



How To Survive EPA's New Regulations For Concentrated Animal Feeding Operations

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HOW TO SURVIVE EPA'S NEW REGULATIONS FOR CONCENTRATED ANIMAL FEEDING OPERATIONS

Farms and ranches are not factories. Nevertheless, the U.S. Environmental Protection Agency (EPA) has issued regulations requiring livestock and poultry operations to obtain permits originally designed to regulate wastewater from factories. Agricultural operations soon will be immersed in complicated requirements that are ill suited to regulate agriculture. EPA openly admits that some operations will be unable to comply and will have to shut their gates. Others will make serious mistakes resulting in crippling lawsuits, fines, and negative publicity, unless they learn the survival skills necessary to cope with EPA's program. This article shows you how to acquire these skills.

The new regulations will expose many livestock and poultry operations to EPA requirements for the first time. Operations classified as concentrated animal feeding operations (CAFOs) will have to comply with permits issued under the water pollution control program, known as the National Pollutant Discharge Elimination System (NPDES). These permits can be burdensome and hard to understand.

With proper guidance, most farms and ranches can deal with the new requirements. In particular, you can benefit from the experiences of factory managers who have learned to live with NPDES permits. The principles explained below can assist you in that process.

THE FIRST STEP: DETERMINING WHETHER YOU ARE REQUIRED TO APPLY FOR AN NPDES PERMIT

Principle #1: Do not assume that you are required to comply with an environmental requirement merely because a government employee says it applies to your operation.

While many environmental officials are conscientious and knowledgeable, others are inexperienced or biased against the regulated community. Factory managers have found that some overzealous officials misinterpret the law to impose unnecessarily burdensome

and expensive requirements on them. Consequently, a government employee may instruct a person to apply for a permit or to comply with other requirements when there is no such obligation. Accordingly, you must understand the requirements applicable to your operations, so that you can question, and if necessary, contest government requests to comply with inapplicable requirements.

Principle #2: Do not assume that agency personnel will always inform you about your obligations, even if you ask.

A common mistake is to assume the government will always tell you when a requirement applies to your operation. Sometimes the government makes an effort to do so, but often it does not. The government expects everyone to take all necessary steps to learn what laws apply, arguing that ignorance of the law is no excuse for violating the law.

On occasion, an agency employee may mistakenly assure a person that a requirement does not apply when it actually does apply. Factory managers have discovered, to their dismay, that some environmental agencies will not hesitate to file suit against persons who follow mistaken agency advice, including persons who relied on agency assurances that they did not need permits for their activities.

The lesson here is the same as for principle #1: you are well advised to make your own determinations about the requirements that apply to your operations rather than relying on the government to tell you.

Principle #3: Make sure that the CAFO regulations actually require a permit for your operation before you apply for the permit.

If the new regulations require you to apply for an NPDES permit, the government may or may not notify you of that fact. As explained above, you are responsible for submitting the application even if the government does not tell you to do so. Conversely, if the government does inform you that your operation must obtain a permit, you should still determine whether the government is correct.

The new regulations substantially increase the number of animal feeding operations that have to apply for NPDES permits. Previously, most operations did not obtain NPDES permits unless they regularly discharged pollutants into surface waters. Now all CAFOs must obtain permits unless they can demonstrate that they have no potential to discharge.

The new regulations no longer use the term "animal units" to describe the sizes of animal feeding operations subject to the permit requirements. Instead, the new regulations divide regulated operations into "Large CAFOs," "Medium CAFOs," and "Small CAFOs" and list the number of animals contained in each class.

Most Large CAFOs are operations that the prior regulations described as having 1000 animal units. Most Medium CAFOs are operations that formerly were described as having 300 to 999 units. Small CAFOs are all operations smaller than Medium CAFOs that the environmental agency designates as significant contributors of pollutants to surface waters. An operation cannot be classified as a Medium or Small CAFO unless it

either (1) discharges manure or wastewater through a ditch, pipe or other man-made device into a surface water or (2) allows its animals to have direct contact with surface water running through or past the animal confinement area.

The following chart taken from the preamble to the regulations provides more details on the farms affected by the regulations:

Table 4.1. Summary of CAFO size thresholds for all sectors

Sector	Large	Medium¹	Small²
cattle or cow/calf pairs	1,000 or more	300 - 999	less than 300
mature dairy cattle	700 or more	200 - 699	less than 200
veal calves	1,000 or more	300 - 999	less than 300
swine (weighing over 55 pounds)	2,500 or more	750 - 2,499	less than 750
swine (weighing less than 55 pounds)	10,000 or more	3,000 - 9,999	less than 3,000
horses	500 or more	150 - 499	less than 150
sheep or lambs	10,000 or more	3,000 - 9,999	less than 3,000
turkeys	55,000 or more	16,500 - 54,999	less than 16,500
laying hens or broilers (liquid manure handling system)	30,000 or more	9,000 - 29,999	less than 9,000
chickens other than laying hens (other than a liquid manure handling system)	125,000 or more	37,500 - 124,999	less than 37,500
laying hens (other than a liquid manure handling system)	82,000 or more	25,000 - 81,999	less than 25,000
ducks (other than a liquid manure handling system)	30,000 or more	10,000 - 29,999	less than 10,000
ducks (liquid manure handling system)	5,000 or more	1,500 - 4,999	less than 1,500

¹Must also meet one of two "method of discharge" criteria to be defined as a CAFO or may be designated.

²Never a CAFO by regulatory definition, but may be designated as a CAFO on a case-by-case basis.

The Large CAFO category includes some operations that were not CAFOs under the prior regulations. For example, although the prior regulations applied to poultry operations with 30,000 laying hens or broilers using a liquid manure handling system,

Large CAFOs for poultry now also include 82,000 laying hens with a dry manure handling system or 125,000 chickens other than laying hens with a dry manure handling system. Large CAFOs also include some operations with immature animals, including operations with 10,000 immature swine weighing less than 55 pounds or 1000 veal calves. A Large CAFO of 1000 cattle includes heifers and steers, including dairy heifers. A cow and its calf are counted as one animal until the calf is weaned.

Different types of animals at an operation are counted separately, rather than added together, to determine whether the operation is a CAFO. Thus, an operation holding 900 beef cattle and 600 dairy cows is not a Large CAFO. The same is true for an operation with 2400 mature swine and 9000 immature swine. However, if an operation is a CAFO for one type of animal, the other types of animals in the operation are also regulated.

It is not unusual for a government official to mistakenly identify an operation as a CAFO. This may occur because the official has overestimated the animals there. Or the official may ask a medium or small operation with a discharge to apply for a permit, contrary to law, when it neither (1) discharges manure or wastewater through a ditch, pipe or other man-made device into surface water, nor (2) allows its animals to have direct contact with surface water running through or past the animal confinement area. Because an NPDES permit imposes serious expenses and liabilities, an operation requested to obtain a permit should first confirm that the regulations classify the operation as a CAFO.

Principle #4: Do not assume that you must apply for an NPDES permit just because you operate a Large CAFO.

Although most Large CAFOs must apply for NPDES permits, some can avoid this burden if they have no potential to discharge manure, litter or process wastewater into surface water. To utilize this exemption, a Large CAFO may file an application for a no discharge determination from the government. At some operations, reasonable modifications in facility design can prevent all discharges, thus avoiding a permit.

Principle #5: Do not rely on the 25-year, 24-hour flood event exemption or the agricultural storm water exemption to immunize your operation from regulation.

These exemptions still exist, but the new regulations modify them substantially.

Previously, animal feeding operations designed to contain the 25-year, 24-hour flood event did not have to obtain NPDES permits. Now even these operations must apply for permits. However, if these existing operations comply with their permits, they can avoid liability for a manure discharge in a flood event greater than the 25-year, 24-hour event. The same exemption applies to new dairy and beef operations.

New swine, poultry, and veal calf operations must be designed to contain the 100-year, 24-hour storm event. If these operations are in compliance with their NPDES permits, they have an exemption for any release during larger flood events.

Despite the agricultural storm water exemption, NPDES permits will now regulate runoff from the land application of manure, litter or process wastewater. This exemption still

exists, but it allows only the field runoff of manure, litter or process wastewater applied in compliance with a nutrient management plan. The agricultural storm water exemption does not allow runoff from animal production areas.

The modification of these exemptions will require NPDES permits for some operations that were not covered by the prior regulations. Persons accustomed to prior exemptions should re-examine their operations to determine whether NPDES permits are required. You should also make sure that your operations contain the 25-year, 24-hour flood event, or the 100-year, 24-hour flood event, whichever is applicable.

Principle #6: Resist any government attempt to issue you an NPDES permit for an operation that you do not own or operate.

The draft regulations published two years ago proposed to expand the liability of "integrators," defined as businesses whose animals are raised at producers' farms and ranches. Under this proposal, integrators with substantial control over the farms and ranches would have shared the responsibility for implementing the producers' permits. This would have made the integrators liable for any permit violations occurring on the producers' properties.

The final regulations delete the integrator provision. Consequently, you should question any attempt to name your business as a permit holder for another person's operation.

Principle #7: Know the applicable deadline for submitting your permit application.

If your operation needs an NPDES permit, you will have to determine the deadline for submitting an application for the permit. Large CAFOs already classified as CAFOs under the prior regulations must apply for NPDES permits by April 14, 2003.

Existing operations classified as CAFOs for the first time by the new regulations have until February 13, 2006 to apply. These operations include dry poultry manure operations without liquid manure handling or continuous overflow watering systems, immature swine, heifer and calf operations, and operations that discharge only in 25-year, 24-hour storm events. EPA or the state environmental agency has the option of requiring any of these CAFOs to submit its application earlier.

New or expanding Large CAFOs have varying deadlines depending on their situations.

THE NEXT STEP: NEGOTIATING PERMIT TERMS THAT REDUCE YOUR BURDEN AND COST

Principle #8: Know whether your operation will benefit more from a general permit or an individual permit.

Some environmental agencies offer general NPDES permits rather than issuing a separate, individual NPDES permit for each operation. In this case, an operation may

submit a notice of intent to be covered by the general permit, thus avoiding some of the disadvantages of individual permits. These disadvantages can include public hearings and expensive requirements designed specifically for that operation.

On the other hand, an individual permit is sometimes preferable. Unlike general permits, the language of an individual permit usually can be negotiated with the government. The result may be a permit that is easier to understand and is tailored to your operation. In particular, the general permit may contain provisions that are unnecessary or onerous for your operation and that can be deleted or replaced with different provisions.

Usually, an environmental agency that offers general permits will also offer an opportunity to opt out of the general permit. Ordinarily, this occurs through the permit holder's request for an individual permit at the time the permit application is submitted.

Where general permits are offered, permit applicants should evaluate their options before submitting their permit applications. Making the right choice can simplify compliance and reduce expense.

Principle #9: Do not assume that you are obligated to accept the government's first draft of the permit.

Factory operators have learned that they can, and must, negotiate the terms of individual NPDES permits with the government. In fact, the environmental agency expects you to negotiate to improve the permit. This process benefits both the permit holder and the government by making the permits more effective and easier to implement. Conscientious regulators realize that you know your operation better than they do, and respect your suggestions for permit language that makes more sense for your operation. Usually, the agency will start discussions by providing you a draft permit for comment.

If the agency insists on keeping illegal or unreasonable provisions in your permit, you have a remedy to address this problem. Usually, final permits may be appealed to an independent review board with authority to strike these provisions. Frequently, the environmental agency will negotiate a reasonable compromise on these issues rather than going to the time and expense of a hearing before the board.

Principle #10: Provide accurate information in the permit applications you submit to the agency.

In many jurisdictions, it is a crime to purposely or recklessly provide inaccurate information to the government on permit applications. It can also result in the agency's denial of your permit application, making it unlawful for your operation to continue. Application information should be checked carefully for accuracy.

Principle #11: Be careful about giving confidential information to the government.

This principle applies to all information you provide the government about your business, including the permit application. The federal government must comply with the Freedom of Information Act, and state agencies are subject to state public records laws that require

them to provide copies of most of their records to the public upon request. Although these laws have the laudable purpose of allowing the public to monitor the government's actions, they can also be exploited to harm your operations. Competitors can use business information or trade secrets in your records to obtain an unfair economic advantage. Environmental activists can use these records for a variety of purposes, including attempts to harass an agricultural operation.

Consequently, you should carefully review all information before submitting it to the government. If you prefer that the public not have access to the information, you should not submit it unless required by law. If submission of business or trade secrets is required, you may be able to assert a claim of confidentiality that will prevent the government from disclosing it to the public. Some laws require you to make a claim of confidentiality at the time you submit the records, or you will lose that right. If the government refuses to designate the records as confidential, there usually are mechanisms to challenge that determination in an administrative proceeding or lawsuit.

Incidentally, you also have the right to request public records. You should not hesitate to exercise that right to see and copy the environmental records that the government keeps on your facility, including any records of complaints that any citizen or environmental activist makes against your operation.

Principle #12: Make sure your permit is written in understandable language.

NPDES permits are notoriously difficult to understand. They are written in the jargon of the NPDES program rather than in plain language. For agriculture, the problem is even more acute, because NPDES permits are designed for factories and use language normally applicable to industrial discharge pipes. A permit holder can easily violate a permit that is ambiguous or uses language he/she does not understand. Accordingly, it is vital to negotiate a well-written permit and to understand it.

Principle #13: Guard against NPDES requirements designed solely to protect the ground water.

The CAFO regulations are designed to prevent the pollution of surface water, not ground water. Consequently, the regulations do not require liners for lagoons or other measures designed to address ground water pollution. Any NPDES permit that requires these measures may be unlawful, unless authorized by state laws that are more stringent than the federal CAFO regulations.

Principle #14: Guard against permit provisions that require you to monitor the application of your manure or wastewater on land not under your control.

The new regulations require an NPDES permit to regulate the application of a CAFO's manure, litter or process wastewater on fields owned, rented or leased by the CAFO, but not on land controlled by other persons. Although EPA's draft regulations would have forced CAFOs to obtain signed certifications from recipients of the manure, litter or process wastewater acknowledging that they would land apply it in accordance with nutrient management plans, the final regulations delete this requirement. The new

regulations only require CAFOs to record the names and addresses of the recipients, to record the approximate amount transferred to them, and to provide them with a current manure nutrient analysis.

Principle #15: Beware of onerous requirements in NPDES permits that are not authorized by either the new federal CAFO regulations or state law.

EPA has authorized most states to issue NPDES permits on behalf of EPA. Thus, in most states, you must submit applications for these permits to the state environmental agency rather than EPA. Federal law allows the states to establish NPDES requirements that are stricter than EPA's new regulations. However, state agencies can do this only if their own state laws authorize them to adopt more stringent requirements. State agencies sometimes attempt to impose stricter provisions in their permits without this additional authority. You should be able to recognize and object to terms in NPDES permits that are not authorized by either the new federal regulations or state law.

AVOIDING CRIPPLING LIABILITY BY UNDERSTANDING YOUR OBLIGATIONS UNDER THE NPDES PROGRAM

Principle #16: Review Principles 1 and 2.

If your operation must obtain an NPDES permit, you must carefully read and understand your permit. Otherwise, the government can file suit and penalize you for violating any provision of the permit. Citizens, including your neighbors, will also have the right to sue you and force you to pay their attorney's fees if they win. To avoid this liability, you should not rely on the government to educate you about your obligations under the permit, since that advice may not be forthcoming or may be inaccurate.

Principle #17: Review your nutrient management plan to determine whether it satisfies the new requirements.

The NPDES permits will require nutrient management plans to control the storage and field application of manure, litter and process wastewater at existing CAFOs starting on December 31, 2006. Some existing plans may not meet some of the requirements of the new regulations and will have to be rewritten. For example, the plans must protect against both phosphorus and nitrogen runoff from fields to streams, although state environmental agencies have some discretion in deciding whether a phosphorus or nitrogen application rate will accomplish this purpose.

New CAFOs must have a nutrient management plan at least 180 days before operation.

Principle #18: Make sure that your operations have the acreage necessary to comply with the land application requirements of the new regulations.

Some operations may have to obtain additional acreage for the land application of manure, litter and process wastewater to comply with the new regulations. For instance,

an operation currently following only a nitrogen standard may need to find more land to accommodate a phosphorus standard.

Operations with NPDES permits also may not apply manure, litter and process wastewater within a 100-foot setback of down-gradient surface water, open tile line intake structures, sinkholes, agricultural wellheads, or other conduits to surface water. The operations may substitute a 35-foot vegetated buffer for the 100-foot setback. Either way, some operations may need more land to satisfy these setback requirements.

Operations needing additional acreage for land application should start their search well in advance of the deadlines for modifying their nutrient management plans.

Principle #19: Understand your obligations under the permit.

Sometimes an agency will write a summary of the permit's requirements in ordinary language to help the permit holder to understand its obligations. While this summary can be useful, it is likely to cover only your basic duties. Unfortunately, an agency will not hesitate to tell you that its summary is not binding on the agency, and you assume the risk of noncompliance if the summary is inaccurate or incomplete.

Principle #20: Beware of the boilerplate language in a permit.

The typical NPDES permit contains pages of boilerplate language, usually in smaller print similar to the "fine print" of a contract. This boilerplate contains requirements that a permit holder ignores at his/her peril. You must understand and comply with the boilerplate language as well as the main body of the permit.

Principle #21: Understand your rights under the NPDES permit.

Factory managers have learned that they are entitled to terms in their permits that exempt them from liability for not complying with the permits in some emergency situations. You should insist on the same protection. Once these terms are written into the permit, you must know what procedures to follow to take advantage of these exemptions.

Principle #22: Attend to the paperwork.

Factory managers know that the paperwork requirements of the environmental laws pose some of the greatest risks of liability for violating the law. Record keeping is designed to document the actions taken to prevent pollution. Environmental agencies take these requirements seriously. Frequently, factories find themselves in trouble for failing to record and submit reports on their pollution control activities. Agriculture will be treated no differently.

The new regulations contain a variety of new paperwork requirements for operations with NPDES permits. These requirements include analyses of manure, litter and process wastewater at least once per year for nitrogen and phosphorus content and analyses of the soil at least once every five years for phosphorus content. The operations must keep records on their transfer of manure, litter and process wastewater to other persons for the

last five years. They must submit an annual report with information about the number of animals and their management of manure, litter and process wastewater.

The regulations contain much more detail about these and other record keeping and reporting requirements. You should pay careful attention to these requirements to avoid unexpected liability.

Principle #23: Get professional assistance to assist you in understanding complicated issues of law and to deal with difficult regulators.

EPA's regulations are typically complicated and difficult to decipher. The CAFO regulations are no exception. Their complexity is demonstrated by the fact that EPA wrote a lengthy preamble in the Federal Register to explain the regulations. Usually, EPA and state environmental agencies also prepare guidance documents to explain the regulations and preambles. This will, without a doubt, be true for the CAFO regulations as well. The guidance documents can be numerous and lengthy. Sometimes, they contradict each other and the regulations.

Due to the complexity of the NPDES program, factory operators have learned that there is no substitute for professional advice to understand their obligations or deal with regulators who make illegal or unreasonable demands. Contacting an experienced environmental attorney can reduce the difficulty in complying, decrease compliance costs, and prevent penalties for noncompliance. Although farms and ranches are not factories, you can take advantage of the same professional assistance to protect your investments, not to mention your peace of mind.

Obviously, this summary is not a complete explanation of the new regulations and should not be construed as legal advice on any specific facts or circumstances. Many nuances in the regulations cannot be explained in a short summary and may affect the application of the regulations to your operation. Accordingly, the contents of this summary are intended for general informational purposes only and may not be quoted or referred to in any other publication or proceeding without Jones Day's prior written consent, to be given or withheld at its discretion. The mailing or publication of this summary is not intended to create, and receipt of it does not constitute, an attorney-client relationship. Nonetheless, we trust that this article will assist you in learning how to cope with the NPDES program.

Readers may consult Jack Van Kley at (614) 469-3875 or their regular contact at Jones Day concerning their own situations or any specific legal questions they may have.

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