



New CAFO Regulations – What Has Changed?

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EPA's 2003 CAFO Rule

- Changes affecting:
 - Facilities raising immature animals
 - Heifer or swine nurseries.
- Poultry operations using dry litter management systems
- Subject to NPDES permits
 - Production areas and land application areas
- Nutrient Management Plans (NMP) required for all CAFO's



Waterkeeper Case (2nd Cir. 2005)

- Three main issues addressed
 - Challenges
 - Permitting scheme in CAFO rule;
 - Discharges subject to regulation;
 - Effluent limitation guidelines in CAFO rule



Challenges to permitting scheme

- Failure to Regulate
 - Is NMP Review required?
 - Is NMP part of NPDES permit?
- Lack of Public Participation
 - Does public review NMP's?
- Duty to Apply for a NPDES permit
 - Is “potential to discharge” adequate to require a NPDES permit application?



Decision on Permitting Scheme Challenges

- Failing to
 - Provide for ***NMP review*** is arbitrary and capricious under APA.
 - ***Require NMPs to be part of NPDES permit*** violates the CWA.
 - Provide ***public participation in NMP review*** violates CWA and APA.
- ***Requiring a permit in absence of discharge*** violates CWA



Challenges to Types of Discharges Regulated

- **Agricultural Storm Water Exemption**
- **CWA “point source” definition includes CAFO’s but excludes “agricultural stormwater”**



EPA 2006 Response to Waterkeeper

- CAFOs that “discharge or propose to discharge” will require a NPDES permit.
- Agriculture storm water discharges are not a discharge.
- Other than storm water discharges, all other discharges violate CWA if no permit is in force.



Factors to Consider In Re: CAFO Permit

- **Discharge or propose to do so.**
- **CAFO's in flood plains, high annual rainfall or lengthy rainy season areas.**
- **Runoff from storage or stockpiles exposed to precipitation.**



(cont.) Factors to Consider In Re: CAFO Permit

- **Improper maintenance or operation**
- **Adequate storage capacity under all contingencies**
- **Providing public access to NMP's may increase public opposition to plan approval**
- **Incorporating a NMP in general permit could make modifications more complex**



EPA Response to Waterkeeper

- **Regarding NMPs:**
 - CAFO permit application and notice of intent
 - Permitting authority review procedures
 - Public review and comment procedures
 - Incorporating NMP in NPDES permit
 - Changes to NMPs



New Compliance Deadlines:

- Developing and implementing a CWA NMP is now ***February 27, 2009.***
- Applies
 - CAFO's subject to regulation as result of 2003 rule changes
 - Existing CAFO facilities that need NMP



What has not changed since this decision?

- **New CAFO definition that define coverage**



Is it better to be proactive or reactive in interim period?

- **State law may apply despite “duty to apply” ruling and this may be guidance that is most meaningful in interim period**
- **Setting rules rather than having rules set for you**



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