



February 20, 2024

Kelli Book  
Iowa Department of Natural Resources  
Via e-mail to [afo@dnr.iowa.gov](mailto:afo@dnr.iowa.gov)

Re: Comments concerning proposed AFO rules

Dear Ms. Book:

Sierra Club Iowa Chapter is the oldest and largest grassroots environmental organization in Iowa. We have approximately 7,000 members throughout the state. Sierra Club has been a leader in Iowa on addressing issues surrounding animal feeding operations and water quality. So we appreciate the opportunity to comment on the proposed revisions to 567 I.A.C. Chapter 65. After reviewing the proposed revisions to Chapter 65, we have the following comments.

For clarification, we will refer to the regulations currently in the Administrative Code as the adopted regulations, the proposed regulations from 2022 as the 2022 regulations, and the proposed regulations from 2023 as the 2023 regulations.

### **Executive Order 10**

The 2023 regulations are being proposed as the result of the directives in Governor Reynolds' Executive Order 10. Sierra Club asserts that Executive Order 10 is illegal and beyond the Governor's authority. There is nothing in the Iowa Code that gives the Governor any authority to micromanage or dictate an agency's rulemaking authority.

Various Iowa Code chapters give administrative agencies the authority to adopt rules. Furthermore, those chapters describe the protections and regulation those rules are supposed to accomplish. In other words, the purpose of the rules is to protect the public and promote public benefits, not reduce regulatory burden on industry. Chapter 65 is supposed to control manure from animal feeding operations so as not to pollute water resources in the state. And, as stated in Iowa Code § 455B.105, the Environmental Protection Commission has the power to adopt rules necessary to implement Chapters 459 and 459A.

Instead of creating rules to protect the public and the environment, Executive Order 10 mandates that the DNR's proposed rules must reduce or remove regulatory burdens and undergo a rigorous cost-benefit analysis. That goal is contrary to the protection of the public and the environment that should be the purpose of the regulations.



Aside from mandating rules that violate the power granted to the EPC, the Governor has no authority to issue an executive order that dictates the content of the rules. The only authority granted to the Governor is found in § 17A.4 of the Iowa Code and is limited to objecting to a rule if it is unreasonable, arbitrary, capricious, or beyond the agency's authority. Or the Governor may rescind an adopted rule by executive order within 70 days of the rule becoming effective. There is no provision for the Governor to mandate any aspect of rulemaking as Executive Order 10 purports to do.

Furthermore, allowing the Governor to dictate what the agency must do in promulgating rules, with no focus on the specific rules, minimizes, or even renders pointless, public input. Iowa Code § 17A.4 makes public input an important part of rulemaking. This is so the agency is fully informed before adopting a rule. As Professor Bonfield said in his often-cited law review article at 60 Iowa L. Rev. 731 (1975), "The most obvious reason why such public participation is desirable is that it helps those responsible for promulgating administrative rules to elicit 'the information, facts, and probabilities which are necessary to fair and intelligent action.'"

Professor Bonfield went on to say:

Public involvement in the formulation of rules is also an excellent way to implement the ideal of participatory democracy. If we assure interested parties an opportunity to influence the decision-makers by communicating with them, public involvement in the rulemaking process will expand, making the process more representative.

Although Executive Order 10 does not prohibit public comment, it renders that comment meaningless, because it ties the agency's hands from considering that comment if the result would be regulations that violate the dictates of the executive order.

Professor Bonfield, in that same article, also discusses review of an adopted rule by a legislative body or some other entity. Specifically, as noted above, pursuant to Iowa Code § 17A.4, the Governor can object to or rescind a rule on narrow grounds. This is much different than dictating how rules must be written in the first place and requiring that the proposed rules be approved by the Governor even before they are adopted. As Professor Bonfield commented:

It is desirable to have agency decision making on [rules] entrusted to administrative agencies. That is why the powers in question were delegated to the agencies in the first place. Agencies are experts in their respective fields; the legislature as a whole or a legislative [review] committee [or the Governor] cannot have expertise in all of the fields in which agencies operate, and cannot fully understand all the technical or practical problems in all of the areas sought to be regulated.

Executive Order 10 turns what should be a technical, fact-based decision into a purely political decision.

It seems clear that, to a great extent, Executive Order 10 is simply a word game. The agencies, including DNR, are trying to not change the rules, but merely rewording provisions in the rules

to use fewer words and, more importantly, incorporating by reference, state statutory provisions and federal statutory and regulatory provisions. This tactic forces anyone using the regulations to take the time and effort to look at the other statutes and rules and try to coordinate them with the new regulations. This does not ease the regulatory burden nor make the regulations more understandable and easier to use, as Executive Order 10 purports to do.

### **Definitions – 2023 regulation 65.1**

**Covered** – Iowa Code § 459.102(19) defines “covered” only as organic or inorganic material placed on an animal feeding operation structure used to store manure. A formed manure storage structure beneath the floor in a confinement building should not be considered covered. The purpose of covering a manure storage structure is to prevent air emissions containing odor from escaping. The slats above a pit beneath a confinement building does not serve this purpose. There is no question that odor and air emissions come up through the slats and are blown out of the building by the fans on the building. The roof of the building does not provide appropriate cover.

**Known sinkhole** – This definition should rely on the applicant’s knowledge only after the applicant has exercised due diligence in determining if a sinkhole exists.

**Manure** – The definition of “animal excreta or other commonly associated wastes of animals” is set out in the Iowa Code. But the definition in the 2023 regulation should make clear that this includes air emissions from confinement buildings. There is no question that those air emissions contain animal excreta. That is where the odor comes from. Those air emissions also contain ammonia, hydrogen sulfide and other components of manure.

**Partially roofed AFO** – The 2023 regulation allows an operation to be classified as an open feedlot if the animals are housed under roof and the unroofed portion of the building is at least 10% of the total area of the building. This definition misconstrues the language and intent of the definition of “open feedlot operation” in Iowa Code § 459A.102(28). The legislature most certainly intended for the open feedlot operation definition to describe an operation where the animals are mostly in an open unroofed yard with a roofed structure where they can seek shelter from inclement weather. It was not intended to manipulate what is for all intents and purposes a confinement building into an open feedlot.

It is also important to note that the statutory reference to “partially roofed” refers to the open feedlot **operation**, while the regulatory definition of “partially roofed” refers to the **building** in which the animals are housed. Animals are not housed in an open feedlot. They are primarily in an unroofed lot and the roofed area is just for temporary shelter. So this regulation deftly shifts the focus of the statutory definition from the open feedlot operation to the building in which animals are confined. This is a perversion of the legislative intent.

The unroofed percentage in order to be classified as an open feedlot should be at least 50%. Any lesser percentage, especially the proposed 10%, allows what is essentially a confinement operation to be classified as an open feedlot and avoid a construction permit and the master

matrix process and other requirements for confinements. An operation only 10% unroofed allows an operation where the animals are confined in the building with only the feed bunk where only the animals' heads are outside the roofed portion of the building. To put it bluntly, calling that an open feedlot is a farce.

### **Complaint Investigations – Section 65.4**

In this section certain portions of the 2022 regulation have been deleted from the 2023 regulation. The deleted portions address county involvement in the complaint process. There is no corresponding language in the Iowa Code for the deleted regulation language. Those deleted portions should be included in the regulation in order to allow the counties to be involved in protecting their citizens and environment.

### **Karst Terrain – Section 65.7**

This section applies only to (1) confinement feeding operation structures over 500 animal units, (2) settled open feedlot effluent basins at open feedlot operations requiring a construction permit, (3) AT systems, and (4) animal truck wash effluent structures. Apparently, this rule does not apply to formed or unformed manure storage structures at open feedlots that are not settled open feedlot effluent basins requiring a construction permit. There is no reason to exclude those types of structures. On the other hand, if settled open feedlot effluent basins are the only types of manure storage structures allowed for open feedlots, the rules should make that clear.

### **Floodplains – Section 65.9**

We agree that a manure storage structure should not be constructed in a 100-year floodplain. This rule apparently applies only to confinement operations and open feedlots with a settled open feedlot effluent basin. It should apply to all types of operations. We do not agree with what appears to be the deletion of the reference in the adopted regulation regarding alluvial soils. If construction in alluvial soils is proposed, there should be an investigation to ensure that it is appropriate to construct the manure storage structure in that area.

We do not see any justifiable reason why the prohibition on construction in a 100-year floodplain should be limited to a major water source. Although there is provision in the 2023 regulation for restricting construction in the floodplain of a non-major water source, this should be an absolute prohibition. Being in a floodplain is being in a floodplain. There is a danger of the manure storage structure being flooded either way.

### **Confinement Operations**

#### **Minimum Manure Control Requirements – Section 65.100**

Section 65.100(3) allows unspecified manure control methods if the DNR determines that an adequate level of manure control will result. This regulation is much too vague. It gives no

guidance to livestock operators, the DNR or the public. It gives far too much discretion to the DNR. There is no basis for determining what is an adequate level of manure control. Moreover, the public that is supposed to be protected by the rules will be left in the dark and will have to expend significant expense and effort to ensure that any manure control approved by the DNR will be adequate.

### **Requirements for Land Application of Manure – Section 65.101**

Section 101(3) allows for application of manure on frozen or snow-covered ground. But the regulation does not set forth any specific requirements as to how the manure must be applied to avoid runoff. The reason this regulation, and Iowa Code § 459.313A, exists is because manure applied to frozen or snow-covered ground will not be absorbed by the soil and will run off, causing pollution to water resources. This regulation does not give the livestock operator any guidance on how to properly apply the manure. Moreover, the public need to be assured that the operator is properly applying manure to frozen and snow-covered ground.

### **Manure Storage Structure Design Requirements – Section 65.108**

Section 65.108(4) for earthen manure storage basins appears to have contradictory requirements. It says that the manure must be removed at least once a year but only needs to be constructed with a capacity for 8 months. If annual removal is all that is required, the basin should be required for a capacity of at least 12 months.

### **MMP Content Requirements – Section 65.111**

Adopted regulation Section 65.17(5), which became Section 65.112(5) in the 2022 regulation, has been deleted as Section 65.111(5) in the 2023 regulation. The section required total nitrogen and phosphorus available in the manure from a confinement operation to be determined. It is not clear why that section has been deleted in the 2023 regulation. It is essential to determine the nutrients in the manure in order to determine the proper application rate for applying the manure to the crop fields. In fact, it is clearly called for the MMP form.

Likewise, adopted regulation 65.17(9), which became Section 65.112(9) in the 2022 regulation, has been deleted as Section 65.111(9) in the 2023 regulation. The section required an estimate of the annual animal production and manure volume or weight produced. Just like the amount of nitrogen and phosphorus in the previous regulation, it is essential to make this determination in order to prepare the MMP. It is not clear why this section has been deleted in the 2023 regulation.

Section 65.111(12) addresses use of the phosphorus index in determining the proper application rate for applying manure to crop fields. But it appears to make no sense. It allows the use of non-compliant soil samples to be used for the phosphorus index if the samples are less than four years old. If they are non-compliant they should not be used, and compliant samples should be required. There is no reason to let the confinement operation off the hook on this.



## Open Feedlot Operations

### Effluent Control Requirements – Section 65.200

This section clearly applies only to open feedlot operations that have settled open feedlot effluent basins or alternative technologies. The regulation should make it clear that the only acceptable manure handling systems that will be approved for open feedlot operations are settled open feedlot effluent basins or alternative technologies.

This section also states that open feedlot effluent shall be land-applied in a manner that will not cause pollution to surface water or groundwater. This section further states that compliance with statutes and rules shall be deemed compliance with this requirement. This presumes that the statutes and rules cover every possible way that pollution could be caused and that the statutes and rules are unquestionably effective in preventing pollution. It would make more sense for the statutes and rules to be a rebuttable presumption that pollution is being prevented. That presumption could be overcome by proof of pollution even if the statutes and rules are being followed.

## Master Matrix

In the adopted regulations the Master Matrix form is part of the regulations. That is important because the form establishes the specific areas to be considered in completing and evaluating the matrix, as well as the scoring of each area. It is our understanding that the Master Matrix form will not be part of the 2023 regulations, but will instead just be on the DNR website. This means that the form will not go through the rulemaking process and can be changed on a whim with no public input. The Master Matrix form should again be part of the regulations.

## Conclusion

Even with the restrictions placed on the DNR by Executive Order 10, the proposed rules do not make the rules simpler, clearer, nor accomplish the purpose of the rules as envisioned by the legislature. Sierra Club's comments are meant to address these flaws. We look forward to the DNR's response to these and other comments.

/s/ *Wallace L. Taylor*

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