

2000

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Recommended Citation

Smith, Rachel Jay (2000) "A Guide to Permitting Confined Animal Feeding Operations in Wyoming," *Land & Water Law Review*: Vol. 35 : Iss. 2 , pp. 339 - 353.

Available at: https://scholarship.law.uwyo.edu/land_water/vol35/iss2/3

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University of Wyoming
College of Law

LAND AND WATER
LAW REVIEW

VOLUME XXXV

2000

NUMBER 2

**A GUIDE TO PERMITTING
CONFINED ANIMAL
FEEDING OPERATIONS IN WYOMING**

Rachel Jay Smith^{*}

I. INTRODUCTION

Historically swine were raised in the country on family farms.¹ During the 1990's, the United States increased its export of pork, thus creating a demand for swine.² As the demand increased, so did the number of large swine facilities in the United States.³ As more facilities were developing, more small family farms were leaving the market and more environmental problems were being reported.⁴

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1. See Edward Lotterman, *Small Hog Farms Losing Ground*, *Fedgazette* (April 1996).

2. Robert Bryce, *Fencing Out Factory Farms*, *THE PROGRESSIVE POPULIST*, November 1997, at 1.

3. See Land Stewardship Project, *Efficiency: Family Farms and Factory Farms*, (visited Sept. 23, 1999) <http://www.inmotionmagazine.com/hogffff.html>; Alabama Environmental Council, *Going to the Hogs: Concentrated Animal Feeding Operations*, (visited Sept. 21, 1999) <http://alenvironmentalcouncil.org/cafos.htm>.

4. JAMES E. KUNDELL, *ANIMAL FEEDING OPERATIONS, THE ROLE OF COUNTIES* (1990); see also Address by Bill Christison on Family Farms and U.S. Trade Policy to the Confederation of Paysans, in Brussels, Belgium (March 1998) <<http://www.inmotionmagazine.com/bruss.html>>; Gail S. Shane, *Concentrated Animal Feeding Operations: Will Increased Enforcement and More Stringent Regulations*

In North Carolina, in June of 1995, a modern, industrial swine facility caused a massive spill of animal sewage into the New River.⁵ The facility had experienced a breach in the dike of its eight-acre sewage lagoon. The breach in the dike resulted in a spill of more than twenty-two million gallons of sewage.⁶ The slug of sewage stretched more than ten miles down the river killing thousands of fish along the way.⁷ As news of this spill spread, combined with news stories of *Pfisteria*⁸ killing fish in streams, concern grew throughout the country.

By 1997 the press had been reporting on the hazards of large-scale swine facilities throughout the United States and some large facilities had begun to move into the state of Wyoming. This caused concern for Wyoming residents.⁹ Although Wyoming had regulated lagoons for pig effluent under the Wyoming Water Quality Rules and Regulations (WWQRR),¹⁰ many Wyoming residents were concerned that these regulations were insufficient to control effluent from large swine facilities.¹¹ When Wyoming Premium Farms decided to build a large facility in Wheatland, Wyoming, local residents were distressed.¹² They were frightened of the potential impact the facility might have on the water quality.¹³ They were also fearful of the odor that this large facility might cause.¹⁴ At public hearings held to review Wyoming Premium Farms' permit application under WWQRR, chapter 3, the Wyoming Department of Environmental Quality (DEQ) stated that it lacked the authority to regulate these facilities for odors and setbacks.¹⁵ DEQ issued a permit for the Wyoming Premium Farms' facility

under the Clean Water Act Adequately Protect Public Health and the Environment?, National Environmental Enforcement Journal, 3, 15 (April 1998)(highlighting Wyoming's legislation).

5. Joby Warrick, *Spill May be Fault of Hog Farm*, The News & Observer, Saturday, June 24, 1995. The facility had been built to house one thousand two hundred sows and thousands of their offspring. *Id.*

6. *Id.*

7. *Id.*; Joby Warrick and J. Andrew Curless, *Managers Get Blame for Spill*, THE NEWS & OBSERVER, July 25, 1995, at A1.

8. *Pfisteria piscicida* is a toxic dinoflagellate. It can flourish when nutrients from manure, such as phosphorus, enter the water. Carde Morison, *The Cell from Hell and Poultry Farmers: Do They Have Anything in Common?*, (visited Jan. 20, 1999), <<http://www.shorejournal.com/9708/cam0831a.html>>.

9. Sarah Dry, *The West's Lax Rules Draw Hog Factories*, HIGH COUNTRY NEWS, June 9, 1997, at 8.

10. Chapter 3 of the Wyoming Water Quality Rules and Regulations (WWQRR) contains the regulations for permits to construct, install or modify wastewater facilities, disposal systems, biosolids management facilities, treated wastewater reuse systems and other facilities capable of causing or contributing to pollution. WWQRR, chapter 11 contains the standards for the permits issued pursuant to chapter 3.

11. Minutes from Public Hearings on Wyoming Premium Farms' Chapter 3 Permit Application, in Wheatland, Wyoming (October 16, 1996, and February 6, 1997).

12. See Sarah Dry, *The Cowboy State Gets Shook Up by 100,000 Hogs*, HIGH COUNTRY NEWS, June 9, 1997, at 8-9; Paula Glover, *Neighbors Oppose Hog Farms*, Wyoming Tribune-Eagle, June 8, 1998.

13. See Dry, *supra* note 12; Glover, *supra* note 12.

14. See Dry, *supra* note 12; Glover, *supra* note 12.

15. WWQRR did not contain odor restrictions. The only available state odor regulations were in the Wyoming Air Quality Standards and Regulations (WAQSR), § 16. WAQSR § 16(a) provides that the ambient air standard for odors from any source shall be limited to an odor emission at the property line which is undetectable at seven dilutions with odor free air.

under chapter 3 of the WWQRR, and local residents are still complaining about the odor and potential environmental threats.¹⁶

In response to these concerns, the Wyoming legislature passed enabling legislation for Wyoming's new confined swine rules.¹⁷ Wyoming's new swine legislation is codified in the water quality section of the Environmental Quality Act.¹⁸ The Wyoming Environmental Quality Council (EQC) adopted the new chapter 20 of the WWQRR on April 9, 1999. Chapter 20 implements the new requirements.¹⁹ The Governor signed these rules into law on May 26, 1999.

Previously, Wyoming regulated confined swine facilities' sewage lagoons and sewerage systems under chapters 3 and 11 of the WWQRR. Chapter 3 contained the permitting requirements and chapter 11 contained the standards. Chapter 20 offers confined swine facilities "one-stop shopping" for permitting.²⁰

This essay explains the key provisions of the new chapter 20 permit program and describes how the program is implemented. Specifically, it examines the applicability of the new rules, the permitting process and issues of particular concern. The goal of this essay is to provide practical guidance for Wyoming attorneys.

II. APPLICABILITY

Swine Only

The new legislation calls for standards for housed facilities for swine.²¹ The statute is explicitly limited to swine. There is no mention of any other livestock or poultry. Furthermore, the statute applies to large housed swine facilities only.²² To fall under the new standards the housed facility must confine, feed, or maintain an equivalent of one thousand animal units of swine for at least forty-five consecutive days in any twelve month period.²³

16. See *Wheatland Area Residents Petition Against Hog Farm*, The Associated Press State & Local Wire, July 22, 1999. Local residents petitioned the county commission about odors from the Wyoming Premium Farms facility in Platte County.

17. 1997 Wyo. Sess. Laws ch. 157, § 1 (codified at WYO. STAT. ANN. § 35-11-302(a)(ix)(LEXIS 1999)).

18. WYO. STAT. ANN. § 35-11-302(a)(ix)(LEXIS 1999).

19. Copies of WWQRR, chapter 20 (1999) are available from the Wyoming Department of Environmental Quality, Water Quality Division, or through the Wyoming Secretary of States website (<http://sos.wy.state.wy.us/rules/rules.htm>) [hereinafter WWQRR].

20. "Chapter 20 will supersede Chapter 11 and Chapter 3, except for Section 15." Wyoming Environmental Quality Council, Statement of Principal Reasons, *In the Matter of a Petition to Adopt Chapter 20, Permitting, Design and Operation Standards for Confined Swine Feeding Operations, Wyoming Water Quality Rules and Regulations* (April 9, 1999).

21. WYO. STAT. ANN. § 35-11-302(a)(ix)(LEXIS 1999).

22. *Id.*

23. *Id.*

Pursuant to the new legislation, the EQC adopted chapter 20 of the WWQRR. Chapter 20 delineates this group of swine facilities by the phrase "confined swine feeding operations." The phrase "confined swine feeding operation" is defined by the rule as "an operational unit where swine are confined, fed, and maintained for a total of forty-five consecutive days or more in any twelve month period, and the operational unit is designed to confine an equivalent of one thousand or more animal units."²⁴ Thus, chapter 20 applies to only swine facilities meeting these parameters.

Timing & Modifications

The new legislation specifies that these new requirements became effective as soon as the bill became law, which was February 28, 1997.²⁵ The Wyoming Session Laws also provide, "This act shall not apply to any business entity which has applied for a permit to construct a swine feeding housed facility prior to the effective date of this act."²⁶ Unfortunately, this last dictate from the legislature is vague. The text of the session laws is not limited to permit applications pending on the date the new legislation becomes effective. Therefore, the question may arise whether an existing facility, already permitted under chapter 3 of the WWQRR, will need to apply for its modification permits under chapter 3 or under chapter 20.

A swine facility that already holds a chapter 3 permit to construct a swine sewage system technically could be considered an entity that "had applied for a permit to construct" prior to the effective date of the Act. However, the Wyoming EQC, through chapter 20, has interpreted that statement more narrowly. Chapter 20 specifies that it is not applicable for all permit modifications relating to swine.²⁷ Instead, the new requirements apply to modifications of permits that result in increased capacity above permitted levels.²⁸ Thus, if an existing facility, one that is already permitted under chapter 3, needs a modification permit and the modification will increase the animal unit capacity to meet or exceed the definition of a "confined swine feeding operation," that permit will be governed by chapter 20.²⁹ Otherwise, the permit modification must be consistent with chapters 3 and 11.

Entire Facility

In crafting the new regulations, the EQC was particular about deline-

24. WWQRR, *supra* note 19, at ch. 20, § 3(k).

25. 1997 Wyo. Sess. Laws ch. 157, § 5.

26. 1997 Wyo. Sess. Laws ch. 157, § 3.

27. WWQRR, *supra* note 19, at ch. 20, § 5(b).

28. *Id.* at ch. 20, § 5(e).

29. *Id.* at ch. 20, §§ 5(b) & 5(e). Chapter 20 regulates only "confined swine feeding operations." Therefore, for chapter 20 to apply, the facility must have the capacity for confining, feeding or maintaining an equivalent of 1,000 animal units.

ating the scope of what is included as a regulated facility. Since the application of the statute and rules turns on whether the facility is a “confined swine feeding operation,” and that is tied to the number of animal units, the regulations had to be specific about what was included in the count.

In the applicability section of chapter 20, the rule states that the “regulations shall apply to any housed facilities that can be considered an operational unit due to common ownership and collectively meet the criteria of a confined swine feeding operation.”³⁰ Operational unit is defined as “all adjacent common ownership housed facilities or housed facilities on noncontiguous, common ownership lands that utilize a common area or system for the storage, treatment, or disposal of animal wastes.”³¹ Common ownership is defined as:

the ownership of a confined swine feeding operation as a sole proprietor, or a major ownership interest held by a person or entity, in each of two (2) or more feeding operations as a joint tenant, tenant in common, shareholder, partner, member, beneficiary, limited liability company or other equity interest holder. The majority ownership interest is a common ownership interest when it is held directly or indirectly through a partnership, a corporation, a closely held corporation, a limited liability corporation or partnership, parent or affiliate corporation, a spouse, a dependent child, or other legal entity or any combination thereof.³²

Housed facility means “any structure that is used to enclose, contain, or shelter swine and to treat or store wastes originating from the operation. This includes feed pens and confinement areas that may not be sheltered by a roof, but contain manure or animal waste.”³³

Thus, chapter 20 is designed to counteract businesses that may try to avoid the regulations through piecemeal production or noncontiguous facilities. If an owner uses a common system for disposal of swine sewage from various facilities and the total number of animal units in those various facilities together meets the definition of confined swine feeding operation, then those disposal facilities and the housed facilities are regulated by chapter 20. This is true whether or not the particular housed facilities are on adjacent property.

30. WWQRR, *supra* note 19, at ch. 20, § 5(d).

31. *Id.* at ch. 20, § 4(bb).

32. *Id.* at ch. 20, § 4(l).

33. *Id.* at, ch. 20, § 4(p).

III. NEW REQUIREMENTS

The new legislation specifically highlighted four areas to be included in the standards for confined swine feeding operations.³⁴ These highlighted areas were not part of the existing permitting scheme under chapter 3 of the WWQRR for sewage lagoons. The new rules were required to include: (1) financial assurance provisions; (2) waste and manure management plans; (3) setback requirements; and (4) notice of intent to issue a permit and opportunity for public comments.³⁵ The implementation of each requirement as interpreted through chapter 20 will be discussed in order.

Financial Assurance

The statute calls for “[f]inancial assurance for accidents and closure requirements for facilities which contain treatment works.”³⁶ Chapter 20 delineates these financial requirements in Part F, section 46 through section 52. The purpose of financial assurance is to ensure there is money available to properly close the facility when the business is finished.³⁷ An improperly closed facility can threaten the environment through potential contamination. Financial assurance is also intended to provide money for corrective action if contamination does occur.³⁸ To apply for a permit, the applicant must include a closure plan with projected costs.³⁹ The permittee must submit revised estimates annually to DEQ⁴⁰ and adjust the financial assurance accordingly.⁴¹

Financial assurance for corrective action is calculated based upon the size of the facility, the location of the facility, the monitoring of groundwater, the recovery system in place, and the saturated hydraulic conductivity, and the thickness of the least permeable stratum before groundwater.⁴² These factors are incorporated into a formula.⁴³ The benefit to this method is that DEQ can come up with a firm number under a consistent approach that should reflect the actual costs involved in a corrective action and closure effort.

Through chapter 20, Wyoming uses a scheme of bonds, letters of credit, federally insured certificates of deposit, government-backed securi-

34. WYO. STAT. ANN. § 35-11-302(a)(ix)(A)-(D) (LEXIS 1999).

35. WYO. STAT. ANN. § 35-11-302(a)(ix)(A)-(D). (LEXIS 1999)

36. WYO. STAT. ANN. § 35-11-302(a)(ix)(A). Treatment facilities are facilities receiving animal waste and designed to digest or alter the waster, either biologically or mechanically. WWQRR, *supra* note 19, at ch. 20, § 4(qq).

37. WWQRR, *supra* note 19, at ch. 20, § 46.

38. *Id.*

39. *Id.* at 20, §§ 7(b)(iv) & 47.

40. *Id.* at ch. 20, § 47(c).

41. *Id.* at ch. 20, § 47(d).

42. *Id.* at ch. 20, § 48.

43. *Id.* at ch. 20, § 48(a).

ties, or cash for financial assurance.⁴⁴ Insurance policies are not included as a mechanism for providing financial assurance. The goal was to create a “binding, irrevocable, unconditional” obligation.⁴⁵

Waste and Manure Management Plans

One of the largest public concerns with respect to concentrated swine facilities was the odor from the swine.⁴⁶ The hurdle for states in regulating odor is the standard by which violations can be measured and the difficulty documenting odor as an environmental hazard.⁴⁷ Since DEQ’s Water Quality Division did not have authority through chapter 3 to regulate odors from confined swine facilities, the new swine legislation explicitly required such controls through the implementation of management plans.⁴⁸ This is an indirect control on odor. Some citizens have complained that this approach to odors is ineffectual because it simply requires facilities to have a plan rather than provide enforceable odor standards.

The statute requires the regulations to include provisions for “[w]aste and manure management plans to prevent pollution of waters of the state, to minimize odors for public health concerns, pathogens and vectors capable of transporting infectious diseases and to specify land application requirements.”⁴⁹ The management plan, as described by section 10 and part D of chapter 20, becomes part of the permit.⁵⁰ It is reviewed and updated formally every five years⁵¹ and informally every year.⁵²

The waste management plan contains descriptions of how much waste will be generated at the facility and its storage methods.⁵³ It lays out the land application procedure to be used by the particular facility.⁵⁴ If land application is not the method of disposal to be used for the animal waste, the applicant must describe a management plan that will be just as effective in protecting the “waters of the state, public health and safety, and the environment.”⁵⁵ The regulations also call for the applicant to describe specific

44. WWQRR, *supra* note 19, at ch. 20, § 50(a)-(e).

45. *Id.* at ch. 20, § 50.

46. *See supra* notes 14-16 and accompanying text.

47. “Because of the complexity in defining the FIDO factors (frequency, intensity, duration, and offensiveness), regulations have been difficult to formulate and would be equally difficult to enforce.” J. Ronald Miner, *A Review of the Literature on the Nature and Control of Odors from Pork Production Facilities* 3 (National Pork Producers Council 1995) (On reserve with Land & Water Law Review)

48. The setback requirements are also intended to control odor as experienced by neighbors to the facility. WWQRR, *supra* note 19, at ch. 20, § 25(c).

49. WYO. STAT. ANN. § 35-11-302(a)(ix)(B) (LEXIS 1999).

50. WWQRR, *supra* note 19, at ch. 20, § 36.

51. *Id.* at ch. 20, § 15.

52. *Id.* at ch. 20, § 36(h)(1).

53. *Id.* at ch. 20, § 10(a).

54. *Id.* at ch. 20, § 10(d), (e)-(j).

55. *Id.* at ch. 20, § 10(m).

procedures that will be used to control vectors⁵⁶ at the operations.⁵⁷ The waste management plan is intended to incorporate Best Available Technology (BAT).⁵⁸

Setbacks and Buffers

One of the biggest differences in the regulation of confined swine feeding operations as opposed to other disposal facilities is the statutory setback requirements.⁵⁹ The statute provides that the regulations must include:

Setback requirements which will restrict the location and operation of structures housing swine and lagoons within:

- (I) One (1) mile of an occupied dwelling without the written consent of the owner of the house;
- (II) One (1) mile of a public or private school without the consent of the school's board of trustees or board of directors;
- (III) One (1) mile of the boundaries of any incorporated municipality without the resolution and consent of the governing body of the municipality;
- (IV) One-quarter (¼) mile of a water well permitted for current domestic purposes without the written consent of the owner of the well;
- (V) One-quarter (¼) mile of a perennial stream unless it is demonstrated to the [DEQ] that potential adverse impacts to the water quality of the stream can be avoided.⁶⁰

Chapter 20 incorporates these restrictions virtually verbatim in part B, "Setback Requirements for Siting."⁶¹ This makes Wyoming one of the most stringent states in the control of large swine facilities.⁶² Yet Wyoming

56. Vectors are carriers that are "capable of transmitting a pathogen from one organism to another including, but not limited to, flies, other insects, rodents, birds, and vermin." WWQRR, *supra* note 19, at ch. 20, § 4(rr).

57. *Id.* at ch. 20, §§ 10(k) & 42.

58. *Id.* at ch. 20, §§ 36, 40(a). Best Available Technology is the "technology and practice that has been tested, proven, and practiced at a number of locations and offers the best performance and protection for the environment and public health and safety for the local site conditions." *Id.* at ch. 20, § 3(f).

59. See WYO. STAT. ANN. § 35-11-302(a)(ix)(C)(LEXIS 1999).

60. *Id.*

61. WWQRR, *supra* note 19, at ch. 20, § 24.

62. See Gail S. Shane, *Concentrated Animal Feeding Operations: Will Increased Enforcement and More Stringent Regulations under the Clean Water Act Adequately Protect Public Health and the Environment?* National Environmental Enforcement Journal, April 1998, at 3, 15 (highlighting Wyoming's

counties can go even further and adopt stricter requirements.⁶³ This was recently done in Laramie County. A Laramie County zoning resolution limits confined swine feeding operations to a three-mile setback from homes, towns, and schools and a half-mile setback from domestic water wells and streams.⁶⁴

Chapter 20 goes on to explain how the setbacks may be waived by the protected entities.⁶⁵ The protected entities may waive the setback limitations through an affirmative decision to do so. However, the waiver is not effective until it is recorded with the county.⁶⁶ If it is a public school or municipality waiving the setback requirement, that must be through an action of the governing body.⁶⁷ A certified copy of the final action must be submitted with the permit application for it to be effective with respect to that permit application.⁶⁸

The regulations also provide for a buffer zone for the land application of liquid and solid animal waste from confined swine feeding operations.⁶⁹ For liquid waste, the rules specify a buffer zone of one quarter mile “between the land application site and any building with human occupancy or area of public use, not including public roadways.”⁷⁰ Also, the liquid waste shall not be applied to the land within two hundred feet of a perennial, intermittent, or ephemeral water body or permitted domestic water well.⁷¹ For solid waste, the rules require a two hundred foot buffer between the land application site and residential or commercial property, schools, industrial development lands, or perennial or intermittent water bodies or domestic wells.⁷² Neither liquid nor solid animal waste shall leave the property on which it was applied.⁷³ There are no provisions for waiving these restrictions.

Public Participation

In determining whether a permit application can meet the setback requirements, it became necessary for the state regulators to set a point in time in which to decide if the facility can comply with the siting requirements.

legislation).

63. WYO. STAT. ANN. § 35-11-302(a)(ix)(LEXIS 1999)(“If any county adopts a land use plan or zoning resolution which imposes stricter requirements than those in subparagraph (C) [relating to setbacks] of this paragraph, the county requirements shall prevail.”).

64. Paula Glover, *Hog Farm Expansion Faces Problems*, Wyoming Tribune-Eagle, June 7, 1998.

65. WWQRR, *supra* note 19, at ch. 20, § 26.

66. *Id.* at ch. 20, § 26(a).

67. *Id.* at ch. 20, § 26(b).

68. *Id.*

69. *Id.* at ch. 20, §§ 37(d) & 39(a).

70. *Id.* at ch. 20, § 37(d)(l).

71. *Id.* at ch. 20, § 37(d)(iii).

72. *Id.* at ch. 20, § 39(a).

73. *Id.* at ch. 20, §§ 37(d)(ii) & 39(a)(iii).

The hypothetical situation was contemplated by the EQC that once an applicant applies for a permit to construct a confined swine feeding operation, a new residence, school, or well may be built within one mile or one quarter mile of the facility, respectively. This presented the question: At what point in time could a neighbor block a project by building a home or constructing a water well? To answer this question, chapter 20 requires a Notice of Intent to be issued by the applicant.⁷⁴

To apply for a permit, the applicant must first publicly file a Notice of Intent.⁷⁵ The Notice of Intent identifies the applicant, the size of the proposed operation, the physical location of the proposed facility, and all property owners of record within one mile of the facility.⁷⁶ The Notice of Intent is filed by publishing it in the newspaper, sending it to all property owners within one mile of the facility, and providing it to all local governmental entities having jurisdiction within five miles of the facility.⁷⁷ The Notice of Intent acts to freeze the facts in time for a period of twelve months.⁷⁸ If protected entities intrude into the one mile setback area after the filing of the Notice of Intent, DEQ will view that as a waiver of the setback protection with respect to that entity.⁷⁹

When a Notice of Intent has been properly filed, on forms provided by DEQ,⁸⁰ then DEQ will assess the siting requirements for the permit application based on the facts as they exist on the date the Notice of Intent was filed. If the applicant has not submitted a complete permit application⁸¹ within the twelve months, the Notice of Intent expires.⁸² Once the Notice of Intent expires, the applicant must file a new Notice if it intends to apply for a permit. The facts as of the date of the new Notice will be controlling when DEQ assesses the application.

The statute also calls for an opportunity for public comment during the permit application process.⁸³ To satisfy this mandate, chapter 20 includes a public participation procedure. First, the applicant must issue a public notice when the permit application is determined by DEQ to be complete.⁸⁴

74. WWQRR, *supra* note 19, at ch. 20, § 13. This is also required by the statute. WYO. STAT. ANN. § 35-11-302(a)(ix)(D)(LEXIS 1999).

75. WWQRR, *supra* note 19, at ch. 20, § 13(a).

76. *Id.* at ch. 20, § 13(a)(iii).

77. *Id.* at ch. 20, § 13(a)(iv).

78. *Id.* at ch. 20, § 13(a)(1)-(ii).

79. *Id.* at ch. 20, § 25(a).

80. *Id.* at ch. 20, § 13(a)(iii).

81. A permit application is complete when the permit application and the management plan have all of the necessary components as required by chapter 20. WWQRR, *supra* note 19, at ch. 20, § 3(k). A permit application may be complete even though it is technically inadequate. *Id.*

82. *Id.* at ch. 20, § 13(a)(ii).

83. WYO. STAT. ANN. § 35-11-302(a)(ix)(D)(LEXIS 1999).

84. WWQRR, *supra* note 19, at ch. 20 § 13(b). The public notice must contain:

(A) The names, addresses, and phone numbers of the [DEQ] and applicant per-

The applicant issues the public notice by publishing it in the newspaper and by mailing it to local governmental entities and to interested parties.⁸⁵ The public notice provides an opportunity for the public to comment on the permit application. The comment period is thirty days from the date of publication.⁸⁶ During the public comment period, any interested party may submit comments to DEQ on the permit application or request a public hearing to review the permit application.⁸⁷

If the administrator of the Water Quality Division of DEQ finds a significant degree of public interest, the administrator may hold a public hearing.⁸⁸ When the administrator decides to hold a public hearing, the applicant must provide notice of the hearing.⁸⁹ Notice of the hearing must be given at least thirty days before the hearing.⁹⁰ The public comment period will automatically extend to the end of the public hearing, although the administrator may extend it further.⁹¹

IV. HOW DOES CHAPTER 20 WORK WITH OTHER PERMITS?

As discussed earlier, chapter 20 supersedes chapters 3 and 11 for confined swine feeding operations.⁹² However, there are other local, state and federal environmental permits that may be required. This article does not provide an exhaustive list of applicable permits. Instead, it gives the practitioner some guidance on what should be considered in counseling a confined swine feeding operation through the web of environmental regulations.

sonnel whom interested persons may contact to review the application.

(B) The name, address, and phone number of the applicant for the confined swine feeding operation permit.

(C) The location of facilities to be constructed, including the housed facility and land application areas.

(D) A brief description of the proposed confined swine feeding operation.

(E) A brief description of comment and public hearing procedures.

(F) Any additional information considered necessary by the [DEQ].

WWQRR, *supra* note 19, at ch. 20, § 13(b)(i).

85. *Id.* at ch. 20, § 13(b)(ii).

86. *Id.* at ch. 20, § 13(b)(iii).

87. *Id.*

88. *Id.* at ch. 20, § 13(c). The decision on whether to have a public hearing is discretionary with the administrator. *Id.*

89. *Id.* at ch. 20, § 13(c)(ii).

90. WWQRR, *supra* note 19, at ch. 20, § 13(c)(i). Public notice shall include all the information required for the initial public notice, as well as,

(A) Reference to previous public notices relating to the proposed permit.

(B) Any additional information considered necessary by the [DEQ].

(C) Date, time, and place of the public hearing.

(D) A brief description of the nature and purpose of the public hearing.

Id. at ch. 20, § 13(c)(iii).

91. *Id.* at ch. 20, § 13(c)(iv).

92. *See supra* note 20; WWQRR, *supra* note 19, at ch. 20, § 5(f).

Solid Waste

An inevitable part of raising hogs is handling the carcasses of swine that die. If the confined swine feeding operation includes storage, treatment or disposal facilities for dead swine on the premises, the operation must obtain a solid waste permit from DEQ's Solid and Hazardous Waste Division.⁹³ The Wyoming solid waste requirements are in chapter 1 of the Wyoming Solid Waste Rules and Regulations (WSWRR).⁹⁴

Chapter 20 incorporates other solid waste requirements into the permit for the confined swine feeding operation. Chapter 20 provides that the permit application shall incorporate the standards from WSWRR, chapters 2, 6, and 7.⁹⁵ WSWRR, chapter 2 contains the sanitary landfill regulations. WSWRR, chapter 6 contains the transfer, treatment, and storage facility regulations. WSWRR, chapter 7 contains the financial assurance requirements for solid waste management facilities. Of course, chapter 20 only requires the applicant to include these solid waste requirements if the confined swine feeding operation includes solid waste management facilities as part of its operation.⁹⁶

Air

Wyoming DEQ's Air Quality Division does have regulations relating to odors.⁹⁷ However, the odors from the confined swine feeding operations are regulated indirectly through the use of setbacks and mandatory management plans.⁹⁸ Thus, there is no relevant odor permit to be issued by the Air Quality Division. Nor are there currently any federal odor regulations. However, the Wyoming Air Quality Division does require permits for facilities that are sources of air emissions. One probable source of air emissions from a confined swine feeding operation would be emissions from the incineration of dead swine. If the confined swine feeding operation incinerates its dead swine, then it needs an air permit from the Wyoming DEQ, Air Quality Division.⁹⁹

National Pollution Discharge Elimination System

The United States Environmental Protection Agency (EPA) governs discharges to surface water through the National Pollution Discharge Elimination System (NPDES).

93. WWQRR, *supra* note 19, at ch. 20, § 21.

94. Copies of WSWRR are available from the Wyoming Department of Environmental Quality, Solid and Hazardous Waste Division, or through the Wyoming Secretary of State's website (<http://soswy.state.wy.us/rules/rules.htm>).

95. WWQRR, *supra* note 19, at ch. 20, § 21.

96. *Id.*

97. WAQSR § 16.

98. See *supra* text accompanying notes 46-73.

99. WWQRR, *supra* note 19, at ch. 20, § 22(a).

nation System (NPDES).¹⁰⁰ For anyone in the United States to discharge from a point source¹⁰¹ into surface water, that discharge must be pursuant to a NPDES permit.¹⁰² However, confined swine feeding operations are not required to obtain a point source NPDES permit because confined swine feeding operations are prohibited from discharging into surface water and this restriction is incorporated into the chapter 20 permit.¹⁰³

Another part of the NPDES system is storm water permits. A storm water permit is required for construction activities that disturb a total land area of one acre or more.¹⁰⁴ The NPDES permit limits run-off that threatens the quality of surface water. Confined swine feeding operations are required to obtain a NPDES storm water permit when applicable.¹⁰⁵

Other Permit Programs

Receiving a permit pursuant to chapter 20 does not relieve the permittee of any local requirements.¹⁰⁶ Furthermore, it does not allow the permittee to circumvent the State Engineer's permitting system.¹⁰⁷ Any appropriation of water must be done through a grant by the State Engineer.¹⁰⁸ The State Engineer's office also controls the safety of dams, so lagoons with above ground berms or dikes may be subject to its regulations.¹⁰⁹

The attorney counseling large swine facilities must also monitor the federal regulatory system. Since 1997, EPA and the United States Department of Agriculture have been looking at ways of ending threats to water quality from animal feeding operations. Animal feeding operations (AFO's) are defined as facilities with animals confined and fed or maintained for a total of forty-five days in any twelve month period and where vegetation, at least in a portion of the facility, is not sustained during the normal growing season.¹¹⁰ Concentrated animal feeding operations

100. 33 U.S.C. § 1342 (1994).

101. "Point source means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill, leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff." 40 C.F.R. § 122.2 (1999).

102. 33 U.S.C. § 1342 (1994). DEQ has assumed responsibility for the issuance and control of NPDES permits in Wyoming. Wyoming has primacy of the NPDES program. Therefore, because it is the DEQ, and not the EPA, who issues the permit, an entity that plans to discharge from a point source into surface water must obtain a NPDES permit from DEQ.

103. WWQRR, *supra* note 19, at ch. 20, § 6(e).

104. EPA Storm Water Discharges, 64 Fed. Reg. 68,838-39 (1999) to be codified at 40 C.F.R. § 122.26(b)(15).

105. WWQRR, *supra* note 19, at ch. 20, § 22(c).

106. *Id.* at ch. 20, § 22(d).

107. *Id.* at ch. 20, § 22(b).

108. *Id.* at ch. 20, § 22(b)(i).

109. *Id.* at ch. 20, § 22(b)(ii).

110. EPA Contracted Animal Feeding Operations, 40 C.F.R. § 122.23 (1999). Concentrated animal feeding operations are point sources and typically must obtain a NPDES permit. Concentrated swine feeding operations are also AFOs, but Chapter 20 covers the discharge requirements. See *supra* text

(CAFO's) are AFO's with particular size capacity for the animals.¹¹¹ Vice President Al Gore issued a directive to EPA and the U.S. Department of Agriculture (USDA) to work with other federal agencies to strive toward fulfilling the original goal of the Clean Water Act: the achievement of "fishable and swimmable" water throughout the United States of America.¹¹² In response to the Vice President's directive, EPA and USDA created the Clean Water Action Plan. The Clean Water Action Plan is a plan to improve the water quality of the surface waters. It contains proposals to strengthen controls of pollutants from CAFO's through the creation of an unified animal feeding operation strategy.¹¹³ In September 1998, USDA and EPA released the *Draft Unified National Strategy for Animal Feeding Operations*.¹¹⁴ The Draft Strategy presents methods to control the threat to water quality from CAFO's.

There are no new federal regulations specifically for CAFOs, just proposals and guidance. The *Draft Unified National Strategy for Animal Feeding Operations* is not binding, yet it is expected to influence the direction of state programs. However, there may be federal regulations coming into effect within the next few years. The impact of any new federal regulations on Wyoming's regulations of confined swine feeding operations is unclear. The federal government does not regulate sewage lagoons but instead has jurisdiction over discharges to surface water.¹¹⁵ Wyoming's protection of groundwater should not be superseded by EPA because EPA does not have authority through the Clean Water Act to regulate groundwater.¹¹⁶

accompanying note 103.

111. 40 C.F.R. § 122.23(b)(3)(1999). Appendix B to Part 122 contains the Criteria for Determining a Concentrated Animal Feeding Operation:

An animal feeding operation is a concentrated animal feeding operation for purposes of Sec. 122.23 if either of the following criteria are met.

(a) More than the numbers of animals specified in any of the following categories are confined: (1) 1,000 slaughter and feeder cattle, (2) 700 mature dairy cattle (whether milked or dry cows), (3) 2,500 swine each weighing over 25 kilograms (approximately 55 pounds), (4) 500 horses, (5) 10,000 sheep or lambs, (6) 55,000 turkeys, (7) 100,000 laying hens or broilers (if the facility has continuous overflow watering), (8) 30,000 laying hens or broilers (if the facility has a liquid manure system), (9) 5,000 ducks, or (10) 1,000 animal units; or

(b) More than the following number and types of animals are confined: (1) 300 slaughter or feeder cattle, (2) 200 mature dairy cattle (whether milked or dry cows), (3) 750 swine each weighing over 25 kilograms (approximately 55 pounds), (4) 150 horses, (5) 3,000 sheep or lambs, (6) 16,500 turkeys, (7) 30,000 laying hens or broilers (if the facility has continuous overflow watering), (8) 9,000 laying hens or broilers (if the facility has a liquid manure handling system), (9) 1,500 ducks, or (10) 300 animal units

112. Carol Browner, U.S. Environmental Protection Agency, Dan Glickman, U.S. Department of Agriculture, Clean Water Action Plan: Restoring and Protecting America's Waters, prologue letter to the vice-president, (1998).

113. *Id.* at 60-62.

114. 63 Fed. Reg. 50192 (1998).

115. See 33 U.S.C. § 1341 *et seq.* (1994).

116. See *Village of Oconomowoc Lake v. Dayton Hudson Corp.*, 24 F.3d 962, 965, *cert. denied*, 115 S.Ct. 322 (1994).

That remains solely in the jurisdiction of the state. However, broad facility requirements may come along that are inconsistent with the state's regulations.

V. CONCLUSION

WWQRR, chapter 20 incorporates the dictate of the legislature. It may be viewed by the swine industry as onerous, and in effect it may discourage new facilities from coming into Wyoming for business. As of the date of this publication, Wyoming has not issued any permits under chapter 20.¹¹⁷ However, it is a shared hope that the new regulations are effective in protecting public health and the environment in Wyoming.

117. Telephone interview with Lou Harmon, Senior Analyst for the Wyoming Department of Environmental Quality, Water Quality Division (March 7, 2000).