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Animal Waste and Water Quality: EPA's Response to the *Waterkeeper Alliance* Court Decision on Regulation of CAFOs

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Summary

On June 30, 2006, the Environmental Protection Agency (EPA) proposed regulations that would revise a 2003 Clean Water Act rule governing waste discharges from large confined animal feeding operations (CAFOs). This proposal was necessitated by a 2005 federal court decision (*Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2nd Cir. 2005)), resulting from challenges brought by agriculture industry groups and environmental advocacy groups, that vacated parts of the 2003 rule and remanded other parts for analysis and clarification.

The Clean Water Act prohibits the discharge of pollutants from any "point source" to waters of the United States unless authorized under a permit that is issued by EPA or a qualified state, and the act expressly defines CAFOs as point sources. Permits limiting the type and quantity of pollutants that a facility can discharge are derived from effluent limitation guidelines promulgated by EPA for categories of point sources. The 2003 rule, updating rules that had been in place since the 1970s, revised the way in which discharges of manure, wastewater, and other process wastes from CAFOs are regulated, and it modified both the permitting requirements and applicable effluent limitation guidelines. It contained important first-time requirements: all CAFOs must apply for a discharge permit, and all CAFOs that apply such waste on land must develop and implement a nutrient management plan.

EPA's proposal for revisions addresses those parts of the 2003 rule that were affected by the federal court's ruling: (1) it would eliminate the "duty to apply" requirement that all CAFOs either apply for discharge permits or demonstrate that they have no potential to discharge, which was challenged by industry plaintiffs, (2) it would add procedures regarding review of and public access to nutrient management plans, challenged by environmental groups, and (3) it would modify aspects of the effluent limitation guidelines, also challenged by environmental groups. EPA's proposal also considers modifying a provision of the rule that the court upheld, concerning the treatment of a regulatory exemption for agricultural stormwater discharges.

Public comments addressed a number of general and specific technical points, with particular focus on the "duty to apply" for a permit and agricultural stormwater exemption provisions of the proposal. Industry's comments were generally supportive of the proposal, approving deletion of the previous "duty to apply" provision and also EPA's efforts to provide flexibility regarding nutrient management plan modifications. Environmental groups strongly criticized the proposal, arguing that the *Waterkeeper Alliance* court left in place several means for the agency to accomplish much of its original permitting approach, but instead EPA chose not to do so. State permitting authorities also have a number of criticisms, focusing on key parts that they argue will greatly increase the administrative and resource burden on states. EPA officials have indicated that they intend to promulgate revised regulations by June 2007. Congress has shown some interest in CAFO issues, primarily through oversight hearings in 1999 and 2001.

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Introduction

According to the Environmental Protection Agency (EPA), the release of waste from animal feedlots — the portion of the livestock industry that involves large, intensive animal raising and feeding operations — to surface water, groundwater, soil, and air is associated with a range of human health and ecological impacts and contributes to degradation of the nation's surface waters. The most dramatic ecological impacts are massive fish kills, which have occurred in a number of locations in the United States. A variety of pollutants in animal waste can affect human health in several ways, such as causing infections to the skin, eye, ear, nose, and throat. Contaminants from manure can also pollute drinking water sources. Data collected for the EPA's 2000 National Water Quality Inventory report identify agriculture as the leading contributor to water quality impairments in rivers and lakes. Animal feeding operations are only a subset of the agriculture sector, but 29 states specifically identified animal feeding operations as contributing to water quality impairment.[1] Federal efforts to control these sources of water pollution have accelerated in recent years, but they have been highly controversial.

The primary pollutants associated with animal wastes are nutrients (particularly nitrogen and phosphorus), organic matter, solids, pathogens, and odorous/volatile compounds. Animal waste also contains salts and trace elements, and to a lesser extent, antibiotics, pesticides, and hormones. Pollutants in animal waste can impact waters through several possible pathways, including surface runoff and erosion, direct discharges to surface waters, spills and other dry-weather discharges, leaching into soil and groundwater, and releases to air (including subsequent deposition back to land and surface waters). Pollutants associated with animal waste can also originate from a variety of other sources, such as cropland, municipal and industrial discharges, and urban runoff.

Although agricultural activities are generally not subject to requirements of environmental law, discharges of waste from large concentrated animal feeding operations (CAFOs) into the nation's waters are regulated under the Clean Water Act (CWA). In the late 1990s, EPA initiated a review of the CWA rules that govern these discharges. The rules had not been revised since the 1970s, despite subsequent structural and technological changes in some components of the animal agriculture

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[1] U.S. Environmental Protection Agency, "National Water Quality Inventory, 2000 Report," August 2002, EPA-841-R-02-001, 1 vol.

industry. A proposal to revise the existing rules was released by the Clinton Administration in December 2000. These regulatory activities and proposals have been very controversial. Agriculture industry groups have opposed permitting requirements that they consider burdensome and costly, while others, such as environmental groups, have favored more stringent national standards that require improved control technology. During this period, Congress showed some interest in CAFO issues, through oversight hearings held by House subcommittees in October 1999 and May 2001.

The Bush Administration issued final revised regulations in December 2002, which were published in the *Federal Register* in February 2003 and became effective April 14, 2003.[2] The 2003 rule was challenged by multiple parties — environmental groups and agriculture industry groups — and in February 2005, a federal court issued a ruling that upheld major parts of the rule, vacated other parts, and remanded still other parts to EPA for clarification, leaving all parties unsatisfied to at least some extent. In June 2006, EPA issued proposed revisions to the CAFO rule in response to the court's decision which have been criticized by a number of stakeholder groups.

This report describes major features of the 2003 CAFO rule. It discusses the parts of the rule that were addressed in the federal court's decision and EPA's response to the court, as presented in proposed regulatory revisions. Finally, the report provides an overview of comments on the June proposal that were submitted by several varied interest groups: the livestock and poultry industry, states, and environmentalists.

The 2003 Rule

The CWA prohibits the discharge of pollutants from any "point source"[3] to waters of the United States unless authorized under a national pollutant discharge elimination system (NPDES) permit that is issued by EPA or a qualified state. Any discharge from a point source, even one that is unplanned or accidental, is illegal unless it is authorized by the terms of a permit. NPDES permits limit the type and quantity of pollutants that can be discharged from a facility and specify other requirements, such as monitoring and reporting. The specific discharge limitations in the permit are derived from effluent limitation guidelines and standards (ELGs) that are separately promulgated by EPA for specific categories of industrial sources. ELGs are technology-based restrictions on water pollution, because they are

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[2] U.S. Environmental Protection Agency, "National Pollutant Discharge Elimination system Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs); Final Rule," 68 *Federal Register* 7175-7274, Feb. 12, 2003. For additional information on the rule, see CRS Report RL31851, "Animal Waste and Water Quality: EPA Regulation of Concentrated Animal Feeding Operations (CAFOs)," by Claudia Copeland.

[3] Under the act, point sources are defined as any discernible, confined, and discrete conveyance, such as any pipe, ditch, channel, or conduit from which pollutants are or may be discharged. In contrast, nonpoint source pollution, which is not regulated by NPDES permits, is any source of water pollution that is not associated with a discrete conveyance, including precipitation runoff from fields, forest lands, or mining and construction activities.

established in accordance with technological standards specified in the act. They vary depending upon the type of pollutant and discharge involved, and whether the point source is new or already existing.

The act expressly defines CAFOs as point sources. EPA issued NPDES permitting rules for CAFOs in 1974 (defining which animal feeding operations are subject to regulation[4]) and effluent limitation guidelines in 1976. The 2003 rule did not redefine what is a CAFO, but it revised the way in which discharges of manure, wastewater, and other process wastes from CAFOs are regulated, and it modified both the NPDES permitting requirements and applicable ELGs. Under the 2003 rule, all CAFOs are required to apply for an NPDES permit. EPA estimated that this requirement expanded the number of covered operations from about 12,800 to 15,500 — primarily the largest CAFOs, in terms of numbers of animals raised or housed on-site — or about 19% of all animal feeding operations of all size in the United States. EPA acknowledged that prior to the revisions, permitting and enforcement had been inadequate and that only 4,000 CAFOs actually had permits.

The rule established ELGs that apply to the production areas of regulated CAFOs (including the animal confinement area, manure storage area, raw material storage area, and waste containment area) and, for the first time, to the land application area (referring to land to which manure, litter, or process wastewater is or may be applied). These ELGs are non-numerical best management practices. Discharges from a production area are subject to a performance standard requiring facilities to maintain waste containment structures that generally prohibit discharges except in the event of overflows or runoff resulting from a 25-year, 24-hour rainfall event.[5] Similarly, discharges of pollutants from land application areas must comply with ELG best management practices, such as the adoption of setback limits from surface waters or vegetative buffer strips. In addition, a permitted facility is required to submit an annual performance report to EPA and to develop and follow a plan, known as a comprehensive nutrient management plan (NMP), for handling manure and wastewater.

The *Waterkeeper Alliance* Decision and EPA's Response

The 2003 rule was challenged in court by a number of groups. The cases, brought by environmental petitioners and by farm industry petitioners, were consolidated by the Second Circuit Court of Appeals, which issued a decision on February 28, 2005 (*Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2nd Cir. 2005)).

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[4] An animal feeding operation (AFO) is a facility in which livestock or poultry are raised or housed in confinement for a total of 45 days or more in any 12-month period and animals are not maintained in a pasture or on rangeland. CAFOs are a subset of AFOs. In addition to meeting the confinement criteria, an AFO is a CAFO if it meets minimum size thresholds (those with more than 1,000 animals are CAFOs; those with fewer animals may be defined as CAFOs in some cases).

[5] This is a rainfall event with the probability of recurrence once in 25 years (or a 4% chance of being exceeded in a 24-hour period in any single year). The amount of precipitation that constitutes a 25-year, 24-hour rainfall event varies by location.

The ruling reflected partial victory for all of the parties, because the court upheld or did not address significant parts of the regulation (such as the definition of what is a CAFO, for regulatory purposes), but it agreed with some of the claims raised by both sets of petitioners. It vacated parts of the regulation and remanded other parts to EPA for clarification. In response to the court's ruling, EPA has proposed revisions to the 2003 rule.[6] The public comment period on this proposal concluded on August 29. EPA officials have indicated that they expect to promulgate revised regulations by June 2007.

The remainder of this report discusses key portions of the regulation that were affected by the court's ruling, beginning with one key issue which the court did not reject or remand. Following that is discussion of issues that EPA addressed in its proposal as a result of the litigation: (1) the "duty to apply" requirement that all CAFOs either apply for NPDES permits or demonstrate that they have no potential to discharge, which was challenged by industry plaintiffs, (2) procedures regarding review of and public access to nutrient management plans, challenged by environmental groups, and (3) aspects of the effluent limitation guidelines, also challenged by environmental groups.

Agricultural Stormwater Discharges

One issue that the court upheld concerns the rule's treatment of a regulatory exemption for agricultural stormwater discharges. This issue, which was one of the most controversial during development of the 2003 rule, arose in the context of the regulatory framework concerning the land application of manure, litter, and process wastewater. As noted above, the CWA expressly defines the term "point source" to include concentrated animal feeding operations. The same provision of the act, section 502(14), also expressly defines "point source" to *exclude* "agricultural stormwater." The court characterized this provision as "self-evidently ambiguous" and observed, "the Act makes absolutely no attempt to reconcile the two."[7] When manure and other waste is applied to land, precipitation-related runoff can transport nutrients, pathogens, and other pollutants in the waste to nearby receiving waters.

To develop the rule, EPA had to interpret the statutory inclusion of CAFOs as point sources and the agricultural stormwater exclusion consistently and to identify the conditions under which discharges from the land application area of a CAFO are point source discharges that are subject to NPDES permitting requirements, and those which are agricultural stormwater discharges and thus are not point source discharges.[8] The land application portion of the rule details requirements to ensure that animal waste is applied to land in accordance with nutrient management

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[6] U.S. Environmental Protection Agency, "Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to Waterkeeper Decision; Proposed Rule," 71 *Federal Register* 37744-37787, June 30, 2006.

[7] *Waterkeeper Alliance et al. v. EPA*, 399 F.3d at 507.

[8] Production areas such as feedlots and lagoons are not eligible for the agricultural stormwater exemption, because they involve the type of industrial activity that originally led Congress to single out CAFOs as point sources. See 68 *Federal Register* 7198.

practices that ensure appropriate agricultural utilization of the nutrients in the waste. Under the rule as promulgated, EPA determined that when manure or process wastewater is applied in accordance with those practices, at appropriate agronomic rates, it is a beneficial agricultural production input. Where such practices have been used, any remaining discharge is agricultural stormwater which is exempt from permitting. In contrast, where such practices have not been used, EPA argued that it is reasonable to conclude that discharges of manure from a land application area have not been applied at agronomic rates, are not agricultural stormwater, and thus are subject to NPDES permitting. Under the rule, adherence to appropriate nutrient management practices eliminates any need to seek permit coverage for land application discharges or submit a land application NMP to the permitting authority.

Both groups of petitioners challenged this portion of the rule. Livestock and poultry industry plaintiffs had argued that land application runoff should be considered a point source discharge subject to permitting only if it is collected or channelized prior to discharge. In contrast, the environmental petitioners argued that the act's definition of "point source" requires regulation of all CAFO discharges, notwithstanding the statutory exemption for agricultural stormwater discharges. The court found that EPA's interpretation of the act in this regard was reasonable. The court interpreted the rule as seeking to remove liability for agriculture-related discharges primarily caused by nature, while maintaining liability for other discharges. "[W]here a CAFO has taken steps to ensure appropriate agricultural utilization of the nutrients in manure, litter, and process wastewater, it should not be held accountable for any discharge that is primarily the result of 'precipitation.'"[9] It rejected the challenges by the parties, and it upheld this portion of the rule.

Although the court did not direct EPA to revise this provision, the agency stated in the Preamble to the June proposal that it is considering adding a requirement that would apply to runoff from CAFO fields that are otherwise unpermitted because they do not discharge or propose to discharge (and thus are considered to be agricultural stormwater). Under this addition, such CAFOs that do not have permits would still be required comply with any more prescriptive nutrient management technical standards for land application (field-specific standards, for example) that have been established by the permitting authority (the state or EPA), in addition to the practices specified in the EPA rule.

Duty to Apply for a Permit

The 2003 rule explicitly required all CAFOs to apply for an NPDES permit, or to demonstrate to the permitting authority that they have no potential to discharge. EPA's policy rationale for this "duty to apply" provision was based on its "presumption that most CAFOs have a potential to discharge pollutants into waters of the United States."[10] However, farm industry plaintiffs argued that, unless there is a discharge of a pollutant, CAFOs and other point sources are neither statutorily obligated to comply with EPA regulations, nor are they obligated to seek or obtain

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[9] Waterkeeper, p. 509.

[10] 71 *Federal Register* at 37748.

an NPDES permit. The *Waterkeeper Alliance* court ruled in support of these plaintiffs and held that EPA exceeded its authority under the CWA in ordering all CAFOs to apply for a permit, finding that the law requires permits only where there is an actual discharge, not just a potential to discharge.

In its proposal to revise the regulation, EPA would replace the "duty to apply" requirement of the 2003 rule with a requirement that all CAFOs that "discharge or propose to discharge" must seek coverage under an NPDES permit. A similar requirement for all point sources already exists under other parts of EPA regulations that were not affected by the *Waterkeeper Alliance* decision (40 CFR §122.21(a)(1)). The proposal deletes the 2003 rule's provision allowing CAFOs to demonstrate that they have no potential to discharge, saying that such a designation would be irrelevant because the proposal requires only those CAFOs that discharge or propose to discharge to seek coverage under a permit. EPA estimated that the change in the "duty to apply" provision means that 25% fewer CAFOs would ultimately receive permits and that CAFO operators will experience a $15.5 million per year reduction (or 26%) in administrative burden, compared with the 2003 rule.

Nutrient Management Plans

The 2003 rule mandated that NPDES permits for all CAFOs that land apply animal waste include a new requirement that the permittee develop and implement a nutrient management plan that includes minimum elements specified in the rule, such as ensuring adequate storage of manure, litter, and process wastewater, and preventing direct contact of confined animals with waters of the United States. CAFOs were to develop and implement an NMP by the same date that the rule required them to comply with the rule's land application provisions (generally December 31, 2006, under the original rule; after the *Waterkeeper Alliance* decision, EPA extended the deadline to July 31, 2007). The rule provided that NMPs would be retained on-site at the CAFO. It must be available to EPA or the permitting authority, but it is not considered part of the facility's permit.

The environmental plaintiffs argued that the NMP part of the rule was unlawful under the Clean Water Act and the Administrative Procedure Act[11] because it failed to require that the terms of the NMP be included in the NPDES permit (inclusion in the permit would make the NMP enforceable by the government and private citizens) and because it allowed permitting authorities to issue permits in the absence of any meaningful government or public review of this aspect of the permit. They also argued that the permitting aspects of the rule violate the Clean Water Act's public participation requirements by effectively shielding the plans from public scrutiny and comment. The court agreed with the environmental plaintiffs on these points and vacated these portions of the rule.

In response, EPA proposes to require that CAFOs seeking permit coverage submit an NMP as part of its permit application and that the permitting authority make the plan available for review prior to developing the facility's permit. The

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[11] The Administrative Procedure Act, 5 U.S.C. §§701-706, contains provisions that govern federal agency rulemaking proceedings.

permitting authority would be responsible for reviewing the NMP for completeness and sufficiency. The terms of the NMP (such as the minimum elements described above) would become terms and conditions of the permit, as required by the court. In its proposal, EPA distinguishes between NMP *terms*, which must be incorporated as enforceable conditions of the permit following the public review process, and the plan as a whole, which must be submitted to the permitting authority for review. The NMP as a whole, EPA says, will include underlying data, calculations, and other information such as technical standards that provide a basis for the facility-specific requirements.

EPA allows permitting authorities to issue two types of permits: either individual facility-specific permits, or general permits to cover multiple facilities without the need to receive individual permit applications from facilities in advance of developing the permit. In the 2003 rule, EPA indicated that it expected that most permitting authorities would utilize general permits, as a way of minimizing regulatory burden. The *Waterkeeper Alliance* ruling required EPA to expressly address public participation in review of NMPs, since they must be included in a permit. In the case of individual permits, existing NPDES rules already establish procedures for public participation. Thus, because the NMP would be part of the individual permit application, it would be subject to existing rules requiring public participation, and no rule changes were needed.

EPA's response to the *Waterkeeper Alliance* ruling does contain new provisions for public participation in review of NMPs for those facilities intending to be covered by a general permit, because there is no provision in existing rules that explicitly addresses incorporation of site-specific NMP requirements into a general permit. The proposal includes mechanisms so that general permits for CAFOs can be modified, once issued, to include the terms of an NMP applicable to a specific CAFO and to provide an opportunity for public review of a CAFO's Notice of Intent (including the entire NMP) to be covered by a general permit, before the CAFO actually receives coverage under the general permit. The proposal gives the permitting authority (state or EPA) discretion as to how best to provide public notification and comment in the context of general permits.

Aspects of the Effluent Limitation Guidelines for CAFOs

Specific effluent limitations contained in individual NPDES permits are dictated by the terms of more general effluent limitations guidelines promulgated by EPA that typically specify the maximum allowable levels of pollutants that may be discharged by facilities within an industrial category or subcategory using specific technologies. While the limits are based on the performance of specific technologies, they do not generally require the industry to use these technologies, but rather allow the industry to use any effective alternatives to meet the pollutant limits. As noted above, in the 2003 rule, EPA established non-numerical effluent limitation guidelines for the production areas of CAFOs, and did so for four subcategories of the CAFO industry. The environmental petitioners challenged several aspects of the ELGs, and the *Waterkeeper Alliance* court upheld parts of their claims. In this portion of the decision, the court remanded the rule to EPA with instruction to present additional analysis and justification, so as to clarify its decisionmaking rationale.

Standards for New Sources of Swine, Poultry, and Veal Operations. The CWA requires EPA to promulgate New Source Performance Standards (NSPS) for new, as opposed to already existing, sources of pollution, based on what is determined to be the best available demonstrated control technology. The 2003 rule dictated that new sources in this subcategory meet a waste management standard of no discharge, except in the event of manure runoff and precipitation from a 100-year, 24-hour rainfall event.[12] The rule also allowed a less restrictive alternative performance standard (a 25-year, 24-hour storm standard) for those facilities that will voluntarily use new technologies and management practices that perform as well as or better than the baseline ELGs at reducing pollutant discharges to surface waters from the production area. The court held that EPA had not provided adequate statutory and evidentiary basis for these portions of the rule and had not justified its decision to allow compliance through an alternative standard. In its proposal to revise the rule, EPA deleted the provision allowing CAFOs to meet the no discharge standard through the use of a 100-year, 24-hour rain event containment structure, thus effectively prohibiting all discharge of manure, litter, and process wastewater from the production area for new sources in this subcategory. EPA also proposes to delete the voluntary superior performance standards provision, since the baseline for all new facilities in this subcategory will now be no discharge.

Technology for Pathogen Control. An effluent limitation guideline establishes the degree of pollutant reduction that is attainable by industrial sources through the application of various levels of technology. The CWA requires that ELGs be based on standards that are progressively more stringent: (1) best practicable control technology currently available (BPT), the minimum technological requirement, (2) best control technology for conventional pollutants (BCT), and (3) best available technology economically achievable (BAT), representing the best control measures that have been developed or are capable of being developed within the industrial category. The act required existing sources to meet BPT by July 1, 1977, and BAT by July 1, 1983. BCT is not an additional limitation, but it replaces BAT for control of a group of pollutants that are naturally occurring in the aquatic environment, are biodegradable, and are the traditional and primary focus of wastewater control. Five pollutants are presently considered conventional pollutants; one of these, the pathogen fecal coliform, is associated with manure discharges from CAFOs. Point sources that discharge conventional pollutants are required to meet the BCT standard, but the act requires that, in establishing BCT, EPA must conduct a "cost reasonableness" test of attaining more stringent pollutant control than BPT.

In the 2003 rule, EPA said that the ELG requirements of the rule were not specifically designed to reduce pathogens in animal waste but may, in EPA's view, achieve some incidental reductions of pathogens. The environmental plaintiffs argued that EPA had not presented adequate evidence to justify establishing a BCT standard for pathogens that is no more stringent than the rule's BPT standard. The court upheld this complaint and ruled that EPA must make an affirmative finding that the BCT-based ELGs adopted in the rule do in fact represent the best control technology for reducing pathogens. In its June proposal to revise the 2003 rule, EPA retains the

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[12] This is a statistical event defined as the amount of rainfall that has a 1% chance of being exceeded in a 24-hour period in any given year (or once in 100 years).

BCT standard promulgated previously and provides a lengthy narrative discussion and cost analysis justifying its rationale.

Water Quality-Based Effluent Limitations. While technology-based NPDES permits derived from EPA's ELGs may result in meeting state water quality standards for individual waterbodies, the effluent guidelines program is not specifically designed to ensure that the discharge from each facility meets the water quality standards for that particular waterbody. For this reason, the CWA requires permitting authorities to establish water quality-based effluent permit limitations (WQBELs), where necessary to attain and maintain water quality standards, that specify discharge limitations that are more stringent than the national ELGs. Where WQBELs are necessary, they are established without consideration of treatment technologies or cost. In the 2003 rule, EPA included no requirements concerning WQBELs, saying that it did not expect that WQBELs will be established for CAFO discharges from land application areas since, as described above, any precipitation-related discharges from those areas will be considered agricultural stormwater, which is exempt from NPDES permitting.

The environmental plaintiffs challenged EPA's failure to justify the lack of WQBELs for other than agricultural stormwater discharges. They also charged that the 2003 rule bars states from promulgating WQBELs. The *Waterkeeper Alliance* court partly upheld these complaints and directed EPA on remand to explain whether or not, and why, WQBELs are needed to assure that CAFO discharges will not interfere with the attainment and maintenance of water quality standards. The court also found that the Preamble to the 2003 rule is ambiguous about whether states may promulgate WQBELs for discharges other than agricultural stormwater, and it ordered EPA to clarify this issue. In the June proposal, EPA restated its view that precipitation-related discharges from land application areas are statutorily exempt from any effluent limitations, including WQBELs, because they are agricultural stormwater, but it clarified that WQBELs can be applied in appropriate cases to further limit discharges from CAFO production areas and with respect to non-precipitation-related land application discharges. This reasoning applies to state-issued as well as EPA-issued permits. Further, EPA said that it is possible that a state, acting under its own regulatory authorities, could impose additional requirements that are broader than the federal NPDES program, if they so choose. Whether many states will do so, however, is unclear.

Public Response to EPA's Proposal

Several hundred public comments on EPA's June 2006 regulatory proposal were submitted by individual citizens, environmental advocacy groups, state agencies (environmental, public health, and agricultural departments), individual livestock and poultry producers, and groups that represent livestock and poultry producers.[13]

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[13] Materials in the EPA docket for this rulemaking, No. EPA-HQ-OW-2005-0037, including EPA documents and public comments on the proposal, can be found at [http://www.regulations.gov/fdmspublic/component/main].

Public comments addressed a number of general and specific technical points, with particular focus on the "duty to apply" and agricultural stormwater exemption provisions of the proposal. Industry's comments were generally supportive of the proposal, approving deletion of the previous "duty to apply" provision and also EPA's efforts to provide flexibility regarding nutrient management plan modifications — especially to limit review and public participation requirements to only those changes that are substantial. Environmental groups, on the other hand, strongly criticized the proposal, arguing that the *Waterkeeper Alliance* court left in place several means for the agency to accomplish much of its original permitting approach, but instead EPA chose not to do so. State environmental and resource agencies, the primary implementers of CWA permitting, also have a number of criticisms. They focus on key parts that they argue will greatly increase the administrative and resource burden on states.

Duty to Apply. Both state permitting authorities and environmental groups are unhappy with EPA's deletion of the requirement that all CAFOs must apply for an NPDES permit. They concur that in doing so, EPA would change the entire permitting program from one that is pro-active to one that is reactive, because it "would allow CAFO operators to decide whether their situation poses enough risk of getting caught having a discharge to warrant the investment of time and resources in obtaining a permit."[14] Although EPA estimates that 25% fewer CAFOs will seek permit coverage, states argue that this overestimates the number that will voluntarily get permits, because under EPA's proposed revisions, there is virtually no incentive to seek a permit. Further, states contend that any cost savings that CAFOs will experience will be shifted to permitting authorities which will be placed in a more adversarial position of first proving that a facility has a discharge and then taking an enforcement action. As one state observed, the number of CAFOs, permitted or not, is the same, and EPA expects states to inspect those that don't apply for permit coverage, as well as process permits for those that do.[15] Overall, states believe that the administrative burden on states of EPA's proposal to delete the "duty to apply" requirement will be greater than under the 2003 rule, not less, as EPA concluded.

Agriculture industry commenters have very different concerns about this aspect of EPA's proposal. They challenged the "duty to apply" provision of the 2003 rule, and the court upheld their argument that the CWA only requires facilities that actually discharge to seek permit coverage. Industry groups fundamentally disagree with any presumption that CAFOs do discharge pollutants, contrary to EPA's position in support of the 2003 rule or environmentalists' contentions.[16] Thus, they object to EPA's attempts to get CAFOs to voluntarily seek permits and the specific

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[14] Natural Resources Defense Council, Sierra Club, Waterkeeper Alliance, Comments on the revised CAFO regulation, Aug. 29, 2006, p. 9.

[15] Ohio Department of Agriculture, Ohio Environmental Protection Agency, Ohio Department of Natural Resources, Comments on the revised CAFO regulation, undated, p. 6.

[16] National Pork Producers Council, United Egg Producers, American Farm Bureau Federation, National Council of Farmer Cooperatives, National Corn Growers Association, "Comments on Proposed Post-*Waterkeeper* CAFO NPDES Regulations," August 29, 2006, p. 38.

addition of a permit requirement for those that "propose to discharge" (see page 6). According to this view, EPA may not lawfully establish permitting requirements based on speculation as to possible future CAFO discharges. Any "duty to apply" triggered by accidental discharges could arise (if at all) only after an actual discharge has occurred and should be limited to facilities that accidentally discharge and fail after a reasonable time to identify the cause and take appropriate corrective measures.[17] One of EPA's rationales for promulgating the 2003 rule was recognition that large numbers of unpermitted CAFOs were discharging wastes that contribute to water quality impairments.[18] Critics of industry's position on this issue contend that allowing CAFOs to self-regulate, self-report accidental releases, and then possibly seek permit coverage will likely perpetuate those same conditions.

Agricultural Stormwater Exemption. Industry groups endorse EPA's proposal regarding agricultural stormwater, which assumes that where land application is conducted in accordance with the rule's nutrient management standards, stormwater runoff is exempt from NPDES permitting. However, these groups strongly object to EPA's suggestion in the Preamble to the rule that it is also considering requiring CAFOs to comply with additional technical standards established by a permitting authority (see page 5), because they maintain that such a change would unlawfully narrow the exemption.

Environmentalists, on the other hand, argue that this portion of the proposal would unlawfully allow CAFOs to self-regulate, as it fails to require them to get permits in order to claim the exemption. States express a similar view, contending that neither a state nor EPA can take enforcement action against an unpermitted CAFO to comply with technical or other standards. One state observed that EPA's proposal represents "a circular arrangement that would be quite difficult to enforce and administer," and that courts will be skeptical of enforcement cases against facilities that are exempt from regulation.[19]

Conclusion

While there is no overall agreement in the views of these varied interest groups, they do concur on at least one point: EPA should provide much more clarity and guidance on such key concepts as criteria or circumstances defining the need for a CAFO to seek permit coverage, what terms in a nutrient management plan should be included in a permit, and what constitutes a substantial change to a NMP (since non-substantial changes could be incorporated in a permit without time-consuming review). The Preamble to the proposal offers some examples on these points, but the public comments indicate that considerable uncertainty still exists about issues that are fundamental to implementation of the rule.

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[17] Id., p. 14.

[18] See 68 *Federal Register* 7179-7181,

[19] Illinois Environmental Protection Agency, Comments on the revised CAFO regulation, August 29, 2006, p. 4.

Further, agriculture industry groups and states generally agree on one other issue. As previously noted, EPA expects to promulgate a final revised rule by June 2007. The proposal does not include an extension of the existing July 31, 2007, deadline for compliance with the rule, apparently assuming that states have already adopted provisions of the 2003 rule and would simply need to rescind provisions of the vacated rule and replace them with language of a revised rule. States consider that date "unrealistic and unattainable," because most states likely stopped their rulemaking adoption of the 2003 rule during the *Waterkeeper Alliance* challenge.[20] Industry groups argue that one month is not enough time for CAFOs to decide whether to apply for a permit, prepare the permit application, and prepare or update their NMPs to meet the new regulatory requirements. Thus, many of their comments urge EPA to extend the compliance deadline.

Finally, because of the differing perspectives on EPA's proposal, one can anticipate that whatever revised regulation emerges from the current process will be challenged. Some of the discussions in the public comments echo criticisms that were made of the 2003 rule and seem to preview legal critiques that are likely to be raised in future challenges. Thus, it is nearly as difficult to estimate when the issues discussed here will ultimately be resolved, as it is to estimate how they will be resolved.

[20] Association of State and Interstate Water Pollution Control Administrators, Comments on revised CAFO regulation, August 29, 2006, p. 4.