
[15] Ex. 10.
[16] Ex. 11.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*

fewer than 1,000 animal units.[22] She pointed out, however, that this cost is related to the statutory changes passed in the 2011 Legislative First Special Session, not the proposed rule changes.[23]

14. By letter dated June 20, 2013, the MPCA requested that the Office of Administrative Hearings schedule a hearing and assign an Administrative Law Judge.[24] Along with the letter, the MPCA filed a Dual Notice of Intent to Adopt the Proposed Rule Amendments and Hold Hearings (Dual Notice), a copy of the proposed rule amendments, and a draft of the SONAR.[25] The MPCA also requested that the Office of Administrative Hearings give prior approval of its Additional Notice Plan.[26]

15. Under the Additional Notice Plan, the MPCA represented that it would notify a broad range of individuals, agricultural associations, and environmental groups and provide a hyperlink to electronic versions of the MPCA's Dual Notice, SONAR, and proposed rule amendments.[27] The MPCA further represented that it would send notice of the availability of the Dual Notice, SONAR, and proposed rule amendments through the Feedlot Update newsletter, which is sent electronically to approximately 1,214 subscribers, including County Feedlot Pollution Control Officers; livestock commodity groups; state and federal agencies; environmental groups; and individual livestock producers with NPDES and state permit coverage.[28]

16. By Order dated June 26, 2012, Administrative Law Judge Ann C. O'Reilly approved the Additional Notice Plan contingent upon the MPCA providing notice to the Association of Minnesota Counties, the Association of Metropolitan Municipalities, the League of Minnesota Cities, and the Minnesota Association of Townships.[29]

17. On July 22, 2013, the MPCA:

- Electronically sent a copy of the SONAR to the Legislative Reference Library as required by law;[30]
- Published its Dual Notice in the *State Register* at 38 Minn. Reg. 79 (July 22, 2013);[31]
- Mailed the Dual Notice to all persons and associations who had registered their names with the agency for purpose of receiving such notice;[32] and

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[22] *Id.*
[23] *Id.*
[24] Ex. 12.
[25] *Id.*
[26] *Id.*
[27] Ex. 3 at pp. 13-15.
[28] Ex. 12; Ex. 3 at p. 14.
[29] Ex. 12.
[30] Ex. 4.
[31] Ex. 5.
[32] Ex. 6.

- Gave notice to all persons and associations identified in the Additional Notice Plan.[33]

18. On July 23, 2013, the MPCA mailed copies of the Dual Notice, SONAR, and proposed rule amendments to legislators and the Legislative Coordinating Commission.[34]

19. On July 23, 2012, the MPCA mailed copies of the Dual Notice, SONAR, and proposed rule amendments to legislators who are chairs and ranking minority members of the Legislative Policy and Budget Committees with jurisdiction over the subject matter of the proposed rule amendments.[35]

20. More than 25 persons requested that a hearing be held on the proposed rules.[36]

21. On August 30, 2013, the MPCA notified all persons who had requested a hearing that a hearing would, in fact, be held.[37]

22. The hearing on the proposed rules was held on September 9, 2013, in St. Paul, Minnesota, and remotely by videoconference in Brainerd, Detroit Lakes, Mankato, Marshall, Rochester, and Willmar. During the hearing, the following documents were received into the hearing record:

Exhibit 1: the Request for Comments as published in the *State Register* on December 19, 2011 (36 Minn. Reg. 685);

Exhibit 2: A copy of the proposed rules dated April 1, 2013, including the Revisor's approval;

Exhibit 3: A copy of the SONAR;

Exhibit 4: The Certificate of Mailing a copy of the SONAR to the Legislative Reference Library on July 22, 2013;

Exhibit 5: A copy of the Agency's Dual Notice as published in the *State Register* on July 22, 2013 (38 Minn. Reg. 79);

Exhibit 6: Certificates attesting to the accuracy of the Agency's mailing list and attesting that the Dual Notice was sent via mail or electronically to all persons and associations on the Agency's rulemaking list on July 22, 2013;

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[33] Ex. 9.
[34] Ex. 7.
[35] Ex. 8.
[36] Ex. 13N.
[37] Ex. 14.

Exhibit 7: Certificate attesting that, on July 22, 2013, the Agency sent the Dual Notice and SONAR to the Legislative Coordinating Commission and the Chairs and Ranking Minority Members of the Legislative Policy and Budget Committees with jurisdiction over the proposed rules;

Exhibit 8: Letter to Legislative Coordinating Commission and the Chairs and Ranking Minority Members of the Legislative Policy and Budget Committees with jurisdiction over the proposed rules;

Exhibit 9: Certificate attesting that, on July 22, 2013, the Agency gave notice of the proposed rules and the Dual Notice to all individuals and organizations identified in the Additional Notice Plan and Certificate attesting that, on Wednesday May 29, 2013, the Agency gave notice of the proposed rules to the Commissioner of Agriculture;

Exhibit 10: A letter to the Commissioner of the Minnesota Department of Agriculture, dated May 20, 2013, notifying him of the proposed rules;

Exhibit 11: Certificate attesting that the Agency consulted with the Commissioner of Minnesota Management and Budget regarding the proposed rules on May 29, 2013, and a copy of the June 5, 2013 memorandum of Michelle Mitchell, Executive Budget Officer, Minnesota Management and Budget, regarding the fiscal impact and benefits of the proposed rules with respect to local governments;

Exhibit 12: A copy of the Agency's June 20, 2013, letter to Chief Administrative Law Judge Tammy Pust requesting that the Office of Administrative Hearings schedule a rules hearing and assign and Administrative Law Judge. The Agency also requested that the Office give prior approval of its Additional Notice Plan.

Exhibit 13: Copies of written comments received on the proposed rule amendments during the comment period;

Exhibit 14: A copy of the Agency's August 30, 2013, letter notifying individuals who provided comments that the scheduled rule hearing will take place;

Exhibit 15: Hard copies of the MPCA's slide presentations prepared for presentation at the public hearing;

Exhibit 16: A copy of the Memorandum of Understanding between the MPCA, the Minnesota Department of Agriculture, and the Minnesota Board of Animal Health, executed in March 2012, regarding the Disposal

of Livestock Carcasses, Concrete and Reinforcing Bar Burial, and Debris from Damaged Farm Structures Resulting from a Disaster.

23. The Administrative Law Judge finds that the Department has met the procedural requirements imposed by applicable law and rules.

A. Additional Notice

24. Minnesota Statutes sections 14.131 and 14.23 require that the SONAR contain a description of the Agency's efforts to provide additional notice to persons who may be affected by the proposed rules.

25. On November 23, 2011, the MPCA held a meeting in St. Paul with potential affected stakeholders to discuss changes made to the NPDES/SDS permitting requirements during the 2011 legislative special session. [38] The MPCA also discussed its intention to commence formal rulemaking to modify Minn. R. ch. 7020, based on these statutory changes.[39]

26. The following individuals attended the MPCA's November 23, 2011, informational meeting:

- Bobby King, Land Stewardship Project
- Bruce Kleven, Kleven Law
- Chris Radatz, Minnesota Farm Bureau Federation
- Bob Lefebvre, Minnesota Milk Producer's Association
- Dave Preisler, Minnesota Pork Producers
- Joe Martin, Minnesota State Cattlemen's Association
- Jerry Schoenfeld, Greater State 2002
- Thom Peterson, Minnesota Farmer's Union[40]

27. The MPCA also held two public meetings in September 2012 after a preliminary draft of the proposed rule amendments was prepared.[41] The purpose of the meetings was to explain why the proposed rule amendments are necessary; provide an overview of the rulemaking process; and answer associated questions.[42] These meetings were held on September 4, 2012, at the Mankato Public Library; and on September 7, 2012, at the Stearns County Service Center in Waite Park, Minnesota.[43]

28. The MPCA notified potential affected parties of the September 2012 meetings in a lead article in the Feedlot Update newsletter.[44] This newsletter is sent electronically to 1,214 subscribers, including County Feedlot Pollution Control Officers,

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[38] Ex. 3 at p. 7.
[39] *Id.*
[40] *Id.* at p. 7.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*; Ex. 6.

livestock commodity groups, state and federal agencies, environmental groups, and individual livestock producers with NPDES or SDS permit coverage.[45] The article was also reprinted in the Minnesota Milk Minute and the Minnesota Farm Bureau newsletters.[46]

29. Prior to the September 2012 meetings, Agency staff sent an e-mail reminder of the meetings to the same individuals who attended the November 2011 meeting identified above, as well as to Steve Olson of the Minnesota Turkey Growers Association, members of the Minnesota Senate's Environment and Natural Resources Committee, members of the Minnesota House Agricultural and Rural Development Policy and Finance Committee, members of the Minnesota House Environment, Energy and Natural Resources Policy and Finance Committee, and State Senators Doug Magnus, Gary Dahms and Rod Skoe.[47]

30. The September 2012 meetings were attended by county feedlot staff and representatives of various agricultural associations.[48]

31. The MPCA also created a website dedicated to the proposed rules at http://www.pca.state.mn.us/tchyffd. In addition to publishing the Request for Comments in the *State Register* on December 19, 2011, the MPCA posted the Request for Comments on its Public Notice webpage at: http://www.pca.state.mn.us/iryp3c9, and on its Feedlot Rulemaking webpage (http://www.pca.state.mn.us/tchyffd).[49]

32. The MPCA's Feedlot Rulemaking webpage has separate links to the proposed rule amendments, the SONAR, the SONAR exhibits, and comments. The webpage also includes a summary of the proposed rule amendments, procedural history, and contact information.

33. The MPCA also posted a copy of the Dual Notice, proposed rule amendments, and SONAR on its Public Notice Webpage.

34. The MPCA provided an electronic notice to those persons who had earlier registered with the Agency to receive such items by e-mail. The notice included a hyperlink to the electronic copies of its Dual Notice, SONAR, and the proposed rule amendments.[50]

35. The MPCA provided electronic notice with a hyperlink to electronic copies of the Dual Notice, SONAR, and the proposed rule amendments to the following agricultural associations:

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[45] Ex. 3 at p. 7.
[46] *Id.*
[47] *Id.* at p. 8.
[48] *Id.*; Ex. 7.
[49] Ex. 3 at p. 7.
[50] Ex. 3 at p. 14.

- Minnesota Farm Bureau Federation
- Minnesota Milk Producers Association
- Minnesota Pork Producers
- Minnesota State Cattlemen's Association
- Greater State 2002
- Minnesota Turkey Growers Association
- Broiler & Egg Association of Minnesota[51]

36. The MPCA provided notice of the availability of the Dual Notice, SONAR, and the proposed rule amendments through the Feedlot Update newsletter.[52]

37. As noted above, the MPCA certified that it had provided notice of the proposed rules and the SONAR to all individuals and organizations included on the Agency's rulemaking mailing list. It also provided notice to the entities identified in the approved Amended Additional Notice Plan, including: the Association of Minnesota Counties, the Association of Metropolitan Municipalities, the League of Minnesota Cities, and Minnesota Association of Townships.[53]

38. The Administrative Law Judge finds that the MPCA has fulfilled its additional notice requirements.

B. Impact on Farming Operations

39. Minnesota Statutes section 14.111 directs that agencies provide notice to the Commissioner of Agriculture when proposed rules would affect farming operations. In addition, where proposed rules affect farming operations, Minn. Stat. § 14.14, subd. 1b, requires that at least one public hearing be conducted in an agricultural area of the state.

40. The MPCA certified that it gave notice to the Commissioner of Agriculture on May 29, 2013.[54] The MPCA also held the public hearing remotely by videoconference in its offices in Brainerd, Detroit Lakes, Mankato, Marshall, Rochester and Willmar.

41. The Administrative Law Judge concludes that the MPCA has satisfied the notice requirements of Minn. Stat. §§ 14.111 and 14.14, subd. 1(b).

C. Impact on Chicano/Latino People

42. Minnesota Statutes section 3.9223, subdivision 4, requires agencies give notice to the State Council on Affairs of Chicano/Latino People for review and

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[51] *Id.*
[52] *Id.*; Ex. 9.
[53] *Id.*
[54] Exs. 9 and 10.

recommendation at least five days before initial publication in the *State Register*, if the proposed rules have their primary effect on Chicano/Latino people.

43. The proposed rules are not expected to have a primary impact on Chicano/Latino people. The Administrative Law Judge concludes that the Agency was not required to notify the State Council on Affairs of Chicano/Latino People.

D. Notification to Commissioner of Transportation

44. Minnesota Statutes Section 174.05 requires the MPCA to inform the Commissioner of Transportation of all rulemakings that concern transportation, and requires the Commissioner of Transportation to prepare a written review of the rules.

45. The proposed rules do not impact or concern transportation. The Administrative Law Judge concludes that the Agency was not required to notify the Commissioner of Transportation.

E. Regulatory Analysis in the SONAR

46. Minnesota Statutes section 14.131 requires an agency adopting rules to consider eight factors in its Statement of Need and Reasonableness. Each of these factors, and the Agency's analysis, are discussed below.

47. The first factor requires "a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule."[55] In its SONAR, the MPCA indicated that the proposed rule amendments will affect four specific classes of persons:

> (1) Owners of facilities that meet the criteria for a large CAFO and owners of facilities that do not meet the large CAFO criteria but house 1,000 animal units or more, or store the manure generated by 1,000 animal units or more;
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> (2) Feedlot owners who chose to acquire an SDS permit instead of a combination NPDES/SDS permit for the construction and/or operation of their feedlot as identified above in item A, and who will be constructing or expanding a facility that will disturb one acre or more of land;
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> (3) Feedlot owners who are proposing to construct a liquid manure storage area; and
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> (4) County Feedlot Pollution Control Officers and, in counties not delegated by the MPCA to administer the applicable parts of Minn. R. ch. 7020, environmental services and/or planning and zoning office staff.

[55] Minn. Stat. § 14.131(1).

48. The second factor requires consideration of "the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues."[56] The MPCA states that, as a result of the 2011 statutory permitting changes, it has hired three additional full-time staff to implement the legislative changes.[57] However, the MPCA forecasts that there will be no costs to it or any other agency as a direct result of implementing and enforcing the proposed rule amendments.[58] The MPCA also states that it anticipates the proposed rule amendments will have no effect upon state revenues because the Agency will not collect revenues as part of the permit changes.[59]

49. The third factor requires "a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule."[60] The MPCA stated in the SONAR that, because the proposed rules amendments were necessitated to align with the 2011 statutory permitting changes, there is no less costly or less intrusive methods available to achieve this purpose.[61]

50. The fourth factor requires "a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule."[62] The MPCA again states that because the purpose of the proposed rule amendments is to align Minn. R. ch. 7020 with the 2011 statutory permitting changes, there was no less costly or less intrusive method available for achieving this purpose.[63] Therefore, the Agency did not consider using an alternative method for achieving the purpose of the proposed rule.[64]

51. The fifth factor specifies that the agency must assess "the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals."[65] In the SONAR, the MPCA states that there are no significant new costs associated with complying with the proposed rule amendments.[66] However, the MPCA anticipates that there will be "some minor additional costs" to the following parties:

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[56] Minn. Stat. § 14.131(2).
[57] Ex. 3 at p. 10.
[58] *Id.*
[59] *Id.*
[60] Minn. Stat. § 14.131(3).
[61] Ex. 3 at p. 10.
[62] Minn. Stat. § 14.131(4).
[63] Ex. 3 at p. 10.
[64] *Id.*
[65] Minn. Stat. § 14.131(5).
[66] Ex. 3 at pp. 10-11.

A. *Large feedlot owners of facilities that will house 1,000 animal units or more or store the manure generated by 1,000 animal units or more.*

The proposed revision to Minn. R. 7020.0505, subp. 4(B)(2), requires that the permit application for an NPDES or SDS permitted facility address the disposal of carcasses resulting from a catastrophic event by including this element in the emergency response plan.[67] The MPCA anticipates that this additional permitting component will increase the costs associated with developing an emergency response plan by approximately $100.[68] This cost will be a one-time occurrence because emergency response plans are developed for the life of the feedlot.[69]

B. *Feedlot owners who chose to acquire an SDS permit instead of a combination NPDES/SDS permit for the construction and/or operation of their feedlots, and who will be constructing or expanding a facility that will disturb one acre or more of land.*

As discussed in factor (1) above, an animal feedlot owner who proposes to create a new facility or modify an existing facility where the construction activity will disturb one or more acres of soil is required to obtain a separate CSW and NPDES or SDS permit.[70] This permit requires a one-time $400 fee to cover the administrative costs associated with the permit.[71]

C. *County Feedlot Pollution Control Officers and, in counties not delegated by the MPCA to administer the applicable parts of Minn. R. ch. 7020, environmental services and/or planning and zoning office staff.*

The MPCA anticipates some additional costs for counties associated with the increase in work created by the proposed rule amendments.[72] According to the MPCA, the costs will depend on the number of feedlot owners in the particular county, how many of these feedlot owners will contact the county staff for assistance, and how much time county staff will expend assisting each owner.[73] The MPCA asserts that it will assist counties by providing clear information for feedlot owners regarding the changes to the rule and the actions owners must take to comply with the rules.[74]

52. The sixth factor requires a description of "the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate

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[67] *Id.* at 11.
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.*
[74] *Id.*

classes of government units, businesses, or individuals."[75] In the SONAR, the MPCA states that there would not likely be significant costs to the affected parties if the proposed rules are not adopted.[76] However, the MPCA notes that failure to adopt the proposed rules will result in confusion regarding permit requirements because the existing rule language will not align with the 2011 statutory changes.[77]

53. The seventh factor requires "an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference."[78] The MPCA states that the intent of the 2011 statutory permitting changes was to align the state NPDES permit requirements for animal feedlots with federal NPDES permit requirements.[79] The proposed rule amendments are a part of this alignment. The MPCA maintains that, upon adopting the proposed rule amendments, there will not be any difference between the federal and state requirements on CAFO applications for NPDES permits.[80]

54. The eighth and final factor requires "an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule."[81] In its SONAR, the MPCA states that there are no other state rules that regulate the control of discharges of pollutants from animal feedlots, manure storage areas, or land application sites.[82] The federal Clean Water Act regulates water quality and defines CAFOs as point sources. As such, these operations are required to be regulated under the NPDES permit system and comply with effluent guidelines established by federal rule. The MPCA reiterates that the proposed rule amendments are intended to align state feedlot requirements for CAFOs with state statute and federal regulations, and do not establish overlapping or cumulative requirements or standards that would apply in addition to federal regulations.[83]

55. The Administrative Law Judge finds that the MPCA has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impacts of the proposed rules.

F. Performance-Based Regulation

56. The Administrative Procedure Act also requires that an agency describe in its SONAR how it has considered and implemented the legislative policy supporting performance-based regulatory systems set forth in Minn. Stat. § 14.002.[84] A performance-based rule is one that emphasizes superior achievement in meeting the

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[75] Minn. Stat. § 14.131(6).
[76] Ex. 3 at 11.
[77] *Id.*
[78] Minn. Stat. § 14.131(7).
[79] Ex. 3 at p. 12.
[80] *Id.*
[81] Minn. Stat. § 14.131(8).
[82] Ex. 3 at p. 12.
[83] *Id.*
[84] Minn. Stat. § 14.131.

agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.[85]

57. In its SONAR, the Agency stated that the proposed rules are not overly-prescriptive and will continue to allow permit-holders flexibility in meeting the required standards through the applicable permit and by developing their own manure management plan.[86]

58. The MPCA also discussed, in detail throughout the SONAR, that it held meetings with potential stakeholders early on in the rule revision process and made efforts to solicit feedback on performance-based standards in the draft rule amendments.[87]

59. The Administrative Law Judge finds that the MPCA has met the requirements set forth in Minn. Stat. § 14.131 for consideration and implementation of the legislative policy supporting performance-based regulatory systems.

G. Consultation with the Commissioner of Management and Budget

60. Under Minn. Stat. § 14.131, the Agency is required to "consult with the commissioner of management and budget to help evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government." In a letter dated May 20, 2013, the MPCA requested that the Commissioner of Management and Budget evaluate the fiscal impact and benefits of the proposed rules on local units of government.[88]

61. In a memorandum dated June 5, 2013, Michelle Mitchell, Executive Budget Officer for Minnesota Management & Budget, noted that she had reviewed the MPCA's proposed rule amendments and SONAR, and evaluated the fiscal impact and benefits of the proposed rules with respect to local governments.[89] Ms. Mitchell concluded that there is "a potential cost to the 54 counties that have been delegated authority to issue certain permits to smaller feedlots.[90] These counties include most of those with significant numbers of feedlots."[91] In both delegated and non-delegated counties, county representatives are the main point of contact for feedlot owners.[92] MPCA estimates the impact of the proposed rule changes on counties will largely be additional time spent responding to questions.[93] Ms. Mitchell also noted that that there is an additional cost for delegated counties issuing construction permits on feedlots less than 1,000 animal units.[94] She pointed out, however, that this cost is related to the

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[85] Minn. Stat. § 14.002.
[86] Ex. 3 at p.12.
[87] *See* Ex. 3 at p. 7.
[88] Ex. 11.
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*

statutory changes passed in the 2011 Legislative First Special Session, not the proposed rule changes.[95]

62. The Administrative Law Judge finds that the Department has met the evaluation requirements set forth in Minn. Stat. § 14.131.

H. Compliance Costs for Small Businesses and Cities

63. Under Minn. Stat. § 14.127, the Agency must "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed $25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.

64. As noted above in Finding 51, the MPCA determined in the regulatory analysis set forth in the SONAR that the cost incurred by feedlot owners and counties in the first year after the rules take effect will not exceed $25,000.[96]

65. In addition, as discussed in Finding 61, Michelle Mitchell, Executive Budget Officer for Minnesota Management & Budget, concluded that there is "a potential cost to the 54 counties that have been delegated authority to issue certain permits to smaller feedlots. These counties include most of those with significant numbers of feedlots."[97] Because county representatives are the main point of contact for feedlot owners, the proposed rule changes will most likely result in counties spending additional time responding to questions.[98] Ms. Mitchell also noted that there is an additional cost for delegated counties issuing construction permits on feedlots less than 1,000 animal units.[99] Ms. Mitchell apparently concurred with the MPCA's conclusion that the cost incurred during the first year after the rules take effect would not exceed $25,000.[100]

66. The Administrative Law Judge finds that the MPCA has made the determination required by Minn. Stat. § 14.127 and approves that determination.

I. Adoption or Amendment of Local Ordinances

67. Under Minn. Stat. § 14.128, the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before

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[95] *Id.*
[96] Ex. 3 at pp. 10-11, 16.
[97] Ex. 11.
[98] *Id.*
[99] *Id.*
[100] *Id.*

the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.[101]

68. The MPCA determined that no local government will be required to adopt or amend an ordinance or other regulation to comply with the proposed rules.[102] The MPCA states that none of the proposed revisions to Minn. R. ch. 7020 require localities to adopt or amend their ordinances or regulations.[103] The MPCA notes, however, that local governments with ordinances that regulate animal feedlots may choose to modify their ordinances after the rule amendments are enacted.[104] The MPCA points out that some counties have regulations that are more restrictive than the requirements in Minn. R. ch. 7020.[105] Thus, although the proposed rule amendments do not require any existing local ordinances to be amended, the MPCA intends to communicate to counties after the rulemaking is complete that they should review their ordinances to determine whether updates would be necessary or beneficial.[106]

69. The Administrative Law Judge finds that the MPCA has made the determination required by Minn. Stat. § 14.128, and approves that determination.

J. Assessment of Proposed Rule with Other State and Federal Standards

70. Minnesota Statutes section 116.07, subdivision 2(f), requires that:

> (f) In any rulemaking proceeding under chapter 14 to adopt standards for air quality, solid waste, or hazardous waste under this chapter, or standards for water quality under chapter 115, the statement of need and reasonableness must include:
>
> (1) an assessment of any differences between the proposed rule and:
>
> (i) existing federal standards adopted under the Clean Air Act, United States Code, title 42, section 7412(b)(2); the Clean Water Act, United States Code, title 33, section 1312(a) and 1313(c)(4); and the Resource Conservation and Recovery Act, United States Code, title 42, section 6921(b)(1);
>
> (ii) similar standards in states bordering Minnesota; and
>
> (iii) similar standards in states within the Environmental Protection Agency Region 5; and

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[101] Minn. Stat. § 14.128, subd. 1.
[102] Ex. 3 at p. 16.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*

(2) a specific analysis of the need and reasonableness of each difference.

71. In its SONAR, the MPCA states that the proposed amendments to chapter 7020 do not establish "new" standards for air quality, solid waste, or hazardous waste under Minn. Stat. ch. 116; nor do they propose "new" standards for water quality under Minn. Stat. ch. 115.[107] The MPCA reiterates that the proposed amendments are necessary to align the rules with the statutory permitting changes made to Minn. Stat. § 116.07, subd. 7c in 2011.[108] The MPCA notes that it is also removing outdated provisions and clarifying provisions in the existing rules. Consequently, the MPCA maintains that Minn. Stat. § 116.07, subd. 2(f) does not apply to this rulemaking.[109]

72. The MPCA states, however, that because the NPDES permit program for animal feedlots is a national requirement, the MPCA has evaluated the way in which the other EPA Region 5 states (Illinois, Indiana, Michigan, Ohio and Wisconsin) and the non-Region 5 states bordering Minnesota (Iowa, North Dakota and South Dakota) use a general NPDES permit for facilities that meet the federal definition of Large CAFO.[110] According to the MPCA, all of the states, except Illinois and Michigan, have some type of permit requirements for animal feeding operations that are not small, medium or large CAFOs, as defined by federal rule.[111] The MPCA summarized its assessment of the differences between its proposed rule and the standards in these other states in SONAR Exhibit 8.[112]

73. The Administrative Law Judge finds that the MPCA has made the determination required by Minn. Stat. § 116.07, subd. 2(f).

III. STANDARD OF REVIEW FOR RULEMAKING

74. Under the Minnesota Administrative Procedure Act, an agency proposing to adopt rules must:

(1) Establish its statutory authority to adopt the proposed rules;

(2) Demonstrate that it has fulfilled all relevant legal and procedural requirements; and

(3) Demonstrate the need for and reasonableness of each portion of the proposed rules with an affirmative presentation of facts.[113]

75. To establish need and reasonableness of a rule, an agency may rely on legislative facts, namely, general facts concerning questions of law, policy and

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[107] Ex. 3 at p. 17.
[108] *Id.*
[109] *Id.*
[110] *Id.* at pp. 16-17.
[111] *Id.*
[112] *Id.*
[113] Minn. Stat. §§ 14.05, subd. 1 and 14.14, subd. 2; Minn. R. 1400.2100.

discretion; or it may simply rely on interpretation of a statute, or stated policy preferences.[114]

76. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[115] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[116] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[117] The Minnesota Supreme Court has further defined an agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[118]

77. An agency is legally entitled to make choices between possible regulatory approaches so long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy alternative represents the "best" approach, because this would invade the policy-making discretion of the agency. The question is, rather, whether the choice made by the agency is one that a rational person could have made.[119]

78. A rule must be disapproved if the rule:

(1) Was not adopted in compliance with procedural requirements of Minn. Stat. ch. 14 and Minn. R. part 1400, unless the judge decides that the error can be disregarded under Minn. Stat. §§14.15, subd. 5 or 14.26, subd. 3(d);

(2) Is not rationally related to the agency's objective or the record does not demonstrate the need for or reasonableness of the rule;

(3) Is substantially different than the proposed rule, and the agency did not follow the procedures of Minn. R. 1400.2110;

(4) Exceeds, conflicts with, does not comply with, or grants the agency discretion beyond which is allowed by law, its enabling statutes, or other applicable law;

(5) Is unconstitutional or illegal;

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[114] *Mammenga v. Dept. of Human Services*, 442 N.W.2d 786. 789 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).
[115] *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 43 N.W.2d 281, 284 (Minn. 1950).
[116] *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975).
[117] *Mammenga*, 442 N.W.2d at 789-90; *Broen Mem'l Home v. Minnesota Dept. of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985).
[118] *Manufactured Housing,* 347 N.W.2d at 244.
[119] *Federal Sec. Adm'r v. Quaker Oats Co.*, 318 U.S. 218, 233 (1943).

(6) Improperly delegates the agency's powers to another agency, person or group;

(7) Is not a "rule" as defined in Minn. Stat. § 14.02, subd. 4, or by its own terms cannot have the force and effect of law; or

(8) Is subject to Minn. Stat. § 14.25, subd. 2, and the notice that hearing requests have been withdrawn and written response to it show that the withdrawal is not consistent with Minn. Stat. § 14.001(2), (4) and (5).[120]

79. If changes to the proposed rule are made by the Agency or suggested by the Administrative Law Judge after original publication of the rule language in the *State Register*, it is also necessary for the Administrative Law Judge to determine if the new language is substantially different from that which was originally proposed.[121] The standards to determine whether changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if the differences are:

(1) within the scope of the matter announced in the notice of hearing and are in character with the issues raised in that notice;

(2) the differences are a logical outgrowth of the contents of the notice of hearing and the comments submitted in response to the notice; and

(3) the notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.[122]

80. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider:

(1) whether persons who will be affected by the rule should have understood that the rulemaking proceeding could affect their interests;

(2) whether the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of hearing; and

(3) whether the effects of the rule differ from the effects of the proposed rule contained in the notice of hearing.[123]

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[120] Minn. R. 1400.2100.
[121] Minn. Stat. § 14.05, subd. 2.
[122] Minn. Stat. §14.05, subd. 2(b).
[123] Minn. Stat. § 14.05, subd. 2(c).

IV. OVERVIEW OF COMMENTS RECEIVED

81. Prehearing Comments[124] were submitted by:

- Minnesota Pork Producers Association
- Minnesota Turkey Growers Association
- Chicken and Egg Association of Minnesota
- Minnesota Farm Bureau Federation
- Minnesota Agri-Growth Council
- Minnesota Milk Producers Association
- Minnesota State Cattlemen's Association
- Land Stewardship Project
- Minnesota Center for Environmental Advocacy
- American Planning Association – Minnesota Chapter
- Minnesota Voters for Animal Protection
- Socially Responsible Agricultural Project
- Animal Legal Defense Fund
- Minnesotans Fighting for Minnesota
- Center for Food Safety
- Clean Water Action Minnesota
- Osakis Lake Association
- 14 individuals[125]

82. At the hearing, the Agency's designated representatives made a presentation on the need and reasonableness of the proposed rules, and addressed issues presented in the prehearing comments received.[126]

83. In addition, comments were presented at the hearing by numerous groups and individuals, including:

- Gary Koch, an attorney representing various farming industry groups;
- John Zimmerman on behalf of himself and the Minnesota Turkey Growers Association;
- Pat Luneman, on behalf of himself and the Minnesota Milk Producers Association;
- Bill Crawford, a Minnesota pork producer and consultant;
- Chris Peterson, a farmer from Clear Lake, Iowa;
- Minnesota Center for Environmental Advocacy;

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[124] Ex. 13 A-M.

[125] Amy Walsh, Mary Soupir, Judy Kreemer, Daniel and Dorothy Snyder, Ralph and Diane Calabria, Scott Merwin, James McComb, Lois Burkhart, Jim Harkness, David Petron, Gary Barber, and Pat Kennedy. All individuals joined in the comments jointly submitted by the Minnesota Voters for Animal Protection, Socially Responsible Agricultural Project, Animal Legal Defense Fund, Minnesotans Fighting for Minnesota, Center for Food Safety, Clean Water Action Minnesota, and Osakis Lake Association.

[126] *See* Hearing Transcript.

- Minnesota Pork Producers Association;
- Minnesota State Cattlemen's Association;
- Minnesota Voters for Animal Protection;
- Socially Responsible Agricultural Project;[127]
- Animal Legal Defense Fund;
- Minnesotans Fighting for Minnesota;
- Center for Food Safety;
- Clean Water Action Minnesota;
- Osakis Lake Association;
- William Mitchell College of Law Animal Law Society
- William Mitchell College of Law Environmental Law Society; and
- American Planning Association – Minnesota Chapter.[128]

84. Post-hearing comments and rebuttal were submitted by:

- MPCA
- Chris Petersen
- Pat Luneman
- Minnesota Pork Producers Association (Pork Producers)
- Minnesota State Cattlemen's Association (MN Cattlemen)
- Minnesota Farm Bureau Federation (Farm Bureau)
- Minnesota Chicken and Egg Association (MN Chicken/Egg)
- Minnesota Turkey Growers Association (Turkey Growers)
- Minnesota Farmers Union (Farmers Union),
- Land Stewardship Project (Land Stewardship)
- Minnesota Voters for Animal Protection
- Socially Responsible Agricultural Project
- Center for Food Safety
- Animal Legal Defense Fund

85. The comments received during the rulemaking comment period came from two general "camps" of interested parties: (1) environmental and animal protection organizations (the "Environmental Groups")[129] which generally expressed support for the proposed rules but advocated for specific changes to strengthen enforcement; and

[127] Including the 14 individuals named above.
[128] *See* Hearing Transcript.
[129] The "Environmental Groups" include the Land Stewardship Project; the Minnesota Center for Environmental Advocacy; the American Planning Association – Minnesota Chapter; Minnesota Voters for Animal Protection; Socially Responsible Agricultural Project; Animal Legal Defense Fund; Minnesotans Fighting for Minnesota; the Center for Food Safety; Clean Water Action Minnesota; Osakis Lake Association; and the William Mitchell College of Law Animal Law Society and Environmental Law Society. The Minnesota Farmers Union joined in the Comments submitted by the Land Stewardship Project, and, therefore, falls into the Environmental Groups, as opposed to the "Industry Groups."

(2) farming and livestock industry groups ("Industry Groups")[130] that opposed many of the rule changes.

86. The Environmental Groups support the proposed rules related to the NPDES and SDS permitting requirements. Like the MPCA, the Environmental Groups assert that requiring SDS permits before discharges occur is reasonable and necessary for large feedlots (facilities with over 1,000 animal units) because the permit requirements serve to prevent discharges and better protect the environment. The Environmental Groups further agree that the permitting requirements need to be applicable to expansions and modifications of operations, not just construction or modification of facilities.

87. However, the Environmental Groups also articulated several objections to the proposed rules, which are generally summarized as follows:

- The proposed rules fail to address surface water discharges, which are equally detrimental to water quality as subsurface discharges, rendering the rules confusing and misleading.

- The definition of "owner" should be clarified and strengthened to prevent ambiguity, and should include entities with operational control.

- The rules need to distinguish between the owner, operator, and permittee to ensure that the responsible party is properly identified.

- The NPDES/SDS permits should not be transferrable to owners not disclosed on permit applications.

- The MPCA should incorporate rules to provide more oversight over delegated counties and establish a citizen complaint system.

- A carcass disposal plan is properly included in permitting requirements, but the content of the plan needs to be strengthened to include how the carcasses will be handled.

- The 10-year SDS permit terms should include a provision that incorporates any future law changes, so as to ensure producers are complying with laws going forward.

- The proposed rules create a new category of "limited risk" liquid manure storage areas (LMSAs) and do not adequately define "limited risk."

[130] The "Industry Groups" consist of the Minnesota Pork Producers Association; the Minnesota Turkey Growers Association; the Chicken and Egg Association of Minnesota; the Minnesota Farm Bureau Federation; the Minnesota Agri-Growth Council; the Minnesota Milk Producers Association; and the Minnesota State Cattlemen's Association.

- Given the dangers presented by bedrock removal around areas containing LMSAs, the proposed rules should clearly define and limit the situations in which bedrock removal is allowed.

- The proposed nine-month storage capacity requirement for LMSAs should be assessed for each individual LMSA, instead of each facility.

- The proposed rules fail to address important operational activities of LMSAs.

- The proposed rule, which allows the MPCA 15 days to respond to a permit issued by a delegated county, is inadequate.

- The proposed rules fail to address enforcement for non-complying feedlots operating under an Open Lot Agreement.

88. The Industry Groups opposed a number of the proposed rules on various grounds, which are generally summarized as follows:

- The MPCA lacks statutory authority to require SDS permits unless there is an actual discharge of pollutants.

- By combining the SDS and NPDES permits, the proposed rules improperly impose state requirements on facilities that do not require NPDES permits under current federal law.

- Combining the NPDES and SDS permits exceeds the Agency's authority and violates the legislature's directive in Minn. Stat. § 116.07, subd. 7(c), that NPDES permits only be issued according to federal law.

- By combining the NPDES and SDS permits, the MPCA is attempting to avoid limitations on the NPDES permit program and sidestep federal law.

- The imposition of new permitting requirements unnecessarily increases the costs of compliance for farmers and producers.

- The definition of "owner" in the proposed rules is vague, overbroad, and confusing because it includes persons "proposing to have possession, control, or title to an animal feed lot or manure storage area."

- The definition of "waters of the United States" is ambiguous and likely to cause confusion.

- The rules related to "modification" of feedlots and manure storage areas include operational changes that do not involve an increase in animal units and extend beyond that reasonably necessary for the MPCA to accomplish its environmental goals. In addition, the proposed definition would include amendments to manure management plans, which would negatively impact producers.

- The imposition of permitting thresholds that are based upon the number of animal units that a feedlot is "capable of holding," as opposed to actually holding, is arbitrary, undefined, unnecessary, unreasonable, difficult to determine, and not rationally related to the Agency's statutory goals for protecting the environment. Instead, the actual number of animal units served should control for permitting thresholds.

- Permitting requirements related to facility name changes are unreasonable and not rationally related to Agency objectives. In addition, permit requirements that are triggered by a change in ownership conflicts with Minn. Stat. § 116.07, subd. 7g.

- The schedule for submission of NDPES/SDS permit applications (180 days) conflicts with the statutory 150-day deadline for issuance or denial of permit applications set forth in Minn. Stat. § 116.03, subd. 2b. In addition, the permitting deadlines impede business transactions and impose risks on facility owners, rendering them unreasonable.

- The term "new technology," as used in the proposed permit application rules, is undefined and improperly left to Agency discretion.

- The MPCA lacks authority to require, as part of a permit application, an emergency response plan that includes a carcass disposal plan. Such matters are regulated by, and under the exclusive jurisdiction of, the Board of Animal Health.

- The term "other direct conduits to groundwater" is undefined, overly broad, and unduly vague. In addition, it is likely to cause confusion and be applied arbitrarily if left to Agency discretion.

- The term "pollution hazard" is undefined and is improperly left to agency discretion.

- The proposed rules improperly combine two separate definitions of "pasture" into one definition, which will cause confusion and will have negative impact on winter grazing practices for livestock producers.

- Rule changes related to the measurement of manure stock piles are not authorized by law, are outside of the scope of the Agency's rule-making objectives, and will cause confusion.

- Removal of the process for smaller operations to enter into Open Lot Agreements cause uncertainty for small farmers who are non-compliant but still awaiting cost-sharing financing.

- The proposed rule on LMSAs in the Karst region[131] fails to incorporate the legislative work group Alternative Standards and will impair the ability of producers to build and effectively operate LMSAs in the Karst region.

- The proposed rules do not make clear what discharges may be allowed by holders of SDS permits.

89. Each of these issues will be addressed in the rule-by-rule analysis below. However, because the issue of statutory authority to issue SDS permits permeates a number of the proposed rule changes, that issue shall be addressed first.

V. STATUTORY AUTHORITY

90. An agency shall adopt, amend, suspend, or repeal its rules only pursuant to authority delegated by law and in full compliance with its duties and obligations.[132] When an administrative agency's authority is questioned, the court independently reviews the enabling statute.[133] The reviewing court "shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rulemaking procedures."[134]

91. In its SONAR, the MPCA cites Minn. Stat. §§ 115.03, subd. 1(e) and 115.03, subd. 5, as its authority to adopt the proposed rule amendments.[135] Minnesota Statutes section 115.03, subdivision 1 provides, in part, that the MPCA is authorized:

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[131] "Karst" is defined as "[a]n area of irregular limestone in which erosion has produced fissures, sinkholes, underground streams, and caverns." *Webster's II New College Dictionary* (2001). In Minnesota, this area is located in the southeastern portion of the state. *See* http://www.pca.state.mn.us/index.php/water/water-types-and-programs/groundwater/groundwater-basics/karst-in-minnesota.html?menuid=.

[132] Minn. Stat. § 14.05, subd. 1.

[133] *Weber v. Hvass*, 626 N.W.2d 426, 431 (Minn. Ct. App. 2001).

[134] Minn. Stat. § 14.45; s*ee, Drum v. Bd of Water & Soil Res.*, 574 N.W.2d 71, 73 (Minn. Ct. App. 1998).

[135] Because these are the only statutes upon which the Agency relies, the Administrative Law Judge does not analyze any other statutory authority to enact the proposed rules. Specifically, the MPCA did not identify Minn. Stat. § 116.07 as a basis for its authority in this matter.

(a) to administer and enforce all laws relating to the pollution of any of the waters of the state;

...

(e) to **adopt**, **issue,** reissue, modify, deny, or revoke, enter into or enforce **reasonable** orders, **permits**, variances, standards, **rules**, schedules of compliance, and stipulation agreements, **under such conditions as it may prescribe, in order to prevent, control or abate water pollution**, or for the installation or operation of disposal systems or parts thereof, **or for other** equipment and **facilities**:

(1) requiring the discontinuance of the discharge of sewage, industrial waste or other wastes into any waters of the state resulting in pollution in excess of the applicable pollution standard established under this chapter;

(2) **prohibiting** or directing the abatement of **any discharge of** sewage, industrial waste, or other **wastes, into any waters of the state....where the same is likely to get into any waters of the state in violation of this chapter and, with respect to the pollution of waters of the state, chapter 116, or standards or rules promulgated or permits issued pursuant thereto**, and specifying the schedule of compliance within which such prohibition or abatement must be accomplished;

(3) prohibiting the storage of any liquid or solid substance or other pollutant in a manner which does not reasonably assure proper retention against entry into any waters of the state that would be likely to pollute any waters of the state;

(4) requiring the construction, installation, maintenance, and operation by any person of any disposal system or any part thereof, or other equipment and facilities, or the reconstruction, alteration, or enlargement of its existing disposal system or any part thereof, or the adoption of other remedial measures to prevent, control or abate any discharge or deposit of sewage, industrial waste or other wastes by any person;[136]

....

[136] Emphasis added.

92. Minnesota Statutes section 115.03, subdivision 5, further provides:

> Notwithstanding any other provisions prescribed in or pursuant to this chapter and, with respect to the pollution of waters of the state, in chapter 116, or otherwise, **the agency shall have the authority to** perform **any and all acts minimally necessary including, but not limited to, the establishment and application of** standards, procedures, **rules,** orders, variances, stipulation agreements, schedules of compliance, **and permit conditions, *consistent with and, therefore not less stringent than* the provisions of the Federal Water Pollution Control Act, as amended, applicable to the participation by the state of Minnesota in the national pollutant discharge elimination system (NPDES); provided that *this provision shall not be construed as a limitation on any powers or duties otherwise residing with the agency pursuant to any provision of law*.**[137]

93. Because these are the rules cited by the Agency for its rulemaking authority in this matter, these statutes are applied with respect to each proposed rule provision in which statutory authority is challenged, as set forth below.[138]

94. Except where otherwise noted below, the Administrative Law Judge concludes that the MPCA has general authority to adopt the proposed rules.

VI. BACKGROUND REGARDING NPDES AND SDS PERMITS

95. In 1948, Congress enacted the Federal Water Pollution Control Act (FWPCA).[139] Recognizing that "water pollution control was primarily the responsibility of state and local governments," the FWPCA encouraged states to enact uniform laws to combat water pollution.[140] However, because the programs were state operated, there was difficulty with uniform enforcement.[141]

96. In 1972, the FWPCA was amended to replace the state-run regulation of discharges with requirements to obtain and comply with a federally-mandated National

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[137] Emphasis added.

[138] The Administrative Law Judge notes that additional authority is provided in Minn. Stat. § 116.07, subd. 4(b), which provides:

> Pursuant and subject to the provisions of chapter 14, and the provisions hereof, the Pollution Control Agency may adopt, amend, and rescind rules and standards having the force of law relating to any purpose within the provisions of Laws 1969, chapter 1046, for the collection, transportation, storage, processing, and disposal of solid waste and the prevention, abatement, or control of water, air, and land pollution which may be related thereto, and the deposit in or on land of any other material that may tend to cause pollution....

[139] Jeffrey M. Gaba, *Generally Illegal; NPDES General Permits Under the Clean Water Act*, 31 HARV. ENVTL. L. REV. 409, 413 (2007).

[140] Kenneth M. Murchison, *Learning from More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 530-531 (2005).

[141] Gaba, 31 HARV. ENVTL. L.REV. at 414.

Pollution Discharge Elimination System (NPDES) permit program.[142] With these changes, the FWPCA was transformed into what is known today as the Clean Water Act (CWA).[143]

97. The CWA prohibits the "discharge of a pollutant"[144] by "any person"[145] from any "point source"[146] into waters of the United States except as authorized by a NPDES permit.[147] Generally speaking, the NPDES permit places limits on the type and quantity of pollutants that can be released into the nation's waters.[148] If a facility obtains a NPDES permit, it can discharge pollutants within certain parameters called "effluent limitations," and will be deemed a "point source" for pollution.[149]

98. The CWA defines the term "point source" to include concentrated animal feeding operations (CAFOs).[150] Generally speaking, CAFOs are "large-scale industrial operations that raise extraordinary numbers of livestock."[151] Federal regulations promulgated under the CWA define and categorize CAFOs into "Large," "Medium," and "Small" CAFOs, depending on the number of animals that they stable or confine.[152]

99. The CWA authorizes the Environmental Protection Agency (EPA) to administer and oversee the NPDES permit program.[153] The CWA provides for two types of NPDES permitting regimes: (1) state-run NPDES permit programs that satisfy federal requirements and are approved by the EPA; and (2) the federal program administered by the EPA.[154] "Before a state desiring to administer its own NPDES program can do so, the [EPA's] approval is required and the state must demonstrate, among other things, adequate authority to abate violations through civil or criminal penalties or other means of enforcement."[155]

100. Once the EPA approves a state's application to administer its own NPDES program, that state's NPDES program is administered pursuant to that state's laws rather than federal law.[156] Accordingly, the EPA's authorization of a state to administer an NPDES program is "not a delegation of Federal authority," but instead, an authorization to run a state-administered program "in lieu of the Federal program."[157]

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[142] *Murchison, supra,* 32 B.C. ENVTL. AFF. L. REV. at 541-42.
[143] *Id.* at 536 n. 71.
[144] 33 U.S.C. § 1362(12)(A).
[145] 33 U.S.C. § 1362(5).
[146] 33 U.S.C. § 1362(14).
[147] *See* 33 U.S.C. §§ 1311(a) and 1342.
[148] *S. Florida Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95,102 (2004).
[149] 33 U.S.C. § 1342, 1362(14).
[150] 33 U.S.C. § 1362 (14).
[151] *Waterkeeper Alliance, Inc. v. Environmental Protection Agency*, 399 F.3d 486, 492 (2nd Cir. 2005).
[152] *See* 40 C.F.R. § 122.23.
[153] 33 U.S.C. § 1342(a)(1).
[154] *See* 33 U.S.C. § 1342; *Arkansas v. Oklahoma*, 503 U.S. 91, 102 (1992).
[155] *Ringbolt Farms Homeowners Ass'n v. Town of Hull*, 714 F. Supp. 1246, 1253 (D. Mass. 1989).
[156] *Id.*
[157] *Id.*

101. The EPA currently authorizes 46 states to issue NPDES permits through their own state-run programs.[158] Minnesota is one of the states that administers its own NPDES permit program.[159]

102. A state that administers its own NPDES program may adopt regulations that are more stringent than the federal standards.[160] However, a state's standards may not be less stringent than the federal standards and limitations.[161]

A. Federal Regulations Related to CAFOs

103. The EPA enacted the first set of federal regulations for CAFOs in 1976.[162] The 1976 regulations provided that all "large" CAFOs were required to have an NPDES permit.[163] Medium and small CAFOs were also subject to regulation but were not necessarily required to obtain an NPDES permit.[164]

104. In 2003, the EPA promulgated new rules regulating CAFOs. Under the 2003 CAFO rules, *all* CAFOs were required to apply for an NPDES permit whether or not they discharged pollutants.[165] This provision is commonly referred to as the "duty to apply" provision. Every CAFO was assumed to have a "potential to discharge" due to the housing of large quantities of animals and the amount of waste created.[166] The "duty to apply" rules, however, contained a provision that permitted a CAFO to request an exemption from the NPDES permit requirements if a CAFO could establish that it did not have a "potential to discharge."[167] In this way, the 2003 rules placed the burden on the CAFO to establish that it did not discharge or have a "potential to discharge."[168]

105. National farm industry groups challenged the 2003 CAFO rules' "duty to apply" for a NPDES permit and the type of discharges subject to regulation in *Waterkeeper Alliance, Inc. v. United States Environmental Protection Agency*.[169] The farm groups in *Waterkeeper* argued that "the EPA exceeded its statutory jurisdiction by requiring all CAFOs to either apply for NPDES permits or otherwise demonstrate that they have no potential to discharge."[170] The U.S. Court of Appeals for the Second

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[158] http://cfpub.epa.gov/npdes/statestats.cfm.
[159] *Id.*
[160] 40 C.F.R. § 123.1(i)(1); *West Virginia Highlands Conservancy, Inc. v. Huffman*, 625 F.3d 159, 162 (4th Cir. 2010); *Michigan Farm Bureau v. Dept. of Environmental Quality*, 807 N.W.2d 866, 873 (Mich. Ct. App. 2011). *See also*, 40 C.F.R. § 123.25(a).
[161] 33 U.S.C. § 1370(1)(B).
[162] *Nat'l Pork Producers Council v. United States Environmental Protection Agency,* 635 F.3d 738, 743 (5th Cir. 2011).
[163] 41 Fed. Reg. 11,458 (Mar. 18, 1976). For purposes of clarity, specific overruled regulations are referred to using the Federal Register citation, as opposed to the Code of Federal Regulations citation.
[164] *Id.*
[165] 68 Fed. Reg. 7176, 7265-66 (Feb. 12, 2003) (emphasis added).
[166] *Id.* at 7266-67.
[167] *Id.*
[168] *Id.*
[169] 399 F.3d 486 (2nd Cir. 2005).
[170] *Id.* at 504.

Circuit agreed and held that the EPA cannot require CAFOs to apply for a permit based on a "potential to discharge."[171] The Second Circuit reasoned that:

> The Clean Water Act authorizes the EPA to regulate, through the NPDES permitting system, only the discharge of pollutants....[U]nless there is a 'discharge of any pollutant,' there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with the EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit.[172]

106. The Court explained that the plain language of the CWA "gives the EPA jurisdiction to regulate and control only actual discharges – not potential discharges, and certainly not point sources themselves."[173]

107. In response to the *Waterkeeper* decision, the EPA drafted and published revised CAFO regulations in 2008 (2008 Proposed Regulations).[174] The 2008 Proposed Regulations attempted to clarify the "duty to apply" for a permit. The 2008 Proposed Regulations provided that a CAFO must seek coverage under an NPDES permit if the CAFO actually discharges or "*proposes to discharge*."[175]

108. National farm industry groups again challenged the 2008 Proposed regulations in various federal courts of appeals, including the Fifth, Seventh, Eighth, Ninth, Tenth, and District of Columbia Circuit Courts.[176] The cases were consolidated and heard by the Fifth Circuit in *National Pork Producers v. United States Environmental Protection Agency*.[177]

109. The farm groups maintained that the terms "proposes to discharge" in the 2008 Proposed Regulations were equivalent to the terms "potential to discharge" in the earlier regulations.[178] Pointing to the Second Circuit Court's holding in *Waterkeeper*, the groups argued that the new regulations were also outside of the EPA's statutory authority.[179]

110. The Fifth Circuit agreed and held that a CAFO must actually discharge a pollutant before it was subject to regulation by the EPA.[180] The Court held that the EPA's authority under the CWA is limited to the regulation of CAFOs that discharge, not

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[171] *Id.* at 504-06.
[172] *Id.* 504.
[173] *Id.* at 505.
[174] *See* 73 Fed. Reg. 70,418 (Nov. 20, 2008).
[175] *Id.* at 70,423 - 70,426 (emphasis added).
[176] *National Pork Producers Council v. United States Environmental Protection Agency*, 635 F.3d 738, 747 (5th Cir. 2011).
[177] *Id.*
[178] *Id.* at 749-750.
[179] *Id.*
[180] *Id.* at 751.

the regulation of CAFOs that "propose" to discharge or have a "potential" to discharge.[181] The Court explained:

> For more than 40 years, the EPA's regulation of CAFOS was limited to CAFOs that discharge. The 2003 Rule marked the first time that the EPA sought to regulate CAFOs that do not discharge. This attempt was wholly rejected by the Second Circuit in *Waterkeeper*.... Again, with the 2008 Rule, the EPA not only attempts to regulate CAFOs that do not discharge, but also to impose liability that is in excess of its statutory authority.[182]

111. In response to the Court of Appeals' decision in *National Pork Producers*, the EPA revised its rules to remove the requirement that CAFOs "that propose to discharge" must seek NPDES permits. The regulation now states simply that CAFOs "must not discharge unless the discharge is authorized by a NPDES permit."[183] As a result, under federal law, CAFOs are not required to apply for an NPDES permit, but if they discharge without first having obtained such permit, they will be held strictly liable for the discharge and subject to severe civil and criminal penalties.[184]

B. Minnesota Feedlot Legislation

112. In 1998, the Minnesota Legislature adopted Minn. Stat. § 116.07, subd. 7c.[185] In part, this statute provided that the MPCA must issue NPDES permits "for feedlots with 1,000 animal units or more."[186] This regulation was consistent with federal regulations at the time, which required all "Large" CAFOs to apply for NPDES permits.[187]

113. In 2000, the Minnesota Legislature amended Minn. Stat. § 116.07, subd. 7c(1) to provide that the MPCA must issue NPDES permits "for feedlots with 1,000 animal units or more" *and* that meet the definition of a CAFO in 40 C.F.R. § 122.23.[188] The Minnesota statutes were silent, however, as to any SDS permit requirements for feedlots.

114. In October 2000, the MPCA promulgated Minnesota Rules chapter 7020, related to feedlots.[189] Rule 7020.0405 established four types of permits: interim permits, construction short-form permits, State Discharge System (SDS) permits, and NPDES permits.[190]

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[181] *Id.*
[182] *Id.* at 753.
[183] 40 C.F.R. 122.23(d).
[184] *See* 33 U.S.C. § 1319.
[185] 1998 Minn. Laws ch. 401, § 43.
[186] Minn. Stat. § 116.07, subd. 7c(a) (1998).
[187] 41 Fed. Reg. 11,458 (Mar. 18, 1976).
[188] 2000 Minn. Laws ch. 435, § 5 (emphasis added).
[189] 25 Minn. Reg. 834 (Oct. 16, 2000).
[190] Minn. R. 7020.0405 (2000).

115. Under Minn. R. 7020.0405, subp.1A, NPDES permits are only required for the "construction and operation" of a CAFO, as defined in 40 C.F.R § 122.23.[191] Rule 7020.0405 also imposed a new requirement that facilities that do not meet the federal criteria for a CAFO must obtain an SDS permit. Minnesota Rules part 7020.0405, subpart 1B(1), provides that unless an owner is required to apply for an NPDES permit under Subpart 1A, an SDS permit is required for:

> the construction and operation of an animal feedlot or manure storage area that has been demonstrated not to meet the criteria for CAFO and is capable of holding 1,000 or more animal units or the manure produced by 1,000 or more animal units.

116. Thus, with the adoption of Minn. R. 7020.0405 in 2000, the MPCA created, through rulemaking, a new permit requirement for feedlots and manure storage areas (MSAs): the SDS permit. Under Rule 7020.0405, which is still in effect today, owners of feedlots and MSAs must apply for an NPDES permit if they qualify as CAFOs under federal law; *or* they must obtain an SDS permit if the facilities are "capable of holding 1,000 or more animal units or the manure produced by 1,000 or more animal units."[192]

117. Because the "1,000 animal units" threshold is not part of the definition of CAFOs under current federal law,[193] the requirement for SDS permits casts a wider net for regulation of feedlots in Minnesota than is required under federal law. In addition, Rule 7020.0405 extended the SDS permit requirement to manure storage areas, not just feedlots. Consequently, the 2000 rulemaking, which established Minn. R. 7020.0405, went beyond the NPDES permit program and imposed new state permit requirements on feedlots and manure storage areas that did not exist in federal law.

118. Neither Minn. Stat. § 116.07, subd. 7c (which adopted the NPDES program for Minnesota), nor Minn. R. 7020.0405 (which established a state permitting program), based the requirement to obtain a permit on actual discharge. Like the EPA, the MPCA determined that animal feedlots and manure storage areas that serve more than 1,000 animal units present inherent risks of discharge due to the amount of waste produced or stored in those areas; and that such waste poses a serious risk to water quality.[194]

C. 2011 Minnesota Statutory Changes

119. In 2011, in response to the federal court decisions in *Waterkeeper* and *National Pork Producers*, the Minnesota Legislature amended Minn. Stat. § 116.07,

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[191] CAFO is defined in Minn. R. 7020.0300, subp. 5A, as an animal feedlot that meets the federal definition of a CAFO in 40 CFR § 122.23.
[192] Minn. R. 7020.0405, subp. 1 A and B.
[193] 40 C.F.R. § 122.23 differentiates between CAFOs based upon the number of animals contained therein, and categorizes them into "Small CAFO," "Medium CAFO," and "Large CAFO."
[194] Ex. 3 at p. 6.

subd. 7c, to provide that the MPCA must issue NPDES permits "for feedlots *only as required by federal law.*"[195] Accordingly, the legislature removed the requirement that all CAFOs "with 1,000 or more animal units" must obtain an NPDES permit. By changing the NPDES permit requirement in Minn. Stat. § 116.07, subd. 7c, the legislature indirectly adopted the holdings in *Waterkeeper* and *National Pork Producers*. Following the 2011 amendments, the MPCA was without the authority to require NPDES permits absent a discharge, as is the current state of the federal law.

120. The legislature did not, however, make any statutory changes related to SDS permit requirements. These permits are not specifically provided for in Minnesota Statutes and are only in existence through Minnesota Rules. By not addressing SDS permits, the legislature neither ratified the SDS permit scheme nor abrogated the established practice.

121. Minnesota Rules part 7020.0405 continues to require an NPDES permit based on the status of the facility as a CAFO, as defined by 40 C.F.R. § 122.23. However, 40 C.F.R. § 122.23 now only requires that a CAFO "be covered by a [NPDES] permit at the time that it discharges." Accordingly, the MPCA has determined that its rules related to the issuance of NPDES and SDS permits should be amended to conform to the 2011 Minnesota statutory changes and federal case law. Hence, the MPCA initiated this rulemaking proceeding.

122. With the proposed rule amendments, the MPCA carries forward the requirement that feedlots and MSAs "capable of holding 1,000 or more animal units or the manure produced by 1,000 or more animal units" obtain SDS permits, irrespective of actual discharge, even if an NPDES permit is no longer required by federal law. The MPCA proposes to amend Minn. R. 7020.0405, as well as various other rule provisions related to feedlots, manure storage areas, and permitting requirements. Because the statutory authority issue related to NPDES and SDS permits has been raised by the Industry Groups with respect to all rules related to the NPDES and SDS permits, that issue is addressed first, before the rule-by-rule analysis.

VI. STATUTORY AUTHORITY TO REQUIRE NPDES AND SDS PERMITS

123. The Industry Groups challenge several of the proposed rules on the grounds that the MPCA lacks authority to: (1) impose SDS permit requirements altogether, given the courts' analyses in *Waterkeeper* and *National Pork Producers*; (2) impose SDS permit requirements on CAFOs that are not required to obtain NPDES permits under federal law; and (3) combine the NPDES and SDS permits in proposed Rule 7020.0405.[196]

124. To best address the Industry Groups' challenges to the Agency's authority to require SDS permits prior to discharge, it is necessary to review the proposed changes to Minn. R. 7020.0405, subp. 1, as that is the rule that establishes the two

[195] Minn. Stat. § 116.07, subd. 7c(a) (2011) (emphasis added).
[196] Exs. 13C, 13D, 13E, 26.

types of permits. The proposed amendments to Rule 7020.0405, subp. 1, are as follows:

> Subpart 1. **Permit required.** Four types of permits are issued under this chapter and chapter 7001: interim permits, construction short-form permits, SDS permits, and NPDES permits. The owner shall apply for a permit as follows:
>
> A. an ~~NPDES~~ NPDES/SDS permit for the construction ~~and~~, expansion, modification, or operation of ~~an animal feedlot that meets the criteria for~~ a CAFO as required by federal law;
>
> B. ~~unless required to apply for an a permit under item A~~, an SDS permit ~~under the following conditions~~: for the construction, expansion, modification, or operation of an animal feedlot or manure storage area:
>
> (1) ~~the construction and operation of an animal feedlot or manure storage area that has been demonstrated not to meet the criteria for CAFO and is capable of holding 1,000 or more animal units or the manure produced by 1,000 or more animal units~~; that is capable of holding, or will be capable of holding, 1,000 or more animal units or the manure produced by 1,000 or more animal units;
>
> (2) ~~the facility~~ that does not comply with all applicable requirements of parts 7020.2225 and for which the pollution hazard cannot be, or has not been, corrected under the conditions in part 7020.0535 applicable to interim permits;
>
> (3) for which the owner is proposing to construct or operate with a new technology. An SDS permit is required for new technology operational methods while these operational methods are employed; or
>
> (4) ~~the facility is one~~ for which conditions or requirements other than those in parts 7020.2000 to 7020.2225 were assumed....

A. Authority to Impose a "Duty to Apply" for SDS Permits Irrespective of Discharge

125. The Turkey Growers, MN Chicken/Egg, and the Farm Bureau assert that the "duty to apply" requirement, applied irrespective of actual discharge, was struck down by the federal courts for NPDES permits and, therefore, cannot be imposed by the MPCA through SDS permits.[197] The producers argue:

> [T]he SDS permit is essentially the state version of the federal NPDES discharge permit. As such, the requirement to apply for an SDS permit

[197] Exs. 13C, 13D, 13E.

> should be based on actual discharge, not on size or the mere potential to discharge....[T]he MPCA is clearly ignoring the 'actual discharge' and 'duty to apply' reasoning that the federal Courts used to alter the proposed federal rules. Extending the logic applied in these Court rulings would mean that a CAFO that does not actually discharge a pollutant would not need to apply for an SDS permit.[198]

126. While it is true that the federal courts have rejected the EPA's attempt to impose "a duty to apply" for an NPDES permit on CAFOs absent a discharge, the same limitations do not exist with respect to the MPCA's authority to establish state permitting requirements. The difference lies in statutory authority given to the EPA under the CWA and the statutory authority vested in the MPCA under state law.

127. The EPA's authority to establish NPDES permitting requirements is derived from the CWA. Under the CWA, the EPA's authority is limited to the regulation of CAFOs that *discharge* pollutants into navigable waters.[199] As explained by the court in *Waterkeeper*:

> The Clean Water Act authorizes the EPA to regulate, through the NPDES permitting system, only the discharge of pollutants. The Act generally provides, for example, that "Except as in compliance [with all applicable effluent limitations and permit restrictions,] the *discharge of any pollutant* by any person shall be unlawful." 33 U.S.C. § 1311(a) (emphasis added). Consistent with this prohibition, the Act authorizes the EPA to promulgate effluent limitations for—and issue permits incorporating those effluent limitations for—the discharge of pollutants. Section 1311 of Title 33 provides that "[e]ffluent limitations ... shall be applied to all point sources of *discharge of pollutants,*" *see* 33 U.S.C. § 1311(e). Section 1342 of the same Title then gives NPDES authorities the power to issue permits authorizing the *discharge of any pollutant or combination of pollutants. See* 33 U.S.C. § 1342(a)(1) ("the Administrator may, after opportunity for public hearing, issue a permit for *the discharge of any pollutant, or combination of pollutants*") (emphasis added); *see also* 33 U.S.C. § 1342(b) (authorizing states to administer permit programs for "discharges into navigable waters"). In other words, unless there is a "discharge of any pollutant," there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit.[200]

128. The MPCA obtains its authority to issue NPDES permits under the CWA, as well as Minn. Stat. § 116.07, subd. 7c, which provides that the MPCA "must issue" NPDES permits "only as required by federal law." Because the Minnesota Legislature

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[198] *Id.*
[199] 33 USC § 1342(a)(1) (emphasis added).
[200] *Waterkeeper*, 399 F.3d at 504 (emphasis supplied in original).

specifically adopted federal law as it applies to NPDES requirements, the MPCA cannot impose a "duty to apply" for NPDES permits under the *Waterkeeper* and *National Pork Producers* cases. The MPCA can, however, impose its own state permitting requirements on feedlots and manure storage areas, so long as those rules are reasonable, necessary, and fall within the rulemaking delegations granted to the MPCA by the Minnesota Legislature.

129. The MPCA obtains its authority to issue SDS permits under Minnesota's Water Pollution Control Act (MWPCA), Minn. Stat. ch. 115. The authority granted to the MPCA by the legislature in the MWPCA is quite broad. The MWPCA, Minn. Stat. § 115.03, subd. 1(e), authorizes the MPCA to "adopt" and "issue" "reasonable" "permits" and "rules" "in order to *prevent*, control or abate water pollution."[201] Section 115.03, subdivision 1(e) further provides that the MPCA can adopt rules and issue permits for "facilities" (such as feedlots and manure storage areas) prohibiting the storage of solid substances or pollutants, and prohibiting the discharge of waste "where the same is likely to get into any waters of the state."[202]

130. Unlike the EPA's rulemaking authority granted under the CWA, which is limited to regulating the discharge of pollutants into navigable waters,[203] the MPCA's authority is much broader and includes the authority to adopt rules and issue permits "in order to prevent, control or abate water pollution" as a whole.[204] The MPCA's authority further includes the ability to adopt rules and issue permits prohibiting discharges where pollution "is likely" to get into waters of the state.[205] Thus, unlike the CWA, the MWPCA gives the MPCA the authority to act when there is a *potential for discharge*, not just in situations where there is an actual discharge. Hence, the MPCA may impose a "duty to apply" for an SDS permit irrespective of actual discharge. It just cannot impose that same "duty to apply" for NPDES permits.

B. Authority to Impose SDS Permit Requirements on CAFOs that are not Required to Apply for NPDES Permits Under Federal Law

131. The Turkey Growers, MN Chicken/Egg, and the Farm Bureau next argue that the proposed rule changes exceed the MPCA's authority because the proposed rule amendments continue to require SDS permits for CAFOs that are not required to obtain an NPDES permit.[206] Under the proposed rule changes, a facility that qualifies

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[201] Emphasis added.

[202] Minn. Stat. § 115.03, subd. 1(e) (2) and (3). Notably, the MPCA did not cite Minn. Stat. § 116.07, subd. 7(g) as a basis for its authority to establish permitting requirements. Section 116.07, subdivision 7(g) provides:

> The Pollution Control Agency shall adopt rules governing the issuance and denial of permits for livestock feedlots, poultry lots or other animal lots pursuant to this section....These rules apply both to permits issued by counties and to permits issued by the Pollution Control Agency directly.

[203] 33 U.S.C. § 1342(a)(1).

[204] Minn. Stat. § 115.03, subd. 1(e).

[205] Minn. Stat. § 115.03, subd. 1(e)(2).

[206] Exs. 13C, 13D, 13E.

as a CAFO under federal law and has the capacity to house more than 1,000 animal units will still be required to obtain an SDS permit, even though the facility is not required to apply for an NPDES permit. The producers contend:

> By keeping the SDS permit in place for non-discharging farms over 1,000 animal units, the MPCA is actually wading into the legislative policy area through a proposed rule amendment. If the legislature wanted the Agency to require a state discharge permit in the form of an SDS permit for non-discharging operations over 1,000 animal units, they could have easily provided that directive to the Agency. But they didn't – there is no state statute specifically mandating that non-discharging operations over 1,000 animal units seek an SDS permit. The Agency has not adequately explained why, in the case of an SDS permit, the mere fact a farm is classified as a Large CAFO[207] the farm operator must apply for a state discharge permit when that same farm is actually prohibited from discharging pollutants under any sort of state permit.[208]

132. The authority granted to the MPCA by the CWA to issue NPDES permits does not limit the MPCA's power under state law to prevent or control water pollution through the establishment of rules and the issuance of state permits. According to the MWPCA, Minn. Stat. § 115.03, subd. 5, the MPCA "shall have the authority to perform any and all acts minimally necessary including ... the establishment ... of ... rules... and permit conditions, consistent with and, therefore not less stringent than" the provisions of the CWA applicable to the NPDES program. The statute further provides, "*this provision shall not be construed as a limitation on any powers or duties otherwise residing with the agency pursuant to any provision of law.*"[209]

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[207] It is unclear what is being asserted here as the SDS permit requirements are not linked to the definition of a "Large CAFO," as defined in 40 C.F.R. § 122.23(b)(4). The "1,000 animal units or more" measurement is specific to Minnesota and is not set forth in the federal definition of "Large CAFO." An animal feedlot is defined as a "Large CAFO" under 40 C.F.R. § 122.23(b)(4), if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:

(i) 700 mature dairy cows, whether milked or dry;
(ii) 1,000 veal calves;
(iii) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;
(iv) 2,500 swine each weighing 55 pounds or more;
(v) 10,000 swine each weighing less than 55 pounds;
(vi) 500 horses;
(vii) 10,000 sheep or lambs;
(viii) 55,000 turkeys;
(ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;
(x) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;
(xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;
(xii) 30,000 ducks (if the AFO uses other than a liquid manure handling system); or
(xiii) 5,000 ducks (if the AFO uses a liquid manure handling system).

[208] Exs. 13C, 13D and 13E at pp. 3-4; Ex. 26 at p. 3.

[209] Minn. Stat. § 115.03, subd. 5 (emphasis added).

133. The legislature granted the MPCA broad authority in the MWPCA, Minn. Stat. § 115.03, to both adopt rules and issue permits "to prevent, control, or abate water pollution" and prohibit the discharge of waste into the waters of the state. The fact that CAFOs with over 1,000 animal units are not required to obtain NPDES permits does not prohibit the state from requiring that those same facilities obtain SDS permits.

134. The federal regulations implementing the NPDES program acknowledge that states may establish their own permitting programs and that such programs may be more stringent than the federal NPDES program. According to 40 C.F.R. 123.25(a):

> All State Programs under this part must have legal authority to implement each of the following [NPDES] provisions and must be administered in conformance with each, except that **States are not precluded from omitting or modifying any provisions to impose more stringent requirements**: ...[with respect to]
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> ...
>
> (6) § 122.23 (Concentrated animal feeding operations).[210]

135. Thus, while a state's NPDES program may not be less stringent than the federal requirements, states may impose their own, more stringent requirements as part of their implementation of the NPDES program or their own permitting programs. Here, the MPCA is establishing its own SDS permit under the authority granted by the MWPCA, not the CWA. The proposed rules do not alter or frustrate the federal NPDES permitting scheme.

136. So long as the MPCA does not impose a "duty to apply" for NPDES permits, the MPCA does not run afoul of federal law. Thus, the MPCA can require all CAFOs with more than 1,000 animal units to apply for SDS permits because of their potential for discharge. This is true even though the MPCA is prohibited by federal law from requiring those same facilities to apply for NPDES permits.

C. Need and Reasonableness of Requiring an SDS Permit Where an NPDES Permit is Not Required

137. The Industry Groups argue that the Agency has failed to establish the need and reasonableness of requiring an SDS permit where there is no actual discharge.[211]

138. To establish need and reasonableness, the MPCA refers back to its 2000 SONAR prepared when the Agency first established the SDS permit and rules related thereto. In its 2000 SONAR, the Agency concluded:

> Large animal feedlots and manure storage areas with more than 1,000 animal units individually present the greatest potential for significant water

[210] Emphasis added.
[211] Exs. 13C, 13D, and 13E.

quality impact in the event of a significant failure such as failure of a liquid manure storage area. For this reason alone, it is necessary to closely monitor these facilities.[212]

139. The MPCA's current SONAR adds:

> The MPCA continues to believe that the proper function of the permitting program is to prevent discharges that are not in compliance with effluent limits, not to require permits after an uncontrolled discharge has occurred. Both state (Minn. Stat. § 115.07) and federal (40 C.F.R. 122.23(d)) law prohibit discharges except in accordance with a permit. It is therefore reasonable to require facilities of a certain size to apply for a permit that is designed to prevent discharges, except as allowed in the permit, and to obtain this permit prior to the incident of discharge....[213]

140. The Agency notes that "after-the-fact" permits, resulting from enforcement actions, are "an inefficient and ineffective regulatory tool."[214] Instead, the MPCA seeks to specifically identify the facilities that pose the greatest risk of discharge and impose requirements that will prevent discharges into state waters. The Agency prefers preventing discharges to sanctioning and remediating a polluting facility after a discharge has occurred.[215] According to the MPCA:

> The MPCA has experience with facilities that are constructed without a permit. Based upon MPCA's experience, it is much more difficult to retrofit a facility to comply with permit conditions after it has been built and is discharging to waters of the state.[216]

141. The Environmental Groups also submitted general comments in support of the MPCA continuing to require state permits for facilities of a certain size. These groups maintain that the proper function of the permitting system is to prevent discharges that are not in compliance with effluent limits, not to require permits after an uncontrolled discharge has occurred.[217]

142. Notably, the duty to apply for and obtain an SDS permit prior to discharge has been in place since 2000. Therefore, it is sufficient that the MPCA relies on its SONAR from 2000 to address the need and reasonableness of that requirement.

143. Minnesota Rules part 1400.2070, subpart 1, provides, "If an agency is amending existing rules, the agency need not demonstrate the need for a reasonableness of the existing rules not affected by the proposed amendments." The

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[212] Ex. 3 at p. 6.
[213] *Id.* at pp. 6-7.
[214] Ex. 25 at p. 11.
[215] *Id.*
[216] *Id.*
[217] Exs. 13I, 13J, 13K, 20, 21, 27.

existing rules already require an SDS permit for feedlots and MSAs capable of holding 1,000 or more animal units or the manure produced by the same, unless such facility has an NPDES permit. Therefore, there is no need for the Agency to establish need and reasonableness for the SDS permit again.

144. The MPCA has reasonably determined that animal feedlots and manure storage areas that serve 1,000 or more animal units present inherent risks of discharge of pollutants, namely animal waste, into waters of the state, including groundwater.[218] Indeed, it is common knowledge that facilities that house large quantities of livestock will have large quantities of waste. It follows that the more animals that are housed, the more waste is produced; and the more waste that is produced, the higher the risk of discharge.

145. It is also reasonable that the MPCA impose pre-discharge permit requirements on facilities that pose a high risk of discharge, such as large feedlots and MSAs. Such regulations are in fulfillment of the MPCA's statutory duty to "prevent, control, and abate water pollution." The MPCA has sufficiently shown that SDS permits are necessary to effectively prevent and control discharges. Therefore, the MPCA has met its burden of establishing the need and reasonableness of imposing a "duty to apply" for an SDS permit prior to discharge for feedlots and MSAs that are capable of holding 1,000 or more animal units or the manure produced by 1,000 or more animal units – even if no NPDES permit is required for such facility under federal law.

D. Joinder of the NPDES and SDS Permits in Part 7020.0405, subp. 1A.

146. The proposed change to Rule 7020.0405, subp. 1A, combines an NPDES and SDS permit into one, joint "NPDES/SDS" permit. Proposed Subpart 1A provides:

> Subpart 1. **Permit required.** Four types of permits are issued under this chapter and chapter 7001: interim permits, construction short-form permits, SDS permits, and NPDES permits. The owner shall apply for a permit as follows:
>
> A. an ~~NPDES~~ NPDES/SDS permit for the construction ~~and~~, expansion, modification, or operation of ~~an animal feedlot that meets the criteria for~~ a CAFO as required by federal law;

147. Subpart B goes on to require an SDS permit for animal feedlots and MSAs that are capable of holding, or will be capable of holding, 1,000 or more animal units or the manure produced by 1,000 or more animal units. Subpart B does not reference CAFOs and does not impose a duty to apply for an SDS permit on all CAFOs.

148. The Pork Producers and Agri-Growth Council argue that by changing the name of the permit in Subpart 1A from an NPDES permit to a combined "NPDES/SDS

[218] Ex. 3 at pp. 6-7.

permit," the MPCA is imposing upon an owner a "duty to apply" for both NPDES and SDS permits.[219] According to the Pork Producers:

> [T]he combination of these permits would be used as a back-door means of imposing NPDES permit requirements as part of an ordinary SDS permit under the guise of agency convenience or informal policy. Any such effort would directly contravene the Minnesota Legislature's clear policy determination that NPDES permits should be required to the extent that they are required under federal law. *See* Minn. Stat. 116.07, subd. 7c. This combination could also be used by the agency to avoid limitations of federal law and impose additional requirements on farmers that are not required under the Clean Water Act.[220]

149. While the existing Rule 7020.0405 separates out the NPDES and SDS permits as two separate permits, it has been MPCA's practice to issue a joint "NPDES/SDS" permit.[221] According to the SONAR:

> When an animal feedlot is required to have coverage under both an NPDES and SDS permit, the MPCA uses a combination NPDES/SDS permit, which incorporates conditions necessary for the feedlot owner to comply with both federal and state rules, rather than issuing two separate permits.[222]

150. The MPCA asserts that it is amending Rule 7020.0405 to conform to its current practice of issuing joint NPDES/SDS permits.[223] As explained by the MPCA:

> In practice, the MPCA has always issued 'joint' state and federal permits, reflecting the fact that the duty to obtain a state permit is independent of the duty to obtain a federal permit. This practice has been applied by the MPCA Feedlot Program for many years....This has never been controversial. . . .
>
> Although Minn. R. 7001.1010 provides that obtaining an NPDES permit satisfies the requirement to obtain an SDS permit, in practice[,] both permits have always been listed. . . .[224]

151. Minnesota Rules part 7001.1010 expressly provides that when an NPDES permit is issued to a person who is required to have both an NPDES and SDS permit, the issuance of an NPDES permit "shall satisfy" the requirement to obtain an SDS permit. Thus, a person need not obtain both an NPDES and SDS permit. Having an

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[219] Ex. 13B at pp. 9-10; Ex. 13F.
[220] Ex. 13B at pp. 9-10.
[221] Ex. 3 at p. 3.
[222] *Id.*
[223] Ex. 25 at p. 8.
[224] *Id.*

NPDES permit satisfies both state and federal requirements. Therefore, the Agency's historical and current practice of issuing both an NPDES and a SDS permit to a person required to have a federal NPDES permit is in conflict with Minnesota Rules part 7001.1010.

152. The Agency has not proposed to amend Rule 7001.1010 in this proceeding. Consequently, there is no need for the Agency to issue joint "NPDES/SDS" permits. A person can obtain an NPDES permit, in which case an SDS permit is not required, *or* an SDS Permit, if required by state law and rule.

153. Subpart 1A states that an owner of a CAFO "shall apply" for an "NPDES/SDS" permit "as required by federal law." However, federal law prohibits imposing a "duty to apply" for an NPDES permit absent discharge. Thus, the MPCA cannot impose a "duty to apply" for an NPDES permit.

154. By combining the NPDES and SDS permit, it appears that the Agency is attempting to impose a "duty to apply" for an SDS permit on all CAFOs even if such CAFOs are not required by federal law to apply for an NPDES permit. While the MPCA has the authority to impose a "duty to apply" for an SDS permit on all CAFOs, Subpart 1A does not impose such duty. Instead, the proposed rule simply says that all CAFOs must apply for a combined NPDES/SDS permit, "as required by federal law." There is no federal law requirement for a CAFO to apply for an SDS permit, as a SDS permit is a creation of state rule, not federal law. At the same time, Subpart 1B imposes a "duty to apply" for an SDS permit on all feedlots with 1,000 or more animal units, but it does not impose such duty on all CAFOs. (Not all CAFOs necessarily have 1,000 or more animal units.)

155. The problem presents itself when proposed Rule 7020.0405 is read in conjunction with proposed Rule 7020.2003. Proposed Rule 7020.2003, subp. 2C prohibits discharges by CAFOs *and* animal feedlots capable of holding 1,000 or more animal units.[225] Therefore, it appears that the MPCA intends proposed Rule 7020.0405, subp. 1A to impose a "duty to apply" for an SDS permit on all CAFOs. But proposed Rule 7020.0405, subps. 1A and 1B do not do that.

156. By combining the NPDES and SDS permits into one joint permit in proposed Rule 7020.0405, subp. 1A, the Agency is skipping a step because it is not imposing a "duty to apply" for an SDS permit on all CAFOs. At the same time, proposed Rule 7020.2003, subp. 2C is prohibiting discharges into state waters by *all* CAFOs unless they have an SDS permit authorizing such discharge. Consequently, proposed Rule 7020.0405, subps. 1A and 1B, and Rule 7020.2003, subp. 2 are in conflict.

157. Because MPCA's authority to impose a "duty to apply" is different for NPDES permits and SDS permits, it is recommended that the Agency delete all

[225] All CAFOs and animal feedlots capable of holding 1,000 or more animal units are two separate groups, although there is overlap within the groups.

references to a joint NPDES/SDS permit in the proposed rules. If the MPCA is, indeed, intending to impose a "duty to apply" for an SDS permit on all CAFOs, then it must amend Rule 7020.0405 to state that directly. Currently, the rule does not impose such requirement, and only infuses confusion into the rule as to what is required by CAFOs that are not capable of holding 1,000 or more animal units.

158. As a result of the ambiguity of proposed Rule 7020.0405, subps. 1 A and 1B, and the conflict presented with proposed Rule 7020.2003, subp. 2, the proposed change to Minn. R. 7020.0405, subp. 1A is **DISAPPROVED.**

159. If the MPCA amends Subpart 1A to reference only an NPDES permit, such change will not be substantially different from the rule proposed and would be approved. However, any changes to the proposed rule to impose a "duty to apply" for an SDS permit on all CAFOs would need to be reviewed to determine if the change is substantially different from the proposed rule, which does not impose such requirement.

160. In addition, because of the ambiguity created by Subpart 1A's reference to a joint "NPDES/SDS" permit, all other rules which reference the joint "NPDES/SDS" permit are also **DISAPPROVED**. These rules are as follows: proposed **Rule 7020.0405, subp. 5;** proposed **Rule 7020.0505, subp. 2A**; proposed **Rule 7020.0505, subp. 5**; and proposed Rule **7020.2003, subp. 2**, and any other proposed rules that reference the "NPDES/SDS" permit.

VII. RULE-BY-RULE ANALYSIS

161. This Report is limited to discussion of the portions of the proposed rules that received critical comment or otherwise need to be examined; it will not include a detailed discussion of each rule part.

162. The Administrative Law Judge finds that the Agency has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all rule provisions not specifically discussed in this Report.

163. The Administrative Law Judge also finds that all provisions not specifically discussed are authorized by law, and there are no other problems that would prevent the adoption of the rules.

Part 7001.1030, subp. 2 – Exemptions to NPDES Permit Requirement

164. Proposed Rule 7001.1030, subp. 2 lists exemptions to the NPDES permit requirement. The proposed rule adds:

> J. persons operating a feedlot who are not required to obtain an NPDES permit under federal law. This item does not release such persons from the requirement to obtain an NPDES permit to discharge a pollutant when required by federal law or from the requirement to obtain a state disposal system permit to discharge a pollutant into the waters of the state.

165. The MPCA asserts that this change is reasonable because it clarifies that NPDES permits are required at the time of discharge, even if the CAFO was not required to obtain an NPDES permit prior to discharge. It also makes clear that an SDS permit is required if there is a discharge to waters of the state, even for CAFOs that are not required to obtain an NPDES permit.

166. Under federal law, an NPDES permit is required anytime a CAFO discharges to waters of the United States. However, under recent federal case law, the EPA cannot require an NPDES permit prior to discharge. Nonetheless, failure to have a permit at the time of discharge subjects a violator to significant civil and criminal penalty. Thus, while a CAFO may not be required to apply for an NPDES permit, if it fails to have one at the time of a discharge, it will be held strictly liable for the same and will suffer significant criminal and civil penalties.[226]

167. Under the proposed changes to Rule 7020.0405, the MPCA is requiring an SDS permit for CAFOs that have 1,000 or more animal units, even if the same facilities have not discharged and are not required by federal law to apply for the same. Thus, the SDS permit requirements will require some CAFOs, which are not required by federal law to obtain an NPDES permit, to obtain an SDS permit. As a result, the proposed rule change makes the rules clearer and expressly advises CAFOs that while they may not be required to apply for an NPDES permit absent discharge, they: (1) may still be required to have an SDS permit under state law; and (2) they will be required to have an NPDES and/or SDS permit if a discharge into state or U.S. waters occurs. Consequently, the proposed change is reasonable and necessary, and is hereby **APPROVED**.

Part 7020.0205, Items E and F – Link to Website

168. The proposed amendments to Rule 7020.0202, items E and F relate to a hyperlink citation to the Code of Federal Regulations. The MPCA initially proposed citing to the EPA website. However, based upon comments received, which expressed concern about the indirect link, the Agency has agreed to change the citation to reference the Government Printing Office website directly (https://www.gpo.gov/fdsys).

169. This is an appropriate change and is not substantially different from the proposed rule. Therefore, the revisions to the proposed subparts are **APPROVED.**

Part 7020.0300, subp. 14a – Definition of Modification

170. Proposed Rule 7020.0300, subp. 14a, inserts, for the first time, a definition for the term "modification" into the feedlot rules. This term is then used in various

[226] 33 U.S.C. § 1319. For example, monetary sanctions can accrue at a rate of up to $50,000 per violation, per day, for criminal violations; and up to $100,000 per violation, per day for repeated, knowing violations. *Id.* Criminal violators may also be subject to imprisonment. *See* 40 C.F.R. § 122.41(a)(2).

proposed rules in Chapter 7020 with respect to the issuance of NPDES and SDS permits. Proposed Rule 7020.0300, subp. 14a, provides:

> 'Modification' means a change to a facility component or operational practice described, required, or authorized by a permit issued under this chapter, including an expansion. Major and minor modifications are as defined in part 7001.0190.

171. As set forth above, proposed Rule 7020.0405, subps. 1A and 1B (the NPDES and SDS rule), require an owner to apply for an NPDES or SDS permit when there is a "modification" or "expansion" of a facility or an operational practice. Therefore, a definition of the term "modification" is necessary for implementation of the new NPDES and SDS permit rules.

172. The Industry Groups argue that the failure to define "major" modification creates ambiguity and uncertainty in the rule. In addition, the Industry Groups assert that by including all changes to facility components and operational practices in the definition of "modification," the regulation goes beyond what is reasonably necessary for the MPCA to accomplish its goals of preventing, controlling, and abating pollution, and thus exceeds the Agency's statutory authority.[227]

173. The Industry Groups explain that there are various changes to facility components and operational practices that do not expand a feedlot's operation; will not increase the number of animals housed or the manure produced; and do not affect the risk of discharge or pollution.[228] For example, a change in milking times or methods would likely have no effect on a discharge of pollution, even though such change is an operational change. The producers assert that only an increase in the number of animals housed or manure produced may potentially affect pollution or discharge.[229]

174. The Pork Producers and Agri-Growth Council explain that the definition of "modification" would include even the most minor changes to manure management plans (MMPs), which farmers routinely update and amend based upon new manure and soil testing.[230] If changes to MMPs are considered an operational change and, thus, a "major" modification, then each time a change is made to a MMP, a farmer would be required to go through the repermitting process, including public notification, which is costly and time consuming.[231]

175. At the hearing, Pat Luneman, a family dairy farmer and President of the Minnesota Milk Producers, presented a helpful explanation of how the proposed rule, in practice, would negatively impact farmers.[232] Mr. Luneman explained how grazing and

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[227] Exs. 13B, 13G, 24, 33
[228] Ex. 13G at p. 3.
[229] Exs. 13B and 13F.
[230] Exs. 13B and 13F.
[231] *Id.*
[232] Test. of Pat Luneman, Hearing Transcript at pp. 112. *See also*, Ex. 33.

foraging practices are critical to a dairy farm operation, as these practices provide feed to the dairy cows.[233] As a result, the ability to enter into rental agreements with other farmers for additional grazing land is essential.[234] These agreements must be concluded in a timely manner and when needs arise.[235] However, the rental of additional property requires a change to a farmer's MMP.[236] Thus, if a change to a MMP constitutes a "major" modification, re-permitting will be required under the proposed rule.[237]

176. According to proposed Rule 7020.0505, subp. 2, an application for such permit must be submitted 180 days prior to entering into such rental agreement (see below).[238] Mr. Luneman notes that six months is an extraordinarily long time for any business operation, especially a farming operation that is dependent upon seasonal changes.[239] Thus, if entering into a rental agreement or modifying a MMP is considered a "major" modification under the rules, then farmers will be required to apply for re-permitting six months prior to such change.[240] Consequently, Mr. Luneman argues, the vague definition of "modification" and the lengthy timeframes applicable to permitting, will combine to negatively impact a farmer's business operation.[241] The Industry Groups further argue that by subjecting them to more permitting requirements, the MPCA is unreasonably increasing regulatory costs for farmers.[242]

177. In response to the Industry Groups' concerns about whether a change to a MMP would be considered a "modification" under the proposed definition that would require re-permitting, the MPCA states:

> For NPDES/SDS permits, the MPCA must implement 40 C.F.R. § 12242 with regard to public notice requirements for substantial changes to manure management plans (MMP), which do include changes to the land used for manure management. However, this is a federal requirement and is not found in state rule or statutes, *so it will likely not be a requirement of an SDS permit.*
>
> For SDS permits, the MPCA does not anticipate that year[-]to[-]year adjustments to activities pursuant to a MMP in response to test data would be viewed as modifications to the plan itself, so no amendment would be necessary for these types of changes. However, if a proposer were to change the land used for manure management, or the methods used for managing manure, these changes would qualify as a 'modification' to the

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[233] *Id.*
[234] *Id.*
[235] *Id.*
[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.*
[240] *Id.*
[241] *Id.*
[242] Exs. 13B and 13F.

plan, although in many cases a 'minor modification,' as defined under Minn. R. 7001.0190.[243]

178. The MPCA's response confirms that the proposed definition of modification is vague and does not apprise regulated parties when permitting is required.

179. Under the proposed rules, "minor" modifications will only need to be reported to the Agency; whereas, "major" modifications will require re-permitting. Therefore, a clear definition of both "major" and "minor" modifications is required.

180. The proposed definition of "modification" expressly states that the terms "major modification" and "minor modification" are defined in Rule 7001.0790. However, the MPCA does not include a definition of "major modification" into the rules. Instead, it only defines "minor modification" and leaves "major modification" undefined.

181. According to the MPCA, "If a proposed modification is not considered a minor modification, then it must be considered a major modification."[244] However, rather than infusing ambiguity through silence, the MPCA would be better served by specifically addressing what would be considered a "major modification."

182. Also contributing to the confusion is the fact that the MPCA does not propose to amend Rule 7001.0790 to address changes to "facility components and operational practices" to correlate Rule 7001.0790 with proposed Rule 7020.0300, subp. 14a.

183. A "minor modification" is defined in Minn. R. 7001.0790, subp. 3, as:

> **Minor modification.** Upon obtaining the consent of the permittee, the commissioner may modify a permit to make the following corrections or allowances without following the procedures in parts 7001.0100 to 7001.0130:
>
> A. to correct typographical errors;
>
> B. to change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the permit and does not interfere with the attainment of the final compliance date;
>
> C. *to change **a provision in the permit** that will not result in allowing an actual or potential increase in the emission or discharge of a pollutant into the environment, or that will not result in a reduction of*

[243] Ex. 25 at p. 7. (Emphasis added).
[244] Ex. 3 at p. 37.

the agency's ability to monitor the permittee's compliance with applicable statutes and rules; and

D. if applicable, to make a change as provided in part 7001.0730, subpart 3; 7001.1150, subpart 2; or 7001.3550, subpart 3.[245]

184. By not specifically addressing changes to facility or operational practices in the definition of "minor modification," as it does in the definition of "modification," the rules leave ambiguity as to what will be considered "minor" when it comes to changes in facilities or operational practices.

185. The MPCA contends that:

> In general, major modifications occur when animal numbers/units increase, changes are made to increase animal holding capacity, or new/additional/different manure storage is added, as these activities generally increase emissions/potential discharges from the facility.[246]

186. The MPCA should make its definitions consistent with its intent. To remedy this problem, the Agency should:

> (a) define "major modification" to specifically address "changes to facility components or operational practices" that result in "an actual or potential increase in the emission or discharge of a pollutant into the environment;" and
>
> (b) amend the definition of "minor modification" to specifically address "changes to facility components and operational practices" that do *not* result in an actual or potential increase in the emission or discharge of a pollutant into the environment.

187. By making these changes, the Agency can both clarify the ambiguity existing in the definitions and fall within the Agency's statutory authority. Such changes will not result in a rule that is substantially different from the proposed rule. However, as written, proposed Rule 7020.0300, subp. 14a, is **DISAPPROVED.**

Part 7020.0300, subp. 17 – Definition of Owner

188. Proposed Rule 7020.0300, subp. 17, amends the definition of "owner," as follows:

> Owner means all persons having <u>or proposing to have</u> possession, control, or title to an animal feedlot or manure storage area.

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[245] Emphasis added.
[246] Ex. 3 at p. 37.

189. According to the SONAR, the MPCA made this change because "[m]any of the pre-operational requirements of chapter 7020, such as those for permit applications, are applicable to persons planning to own or construct a feedlot or MSA, but do not yet own a facility."[247]

190. In a written comment, the Land Stewardship Project expressed its support of the proposed modification to the definition of "owner" and stated that it will cover situations where there is an agreement to transfer ownership of a facility to another entity.[248] The Land Stewardship Project asserts that expanding the definition of "owner" to include those "proposing to have" possession will cover those entities that have entered into transfer agreements with the original owner and make them subject to the rule requirements.[249]

191. The Pork Producers argue that the words "proposing to have" render the definition vague and overbroad, and will cause uncertainty for the industry. Similarly, Agri-Growth Council asserts that the proposed language is "extremely vague and undefined, and will cause uncertainty with livestock producers and have a significant impact on the sale of existing feedlots."[250]

192. Specifically, the Pork Producers note that it is unclear exactly when an individual becomes an owner under the proposed definition.[251] Is it when a person becomes interested in purchasing the feedlot? Is it when an agreement is executed? Or is it when the transaction actually closes? According to the Pork Producers, the uncertainty created by the rule will affect agricultural lending practices because the definition could potentially extend to lenders who hold mortgages or interests on real property.[252] Similarly, the rule could have effect on testamentary trusts which transfer property at death.[253] Therefore, the Industry Groups assert that the proposed changes to the rule render the definition of "owner" ambiguous.

193. The MPCA responded as follows:

> The MPCA believes that the proposed language in the amendment is adequate. The MPCA does not believe that people who are merely interested in purchasing a feedlot in a general sense are 'proposing to have' possession, control or title to a feedlot. When that 'interested' person has identified a particular feedlot that they wish to possess, however, and has taken actions to gain possession, control or title (such as entering into agreements with the owner) then that person should be an applicant for a permit.

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[247] Ex. 3 at p. 24.
[248] Ex. 13I.
[249] *Id.*
[250] Ex. 13F.
[251] Ex. 13B.
[252] Exs. 13B and 41.
[253] *Id.*

> The MPCA does not believe that an agricultural lender proposes to have possession, control, or title as a result of a secured agricultural loan....
>
> The MPCA is aware of cases...in which persons who applied for feedlot permits did so on behalf of another person and transferred the permit to that person after the permit was issued, which caused public concern. The MPCA prefers to have the actual owners listed on the application, as opposed to a 'straw man' applicant.[254]

194. In rebuttal comments, the MPCA address the Pork Producers' comments, but does not establish that the terms "proposing to have possession" have a reasonably definite meaning or scope. The MPCA writes:

> The MPCA does not consider persons who may come into possession of a feedlot as a result of future circumstances that are beyond their control (i.e., bank with mortgage, person with inchoate future interest such as a[n] heir or trustee of a trust) to be a person who 'proposes to have possession, control or title to an animal feedlot....'[255]

195. The MPCA's representations about how it may or may not interpret or enforce its definition underscore the ambiguity of the change and do nothing to justify the amendment. The Administrative Law Judge understands what the Agency is trying to address in the rule change. However, the phrase "proposing to have" is overly broad, and leaves regulated parties guessing as to the meaning and scope of the rule. As a result, the change renders the rule impermissibly vague and defective. Therefore, the proposed amendment to Rule 7020.0300, subp. 17, is **DISAPPROVED**.

Part 7020.0300, subp. 18 – Definition of Pasture

196. Under Minn. Stat. 116.07, subd. 7(g) and Minn. R. 7020.0300, subp. 3, pastures are exempt from feedlot and MSA regulations, including permitting requirements. Therefore, a clear definition of "pasture" is critical for the application of NPDES and SDS permitting rules.

197. Proposed Rule 7020.0300, subp. 18, creates a definition of "pasture" by combining two different statutory definitions of the term found in Minn. Stat. § 116.07, subds. 7(q) and 7d(b). However, instead of simply incorporating the two statutory definitions, the Agency adds an additional element to the definition contained in Minn. Stat. § 116.07, subd. 7d(b). Such change alters the scope of the statutory definition, creates a conflict of law, and exceeds the Agency's authority.

198. The definition of "pasture" set forth in Minn. Stat. § 116.07, subd. 7(q), is as follows:

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[254] Ex. 25 at p. 6.
[255] Ex. 40 at p. 2.

For the purposes of this section, "pastures" means areas, including winter feeding areas as part of a grazing area, where grass or other growing plants are used for grazing and where the concentration of animals allows a vegetative cover to be maintained during the growing season except that vegetative cover is not required:

(1) in the immediate vicinity of supplemental feeding or watering devices;

(2) in associated corrals and chutes where livestock are gathered for the purpose of sorting, veterinary services, loading and unloading trucks and trailers, and other necessary activities related to good animal husbandry practices; and

(3) in associated livestock access lanes used to convey livestock to and from areas of the pasture.

199. Proposed Rule 7020.0300, subp. 18A, incorporates the statutory definition verbatim and is not challenged by the Industry Groups. Subpart 18A is needed and reasonable, and is hereby **APPROVED.**

200. Proposed Rule 7020.0300, subp. 18B, however, incorporates a second definition of "pasture" found in Minn. Stat. § 116.07, subd. 7d(b), but includes an additional element not found in the statutory definition.[256] To analyze the significance of the change, it is important to compare the statutory definition and the definition in Proposed Rule 7020.0300, subp. 18B.

201. Minnesota Statute section 116.07, subd. 7d(b), provides:

For the purposes of this subdivision, 'pasture' means areas where livestock graze on grass or other growing plants. Pasture also means agricultural land where livestock are allowed to forage during the winter time and which land is used for cropping purposes in the growing season. In either case, the concentration of animals must be such that a vegetative cover, whether of grass, growing plants, or crops, is maintained during the growing season except in the immediate vicinity of temporary supplemental feeding or watering devices.

202. Proposed Rule 7020.0300, subp. 18B incorporates this statutory definition, but includes the additional language highlighted in bold below:

B. agricultural land:

(1) where livestock are allowed to forage during the winter;

[256] Minn. Stat. § 116.07, subd. 7d(b) is a definition of limited term, applicable from January 1, 2010, to January 1, 2020.

(2) that is used for cropping purposes in the growing season; and

(3) where the concentration of animals is such that a vegetative cover of crops is maintained during the growing season **without the need for manure removal to avoid exceeding nutrient application rate standards as provided in part 7020.2225,** except in the immediate vicinity of temporary supplemental feeding or watering devices.[257]

203. The Industry Groups argue that imposing this additional element in the definition of pasture is a material change from the statutory definition that would severely impact livestock producers' winter grazing practices, which practices serve important economic, environmental, and land use benefits.[258] Specifically, many farmers rely on winter grazing to make their business operations economically viable.[259]

204. In its written comments, the Agri-Growth Council asserts that the Minnesota Legislature acknowledged these practices when it carefully crafted the two definitions of "pasture" in Minn. Stat. § 116.07.[260] The Industry Groups, thus, argue that the proposed change to the statutory definition is unreasonable, is in conflict with existing law, and exceeds the Agency's authority.[261]

205. The SONAR notes that: "[t]he proposed amendment is necessary to conform the chapter 7020 rule definition to include all elements from both statutory definitions."[262]

206. The SONAR goes on to state that:

> The proposed definition also clarifies the phrase, 'concentration of animals is such that a vegetative cover of crops is maintained during the growing season' to make it consistent with legislative intent, which was to avoid creating an exception for crop residue feeding that would turn a recently harvested grain field into a feedlot.[263]

207. The SONAR goes on to assert that "[s]craping and removal of manure is typical of traditional high-density open-lot feedlots – not pastures – and is best managed under a permit requiring a manure management plan that includes soil and manure testing."[264] Therefore, the MPCA asserts that its amendment to the statutory definition is necessary and reasonable.

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[257] Proposed Rule 7020.0300, subp. 18B (emphasis added).
[258] Ex. 13F; Ex. 24 (MN Cattlemen's Comments).
[259] *Id.*
[260] Ex. 13F.
[261] Exs. 13F and 24 (MN Cattlemen's Comments).
[262] Ex. 3 at p. 25.
[263] *Id.*
[264] *Id.*

208. According to Samantha Adams, a Pollution Control Specialist with the MPCA, the Agency added the phrase "without the need for manure removal..." to the statutory definition so as to: (1) "reduce subjectivity" in the application of the definition; and (2) provide a measurable "agronomic rate" (the "nutrient application rate standard" provided in Minn. R. 7020.2225).[265] Ms. Adams explained that determining which land is used for winter grazing and which is being used as a feedlot is sometimes difficult to differentiate during winter months when the ground is muddy and lacking vegetation.[266] Therefore, the MPCA asserts that the addition of a measurable standard will provide clarity to the statutory definitions and will allow the Agency to better enforce its rules.[267]

209. Ms. Adams makes a valid point that the amendment to the statutory definitions better allows the Agency to enforce its rules and apply them consistently. However, by changing the statutory definition, the Agency is creating a conflict with the law. The inclusion of additional language to the statutory definition is not merely technical. It changes the scope and effect of the definition for livestock producers who employ and rely on winter grazing practices.

210. In drafting these statutory definitions, the legislature made a policy determination to which the MPCA must defer. By altering the statutory definitions that were specifically enacted to exempt winter grazing from feedlot permitting rules, the Agency is exceeding its statutory authority and creating a conflict of law. Therefore, proposed Rule 7020.0300, subp. 18B, is **DISAPPROVED**. The MPCA can correct the defect by removing the additional language and conforming the definition to the language set forth in Minn. Stat. § 116.07, subd. 7d(b).

Part 7020.0300, subp. 27 – Waters of the United States

211. Proposed Rule 7020.0300, subp. 17 inserts a new defined term into the rules: "Waters of the United States." The proposed rule defines the term as "has the meaning given under the federal Clean Water Act."

212. The MPCA states that it must include this term because federal law prohibits discharges from CAFOs to "waters of the United States" absent a NPDES permit.[268] Although the MPCA may authorize discharges to waters of the state under the SDS permit scheme, it cannot issue SDS permits authorizing discharges to "waters of the United States."[269] Accordingly, the MPCA seeks to incorporate the definition of the term, as interpreted by federal law.[270]

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[265] Testimony of Samantha Adams, Hearing Transcript at pp. 33-40.
[266] *Id.*
[267] *Id.*
[268] Ex. 3 at 27.
[269] *Id.*
[270] *Id.*

213. The Federal Code of Regulations, 40 C.F.R § 122.2, defines the term "waters of the United States" or "waters of the U.S." as:

> (a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> (b) All interstate waters, including interstate 'wetlands;'
>
> (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:
>
> > (1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;
> >
> > (2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
> >
> > (3) Which are used or could be used for industrial purposes by industries in interstate commerce.
>
> (d) All impoundments of waters otherwise defined as waters of the United States under this definition;
>
> (e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;
>
> (f) The territorial sea; and
>
> (g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition.
>
> Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR § 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act jurisdiction remains with EPA.

214. The MPCA does not adopt this definition because the Agency contends that the definition has been subject to court challenges in recent years and "may be modified in the future."[271] Therefore, the MPCA seeks to generally define the term as interpreted in federal law.

215. The Industry Groups emphasize that the CWA does not define "waters of the United States," and quote Justice Samuel Alito in his concurring opinion in *Sackett v. EPA*, in which the Justice writes:

> When Congress passed the Clean Water Act in 1972, it provided that the Act covers 'waters of the United States.' 33 U.S.C. 1362(7). But Congress did not define what it meant by 'waters of the United States'; the phrase was not a term of art with a known meaning; and the words themselves are hopelessly indeterminate. We reject that boundless view...but the precise reach of the Act remains unclear. For 40 years, Congress has done nothing to resolve this critical ambiguity, and the EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase.[272]

216. The Industry Groups argue that because there is no clear definition of the term under federal law, MPCA's attempt to define the term by referencing federal law will cause confusion.[273] In its reply comment, the MPCA acknowledged that:

> [T]here is currently no clear definition of 'waters of the United States' due to various Supreme Court cases that failed to establish a clear test. At this time, jurisdictional determinations are being made on a case[-]by [-]case basis, subject to challenge when enforcement actions are taken, or permits denied....The MPCA would be willing to amend the rule to reference the definition in 40 CFR 122.2. However, it is likely that definition will be modified as it is not consistent with any of the Supreme Court 'tests.'[274]

217. Because MPCA's jurisdiction to enforce the NPDES and SDS permit requirements depends upon the waters into which the discharge occurs, a definition of "waters of the United States" is reasonable, necessary, and would certainly be helpful. However, given the lack of clarity with respect to the definition under federal law, the Administrative Law Judge suggests that the MPCA amend the proposed rule to state:

> Subp. 27. **Waters of the United States**. "Waters of the United States" is defined as set forth in 40 C.F.R. § 122.2.

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[271] Ex. 3 at p. 27.
[272] *Sackett v. United States Environmental Protection Agency*, --- U.S. ---, 132 S. Ct. 1367, 1375 (2012).
[273] Ex. 13B at. 6; Exs. 13C, 113D, 13E at p. 5; Ex. 13F at pp. 1-2.
[274] Ex. 25 at pp. 6-7.

218. This definition will not cause an inconsistency with federal law, as case law interpreting the regulation will thus apply, as will any future changes to that regulation. Subject to the change recommended, the Administrative Law Judge finds the proposed rule amendment necessary and reasonable.

219. Proposed Rule 7020.0300, subp. 27, as written, is **DISAPPROVED.** If changed as recommended, such rule will be approved.

Part 7020.0405, subp. 1B – SDS Permit Based Upon Capacity

220. The proposed changes to Minn. R. 7020.0405, subp. 1B, impose a duty to apply for an SDS permit for a feedlot or MSA "that is capable of holding *or will be capable of holding* 1,000 or more animal units or the manure produced by 1,000 or more animal units."[275]

221. The Industry Groups argue that by basing the permitting threshold on capacity, rather than actual animal units confined, the MPCA is inserting ambiguity into the rule.[276] The groups contend that using an "arbitrary" measure of "capacity" will result in inconsistencies and confer too much discretion upon the Agency when applying the permitting requirements.[277]

222. The Industry Groups explain that "capacity" for a farm is not a definite quantity, but rather a range that can vary widely depending upon operational practices used by individual farmers.[278] For example, some farmers use larger stalls, giving more room to their animals.[279] Other farmers have more densely populated buildings.[280]

223. The Industry Groups further argue that because the Agency is basing the SDS permit requirement on capacity, rather than on actual animal units creating waste, the proposed rule is not rationally related to the Agency's objective of preventing or controlling pollution.[281] Finally, the groups assert that the change to the rule is unreasonable and unnecessary.[282]

224. Since the SDS permit requirements were first promulgated in 2000, Subpart 1B has used capacity as the basis for determining whether an SDS permit is required. Subpart 1B currently provides:

> (1) the construction and operation of an animal feedlot or manure storage area that has been demonstrated not to meet the criteria

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[275] Emphasis added.
[276] Exs. 13C, 13D, 13E, 13F, and 13G.
[277] *Id.*
[278] Exs. 13C, 13D, 13E, 13F, and 13G.
[279] *Id.*
[280] *Id.*
[281] Exs. 13C, 13D, 13E, 13F, and 13G.
[282] *Id.*

for CAFO *and is capable of holding* 1,000 or more animal units or the manure produced by 1,000 or more animal units.[283]

225. Therefore, the only change that the MPCA is proposing to make with respect to the SDS permit threshold is adding the phrase, "or will be capable of holding," as it relates to a facility that is being constructed or modified.

226. Minnesota Rules part 1400.2070, subp. 1, provides, "If an agency is amending existing rules, the agency need not demonstrate the need for a reasonableness of the existing rules not affected by the proposed amendments." The existing rule already uses capacity as a threshold for determining the need for an SDS permit. Therefore, the only issue presented is whether the phrase, "or will be capable of holding," is needed and reasonable.

227. Livestock producers have been subject to a "capacity" determination for well over a decade. According to the MPCA, the Agency "has not found this concept to be problematic."[284] The MPCA asserts that the change is necessary to ensure that an owner does not incrementally add animals after construction of a facility, so as to avoid permitting thresholds.[285]

228. The MPCA has a reasonable need to ensure that it has an accurate count of the maximum number of animals that a facility can hold at the time it issues the permit to ensure that the appropriate requirements are applied. The farmer still has the discretion to use his/her space as he/she so desires, consistent with his/her farming philosophy and business practices. The farmer will just be subject to permitting requirements based upon the maximum number of animals it is possible to house.

229. Because the issue of "capacity" was approved in the 2000 rulemaking proceeding, it is not properly before the Administrative Law Judge at this time. However, with respect to the proposed change related to "will be capable of holding," the proposed change is ambiguous. "Will be" indicates an unspecified future action. Because the phrase does not specify which future action the rule is addressing, the rule is ambiguous.

230. To correct this defect, the MPCA can simply amend the proposed rule to read: "capable of holding, or will be capable of holding <u>after construction, expansion, or modification</u>." This change would not render the rule substantially different than the proposed rule, and it will clarify the ambiguity in the phrase. Accordingly, the proposed rule is **DISAPPROVED,** absent this change.

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[283] Minn. R. 7020.0405, subp. 1B(1).
[284] Ex. 25 at p. 9.
[285] *Id.*

Part 7020.0405, subp. 4A – Change of Facility Name

231. The contested portion of proposed Rule 7020.0405, subp. 4A, provides:

A. Before changing the name of a facility operating under a permit issued ~~a permit~~ under this chapter, the ~~new~~ owner shall submit....

232. The Environmental Groups support the proposed rule because it requires that both a change in facility name and a change in ownership be reported to the MPCA.[286] These groups believe the proposed amendment is necessary for MPCA to keep accurate records.[287]

233. The Pork Producers suggested that the MPCA change the proposed rule to apply to the "permitee" (i.e., the individual or entity named on the permit), as opposed to the "facility."[288]

234. In response to this comment, the MPCA has proposed to modify Subpart 4 to add the phrase "of the permittee" after the word "name" in the first sentence of item A. Thus, item A of Subpart 4 would begin as follows: "Before changing the name of the permittee of a facility operating under a permit issued under this chapter, the owner shall submit...."[289]

235. The Socially Responsible Agricultural Project (SRAP) notes that the rule should require notification to the permitting authority whenever the name of the permittee changes, as well as whenever the name of the facility itself changes.[290] According to SRAP, requiring notification of either name change will help ensure accurate recordkeeping and regulation. Otherwise the permitting authority may be left unaware of key changes to the facility's operation.[291]

236. While SRAP's policy arguments are persuasive, the MPCA has apparently opted not to adopt them. It is not the role of the Administrative Law Judge to suggest policy changes to rules that meet the requirements of rule and law. The MPCA has established that the proposed rule change, as modified by the Agency, is needed and reasonable. Accordingly, the rule is **APPROVED.**

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[286] Ex. 13I, 13J, 20, 27, 28, and 29.
[287] *Id.*
[288] Ex. 13B.
[289] Ex. 25 at 2.
[290] Ex. 35.
[291] *Id.*

Part 7020.0405, subp. 4B – Change in Ownership or Control

237. Proposed Rule 7020.0405, subp. 4B, provides

> Before changing ownership or control of an animal feedlot or manure storage area issued a permit under this chapter, the new owner shall submit to the permitting authority the information required under part 7001.0190. If the permitting authority determines that the new owner meets the requirements for obtaining the permit, then the permitting authority shall issue the modified permit to the new owner. All other modifications must comply with subpart 5.

238. The Turkey Growers, MN Chicken/Egg, and the Farm Bureau argue that the proposed change conflicts with Minn. Stat. § 116.07, subd. 7(g), which provides that, "[a] livestock feedlot permit does not become required solely because of a change in ownership of the buildings, grounds, or feedlot."

239. The proposed change, however, does not require that a new permit be issued. Rather, the proposed change requires that before changing ownership or control, the new owner shall submit the information required under Rule 7001.0190. This information is submitted so that the permit can reflect the change of ownership. As long as the new owner meets the requirements for the permit, then a modified permit will be issued. Thus, the proposed change does not require a new permit based "solely" on the change of ownership. Instead, a modified permit will be issued to new owners who meet the rule requirements. The proposed rule is, therefore, **APPROVED**.

Part 7020.0505, subp. 2 – Schedule of Deadlines

180-Day Requirement for Permit Applications

240. The proposed rule provides for a general schedule of deadlines for the submission of permit applications by livestock producers. Under this schedule, the MPCA proposes to require: (1) that an application for an "NPDES/SDS permit" be submitted "at least 180 days before the planned commencement of construction, expansion, or major modification;"[292] and (2) that an SDS permit application be filed six months prior to the implementation of a "new technology."[293]

241. The Industry Groups argue that this change conflicts with Minn. Stat. § 116.03, subd. 2b(a),[294] which provides:

> It is the goal of the state that environmental and resource management permits be issued or denied within 150 days of the submission of a permit

[292] Ex. 3 at p. 38.
[293] *Id.* at p. 39.
[294] Ex. 13B at p. 11; Ex. 13F at p. 2; Ex. 13G at p. 2.

application. The commissioner of the Pollution Control Agency shall establish management systems designed to achieve the goal.

242. The Industry Groups further argue that the long timeframe imposes significant risk on farmers.[295] Under the proposed rules, NPDES permit applications will be required to be filed six months prior to any construction, expansion or major modification.[296] In addition, an SDS permit application will need to be filed six months prior to the implementation of a "new technology."[297] The rules do not, however, define "new technology."

243. At the hearing, John Zimmerman, an independent farmer and President of the Minnesota Turkey Growers Association, explained how permitting requirements caused him to lose a business opportunity to test manure gasifying technology.[298] According to Mr. Zimmerman, when the MPCA learned about his use of the gasifying technology, the MPCA insisted that he amend his MMP, reclassify his farming operation, and apply for a different feedlot permit.[299] Mr. Zimmerman maintained that the new permit cost twice as much as the original permit.[300] Due to the time required to submit his revised permit application, Mr. Zimmerman lost his opportunity to purchase the test equipment and he was unable to be part of the study.[301] The West Virginia farm that installed the technology received a Clean Energy Award from its state Department of Environmental Protection.[302]

244. The MPCA responds that the 150-day deadline imposed by Minn. Stat. § 116.03, subd. 2b(a), sets a deadline for *the MPCA* to issue or deny environmental and resource management permits once they have been submitted to the Agency. The statute, the MPCA contends, does not impose any timelines *for livestock producers* to apply for permits.

245. The proposed rule and Minn. Stat. § 116.03, subd. 2b(a) are addressing two separate matters. The proposed rule is the deadline for farmers to submit their applications to the Agency. The statute is merely a "goal" articulated by the legislature for how much time the MPCA should take to process applications. The MPCA has established that a 180-day timeframe is reasonable and necessary for the Agency to process NPDES and SDS permit applications. While the Agency frequently takes less than 180 days to process applications, as is consistent with Section 116.03, subd. 2b(a), the Agency contends that allowing it up to 180 days will ensure that it can carefully and thoroughly review the applications before issuing permits. Accordingly, the MPCA has established that the rule is not in conflict with Minn. Stat. § 116.03, subd. 2b(1), and is reasonable and necessary.

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[295] Ex. 13G at pp. 2-3.
[296] Proposed Rule 7020.0505, subp. 2A(1). See Ex. 3 at pp. 38-39.
[297] Proposed Rule 7020.0505, subp. 2B(2). See Ex. 3 at pp. 38-39.
[298] Test. of John Zimmerman, Hearing Transcript at pp. 92-96.
[299] *Id.*
[300] *Id.*
[301] *Id.*
[302] *Id.* See also Test. of P. Luneman.

246. However, as a condition of approval, the MPCA must amend the proposed rule to separate out NPDES and SDS permit in Subpart 2A, and replace the term "NPDES/SDS permit" with "NPDES permit," as explained above. Subject to this change, the proposed rule is **APPROVED.**

Determination of "Pollution Hazard"

247. Several of the Industry Groups argue that the interim permit requirements set forth in proposed Rule 7020.0505, subp. 2D, are overbroad and confer too much to Agency discretion.[303] Specifically, the groups argue that the proposed rule will require an interim permit for facilities that have been determined to be "pollution hazards" by the Commissioner.[304] The groups assert that such term is not well defined and, thus, improperly falls to the Agency's discretion.[305] In addition, because the term is broad, it will potentially require more feedlots to apply for an interim permit.[306]

248. Minnesota Rule 7020.0300, subp. 19a, expressly defines "pollution hazard." This definition is sufficiently clear to prevent any ambiguity in the proposed rule. Therefore, the proposed rule amendment to Rule 7020.0505, subp. 2D, is **APPROVED.**

Part 7020.0505, subp. 4B – Emergency Response Plan

249. Proposed Rule 7020.0505, subp. 4B imposes a new requirement on all feedlots capable of holding 1,000 animal units or more and all MSAs capable of holding the manure produced by 1,000 animal units or more. The proposed rule requires that the permit application contain an emergency response plan that includes a description of the procedures providing "for the disposal of carcasses resulting from a catastrophic event such as extreme weather conditions, fire, unexpected power failures, and disease."

250. The Industry Groups argue that the MPCA lacks authority and jurisdiction to regulate the removal and disposal of animal carcasses.[307] According to the Industry Groups, the removal and disposal of animal carcasses is regulated by the Board of Animal Health.[308] Therefore, the MPCA lacks the authority to require a disposal plan as part of its NPDES and SDS permit requirements.[309]

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[303] Exs. 13C, 13D, 13E, and 13G.
[304] *Id.*
[305] *Id.*
[306] *Id.*
[307] *See* Exs. 13C, 13D, 13E, 13F, 13G.
[308] *Id.*
[309] *Id.*

251. The Industry Groups cite Minn. Stat. § 35.815, which provides:

(a) Notwithstanding any other law, the executive director of the Board of Animal Health is responsible for the regulation and oversight of the disposal of livestock mortalities due to animal disease.

(b) Notwithstanding any other law, the executive director of the Board of Animal Health is responsible for the regulation and oversight of livestock mortality disposal due to nondisease causes to protect animal health and the environment. The board shall, in cases where the disposal may adversely affect ground or surface water, seek the input of the Pollution Control Agency.

252. The Industry Groups argue that by enacting this statute in 2011, the Minnesota Legislature made it clear that the regulation of animal carcass disposal is within the sole jurisdiction of the Board of Animal Health (BAH).[310] Thus, the argument continues, the proposed rule is in conflict with Minn. Stat. § 35.815.[311] The Groups contend that the MPCA is attempting to circumvent the legislative change and is exceeding its authority.[312]

253. The MPCA explained that, in recent years, there have been several catastrophic events, such as fires, storms, and floods, which have caused a significant loss of animals at one time.[313] When such events occur, the disposal of mass carcasses presents an imminent threat to the environment and to drinking water due to decay occurring on-site.[314] During the emergency, the farmer is often coping with other losses and issues.[315] Therefore, the stated purpose of the proposed rule is to ensure that all feedlot and MSA owners (having 1,000 or more animal units or the manure produced thereby) have in place a plan for completing the immediate disposal of such carcasses in a way that best protects both the public health and the environment.[316]

254. The MPCA cites to a Memorandum of Understanding (MOU) between the MPCA and the BAH relating to the disposal of livestock carcasses, on-site burials, and debris from damaged farm structures resulting from disaster.[317] The MOU acknowledges that Minn. Stat. § 35.815 gives BAH oversight authority over carcass disposal; that the MPCA and BAH shall work together to affect disposal of carcasses; and that the MPCA shall have authority over the disposal of all other (non-carcass) debris in the case of a catastrophic event.[318]

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[310] Exs. 13C, 13D, and 13E.
[311] *Id.*
[312] *Id.*
[313] Ex. 3 at p. 42.
[314] *Id.*
[315] *Id.*
[316] *Id.*
[317] Ex. 16.
[318] *Id.*

255. The MPCA agrees that the carcass disposal plan provided for in the proposed rule amendment should be created in consultation with and meet the BAH requirements.[319] However, the MPCA asserts that the MWPCA grants it broad authority to issue rules and impose permit requirements for the prevention of pollution.[320] Thus, the MPCA asserts that it has authority to require large feedlots and MSAs to develop a plan as a condition for the issuance of a discharge permit.[321]

256. The Environmental Groups assert that requiring a plan for carcass disposal is a good first step but that it does not go far enough.[322] These groups maintain that the MPCA should require that the emergency plans identify burial and composting sites after consultation with the BAH.[323] In addition, the Environmental Groups maintain that the plans should include contact information for the local Minnesota Department of Health (MDH) representative because of the potential human health risks associated with animal carcasses.[324]

257. In response to this comment, MPCA states that it believes details regarding burial and composting sites, and MDH contact information, should be left up to the individual facility and will depend on the nature of the carcass disposal plan.[325]

258. While it is true that the BAH has exclusive jurisdiction to regulate and oversee the disposal of livestock under Minn. Stat. § 35.815, the MPCA has the authority to impose, as a condition of a permit, that a feedlot and MSA have such a plan in place. As long as the MPCA is not dictating how the disposal should occur, the requirement to have such plan in place is not in conflict with the law granting the BAH exclusive jurisdiction over the disposal. Accordingly, the proposed rule amendment is **APPROVED** as reasonable and necessary.

Part 7020.2003 – Prohibited Discharges

259. Proposed Rule 7020.2003, subp. 2, addresses when discharges are permitted under NPDES and SDS permits. The Industry Groups assert that the changes to this rule infuse confusion because Subpart 1 prohibits all discharges and Subpart 2 indicates that discharges may be permissible under an NPDES or SDS permit, but it confuses what kinds of discharges may be allowed.[326]

260. The Environmental Groups, too, urge the MPCA to resolve the ambiguity. According to the Environmental Groups, the rules should make it clear that all

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[319] Ex. 25 at p. 10.
[320] *Id.*
[321] *Id.*
[322] Exs. 13J, 20, 27, 28, 29.
[323] *Id.*
[324] *Id.*
[325] Ex. 25 at p. 18.
[326] Ex. 13G at p. 4; Exs. 37, 38, and 39.

discharges, both to subsurface and surface waters, are prohibited.[327] As written, the rule makes it appear as through only subsurface discharges are prohibited, and that discharges to surface waters may be allowed by NPDES or SDS permit.[328]

261. To address these concerns, it is important to review proposed changes to Rule 7020.2003, both Subparts 1 and 2. Proposed Rule 7020.2003 provides:

> Subpart 1. **Subsurface discharges from animal feedlots and manure storage areas**. No person shall discharge animal manure, manure-contaminated runoff, or process wastewater from any animal feedlot, including ~~CAFOs~~ a CAFO, or manure storage area ~~is prohibited from flowing~~ into a sinkhole, fractured bedrock, well, surface tile intake, mine, ~~or~~ quarry, or other direct conduits to groundwater.
>
> Subpart 2. **CAFOs and ~~facilities~~ animal feedlots with 1,000 animal units or more.**
>
> A. An owner of an animal feedlot that is a CAFO or is capable of holding 1,000 animal units or more, or a manure storage area capable of holding the manure produced by 1,000 animal units or more, shall comply with the effluent limitation requirements of Code of Federal Regulations, title 40, part 412, and discharge only as authorized by an NPDES/SDS, SDS, or other applicable permit.
>
> B. No discharge, as defined by Code of Federal Regulations, title 40, section 122.2, shall be allowed from a CAFO into waters of the United States, unless the animal feedlot or manure storage area has an NPDES/SDS permit authorizing such discharge.
>
> C. No discharge shall be allowed from a CAFO or an animal feedlot capable of holding 1,000 animal units or more or a manure storage area capable of holding the manure produced by 1,000 or more animal units into waters of the state unless the animal feedlot or manure storage area has an SDS permit authorizing the discharge.

262. Both groups of commenters are correct that there is ambiguity when Subparts 1 and 2 are read together. Subpart 1 states that no discharges are permitted; subpart 2 indicates that discharges may be allowed if authorized by a permit.

263. It appears that Subpart 1 only prohibits discharges into subsurface waters. The heading of Subpart 1 addresses subsurface discharges, but nothing in the content of the rule expressly differentiates between surface and subsurface discharges. The NPDES and SDS permits referenced in Subpart 2, however, allow for discharges, but

[327] Exs. 27, 28, and 29.
[328] *Id.*

only as provided by permit (i.e., surface water discharges subject to effluent limits in 25-year rainfall events).[329] Thus, the Subparts, when read together, do clash.

264. Moreover, Subpart 2 creates its own ambiguity when read in conjunction with proposed Rule 7020.0405. The MPCA contends that it is proposing these rule changes to adopt state and federal law as it relates to the NPDES permits. In compliance with federal law, the MPCA can only require an NPDES permit for CAFOs at the time of discharge. Therefore, the MPCA cannot impose a "duty to apply" for an NPDES permit on all CAFOs absent a discharge into waters of the United States.

265. Under the proposed changes to Rule 7020.0405, subp. 1B, the MPCA is requiring an SDS permit for all animal feedlots and MSAs that are capable of holding 1,000 or more animal units or the manure produced by 1,000 or more animal units. Proposed Rule 7020.0405, subps. 1A and B, do *not*, however, require an SDS permit for *all CAFOs.*

266. Proposed Rule 7020.2003, subp. 2, items A and C indicate that all CAFOs are required to have an SDS permit upon discharge. That is in conflict with proposed Rule 7020.0405, which only requires that feedlots capable of holding more than 1,000 animal units[330] apply for an SDS permit. By prohibiting discharges from CAFOs into waters of the state without an SDS permit, the MPCA is requiring all CAFOs to have an SDS permit under Rule 7020.0405. Therefore, proposed Rule 7020.0405 and Rule 7020.2003, subp. 2 are in conflict.

267. Proposed Rule 7020.2003 is, therefore, ambiguous and **DISAPPROVED**.

Conduits to Groundwater

268. The Industry Groups assert that the term "other direct conduits to groundwater," as used in Subpart 1, is likewise undefined, overly broad, and unduly vague.[331] The groups contend that the term, "other direct conduits," is a catch-all phrase without limitation, and grants the Agency discretion beyond that allowed by law.[332] The Administrative Law Judge agrees.

269. The MPCA lists several "conduits" to groundwater and then completes the sentence with the all-inclusive term, "other direct conduits," rendering the itemized list essentially redundant.

270. The word "conduit" has two commonly accepted meanings. The first is: "A channel or pipe for conveying fluids, [such] as water."[333] This definition appears to be the most applicable, given the list of examples preceding the phrase in the proposed

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[329] *See* Minn. R. 7053.0305, subp. 2 and 40 C.F.R. § 412.13.
[330] As well as MSAs capable of holding the manure of 1,000 or more animal units.
[331] Ex. 13B at p. 12; Exs. 13C, 13D, and 13E at p. 7; Ex. 13F at p. 2; Ex. 13G at p. 4.
[332] *Id.*
[333] *Webster's II New College Dictionary* 235 (2001).

rule. However, a second, but common, definition of "conduit" is much broader: "Someone or something that is used as a way of sending something (such as information or money) from one place or person to another."[334]

271. Because of the broad common definition of the term "conduit," the Agency will be left with unfettered discretion in applying and enforcing the rule. Therefore, if the MPCA intends to keep this phrase, it should include some definition of "conduit." Otherwise, the MPCA should remove this phrase from the rule altogether. As set forth above, the proposed changes to Rule 7020.2003, subp. 1, are **DISAPPROVED.**

Part 7020.2003, subps. 4 – 6 – Open Lot Agreements

272. The proposed changes to Minn. R. 7020.2003, subps. 4 through 6, involve the removal of all references to Open Lot Agreements (OLAs). The 2000 revisions to the feedlot rules created an OLA program, which allowed small feedlots[335] with pollution discharges up to 10 years to correct the problem, so long as they executed an OLA with the Agency.[336] The term of each of those agreements has now expired.[337]

273. In 2009, before the OLAs expired, the MPCA, the Department of Agriculture, and the Board of Water and Soil Resources executed a Memorandum of Understanding (MOU). The MOU established that an owner of a feedlot who executed an OLA prior to October 1, 2010, and who applied and maintained eligibility for cost-share funding, will continue to receive a conditional waiver from enforcement penalties until the cost-share funding is available to pay for the corrective measures.[338] Essentially, the MOU create a "safe harbor" for owners who had an OLA and applied for cost-sharing subsidies while their applications for funding were pending.

274. The MOU does not apply to feedlot owners who failed to maintain eligibility for, or who failed to seek, cost-share funding.[339] Also, feedlot owners who did not execute an OLA are not eligible for the waiver.[340] Thus, under the proposed rule, these owners are subject to all regulations and penalties set forth in law and rule.[341]

275. The MPCA asserts that the proposed changes are necessary to delete references to an obsolete program. The Agency notes that anyone who was a part of the OLA Program and who properly applied for cost-share funding will still be covered under the MOU. However, the rules do not provide any such security.

276. The Milk Producers assert that the rule changes will cause uncertainty for small producers who may now be subject to regulations from which they were

[334] https://www.Merriam-Webster.com/dictionary/conduit.
[335] Feedlots with fewer than 300 animal units.
[336] Ex. 3 at 56.
[337] *Id.*
[338] *Id.*
[339] *Id.*
[340] *Id.*
[341] *Id.*

previously excused.[342] The Minnesota Center for Environmental Advocacy (MCEA) further notes that these non-complying small feedlots still exist, are still discharging into state waters, and need to be addressed.[343] The MCEA recommends that the MPCA amend reporting requirements to ensure that these discharges are corrected and that these small feedlots are not simply overlooked now that the OLA program has expired.[344]

277. The rules do not adopt the provisions of the MOU. Therefore, the Agency is apparently intending to simply ignore enforcement rules and continue to honor the MOU as it applies to small farms that signed OLAs and timely applied for cost-sharing funding. However, there are no assurances in law or rule for those farmers.

278. Because the OLA Program has expired, the need and reasonableness of the proposed rule change has been established. How the MPCA will deal with the small feedlots that are still non-compliant is unknown. However, the issue before the Administrative Law Judge is whether the deletions are reasonable and necessary, not whether new rules should replace them. That is a policy decision that the Agency has declined to address in this rulemaking proceeding. Accordingly, the proposed changes to Rule 7020.2003, subps. 4 through 6, is hereby **APPROVED.**

Part 7020.2005, subp. 1 – Construction of Feedlots in Karst Region

279. The proposed amendments to Minn. R. 7020.2005 impose restrictions on the construction of new feedlots and MSAs within 300 feet of a sinkhole or within a certain distance from a water supply well.[345]

280. The MN Cattlemen assert that such restrictions are inconsistent with "Alternative Standards"[346] that were developed by a workgroup to propose standards for LMSAs in the Karst region.[347] According to the MN Cattlemen, the legislature specifically directed the MPCA to convene a technical workgroup to review and develop design standards for LMSAs in the Karst region.[348] The MN Cattlemen assert that, in proposing changes to Rule 7020.2005, subp. 1, the MPCA is ignoring the workgroup's findings.[349]

281. In addition, the MN Cattlemen argue that the restrictions set forth in the proposed rule are inconsistent with the Agency's past practices.[350] According to the MN Cattlemen, the proposed rules "will impair the ability of livestock producers to build and

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[342] Ex. 13G at p. 4.
[343] Ex. 21.
[344] *Id.*
[345] Ex. 3 at 56-57.
[346] *See Recommendations of the Technical Workgroup, Liquid Manure Storage in Karst Region,* available at http://www.pca.state.mn.us/index.php/view-document.html?gid=3627.
[347] Ex. 24 at p. 3 (MN Cattlemen Comments).
[348] *Id.*
[349] *Id.*
[350] *Id.*

operate facilities that achieve equivalent environmental results as those achieved by facilities in non-Karst regions."[351]

282. The MDH's administrative rules, Minn. R. ch. 4700, contain minimum set-back requirements to ensure separation of new wells from spaces where animals are housed or manure is stored.[352] These rules were last revised in 2008 and contain well location restrictions that are more restrictive than the existing Minn. R. 7020.2005, subp. 1.[353] Thus, the MPCA is revising its rule to: (1) inform readers that MDH's set-back requirements will apply; and (2) conform its rule to MDH standards.[354] Under revised Rule 7020.02005, subp. 1, where MDH's set-back standards are more restrictive, the MDH's standard shall apply.[355]

283. The MPCA notes that it decided not to adopt the Alternative Standards in its rules because such a change would be "highly controversial" and would be a "significant change" in the scope of the rule.[356] The MPCA notes that because the Alternative Standards have not been adopted by rule, they are not legally binding.[357]

284. There is no legal requirement that the MPCA adopt the Alternative Standards during this rulemaking proceeding. The MPCA has the statutory authority to adopt rules to prevent, control and abate water pollution.[358] The MPCA has established that it has authority to adopt the proposed changes to Rule 7020.02005, and that such changes are reasonable and necessary. Therefore, the rule is **APPROVED**.

Part 7020.2100 – Liquid Manure Storage Areas

Subpart 1 – General requirements; exemptions

285. The MPCA is proposing to add an exemption to the site restrictions and requirements for design, construction, maintenance, and operation of liquid manure storage areas (LMSAs). Proposed item D reads, as follows:

> D. A liquid manure storage area that provides temporary storage or temporary processing of manure, manure-contaminated runoff, or process wastewater is not subject to this part if the commissioner determines that the liquid manure storage area is a limited risk liquid manure storage area. In making this determination, the commissioner shall consider the:

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[351] *Id.*
[352] Ex. 3 at pp. 56-57.
[353] *Id.*
[354] *Id.*
[355] *Id.* The proposed changes to Subpart 1A, which has not been challenged, was revised to incorporate changes to Minn. Stat. § 116.0711, subd. 1(c).
[356] Ex. 40 at p. 5.
[357] *Id.*
[358] Minn. Stat. § 115.03, subd. 1(e).

(1) location of the proposed liquid manure storage area in relation to waters of the state;

(2) geologic sensitivity of the proposed location;

(3) length of time the manure, manure-contaminated runoff, or process wastewater is stored or processed in the liquid manure storage area;

(4) likelihood of a discharge to waters of the state given the design standards that are proposed, including the volume that will be stored; and

(5) type of material proposed to be stored and the material's expected pollutant concentration.

An exemption granted under this item does not prevent the agency from imposing permit conditions, if appropriate to protect human health and the environment, to govern construction and operation of the limited risk liquid manure storage area.

286. In its SONAR, the MPCA states that this rule part was amended to provide clarity as to what types of structures are considered LMSAs and what requirements apply to the various types of LMSAs.[359]

287. The MPCA asserts that the exemption provided in proposed item D is needed and reasonable because it makes clear that certain temporary manure and wastewater holding structures need not meet all of the design standards of Rule 7020.2100. The MPCA states that examples of temporary manure and process wastewater holding structures include "settling basins used in conjunction with grass treatment systems, small open lot runoff collection areas used to collect and pump waste to a larger storage structure, and other small structures that essentially provide no appreciable storage volume for the facility." The MPCA asserts that because the potential for harm to the environment from these temporary structures is limited, it is necessary and reasonable to provide this exemption at item D.[360]

288. The MPCA states further that the item D exemption does not imply that there will be no location and design restrictions on such structures. Rather, an evaluation will be undertaken of the potential for impacts to the environment based on the five criteria provided. According to the MPCA, it is currently developing additional "guidance" to outline common types of limited risk LMSAs, and provide some minimum location and design suggestions based on the five criteria provided.[361]

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[359] Ex. 3 at p. 59.
[360] *Id.*
[361] *Id.*

289. The MPCA ends its discussion of proposed item D by giving examples of LMSAs that *may* be deemed to be "limited risk."[362] The MPCA states that settling basins used in conjunction with grass treatment systems may be deemed of limited risk if the basins provided "adequate separation distance to bedrock and the seasonable water table, and there is adequate setback from surface waters and conduits to groundwater such as wells and sinkholes."[363] Other examples include small open lot runoff collection areas, and "other small structures that essentially provide no appreciable storage volume for the facility."[364]

290. In its comments, the Minnesota Center for Environmental Advocacy (MCEA) strongly objected to the creation of a "limited risk" LMSA exemption. The MCEA asserts that the MPCA has not demonstrated why this alternative category is needed or reasonable. It notes that the MPCA has failed to define what LMSAs would fall into the new category, and it argues that it unreasonably leaves the eligibility determination to the complete discretion of the Commissioner. The MCEA also takes little comfort in the Agency's promise that it will provide "guidance" on common types of "limited risk" LMSAs. The MCEA likewise contends that the five factors are not quantifiable. That is, none of them provide a numeric or narrative standard against which to evaluate a LMSA's risk. For example, there is no minimum distance from water; no basis to measure or avoid "geologic sensitivity;" no maximum length of time for storage shown to obviate risk; no metrics by which o assess the "likelihood of a discharge to waters;" and no limitation on the types of material stored.[365]

291. The Environmental Groups, as a whole, object to what they deem is a broad exemption from site restrictions and the design and operation requirements for "low risk" LMSAs.[366] These groups also oppose allowing the Commissioner discretion to grant exemptions based on not-yet-published guidelines and location and design suggestions.[367]

292. In its post-hearing response, the MPCA stated that, while it would be preferable to have a numeric standard, in practice, there are too great a number of factors that contribute to the evaluation of risk. For example, there are site-specific circumstances associated with these structures that must be considered, such as nearby sinkholes or a drinking water supply management area. The MPCA asserts that the intent of the rule was to allow some flexibility in the design of structures that temporarily store or process manure and provide no appreciable storage volume at the facility.[368]

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[362] *Id.*
[363] *Id.*
[364] *Id.*
[365] Exs. 13K and 21.
[366] Ex. 13I at 5-6; Ex. 20 at 6.
[367] *Id.*
[368] MPCA Post-Hearing Response (September 30, 2013) at 18-19.

293. The Administrative Law Judge agrees with the Environmental Groups that the proposed new classification of "limited risk" LMSAs set out in item D is unreasonably vague and renders the rule defective. A rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies.[369] Discretionary power may be delegated to administrative officers "[i]f the law furnishes a reasonably clear policy or standard of action which controls and guides the administrative officers in ascertaining the operative facts to which the law applies, so that the law takes effect upon these facts by virtue of its own terms, and not according to the whim or caprice of the administrative officers."[370]

294. Item D does not set forth sufficient specific criteria to guide the Agency in making a determination as to whether a LMSA poses a "limited risk." As a result, it is defective because it grants unfettered discretion to the Agency to determine what LMSAs meet this exemption. Accordingly, proposed Rule 7020.2100, subp. 1D is **DISAPPROVED.**

295. To cure this defect, the Administrative Law Judge recommends that MPCA modify item D by providing minimum design and operational standards necessary to ensure that these facilities do not pose a threat to water quality. Such minimum standards are necessary to provide consistency in exempting storage areas from the requirements in other parts of the rules. MPCA's statement in its SONAR that it is developing future "guidance" on "minimum location and design suggestions" is not adequate to support approving the proposed rule language.

Subpart 2 – Site restrictions

296. The MPCA is proposing a new item D regarding the removal of bedrock. Proposed Subpart 2, item D, reads as follows:

> D. Removal of bedrock in order to comply with the applicable separation distances under item B is prohibited unless specifically authorized by the commissioner. In making the determination to allow the removal of bedrock, the commissioner shall consider:
>
> (1) geologic sensitivity of the proposed location;
>
> (2) type and extent of bedrock to be removed;
>
> (3) length of time the manure, manure-contaminated runoff, or process wastewater is stored or processed in the liquid manure storage area;
>
> (4) likelihood of a discharge to waters of the state given the design standards that are proposed, including the volume that will be stored;

[369] *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N.W.2d 763, 768 (Minn. 1980).
[370] *Lee v. Delmont*, 228 Minn. 101, 113, 36 N.W.2d 530, 538 (1949); *accord Anderson v. Commissioner of Highways*, 126 N.W.2d 778, 780 (Minn. 1964).

(5) type of material proposed to be stored and the material's expected pollutant concentration; and

(6) analysis of other options that would allow for compliance with the separation distances.

Authorization to remove bedrock under this item does not prevent the agency from imposing permit conditions, if appropriate to protect human health and the environment, to govern construction and operation of the liquid manure storage area.

297. In its SONAR, the Agency states that the proposed Subpart 2D is needed to make clear that the feedlot rules protect the sensitive geology in a Karst setting. The MPCA asserts that it is aware of the sensitivity and risks associated with locating an LMSA in a Karst-susceptible area. Separation distances to bedrock were established in the current rule to help minimize risks with locating LMSAs over Karst-susceptible bedrock. According to MPCA, the intent of the current rule was to first locate the bedrock in the area, and then construct LMSAs in a manner to avoid impacting the bedrock, maintain the natural soil profile, and ensure adequate separation distance. However, the MPCA notes that owners and consultants have proposed removing the bedrock in order to establish the required separation distance. The proposed amendment allows removal of bedrock if approved by the Commissioner.[371]

298. The MPCA states that the proposed item D is reasonable. The MPCA notes that uncontrolled removal of bedrock can alter subsurface drainage patterns, and cause unintended and negative consequences directly below the excavated area. The Agency maintains, however, that in some instances, removal of bedrock may be necessary to allow installation of an LMSA and correct pollution hazards. The MPCA contends that consideration of the six criteria allows the Agency to permit removal of bedrock in very limited situations. The MPCA states that it is developing additional "guidance" pertaining to situations when bedrock removal may be necessary with "details on how to minimize the extent of removal necessary and limit the potential impacts from bedrock removal."[372]

299. The Environmental Groups strongly object to proposed Subpart 2D. Given that the MPCA acknowledges the risks associated with locating an LMSA in a geologically-sensitive Karst setting, these groups contend that it is unreasonable to permit any bedrock removal as a means to provide separation distance directly below an LMSA. The Environmental Groups maintain that the MPCA should prohibit bedrock removal entirely and devise other methods for facilities to address pollution hazards.[373]

300. The Environmental Groups assert that, at the very least, the MPCA should amend the proposed criteria in item D to more clearly define what limited situations

[371] Ex. 3 at p. 61.
[372] *Id.* at p. 62.
[373] Ex. 13I at 6.

would justify bedrock removal. In addition, these groups argue that the MPCA should include its not-yet-drafted guidance materials in the final rule.[374]

301. In its response, the MPCA states that it is attempting to clarify how the separation distance between bedrock and the bottom of an LMSA may be accomplished. The MPCA maintains that "in most cases, the need to remove bedrock will be quite minor." However, the MPCA acknowledges that there may be limited instances when more extensive planned excavation of bedrock will be necessary when constructing a manure storage area. The MPCA maintains that in these instances, it will closely evaluate the situation and consider the six criteria before allowing such a practice.[375]

302. The Administrative Law Judge finds that the proposed item D is a needed and reasonable approach. Unlike Subpart 1 where the phrase "limited risk LMSAs" is vague and left to the Commissioner's discretion to determine, "bedrock" is a well-defined term. The factors in item D will provide the Agency with intelligible standards for determining in what limited instances bedrock may be removed. While the MPCA is encouraged to consider further revising the proposed criteria in item D to more clearly define what limited situations would justify bedrock removal, its failure to do so does not amount to a defect. Accordingly, the proposed changes to Rule 7020.2100, subp. 2D are **APPROVED**.

Subpart 3 – Design standards

303. Proposed Rule 7020.2100, subp. 3A requires new or modified LMSAs at facilities capable of holding more than 1,000 animal units or the manure produced thereby, be designed to provide a "minimum storage volume" equal to at least nine months of storage capacity.

304. In its SONAR, the MPCA states that the changes made to Subpart 3A are intended to clarify that this provision does not require all new LMSAs have nine months storage capacity, provided that storage capacity at the facility, as a whole, has at least nine months capacity.[376]

305. In written comments, the Environmental Groups state that MPCA should require each new LMSA to provide nine months of storage capacity, rather than measuring storage capacity of the facility as a whole.[377] The Environmental Groups assert that the rule should also distinguish between the various types of liquid manure storage systems and clarify the risks of different types of wastewater (high vs. low risk).[378]

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[374] *Id.*
[375] Ex. 25 at pp. 19-20.
[376] Ex. 3 at p. 62.
[377] *Id.*
[378] Ex. 13 I; Ex. 20 at 7.

306. In response, the MPCA states that it never intended, and it does not see a reason to, require that each LMSA have nine months manure storage capacity. The MPCA notes that it is not uncommon for a facility to have a variety of LMSAs to store manure. The MPCA did not comment on the suggestion that it distinguish between different types of manure and wastewater.[379]

307. The MPCA has established that the amendments to the rule are needed and reasonable. Therefore, the proposed changes to Rule 7020.2100, subp. 3, are **APPROVED.**

Part 7020.2125, subp. 1B – Manure Stockpiling

308. Proposed Rule 7020.2125, subp. 1B applies both a solid content requirement and a stacking requirement to the content ratios for manure stockpiling. The Turkey Growers, MN Chicken/Egg, and the Farm Bureau object to subjecting producers to both requirements.[380]

309. The MPCA explains that since this rule was first established in 2000, farmers have started using other types of animal bedding, which is mixed with animal excreta, and becomes part of the manure stockpile.[381] Specifically, the MPCA is addressing the use of sand for bedding for dairy cows.[382] Sand is less absorbent for liquid waste and is difficult to stack.[383] As such, manure-contaminated liquids are not held in place by the sand, and because it is not easily stackable, there is a larger surface area for seepage to groundwater.[384] By requiring both a solid content requirement and a stacking requirement, the Agency is better able to control the stockpiling of manure to ensure that it is not polluting the environment.[385]

310. The Agency has shown that this change is necessary to address the new types of bedding being used by farmers, and is reasonable to prevent, control, or abate the discharge of waste. Accordingly, the proposed amendment to the rule is **APPROVED.**

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[379] Ex. 25 at p. 20.
[380] Exs. 13C, 13D, and 13E at p. 8.
[381] Test. of Kim Brynildson, Hearing Transcript at pp. 62-64.
[382] *Id.*
[383] *Id.*
[384] *Id.*
[385] *Id.*

Based on the Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The MPCA gave proper notice of the hearing in this matter. The Agency has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

2. The MPCA has demonstrated its statutory authority to adopt the proposed rules, except as to proposed Rule 7020.0300, subp. 18B (definition of "pasture"). Recommendations on how to correct the defect are set forth in the Findings above.

3. The MPCA has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4 and 14.50 (iii), with the exception of the following proposed rules which were disapproved:

Rule 7020.0405, subp. 1A;
Rule 7020.0405, subp. 1B;
Rule 7020.0405, subp. 5;
Rule 7020.0505, subp. 2A;
Rule 7020.0505, subp. 5;
Rule 7020.0300, subp. 14a;
Rule 7020.0300, subp. 17;
Rule 7020.0300, subp. 18B;
Rule 7020.0300, subp. 27;
Rule 7020.2003, subp. 1;
Rule 7020.2003, subp. 2; and
Rule 7020.2100, subp. 1D.

4. With the exception of the rules disapproved, the Department has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii) to adopt the proposed rules.

5. The Administrative Law Judge has suggested action to correct the defects cited in Conclusions 2 and 3, with respect to the following proposed rules:

Rule 7020.0405, subp. 1A;
Rule 7020.0405, subp. 1B
Rule 7020.0405, subp. 5;
Rule 7020.0505, subp. 2A;
Rule 7020.0505, subp. 5;
Rule 7020.0300, subp. 14a;
Rule 7020.0300, subp. 18B;
Rule 7020.0300, subp. 27; and
Rule 7020.2100, subp. 1D.

6. The amendments and additions to the proposed rules which were suggested by the Agency after publication of the proposed rules in the *State Register* do not result in rules which are substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.

7. Due to Conclusions 2 and 3, this Report has been submitted to the Chief Administrative Law Judge for her approval pursuant to Minn. Stat. § 14.15, subd. 3.

8. Any Findings that might properly be termed Conclusions, and any Conclusions that might properly be termed Findings, are hereby adopted as such.

9. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Agency from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based on facts appearing in this rule hearing record and is not substantially different from the proposed rule.

Based on the Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RECOMMENDED that the proposed rules, as modified, be adopted, except where otherwise noted above.

Dated: November 18, 2013

ANN C. O'REILLY
Administrative Law Judge