



University of Arkansas Division of Agriculture

**An Agricultural Law Research Project**

**Nutrient Management Plans  
Statutes & Regulations**

**Alaska**

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## Nutrient Management Plans

### STATE OF ALASKA

**1) Alaska Stat. 46.03.010, .040, .860, .865, .870  
.875 .880, .890; 18 AAC 83.005, .010, .015, .020, .320,  
.630, .325, .405, .435 .475, .610(f)**

*The statutes and Constitution are current through the 2018 regular and special legislative sessions. The statutes are subject to changes by the Alaska Legislative Council.*

**1) Alaska Stat. 46.03, .010 .040, .860, .865, .870, .875, .880, .890; 18 AAC  
83.005, .010, .015, .320, .630, .325, .405, .475, .610(f)**

#### **Article 1. Declaration of Policy.**

##### **Sec. 46.03.010. Declaration of policy.**

(a) It is the policy of the state to conserve, improve, and protect its natural resources and environment and control water, land, and air pollution, in order to enhance the health, safety, and welfare of the people of the state and their overall economic and social well-being.

(b) It is the policy of the state to improve and coordinate the environmental plans, functions, powers, and programs of the state, in cooperation with the federal government, regions, local governments, other public and private organizations, and concerned individuals, and to develop and manage the basic resources of water, land, and air to the end that the state may fulfill its responsibility as trustee of the environment for the present and future generations.

#### **Article 2. Department of Environmental Conservation.**

##### **Sec. 46.03.040. Alaska environmental plan.**

(a) The department shall formulate and annually review and revise a statewide environmental plan for the management and protection of the quality of the environment and the natural resources of the state, in furtherance of the legislative policy and purposes expressed in this chapter.

(b) The department shall submit the first plan to the governor on or before January 1, 1972, and thereafter submit periodic revisions of the plan to the governor. The plan is effective upon approval by the governor and shall serve thereafter as a guide to the public, the state government and the political subdivisions of the state in the development of the environment and natural resources of the state.

(c) In formulating the plan and any revisions, the department may consult with persons, organizations, and groups, public or private, interested in or concerned with the environment of the state, and with a department, division, board, commission, or other agency of the state, with a political subdivision, or with any public authority as may be necessary to enable the department to carry out its responsibilities under this section.

## **Article 10. General Provisions.**

### **Sec. 46.03.860. Inspection warrant.**

The department may seek search warrants for the purpose of investigating actual or suspected sources of pollution or contamination or to ascertain compliance or noncompliance with AS 46.14 or this chapter or a regulation adopted under AS 46.14 or this chapter.

### **Sec. 46.03.865. Authority of department in cases of emergency.**

(a) When the department finds that an actual or imminent discharge of oil, a hazardous substance, or low level radioactive materials to the air, water, land, or subsurface land of the state poses an immediate threat to the public health or welfare or the environment of the state, it may issue an order declaring an emergency and directing a person or persons to take action the department believes necessary to meet the emergency, and protect the public health, welfare, or environment. If there is an incident command system established under AS 26.23 or AS 46.04.200 — 46.04.210 that is applicable to the situation for which the department issues an order under this subsection, the department's exercise of authority under this subsection shall be guided by the relevant provisions of the incident command system.

(b) A person to whom an order is directed shall comply with it immediately, but on application to the department shall be given a hearing under AS 44.62 (Administrative Procedure Act). Thereafter the department may affirm, revoke, or modify the order.

(c) During a period of emergency declared under (a) of this section, each state agency shall take whatever action the department finds necessary to meet the emergency and to protect the public health, welfare, or environment, consistent with the responsibilities assigned to them under an incident command system established under AS 26.23 or AS 46.04.200 — 46.04.210 if one is applicable to the situation.

### **Sec. 46.03.870. Actionable rights.**

(a) Except as specified in AS 46.03.822 — 46.03.828, the bases for proceedings or actions resulting from violations of this chapter or a regulation adopted under this chapter inure solely to and are for the benefit of the state, and are not intended to in any way create new or enlarge existing rights of persons or groups of persons in the state.

(b) Except as specified in AS 46.03.822 — 46.03.828, a determination or order of the department does not create a presumption of law or finding of fact inuring to or for the benefit of persons other than the state.

(c) This chapter does not estop the state, persons, or political subdivisions of the state in the exercise of their rights to suppress nuisances, to seek damages, or to otherwise abate or recover for the effects of pollution or other environmental degradation.

**Sec. 46.03.875. Remedies cumulative.**

All remedies provided by this chapter, AS 46.04, or AS 46.14 are cumulative, and the securing of relief, whether injunctive, civil, or criminal, under a section of this chapter, AS 46.04, or AS 46.14 does not stop the state from obtaining relief under any other section of this chapter, AS 46.04, or AS 46.14.

**Sec. 46.03.880. Applicability of the Administrative Procedure Act.**

(a) Except as otherwise specifically provided in this chapter, AS 44.62 (Administrative Procedure Act) governs the activities and the proceedings of the department.

(b) Notwithstanding AS 44.62.330(a)(25), adjudicatory hearing procedures to review permit decisions under this chapter need not conform to AS 44.62.330 — 44.62.630 (Administrative Procedure Act).

**Sec. 46.03.890. Enforcement authority.**

(a) The following persons are authorized to enforce this chapter:

- (1) a state employee authorized by the commissioner;
- (2) a police officer of the state.

(b) Inspection and enforcement employees of the department designated by the commissioner are peace officers in the performance of their duties under this chapter, AS 46.04, AS 46.09, and AS 46.14.

**18 AAC 83.005. Purpose, scope, and applicability of Alaska Pollutant Discharge Elimination System (APDES) program**

(a) The purpose of this chapter, 18 AAC 83.005 – 18 AAC 83.990, is to implement the Alaska Pollutant Discharge Elimination System (APDES) point source wastewater discharge program in a manner that meets the purposes of AS 46.03 and in accordance with 33 U.S.C. 1342 (Clean Water Act, sec. 402) and the requirements adopted by reference at 18 AAC 83.010.

(b) The permit requirements and standards established and adopted in this chapter apply to the discharge of pollutants from any point source into waters of the United States.

(c) The state's administration of the APDES program and the requirements and standards adopted in this chapter will apply after the date the commissioner certifies to the lieutenant governor that the United States Environmental Protection Agency has approved, under 33 U.S.C. 1342(b), the state's administration of the APDES program.

(d) This chapter does not apply to the use or disposal of sewage sludge when that use or disposal is regulated under 40 C.F.R. Part 503, as revised as of July 1, 2006.

### **18 AAC 83.010. Requirements, guidelines, and policy documents adopted by reference**

(a) The provisions of 40 C.F.R. 2.208 (Substantive Criteria for Use in Confidentiality Determinations), as revised as of July 1, 2005, are adopted by reference.

(b) The following provisions of 40 C.F.R. Part 122 (EPA Administered Permit Programs: The National Pollutant Discharge Elimination System), as revised as of July 1, 2006, are adopted by reference:

(1) 40 C.F.R. 122.23 (Concentrated Animal Feeding Operations);

(2) 40 C.F.R. 122.25 (Aquaculture Projects);

(3) 40 C.F.R. 122.26 (Storm Water Discharges);

(4) 40 C.F.R. 122.29(d) (Effect of Compliance with New Source Performance Standards);

(5) 40 C.F.R. 122.30 – 40 C.F.R. 122.37 (Requirements and Guidance for Small Municipal Separate Storm Sewer Systems);

(6) 40 C.F.R. 122.42(e) (Additional Conditions Applicable to NPDES Permits for Concentrated Animal Feeding Operations);

(7) Appendix A to 40 C.F.R. Part 122 (NPDES Primary Industry Categories);

(8) Appendix C to 40 C.F.R. Part 122 (Criteria for Determining a Concentrated Aquatic Animal Production Facility);

(9) Appendix D to 40 C.F.R. Part 122 (NPDES Permit Application Testing Requirements);

(10) Appendix J to 40 C.F.R. Part 122 (NPDES Permit Testing Requirements for Publicly Owned Treatment Works).

(c) The following provisions of 40 C.F.R. Part 125 (Criteria and Standards for the National Pollutant Discharge Elimination System), as revised as of July 1, 2006, are adopted by reference:

- (1) Subpart A (40 C.F.R. 125.1 – 40 C.F.R. 125.3; Criteria and Standards for Imposing Technology-Based Treatment Requirements);
- (2) Subpart B (40 C.F.R. 125.10 – 40 C.F.R. 125.11; Criteria for Issuance of Permits to Aquaculture Projects);
- (3) Subpart D (40 C.F.R. 125.30 – 40 C.F.R. 125.32; Criteria and Standards for Determining Fundamentally Different Factors);
- (4) Subpart G (40 C.F.R. 125.56 – 40 C.F.R. 125.68; Criteria for Modifying Secondary Treatment Requirements);
- (5) Subpart H (40 C.F.R. 125.70 – 40 C.F.R. 125.73; Criteria for Determining Alternative Effluent Limitations);
- (6) Subpart I (40 C.F.R. 125.80 – 40 C.F.R. 125.89; Requirements Applicable to Cooling Water Intake Structures for New Facilities);
- (7) Subpart J (40 C.F.R. 125.90 – 40 C.F.R. 125.99; Requirements Applicable to Cooling Water Intake Structures for Phase II Existing Facilities);
- (8) Subpart M (40 C.F.R. 125.120 – 40 C.F.R. 125.124; Ocean Discharge Criteria);
- (9) Subpart N (40 C.F.R. Part 125.130 – 40 C.F.R. 125.139; Requirements Applicable to Cooling Water Intake Structures for New Offshore Oil and Gas Extraction Facilities Under Section 316(b) of the Act).

(d) The provisions of 40 C.F.R. Part 129, Subpart A (40 C.F.R. 129.1 – 40 C.F.R. 129.105; Toxic Pollutant Effluent Standards and Prohibitions), as revised as of July 1, 2006, are adopted by reference.

(e) The provisions of 40 C.F.R. Part 133 (Secondary Treatment Regulation), as revised as of July 1, 2006, are adopted by reference.

(f) The provisions of 40 C.F.R. Part 136 (Guidelines Establishing Test Procedures for the Analysis of Pollutants), revised as of September 18, 2014, are adopted by reference.

(g) The following provisions of Subchapter N (40 C.F.R. Part 400 – 40 C.F.R. Part 471; Effluent Standards) are adopted by reference:

- (1) 40 C.F.R. Part 401 (General Provisions), as revised as of July 1, 2006;

(2) 40 C.F.R. 403.1 – 40 C.F.R. 403.18 (General Pretreatment Regulations for Existing and New Sources of Pollution) and Appendices D, E, and G as revised as of July 1, 2007;

(3) 40 C.F.R. Part 405 – 40 C.F.R. Part 471, containing industry sector effluent limitations and guidelines, as revised as of July 1, 2006.

(h) The EPA's Combined Sewer Overflow Control Policy of April 19, 1994, published at 59 Fed. Reg. 18688, is adopted by reference.

(i) Unless the context in which a term is used clearly requires a different meaning, terms in the provisions adopted by reference in (a) – (h) of this section have the following meanings:

(1) "director" means "Department of Environmental Conservation";

(2) "Environmental Protection Agency" or "EPA" means "Department of Environmental Conservation";

(3) "regional administrator" or "administrator" means "Department of Environmental Conservation".

### **18 AAC 83.015. Duty to obtain a permit; exclusions and prohibitions**

(a) A person may not discharge pollutants from any point source into waters of the United States in the state without first obtaining an APDES permit from the department, unless the discharge is excluded from APDES permit requirements under (b) of this section or the discharge is authorized by an APDES or NPDES permit that continues in effect under 18 AAC 83.155.

(b) The following discharges do not require an APDES permit under this chapter, but are subject to any applicable waste disposal permit requirements of AS 46.03.100, or any other state authorization:

(1) any discharge of sewage from a vessel, effluent from a properly functioning marine engine, laundry, shower, and galley sink wastes, or any other discharge incidental to the normal operation of a vessel as that term is defined in AS 46.03.826(14); however, this exclusion does not apply to

(A) rubbish, trash, garbage, or other materials discharged overboard, or

(B) other discharges when the vessel is operating in a capacity other than as a means of transportation, including when the vessel is

- (i) used as an energy or mining facility, a storage facility, or a seafood processing facility;
- (ii) secured to a storage facility or a seafood processing facility; or
- (iii) secured to the bed of the ocean, contiguous zone, or waters of the United States for the purpose of mineral or oil exploration or development;

(2) any discharge of dredged or fill material into waters of the United States that is regulated under 33 U.S.C. 1344 (Clean Water Act, sec. 404);

(3) the introduction of sewage, industrial wastes, or other pollutants into publicly owned treatment works (POTWs) by an indirect discharger; however, this exclusion does not apply to an indirect discharger defined as a significant industrial user under 40 C.F.R. Part 403, adopted by reference in 18 AAC 83.010, if the indirect discharge is or will be a POTW without an approved pretreatment program; the department will provide an opportunity for any POTW that may receive indirect discharges from a significant industrial user to comment on the significant industrial user's permit;

(4) any discharge in compliance with the instructions of an on-scene coordinator under 40 C.F.R. Part 300 (The National Oil and Hazardous Substances Pollution Contingency Plan), as revised as of July 1, 2006, or 33 C.F.R. Part 153 (Control of Pollution by Oil and Hazardous Substances, Discharge Removal), as revised as of July 1, 2006;

(5) any introduction of pollutants from non-point source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands; however, this exclusion does not apply to discharges from concentrated animal feeding operations, discharges from concentrated aquatic animal production facilities, discharges to aquaculture projects, and discharges from silvicultural point sources;

(6) any return flow from irrigated agriculture;

(7) any discharge into a privately owned treatment works, unless the department otherwise requires under 18 AAC 83.485;

(8) any discharge of a pollutant from a POTW into marine waters where the discharger has been granted a waiver under 33 U.S.C. 1311(h).

(c) The department will not issue an APDES permit for a discharge,

(1) unless the conditions of the permit provide for compliance with the applicable requirements of 33 U.S.C. 1251 – 1387 (Clean Water Act) and this chapter;



- (2) when the regional administrator has objected to issuance of the permit;
- (3) when the department cannot impose conditions that ensure compliance with the applicable water quality requirements of all affected states;
- (4) when, in the judgment of the United States Army Corps of Engineers, anchorage and navigation in or on any of the waters of the United States would be substantially impaired by the discharge;
- (5) of any radiological, chemical, or biological warfare agent or high-level radioactive waste;
- (6) that is inconsistent with a plan or plan amendment approved under 33 U.S.C. 1288(b);
- (7) to the territorial sea, the waters of the contiguous zone, or the oceans,
  - (A) before the EPA promulgates guidelines under 33 U.S.C. 1343 for determining degradation of the waters of the territorial seas, the contiguous zone, and the oceans, unless the department determines that it is in the public interest to issue a permit; or
  - (B) after the EPA promulgates guidelines under 33 U.S.C. 1343, if the department has insufficient information to make a reasonable judgment whether the discharge complies with the EPA guidelines;
- (8) to a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards; however,
  - (A) when an owner or operator of a new source or new discharger proposes to discharge into a water segment
    - (i) that does not meet applicable water quality standards or that is not expected to meet those standards even after application of the effluent limitations required by 33 U.S.C. 1311(b)(1)(A); and
    - (ii) for which the state or interstate agency has performed a pollutants load allocation for the pollutant to be discharged;
  - (B) the department will provide an opportunity before the close of the public comment period for that owner or operator to demonstrate that
    - (i) there are sufficient remaining pollutant load allocations to allow for the discharge; and

(ii) the existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards;

(C) the department may waive the submission of information required by (c)(8)(B) of this section if the department determines that the department already has adequate information to evaluate the request;

(D) the department must include an explanation of the development of limitations to meet the criteria of (c)(8)(B) of this section in the fact sheet to the permit under 18 AAC 83.115; or

(9) of any pollutant to waters of the United States located in Denali National Park and Preserve.

### **18 AAC 83.020. Term of permit**

(a) An APDES permit is effective for a fixed term that must be listed in the permit and must not exceed five years. The department may issue a permit for a term of five years or any shorter period. Except as provided in 18 AAC 83.155(c) for the administrative continuance of expiring permits, the department will not extend the term of a permit by modification beyond the maximum duration specified in this section.

(b) The department may issue a permit to expire on or after the statutory deadline set in 33 U.S.C. 1311(b)(2)(A), (C), and (E) if the permit includes effluent limitations to meet the requirements of 33 U.S.C. 1311(b)(2)(A), (C), (D), (E), and (F), whether or not the EPA has promulgated or approved applicable effluent limitations guidelines.

(c) If the department determines that a discharger falls within an industrial category for the purpose of setting a permit expiration date under (b) of this section, that determination does not establish the discharger's industrial category for any other purpose, and does not foreclose either the discharger or the department from a different industrial category determination when a permit is formulated.

### **18 AAC 83.320. Permit application requirements for new and existing concentrated animal feeding operations**

An applicant for an APDES permit for a new or existing concentrated animal feeding operation, as defined in 40 C.F.R. 122.23(b) and adopted by reference in 18 AAC 83.010, shall provide the following information to the department, using the applicable forms specified in 18 AAC 83.305(a):

(1) the name of the owner or operator;

(2) the facility location and mailing addresses;

- (3) latitude and longitude of the production area, measured at the entrance to the production area;
- (4) instead of the map or alternative information required by 18 AAC 83.305(b)(7), a topographic map of the geographic area in which the concentrated animal feeding operation is located, showing the specific location of the production area;
- (5) specific information about the number and type of animals, including if applicable: beef cattle, broilers, layers, swine weighing 55 pounds or more, swine weighing less than 55 pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, or other animals, whether in open confinement or housed under roof;
- (6) the type of containment and total capacity in tons or gallons of any anaerobic lagoon, roofed storage shed, storage pond, under-floor pit, above-ground storage tank, below-ground storage tank, concrete pad, impervious soil pad, or other structure or area used for containment and storage of manure, litter, and process wastewater;
- (7) the total number of acres available and under the applicant's control for land application of manure, litter, or process wastewater;
- (8) estimated amounts of manure, litter, and process wastewater generated per year in tons or gallons;
- (9) estimated amounts of manure, litter, and process wastewater transferred to other persons per year in tons or gallons;
- (10) certification that a nutrient management plan has been completed and will be implemented upon the date of permit coverage.

#### **18 AAC 83.630. Requirements for concentrated animal feeding operations**

A permit issued to any concentrated animal feeding operation must include as a condition compliance with the applicable requirements set out in 40 C.F.R. 122.23, adopted by reference in 18 AAC 83.010.

#### **18 AAC 83.325. Permit application requirements for new and existing concentrated aquatic animal production facilities**

An applicant for APDES permit for a new or existing concentrated aquatic animal production facility shall provide the following information to the department, using the applicable forms specified in 18 AAC 83.305(a):

- (1) the maximum daily and average monthly flow from each outfall;
- (2) the number of ponds, raceways, and similar structures;
- (3) the name of the receiving water and the source of intake water;
- (4) for each species of aquatic animal, the total yearly and maximum harvestable weight;
- (5) the calendar month of maximum feeding and the total mass of food fed during that month.

### **18 AAC 83.405. Conditions applicable to all permits**

(a) *Incorporation of conditions.* The conditions in (b) - (l) of this section and in 18 AAC 83.410 -- 18 AAC 83.420 apply to all APDES permits and must be incorporated into the permits expressly or by reference along with any additional conditions required under this chapter. Any section incorporated by reference in a permit must be identified by a specific citation.

(b) *Duty to comply.* A permittee shall comply with all conditions of that permittee's APDES permit. Any permit noncompliance constitutes a violation of 33 U.S.C. 1251 - 1387 (Clean Water Act) and this chapter, and is grounds for an enforcement action including termination, revocation and reissuance, or modification of a permit, or denial of a permit renewal application. A permittee shall comply with effluent standards or prohibitions established under 33 U.S.C. 1317(a) for toxic pollutants within the time provided in the regulations that establish those effluent standards or prohibitions even if the permit has not yet been modified to incorporate the requirement.

(c) *Duty to reapply.* If a permittee wishes to continue an activity regulated by a permit after its expiration date, the permittee must apply for and obtain a new permit.

(d) *Need to halt or reduce activity not a defense.* In an enforcement action, a permittee may not assert as a defense that compliance with the conditions of the permit would have made it necessary for the permittee to halt or reduce the permitted activity.

(e) *Duty to mitigate.* A permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit that has a reasonable likelihood of adversely affecting human health or the environment.

(f) *Proper operation and maintenance.* A permittee shall at all times properly operate and maintain all facilities and systems of treatment and control and related appurtenances that the permittee installs or uses to achieve compliance with the conditions of the permit. The permittee's duty to operate and maintain properly includes using adequate laboratory controls and appropriate quality assurance procedures. However, a permittee is not required to operate back-up or auxiliary facilities or similar systems that a permittee

installs unless operation of those facilities is necessary to achieve compliance with the conditions of the permit.

(g) *Permit actions.* A permit may be modified, revoked and reissued, or terminated for cause as provided in 18 AAC 83.130. If a permittee files a request to modify, revoke and reissue, or terminate a permit, or gives notice of planned changes or anticipated noncompliance, the filing or notice does not stay any permit condition.

(h) *Property rights.* A permit does not convey any property rights or exclusive privilege.

(i) *Duty to provide information.* A permittee shall, within a reasonable time, provide to the department any information that the department requests to determine whether a permittee is in compliance with the permit, or whether cause exists to modify, revoke and reissue, or terminate a permit. A permittee shall also provide to the department, upon request, copies of any records the permittee is required to keep under the permit.

(j) *Inspection and entry.* A permittee shall allow the department, or an authorized representative, including a contractor acting as a representative of the department at reasonable times and on presentation of credentials establishing authority and any other documents required by law, to

(1) enter the premises where a permittee's regulated facility or activity is located or conducted, or where permit conditions require records to be kept;

(2) have access to and copy any records that permit conditions require the permittee to keep;

(3) inspect any facilities, equipment, including monitoring and control equipment, practices, or operations regulated or required under a permit; and

(4) sample or monitor any substances or parameters at any location for the purpose of assuring permit compliance or as otherwise authorized by 33 U.S.C. 1251-1387 (Clean Water Act).

(k) *Monitoring and records.* A permittee must comply with the following monitoring and recordkeeping conditions:

(1) samples and measurements taken for the purpose of monitoring must be representative of the monitored activity;

(2) the permittee shall retain records of all monitoring information for at least three years, or longer at the department's request at any time, from the date of the sample, measurement, report, or application; monitoring records required to be kept include

(A) all calibration and maintenance records;

(B) all original strip chart recordings or other forms of data approved by the department for continuous monitoring instrumentation;

(C) all reports required by a permit; and

(D) records of all data used to complete the application for a permit;

(3) records of monitoring information must include

(A) the date, exact place, and time of any sampling or measurement;

(B) the name of any individual who performed the sampling or measurement;

(C) the date any analysis was performed;

(D) the name of any individual who performed any analysis;

(E) any analytical technique or method used; and

(F) the results of the analysis; and

(4) monitoring must be conducted according to test procedures approved under 40 C.F.R. Part 136, adopted by reference in 18 AAC 83.010, unless other test procedures have been specified in the permit.

(1) *Signature requirement; penalties.* Any application, report, or information submitted to the department in compliance with a permit requirement must be signed and certified in accordance with 18 AAC 83.385. Any person who knowingly makes any false material statement, representation, or certification in any application, record, report or other document filed or required to be maintained under a permit, or who knowingly falsifies, tampers with or renders inaccurate any monitoring device or method required to be maintained under a permit shall, upon conviction, be subject to penalties under 33 U.S.C. 1319(c)(4).

#### **18 AAC 83.475. Best management practices**

A permit must include best management practices to control or abate the discharge of pollutants in the permit when

(1) authorized under 33 U.S.C. 1314(e) for the control of toxic pollutants and hazardous substances from ancillary industrial activities;

(2) authorized under 33 U.S.C. 1342(p) for the control of storm water discharges;

- (3) numeric effluent limitations are infeasible; or
- (4) the practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of 33 U.S.C. 1251 - 1387 (Clean Water Act).

**18 AAC 83.610. Additional conditions applicable to specified categories of permits**

[ . . . ]

**(f) *Concentrated animal feeding operations.*** Any permit issued to a concentrated animal feeding operation must include the applicable requirements set out in 40 C.F.R. 122.42(e), adopted by reference in