



Concentrated Animal Feeding Operations Supplemental Notice of Proposed Rulemaking

*EPA is publishing in the Federal Register a supplemental notice of proposed rulemaking to EPA's June 30, 2006, notice of proposed rulemaking revising the National Pollutant Discharge Elimination System (NPDES) permitting requirements for concentrated animal feeding operations (CAFO). EPA is seeking public comment on: 1) a voluntary option for CAFOs to certify that they do not discharge or propose to discharge; and 2) a framework for identifying terms of the nutrient management plan (NMP) relating to rates of land application. This action is part of the Agency's response to the decision issued by the Second Circuit Court of Appeals in *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2nd Cir. 2005). The proposal will be open for public comment for 30 days.*

Background

In February 2003, EPA revised the effluent limitations and permitting regulations for CAFOs. The 2003 rule added poultry operations with dry manure handling systems to the definition of CAFO, eliminated the exemption for operations that discharge only in a large 25-year, 24-hour storm event, and added requirements for land application areas under the control of the CAFO (68 FR 7176). The 2003 CAFO rule required any Large CAFO with a potential to discharge manure, litter, or process wastewater to waters of the U.S. to apply for an NPDES permit.

On February 28, 2005, the Second Circuit issued a decision in *Waterkeeper Alliance et al. v. EPA* regarding challenges to the 2003 rule. Among its decisions, the court vacated the 2003 rule requirement that all CAFOs must apply for permits or demonstrate that they do not have the potential to discharge. The court also vacated the rule provisions that allow permitting authorities to issue permits to CAFOs without including the terms of the CAFOs' nutrient management plans (NMPs) in the permits. The court also required that permitting authorities review NMPs and provide an opportunity for public review and comment.

In response to the *Waterkeeper* decision, EPA published a proposed rule in June 30, 2006. EPA proposed to require only owners or operators of those CAFOs that discharge or propose to discharge to seek authorization under an NPDES permit. Second, EPA proposed to require CAFOs seeking authorization to discharge under individual permits to submit their NMPs with their permit applications or, under general permits, with their notices of intent. Permitting authorities would be required to review the NMP and provide the public with an opportunity for meaningful public review and comment. Permitting authorities would also be required to incorporate terms of the NMP as NPDES permit conditions. The proposed rule also addressed the remand of issues for further clarification and analysis. These issues concern clarifications regarding the applicability of water quality-based effluent limitations (WQBELs); new source performance standards for swine, poultry,

and veal CAFOs; and “best conventional technology” effluent limitations guidelines for fecal coliform.

This notice supplements the 2006 proposed rule by proposing additional options being considered by EPA for inclusion in the rulemaking to respond to the Second Circuit’s decision in the *Waterkeeper* case. No provisions promulgated in the 2003 final rule are affected or reopened by this supplemental proposal, nor is EPA reopening the comment period on the 2006 proposed rule.

About this Regulation

EPA is proposing a new provision that would allow CAFO operators to voluntarily certify that they do not discharge or propose to discharge and as such have no duty to apply for a permit. The proposal would establish clear criteria that a CAFO must meet in order to be eligible for certification. The certification option would not change the requirement proposed in 2006 that CAFOs that discharge or propose to discharge would be required to seek permit coverage. In the event of an unforeseen accidental discharge from a properly certified CAFO, the CAFO would not be liable for violation of the duty to apply for a permit, but the certification would no longer be valid.

EPA is also proposing a framework for identifying the terms of the NMP that must be enforceable requirements of a CAFO’s NPDES permit. The proposed framework includes three alternative approaches for specifying terms of the NMP with respect to rates of application, which are needed to satisfy the requirement that the NMP include “protocols to land apply manure, litter or process wastewater...that ensure appropriate agricultural utilization of the nutrients” (40 CFR 122.42(e)(1)(viii)). The proposed framework would include supplemental annual reporting requirements for permitted CAFOs to accompany these proposed alternative approaches.

How to Get Additional Information

Copies of the Federal Register Notice containing the proposed rule are available on EPA’s website at www.epa.gov/npdes/afo/revisedrule. Copies of the Notice may also be obtained by contacting EPA’s Water Resource Center, Mail Code RC-4100T, 1200 Pennsylvania Avenue NW, Washington, DC 20460, 202-566-1729, or via email at center.water-resource@epa.gov. To provide additional information about the supplemental proposal, EPA will be hosting a public webcast during the comment period. Details about the webcast will be updated on EPA’s website at www.epa.gov/npdes/afo/revisedrule.

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