

**IOWA CITIZENS FOR COMMUNITY IMPROVEMENT, IOWA  
CHAPTER OF THE SIERRA CLUB, ENVIRONMENTAL INTEGRITY  
PROJECT**

September 20, 2007

**Via overnight mail**

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**PETITION FOR WITHDRAWAL OF THE  
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM  
DELEGATION FROM THE STATE OF IOWA**

Iowa Citizens for Community Improvement (“Iowa CCI”)<sup>1</sup>, the Sierra Club,<sup>2</sup> and the Environmental Integrity Project (“EIP”)<sup>3</sup> petition the U.S. Environmental Protection Agency (“EPA”) to initiate formal proceedings to withdraw the Iowa Department of Natural Resources’ (“IDNR”) authority to issue National Pollutant Discharge Elimination System (“NPDES”) permits because of the State of Iowa’s continuing violations of the Clean Water Act and its implementing regulations. These citizen groups request that EPA formally respond to this petition in writing by notifying the State of Iowa that it is not administering the permit program

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<sup>1</sup> Iowa CCI is a 31 year old membership-based community organization that works in both urban and rural areas on issues that people are concerned about. CCI encourages citizen participation and holds public and private institutions accountable to grassroots people. CCI has over 3,500 members statewide. The majority of CCI members are family farmers, independent livestock producers, and rural residents. Many of the members live near CAFOs and have been impacted by the problems they create.

<sup>2</sup> The Sierra Club is a national nonprofit organization of approximately 780,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth’s ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club’s concerns encompass the protection of the environment from pollution caused by animal feeding operations. The Sierra Club has approximately 6,000 members in the state of Iowa.

<sup>3</sup> EIP is a nonprofit, tax-exempt organization created to safeguard federal environmental laws by improving the quality of federal and state enforcement and permitting, and by protecting those programs from political interference. EIP assists community groups in Iowa that have long been active in efforts to reduce pollution from animal feeding operations and to promote sustainable agriculture.

for Concentrated Animal Feeding Operation (“CAFO”) discharges into the waters of Iowa in accordance with the Clean Water Act, and to conduct a public hearing regarding these violations as required by 33 U.S.C. § 1342(c)(3). Because Iowa fails to demonstrate sufficient authority and willingness to carry out the NPDES program, the citizen groups further petition EPA to withdraw its approval of Iowa’s NPDES delegation and to assume administration and enforcement of the program.

## BACKGROUND

Since IDNR received authority to implement and enforce the Clean Water Act in 1978,<sup>4</sup> its program has failed to keep pace with dramatic changes in Iowa’s livestock industry. Iowa has become the nation’s number one producer of both hogs and eggs, and is home to more than 2,100 large CAFOs.<sup>5</sup> Iowa livestock produce more than 50 million tons of waste each year,<sup>6</sup> and since receiving Clean Water Act authority, IDNR has allowed CAFOs to illegally discharge millions of gallons of manure into hundreds of rivers and streams, killing millions of fish and contributing to widespread water quality impairments.<sup>7</sup> IDNR is aware of its failure to regulate CAFOs under the Clean Water Act, and even acknowledged that “the most obvious threat to maintaining good chemical water quality in Iowa surface waters is the recent expansion of the confined animal feeding industry.”<sup>8</sup>

Despite repeated attempts by EPA and citizen groups to spur IDNR to action, IDNR has resisted making any meaningful progress to bring CAFOs into compliance with the Clean Water Act. After years of notice from citizens and EPA, IDNR has issued no NPDES permits to confinement dischargers, and has issued permits to only a fraction of open feedlot dischargers.

A 2003 GAO report addressed nationwide problems implementing the Clean Water Act for CAFOs, highlighting deficiencies in Iowa’s program, and calling on EPA for strong leadership: “For its part, EPA will need to increase its oversight of state programs to ensure that the new requirements are adopted and implemented. Neither the states nor EPA have determined how they will meet these challenges.”<sup>9</sup> Unless EPA acts to withdraw Iowa’s program, IDNR will continue delaying Clean Water Act implementation for the hundreds of CAFO polluters in the

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<sup>4</sup>EPA, *National Pollutant Discharge Elimination System Memorandum of Agreement between Regional Administrator and the Executive Director* (Aug. 10, 1978) (attachment A).

<sup>5</sup> Environmental Integrity Project, *Threatening Iowa’s Future* (2004) at 15, 17 available at <http://environmentalintegrity.org/pub194.cfm>. IDNR has documented more than 1,800 large confinement CAFOs, and USDA estimates Iowa has more than 300 large open feedlot CAFOs. *Id.*

<sup>6</sup> Iowa Manure Management Action Group, *Most Frequently Asked Questions about Manure and Manure Management in Iowa* available at <http://www.agronext.iastate.edu/immag/faqdetails.html#q1>.

<sup>7</sup> See *infra* pp. 16-19

<sup>8</sup> IDNR, *Water Quality in Iowa During 1998 and 1999* at 1-7 (2001) available at [http://wqm.igsb.uiowa.edu/wqa/305b/2000/2000\\_305b.html](http://wqm.igsb.uiowa.edu/wqa/305b/2000/2000_305b.html).

<sup>9</sup> U.S. Government Accountability Office, *Increased EPA Oversight Will Improve Environmental Program for Concentrated Animal Feeding Operations*, GAO-03-285 (January 2003) at 2 available at <http://www.gao.gov/new.items/d03285.pdf>.

state as evidenced by IDNR's announced intention<sup>10</sup> to forestall permitting until EPA promulgates new rules in accordance with *Waterkeeper v. EPA*.<sup>11</sup>

Because hundreds of Iowa CAFOs continue to discharge illegally into waters of the United States, and the damage to these waters will only worsen with continued delay, we request EPA begin withdrawal of Iowa's delegation immediately. As outlined below, IDNR's failures warrant withdrawal pursuant to the criteria set forth in 40 C.F.R. § 123.63.

## PETITIONERS' ARGUMENT

### I. IOWA'S LEGAL AUTHORITY FAILS TO MEET THE FEDERAL NPDES REQUIREMENTS.

Iowa's legal authority fails to meet federal NPDES requirements<sup>12</sup> because the Iowa legislature has unlawfully limited IDNR's authority to implement the Clean Water Act for open feedlots and because Iowa's regulations fail to satisfy federal conflict of interest provisions.

#### A. The State Legislature Limited Iowa's Authority to Implement and Enforce the Clean Water Act by Passing House File 805.

House File ("HF") 805, which was signed into law on May 23, 2005, contains regulations for open feedlot runoff that are less stringent than the federal requirements. As EPA has noted this legislation is less stringent than federal law,<sup>13</sup> and makes it impossible for IDNR to comply with the Clean Water Act when regulating open feedlots. HF 805's most blatant areas of non-compliance with the Clean Water Act include: (1) the authorization of illegal discharges, (2) inconsistent definitions, (3) less stringent requirements for Nutrient Management Plans ("NMPs"), (4) less stringent record-keeping requirements, (5) improper method to calculate animal unit capacity, (6) failure to establish setbacks from waterways, and (7) limitations on IDNR's enforcement authority.

##### 1. *Authorization of Illegal Discharges*

HF 805 authorizes discharges from open feedlots that are prohibited by the Clean Water Act by: (1) allowing discharge of effluent with solids settled out; and (2) allowing discharge due to precipitation without required inspection and recordkeeping provisions.

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<sup>10</sup> IDNR statements at February 13, 2007 meeting with Iowa CCI; Letter from IDNR to David Peterson re: pending NPDES permit (March 6, 2007) (attachment B).

<sup>11</sup> 399 F.3d 486 (2005).

<sup>12</sup> 40 C.F.R. § 123.63(1).

<sup>13</sup> In a series of letters, EPA identified numerous provisions of HF 805 that are less stringent than federal law. See Letter from Leo Alderman to Wayne Gieselmann (March 7, 2005) (attachment C); Letter from Leo Alderman to Jeffrey Vonk (April 7, 2005) (attachment D); Letter from David Cozad to Wayne Gieselmann (April 25, 2005) (attachment E).

First, no open feedlot that meets the federal definition of a CAFO may legally discharge pollutants without authorization from an NPDES permit.<sup>14</sup> Federal regulations establish that CAFO permits must authorize zero discharge from the production area.<sup>15</sup> Specifically, a production area must be designed to retain all manure, litter and process wastewater.<sup>16</sup> On the other hand, HF 805 requires only that “[a]ll settleable solids from open feedlot effluent shall be removed prior to discharge into waters of the state.”<sup>17</sup> This creates a blanket authorization for Iowa’s open feedlots to discharge settled manure effluent into waters of the United States.

Moreover, the Clean Water Act and federal regulations require any facility that is defined as a CAFO to obtain a permit to discharge pollutants into waters of the United States.<sup>18</sup> HF 805, however, only requires large CAFOs to obtain a permit before discharging settled effluent.<sup>19</sup> By omission, this allows discharges of settled effluent pollutants from un-permitted facilities that meet the federal definition of CAFOs; namely, this excludes small and medium CAFOs.

This failure to be as stringent as federal law has serious consequences. Specifically, EPA highlighted this shortcoming in its correspondence with IDNR, pointing out that effluent with the solids settled out “is a major source of ammonia, fecal coliform, and other feedlot related contamination.”<sup>20</sup> Thus HF 805 allows discharges that are not only illegal, but that will increase levels of harmful nutrients and dangerous pathogens in Iowa’s rivers and streams.

Second, federal regulations allow production area discharges due to precipitation from permitted existing CAFOs and new source cattle CAFOs if they are designed to retain all runoff from a 25-year, 24-hour storm event.<sup>21</sup> However, facilities that discharge pursuant to these provisions must meet additional production area inspection and record keeping requirements for their discharges to be exempt.<sup>22</sup> HF 805 also exempts discharges due to precipitation if a permitted open feedlot meets the applicable federal design standard, but fails to require these facilities to meet the additional federal requirements for production area inspection and record keeping before allowing discharges of pollutants.<sup>23</sup> Thus, Iowa allows CAFOs to discharge under circumstances less stringent than federal law.

## 2. *Definitions Inconsistent with Federal Law*

Iowa’s definition of “effluent” conflicts with federal effluent limitations and its definition of “AFO” is inconsistent with the federal definition. With respect to “effluent,” federal regulations set the effluent limitations applicable to permitted CAFOs. Under those regulations,

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<sup>14</sup> 33 U.S.C. §§ 1311(a), 1342 (a)(1). The Clean Water Act excludes agricultural stormwater discharges from the definition of point source. 33 U.S.C. § 1362(14). Thus, when Petitioners refer to CAFO discharges, they are referring to discharges other than those of agricultural stormwater.

<sup>15</sup> 40 C.F.R. §§ 412.31(a), 412.43(a).

<sup>16</sup> 40 C.F.R. §§ 412.31(a), 412.43(a).

<sup>17</sup> Iowa Code § 459A.401(1).

<sup>18</sup> 33 U.S.C. § 1311(a); 40 C.F.R. § 122.23(a).

<sup>19</sup> Iowa Code § 459A.401(3).

<sup>20</sup> Letter from Leo Alderman to Jeffrey Vonk (April 7, 2005) (Attachment D).

<sup>21</sup> 40 C.F.R. §§ 412.31(a)(1)(i), 412.43(a)(1).

<sup>22</sup> 40 C.F.R. §§ 412.37(a), (b).

<sup>23</sup> Iowa Code § 459A.401(2).

“there must be *no discharge of manure, litter, or process wastewater pollutants* into waters of the U.S. from the production area.”<sup>24</sup> Iowa, however, only requires open feedlot CAFOs to manage “open feedlot effluent,” which HF 805 defines as “a combination of manure, precipitation-induced runoff, or other runoff from an open feedlot before its settleable solids have been removed.”<sup>25</sup> Thus, Iowa’s definition of effluent is contrary to federal law, because it authorizes open feedlot discharges of litter, process wastewater, and even manure effluent with the solids settled out.

With respect to the definition of “AFO,” federal regulations define an “AFO” as a facility where “Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.”<sup>26</sup> Iowa defines animal feeding operation similarly, as “a lot, yard, corral, building, or other area in which animals are confined and fed and maintained for forty-five days or more in any twelve-month period, and all structures used for the storage of manure from animals in the operation,” but adds the caveat that “[a]n animal feeding operation does not include a livestock market.”<sup>27</sup> However, the Iowa Code and regulations contain no restrictions that ensure that livestock markets do not meet the definition of AFO. To be consistent with federal law, Iowa must remove its exemption for livestock markets from its definition of animal feeding operation. If the exemption remains, Iowa may regulate a smaller universe of facilities than federal law requires.

### 3. *NMP Requirements Less Stringent than Federal Law*

The NMP requirements established for open feedlots in HF 805 fall short of federal NMP requirements because Iowa allows illegal land application area discharges, fails to require site specific conservation practices, allows Alternative Technology systems without the requisite technical analysis, and adopts a phosphorus index that does not ensure phosphorus will be applied at agronomic rates.

First, EPA requires CAFO NMPs to follow best management practices to prevent runoff of “manure, litter, and other process wastewater” applied to land.<sup>28</sup> As explained,<sup>29</sup> Iowa requires open feedlot NMPs to manage only “open feedlot effluent,” which does not include litter, process wastewater, or liquid manure with the solids settled out. Therefore, Iowa’s NMPs for open feedlots are less stringent than federal law requires.

Second, the federal NMP regulations require CAFOs to “identify appropriate site specific conservation practices to be implemented...to control runoff of pollutants to waters of the United States.”<sup>30</sup> Iowa has no analogous requirement for NMPs and thus could impose less stringent requirements on open feedlots than required by federal regulations.

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<sup>24</sup> 40 C.F.R. §§ 412.31(a), 412.43(a) (emphasis added)

<sup>25</sup> Iowa Code § 459A.102(12).

<sup>26</sup> 40 C.F.R. § 122.23(b)(1), (2).

<sup>27</sup> Iowa Code § 459.102.

<sup>28</sup> 40 C.F.R. § 412.4(c)(2).

<sup>29</sup> See *supra* p. 4.

<sup>30</sup> 40 C.F.R. § 122.42(e)(1)(vi).

Third, federal law allows NPDES permit effluent limitations to be based on an Alternative Technology (“AT”) system, but the CAFO operator seeking permit coverage for such a system must submit a supporting technical analysis. This analysis must include all daily inputs and outputs, as well as pollutant data including biological oxygen demand and total suspended solids.<sup>31</sup> In allowing AT systems for Iowa’s open feedlots, HF 805 requires that the system “must provide an equivalent level of open feedlot effluent control as would be achieved by using a settled open feedlot effluent basin.”<sup>32</sup> However, “the nutrient management plan is not required to provide for settled effluent that enters the alternative technology system.”<sup>33</sup> By failing to require both the technical analysis and that the NMP account for settled effluent entering the AT system, HF 805 assumes rather than demonstrates that untested AT systems will retain all pollutants, and thus is less stringent than federal law.

Additionally, Iowa’s AT design requirements only require “[c]ontrols on the solids settling facility or the AT system shall prevent release of collected open feedlot effluent to waters of the United States during the period from November 1 to March 30.”<sup>34</sup> These AT provisions are less stringent than federal law because Iowa does not require open feedlots to ensure that settled effluent entering an AT system is not discharged into a water of the United States, and because Iowa authorizes illegal discharges of effluent to waters of the United States between March 31 and October 31.

Fourth, Iowa’s phosphorus index requirements do not ensure compliance with federal law. Federal law requires CAFOs to determine manure application rates which will “minimize phosphorus and nitrogen transport from the field to surface waters in compliance with the technical standards for nutrient management established by the Director [of the delegated state agency].”<sup>35</sup> These standards must “[i]nclude a field-specific assessment of the potential for nitrogen and phosphorus transport from field to surface waters, and address the form, source, amount, timing, and method of application of nutrients on each field to achieve realistic production goals.”<sup>36</sup>

While the Iowa NRCS phosphorus index, adopted for confinement and open feedlot CAFOs in Iowa Admin. Code 567-65.17(1)(d), does require field-specific calculations of phosphorus transport, certain provisions of Iowa’s phosphorus index are less stringent than federal law. Iowa Admin. Code 567-65.17(6)(b) provides there is no penalty for “exceeding the nitrogen or phosphorus application rate for an unplanned crop.” This is less stringent than federal law both because it does not ensure phosphorus transport will be minimized, and because it codifies a lack of consequences for non-compliance, thereby limiting IDNR’s enforcement authority. Finally, Iowa Admin. Code 567-65.17(17)(f)(4) requires that for high phosphorus index site vulnerability, an operator must adopt practices “which reduce the phosphorus index to at least the Medium risk category” before applying manure. However, it does not specify what

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<sup>31</sup> 40 C.F.R. § 412.31 (a)(2)(i)(A)-(E).

<sup>32</sup> Iowa Code § 459A.303(1).

<sup>33</sup> Iowa Code § 459A.208(8).

<sup>34</sup> Iowa Admin. Code 567-65.110(1)(a).

<sup>35</sup> 40 C.F.R. § 412.4(c)(2).

<sup>36</sup> 40 C.F.R. § 412.4(c)(2)(i).

those practices are or how the operator must demonstrate they have reduced the site's risk index. This is less stringent than federal law because Iowa CAFO operators are not required to demonstrate that their practices minimize phosphorus transport to surface waters.

#### 4. *Recordkeeping Requirements are Less Stringent than Federal Law*

Federal law requires “[a] copy of the CAFO’s site-specific nutrient management plan must be maintained on site and made available to the Director upon request.”<sup>37</sup> Additionally, NMP compliance records and manure and soil test methods and results must be maintained on site and made available to the Director for at least 5 years.<sup>38</sup> HF 805 is not as stringent because it requires open feedlot CAFOs to “maintain a current nutrient management plan and maintain records sufficient to demonstrate compliance with the nutrient management plan,” but fails to require that either the NMP or the records documenting compliance be kept on site, made available to IDNR, or available to the public.<sup>39</sup>

Moreover, although federal regulations do not currently require compliance documents be made available to the public, the Second Circuit strongly implied in its *Waterkeeper* decision that EPA’s new rules will have to require that these documents be made available to the public, so as to comply with the Clean Water Act. To do otherwise, could “deprive the public of its right to assist in the... enforcement of... [an] *effluent limitation*.”<sup>40</sup> Because Iowa does not require compliance documents be made available to the public, open feedlot records requirements do not comply with the Clean Water Act.

#### 5. *Improper Method to Calculate Animal Unit Capacity*

When determining whether an animal feeding operation meets the federal definition of a CAFO, federal regulations make no distinction between animals housed in open feedlots and those housed in confinement buildings. EPA has clarified its method of determining the size of a CAFO: “EPA no longer uses the term “animal unit,” but instead refers to the actual number of animals at the operation to define a CAFO.”<sup>41</sup> Iowa adopted a method to calculate open feedlot animal capacity that is both illogical and, as pointed out by EPA,<sup>42</sup> contrary to the federal method: “[i]n calculating the animal unit capacity of an open feedlot operation, the animal unit capacity shall not include the animal unit capacity of any confinement feeding operation building as defined in section 459.102, which is part of the open feedlot operation.”<sup>43</sup> This method results in feedlots EPA defines as medium or large CAFOs escaping the NPDES permit requirement, which is in clear conflict with the Clean Water Act and implementing regulations.

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<sup>37</sup> 40 C.F.R. §122.42(e)(2)(ii).

<sup>38</sup> 40 C.F.R. § 122.42(e)(2)(i).

<sup>39</sup> Iowa Code § 459A.208(9).

<sup>40</sup> *Waterkeeper* at 503 (quoting 33 U.S.C. § 1251(e)) (emphasis added).

<sup>41</sup> EPA, *Animal Feeding Operations Overview*, available at [http://cfpub.epa.gov/npdes/home.cfm?program\\_id=7](http://cfpub.epa.gov/npdes/home.cfm?program_id=7).

<sup>42</sup> Letter from David Cozad to Wayne Gieselman (April 25, 2005) (Attachment E).

<sup>43</sup> Iowa Code § 459A.103(3).

## 6. *Failure to Establish Setbacks from Waters of the United States*

Federal law prohibits any CAFO from applying manure, litter, or process wastewater within 100 feet of “any down-gradient surface waters, open tile line intake structures, sinkholes, agricultural well heads, or other conduits to surface waters,”<sup>44</sup> unless the CAFO either uses a 35-foot vegetated buffer or demonstrates equivalent or greater protection through alternative conservation practices.<sup>45</sup> Iowa, however, allows open feedlot – and confinement – CAFOs to apply manure with zero separation distance from waters of the United States if the manure is incorporated within 24 hours.<sup>46</sup> Despite this historical weakness in Iowa’s regulations, HF 805 failed to correct this defect. Because this rule fails to demonstrate that incorporation is as protective to water resources as maintaining a 100-foot separation or a 35-foot vegetated buffer, it is less stringent than federal law.

## 7. *Limitation on Enforcement Authority*

To ensure that authorized states can adequately implement and enforce the Clean Water Act, the statute requires delegated state agencies to have criminal enforcement authority for NPDES permit violations, as well as the authority to enact civil penalties.<sup>47</sup> Additionally, in determining whether to delegate authority, “[t]he administrator shall approve each submitted program unless he determines that adequate authority does not exist...[t]o abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.”<sup>48</sup> Thus a state must be able to impose criminal penalties to have delegated NPDES authority.

IDNR’s authority to impose criminal penalties against open feedlots, however, is ambiguous at best. Under Iowa Code § 459A.502, open feedlot violations “shall be subject to a *civil* penalty...as provided in Iowa Code § 455B.191.” (emphasis added). While 455B.191(2) authorizes criminal sanctions for negligent or knowing violations, 459A.502 only mentions civil penalties. While HF 805 amended Iowa Code § 455B.112 to allow the Attorney General to “institute civil or criminal proceedings” to enforce Iowa Code chapters 459 or 459A, it is not clear how that provision interacts with 459A.502’s failure to mention criminal penalties. If 459A.502 is interpreted to prevent criminal penalties, then Iowa’s program is legally insufficient.

### B. Iowa Fails to Comply with Federal Conflict of Interest Requirements.

Federal law provides conflict of interest provisions for board and body members responsible for approving permits. Specifically, these positions may not be filled by “any person who receives, or has during the previous 2 years received, a significant portion of income directly or indirectly from permit holders or applicants for a permit.”<sup>49</sup> This requirement applies to Iowa’s Environmental Protection Commission (“EPC”) members because the EPC is a “Board

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<sup>44</sup> 40 C.F.R. § 412.4(c)(5).

<sup>45</sup> 40 C.F.R. §§ 412.4(c)(5)(i)-(ii).

<sup>46</sup> Iowa Code § 459.205(4)(a).

<sup>47</sup> 33 U.S.C. § 1319(b), (c).

<sup>48</sup> 33 U.S.C. § 1342(b)(7).

<sup>49</sup> 40 C.F.R. § 123.25(c).

or body . . . who has or shares authority to approve all or portions of permits either in the first instance, as modified or reissued, or on appeal.”<sup>50</sup>

At first blush, Iowa’s EPC rules appear to comply with federal law as they provide that a commissioner may not “sell . . . any goods or services to individuals, associations, or corporations subject to the regulatory authority of the department.”<sup>51</sup> However, Iowa law permits commissioners to apply for consent for a sale to regulated parties. Iowa law then grants automatic consent for otherwise prohibited sales in certain sectors, including the “sale of farm products at market prices to a buyer ordinarily engaged in the business of purchasing farm products.”<sup>52</sup> This authorizes appointment of EPC members who profit from sales of farm products to CAFO operators, despite the clear conflict of interest. Furthermore, the chance of such a conflict is heightened by the requirement that three of the nine EPC members be “actively engaged in livestock and grain farming.”<sup>53</sup> As a result, Iowa’s statutory conflict of interest provisions fall short of federal requirements.

## II. IOWA’S OPERATION OF ITS STATE PROGRAM FAILS TO COMPLY WITH NPDES REGULATIONS.

In addition to defects in its statutes and regulations, Iowa’s operation of its NPDES program fails to comply with the Clean Water Act. Thus, this petition satisfies the second criteria for EPA to withdraw delegation.<sup>54</sup> Specifically, IDNR has failed to issue permits to the majority of CAFOs that require them and has repeatedly issued NPDES permits to CAFOs that do not conform to federal requirements, including the public participation requirements.

### A. Iowa Fails to Exercise Control Over Activities Required to be Regulated Under the NPDES Program, Including Failure to Issue Permits.

The Clean Water Act’s permit requirements apply to CAFOs that have discharged into water of the United States. Although *Waterkeeper* invalidated the requirement in EPA’s 2003 rules that a CAFO with the “potential to discharge” seek permit coverage, neither that case nor any EPA regulations has ever cast doubt on the requirement that CAFOs with actual discharges seek a NPDES permit. IDNR, however, has consistently failed to issue permits to CAFOs that actually discharge. Furthermore, EPA’s proposed revised CAFO rule will require CAFOs to seek NPDES permit coverage if they propose to discharge.<sup>55</sup> This rule clarifies the meaning of “propose to discharge” by listing circumstances in which a CAFO is likely to discharge, and therefore should seek coverage.<sup>56</sup> These circumstances include when CAFO production areas are not designed or operated for zero discharge, and when CAFOs have discharged in the past and

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<sup>50</sup> 40 C.F.R. § 123.25(c)(1)(i).

<sup>51</sup> Iowa Admin. Code 567-1.11(1).

<sup>52</sup> Iowa Admin. Code 567-1.11(6)(b)(2).

<sup>53</sup> Iowa Code § 455A.6(1)(a).

<sup>54</sup> 40 C.F.R. § 123.63(2).

<sup>55</sup> EPA, Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to Waterkeeper Decision, 71 Fed. Reg. 37,749, 37,784 (proposed June 30, 2006) (to be codified at 40 C.F.R. pts. 122 and 412).

<sup>56</sup> *Id.*

have failed to correct the factors that caused the discharge to occur.<sup>57</sup> IDNR has also failed to permit CAFOs which propose to discharge.

*1. Iowa Has Failed to Issue Permits to all CAFOs that Have Discharged.*

The Clean Water Act requires all point source dischargers to obtain and comply with an NPDES permit.<sup>58</sup> Despite this clear mandate, however, Iowa has failed to issue permits to hundreds of confinement and open feedlot CAFOs that have discharged into waters of the United States but have failed to correct the factors that caused the discharge to occur.

Between 1992 and 2006, Iowa AFOs were responsible for 589 documented manure spills, approximately half of which reached waters of the state, and more than 100 of which caused fish kills in Iowa surface waters.<sup>59</sup> These spills killed more than 2.9 million fish.<sup>60</sup>

When these facilities discharged they were required to apply for NPDES permits as a matter of law. But despite hundreds of illegal discharges from Iowa CAFOs, IDNR has only issued NPDES permits to a fraction of open feedlots, and has *never* issued an NPDES permit to a confinement feeding operation.

a. Open Feedlots

To address open feedlot pollution, IDNR created the Iowa Plan for Open Feedlots in 2001. Under this voluntary plan, feedlots registered for NPDES permit coverage, and, in return, received amnesty for Clean Water Act violations that occur while the facility is making progress towards compliance. EPA Region VII supported the plan, conditional on IDNR having permitted all participating feedlots by the end of its five year timeframe; the program ended in 2006. EPA made clear to IDNR that “at the end of the five year timeframe for the Open Feedlot program, EPA expects all open feedlots that registered...to be in full compliance with the Clean Water Act. ...EPA considers the five year compliance deadline to be a firm one.”<sup>61</sup>

By establishing the Open Feedlot Plan, IDNR acknowledged its obligation to permit open feedlot CAFOs. The agency has also been aware for several years of EPA’s stated position and the possible consequences of continued noncompliance. In 2001, in an explanation of the open feedlot plan, IDNR Environmental Services Division Director Wayne Gieselmann stated:

Our lax enforcement and administration of the operation permit program for large open feedlots are inconsistent with our duties under the Clean Water Act and state law. Driven by lawsuits and three large manure spills, including one that occurred in Iowa, the federal EPA has begun an enforcement effort to bring open feedlots into compliance with the Clean Water Act. EPA has also reviewed our

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<sup>57</sup> *Id.*

<sup>58</sup> 33 U.S.C. § 1342(a).

<sup>59</sup> Iowa Manure Spill Database (Attachment F).

<sup>60</sup> *Id.*

<sup>61</sup> Letter from Leo Alderman, Director, EPA Region VII Water, Wetlands and Pesticides Division, to Carol Balvanz, Iowa Cattlemen’s Association (July 21, 2004) (attachment G).

administration of federal requirements the implementation of which has been delegated to us, and has been critical of our lax enforcement. We face the prospect of losing grant funding or even authority to administer the federal operation permit program.<sup>62</sup>

Although IDNR has begun issuing NPDES permits to open feedlots pursuant to this plan, the majority of those requiring permits still do not have them, many of those with permits still have not submitted NMPs, and many facilities requiring permits failed to register. Alarming, though 1,576 producers registered for IDNR's open feedlot plan<sup>63</sup> by indicating on the application form that they may meet the criteria for an NPDES permit, IDNR has issued only 112 permits.<sup>64</sup> Furthermore, as of August 28, 2007, IDNR still has not received at least 70 of these permits' NMPs.<sup>65</sup> Finally, though more than 1,000 medium and large CAFOs registered for the Iowa Plan,<sup>66</sup> many feedlots requiring NPDES permits failed to register. USDA estimated in 2001 that Iowa has more than 300 large open feedlots,<sup>67</sup> yet fewer than 200 registered for the Iowa Plan.<sup>68</sup> Thus even if IDNR had successfully implemented the Iowa Plan by permitting all registered feedlots by 2006, more than 100 of Iowa's largest open feedlot CAFOs would continue to escape regulation.

Because Iowa has not satisfied the express condition EPA put on approval of the plan, EPA cannot allow the lax enforcement and implementation to continue. Despite the increased oversight EPA provided to ensure the success of the Iowa Plan, IDNR has refused to bring open feedlots into Clean Water Act compliance. EPA must act to withdraw IDNR's authority; alternative courses of action have proven ineffective.

#### b. Confinements

Efforts to persuade IDNR to permit confinement dischargers have been even more unsuccessful. Beginning in 2005, citizen groups lobbied IDNR to issue a permit to the David Peterson confinement in Winnebago County. Peterson's 3,300 head hog confinement facility discharged an estimated 120,000 gallons of manure into Beaver Creek on October 19, 2004,<sup>69</sup> making it a clear candidate for an NPDES permit. IDNR eventually proposed a draft permit and released it for public comment, but has still failed to issue the permit. IDNR's resistance to issuing NPDES permits following even the most egregious confinement discharges demonstrates the agency's unwillingness and inability to adequately implement their program. Moreover, IDNR's proposed permit had serious deficiencies, including failure to consider water quality

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<sup>62</sup> Wayne Gieselmann, IDNR, *Policy/Procedure Statement: Concentrated Animal Feeding Operation Registration Program* (March 22, 2001), available at <http://www.iowadnr.com/afo/files/0601expl.pdf>.

<sup>63</sup> *Threatening Iowa's Future* at 16.

<sup>64</sup> IDNR Agricultural NPDES permits, available at <http://programs.iowadnr.gov/wwpie/default.aspx#results>.

<sup>65</sup> IDNR field offices communication, from Jeff Prier, IDNR, August 28, 2007 (attachment H).

<sup>66</sup> IDNR AFO Statistics, available at <http://www.iowadnr.com/afo/stats.html>.

<sup>67</sup> *Threatening Iowa's Future* at 15.

<sup>68</sup> IDNR AFO Statistics available at <http://www.iowadnr.com/afo/stats.html>.

<sup>69</sup> Randall Clark, IDNR Litigation Report (October 24, 2005) (attachment I).

based effluent limitations in case of dry weather land discharges that may violate Water Quality Standards.<sup>70</sup>

The agency asserts that the state regulatory system for confinement feeding operations is equivalent to, and in some cases, more stringent than, the federal CAFO program; accordingly, Iowa has never required confinement operations to obtain NPDES permits. However, although Iowa law ostensibly prohibits discharges from confinement feeding operations, this prohibition has failed to prevent hundreds of discharges. Once a facility has discharged, it must obtain a NPDES permit.<sup>71</sup>

In addition to the zero discharge standard, IDNR also asserts that its program is as stringent as the federal program because large confinement operations (and medium operations seeking to use an unformed manure storage structure) must obtain a construction permit, and because confinements housing more than 500 animal units must submit a Manure Management Plan (“MMP”).<sup>72</sup> However, as discussed below confinement construction permits are not equivalent to NPDES permits, and MMPs are not equivalent to NMPs.

#### i. IDNR Construction Permits are not Equivalent to NPDES Permits

Iowa requires all confinement feeding operations housing more than 1,000 animal units obtain a construction permit.<sup>73</sup> However, federal law requires confinements that discharge to obtain NPDES permits and does not make exceptions for facilities with state construction permits. Moreover, IDNR’s construction permits are not functionally equivalent to NPDES permits, but rather fall short of NPDES requirements by covering a smaller number of facilities, lacking regular review and update provisions, and restricting public participation.

First, federal law requires all CAFOs that discharge into waters of the United States to obtain NPDES permits. There is no federal provision to grandfather in facilities constructed prior to the creation of the NPDES program. However, Iowa has more than 1,800 documented confinements larger than 1,000 animal units,<sup>74</sup> but only 623 were required to obtain construction permits when they were built.<sup>75</sup> The CAFOs that do not have construction permits may still need NPDES permits. Clearly, the state construction permits do not cover the universe of CAFOs needing NPDES permits.

Second, NPDES permits must contain fixed terms and be subject to regular review and update. Permitting authorities may not issue NPDES permits with terms exceeding five years<sup>76</sup> and before their permit term expires, operators must apply for a new permit to continue

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<sup>70</sup> See *Waterkeeper* at 521-525; see also EIP, Iowa CCI, Sierra Club comments Re. Draft NPDES Permit for the Dave Peterson Swine Confinement (Dec. 29, 2006) (attachment J).

<sup>71</sup> 33 U.S.C. § 1311(a).

<sup>72</sup> Letter with attached comments from Jeffrey Vonk, Director of IDNR, to EPA Office of Water, regarding the CAFO Proposed Rule. (July 30, 2001) (attachment K).

<sup>73</sup> Iowa Code § 459.303.

<sup>74</sup> *Threatening Iowa’s Future* at 16.

<sup>75</sup> *Id.* at 17.

<sup>76</sup> 33 U.S.C. § 1342(b)(1)(B).

operating.<sup>77</sup> Moreover, federal law does not guarantee an NPDES permit will be reissued; EPA or the state permitting agency may terminate an NPDES permit if the operator fails to comply with its terms.<sup>78</sup> In contrast, IDNR construction permits last indefinitely. Additionally, IDNR cannot revoke a construction permit unless it determines the operation “constitutes a clear, present and impending danger to public health or the environment.”<sup>79</sup>

Third, the Clean Water Act requires public notice of every NPDES permit application, as well as opportunity to comment and request a public hearing before the permitting agency makes a final decision.<sup>80</sup> Although Iowa law requires public notice of construction permit applications in the county of the proposed construction, the county is not required to submit public comments received to IDNR.<sup>81</sup> In addition, citizens cannot request a public hearing, and as a result may be completely cut out of the permitting process.<sup>82</sup> For these reasons, IDNR’s assertion that construction permits render NPDES permits unnecessary is without merit.

#### ii. IDNR Manure Management Plans are Less Stringent than Federal NMPs

Iowa requires confinement AFOs housing 500 or more animal units, and which were constructed or expanded after May 31, 1985, to submit an MMP to IDNR.<sup>83</sup> However, MMPs are less stringent than federally required NMPs in the following respects: MMPs regulate a smaller universe of CAFO discharges than NMPs, fail to prohibit all discharges of manure to waters of the United States, fail to require adequate setback distances from surface waters, and fail to meet federal record keeping and inspection requirements.

First, federal law requires CAFOs to retain all “manure, litter, and process wastewater.”<sup>84</sup> Iowa laws regulating confinement CAFOs, however, define manure as “animal excreta or other commonly associated wastes of animals including, but not limited to, bedding, litter, or feed losses. Manure does not include wastewater resulting from the washing and in-shell packaging of eggs.”<sup>85</sup> Thus MMPs, unlike federal NMPs, fail to prohibit discharges of all process wastewater, and are not substitutes for NMPs.

Second, federal law requires that NPDES CAFO permits meet a zero discharge standard from production areas by requiring facilities to meet design standards.<sup>86</sup> Iowa’s MMPs fall short of this requirement both by failing to impose facility design standards and by prohibiting only “direct” discharges from production areas to waters of the state. The only design requirement Iowa imposes for confinement manure storage structures is that they must have sufficient

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<sup>77</sup> 40 C.F.R. § 122.23(h).

<sup>78</sup> 40 C.F.R. § 122.64.

<sup>79</sup> Iowa Admin. Code 567-65.7(6).

<sup>80</sup> 33 U.S.C. § 1342(b) (3).

<sup>81</sup> Iowa Admin. Code 567-65.10(2)(b).

<sup>82</sup> Iowa Admin. Code 567-65.10(7), (8).

<sup>83</sup> Iowa Code § 459.312.

<sup>84</sup> 40 C.F.R. § 122.42(e)(1)(i); *see supra* pp 4-5.

<sup>85</sup> Iowa Admin. Code 567-65.1.

<sup>86</sup> 40 C.F.R. § 412.

capacity to retain all manure between land applications.<sup>87</sup> Further, whereas federal law prohibits all production area discharges of “pollutants into waters of the U.S.,”<sup>88</sup> Iowa requires only that “manure” cannot be “discharged *directly* into a water of the state or into a tile line that discharges to waters of the state” from a confinement facility.<sup>89</sup>

Third, federal law requires a minimum 100-foot setback or alternative conservation practice between manure application areas and surface waters or conduits to surface waters.<sup>90</sup> Under Iowa law, confinement CAFOs are permitted to apply manure with zero separation distance from surface waters or conduits to surface waters, simply by incorporating or injecting the manure within 24 hours.

Fourth, federal law currently requires NMPs and compliance records to be kept on-site and available to the IDNR for inspection,<sup>91</sup> and *Waterkeeper* will require EPA to allow public inspection and enforcement of NMPs.<sup>92</sup> In contrast, MMPs and compliance records must only be kept within 30 miles of the CAFO.<sup>93</sup> In addition, Iowa regulations require that IDNR keep these records confidential and they are not subject to public review.<sup>94</sup>

Because IDNR’s construction permits and MMPs are not functionally equivalent to the federal program’s requirement of an NPDES permit with a nutrient management plan for every medium and large discharging facility, Iowa has unjustifiably refused to issue permits to confinement CAFOs that discharge. The failure to establish an NPDES permit program for confinement CAFOs that discharge, and the failure to issue NPDES permits to all open feedlots that discharge, is a failure to exercise control over activities required to be regulated under the NPDES program, and so EPA must withdraw Iowa’s program.

## 2. *Iowa Does Not Issue Permits to all CAFOs that Propose to Discharge.*

### a. Open Feedlots are Designed to Discharge

Iowa has hundreds of open feedlots that meet the federal definition of a medium or large CAFO.<sup>95</sup> As established, more than 1,500 open feedlots in Iowa thought they met the federal requirements for an NPDES permit, and so registered for the Iowa Plan for Open Feedlots. However, the majority of these facilities have not been covered by the NPDES permits they sought. Because these un-permitted feedlot operators believe they need permit coverage, EPA must presume their facilities were built in accordance with Iowa’s construction standards for permitted feedlots, which require only that feedlots production areas will not discharge in a 25-year, 24-hour storm event. Iowa Code § 459A.401(2)(a). Thus, many open feedlots without NPDES permits propose to discharge in any storm event greater than 25-year, 24-hour. Although

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<sup>87</sup> Iowa Admin. Code 567-65.2(3).

<sup>88</sup> 40 C.F.R. §§ 412.31(a) and 412.46(a).

<sup>89</sup> Iowa Admin. Code 567-65.2(3) (emphasis added).

<sup>90</sup> See *supra* p. 6.

<sup>91</sup> 40 CFR §§ 122.42(e)(1)(ix) and (e)(2)(ii).

<sup>92</sup> *Waterkeeper* at 503 (quoting 33 U.S.C. § 1251(e)).

<sup>93</sup> Iowa Admin. Code 567-65.17(12)-(13).

<sup>94</sup> Iowa Admin. Code 567-65.17(14).

<sup>95</sup> IDNR AFO Statistics, available at <http://www.iowadnr.com/afo/stats.html>.

federal regulations provide a limited exception from zero discharges in those circumstances, facilities that do not have NPDES permits cannot avail themselves of the exemptions for precipitation-related discharges from the production area in the effluent guidelines.<sup>96</sup> Thus, IDNR has failed to issue permits to all open feedlot CAFOs that are designed to, and therefore propose to, discharge.

b. Open Feedlots Will Discharge Pursuant to HF 805

As discussed above, open feedlots also propose to discharge under the terms of HF 805, because HF 805 authorizes discharges from open feedlots, including discharges that are prohibited by the Clean Water Act.<sup>97</sup>

B. Iowa Issues Permits that do not Conform to the Requirements of the NPDES Regulations, Including the Public Participation Requirements.

1. *Open feedlot permits issued federal NPDES requirements.*

The open feedlot NPDES permits issued by IDNR do not conform to the federal NPDES regulations. First, as established, the permits contain no required setback distance between manure application areas and surface waters.<sup>98</sup> Second, most permitted feedlots failed to submit their NMPs by the May 31 deadline written into each permit, and some permits are still incomplete.<sup>99</sup> Third, once NMPs for permitted facilities are approved, they will likely be deficient in ways authorized by HF 805 – by managing only effluent without the solids settled out, using untested Alternative Technology systems, and failing to minimize phosphorus runoff.

Fourth, IDNR open feedlot permits issued thus far state that they incorporate EPA’s standard terms, listed in 40 C.F.R. § 122.41. However, Section VIII: Standard Conditions only incorporates some, but not all, of the standard terms. Although the Section states that “to meet the requirements of 40 C.F.R. § 122.41, standard conditions applicable to all NPDES permits, including yours is attached to your permit for your review and compliance,” Iowa attaches an edited, and in some provisions less stringent, version.

For example, 40 C.F.R. § 122.41(k)(1)(3) provides that a permit “is not transferable to any person except after notice to the Director. The Director may require modification or revocation and reissuance of the permit to change the name of the permittee and incorporate such other requirements as may be necessary under the Clean Water Act. (See § 122.61; in some cases, modification or revocation and reissuance is mandatory.)” Iowa open feedlot permits, however, state that “[i]f title to your facility, or any part of it, is transferred the new owner shall be subject to this permit.” This is less stringent than federal law, because it does not allow IDNR to modify, revoke, or reissue a permit upon transfer of a facility.

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<sup>96</sup> 40 C.F.R. § 412.31(a), § 412.45(a).

<sup>97</sup> See *supra* pp. 4-5.

<sup>98</sup> IDNR Agricultural NPDES Permits, available at <http://programs.iowadnr.gov/wwpie/default.aspx#results>. None of the NPDES permits issued to open feedlots include required setbacks from surface waters.

<sup>99</sup> IDNR Field Offices Communications, from Jeff Prier, IDNR, August 28, 2007 (attachment H).

In addition, under 40 C.F.R. § 122.41(j) all permits must include monitoring and recordkeeping standards, including that samples and measurements must be representative and that monitoring and analysis methods must be recorded. This requirement is absent from Iowa's list of standard terms. The federal requirement that "reports of compliance or noncompliance with...interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date,"<sup>100</sup> is also absent from Iowa's standard terms, making Iowa's open feedlot permits less stringent than federal law.

Fifth, according to the U.S. Court of Appeals for the Second Circuit, a valid regulatory program for CAFOs must include a technology-based standard to reduce pathogens.<sup>101</sup> IDNR's NPDES permits for CAFOs must limit pathogens from the land application areas as well as the production areas, beyond any incidental reductions that might occur from the agricultural utilization requirement on waste. However, neither Iowa's administrative rules nor the open feedlot permits issued to date address technology-based standards to reduce pathogens. As a result, Iowa's open feedlot permits fail to meet the requirements of the NPDES program, and continue putting Iowa waters at risk of bacterial contamination.

C. Iowa's Enforcement Program Fails to Comply with NPDES Regulations.

Iowa's enforcement program fails to comply with NPDES regulations because IDNR fails to act on permit and program violations, fails to seek adequate enforcement penalties or collect administrative fines when imposed, and fails to inspect and monitor CAFOs subject to Clean Water Act regulation. Thus, Petitioners also establish that the Iowa's program meets this criterion for withdrawal.<sup>102</sup>

1. *Iowa Fails to Act on Violations of Permits and other Program Violations.*

a. Iowa fails to investigate complaints and take enforcement actions

IDNR also fails to take enforcement actions against a large number of CAFO dischargers. Between 1992 and 2006, IDNR imposed monetary penalties in response to only about 75 percent of reported manure spills that reached waters of the U.S.<sup>103</sup> More than 72 reported manure spills that impacted water quality during this period did not result in any monetary penalty or required improvements to the facility.<sup>104</sup> Because IDNR has consistently demonstrated its inability to respond appropriately to the many violations of state and federal law committed by Iowa CAFOs – through investigations and penalties that deter future discharges – EPA must withdraw its authority.

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<sup>100</sup> 40 C.F.R. § 122.41(k)(1)(3).

<sup>101</sup> *Waterkeeper* at 519.

<sup>102</sup> 40 C.F.R. § 123.63(3).

<sup>103</sup> Iowa Manure Spill Database (attachment F); IDNR Enforcement Database (attachment L).

<sup>104</sup> *Id.*

b. Iowa Failed to Enforce its NMP Submission Deadline

The majority of permitted open feedlots in Iowa have failed to submit their NMP to IDNR by the deadline stated in their NPDES permits. These permits made clear that the permittee “must ensure that the site-specific NMP for this facility is received by DNR’s Field Office 3 no later than **May 31, 2007** (60 days prior to July 31, 2007 [approval and implementation] deadline).”<sup>105</sup> Despite this deadline, which in some cases provided *years* of advance notice, IDNR had not received the majority of the required open feedlot NMPs for permits already issued by May 31.<sup>106</sup>

Rather than hold CAFO operators to their NMP submission deadlines, Iowa DNR has reinterpreted its own permits to require submission, and not implementation, by July 31, 2007, despite clear language to the contrary. IDNR thus created a disincentive for operators to meet deadlines necessary to ensure compliance with the Clean Water Act. Moreover, participation in the Open Feedlot amnesty agreement does not exempt feedlots from enforcement actions for compliance with their NPDES permit terms. Participating facilities are on notice that “the limited amnesty does not apply to permitted facilities, since they already have a permit and are on a compliance schedule if appropriate.”<sup>107</sup> By failing to enforce the deadline for NMP submission for the few Iowa CAFOs the agency has permitted, IDNR has failed to act on violations of permits and EPA must revoke its authority.

2. *Iowa Fails to Seek Adequate Enforcement Penalties or to Collect Administrative Fines When Imposed.*

IDNR has long defended its CAFO program, claiming that its zero discharge standard makes Iowa’s regulatory scheme more protective than federal law. As demonstrated, however, this zero discharge standard has failed to prevent hundreds of illegal discharges. IDNR’s lax enforcement practices following these discharges – including inadequate penalties and failure to collect fines – have created a system where it pays to pollute, and there is no disincentive for CAFOs to repeatedly discharge pollutants illegally.

IDNR’s penalties for CAFO discharges are too low to deter future violations. Moreover, Iowa law imposes limits on IDNR’s authority to obtain adequate penalties that are contrary to federal law. Federal law allows penalties of up to \$32,500 per violation per day.<sup>108</sup> Iowa law, however, places a maximum of \$5,000 per violation per day on penalties for discharges or other permit violations, and of \$10,000 per day for multiple violations.<sup>109</sup> Furthermore, as explained above, federal law requires state agencies have the authority to recover at least \$10,000 per day

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<sup>105</sup> IDNR, Beef & Bacon Drive, Inc. Open Feedlot NPDES permit at 5 (January 22, 2007) (emphasis in original), available at [http://programs.iowadnr.gov/wwpie/Documents/Permits/6057418\\_fp.pdf](http://programs.iowadnr.gov/wwpie/Documents/Permits/6057418_fp.pdf). Every IDNR open feedlot NPDES permit issued in 2007 includes this deadline for NMP submission.

<sup>106</sup> IDNR Field Offices Communications from Jeff Prier, IDNR, August 28, 2007 (attachment H)

<sup>107</sup> Iowa Open Feedlot Working Group, *Answering Your Questions about the Iowa Open Feedlot Plan* (April 2001), available at <http://www.agronext.iastate.edu/immag/openfeedlot/qa.html>.

<sup>108</sup> 33 U.S.C. § 1319(d); 40 C.F.R. § 19.4, Table 1.

<sup>109</sup> Iowa Admin. Code 567-10.3.

in criminal fines for willful or negligent violations,<sup>110</sup> but Iowa law does not clearly allow IDNR to impose criminal penalties.

Compounding these serious limitations on the effectiveness of IDNR's enforcement system, the agency rarely collects its maximum penalty, even for the most egregious manure spills on record. In July of 1995, a hog confinement in Hamilton County discharged approximately 1.5 million gallons of manure into the South Fork of the Iowa River when its manure storage structure failed below ground. Despite the fact that this was the largest documented volume manure spill in Iowa history, IDNR collected a mere \$2,000 penalty and \$6,000 fish restitution, and of course failed to require the discharger to obtain an NPDES permit.<sup>111</sup> In September of 1996, another hog confinement discharged more than 100,000 gallons of manure into North Buffalo Creek, killing an estimated 586,753 fish along with all other aquatic life over 22 miles of the stream. This was the largest manure spill fish kill in Iowa history, yet IDNR collected only a \$3,000 penalty along with its fish restitution.<sup>112</sup> In yet another incident, in May of 2002, Grieg and Co., Inc. discharged up to one million gallons of manure from its cattle feedlot into Brown Creek and the Des Moines River, killing 33,428 fish valued at \$23,934.40. Despite this assessment of the fish's value, IDNR collected a fish restitution of only \$15,000.<sup>113</sup>

IDNR's collection of these inadequate penalties has been equally ineffective. Of the 168 penalties assessed between 1997 and 2006, 29 have yet to be collected as of August 1, 2007.<sup>114</sup> To assess the effectiveness of IDNR's enforcement program, one must only look at the spill records for the past 15 years and the number and severity of manure spills despite IDNR's regulations and enforcement actions. In fact, in the last six years, the number of spills has increased while fines for pollution have not.<sup>115</sup> Because IDNR fails to seek adequate enforcement penalties and to collect fines when imposed, manure spills continue unabated and EPA must withdraw Iowa's authority to implement the program.

### 3. *Iowa Fails to Inspect and Monitor Activities Subject to Regulation.*

Comprehensive oversight is a cornerstone of effective Clean Water Act implementation; to ensure regulations have meaning, authorized states must have and use means of monitoring for compliance. Accordingly, federal law requires authorized states to have "inspection and surveillance procedures to determine... compliance or noncompliance with applicable program requirements."<sup>116</sup> Specifically, federal law requires Iowa to maintain "a program which is capable of making comprehensive surveys of all facilities and activities subject to the State Director's authority,"<sup>117</sup> and "a program for periodic inspections of the facilities and activities subject to regulation."<sup>118</sup> IDNR fails to comply with these federal requirements because IDNR is

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<sup>110</sup> 40 C.F.R. § 123.27(a)(3)(ii).

<sup>111</sup> *Threatening Iowa's Future* at 18; IDNR Enforcement Database (attachment L).

<sup>112</sup> *Threatening Iowa's Future* at 25; IDNR Enforcement Database (attachment L).

<sup>113</sup> IDNR Enforcement Database (attachment L).

<sup>114</sup> *Id.*

<sup>115</sup> IDNR Manure Spill Database (attachment F).

<sup>116</sup> 40 C.F.R. § 123.26(b).

<sup>117</sup> 40 C.F.R. § 123.26(b)(1).

<sup>118</sup> 40 C.F.R. § 123.26(b)(2).

not capable of making comprehensive surveys of all CAFOs subject to regulation, and because IDNR fails to inspect and monitor CAFOs subject to Clean Water Act regulation.

As established, Iowa has thousands of CAFOs subject to regulation; nearly 1,500 open feedlots are waiting for NPDES permit coverage, more than 100 additional large open feedlots that failed to register for the Open Feedlot Plan are subject to permitting, and several hundred confinements that have discharged illegally into waters of the United States also require NPDES permits. For several reasons, IDNR is not capable of making comprehensive surveys of this universe of facilities. IDNR regulates its thousands of animal feeding operations with only approximately 30.9 full-time equivalent positions dedicated to inspections, permitting and enforcement.<sup>119</sup> The actual inspections are conducted by just 25 field staff around the state; these field staff must also review MMPs for every confinement housing more than 500 Animal Units.<sup>120</sup>

IDNR's actual inspection record demonstrates the agency's inability to periodically inspect facilities subject to regulation. In 2005 and 2006, IDNR conducted 121 and 349 inspections on open feedlots.<sup>121</sup> While this is an improvement from previous years, IDNR has in no way demonstrated ability or intent to transition from this sporadic inspection scheme to one in which the agency "comprehensively" or "periodically" monitors all 1,576 open feedlots and several hundred confinements requiring NPDES permits. Thus, IDNR fails to comply with federal law by failing to inspect and monitor CAFOs subject to regulation, and EPA must act to withdraw Iowa's authority.

## CONCLUSION

For the foregoing reasons, Iowa Citizens for Community Improvement, Environmental Integrity Project, and the Sierra Club request that EPA take immediate action to notify the State of Iowa of its ongoing violations of the Clean Water Act, and request that EPA withdraw its approval of Iowa's NPDES program and take other actions as are necessary and appropriate.

Respectfully Submitted,

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<sup>119</sup> DNR Environmental Services State Fiscal Year Animal Feeding Operations Activity Report (attachment M)

<sup>120</sup> *Id.*

<sup>121</sup> DNR Environmental Services State Fiscal Year Animal Feeding Operations Activity Report (attachment M).