

# EPA CAFO Regulations: What's New 2007?

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EPA's response to the Second Circuit's decision in *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2005) reflects an unsettled situation in which the agency finds itself after the decision. The decision upheld certain challenged provisions of EPA's 2003 CAFO rule that was designed to update the Clean Water Act requirements applied to large and medium scale livestock production facilities. The decision vacated some key provisions of the 2003 rule, including major provisions that address whether a facility operator has a duty to apply for a Clean Water Act permit and requirement is involved with Nutrient Management Plans.

In 2006 EPA proposed several revisions to 2003 CAFO Rule as a result of the *Waterkeeper* decision and asked for public comment on several key ideas. This summary will discuss the 2006 proposals and offer comment regarding their impact. This summary will also discuss the July, 2007 order extending the compliance dates for new and existing CAFO's who have a Clean Water Act permit and nutrient management plan requirement to fulfill as a result of the 2003 rule.

## **I. Issues Vacated in *Waterkeeper*: The Duty to Apply for NPDES Permit:**

The court found that the duty of a CAFO operator to apply for a Clean Water Act permit, which the Agency was based on a presumption that most CAFO's have at least a potential to discharge was invalid. The Court concluded the CWA subject's only actual discharges to permitting requirements rather than potential discharges. The CAFO industry organizations argued that the EPA exceeded its statutory authority by requiring all CAFO's to either apply for NPDES permits or demonstrate that they have no potential to discharge. The court agreed with the CAFO industry petitioners on this issue and therefore vacated the "duty to apply" provision of the 2003 CAFO rule. The court acknowledged EPA's policy considerations for seeking to impose a duty to apply but found that the Agency lacked statutory authority to do so.

EPA's Response to the Vacated Duty to Apply for a Permit

To address the court's decision on the duty to apply, EPA proposed two changes to the 2003 CAFO rule:

- \*) Revising the requirement that all CAFO's apply for an NPDES permit; and
- \*) Eliminating the procedures for a "no potential to discharge" determination.

EPA also seeks to clarify how un-permitted CAFO's may meet the agricultural storm water exemption when they apply manure, litter, or process wastewater.

The 2006 proposed rule would replace the "duty to apply" requirement of the 2003 rule with a requirement that all CAFO's that "discharge or propose to discharge" must seek coverage under an NPDES permit. This proposed change would hold CAFO owners and operators to the same "duty to apply" requirement as already exists for point sources under 40 CFR 122.21(a) (1).

#### (a) Producer Considerations

The result of this proposed revision is that only owners and operators of those CAFO's that discharge or propose to discharge regardless of the volume or duration of the discharge except for discharges of agricultural storm water as discussed below.

A facility may seek permit coverage by submitting an application for an individual permit or by submitting a notice of intent to be covered by a general permit that has been issued by the permitting authority. Generally, under the 2006 proposal, it would be the CAFO's responsibility to decide whether or not to seek permit coverage based on whether they discharge or propose to discharge. In EPA's view, any CAFO that discharged or proposed to discharge and failed to obtain an NPDES permit would be in violation of the NPDES regulatory requirement to seek coverage under an NPDES permit. A facility with an actual discharge would also be in violation of the CWA prohibition against discharging without an NPDES permit (33 U.S.C. 1311(a)).

Any discharge from a CAFO, even one that is unplanned or accidental, is illegal unless it is authorized by the terms of a permit. Many CAFO's have conditions that may result in a discharge. For example, manure structures that are improperly designed or, for other reasons, have insufficient capacity (e.g., due to facility expansion) may discharge. In addition, discharges can occur from a properly designed containment structure that is improperly operated and maintained or as a result of precipitation that exceeds the operating capacity of the structure. In the absence of an actual discharge or proposed discharge, CAFO's with such conditions are not required under the terms of today's proposed rule to obtain an NPDES permit. However, the owner or operator of a CAFO that fails to obtain an NPDES permit and has a discharge is subject to State or federal enforcement, as well as liability from citizen suits under CWA Section 505(a).

In general, NPDES permit coverage reduces CAFO operator risk and provides certainty to CAFO operators regarding activities and actions that are necessary to comply with the Clean Water Act. Compliance with the permit acts as a shield against EPA enforcement or citizen suits under CWA Section 402(k). Furthermore, under the 2003 rule, most CAFO NPDES permits will incorporate Effluent Limitation Guidelines (ELG) provisions that allow for discharge when precipitation causes an overflow from a structure that is properly designed, constructed, operated, and maintained, in accordance with the

applicable design standards. Finally, upset provisions can protect permittees from legal liability when emergencies or natural disasters cause discharges beyond the permittee's reasonable control. This protection is not available to un-permitted CAFO's.

CAFO owners or operators should consider many factors in determining whether to seek permit coverage. For example, if the CAFO is in a flood plain, subject to high annual precipitation, or subject to lengthy rainy seasons, it is likely to have a discharge if the CAFO drains to a water of the United States. Other factors likely to result in a discharge include runoff from open feed bunkers, field storage, or other stockpiles exposed to precipitation; lagoons that are not sufficiently pumped down for the upcoming winter season; holding of process wastewater for summer irrigation that precludes adequate capacity for chronic rainfalls; and inadequate containment due to unavailability of land for manure, litter, or process wastewater application due to timing constraints associated with, for example, saturated ground or imminent rain. In addition, a discharge may occur from land application due to improper maintenance or operation of manure handling equipment that may lead to spills, and application of manure, litter or process wastewater to land in such a way that it does not qualify for the agricultural storm water exemption.

(b) The “No Potential to Discharge” Determination

EPA is proposing to delete the regulatory provisions adopted in the 2003 CAFO rule allowing CAFO's to demonstrate that they have no potential to discharge and authorizing the Director to make such a determination. This action would be consistent with the Court's interpretation of when a duty to apply arises.

## **II. Issues Vacated in *Waterkeeper*: Nutrient Management Plans (NMP's)**

The environmental organizations in this suit argued that the 2003 CAFO rule was unlawful because: (a) The rule empowered permitting authorities to issue permits without any meaningful review of a CAFO's NMP, (b) the rule failed to require that the terms of the nutrient management plan be included in the NPDES permit, and (c) the permitting approach established by the rule violated the Clean Water Act's public participation requirements. The court agreed with the environmental petitioners on these three issues.

The court relied on provisions of the Act that authorize point source discharges only where NPDES permits “ensure that every discharge of pollutants will comply with all applicable effluent limitations and standards,” citing CWA sections 402(a)(1), (a)(2), and (b). Because the 2003 CAFO rule did not provide for permitting authority review of a CAFO's nutrient management plan before the permit was issued, the court found that the rule did not ensure that each Large CAFO's discharges comply with these CWA provisions. In addition, the court found that by not making the NMPs part of the permit and available to the public for review, the 2003 CAFO rule violated public participation requirements in sections 101(e) and 402 of the Act. The court also found that the terms of the NMPs themselves are “effluent limitations” as that term is defined in the Act and therefore must be made part of the permit and enforceable as required under CWA sections 301 and 402.

## EPA's Response to the Vacated Nutrient Management Plan Requirements:

### Requirement to Develop and Implement a Nutrient Management Plan

NPDES permits for all CAFO's must include a requirement for the permittee to develop and implement a nutrient management plan. At a minimum, the NMP must include BMPs and procedures necessary to achieve effluent limitations and standards. The plan must, to the extent applicable, include the minimum elements established at 40 CFR 22.42(e) (1) (i)-(ix). For Large CAFO's in the cattle, swine, poultry, and veal subcategories, the NMP must also meet the more detailed requirements in the Part 412 effluent limitations guidelines. For Small and Medium CAFO's, or other operations not otherwise subject to Part 412 requirements for land application, the required elements of a nutrient management plan would be further specified in the permit based on the best professional judgment (BPJ) of the permitting authority.<sup>1</sup>

In the 2006 proposal EPA is proposing:

- a) Receipt and review of the nutrient management plan by the permitting authority prior to issuing an individual permit or granting coverage under a general permit;
- b) Procedures to provide opportunity for adequate public participation prior to issuing an individual permit or granting coverage under a general permit; and
- c) Incorporation of the terms of the nutrient management plan into the NPDES permit.

EPA devoted particular attention to the process for issuance of general permits, because most CAFO's are expected to be covered by general permits and the individual permitting process already allows for review of NMP's by the permitting authority, public review of an NMP, and incorporation of the terms of the NMP into the individual permit consistent with the CWA.

### **III. EPA also proposes a process to address changes to the NMP once permit coverage is granted, for both individual and general permits.**

EPA's discussion is divided into five sections to separately address each of the following issues:

- a) CAFO permit application and notice of intent requirements;
- b) Procedures for permitting authority review;
- c) Procedures for public review and comment;
- d) Incorporation of nutrient management plan terms in NPDES permits;
- e) Changes to nutrient management plans.

#### (a) CAFO Permit Application or Notice of Intent Requirements for Nutrient Management Plans

EPA is proposing to revise 40 CFR 122.21(i)(1)(x) to require the applicant to submit, as part of its permit application or notice of intent (NOI), a nutrient management plan developed in accordance with the provisions of 40 CFR 122.42(e)(1) and 40 CFR 412.4(c) (1). This proposed change would be codified in the section of the regulations applicable to individual permit applications (40 CFR 122.21(i) (1)), and would also apply to notices of intent to be covered by a general permit, because 40 CFR 122.28(b) (2) (ii), the regulation governing notices of intent for general permits, incorporates the requirements of 40 CFR 122.21(i) (1) by reference.

The proposed revisions would not change the required contents of the NMP, but would now require CAFO's to submit the plan with the application or the notice of intent rather than only at the request of the Director. The permitting authority would then make the nutrient management plan available for review prior to developing an individual permit or providing coverage under an NPDES general permit.

#### (b) Procedures for Permitting Authority Review

Once the permitting authority receives an application or an NOI from a CAFO seeking permit coverage, it would be the responsibility of the permitting authority to review the application or NOI to ensure that the nutrient management plan meets the requirements of 40 CFR 122.42(e)(1) and, for Large CAFO's, the applicable requirements of 40 CFR 412.4(c). As part of that process, the Director would review the NMP for completeness and sufficiency.

For individual permits, the NMP would be submitted and reviewed as part of the permit application. The decision-making procedures in 40 CFR Part 124 continues to apply to the Director's review of the application, which now would include the NMP. Part 124 requires review of the completeness and sufficiency of the permit, includes an opportunity for the CAFO to modify the plan or provide additional information to the permitting authority, and provides for a final decision by the Director after an opportunity for public comment and a public hearing.

EPA is proposing new regulatory provisions to establish permitting authority review of NMPs for CAFO general permits. These procedures would require the Director to review the NMP submitted with the NOI and to take appropriate steps to ensure that the NMP meets the requirements of the regulations. If upon review the permitting authority determines that additional information is necessary to complete the notice of intent or clarify, modify, or supplement previously submitted material, the Director would notify the CAFO owner or operator and request the appropriate information be provided. When the NOI is complete the permitting authority would notify the public of its receipt and of the terms of the nutrient management plan proposed to be incorporated into the existing general permit as terms and conditions applicable to that CAFO. Following an opportunity for public comment and public hearing, the permitting authority would decide whether to authorize coverage under the general permit and incorporate the terms of the NMP into the general permit for that CAFO.

### (c) Procedures for Public Participation Prior to Permit Coverage

Because the NMP would be part of the individual permit application, it would be subject to existing regulations requiring public participation, including the requirement for public notice (40 CFR 124.10) and the opportunity for the public to provide comments and request a public hearing (40 CFR 124.11). Because of the proposed regulatory change requiring nutrient management plans to be submitted with the permit application, the public would have access to the nutrient management plan prior to permit issuance and would also have full opportunity to comment on the adequacy of the plan and on the nutrient management terms and conditions of the draft NPDES permit developed for the specific CAFO facility.

The general permit issuance process differs from the individual permitting process discussed above in the way in which a permit is developed and the means by which individual facilities obtain coverage under the permit. A general permit is developed by the permitting authority to cover multiple facilities without the need to receive individual permit applications from facilities in advance of the development of the permit. Once the draft general permit is developed, the public (including potential future permittees) is provided the opportunity to review the permit, submit comments, and request a hearing. After considering any comments submitted, the permitting authority then finalizes the general permit. Once the final general permit is issued, facilities may submit a notice of intent (NOI) seeking coverage under the permit. Typically, the permitting authority then grants coverage, without the need for further public notice and comment, or requires the facility to seek coverage under an individual permit.

### (d) Incorporation of Nutrient Management Plan terms in NPDES permits

Following the Waterkeeper decision, general permits for CAFO's must be modified, once issued, to include the terms of an NMP applicable to a specific CAFO. Moreover, Waterkeeper requires that the public have an opportunity to comment on the incorporation of NMP requirements into the permit. Thus, a second round of public notice and comment is necessary when providing coverage for CAFO's under a general permit. There is no provision in the existing regulations that explicitly addresses incorporation of site-specific requirements into a general permit when a CAFO seeks coverage or any additional public process for such incorporation.

EPA now proposes to establish new procedures applicable to the general permitting process that would allow the incorporation of the site-specific NMPs into CAFO general permits and provide an opportunity for public review of a CAFO's NOI (including the entire NMP) before the CAFO receives coverage under a general permit. The proposed procedures would also allow the public to review and comment on those terms of the nutrient management plan to be incorporated into the permit, and to request a public hearing before a CAFO receives coverage under a general permit. The discussion that follows describes the process for public participation that EPA is proposing.

Proposed 40 CFR Sec. 122.28(d) would provide specific procedures for public participation. The proposed rule would require that, for each facility submitting a completed NOI, the permitting authority must notify the public of the following: (1) That

it has received a complete NOI; (2) that the permitting authority is proposing to allow coverage under the general permit; and (3) that the nutrient management plan is available for public review, along with the terms of the nutrient management plan proposed to be incorporated into the permit by the permitting authority.

The permitting authority has discretion as to how best to provide such public notification in the general permit context. For example, public notification could be provided on the permitting authority's web page or through other electronic means. Another alternative would be to use the notice or fact sheet for the general permit to establish a procedure allowing any person to request notice by mail or electronically of the receipt of an NOI, the permitting authority's proposed action, and the terms of the nutrient management plan proposed to be incorporated into the permit. EPA believes that these are appropriate ways to balance the competing concerns of providing adequate notification to the public, providing flexibility to the permitting authority, and ensuring the practicality of general permits. The permitting authority should describe the process to be used to give the public notice of and comment opportunities on site-specific NMPs in the draft and final general permit to ensure meaningful public participation.

The Director would also have discretion to establish an appropriate period of time for public review of the NOI and proposed permit conditions incorporating the terms of the NMP into the permit. Factors to consider might include the number of NOI's being publicly noticed at any one time, the complexity of the material made available for public review, expected level of public interest based on prior notices of CAFO's seeking coverage, the relative availability of NOI's to the public (e.g., on the internet), the opportunity for the public to extend the comment period for one or more facilities, and whether individuals can request and receive individual notification of CAFO's seeking coverage in a timely fashion. Because this proposal would not mandate a 30-day public notice period as currently required in 40 CFR 124.10, EPA would require that the Director establish a time frame for public review by regulation or propose the time frame for public notice in the draft general permit and include it as a provision in the final permit. This would allow the public and other interested parties an opportunity to comment on the sufficiency of the time allotted for public notice. EPA solicits comment on this approach, as well as on fixed minimum time frames for public review, such as 7 days, 15 days, 21 days, and 30 days.

The Director would also have to provide an opportunity for the public to request a hearing. EPA further proposes that the procedures for requesting and holding a hearing on the terms of the NMP to be incorporated into the general permit would be the same as those for draft individual permits, which are provided in Sec. Sec. 124.11 through 24.13. When granting permit coverage, the permitting authority would be required to respond to all significant public comments.

Under this proposal, incorporation of the terms of a particular CAFO's NMP into a general permit would not be a permit modification subject to 40 CFR 122.62. Rather, EPA views this as an extension of the CAFO general permitting process itself. EPA seeks comment on its proposed process for incorporation of the terms of a CAFO's NMP into NPDES permits. EPA specifically seeks comment from States on the workload implications of requiring the permitting authority to respond to all significant comments

on each individual CAFO's NOI (including the NMP) and the terms of the NMP to be incorporated into the permit.

#### (e) Changes to Nutrient Management Plans

Agricultural operations sometimes modify their nutrient management and farming practices as a normal part of their operations, and because such alterations may require changes to NMP's after a permit is issued, EPA is proposing a permit revision process to specifically address these circumstances.

The Agency does not, however, believe that such a process is necessary for all operating changes at a CAFO. Routine changes at a facility should not require changes to the NMP itself because of the way NMP's are developed. Nutrient management plans are dynamic documents and are developed to accommodate routine variations, for example changes resulting from anticipated crop rotation or climatic variability inherent in agricultural operations, as well as changes in numbers of animals and volume of manure, litter or process wastewater resulting from normal fluctuations or a facility's planned expansion.

EPA encourages CAFO operators to develop, at the outset, NMP's that thoughtfully anticipate, to the extent feasible, all contingencies and changes in operations that may occur over the term of the permit.

EPA is proposing formal public notice and comment procedures that the permitting authority would be required to follow for permit modification when a CAFO is seeking to make substantial changes to its NMP. EPA is proposing that substantial changes would include, but are not limited to: (1) Changes that could result in an increase in runoff of manure, litter, or process wastewater from the facility; (2) an increase in the rate of nutrients from manure, litter, or process wastewater applied to the land application area that is significant in relation to technical standards established by the Director; (3) a significant change in the nutrient balance at the CAFO caused by: (i) An increase in the ratio of animals, manure, litter, or process wastewater to the available land application acreage or storage capacity; (ii) changes in the CAFO's procedures for handling, storage, treatment, or land application of manure, litter, or process wastewater; (iii) a significant increase in the number of animals; or (iv) a significant reduction of manure, litter, or process wastewater hauled off site when there is no equivalent decrease in the amount of manure, litter, or process wastewater produced; and (4) the addition of land application areas not previously included in the nutrient management plan.<sup>ii</sup>

For these types of changes, EPA is proposing to create new procedures in 40 CFR 122.42(e)(5) to allow CAFO's to change their nutrient management plans after the Director has incorporated the terms of the NMP into the permit. These procedures, which would be available to CAFO's operating under both individual and general permits, would be nearly identical to those for CAFO's seeking coverage in the first place. The Agency believes that such a process satisfies the need for the permitting authority and the public to have ample opportunity to review and comment on changes to a facility's NMP, while allowing the CAFO the flexibility it needs.

The 2006 proposal would require that, whenever a CAFO makes any change to its NMP, the owner or operator would provide the Director with the revised NMP and identify the changes from the previous version submitted to the permitting authority. The Director would then review the changes to ensure that the NMP still meets the requirements of 40 CFR and the technical standards developed by the Director. If the changes are not substantial, the Director would simply modify the permit as necessary and notify the public of such modification (and not seek public comment). If the changes are substantial, the nutrient management plan would be revised using procedures similar to those proposed for the initial incorporation of an NMP into a general permit. Thus, today's proposed rule would require the Director to notify the public of substantial changes, and provide an opportunity for public notice and comment. Moreover, the appeals process would be the same as that for incorporation of NMP's into a general permit. EPA solicits comment on the approach proposed to deal with NMP revisions, as well as on the conditions concerning what constitutes a substantial change to an NMP.

Because the process in 40 CFR 122.42(e)(5) would allow for public review of changes to the terms of nutrient management plans and the underlying data and calculations, EPA proposes that the incorporation of changes to the permit through this process would be treated as a minor permit modification, under Sec.122.63(h), and not require additional review.

For substantial changes, the Agency also proposes to expressly allow the facility, at the Director's discretion, to proceed in implementing the change for up to 180 days before completion of public review and permitting authority approval, so long as the change is not likely to result in increased runoff of manure, litter or process wastewater from the facility. Given the importance of timing in farming, EPA recognizes that CAFO's may be unable to delay the implementation of a substantial change to their nutrient management plan to allow for public review and still implement the change in a timely fashion.

EPA believes that it would be reasonable to allow the Director to temporarily allow substantial changes as long as certain conditions are met. First, the approval would be temporary, allowing the CAFO to implement the changes for only 180 days. Second, the facility would need to provide to the Director documentation to demonstrate that the change would not result in increased runoff of manure, litter, or process wastewater from the facility. Third, the Director would have to review the documentation and conclude that the changes would not result in increased runoff of manure, litter, or process wastewater from the facility. Finally, the Director would have to include such expedited decisions with the permit in the public record and notify the public of its decision. By the end of the 180 day period, these changes would need to undergo the public review procedures required for all substantial changes and be incorporated into the CAFO's permit by the Director. Changes EPA intends to encompass within this provision include the addition of new fields for land application where the Director determines that such additional or replacement fields have equivalent phosphorous ratings (based on the Phosphorous Index, for example) for nutrient uptake as the fields they are supplementing or replacing, whichever may be the case. EPA is interested in commenter's views concerning this proposed provision. EPA specifically solicits comment on whether a change that would result in increased rates of land application of manure, litter, or

process wastewater in addition to those changes likely to result in increased runoff, should also be precluded from expedited implementation during the 180 day period.

#### July 18, 2007, Compliance deadline Extended to 2009

A final rule was issued on July 18, 2007 establishing February 27, 2009 as the new date for CAFO's that became classified as such as a result of the 2003 Rule to seek NPDES permits and for previously permitted CAFO's to develop and implement nutrient management plans as required by the 2003 Rule. The deadline extensions were described as necessary to allow EPA time to respond adequately to an array of public comments on issues raised by the Waterkeeper decision before the compliance dates take effect. Extending the compliance deadline until February 27, 2009 will provide additional time, after the final rule in response to Waterkeeper is promulgated, to allow States, the regulated community and other stakeholders the opportunity to adjust to the new regulatory requirements. This justification statement implies that sometime before February 27, 2009, EPA will announce its final CAFO Rule that reflects the changes it makes as a result of the 2005 decision.

#### **IV. Conclusion**

In late 2007, EPA is still working on its final rule response to Waterkeeper. Presumably it will continue to shift the decision whether or not to apply for a Clean Water Act permit to livestock producers who must weigh the advantages of having a permit against the financial and temporal costs of obtaining one. Although the technical requirements of Nutrient Management Plans are not new, subjecting the plans to public review and comment may cause some operators to more closely evaluate whether this process may open doors to challenges that producers would rather avoid. These plans will take on the character and nature of a comprehensive review of the operation, including a serious look at the issues which the operator is likely to face over the course of the permit. Planning will take on a greater importance than previously considered.

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<sup>ii</sup> Specific examples of such changes would include changes to the method of land application from injection to surface application, changes in timing from spring to late fall or winter application, and installation of new drainage systems that would increase runoff from land application fields. The proposed new paragraph 40 CFR 122.42(e) 5) (iv) identifies what would constitute substantial changes to the facility's NMP that would trigger this process for permit revisions.