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Document No. 5137

**DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL**

CHAPTER 61

Statutory Authority: 1976 Code Sections 48‑1‑10 et seq.

61‑9. Water Pollution Control Permits.

**Synopsis:**

Pursuant to the South Carolina Pollution Control Act, S.C. Code Ann. 48‑1‑10 et seq., the Department of Health and Environmental Control (“Department”) establishes programs to regulate discharges from point sources, including concentrated animal feeding operations. The Department proposes amending R.61‑9.122.23, Concentrated Animal Feeding Operations, for conformity with the current federal regulation in Title 40, Part 122 of the Code of Federal Regulations (40 CFR Part 122), Subpart B, Section 23, *Concentrated animal feeding operations* and to improve regulatory clarity. Although the Administrative Procedures Act, S.C. Code Section 1‑23‑120, exempts these proposed amendments from General Assembly review, the Department is sending the proposed amendments to the General Assembly for review.

The Department had a Notice of Drafting published in the July 22, 2022, South Carolina State Register.

Section‑by‑Section Discussion of Proposed Amendments

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| **Section** | **Type of Change** | **Purpose** |
| (a) | Revision | Amended to clarify references, permitting requirements, and feeding operations. |
| (b)(1) | RevisionReorganization | Amended for clarity; recodified items. |
| (b)(2) | Reorganization | Amended to add recodified (a)(1)(ii). |
| (b)(4) | Technical Correction | Amended to correct punctuation. |
| (b)(6) | Technical Correction | Amended to correct punctuation. |
| (b)(6)(ii) | Revision | Amended to clarify U.S. waters.  |
| (b)(8) | Technical Correction | Amended to correct spelling. |
| (b)(9) | Technical Correction | Amended to correct punctuation and grammar. |
| (c)(1) | RevisionAddition | Amended for clarity. |
| (c)(2) | Revision | Amended to clarify U.S. waters. |
| (c)(3) | RevisionTechnical Correction | Amended to clarify U.S. waters and to correct punctuation. |
| (d)(1)‑(2) | Revision | Amended to comply with federal law. |
| (e) | Revision | Amended to clarify U.S. waters. |
| (e)(1)‑(2) | Addition | Added to comply with federal law. |
| (f)‑(h) | Deleted | Deleted to replace with current federal law. |
| New (f) | Addition | Added permit coverage requirement to comply with federal law. |
| New (g) | Addition | Added as reserved to comply with federal law. |
| New (h) | Addition | Added procedures for permit coverage to comply with federal law. |

**Instructions:**

Amend R.61‑9.122.23, Concentrated Animal Feeding Operations, by striking the existing language and replacing it with language that conforms to current federal regulation as set forth below.

**Text:**

61‑9.122. The National Pollutant Discharge Elimination System.

(Statutory Authority: 1976 Code Sections 48‑1‑10 et seq. and Sections 48‑14‑10 et seq.)

**Amend R.61‑9.122.23, Concentrated animal feeding operations, to read:**

**122.23. Concentrated animal feeding operations.**

 (a) Scope. Concentrated animal feeding operations (CAFOs), as defined in paragraph (b) of this section or designated in accordance with paragraph (c) of this section, are point sources, subject to NPDES permitting requirements as provided in this section. Once an animal feeding operation is defined as a CAFO for at least one type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

 (b) Definitions applicable to this section:

 (1) “Animal feeding operation (AFO)” means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

 (i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of forty‑five (45) days or more in any twelve (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.

 (2) “Concentrated animal feeding operation (CAFO)” means an AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section. Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes.

 (3) The term “land application area” means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter, or process wastewater from the production area is or may be applied.

 (4) “Large concentrated animal feeding operation (Large CAFO).” An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:

 (i) 700 mature dairy cows, whether milked or dry;

 (ii) 1,000 veal calves;

 (iii) 1,000 cattle other than mature dairy cows or veal calves. The term cattle includes but is not limited to heifers, steers, bulls, and cow/calf pairs;

 (iv) 2,500 swine, each weighing fifty‑five pounds (55 lbs) or more;

 (v) 10,000 swine, each weighing less than fifty‑five pounds (55 lbs);

 (vi) 500 horses;

 (vii) 10,000 sheep or lambs;

 (viii) 55,000 turkeys;

 (ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;

 (x) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;

 (xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;

 (xii) 30,000 ducks, if the AFO uses other than a liquid manure handling system; or

 (xiii) 5,000 ducks, if the AFO uses a liquid manure handling system.

 (5) The term “manure” is defined to include manure, bedding, compost, and raw materials or other materials commingled with manure or set aside for disposal.

 (6) “Medium concentrated animal feeding operation (Medium CAFO).” The term Medium CAFO includes any AFO with the type and number of animals that fall within any of the ranges listed in paragraph (b)(6)(i) of this section and which has been defined or designated as a CAFO. An AFO is defined as a Medium CAFO if:

 (i) The type and number of animals that it stables or confines falls within any of the following ranges:

 (A) 200 to 699 mature dairy cows, whether milked or dry;

 (B) 300 to 999 veal calves;

 (C) 300 to 999 cattle other than mature dairy cows or veal calves. The term cattle includes, but is not limited to, heifers, steers, bulls, and cow/calf pairs;

 (D) 750 to 2,499 swine each weighing fifty‑five pounds (55 lbs) or more;

 (E) 3,000 to 9,999 swine each weighing less than fifty‑five pounds (55 lbs);

 (F) 150 to 499 horses;

 (G) 3,000 to 9,999 sheep or lambs;

 (H) 16,500 to 54,999 turkeys;

 (I) 9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system;

 (J) 37,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;

 (K) 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system;

 (L) 10,000 to 29,999 ducks, if the AFO uses other than a liquid manure handling system; or

 (M) 1,500 to 4,999 ducks, if the AFO uses a liquid manure handling system; and

 (ii) Either one of the following conditions is met:

 (A) Pollutants are discharged into waters of the United States through a man‑made ditch, flushing system, or other similar man‑made device; or

 (B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

 (7) “Process wastewater” means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs, or bedding.

 (8) “Production area” means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under‑house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

 (9) “Small concentrated animal feeding operation (Small CAFO).” An AFO that is designated as a CAFO and is not a Medium CAFO.

 (c) How may an AFO be designated as a CAFO? The appropriate authority (i.e., the Department or Regional Administrator, or both, as specified in paragraph (c)(1) of this section) may designate any AFO as a CAFO upon determining that it is a significant contributor of pollutants to waters of the United States.

 (1) Who may designate? Designations may be made by the Department. The Regional Administrator may also designate CAFOs but only where the Regional Administrator has determined that one or more pollutants in the AFO’s discharge contributes to an impairment in a downstream or adjacent state or Indian country water that is impaired for that pollutant.

 (2) In making this designation, the Department or the Regional Administrator shall consider the following factors:

 (i) The size of the AFO and the amount of wastes reaching waters of the United States;

 (ii) The location of the AFO relative to waters of the United States;

 (iii) The means of conveyance of animal wastes and process wastewaters into waters of the United States;

 (iv) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes, manure, and process wastewaters into waters of the United States; and

 (v) Other relevant factors.

 (3) No AFO shall be designated under this paragraph unless the Department or the Regional Administrator has conducted an on‑site inspection of the operation and determined that the operation should and could be regulated under the permit program. In addition, no AFO with numbers of animals below those established in paragraph (b)(6) of this section may be designated as a CAFO unless:

 (i) Pollutants are discharged into waters of the United States through a manmade ditch, flushing system, or other similar man‑made device; or

 (ii) Pollutants are discharged directly into waters of the United States which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

 (d) NPDES permit authorization –

 (1) Permit Requirement. A CAFO must not discharge unless the discharge is authorized by an NPDES permit. In order to obtain authorization under an NPDES permit, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit.

 (2) Information to submit with permit application or notice of intent. An application for an individual permit must include the information specified in section 122.21. A notice of intent for a general permit must include the information specified in sections 122.21 and 122.28.

 (3) Information to submit with permit application. A permit application for an individual permit must include the information specified in section 122.21. A notice of intent for a general permit must include the information specified in sections 122.21 and 122.28.

 (e) Land application discharges from a CAFO are subject to NPDES requirements. The discharge of manure, litter, or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter, or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural stormwater discharge as provided in 33 U.S.C. 1362(14). For purposes of this paragraph, where the manure, litter, or process wastewater has been applied in accordance with site‑specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in section 122.42(e)(1)(vi) through (ix), a precipitation‑related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

 (1) For unpermitted Large CAFOs, a precipitation‑related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land applied in accordance with site‑specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in section 122.42(e)(1)(vi) through (ix).

 (2) Unpermitted Large CAFOs must maintain documentation specified in section 122.42(e)(1)(ix) either on site or at a nearby office, or otherwise make such documentation readily available to the Department or Regional Administrator upon request.

 (f) By when must the owner or operator of a CAFO have an NPDES permit if it discharges? A CAFO must be covered by a permit at the time that it discharges.

 (g) [Reserved]

 (h) Procedures for CAFOs seeking coverage under a general permit.

 (1) CAFO owners or operators must submit a notice of intent when seeking authorization to discharge under a general permit in accordance with section 122.28(b). The Department must review notices of intent submitted by CAFO owners or operators to ensure that the notice of intent includes the information required by section 122.21(i)(1), including a nutrient management plan that meets the requirements of section 122.42(e) and applicable effluent limitations and standards, including those specified in 40 CFR part 412. When additional information is necessary to complete the notice of intent or clarify, modify, or supplement previously submitted material, the Department may request such information from the owner or operator. If the Department makes a preliminary determination that the notice of intent meets the requirements of sections 122.21(i)(1) and 122.42(e), the Department must notify the public of the Department’s proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO’s nutrient management plan, and the draft terms of the nutrient management plan to be incorporated into the permit. The process for submitting public comments and hearing requests, and the hearing process if a request for a hearing is granted, must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Department may establish, either by regulation or in the general permit, an appropriate period of time for the public to comment and request a hearing that differs from the time period specified in 40 CFR 124.10. The Department must respond to significant comments received during the comment period, as provided in 40 CFR 124.17, and, if necessary, require the CAFO owner or operator to revise the nutrient management plan in order to be granted permit coverage. When the Department authorizes coverage for the CAFO owner or operator under the general permit, the terms of the nutrient management plan shall become incorporated as terms and conditions of the permit for the CAFO. The Department shall notify the CAFO owner or operator and inform the public that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

 (2) For EPA‑issued permits only. The Regional Administrator shall notify each person who has submitted written comments on the proposal to grant coverage and the draft terms of the nutrient management plan or requested notice of the final permit decision. Such notification shall include notice that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

 (3) Nothing in this paragraph (h) shall affect the authority of the Department to require an individual permit under section 122.28(b)(3).

**Fiscal Impact Statement:**

There is no anticipated increase in costs to the state or its political subdivisions, or to the regulated community, resulting from these proposed revisions.

**Statement of Need and Reasonableness:**

The following presents an analysis of the factors listed in 1976 Code Sections 1‑23‑115(C)(1)‑(3) and (9)‑(11):

DESCRIPTION OF REGULATION: R.61‑9.122.23, Concentrated Animal Feeding Operations

Purpose: The Department proposes amending R.61‑9.122.23, Concentrated Animal Feeding Operations, for conformity with the federal regulation at 40 CFR Section 122.23 and to improve regulatory clarity

Legal Authority: 1976 Code Sections 48‑1‑10 et seq.

Plan for Implementation: The amendments will take legal effect upon General Assembly approval and upon publication in the State Register. Department personnel will then take appropriate steps to inform the regulated community of the amendments. Additionally, a copy of the regulation will be posted on the Department’s website, accessible at [www.scdhec.gov/regulations‑table](http://www.scdhec.gov/regulations-table). Printed copies may also be requested, for a fee, from the Department’s Freedom of Information Office.

DETERMINATION OF NEED AND REASONABLENESS OF THE REGULATION BASED ON ALL FACTORS HEREIN AND EXPECTED BENEFITS:

The Department proposes to amend R.61‑9.122.23 for conformity with federal regulations and to improve regulatory clarity.

DETERMINATION OF COSTS AND BENEFITS:

Amending R.61‑9.122.23 for conformity with federal regulations will increase the efficiency of processing facility applications, which will be a benefit to the regulated community and the state. There is no anticipated increase in costs to the state or its political subdivisions, or to the regulated community, resulting from these proposed revisions. It is anticipated that these proposed revisions will result in cost savings to the regulated community.

UNCERTAINTIES OF ESTIMATES:

There are no uncertainties of estimates relative to the costs to the state or its political subdivisions.

EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH:

The proposed revisions to R.61‑9.122 will provide continued protection of the environment and human health in accordance with updates to federal law.

DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE REGULATION IS NOT IMPLEMENTED:

There is no anticipated detrimental effect on the environment and public health if the regulation is not implemented.

**Statement of Rationale:**

Pursuant to the South Carolina Pollution Control Act, S.C. Code Ann. 48‑1‑10 et seq., the Department of Health and Environmental Control (“Department”) establishes programs to regulate discharges from point sources, including concentrated animal feeding operations. The Department proposes amending R.61‑9.122.23, Concentrated Animal Feeding Operations, for conformity with the current federal regulation in Title 40, Part 122 of the Code of Federal Regulations (40 CFR Part 122), Subpart B, Section 23, *Concentrated animal feeding operations* and to improve regulatory clarity.