

Review of “Implementation Guidance on CAFO Regulations- CAFOs That Discharge or Are Proposing to Discharge”

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Background

On November 20, 2008, the EPA published the current CAFO rule in the Federal Register. This rule was published in response to the Second Circuit Court’s decision in *Waterkeeper Alliance et al. v. EPA* that ruled the Clean Water Act regulated actual discharges and could not regulate potential discharges. With this decision the court ruled that the EPA lacked the statutory authority to require CAFOs to apply for an NPDES permit merely because they had a potential to discharge.

Shortly after the rule was published, a number of environmental groups filed a lawsuit to challenge the current rule hoping to increase the universe of animal feeding operations that would be required to obtain a permit. On May 25, 2010, EPA signed a settlement agreement with the environmentalists to influence that result. One term of the settlement agreement was the development of a guidance document to assist owners and operators of CAFOs when determining their need for an NPDES permit. The document issued by EPA is titled, “**Implementation Guidance on CAFO Regulations- CAFOs That Discharge or Are Proposing to Discharge.**” The following is a brief, section by section review of the guidance document.

Objective Assessment of Facility

Clearly EPA and environmental groups did not agree with the court ruling that lifted the duty to apply provision. While it’s certainly appropriate for a CAFO that discharges to operate under a permit, the 2008 rule also requires the CAFO owner or operator that “proposes to discharge” to obtain a discharge permit as well. The rule requires that an objective assessment of the design, construction, operation and maintenance of the facility be performed to determine if a CAFO “proposes to discharge.” Section II of the guidance document points out “...an objective assessment should take into account not only the manmade aspects of the CAFO itself, but climatic, hydrologic, topographic, and other characteristics beyond the operator’s control...” The guidance document identifies a number of factors that EPA points out are key elements of an objective assessment of a CAFO. Items identified by the EPA as key factors include the proximity of a CAFO to waters of the US, discharge history and the type and capacity of the waste storage facility. These factors are practical elements useful in performing an objective assessment. However, further key factors identified by the document include whether precipitation exceeds evaporation, climatic conditions, hydrologic conditions and “characteristics beyond the operator’s control.” These elements are not practical and require a subjective evaluation and possibly speculation. The inclusion of these types of factors leaves the assessment open to

interpretation. Given the EPA's expressed interest in substantially increasing the number of permitted facilities, EPA will undoubtedly disagree with many assessments and subsequently require a facility to seek coverage.

The guidance document points out that the Federal CAFO rule provides a voluntary no discharge certification option for those CAFOs that determine they are not required to obtain a permit. This no discharge certification option is available in states where EPA is the permitting authority and in states that have modified their permitting program to include the no discharge certification option. However, the 2008 rule did not make this option mandatory, and it may therefore not be available to CAFO owners or operators in some states.

Which CAFOs Discharge or Propose to Discharge?

The document points out that the design, construction, operation and maintenance are equal components of determining if a facility discharges or proposes to discharge. The guidance document delineates certain areas that are critical when making a determination of whether a facility discharges or proposes to discharge. These areas include the confinement area, waste storage and handling areas, mortality management and land application practices.

Animal Confinement Area

Much debate has occurred over what constitutes the CAFO production area. The guidance document indicates the animal confinement area is a component of the production area and includes, but is not limited to, any area where animals may be confined, housed, staged, milked, treated or fed. Any and all water that comes into contact with these areas or the products or byproducts of these areas such as manure, feed, bedding, milk, etc. cannot be discharged unless they have been authorized by an NPDES permit.

Factors from the animal confinement area emphasized in the guidance document when determining if the CAFO discharges or proposes to discharge include, the existence and condition of structural controls to keep clean water from coming into contact with pollutants, inspection and maintenance of structural controls, adequate design and operation of devices that collect wastewater from animal confinement areas if such devices exist, adequate design, operation and maintenance of secondary containment structures to manage contaminated stormwater runoff, if applicable, and if animals are controlled to prevent them from having direct contact with a waters of the U.S.

Waste Storage and Handling

The guidance document stresses the importance of providing enough storage capacity to store all manure, process wastewater, litter, and contaminated stormwater runoff. The document explains the determination of whether a CAFO discharges or proposes to discharge relies on the critical storage period for the CAFO. The critical storage period is defined as the minimum storage period required to store all manure, process wastewater, contaminated stormwater minus evaporation before it can be land applied or transferred offsite. The document emphasizes the necessity for

regular inspections to verify the integrity of all aspects of the storage structure including walls, berms, valves, control devices, etc.

The document reiterates that stockpiles of manure and litter are considered a part of the production area, regardless of their location.

The guidance document discusses the requirement to properly design, construct, operate and maintain liquid handling systems. The document points out that improper operation and maintenance includes growth of vegetation within the pond, erosion of banks and berms and allowing large animals to gain access to the structure. It points out that failure to address these issues could lead to the determination that the storage structure is not operated and maintained properly, and therefore the CAFO proposes to discharge. Furthermore, the document explains that a liquid storage structure designed to contain the 25-year, 24-hour storm is not excluded from the requirement to seek permit coverage. The document cites the fact that larger rainfall events do occur indicating EPA would assess a CAFO designed to this standard as proposing to discharge.

Mortality Management

Relevant factors outlined in this section of the guidance document include the type of animal, method for handling and disposing of the mortalities, storage capability and factors specific to each site.

Land Application Area

In accordance with the agricultural stormwater exemption, the guidance document affirms that a CAFO does not propose to discharge if it land applies manure to land under its control and the only discharges from the CAFO originate from the land application area. Additionally, the CAFO owner or operator is required to keep records in accordance with 40 CFR 122.42(e)(1)(ix). However, application of manure at quantities beyond the nutritional requirement of the crop being grown is not consistent with the definition of an agricultural stormwater discharge. The document points to 40 CFR 123.26 for benchmarks to assess land application protocols to ensure stormwater runoff from land application areas qualifies as agricultural stormwater runoff. The document infers that failure to evaluate these protocols may remove certain precipitation related discharges from being classified as an agricultural stormwater discharge and therefore categorize a CAFO as proposing to discharge.

The document specifically addresses land application of manure on frozen and snow covered ground by delineating that, despite some states allowing this practice under certain circumstances, it is not allowed under the federal CAFO rule. Subsequently, a precipitation related discharge under this circumstance would not be classified as an agricultural stormwater discharge, and the CAFO would be perceived as proposing to discharge.

Various Animal Sectors

The guidance document addresses each individual animal sector by focusing on factors that should be considered during the assessment. The factors identified are specific to standard industry practices and operations that occur for each animal sector.

Conclusion

While the guidance document provides a disclaimer that indicates the document does not change the legal requirements of the final CAFO rule, it is clear the document was developed to supplement and broaden the definition of those categorized as “proposing to discharge.” Another term of the settlement agreement signed on May 25, 2010, requires EPA to initiate the rule making process to finalize a rule to collect information from CAFOs to identify categories of operations that occur at facilities. It is likely that data will be used in conjunction with the guidance provided in this document to support the rationale behind designating certain CAFOs as proposing to discharge.

This review was developed to provide an overview and assist individuals with interpreting the guidance document “**Implementation Guidance on CAFO Regulations- CAFOs That Discharge or Are Proposing to Discharge**” issued by the EPA on May 28, 2010. CAFO owners or operators planning to perform an assessment of their operation should review the guidance document and the CAFO rule published in November of 2008 in detail prior to performing the objective assessment of their facility to determine if it discharges or proposes to discharge.