Concentrated Animal Feeding Operations Final Rulemaking – Q & A

EPA has finalized revisions to the National Pollutant Discharge Elimination System (NPDES) permitting requirements and Effluent Limitations Guidelines (ELG) for Concentrated Animal Feeding Operations (CAFOs). This rulemaking is in response to the decision in Waterkeeper Alliance, et al. v. EPA, *issued by the Second Circuit Court of Appeals in February 2005. The final rule was published in the Federal Register on November 20, 2008 (73 FR 70418).*

Q: What action is EPA taking as a result of the Second Circuit decision in *Waterkeeper Alliance et al. v. EPA*?

A: In response to the court's decision, EPA revised the National Pollutant Discharge Elimination System (NPDES) permitting requirements (40 CFR Part 122) and Effluent Limitations Guidelines and Standards (ELGs) (40 CFR Part 412) for CAFOs. First, EPA is requiring owners and operators of CAFOs that discharge or propose to discharge to seek coverage under an NPDES permit. Second, EPA is requiring CAFOs seeking coverage under a permit to submit their nutrient management plan (NMP) with their application for an individual permit or notice of intent for coverage under a general permit. Permitting authorities are then required to review the NMPs, identify the terms that will be incorporated into the permit and provide the public with an opportunity for meaningful review and comment. Permitting authorities are required to incorporate terms of the NMP as enforceable elements of the NPDES permit. The final rule lays out a process for including these site-specific terms into general permits. Third, the rule modifies the no-discharge 2003 new source performance standards in two ways. It deletes the provision that authorized compliance with the no-discharge limitations for new source large swine, poultry, and veal calf facilities through design, construction, operation and maintenance of waste and storage facilities that would contain runoff and direct precipitation from the 100-year, 24-hour rainfall event. Next, it adds a new provision that authorizes permit writers, upon request by swine, poultry, and veal calf CAFOs that are new sources, to establish best management practice no discharge effluent limitations.

This final rule also responds to the court's remand orders regarding water-quality based effluent limitations (WQBELs). EPA is clarifying that WQBELs may be required in permits with respect to production area discharges and discharges from land application areas that are not exempt as agricultural stormwater. Finally, the court remanded the selection of best pollutant control technology (BCT) for fecal coliform. EPA clarifies its selection of BCT technology for fecal coliform, and reaffirms its decision to set the BCT limitations for fecal coliform equal to the best practicable control technology currently available (BPT) limits and BCT limitations for other conventional pollutants established in the 2003 CAFO rule. EPA is making the finding that the BCT limitations established in 2003 with respect to other conventional pollutants are based on technology controls that also represent BCT for fecal coliform.

Q. Is there still a requirement for CAFOs to seek permit coverage?

A. Yes. Under the final rule, CAFOs that discharge or propose to discharge have a duty to apply for NPDES permits. This is consistent with the duty to apply requirement for all NPDES point source categories.

Q: How will CAFO owners/operators know whether or not they need to apply for an NPDES permit?

A: Under this final rule, any CAFO that discharges or proposes to discharge is required to seek permit coverage. EPA is clarifying that "a CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur." This means that the evaluation of whether the CAFO discharges or will discharge is based on a factual objective assessment.

Q: What is the benefit to the CAFO owner/operator of having an NPDES permit?

A: Because the CWA prohibits discharges from unpermitted CAFOs, NPDES permit coverage provides certainty to CAFO operators regarding activities and actions that are necessary to comply with the Clean Water Act. Compliance with the permit is deemed compliance with the CWA under section 402(k) and thus acts as a shield against EPA or State CWA enforcement or against citizen suits under section 505 of the CWA. Furthermore, NPDES permits for Large CAFOs incorporate effluent limitations prescribed by the effluent limitations guideline, which allow for discharge when precipitation causes an overflow from a structure that is designed, constructed, operated, and maintained in accordance with the permit. Finally, upset provisions can afford permittees a defense when emergencies or natural disasters cause discharges beyond their reasonable control, as provided in 40 CFR 122.41(n).

Under the CWA, operators that do not apply for permits operate at their own risk because any discharge from an unpermitted CAFO (other than agricultural stormwater) is a violation of the CWA subject to enforcement action, including third party citizen suits.

Q: What happened to the "no potential to discharge" determination process?

A: Because the court vacated the requirement to seek permit coverage solely on the basis of a CAFO's *potential* to discharge, there is no need for a CAFO to obtain a "no potential to discharge" determination from the permitting authority. Therefore, this final rule removes the "no potential to discharge" determination provision from the federal regulations.

Q: Will a CAFO whose only discharge is agricultural stormwater need to apply for an NPDES permit?

A: No; however, the CAFO must implement site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients as specified previously

under the 2003 rule. Also, an unpermitted CAFO must maintain documentation of its nutrient management practices and make such documentation available to the permitting authority upon request in order for a precipitation-related discharge from the land application area to qualify for the agricultural stormwater exemption.

Q: Why should an unpermitted CAFO certify if it is not going to discharge?

A: By following the elements of the rigorous evaluation prescribed in the certification requirements and by conducting the necessary operation and maintenance to achieve no discharge, the operator will be able to demonstrate that the CAFO is designed, constructed, operated and maintained such that a discharge will not occur.

In the event of a discharge from a properly certified CAFO, the CAFO will not be liable for prior failure to seek permit coverage. The CAFO, however, remains liable for discharging without an NPDES permit. Only CAFOs with NPDES permits can invoke the "upset and bypass" defense provisions of the NPDES regulations.

Q: If a CAFO previously discharged and has permanently fixed the cause of the discharge, does it still need to apply for a permit?

A: Only CAFOs that discharge or propose to discharge are required to apply for NPDES permits. A CAFO that has had a discharge in the past but has taken the steps necessary to permanently fix the cause of the discharge and is designed, constructed, operated and maintained such that a discharge will not occur is not required to apply for a permit. The CAFO's decision as to whether to apply for a permit involves an objective assessment of conditions at the operation. CAFOs should consider seeking advice from third-party professionals. EPA encourages CAFOs to consider the set of criteria for no discharge certification when deciding whether to seek permit coverage.

Q: If a properly certified CAFO has more than one discharge from the same cause, can it recertify?

A: No. In the event that a certified CAFO does discharge, the rule limits the ability of that CAFO to recertify. Specifically, a certified CAFO that discharges twice from the same cause would not be able to recertify again. EPA believes the benefits of certifying should not be available to CAFOs with a recurring discharge.

Q: How will the process for seeking coverage under a general or individual permit change for CAFOs?

A: In the past, a CAFO general permit allowed a facility that submitted a notice of intent (NOI) for coverage under that permit to be covered without permitting authority approval and public review because all of the terms and conditions of the general permit underwent public review and comment during the process to issue the general permit. However, as a result of the *Waterkeeper* decision, EPA is requiring CAFOs to submit site-specific NMPs as part of the NOI to be covered by a general permit. Further, the

permitting authority is required to review the NMP, make NMPs and NOIs available for public review and notify the public of the terms of the NMP that the permitting authority proposes to incorporate into the permit as terms and conditions applicable to that CAFO. Following public comment and an opportunity for public hearing, the permitting authority will issue a final determination incorporating the terms of the NMP into the general permit for that CAFO. However, for an individual permit, the process has not changed substantially. A CAFO applying for an individual permit must include its NMP as part of the permit application (which is public information), and the permitting authority will identify terms from this NMP to include in the draft permit that will be made available to the public for review and comment.

Q. Is the entire NMP incorporated into the permit?

A. The permitting authority must incorporate the "terms of the NMP" into the permit, which are the information, protocols, best management practices (BMPs) and other conditions in the NMP necessary to meet the NMP requirements of the 2003 rule. The permitting authority must include, at a minimum, the specific terms identified in the 2008 final rule as terms and conditions of the permit. When incorporating the terms, the permitting authority may attach the entire NMP to the permit or incorporate the terms of the NMP by reference, however the enforceable terms and conditions of the permit must be clearly identified.

Q. Is the entire NMP required to be made publicly available?

A. Yes, the final rule requires the permitting authority to make the NMP and NOI or application publicly available (as with any NPDES permit application) for comment.

Q: With respect to land application, what are the two approaches in the final rule for expressing rates of application?

A: The final rule provides two approaches which a CAFO may use in its NMP to identify annual maximum rates of application of manure, litter, and process wastewater by field and crop for each year of permit coverage:

- The "linear approach" expresses field-specific maximum rates of application in terms of the amount of nitrogen and phosphorus from manure, litter, and process wastewater allowed to be applied.
- The "narrative rate approach" expresses the field-specific rate of application as a narrative rate prescribing how to calculate the amount of manure, litter, and process wastewater allowed to be applied.

Q: What happens if the CAFO operator wants to change its NMP after the permit has been issued?

A: The CAFO operator is required to submit the revised NMP to the permitting authority. Not every change to the NMP is a change to a "term of the NMP," so a permit modification may not be necessary. If the permitting authority determines that the

changes to the NMP are changes to any permit requirements, the rule establishes a two-tier process for modifying the permit: non-substantial changes will be made without the need for public review and comment and reflected in the annual report available to the public; substantial changes will be subject to public notice and comment and an opportunity for public hearing before the permit is modified.

Q: Do either of the two approaches in the final rule for identifying terms of the NMP with respect to rates of application address the concern that operators often change their course of action within a 5-year permit term and do not want to have to revise their permits every time a need to change land application plans occurs?

A: Yes. The narrative rate approach allows CAFO operators to change their crop rotation, form and source of manure, litter, and process wastewater, as well as the timing and method of application. The narrative rate approach allows the use of "real time" data for determining rates of application and provides the most flexible approach for farmers.

Q: What constitutes a substantial change to the NMP and requires a permit modification?

A: The final rule includes a list of changes to the NMP that constitute a substantial change to the terms of a CAFO's NMP. Examples of such substantial changes include addition of new land application areas not previously included in the CAFO's NMP and addition of any crop not included in the terms of the CAFO's NMP and corresponding field-specific rates of application.

Q: Why didn't EPA add requirements regarding pathogens to the regulations?

A: EPA's regulation of CAFO discharges controls the discharge of all pollutants and as a consequence will control the discharge of pathogens. In this final rule, EPA concluded that the existing BPT/BCT limitations represent the best conventional technology for controlling fecal coliform, the one pathogen that is a conventional pollutant, even though there are no specific limitations for fecal coliform. The existing limitations prohibit the discharge of manure, litter, or process wastewater into waters of the U.S. from the production areas of CAFO except in limited circumstances. EPA is not promulgating more stringent limitations for fecal coliform because it concluded that there is no available, achievable, and cost reasonable technology on which to base such limitations.

Q: What additional limitations can be imposed in a CAFO's permit?

The final rule explicitly recognizes the permitting authority's authority to impose water quality-based effluent limitations (WQBELs) on all production area discharges and any land application discharges other than agricultural stormwater discharges if technology-based effluent limitations are insufficient to meet applicable water quality standards. Discharges to waters of the U.S. via groundwater with a direct hydrologic connection to waters of the U.S. should be assessed on a case-by-case basis and additional effluent limits for those discharges may be appropriate.

Q: How much time will states have to update their programs?

A: Following issuance of this rule, authorized states have up to one year to revise, if necessary, their NPDES regulations to adopt the requirements of this rule, or two years if statutory changes are needed, as provided in 40 CFR 123.62. States are not required to adopt the provisions for no discharge certification since certification is not a program requirement and is a *voluntary* option for CAFOs that are not required to have NPDES permit coverage.

Q: If a CAFO already has coverage under a permit, will the operator need to submit a new application by 2/27/09?

A: No. EPA recognizes that approximately 9,000 CAFOs already have NPDES permit coverage. These CAFOs must comply with the conditions of their existing permits so long as those permits remain in effect. Upon expiration of existing individual or general permits, EPA expects permitting authorities to issue new individual or general permits that will then need to reflect the requirements of this rule. EPA will work with permitting authorities to transition to the new requirements. Permitting authorities may request NMPs at any time based on the 2003 rule, and newly permitted CAFOs will need to submit an NMP when seeking permit coverage.

Q: What are the compliance deadlines for newly defined CAFOs?

A: The compliance deadline to apply for NPDES permits for operations that were newly defined as CAFOs by the 2003 rule is February 27, 2009.

Q: What resources are available to help CAFOs develop their NMPs?

A: EPA has awarded $8 million in federal grants for providing technical assistance to livestock operators, including animal feeding operations, for the prevention of water discharges and reduction of air emissions. Under these grants CAFOs, can obtain an NMP at no cost to the operator. For more information see http://livestock.rti.org/ and http://www.erc-env.org/CLEANMP.htm. The Manure Management Planner (MMP) software program, under development by a grant from EPA and USDA to Purdue University, is a computer program that will provide permitting authorities and producers assistance in NMP development. MMP is currently being adopted by the majority of States and is tailored to the State's technical standards. MMP supports 34 States and has been recently updated to include Phosphorus Indexes and other phosphorus risk assessment tools for 22 of these States. This program is free for use by all operators. For additional information and to download the MMP software, see the Purdue University website at http://www.agry.purdue.edu/mmp/. In addition, USDA has a long-term program for assisting CAFOs with nutrient management planning and offers a range of support services.