AGENDA

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Office of Management and Budget

Meeting re. EPA CAFO Rules, on remand from 2d Circuit US Court of Appeals

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I. Update on Status of Rulemaking. Discussion of Emerging Concerns.

II. Background on 2d Circuit Decision and Environmental Petitioners' Perspective

III. CAFOs and Stormwater: Agricultural and Industrial

IV. Public Access to Nutrient Management Plan Information

V. Other Issues

   a. New Source Performance Standards

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Stormwater Provisions In EPA CAFO Rule Could Expand Permit Universe

EPA's upcoming revisions to a rule governing discharges from concentrated animal feeding operations (CAFOs) could force a large number of facilities to obtain stormwater permits even as the agency works to comply with a 2005 court decision that limits the number of facilities that must obtain discharge permits, EPA regional and state sources say.

Sources familiar with revisions EPA submitted March 3 to the White House Office of Management & Budget (OMB) say the new proposal requires CAFOs that do not need National Pollutant Discharge Elimination System (NPDES) permits because they do not discharge manure to still get permits for stormwater runoff that contains no agricultural waste.

This would be a disappointment for industry and other stakeholders who had hoped the revised rule would exempt them from permit requirements altoghether following a federal appellate ruling requiring EPA to narrow the scope of the rule. "This would be a way of sweeping into the permitting program numerous CAFOs that could have been exempted," one state source says.

EPA originally proposed a rule regulating CAFOs in 2003, but was forced to revise portions of it that the U.S. Court of Appeals for the 2nd Circuit struck down just over a year ago. The court ruled in February 2005 in *Waterkeeper Alliance, Inc, et al. v. EPA* that the agency exceeded its statutory authority under the CWA by requiring CAFOs to obtain permits because they have the "potential" to discharge pollutants. The court said EPA could require permits only for CAFOs with "actual" discharges.

A source at EPA headquarters declined to comment on any changes EPA made in the revised rule sent to OMB, saying the document is an "internal, deliberative document" that could change again before the agency proposes a rule for public comment. "No decision has been made yet," the source says. "We're collectively thinking through the process, and there's no resting point we have to share with the public."

EPA has extended the deadlines for applying for CAFO permits and completing manure management measures, known as nutrient management plans (NMPs), while it revises the rule. The permit application deadline was moved back from Feb. 13, 2006, to March 30, 2007, while the NMP development and implementation dates were delayed from Dec. 31, 2006, to March 30, 2007.

At issue is how EPA addresses the water law's "agricultural stormwater" exemption in its CAFO rule. In its definition of point sources of pollution subject to NPDES permitting requirements, the water law includes CAFOs but excludes "agricultural stormwater discharges and return flows from irrigated agriculture."

EPA applied this exemption to its 2003 CAFO rule by requiring NPDES permits for any discharge of "manure, litter, or process wastewater that results from the land application of these materials by a CAFO," if the CAFOs meet the rule's requirements of operating in accordance with NMPs. The rule exempts "any subsequent 'precipitation-related' discharge [that] is considered to be an 'agricultural stormwater discharge'" under the terms of the CWA. The 2nd Circuit upheld this portion of the rule.

The 2003 rule, however, does not explicitly define agricultural stormwater discharge. This has proven to be problematic for the agriculture industry and environmental groups, which have both tried to make the case to EPA on what the exemption should encompass.

The agriculture industry and several lawmakers including Senate environment panel Chairman James Inhofe (R-OK) have argued that the exemption should apply to all stormwater discharges that come from CAFOs -- whether or not they include "manure, litter or process wastewater" stemming from land application of the materials.

These groups point out that because the 2nd Circuit requires NPDES permits only for CAFOs with actual discharges to waterbodies -- and not CAFOs with only the potential to discharge -- CAFOs without the potential to discharge should not need to obtain separate stormwater permits for runoff that occurs during wet weather.

But environmentalists have argued that CAFOs should be required to get CWA stormwater permits even if they discharge no manure, but only contribute runoff when it rains. These environmentalists have pointed out that the 2nd Circuit ruled that stormwater discharges are lawful only as long as facilities comply with their NMPs. They also argue that the court decision requires NMPs to be included in permits, an interpretation they say shows stormwater discharges must be permitted.

EPA appears to be backing environmentalists' viewpoint on this issue, according to EPA regional and state sources who are familiar with the agency's CAFO rule revisions. Several of these sources say EPA's revised rule allows stormwater exemptions only for facilities that have obtained CAFO permits, meaning that permitted facilities will not face enforcement for manure discharges that occur if their operations are complying with their NMPs.

The sources say this leaves out operations that generally do not have the potential to discharge, but could occasionally discharge during heavy rains. "If there's a wet weather event, they would be in violation," one state source says. "Unpermitted CAFOs are not protected by the exemption."

A California source says this interpretation of the stormwater exemption would be problematic in that state, where a majority of CAFOs do not typically discharge manure to surface waters but discharge uncontaminated stormwater when it rains.

The source, who was not familiar with EPA's rule revisions, explained that many California dairies are set up so that manure is spread over the ground through irrigation water, which is then reabsorbed through berms and similar structures that act as barriers and prevent the irrigation water from reaching surface waters. The source says these structures are generally effective in preventing CAFO waste from reaching surface waters during most times of the year.

The source says the state grants CAFOs permit waivers if facilities have monitoring data showing any runoff that occurs during heavy rains does not contaminate nearby surface waters. The source says the state believes such facilities should not be subject to federal stormwater permits. "We say if a discharge doesn't contain animal waste, the facility doesn't need a permit," the source says.

Requiring permits for stormwater discharges would "be a diversion of our resources," the source adds. The source says California has "good enforcement" to ensure no facilities that are discharging manure go unpunished, but the state "prefers enforcement and inspections to writing

stormwater permits."

In addition to clarifying the agricultural stormwater exemption, state and regional sources say EPA's CAFO rule revisions will address which facilities must obtain permits. The agriculture industry originally believed the 2nd Circuit's ruling restricting permits to facilities with actual discharges would greatly scale back the number of CAFOs subject to CWA permits, but that now appears uncertain, as some of these facilities could need to obtain stormwater permits.

Nonetheless, EPA regional sources and state regulators say EPA in its revisions has scaled back the rule to require permits only for facilities with actual discharges, or those that propose to discharge and treat discharges so they comply with water-quality-based effluent limits for CAFOs.

EPA notes in a fact sheet posted on its Web site that the 2nd Circuit did not strike down the portion of the CAFO rule requiring a person who "discharges or proposes to discharge pollutants" to apply for NPDES permits, and only struck down the portion that said there is a duty to apply based on the potential to discharge.

An Ohio source who was not familiar with how EPA handled this issue in its rule revision says states are hoping EPA will clearly explain how states can prove that a discharge has occurred, and thus require a permit, without taking the time to inspect each CAFO. The source says that if EPA does not clarify this issue, it will force states to develop their own rules, which could vary state-to-state and force regulators to track where discharges have occurred.

"Every state has varying levels of resources to document if they have discharges, " the source says. "You don't want to have a situation where the state has to document every discharge and sit around to witness it."

EPA is also expected to clarify how states should submit NMPs so they meet the CWA's public participation requirements. The 2nd Circuit also struck down the portion of EPA's CAFO rule that allowed permitting authorities to issue CAFO permits without including the terms of NMPs, and without making the NMP available to the public.

Regional and state sources were unsure how the agency resolved this issue in its rule revision. One regional source says the agency was considering prohibiting CAFOs from applying for general permits because those permits do not include site-specific NMPs. But a state source says this was likely not the case, because that state received concurrence from EPA to continue using general permits as long as it made its NMP available to the public at the same time as a facility applies for the general permit.

An EPA fact sheet says, "All nutrient management plans must be made available for review by the public" and, "After public review, the 'terms' of the nutrient management plan will become conditions of the permit." -- *Natalie Baughman*

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