

2002 Feedlot Program

Report to the Legislature



Minnesota Pollution Control Agency

January 2003

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As required by Minnesota Statutes section 3.197, the cost to write, print and distribute this Legislative report is \$6,300.

2002 FEEDLOT LEGISLATIVE REPORT

The Minnesota Pollution Control Agency (MPCA) is providing this legislative report for two reasons. First, as required in Minnesota Sessions Laws 2001 (1st Special Session, Chapter 2, Section 2), the MPCA is reporting on counties that receive state feedlot grant funds regarding “activities conducted under the grant, expenditures made, and local match contributions.” Second, the MPCA is reporting on its activities, including responses to the January 1999 Legislative Auditor’s feedlot recommendations and the increased funding received by the MPCA in the 2001 legislative session.

This legislative report recommends that the Legislature should amend Minn. Stat. 116.07, subd. 7(p) to exempt federally regulated feedlots from the cost-share provisions in parts (1) and (2) of this statute.

MPCA FEEDLOT PROGRAM OVERVIEW

The MPCA is the principal agency for regulating feedlots in Minnesota. The MPCA has been regulating feedlot operations since the early 1970s. By law, the MPCA may also delegate some of its feedlot program responsibilities to counties. In the 1990s, feedlots emerged nationally as an important environmental and economic issue because of the growth in the number of large feedlots (> 1,000 animal units) and the tendency for large feedlot owners not to live on-site. As public concerns with feedlots grew, the MPCA came under intense scrutiny by the Minnesota Legislature.

In 1998, the Legislative Audit Commission directed the Office of the Legislative Auditor (Legislative Auditor) to evaluate the MPCA’s feedlot program. The Legislative Auditor issued the “Animal Feedlot Regulation: A Program Evaluation Report, prepared by the Office of the Legislative Auditor (January 1999)” (Audit Report). The Audit Report found a number of problems with the MPCA’s feedlot program and significant inconsistencies in the adequacy of delegated county programs. Two main issues raised in the Audit Report were: (1) that the

MPCA feedlot rules, last revised in 1978, were outdated, and (2) the MPCA did not have sufficient staff working in the feedlot program.

During 1999 and 2000, the MPCA focused its efforts on completion of feedlot rule revisions. The Minnesota Legislature was very involved in reviewing and approving the draft rules. The revised rules became effective in October 2000 and are found in M.R. 7020 (2000). During the 2001 Legislative Session, the MPCA requested and the Legislature approved significant new funding for the feedlot program. This funding included feedlot cost-share funding (\$610,000 additional to other cost-share funds), technical assistance funding (\$725,000), and regulatory program funding (\$1,725,000). The remainder of this legislative report will focus on the following five areas:

1. Additional resources provided to the MPCA and delegated counties in 2001.
2. Delegated county activities.
3. MPCA activities with special emphasis on legislative audit recommendation response.
4. Proposed 2003 legislation to meet federal program requirements.
5. Future feedlot program activities.

Section A. MPCA – Delegated County Resources

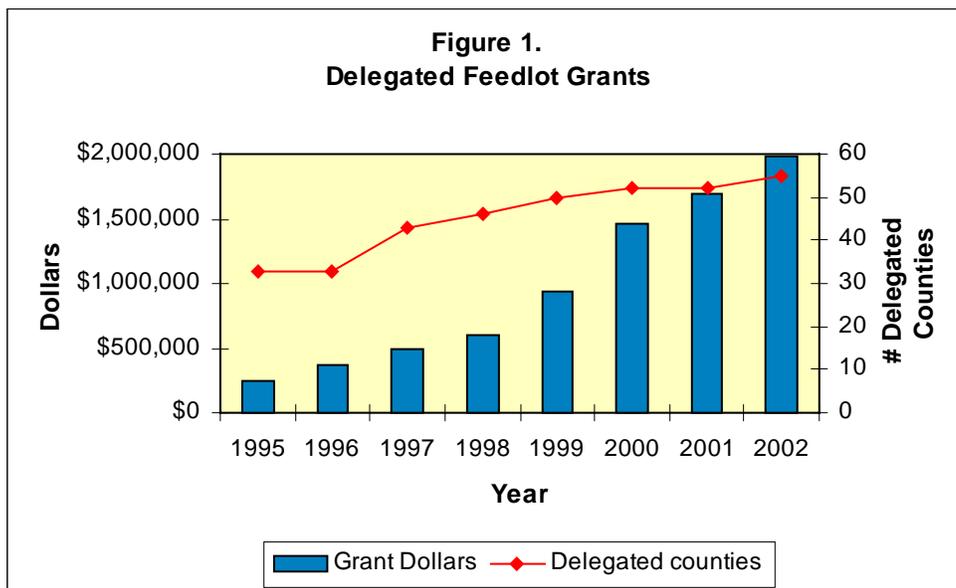
Administration of feedlot regulations is accomplished by a combination of state and local feedlot programs. The MPCA’s 1998 decentralization placed staff closer to where their services were needed throughout the state. The goal was to improve service delivery and ensure that decision making required in that service delivery was faster. Accordingly, MPCA regional FTE (full-time equivalents, a measure of staff time dedicated to a program) numbers increased from 116 FTE in 1997 to 187 FTE by the end of 2002. In addition to staff actually providing environmental regulatory activity, additional administrative and management support had to be assigned locally to assist them. The FTE numbers for program activity described in this report include environmental staff, and administrative and management support. The feedlot program is implemented in eight (8) offices throughout Minnesota, currently using 43 FTE. The current MPCA feedlot budget is \$5,374,000. The Legislature increased MPCA feedlot funding during the 2001 session. With the increase, the MPCA added nine additional staff as follows:

1. 1.0 FTE to improve the MPCA's data management system;
2. 2.5 FTE providing technical assistance to county feedlot officers and producers;
3. 0.5 FTE to improve the environmental review process, and
4. 5.0 FTE to improve the MPCA's efforts in permit review, land application review and compliance inspections, including enforcement

Appendix 1 shows the organizational structure for implementation of the feedlot program. Appendix 2 shows only the compliance/permit field staff and their deployment.

Fifty-five Minnesota counties have delegated county feedlot programs. County programs are staffed by County Feedlot Officers and are funded by State grants based on the number of feedlots in the county. Counties must match the State grant one to one with cash or in-kind services. See Appendix 3 for detail grant allocation to delegated counties from 1995 through 2002. Figure 1 shows the trend for grants made available for delegated counties during this period.

From 1995 to 2002, the legislature increased the funding for delegated counties by nearly two



million dollars. In 2001, the Legislature approved a one-time allotment of an additional \$500,000 from the General Fund to help county feedlot program funding in fiscal years 2002 and 2003. While the MPCA believes that continuation of this one-time funding is important, the MPCA cannot recommend that the Legislature make this one-time biennial

appropriation permanent at this time because of Minnesota's budget deficit of \$4.2 billion in fiscal years 2004 and 2005. However, if Minnesota's budget situation improves in the future, the MPCA will likely recommend permanent restoration of this appropriation for operation of delegated county feedlot programs.

FEEDLOT PROGRAM ACHIEVEMENTS

Section B. Delegated County Achievements

Delegated counties are important to the effective and efficient implementation of Minnesota's feedlot program. Delegated counties provide local understanding and commitment to the regulatory components of the feedlot program and to obtaining technical and financial assistance for livestock producers needing such aid.

1. Registration. A prime example of the value of delegated counties is the completion of the registration effort by January 2002 in accordance with the feedlot rules (M.R. ch 7020 (2000)). About 29,000 feedlots were registered from October 2000 to January 2002. Appendix 4 provides a map of the number of registered feedlots by county. Delegated counties are highlighted in green on this map.
2. Regulatory Components. Figure 2 summarizes key program achievements by

delegated counties. In addition to these program achievements, delegated counties issued 90 letters of warning of possible feedlot rule or permit violations in 2001.

3. Feedlot Owner Education. About 4,800 feedlot owners were provided feedlot information and training at meetings sponsored by delegated counties in 2001.

Section C. MPCA Achievements

The MPCA feedlot program made gains in every area of measurement in 2001 and 2002. Service to feedlot owners improved, new pollution protection and abatement programs were implemented, and the level of "field presence" increased statewide.

In an e-mail to the MPCA, dated September 13, 2002, Stephen Jann, Water Quality Permit Specialist, of the U.S. Environmental Protection Agency expressed appreciation "for the fine work MPCA is doing to assure that

**Figure 2.
County Feedlot Program Statistics**

Measurement	1997	2001	2002*
Number of delegated counties	43	52	55
Sites inspected	2151	5296	6050
Permits issued	109	301	345
Complaints received	321	407	475

*Note: 2002 figures are projected; county reports are not due to MPCA until March 2003

**Figure 3.
Record of NPDES Feedlot Permits**

Total estimated feedlots needing an NPDES permit.	566
Feedlots with NPDES permits on October 1, 2001.	45
NPDES permits issued from October 1, 2001 – September 30, 2002.	422
Total number of Minnesota Feedlots with NPDES permits.	467
Total number of NPDES permits remaining to be issued.	99

Concentrated Animal Feeding Operations (CAFOs) possess National Pollutant Discharge Elimination System (NPDES) permits as a means for preventing water pollution from manure and related wastewater.”

Below is a summary and discussion of the more significant results generated in 2001 and 2002 from the MPCA feedlot program.

1. MPCA completes permitting of 82 percent of large feedlot operations (1,000 or more animal units). All feedlot owners with 1,000 or more animal units are required by federal and state regulations to have an NPDES permit. Prior to October 1, 2001, only a small number of feedlots with 1,000 or more animal units had been issued an NPDES permit. See Figure 3 above. The 2001 legislative action funding additional feedlot positions allowed the MPCA to make implementation of this requirement a priority. As a result, 422 NPDES permits were issued during the 12-month period from October 1, 2001, to September 30,

2002. The issuance of these permits resolved the permit issuance backlog for this group of feedlot owners. The remaining feedlot owners required to have NPDES permits will receive them by December 2003. See Appendix 5, which provides a map of the number of NPDES permits issued by the MPCA in each county.

2. Timely issuance of permits to feedlot owners. The MPCA has improved markedly the amount of time required to issue a permit after receiving a complete permit application from a feedlot owner. Figure 4 shows that the MPCA met statutory permit issuance deadline requirements over 90 percent of the time during the past year.

The results shown in Figure 4 are a substantial improvement from the issuance rates that were common only two years ago. An MPCA report to the legislature in November of 2000 (Ability to Meet 60-day Issuance Deadline for Feedlot) indicated that permits issued in 1999 and 2000 were issued

**Figure 4.
MPCA Timeliness in Issuance of Feedlot Permits**

Calendar Period	Percent issued in compliance with Minn. Stat. § 15.99
October – December 2001	90
January – March 2002	89
April – June 2002	92
July – September 2002	100

within the requirements of M.S. §15.99 only 49 percent of the time. The MPCA attributes the improvement in the permit issuance timeliness to (1) new feedlot rules that clarified expectations for permit applicants, and (2) increased resources for the MPCA feedlot program provided by the 2001 Legislature.

3. Inspections: MPCA feedlot program emphasizes “field presence.” The MPCA is responsible for conducting all feedlot inspections in non-delegated counties; inspections for all feedlots with 1,000 or more animal units throughout the state; and, providing assistance on feedlot inspections when requested in delegated counties. As Figure 5 shows, the number of inspections increased substantially in 2002 as compared to 2001.

used in cases of negligence and serious violations where environmental impacts are observed. Figure 6, on page 6, indicates the compliance and enforcement actions taken by the MPCA in the fiscal year 2002.

6. Use of Manure Application Practices Increases after 2000 Feedlot Rule Revision and Training. More farmers are adopting recommended manure and nutrient management practices than before the feedlot rules were revised in 2000. A study, Land Application of Manure: Minnesota Livestock Producers’ Practices and Educational Needs, November 2002, was prepared by John Vickery, a consultant, for the University of Minnesota Water Resources Center. The Report contained an evaluation of farmer practices in four counties in different parts of Minnesota

**Figure 5.
MPCA Feedlot Inspections**

Inspection Type	FY01	FY02
CAFO (1,000 animal units or more)	155	250
Construction	34	122
Interim Permit Corrections Complete	31	22
Assistance	104	268
Total MPCA Feedlot Inspections	225	662

4. Feedlot Owner Education. About 9,450 feedlot owners, consultants, and technical assistance staff attended MPCA feedlot information and training meetings in 2001.
5. MPCA feedlot enforcement strategy emphasizes return-to-compliance. The MPCA and county feedlot programs work to communicate early and frequently with feedlot owners regarding matters of compliance. The MPCA uses many tools to achieve compliance including education, technical assistance, interim permits, and a range of enforcement actions. Enforcement actions with monetary penalties are typically

reported overall adoption rate of 10 key manure application practices increased from 53 percent before the 2000 revised feedlot rules to a current adoption rate of 69 percent.

The producers in the study expect their adoption rates will further increase by 2004 to 84 percent. Producers who attended training on the new land application rules predict a greater change in their practices compared to those who did not attend training. Those attending the training expect an overall 38 percent adoption rate increase, while non-attendees project a 22 percent adoption rate increase (pre-2000 to 2004 projected).

7. Establishment of county review program.
 To provide oversight and assistance to delegated counties, the MPCA has designed and implemented county feedlot program reviews. The MPCA has assigned 0.5 FTE from the 2001 Legislative-approved 9 FTE to conduct program reviews. The MPCA has conducted five county program reviews. The MPCA expects to complete seven additional reviews by July 1, 2003. The reviews examine the recordkeeping systems used by counties to track activities and the protocol used to conduct inspections and issue permits. To assist the counties with their recordkeeping activities, the MPCA developed tracking logs for counties to use.

During the 2002 Fiscal Year, the MPCA conducted a review of the Rock County delegated-county feedlot program as the result of U.S. Department of Justice criminal indictments against a county feedlot official.

The review discovered several deficiencies in Rock County's program including administrative errors, improper size calculations, and failure to identify pollution hazards. A Memorandum of Understanding, between the MPCA and Rock County, and the development of a workplan have been completed to provide a process to resolve these issues. The lessons learned from the Rock County program review have been incorporated in the ongoing county program reviews.

8. Response to Legislative Audit Report. The Legislative Auditor conducted an audit of Minnesota's feedlot program and produced an Audit Report in January 1999. The Audit Report contained several recommendations for improvement. Appendix 6 provides a breakdown of the Legislative Auditor's recommendations and the MPCA's actions to respond to the recommendations.

Figure 6.
MPCA Feedlot Compliance/Enforcement Data*

Compliance/Enforcement Response	Number of Actions
Letters of Warning	127
Administrative Penalty Orders	17
Stipulation Agreements	1
Total Actions	145

*Note: Data represents FY02 efforts.

FUTURE CHALLENGES

Section D. Proposed 2003 Legislation to meet Federal program requirements

The U.S. Environmental Protection Agency (EPA) has informed the MPCA that cost-limitations provisions in law related to corrective measures that may be required of a feedlot operator are inconsistent with point source (NPDES) requirements and needs to be revisited. This clarification is important for Minnesota in implementing the federal program. Appendix 7 contains letters from EPA to the MPCA explaining their concern with these provisions.

M.S. 116.07 subd 7(p) limits the amount that the MPCA may require a feedlot operator to spend on corrective measures to \$3000 unless 75 percent cost-share is made available for upgrades at feedlots with a capacity of less than 300 animal units; and \$10,000 unless the lesser of 75 percent cost-share or \$50,000 is made available for feedlots between 300 and 500 animal units.

Federal NPDES rules allow for designation of certain feedlots in these size categories as Concentrated Animal Feeding Operations (CAFOs). The EPA and the Minnesota Attorney General's Office have indicated that this cost limitation is inconsistent with Federal NPDES rules for compliance with feedlots designated as CAFOs and is not acceptable under the State's NPDES delegation agreement with EPA.

Failure to enact this clarification could endanger Minnesota's Federal delegation of the NPDES program including the loss of administrative funding for Minnesota's NPDES program, which includes 1500 additional businesses besides feedlots, and federal acceptance of Minnesota's feedlot program for federally-regulated feedlots.

The MPCA recommends that the Legislature amend M.S. 116.07, subd. 7(p) to exempt federally regulated feedlots from the cost-share provisions in parts (1) and (2) of this statute.

The MPCA proposes the following changes to M.S. 116.07 subd 7(p):

- (p) Unless the upgrade is needed to correct an immediate public health threat under section 145A.04, subdivision 8, the agency may not require a feedlot operator:
- (1) to spend more than \$3,000 to upgrade an existing feedlot with less than 300 animal units unless cost-share is available to the feedlot operator for 75 percent of the cost of the upgrade, or unless the facility is designated as a concentrated animal feeding operation(CAFO) under Code of Federal Regulations, title 40, section 122.23; or
 - (2) to spend more than \$10,000 to upgrade an existing feedlot with between 300 and 500 animal units, unless cost-share money is available to the feedlot operator for 75 percent of the cost of the upgrade or \$50,000, whichever is less, or unless the facility is defined or designated as a CAFO.

The MPCA recommended this change to the 2002 Legislature and was unsuccessful in gaining its approval. It is important that this change be considered again to provide consistency in Minnesota's feedlot program by maintaining administration of the program within the state.

Section E. Future Feedlot Program Activities

The MPCA has been fortunate to have received additional resources in 2001 and the cooperation and commitment of other partners. The combined resources help ensure an effective program that serves the needs of both the farm economy and the environment. Yet, many existing challenges remain to be met and new ones are emerging. This section discusses some of the main areas that the MPCA must address in the next four (4) years.

1. Follow-through on Open Lot Agreements.

The revised feedlot rules established a program, called the Open Lot Agreement (OLA), to eliminate run-off from small Minnesota farms. The OLA allows feedlot owners to correct pollution problems over a several year period without being penalized for passive runoff from the open lots. To be successful, the MPCA and delegated counties must clearly communicate feedlot owner advantages of entering into the agreement and, also, conduct regular follow-up site visits to monitor compliance with the different stages of the agreement. In Fiscal years 2003 and 2004, the MPCA expects to spend nearly 3000 staff hours on assisting producers relative to open lot agreements and the repair of existing problems.

2. Creating new approaches to environmental gains through partnerships with agencies and producers groups.

The MPCA actively promotes creative collaborations and projects with livestock producer groups and agencies related to agricultural production. More doors are opening to opportunities and creative ways for MPCA to accomplish its mission. For example, the MPCA had the opportunity to assist Minnesota Milk Producers in designing their own self-regulatory Environmental Quality Assurance plan. Another opportunity is using third-

party vendors to assist feedlot owners in complying with state rules, such as visiting open lot sites and guiding them in corrective actions or completing inspections/audits and working directly with the producer to correct any problems. Third party vendors would augment the work done by local government and state agencies in bringing facilities into compliance. The challenge for MPCA in this pursuit is ensure consistency between vendors and the governmental bodies in achieving environmental protection.

3. Develop proactive component to managing feedlots in harmony with social and environmental considerations.

In September 2002, the Environmental Quality Board found the Generic Environmental Impact Statement on Animal Agriculture (GEIS) adequate. The GEIS documented that the rural landscape is undergoing dramatic changes in areas such as land use, demographics, economic structure and culture. The MPCA must be a partner in the on-going efforts to devise policies, strategies and regulations to address the larger community factors while continuing to protect the environment. Economic incentives to ensure a vital agriculture sector are important. Equally important is a commitment to continue research on potential impacts associated with feedlots and cost-effective solutions to these impacts. Financial viability and environmental protection are compatible.

4. Maintain a strong county feedlot program.

The county feedlot program has proven effective in ensuring good service to feedlot owners and to maintain an effective regulatory field presence. With increasing emphasis on inspections and compliance, County Feedlot Officers (CFOs) need education and training to make competent farm site assessments and to be a source for discussing technical options and solutions

with feedlot owners and operators. The program must be accountable and reflect the increased role of counties in feedlot regulation and the funds they receive for administration. Since November 1999, the MPCA increased its efforts to hold quarterly meetings with feedlot officers across the state, and to hold one annual meeting for developing and maintaining program skills. Additionally, the MPCA provides one-on-one assistance to feedlot officers.

5. Rising importance of land application of manure component of animal agriculture. The GEIS highlighted the importance of good manure application practices to environmental protection. Land application of manure at feedlots has the greatest effect on water quality (positive or negative), particularly with the trend to larger animal feedlot operations. Manure is more likely to be applied at higher rates at larger feedlots because they may have limited acreage on which to apply their manure and the cost to transport manure long distances is expensive. These changes increase the need for MPCA to develop a Geographic Information System (GIS) capable of mapping land application sites to evaluate potential impacts and assist in the review of manure management plans and land application records.
6. Improve approaches to address issues associated with pasture operations and, specifically, winter-feeding. Producers have asked that guidance polices be established for winter-feeding setups. The MPCA is working with the Cattlemen's association and pasture experts to collect data and develop guidance for winter-feeding operations on pasture, crop stubble, and forage grain areas. In November 2002, the MPCA with assistance from experts from the University of Minnesota and the U.S. Department of Agriculture developed a

Guidance Factsheet for Best Management Practices in siting and managing winter-feeding operations. The next steps for 2003 include gathering data, further evaluating the 2002 Guidance document, and assessing the need for any rule revisions. The MPCA will be in contact with the legislature to keep them up to date on our activities in this area.

7. Develop new and streamlined approaches to enforcement component of program. Current mechanisms and strategies for initiating enforcement actions are cumbersome. Improvements currently in development to the compliance/enforcement process are a checklist (to be completed by March 2003) for use during on-site inspections to provide a thorough and consistent inspection process and generic enforcement documents for use at sites with similar violations. The enforcement process needs further review for additional ways to streamline the process while maintaining the integrity of the program.

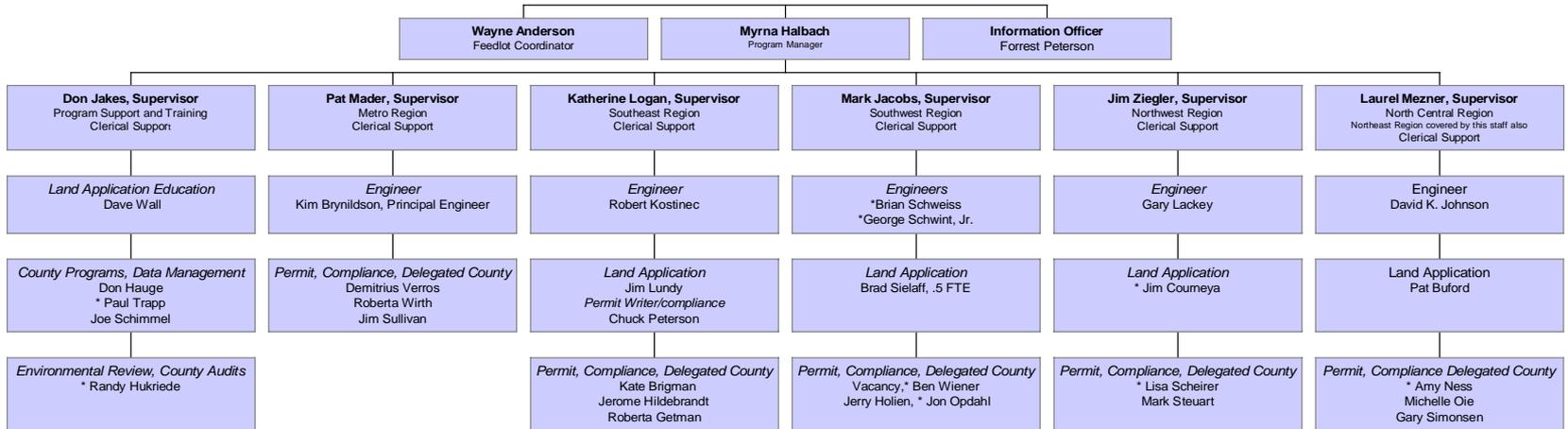
APPENDICES

1. Organizational Structure for MPCA Feedlot Program Implementation
2. Map Showing MPCA Compliance/Permit Staff Distribution
3. Approved Delegated County Grant Requests (1995 – 2002)
4. Map showing registered feedlots by County
5. Map showing NPDES permits by MPCA
6. Response to Office of Legislative Auditor's Feedlot Program Recommendations
7. Letters from the U.S. Environmental Protection Agency to MPCA

APPENDIX 1

Organizational Structure for Feedlot Program Implementation

Rod Massey, Division Director
Regional Environmental Management Division

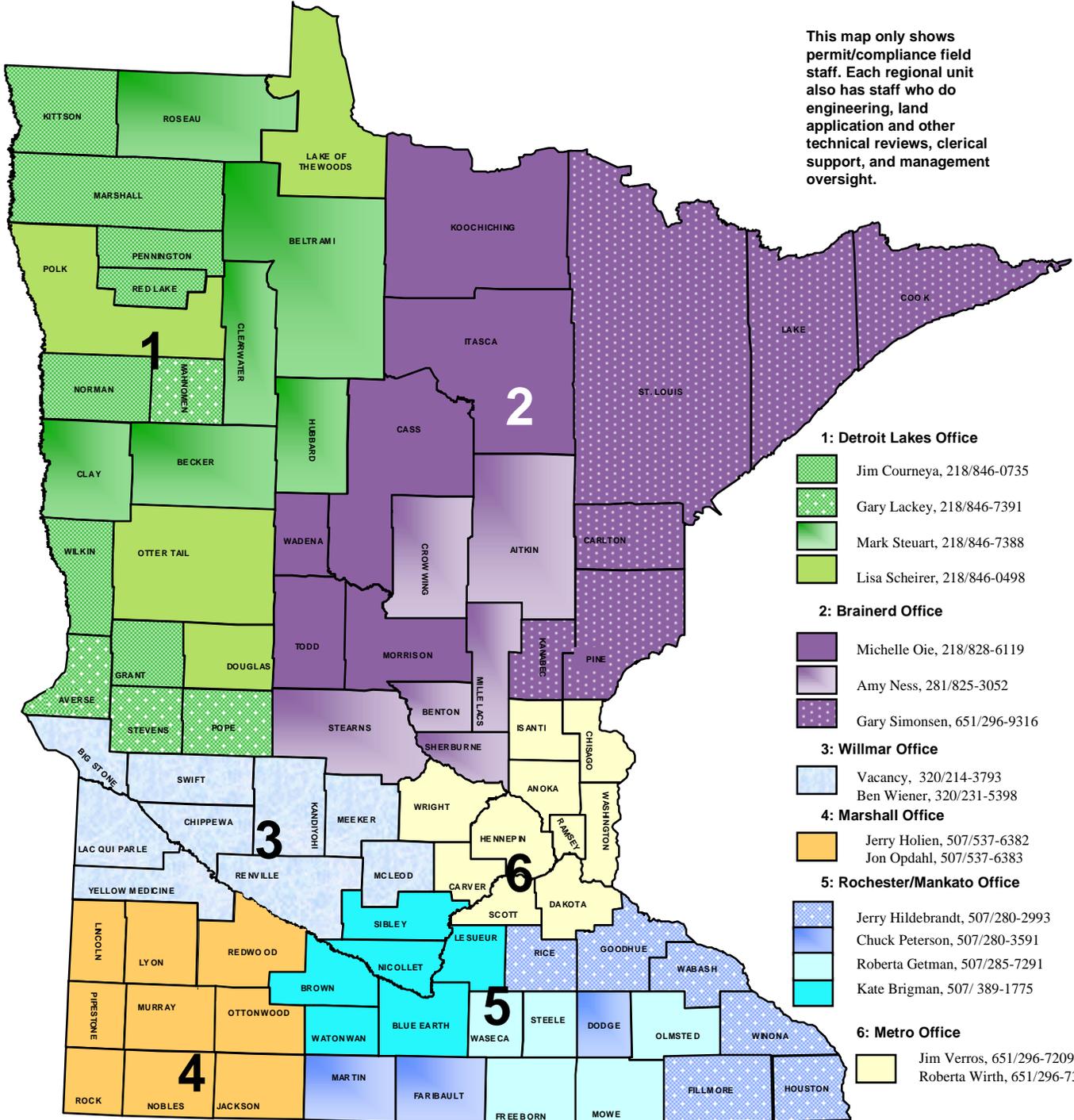


*Denotes 2001 FTE Appropriation

APPENDIX 2

Feedlot Permitting/Compliance Field Staff (Shows Base Location)

This map only shows permit/compliance field staff. Each regional unit also has staff who do engineering, land application and other technical reviews, clerical support, and management oversight.



Minnesota Pollution Control Agency
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November 2002

APPENDIX 3

County Feedlot Grant Program State of Minnesota

History of County Feedlot Delegation and Grant Program

Program Year		1995	1996	1997	1998	1999	2000	2001	2002
Number of Counties Delegated		33	33	43	46	50	52	52	55
Award Amount Per Feedlot	*Base	\$5	\$15	\$15	\$30	\$40	\$50	\$50	\$50
	*Inventoried	\$15	\$25	\$25	\$35	\$50	\$80	\$80	\$80
Total Amount Awarded		\$239,535	\$376,270	\$494,390	\$607,665	\$932,090	\$1,463,666	\$1,696,980	\$1,980,563

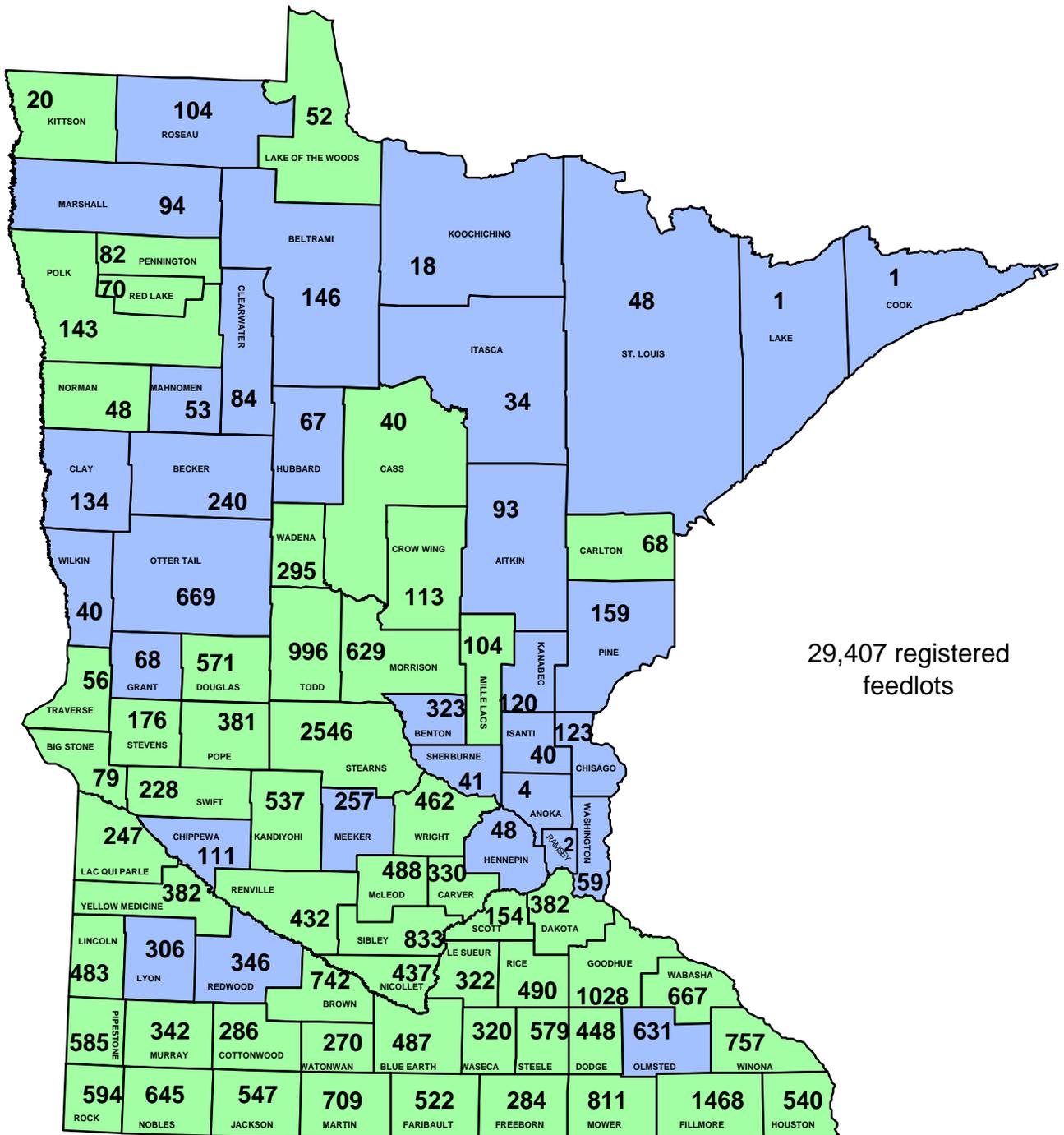
*Delegated counties are awarded funding at one of two-levels (Base and Inventoried). Counties that have conducted inventories and conducted site visits receive the higher rate (Inventoried). In 2002, counties were guaranteed a minimum of \$7500.

2002 County Feedlot Grant Summary

Delegated County	Number of Feedlots	Award Amount	Delegated County	Number of Feedlots	Award Amount	Delegated County	Number of Feedlots	Award Amount
Big Stone	<100	\$7,500	Lac Qui Parle	<100	\$7,500	Rice	1,117	\$89,360
Blue Earth	459	\$36,720	Lake of the Woods	<100	\$7,500	Rock	618	\$49,440
Brown	578	\$45,360	Le Sueur	333	\$26,010	Scott	271	\$21,680
Carlton	280	\$16,040	Lincoln	472	\$37,760	Sibley	650	\$52,000
Carver	417	\$33,360	Martin	774	\$61,920	Stearns	2835	\$226,840
Cass	<100	\$7,500	McLeod	400	\$32,000	Steele	560	\$44,800
Cottonwood	294	\$23,520	Mille Lacs	214	\$10,700	Stevens	178	\$8,900
Crow Wing	<100	\$7,500	Morrison	637	\$56,260	Swift	208	\$16,640
Dakota	335	\$26,800	Mower	738	\$59,040	Todd	818	\$59,980
Dodge	440	\$35,200	Murray	429	\$34,320	Traverse	<100	\$7,500
Douglas	532	\$42,020	Nicollet	419	\$33,520	Wabasha	673	\$53,840
Faribault	473	\$37,840	Nobles	494	\$39,760	Wadena	249	\$19,920
Fillmore	953	\$66,583	Norman	<100	\$7,500	Waseca	560	\$26,560
Freeborn	432	\$34,560	Pennington	<100	\$7,500	Watonwan	262	\$18,580
Goodhue	1013	\$60,400	Pipestone	585	\$46,800	Winona	805	\$64,400
Houston	610	\$48,640	Polk	<100	\$7,500	Wright	586	\$30,050
Jackson	583	\$44,150	Pope	342	\$27,360	Yellow Medicine	380	\$30,400
Kandiyohi	482	\$36,590	Red Lake	<100	\$7,500			
Kittson	<100	\$7,500	Renville	393	\$31,440			

APPENDIX 4

Number of Registrations Received by County *



29,407 registered feedlots

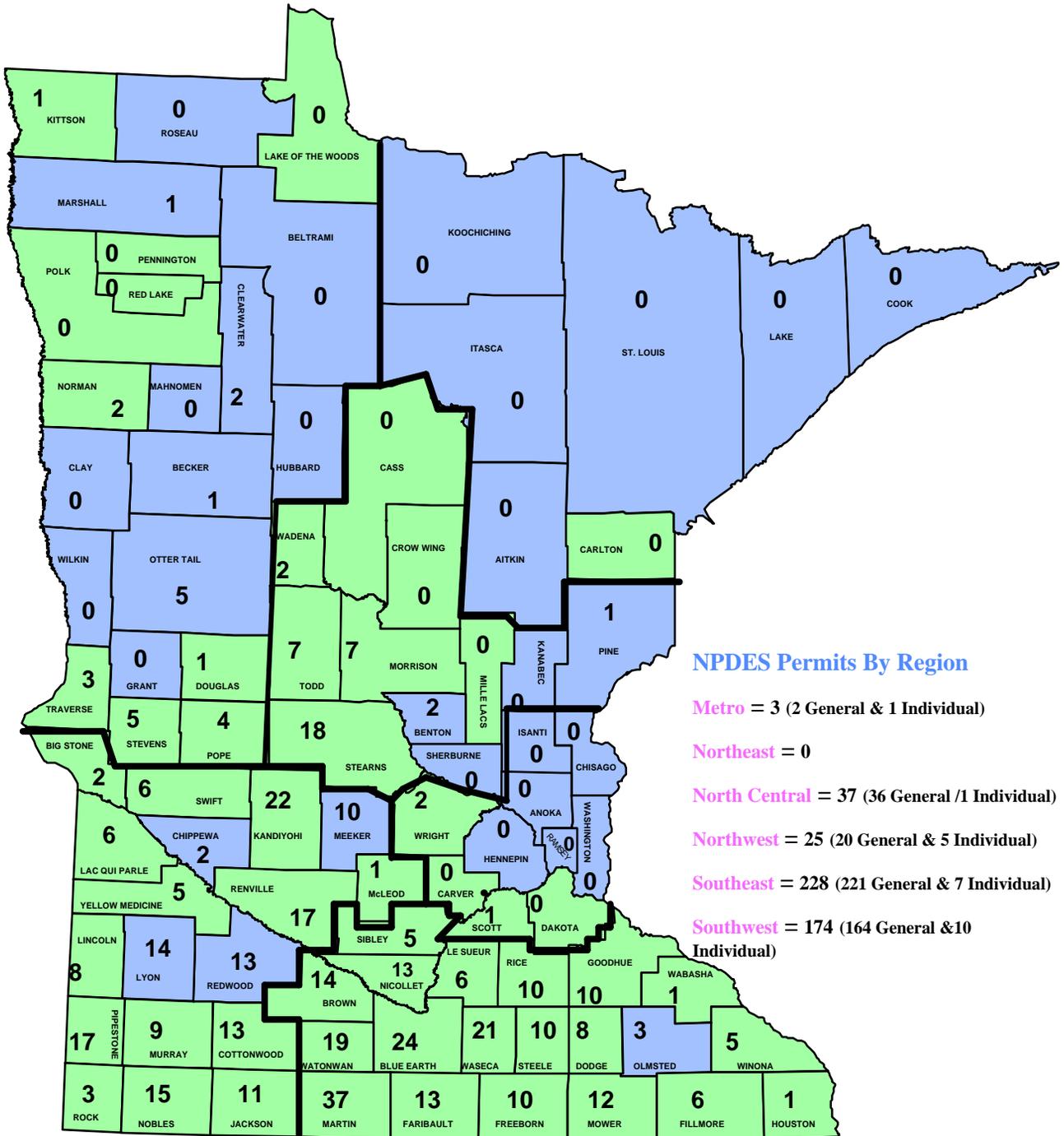


Green shaded counties are in the MPCA County Feedlot Program

*Numbers based on available information as of November 8, 2002. Revised map based on data entry will be available January 15, 2003.

APPENDIX 5

NPDES Permits Issued by MPCA *



NPDES Permits By Region

Metro = 3 (2 General & 1 Individual)

Northeast = 0

North Central = 37 (36 General /1 Individual)

Northwest = 25 (20 General & 5 Individual)

Southeast = 228 (221 General & 7 Individual)

Southwest = 174 (164 General & 10 Individual)



Green shaded counties are in the MPCA County Feedlot Program

*Estimated 566 facilities need an NPDES Permit based on December 31, 2001, data.

Numbers based on available information as of November 8, 2002.

More Permits under review for issuance by December 2003.

APPENDIX 6

ANIMAL FEEDLOT REGULATION: A PROGRAM REPORT PREPARED BY THE OFFICE OF LEGISLATIVE AUDITOR, JANUARY 1999

The MPCA provides the following response to recommendations contained in the Office of Legislative Auditor's report of January 1999.

PROGRAM ACTIVITY	RECOMMENDATION	MPCA RESPONSE	MPCA PROGRESS
Permitting			
	MPCA conduct more site visits during and after construction work.	MPCA and county feedlot officers are required to visit construction sites.	Required in 2001. Inspections have doubled from 225 in 2001 to 527 in the first 9 months of 2002.
	MPCA should conduct more site visits prior to issuing feedlot permits, particularly in environmentally-sensitive areas.	MPCA and county feedlot staff are required to visit all sites prior to permit issuance.	Required in 2001. - 95 percent of sites are inspected prior to permit issuance.
	MPCA should strive to provide a thorough review of permit applications and ensure that required documents are filed with the MPCA in a timely way.	MPCA developing review checklists and filing requirements.	To be fully implemented in March 2003 by MPCA and county feedlot staff.
	MPCA should notify feedlot owners with expired interim permits and take appropriate actions.	Using DELTA database, MPCA initiated tracking in 2002. Counties are using spreadsheets supplied by MPCA.	To be fully implemented in July 2003 by MPCA and county feedlot staff.
	MPCA also needs to develop a tracking system to make sure that feedlot owners follow through on permit requirements.	MPCA using DELTA database for tracking feedlot compliance with permit requirements.	Tracking began in 2001. Evaluation of data to begin in February 2003 as permits have two year timeframes to complete tasks.
	MPCA should strive to reduce its permitting backlog and reduce the amount of time producers wait for their applications to be reviewed.	MPCA eliminated 95 percent of backlog in 2000/2001 and reduced permit issuance time by 50 percent in 2002.	Focused backlog reduction in 2000 and 2001. Reduced permit review time focus since October 2001.
	MPCA should track timeliness of its performance in issuing permit applications.	MPCA tracking performance.	Tracking initiated in 2001. Since initiated in October 2001, permit issuance within 120 days of receiving a complete permit application was greater than 90 percent. This timeframe reflects an improvement from 49 percent prior to October 2001.

PROGRAM ACTIVITY	RECOMMENDATION	MPCA RESPONSE	MPCA PROGRESS
Complaint Handling and Enforcement			
	MPCA should require regular status reports from investigators to ensure progress is being made on water quality enforcement cases.	MPCA began status reports from compliance staff in September 2002, as part of the development of an electronic reporting.	MPCA will be using electronic reporting by March 2003.
	MPCA should have more staff resources assigned to water quality enforcement activities in order to reduce the backlog and speed up the resolution of cases.	MPCA requested reallocation of 3 FTE in 2001 Legislative session.	Increased from 3 FTE in 1998 to 6 FTE in 2002; new staff hired by February 2002.
	MPCA should ensure that regional offices are consistent in their willingness to investigate potential water quality violations.	MPCA assigned Feedlot compliance coordinator and Feedlot program manager with this responsibility in October 2000. Additionally, Minn. R. part 7020.1600 requires more compliance efforts from delegated counties.	Ongoing effort to ensure consistency. This effort will require additional efforts as the feedlot program at the MPCA and delegated counties is ramped up and new staff receive training.
Ongoing Oversight of Feedlots			
	Legislature weigh the need for additional county inventories for regulatory purposes along with the budget request it will receive for the Generic Environmental Impact Statement on Animal Agriculture.	The need for county inventories was replaced by a registration and inspection program in October 2001 (Minn. R. ch. 7020).	Revised feedlot rules of October 2000 establish this protocol. Over 29,000 feedlots are registered as of November 2002.
	Policymakers should consider alternative ways of reducing water pollution emanating from small feedlots, including the need for additional public funds and cost-effective ways of achieving a reduction in water pollution.	The 2001 Legislature increased funding for cost-share at feedlots. Minn. R. ch 7020 provides producers of small feedlots the option of signing an Open Lot Agreement and receive a 10-year compliance window or use an interim permit to correct situations in two years.	<p>Required compliance standards: October 2005 – 50 percent reduction in runoff from open lots</p> <p>October 2010 – 100 percent compliance</p> <p>MPCA Goal: 7500 open lot agreements by 2005</p> <p>As of January 2002, 334 open lot agreements had been signed. This represents about 4 percent of the MPCA's goal. Producers have until October 1, 2005, to sign the Open Lot Agreement.</p>

PROGRAM ACTIVITY	RECOMMENDATION	MPCA RESPONSE	MPCA PROGRESS
MPCA Oversight of Counties			
	MPCA should provide more effective oversight of county feedlot programs. MPCA should ensure that counties are meeting the financial requirements set forth in law and should establish expectations and standards for county feedlot programs.	In 2000, increased funding from \$40 to \$50 per feedlot for no inventory, and from \$50 to \$80 per feedlot for Level II inventory. A Level II inventory requires a site visit of any feedlot before it may be listed. In 2001, provided for minimum funding for counties of \$7500.	Legislature should continue one-time biennial appropriation to counties in 2003 session. MPCA Goal: complete 10 county program reviews per year. In 2002, the MPCA began a formal program review at the county level. Five program reviews were completed in 2002.
	MPCA should encourage, and the Legislature should support, the participation of additional counties in the feedlot program.	Stable funding needed to support additional delegated counties.	Counties and MPCA working together to evaluate funding formula for proposal in Legislative session 2004. Funding is critical to maintaining a strong county presence: 1995 - 33 delegated counties (\$239,000) 1998 – 47 delegated counties (\$607,665) 2001 – 55 delegated counties (\$1,696,980)
	MPCA should attempt to ensure that county feedlot officers receive adequate training.	Training events in 2001/2002 with formal Feedlot Academy in development.	Training events: March 2001/October 2002/May 2003. MPCA Goal: Academy begin in June 2003.
Implementation Options			
	MPCA should make every possible effort to implement the recommendations in this report using existing resources.	The MPCA provided a needs analysis for additional resources to 2001 Legislature in its November 15, 2000, “Report to Legislature on: The Minnesota Pollution Control Agency’s Ability to Meet 60-day Issuance Deadline for Feedlot Permits”.	2001 Legislature approved funding for 9 additional FTEs for the MPCA to improve its response to permit issuance, compliance activities, and oversight of delegated counties.
	MPCA and counties probably need additional resources to address certain problems in feedlot regulation.	MPCA requested additional resources from the 2001 Legislature in terms of increased staffing for the MPCA and funding for delegated counties.	2001 Legislature approved an additional 9 FTE for the MPCA and a one-time biennial funding for counties in the amount of \$500,000.
	It is unclear how much additional resources MPCA may need to improve its feedlot program.	The MPCA provided a needs analysis for additional resources to 2001 Legislature in its November 15, 2000,	See Appendix 8 - resource review

PROGRAM ACTIVITY	RECOMMENDATION	MPCA RESPONSE	MPCA PROGRESS
		<p>“Report to Legislature on: The Minnesota Pollution Control Agency’s Ability to Meet 60-day Issuance Deadline for Feedlot Permits”.</p>	
	<p>Prior to request for additional staff, MPCA should provide the Legislature with more information on its estimated workload and the average amount of staff time it takes to complete major tasks.</p>	<p>The MPCA provided a needs analysis for additional resources to 2001 Legislature in its November 15, 2000, “Report to Legislature on: The Minnesota Pollution Control Agency’s Ability to Meet 60-day Issuance Deadline for Feedlot Permits”.</p>	<p>See Appendix 8 - resource review</p>
	<p>Before appropriating any additional funds to increase MPCA staffing, the Legislature should consider whether funds from other MPCA activities could be permanently reallocated to feedlot regulation.</p>	<p>The MPCA reallocated 3 FTE for activities related to the feedlot program.</p>	<p>The 3 FTEs were instrumental in issuing 229 NPDES permits from June 2001 through December 2001.</p>

APPENDIX 7

Letters from U.S. Environmental Protection Agency to MPCA - Attached

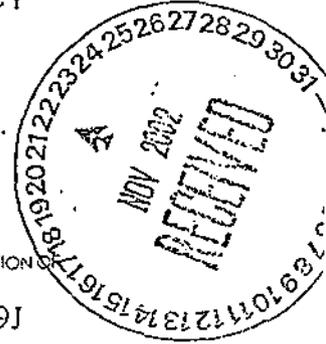


UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

NOV 13 2002

REPLY TO THE ATTENTION

R-19J



Karen Studders, Commissioner
Minnesota Pollution Control Agency
520 Lafayette Road North
Saint Paul, Minnesota 55155-4194

Subject: Concentrated animal feeding operations

Dear Ms. ^{Karen} Studders:

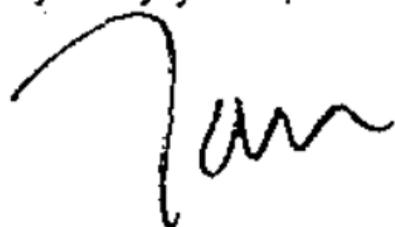
Thank you for your August 2, 2002, letter in which you reported that the Minnesota Legislature adjourned last May without solving the problem with Minnesota's authority to prevent water pollution from the manure and wastewater generated by concentrated animal feeding operations. Specifically, the Legislature adjourned without amending Minn. Stat. §116.07, subd. 7(p) to resolve the basis for this Agency's January 30, 2002, disapproval of that section. Like the Minnesota Pollution Control Agency, we are disappointed that the Minnesota Legislature failed to act in the last session.

The United States Environmental Protection Agency, Region 5, is highly satisfied with the actions MPCA continues to take to issue National Pollutant Discharge Elimination System permits to large-sized CAFOs. Our satisfaction notwithstanding, I must emphasize that the Clean Water Act requires Minnesota to maintain all the authority needed to administer the NPDES program. In fact, action by a state legislature limiting the state's authority is a criterion for withdrawal of the NPDES program from a state (*see* 40 CFR section 123.63).

The USEPA feels strongly that MPCA must retain the primary responsibility for preventing water pollution from CAFOs as well as cities and businesses throughout Minnesota. For CAFOs, proper fulfillment of this responsibility will help to assure that owners or operators are not at risk of citizen lawsuits or federal enforcement based on an allegation that the MPCA failed to require the CAFOs to comply with the Clean Water Act. Therefore, MPCA needs to redouble its efforts to work with the Minnesota Legislature to promptly solve the problem with the state's authority for CAFOs. In the meantime, I have instructed my staff to work with MPCA to develop additional details on our existing plan for coordination with respect to enforcement and permitting for CAFOs with more than 300 but less than 500 animal units. We anticipate that a detailed plan will include federal enforcement action as necessary to properly resolve violations by CAFOs of this size. In addition, we anticipate that the plan will include USEPA objection to Minnesota permits for such CAFOs when the permits do not include conditions to prevent water pollution as required under the Clean Water Act.

Thank you for your personal involvement in the effort to resolve this matter without further delay.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Tom', with a large, sweeping initial stroke.

Thomas V. Skinner
Regional Administrator

cc: Mr. Rodney Massey, P.E., MPCA ✓
Mr. Wayne Anderson, MPCA



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
 REGION 5
 77 WEST JACKSON BOULEVARD
 CHICAGO, IL 60604-3590

JAN 30 2002

REPLY TO THE ATTENTION OF

OPTIONAL FORM 99 (7-99)

FAX TRANSMITTAL

of pages 19

Karen Studders from Tom Skinner (S. Jan)

TO: USEPA

Phone: 312 886 2446 (Jan)

FAX # 651 296 6334

Fax #

NSN 7540-01-317-7368 5000-101 GENERAL SERVICES ADMINISTRATION

Karen Studders, Commissioner
 Minnesota Pollution Control Agency
 520 Lafayette Road North
 Saint Paul, Minnesota 55155-4194

Subject: Concentrated Animal Feeding Operations

Dear Karen:

I am writing to advise you of the findings and conclusions from our review of Minnesota's legal authority to prevent water pollution from the manure and wastewater generated by concentrated animal feeding operations (CAFOs). This review focused primarily on the 2000 Minnesota Laws, Chapter 435, as well as amendments to Chapter 7020 of the Minnesota Rules adopted in 2000. On behalf of the United States Environmental Protection Agency (USEPA), Region 5, I offer my thanks to you and your staff for working with Minnesota Attorney General Mike Hatch to help us understand Minnesota law and rules for CAFOs.

Certain provisions in Minnesota law constitute a revision to Minnesota's National Pollutant Discharge Elimination System (NPDES) program. These are identified below. For ease of reference, the provisions are identified through citations to the Minnesota Statutes, as amended during the 2000 session of the Minnesota Legislature.

Scope of the Revision to the Minnesota NPDES Program

<u>Citation</u>	<u>Subject Matter</u>
Minn. Stat., §116.07, subd. 7c(a).	Scope of the permit program.
Minn. Stat., §116.07, subd. 7(b).	Time for acting on permit applications.
Minn. Stat., §116.07, subd. 7(m).	Permit conditions.
Minn. Stat., §116.07, subd. 7(n).	Fines for discharges from stockpiles and land application of manure.

<u>Citation</u>	<u>Subject Matter</u>
Minn. Stat., §116.07, subd. 7(o).	Discharges from stockpiles and land application of manure.
Minn. Stat., §116.07, subd. 7(p).	Facility upgrades.
Minn. Stat., §116.072, subd. 13(b).	Administrative penalties.

Under Title 40 of the Code of Federal Regulations (CFR), section 123.62, this revision is subject to the approval or disapproval of USEPA. Authority to approve or disapprove revisions to the Minnesota program has been duly delegated from the USEPA Administrator to the undersigned Regional Administrator of USEPA, Region 5.

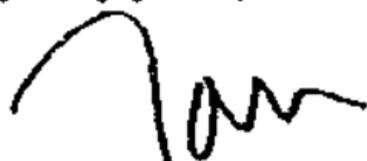
For the reasons described in the enclosure, USEPA, Region 5, is approving the revision in part and disapproving the revision in part.

The Clean Water Act and federal regulations require states with approved NPDES programs, including Minnesota, to maintain the authority needed to administer their programs in conformance with the Act and regulations at all times. As a result, Minnesota needs to properly amend the provision USEPA is disapproving herewith. Within 20 days of receipt of this letter, please confirm in writing that the Minnesota Pollution Control Agency (MPCA) will seek the necessary amendment. The amendment needs to be enacted into law before April 2002. If in the future a Minnesota court strikes down or limits Minnesota's authority to administer the NPDES program including, but not limited to, the legal authority upon which our partial approval of the present revision is based, USEPA, Region 5, reserves the right to initiate a subsequent revision to the Minnesota program.

As you know, USEPA is working with interested parties to revise and update the federal clean-water regulations for CAFOs. We appreciate the thoughtful comments the State of Minnesota and its citizens provided in response to the proposed regulations. Once changes to the federal regulations are published in final form, an event we expect to occur in January 2003, Minnesota will need to reconsider its legal authority for CAFOs. If changes to Minnesota Statutes are necessary, they will need to be enacted into law within two years after USEPA revises the federal regulations. If changes to Minnesota Rules are necessary, they will need to be adopted within one year after USEPA revises the federal regulations.

Thank you for your personal involvement in the effort to resolve the current concern with Minnesota's legal authority for CAFOs. I look forward to working cooperatively with you to achieve an appropriate resolution.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Tom Skinner', written over a horizontal line.

Thomas V. Skinner
Regional Administrator

Enclosure

cc: The Honorable Mike Hatch, Minnesota Attorney General
Mr. Rodney Massey, P.E., MPCA

Enclosure

Revision to the Minnesota NPDES Program
for

Concentrated Animal Feeding Operations

I. Approved provisions.

A. Scope of the permit program.

Minnesota law and rules provide in relevant part that (1) no person may discharge a pollutant from a point source into the waters of the state without obtaining an National Pollutant Discharge Elimination System (NPDES) permit (*see* Minn. R. 7001.1030, subp. 1), (2) the term "point source" includes concentrated animal feeding operations (CAFOs) from which pollutants are or may be discharged (*see* Minn. Stat. §115.01, subd. 11), (3) "CAFO" means animal feedlots meeting the definition of a CAFO in 40 CFR, section 122.23 (*see* Minn. R. 7020.0300, subp. 5a), and (4) an NPDES permit is required for the construction and operation of an animal feedlot that meets the criteria for CAFO (*see* Minn. R. 7020.0405, subp. 1).

Taken together, to some observers the above provisions may appear not to harmonize with the relatively new language in Minn. Stat. §116.07, subd. 7c(a), which says, "[t]he [Minnesota Pollution Control Agency (MPCA)] must issue National Pollutant Discharge Elimination System permits for feedlots with 1,000 animal units or more and that meet the definition of a concentrated animal feeding operation in Code of Federal Regulations, title 40, section 122.23." A conflict arises to the extent this provision is interpreted to limit the scope of the permit requirement as compared with other provisions in Minnesota law and rules. This is further discussed below.

Under Minnesota rules, CAFOs include animal feedlots that meet the definition of a CAFO in 40 CFR, section 122.23. *See* Minn. R. 7020.0300, subp. 5a. Generally, this federal regulation defines the term "CAFO" in three ways. First, animal feeding operations with one type of animal are CAFOs if they have more than the number of animals in items (a)(1) through (9) in 40 CFR, part 122, Appendix B. Under item (a)(10) in Appendix B, operations with more than one type of animal are CAFOs if they have more than 1,000 "animal units" as that term is defined in the federal regulations. Second, animal feeding operations with one type of animal are

CAFOs if they have animals within the numeric range in items (b)(1) through (9) in 40 CFR, part 122, Appendix B. Under item (b)(10) in Appendix B, operations with more than one type of animal are CAFOs if they have more than 300 but less than 1,000 "animal units" as that term is defined in the federal regulations. However, operations described in items (b)(1) through (10) are CAFOs only if pollutants are discharged via a man-made device or waters of the United States pass through the animal production area at the operation. Third, other operations are CAFOs if designated as such on a case-by-case basis under 40 CFR, section 122.23(c).

Minn. Stat. §116.07, subd. 7c(a), establishes an affirmative requirement that MPCA issue NPDES permits to certain feedlots. It does not prohibit MPCA from issuing NPDES permits to any CAFOs. Even so, to some observers the provision may appear not to harmonize with other provisions of Minnesota law and rules because it does not affirmatively require MPCA to issue NPDES permits for discharges or potential discharges of pollutants from all feedlots that are CAFO point sources under Minn. Stat. §115.01, subd. 11, and Minn. R. 7020.0300, subp. 5a. Specifically, it does not require MPCA to issue permits to the CAFOs described in item (b) in 40 CFR, part 122, Appendix B. Also, it does not require MPCA to issue permits to the larger feedlots that are CAFOs under item (a) in Appendix B but have fewer than 1,000 animal units as that term is defined in Minn. Stat. §116.06, subd. 4a, and Minn. R. 7020.0300, subp. 5. That is to the extent the word "and" in Minn. Stat. §116.07, subd. 7c(a), has the effect of creating a two-part test for establishing an affirmative requirement that MPCA issue permits to larger CAFOs.

In an August 6, 2001, letter to USEPA, Region 5, Minnesota Attorney General Mike Hatch provided his opinion on Minnesota law as it relates to potential conflicts between existing and new provisions of state law. He said, "[u]nder Minnesota law, courts presume that the legislature acts with full knowledge of existing law on the same subject and that new statutes will harmonize rather than conflict with existing laws. Dorn v. Peterson, 512 N.W. 2d 902, 905 Minn. Ct. App. 1994 citing People for Enviro. Enlightenment & Responsibility v. Minn. Enviro. Qlty. Council, 266 N.W. 2d 858, 866 (Minn. 1978). As a result, courts avoid interpreting new laws in a manner that creates a conflict with existing law on the same subject if possible." The Attorney General went on to say, "[i]nterpreting [Minn. Stat. §116.07, subd. 7c(a)] to excuse [from the permit requirement] animal feedlots that qualify as CAFOs under federal law but have fewer than 1,000 animal units under state multipliers would result in a conflict with several existing laws. Accordingly, such an interpretation is improper."

If the Minnesota Legislature knew the existing permit requirement for CAFOs and intended to exclude certain CAFOs from the requirement, it could have harmonized Minn. Stat. §116.07, subd. 7c(a), with Minn. Stat. §115.01, subd. 11, Minn. R. 7020.0500 (1999) and Minn. R. 7001.1030, subp. 1. The Legislature did not do this. Consistent with the statement from the Minnesota Attorney General, then, USEPA, Region 5, finds that provisions of Minnesota law and rules in addition to Minn. Stat. §116.07, subd. 7c(a), establish the scope of the permit requirement for CAFOs in Minnesota. The additional provisions include, but are not limited to, Minn. Stat. §115.01, subd. 11, and Minn. R. 7001.1030, subp. 1. They require all feedlots that meet the definition of CAFO in Minn. R. 7020.0300, subp. 5a, to obtain and comply with an NPDES permit before discharging a pollutant or combination of pollutants to waters of the state.

Minn. Stat. §115.03, subd. 5, provides further support for the finding described above. Under this provision of Minnesota law, MPCA has the authority to perform any and all acts minimally necessary to retain its approved NPDES program. If MPCA did not have the authority to issue NPDES permits for discharges or potential discharges from all CAFOs, including those described in item (b) in 40 CFR, part 122, Appendix B, as well as those described in item (a) in 40 CFR, part 122, Appendix B, but having fewer than 1,000 animal units under Minnesota law, its NPDES program for CAFOs would not conform to the Clean Water Act. This would be contrary to Minn. Stat. §115.03, subd. 5.

USEPA, Region 5, hereby approves the revision to the Minnesota NPDES program caused by enactment of Minn. Stat. §116.07, subd. 7c(a).

B. Time for acting on permit applications.

Minn. Stat. §15.99 provides, in general, that certain types of permits must be issued or denied within 60 days. Under Minn. Stat. §116.07, subd. 7(b), Minn. Stat. §15.99 applies to feedlot permit applications filed after October 1, 2001.

The potential applicability of §15.99 to the issuance, denial, or modification of NPDES permits for CAFOs raised questions about whether MPCA retains adequate authority to administer its NPDES program for CAFOs in conformance with 40 CFR, section 123.30, and the following provisions in 40 CFR, section 123.25(a): (1) and (26) through (31). These regulations

contain certain of the procedural requirements states must satisfy in the course of issuing, denying, or modifying NPDES permits.

According to the August 6, 2001, letter from the Minnesota Attorney General, MPCA retains adequate authority. This is because Minn. Stat. §15.99 contains certain procedural safeguards. Specifically, time does not begin to accrue under §15.99 until (1) MPCA receives all information required by law, rule¹, or policy of that agency, (2) all processes required by a state or federal law occur, and (3) approval, when required, is given by a federal agency. It does not undermine MPCA's authority for the additional reason that the 60-day limit does not apply when the time period for a required process makes it impossible for MPCA to act on a permit application within 60 days. Furthermore, the Attorney General said §15.99 does not interfere with the opportunity for judicial review of decisions on permit applications since any person aggrieved by the denial or issuance of a permit has the right to judicial review. This right does not attach until after a final decision by MPCA.

In light of procedural safeguards in Minn. Stat. §15.99 and Minn. R. 7020.0505 (*see* footnote 1), as well as the August 6, 2001, letter from the Minnesota Attorney General, USEPA, Region 5, finds that Minn. Stat. §116.07, subd. 7(b), does not undermine MPCA's authority to administer its NPDES program for CAFOs in conformance with 40 CFR, sections 123.25 and 123.30. The revision to Minnesota's program caused by enactment of this provision is hereby approved.

C. Permit conditions.

Minnesota law provides that, "after the proposed rules published in the State Register, volume 24, number 25, are finally adopted, the [MPCA] may not impose additional conditions as

¹ In a September 12, 2001, letter to USEPA, Region 5, the Minnesota Center for Environmental Advocacy expressed the concern that, if a permit application is not complete, the time period under Minn. Stat. §15.99 is not extended unless MPCA advises the applicant of the missing information within 10 business days. However, Minn. Stat. §15.99, subd. 3(a) and Minn. R. 7020.0505, subp. 1, should temper such a concern. Under §15.99, subd. 3(a), the 60-day clock does not begin to run until MPCA receives all the information required by law, rule, or policy of MPCA. Moreover, Minn. R. 7020.0505, subp. 1, specifically prohibits MPCA from processing permit applications until it receives all the required information.

part of a feedlot permit unless specifically required by law or agreed to by the feedlot operator.” See Minn. Stat. §116.07, subd. 7(m). The proposed rules referenced in this provision are Minn. R. ch. 7020, Minn. R. 7001.0020, Minn. R. 7002.0210, and Minn. R. 7002.0280. MPCA proposed and finally adopted these rules in December 1999 and October 2000, respectively. They are in effect.

Minn. Stat. §116.07, subd. 7(m), raised a question about MPCA’s ability to include conditions in NPDES permits for CAFOs based on requirements established after the proposed rules were finally adopted. It also raised a question about MPCA’s ability to establish permit conditions based on requirements other than those in the final rules, if the additional conditions are not specifically required by law or agreed to by the operator.

As provided in Minn. R. ch. 7001, Minnesota NPDES permits include effluent limitations, general conditions, special conditions (including, but not limited to, monitoring, record-keeping, and reporting requirements), and best management practices (BMPs). Generally, effluent limitations in NPDES permits are based on federal effluent limitations guidelines (ELG) or new source performance standards (NSPS), the best professional judgement (BPJ) of the permit writer, or water quality standards, whichever is more stringent. Since Minn. R. 7020.2003, subp. 2, incorporates 40 CFR, part 412, by reference, there should be no debate about MPCA’s authority to establish effluent limitations in CAFO permits based on the federal ELG or NSPS for feedlots. Similarly, since Minn. R. 7020.0505, subp. 5, incorporates Minn. R. 7001.0150 by reference, there should be no debate about MPCA’s authority to establish special conditions (including monitoring, record-keeping, and reporting requirements) and certain general conditions in NPDES permits for CAFOs.

Minn. R. 7001.1080 contains MPCA’s authority to establish effluent limitations in NPDES permits based on BPJ or water quality standards. It also contains MPCA’s authority to establish BMPs in permits. Minn. R. 7001.1090 contains MPCA’s authority to prescribe certain general conditions in permits. The history of these rules shows that they were last amended more than 10 years ago. As a result, one cannot claim that the permit conditions they require are untimely under Minn. Stat. §116.07, subd. 7(m). Moreover, the express language of Minn. R. 7020.0405, subp. 1, providing that NPDES permits for CAFOs are “issued under [chapter 7020] and chapter 7001,” shows that Minn. Stat. §116.07, subd. 7(m), does not apply to CAFO permit conditions established pursuant to any of the requirements in Minn. R. ch. 7001 since that rule

was part of the proposed rules published in the State Register, volume 24, number 25, in December 1999 and finally adopted in October 2000.

In the record supporting Minn. R. ch. 7020, as proposed, MPCA clearly stated its intention with regard to the nexus between that rule and Minn. R. ch. 7001. It said, "... NPDES and [State Disposal System] permits must be issued, reissued, revoked, or modified in accordance with Minn. R. ch. 7001 and [Minn R. ch. 7020]." *See Statement of Need and Reasonableness (SONAR) In the Matter of Proposed Amendments to Minnesota Rules Chapters 7001, 7002, and 7020 Relating to Animal Feedlots, Storage, Transportation, and Utilization of Animal Manure*, December 8, 1999, at p. 104. MPCA also said, "[i]t is not the MPCA's intention to suggest that all of the other rule requirements (e.g., chapters 7001, ...) are not now applicable ..." Rather, MPCA said, "... CAFOs are still subject to ... regulatory procedures and substantive requirements ... in chapter 7001 ..." and "NPDES permits are issued using the criteria and procedures in chapter 7001." *See MPCA Staff Initial Post-Hearing Responses*, OAH Docket No. 6-2200-12162-1, March 6, 2000, at pp. 114 and 115.

In his August 6, 2001, letter, the Minnesota Attorney General affirmed the continued applicability of Minn. R. 7001.1080 and Minn. R. 7001.1090 to NPDES permits for CAFOs. The Attorney General said, "[n]othing in the language of Minn. R. 7001.1080 or Minn. R. 7001.1090 suggests that these provisions do not apply to NPDES permits for feedlots. On the contrary, Minn. R. 7001.1090, subp. 1. expressly establishes '[c]onditions for *all* NPDES permits.' (emphasis added). Similarly, Minn. R. 7001.1080 specifically provides that an NPDES permit issued by the MPCA 'must contain conditions necessary for the permittee to achieve compliance with *all* Minnesota or federal statutes or rules.' (emphasis added). The clear intent of these rules is to require that all NPDES permits issued by MPCA to any type of permittee include conditions that ensure compliance with federal requirements."

To ensure compliance with federal requirements, NPDES permits for CAFOs must include certain conditions. These include effluent limitations pursuant to the specific requirement in the Clean Water Act and federal regulations that permits control point source discharges as necessary to achieve compliance with and preserve water quality standards. *See* the Clean Water Act, sections 301(b)(1)(C) and 402(a), and 40 CFR, section 122.44(d) (made applicable to state NPDES programs by 40 CFR, section 123.25(a)(15)). When the ELG or NSPS in 40 CFR, part 412, do not apply to a particular discharge from a CAFO, such as

noncontact cooling water, then the Clean Water Act and federal regulations specifically require permits to include effluent limitations based on BPJ. See the Clean Water Act, section 402(a)(1)(B), and 40 CFR, section 122.44(a) (made applicable to state NPDES programs by 40 CFR, section 123.25(a)(15)). Under the Clean Water Act, section 402(a)(3) and (c)(2), NPDES permits also must include the general conditions in 40 CFR, section 122.41 (made applicable to state NPDES programs by 40 CFR, section 123.25(a)(12)).

In accordance with the express language of Minn. R. 7020.0405, subp. 1, as proposed and finally adopted, the long-standing requirements in Minn. R. 7001.1080 and Minn. R. 7001.1090, the August 6, 2001, statement from the Minnesota Attorney General, and the specific requirements of the Clean Water Act and federal regulations, USEPA, Region 5, finds that Minn. Stat. §116.07, subd. 7(m), does not undermine MPCA's authority to establish (1) effluent limitations based on BPJ or water quality standards or (2) general conditions in NPDES permits for CAFOs.

The Clean Water Act, section 402(a)(3) and (c)(2), specifically requires NPDES permits to include all the conditions that are required under 40 CFR, section 122.44 (made applicable to state NPDES programs by 40 CFR, section 123.25(a)(15)). This regulation specifically requires BMPs in permits when numeric effluent limitations are infeasible or the practices are reasonably necessary to achieve compliance with effluent limitations or to carry-out the intent and purpose of the Clean Water Act. See 40 CFR, section 122.44(k). In relevant effect, Minn. R. 7001.1080, subp. 3, is the same as 40 CFR, section 122.44(k). For two reasons, USEPA has determined that BMPs are necessary in NPDES permits for CAFOs. See 66 Federal Register 3051-3052, January 12, 2001. First, it is infeasible to establish numeric effluent limitations applicable to discharges resulting from the application of manure and wastewater to land. Second, CAFOs have historically not attained compliance with effluent limitations applicable to their animal production areas.

While federal regulations and Minn. R. 7001.1080, subp. 3, establish an explicit requirement for BMPs, they do not enumerate the particular practices required in all instances. This is in contrast to Minn. R. ch. 7020, inasmuch as this rule enumerates a wide range of BMPs dealing, for example, with manure management, the response to environmental emergencies, and the operation and maintenance of lagoons wherein liquid manure is stored. The contrast is only partial, however, since the record MPCA developed in support of Minn. R. ch. 7020 shows that

MPCA intended to establish in permits, on a case-by-case basis, BMPs in addition to or more stringent than those enumerated in the rule. For example, in anticipation of comments in response to the fact that the proposed rule contained no explicit limitation on the application of phosphorus in manure to certain lands, MPCA said, "... phosphorus control measures [on such lands] may be better addressed through ... permit conditions." See *SONAR* at p. 207. The *MPCA Staff Initial Post-Hearing Responses* provides another example. Responding to citizen observations that the proposed components of a manure management plan were similar to, but not the same as, a Comprehensive Nutrient Management Plan (CNMP), MPCA replied that "[t]he elements required (in NPDES permits) for a CNMP which are not required as part of a manure management plan in the proposed revisions to Chapter 7020 can be added as permit conditions in NPDES permits." See *Responses* at p. 103.

While federal and Minnesota NPDES rules do not enumerate the BMPs required in all instances, they do articulate the specific purposes the BMPs need to fulfill. The practices must (1) establish, or (2) enable the permittee to achieve compliance with, effluent limitations as required under the Clean Water Act, sections 301(b) and 402(a), (or Minnesota statutes or rules) or they must (3) carry-out the intent and purpose of the Clean Water Act (or Minnesota statutes or rules).

The standard against which one would evaluate the performance of BMPs established pursuant to (1) or (2) is straightforward. In these cases, the BMPs must reflect the best available technology economically achievable (BAT) and the best conventional pollutant control technology (BCT), or they must enable the permittee to achieve compliance with effluent limitations reflecting BAT or BCT. Furthermore, if discharges would cause or contribute to a violation of water quality standards despite the imposition of BMPs reflecting BAT and BCT, then the Clean Water Act, sections 301(b)(1)(C) and 402(a), requires the permit writer to establish additional or more stringent BMPs as necessary for discharges to achieve compliance with and preserve water quality standards.

The intent and purpose of the Clean Water Act is the standard against which one would determine the reasonableness of BMPs established pursuant to (3) above. Congress established the intent and purpose of the Clean Water Act in section 101. As provided in that section, the goals of the Act are to eliminate the discharge of pollutants and, whenever attainable as an interim goal, provide for the protection and propagation of fish, shellfish, and wildlife and

provide for recreation in and on the water. Thus, the reasonableness of the BMPs turns on whether they will eliminate the discharge of pollutants or ensure water of sufficient quality to protect aquatic life, wildlife, and recreation. Alternatively, one would determine reasonableness based on the intent of Congress, as provided in the Clean Water Act, section 502(14), that truly agricultural discharges due to storm water are excluded from the definition of the term "point source."

In accordance with the express language of Minn. R. 7020.0405, subp. 1, as proposed and finally adopted, the long-standing requirements in Minn. R. 7001.1080, subp. 3, the August 6, 2001, statement from the Minnesota Attorney General, and the specific requirements of the Clean Water Act and federal regulations, USEPA, Region 5, finds that Minn. Stat. §116.07, subd. 7(m), does not undermine MPCA's authority to establish in CAFO permits BMPs in addition to or more stringent than enumerated in Minn. R. ch. 7020.

For the forgoing reasons, USEPA, Region 5, hereby approves the revision to the Minnesota NPDES program caused by enactment of Minn. Stat. §116.07, subd. 7(m).

D. Administrative penalties.

Under Minnesota law, at least 75 percent of an administrative penalty order issued for feedlot law or rule violations must be forgiven if the abated penalty is used for measures to mitigate the violation that is the subject of the administrative penalty order and the MPCA determines that the violation is being corrected. *See* Minn. Stat. §116.072, subd. 13(b). This provision raised a question about whether MPCA retains adequate authority to enforce compliance by CAFOs in conformance with 40 CFR, section 123.27. In part, this regulation requires states with approved NPDES programs to have authority to recover civil penalties of \$5,000 per day for each violation.

In his August 6, 2001, letter, the Minnesota Attorney General stated that MPCA has statutory authority to seek penalties of \$10,000 per day for each violation. *See* Minn. Stat. §115.071, subd. 3. Although Minn. Stat. §116.072, subd. 13(b), limits MPCA's authority to impose an administrative penalty, the Attorney General on behalf of the State of Minnesota may recover by a civil action penalties of not more than \$10,000 a day. As a result of this authority, USEPA, Region 5, finds that Minn. Stat. §116.072, subd. 13(b), does not undermine the

Minnesota NPDES program for CAFOs. The revision to the Minnesota program caused by enactment of this provision is hereby approved.

E. Discharges from manure stockpiles and land application of manure.

Minnesota law provides that, “[f]or the purpose of feedlot permitting, ... a manure stockpile that is managed according to agency rule must not be considered a discharge into waters of the state; unless the discharge is to waters of the state, as defined by section 103G.005, subd. 17², except type 1 or type 2 wetlands, as defined in section 103G.005, subd. 17b, and does not meet discharge standards established for feedlots under agency rule.” See Minn. Stat. §116.07, subd. 7(o). This provision raised a question about MPCA’s authority to administer its NPDES program for CAFOs in conformance with 40 CFR, section 123.1(g)(1). This regulation requires states with approved NPDES programs to prohibit all point source discharges of pollutants to waters of the United States except as authorized by an NPDES permit.

To the extent the Minnesota Legislature may have intended for Minn. Stat. §116.07, subd. 7(o), to provide relief from requirements, albeit unspecified ones, the law provides no relief to a person who does not manage his or her manure stockpile in accordance with Minnesota rules.

To manage a manure stockpile in accordance with the rules, the owner or operator of the stockpile must meet certain requirements. This includes the requirement in Minn. R. 7020.2003, subp. 1, that manure and manure-contaminated runoff from manure storage areas, including stockpiles, are prohibited from flowing into a surface tile intake³. It includes the requirement in Minn. R. 7020.2125, subp. 1, that stockpiling sites must be located and constructed such that manure-contaminated runoff from the site does not discharge to waters of the state⁴. When the

² Under this provision, waters of the state are defined to mean “surface or underground waters, except surface waters that are not confined but are spread and diffused over the land. Waters of the state includes boundary and inland waters.”

³ The term “manure-contaminated runoff” is defined in Minn. R. 7020.0300, subp. 13b, to mean a liquid that has come into contact with manure. In the *SONAR* (at p. 69), MPCA clarified its intent that the term includes liquids that contain manure.

⁴ USEPA, Region 5, believes stockpile owners or operators have three options for constructing their stockpiles in compliance with Minn. R. 7020.2125, subp. 1. First, the

stockpile is capable of holding the manure produced by 1,000 animal units or more, it includes the requirement that there shall be no discharge of process wastewater provided, however, that pollutants in the overflow may be discharged when rain, either chronic or catastrophic, causes an overflow from a facility designed, constructed, and maintained to contain all process-generated wastewater plus the runoff from the 25-year, 24-hour storm event⁵. See Minn. R. 7020.2003, subp. 2.

According to the August 6, 2001, letter from the Minnesota Attorney General, Minn. Stat. §116.07, subd. 7(o), does not alter the requirement in Minn. R. 7001.1030, subp. 1, that no person may discharge a pollutant from a point source, including a CAFO, into waters of the state without obtaining an NPDES permit. CAFOs include the storage and handling areas, including manure stockpiles, necessary to support the operation. See USEPA's *Final Internal Review Draft Guidance Manual and Example NPDES Permit for CAFOs*, September 21, 2000, at p. 23. Therefore, when a stockpile is owned or operated by a feedlot that meets the criteria for CAFO, management in accordance with Minnesota rules includes management in compliance with Minn. R. 7001.1030, subp. 1. Also, it includes management in compliance with the terms and conditions of an NPDES permit inasmuch as Minn. R. 7020.0405, subp. 1, requires the owner to apply for such a permit to construct and operate a feedlot that meets the criteria for CAFO.

In light of the express requirements in the Minnesota rules, as identified above, and the August 6, 2001, statement from the Minnesota Attorney General, USEPA, Region 5, finds that Minn. Stat. §116.07, subd. 7(o), does not undermine MPCA's authority to administer its NPDES program in conformance with 40 CFR, section 123.1(g)(1), as that regulation applies to state legal authority prohibiting unpermitted discharges from manure stockpiles owned or operated by CAFOs.

stockpile could be constructed with an impermeable cover and sidewalls or a berm to keep precipitation from falling on the manure and keep runoff from upland areas from coming into contact with the manure. Second, the stockpile could be constructed with containment sufficient to store manure-contaminated runoff for the entire period during which irrigation will not or cannot occur. Third, the stockpile could be located and constructed such that manure-contaminated runoff never enters waters of the state.

⁵ Minn. R. 7020.2125, subp. 1, establishes a standard for the construction of manure stockpiles that is broader in its scope of applicability and more stringent than Minn. R. 7020.2003, subp. 2.

Minnesota law provides that, “[f]or the purpose of feedlot permitting, manure that is land applied ... must not be considered a discharge into waters of the state, unless the discharge is to waters of the state, as defined by section 103G.005, subd. 17, except type 1 or type 2 wetlands, as defined in section 103G.005, subd. 17b, and does not meet discharge standards established for feedlots under agency rule.” See Minn. Stat. §116.07, subd. 7(o). This provision raised a question about MPCA’s authority to administer its NPDES program for CAFOs in conformance with 40 CFR, section 123.1(g)(1).

To the extent the Minnesota Legislature may have intended for Minn. Stat. §116.07, subd. 7(o), to provide relief from requirements, albeit unspecified ones, the law provides no relief to a person who applies manure to land and, either during or as a result of the manure application, discharges to waters of the state in a manner that does not meet discharge standards⁶.

Minnesota rules contain several standards applicable to discharges that may result from the application of manure to land. First, under Minn. R. 7020.2225, subp. 1, item A, subitem (1), manure (and process wastewater) must not be applied to land in a manner that will result in a discharge to waters of the state during the application process. This subitem is more stringent than 40 CFR, section 123.1(g)(1), because it prohibits all discharges during the land application process, even those under the control of a person who possesses an NPDES permit. Second, Minn. R. 7020.2225, subp. 1, item A, subitem (2), prohibits the application of manure (and process wastewater) to land in a manner that will cause pollution of waters of the state due to manure-contaminated runoff. Under Minnesota law, “pollution of water” is defined to mean “(a) the discharge of any pollutant into any waters of the state or the contamination of any waters of the state so as to create a nuisance or render such waters unclean, or noxious, or impure so as to be actually or potentially harmful or detrimental or injurious to public health, safety or welfare, to domestic, agricultural, commercial, industrial, recreational or other legitimate uses, or to livestock, animals, birds, fish or other aquatic life; or (b) the alteration made or induced by human activity of the chemical, physical, biological, or radiological integrity of waters of the state.” See Minn. Stat. §115.01, subd. 13. For discharges of manure-contaminated runoff that cause pollution, this subitem is more stringent than 40 CFR, section 123.1(g)(1), because it

⁶ Minnesota law defines the term “standards” to include effluent standards, effluent limitations, standards of performance for new sources, water quality standards, pretreatment standards, and prohibitions. See Minn. Stat. §115.01, subd. 19.

prohibits all such discharges, even those under the control of a person who possesses an NPDES permit.

The discharge standard in subitem (2) appears not to apply to three types of runoff: (1) that which does not contain manure, (2) that which contains manure but does not enter waters of the state, and (3) that which contains manure and enters waters of the state but does not cause pollution of the waters. An exclusion as described under (1) or (2) would not be problems as a matter of federal law since, for the purpose of the present analysis, 40 CFR, section 123.1(g)(1), imposes no requirement on approved states with respect to runoff that does not enter waters of the United States or runoff that enters waters of the United States but does not contain pollutants from CAFO manure or wastewater. Our analysis of an exclusion as described under (3) is presented below.

In his August 6, 2001, letter, the Minnesota Attorney General provided his opinion that Minn. Stat. §116.07, subd. 7(o), does not modify the prohibition against unpermitted discharges from point sources, including CAFOs, in Minn. R. 7001.1030, subp. 1. Consistent with this opinion, USEPA, Region 5, finds that for the purpose of Minn. Stat. §116.07, subd. 7(o), Minn. R. 7001.1030, subp. 1, contains a discharge standard for feedlots that are CAFOs.

According to the Attorney General, “*any* discharge from an unpermitted CAFO would not ‘meet discharge standards established for feedlots under agency rule’ (emphasis added).” Regarding releases of pollutants following application of manure or wastewater to land, the Minnesota rules define the term “discharge” to mean, “the addition of a pollutant to waters of the state, including a release of manure, manure-contaminated runoff or process wastewater from ... a land application site by ... any ... means.” See Minn. R. 7020.0300, subp. 9c. In the record supporting establishment of this definition, MPCA expressed its intent that the term “discharge” have a broad meaning. It said the term includes “animal manure or manure-contaminated runoff from a ... land application site ... that enters any water of the state *in any quantity or concentration* by any means.” (emphasis added). See *SONAR* at pp. 67-68.

Due to the broad meaning of the term “discharge” under Minnesota rules and in light of the August 6, 2001, statement from the Minnesota Attorney General, USEPA, Region 5, finds that a discharge of manure-contaminated runoff from land application activities under the control

of an unpermitted CAFO is subject to Minn. R. 7001.1030, subp. 1, even if the runoff does not cause pollution of waters of the state⁷.

For the forgoing reasons, USEPA, Region 5, hereby approves the revision to the Minnesota NPDES program caused by enactment of Minn. Stat. §116.07, subd. 7(o).

F. Fines for discharges from stockpiles and land application of manure.

Minnesota law provides that, “[f]or the purpose of feedlot permitting, a discharge from land-applied manure or a manure stockpile that is managed according to agency rule must not be subject to a fine for a discharge violation.” See Minn. Stat. §116.07, subd. 7(n). This provision raised a question about whether MPCA retains adequate authority to administer its NPDES program for CAFOs in conformance with 40 CFR, section 123.27. In part, this regulation requires states with approved NPDES programs to have authority to assess, or sue to recover in court, civil penalties and to seek criminal remedies for violations of NPDES program requirements.

(Due to the similarities between this provision and Minn. Stat. §116.07, subd. 7(o), USEPA, Region 5, will not repeat the analysis presented in E. above.)

According to the August 6, 2001, letter from the Minnesota Attorney General, “[a]ny CAFO that discharges without an NPDES permit would not be being ‘managed according to agency rule.’ As a result, the statute would not apply to a discharge of pollutants from land-applied manure from an unpermitted CAFO. The statute would similarly not apply to a discharge from a permitted CAFO that was not in compliance with permit terms and conditions.” Instead of relieving CAFOs from the dual obligations to obtain permits prior to any discharge and then discharge from stockpiles and land application activities only in compliance with the terms and conditions of their permits, the Attorney General stated that Minn. Stat. §116.07, subd. 7(n),

⁷ CAFO owners or operators who discharge manure-contaminated runoff from land application activities but do so in compliance with the terms and conditions of their NPDES permits have a shield from USEPA and citizen enforcement under the Clean Water Act, section 402(k). According to the August 6, 2001, letter from the Minnesota Attorney General, Minn. Stat. §116.07, subd. 7(n), establishes a similar shield for the purpose of Minnesota law.

simply establishes a "permit-as-a-shield" defense for permitted CAFOs. (See footnote seven for information on this defense.) In this way, Minnesota law is similar to the Clean Water Act, section 402(k).

In light of the statement from the Minnesota Attorney General, USEPA, Region 5, finds that Minn. Stat. §116.07, subd. 7(n), does not undermine MPCA's authority to administer its NPDES program for CAFOs in conformance with 40 CFR, section 123.27. The revision to the Minnesota NPDES program caused by enactment of this provision is hereby approved.

II. Disapproved Provision.

Minnesota law provides that, "[u]nless the upgrade is needed to correct an immediate public health threat ..., the [MPCA] may not require a feedlot operator: (1) to spend more than \$3,000 to upgrade an existing feedlot with less than 300 animal units unless cost-share money is available to the feedlot operator for 75 percent of the cost of the upgrade; or (2) to spend more than \$10,000 to upgrade an existing feedlot with between 300 and 500 animal units unless cost-share money is available to the feedlot operator for 75 percent of the cost of the upgrade or \$50,000, whichever is less." See Minn. Stat. §116.07, subd. 7(p). This provision raised questions about whether MPCA retains adequate authority to administer its NPDES program for CAFOs in conformance with 40 CFR, sections 123.25(a)(1) and (15) and 123.27. In part, these regulations require states to have adequate authority to incorporate Clean Water Act standards into NPDES permits. They also require states to have adequate authority to force CAFOs to comply with NPDES program requirements.

For some of the feedlots that are defined as CAFOs under Minn. R. 7020.0300, subp. 5a, as well as certain feedlots that MPCA might designate as CAFOs on a case-by-case basis⁸, USEPA, Region 5, finds that Minn. Stat., §116.07, subd. 7(p), undermines MPCA's authority to administer its NPDES program for CAFOs in conformance with the federal regulations cited

⁸ Under Minn. R. 7020.0300, subp. 5a, Minnesota defines the term "CAFO" in accordance with 40 CFR, section 122.23. In addition to defining certain animal feeding operations as CAFOs, paragraph (c) in that federal regulation provides authority for other operations to be designated as CAFOs on a case-by-case basis.

above. Specifically, we find that MPCA does not have adequate authority for feedlots that are either defined or may be designated as CAFOs and have more than 300 but less than 500 animal units as that term is defined in Minnesota law and rules. We also find that MPCA does not have adequate authority for feedlots designated as CAFOs and having fewer than 300 animal units. These findings are based on the fact that the limits on the amount of money MPCA may require these CAFOs to spend, as well as the requirement for taxpayers to incur part of the cost for pollution control devices or practices at the CAFOs, may prevent MPCA from requiring some CAFOs to comply with the Clean Water Act.

For the forgoing reasons, the revision to the Minnesota NPDES program caused by enactment of Minn. Stat. §116.07, subd. 7(p), is hereby disapproved⁹.

⁹ Even though USEPA, Region 5, is disapproving this provision, readers are advised that government agencies can continue to provide cost-share dollars to CAFOs where allowed under applicable law.