

Agribusiness Alert: EPA Proposes Reporting Rule for Concentrated Animal Feedlot Operations

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(Updated: On July 20, 2012, the United States Environmental Protection Agency (USEPA) withdrew the proposed rule discussed below, that would have required concentrated animal feedlot operations (CAFOs) to provide information on their operations to USEPA. See 77 Fed. Reg. 42679 (July 20, 2012). Instead, USEPA will collect CAFO information from existing sources, including state permitting programs, and other regulatory programs at the federal, state and local level. The decision was heralded as a victory by agricultural interests that viewed the proposed rule as causing needless time, effort and paperwork.)

The United States Environmental Protection Agency (EPA) recently published a proposed reporting rule for Concentrated Animal Feedlot Operations (CAFOs) (the Proposed Rule). (See 76 Federal Register at 65431-65458 (Oct. 21, 2011), available on the U.S. Environmental Protection Agency Web site. In this proposal, EPA plans to exercise its broad information collection authority under Section 308 of the Clean Water Act (CWA) to reach CAFOs that neither discharge, nor propose to discharge, to CWA regulated waters. As a rationale for the Proposed Rule, EPA contends it requires additional information to implement the National Pollutant Discharge Elimination System (NPDES) permit program effectively and to ensure that CAFOs comply with NPDES permitting requirements. EPA pursues this data despite food security concerns raised by making certain of the sought after information public. This article briefly summarizes key portions of the Proposed Rule.

Who would need to report? The table below shows the various types of operations and whether they would need to report if EPA issues this proposal as a final rule.

Summary of CAFO Size Thresholds

¹ *Would need to report if designated by the NPDES permitting authority, or if the operation meets one of the following criteria: (A) discharges pollutants through a man-made device; or (B) directly discharges pollutants into waters of the United States which pass over, across, or through the facility or otherwise come into direct contact with the confined animals. 40 CFR 122.23(b)(6).*

EPA suggests two approaches for collecting data on the CAFOs identified for reporting in the table above. One option would require all the CAFOs to report to EPA. This option would also allow a state NPDES

permitting authority to provide EPA with the information in place of the CAFOs, if the state so chooses.

The second option uses a "focused watershed" trigger for collecting data. Only those CAFOs identified on the table that are located in a "focused watershed" would be reporting under this option. EPA proposes to select the "focus watersheds" based on water quality concerns potentially associated with CAFOs or land application of CAFO wastes, and EPA would request data only from CAFOs within those watersheds. Criteria that EPA may use in choosing a watershed include whether the watershed contains high priority areas (e.g., drinking water supplies, outstanding resource value waters), vulnerable soil types, high densities of animal agriculture, or other information EPA deems relevant.

What Data would be Reported and What Reporting Deadlines are Proposed? The Proposed Rule would require completion and submittal of an EPA survey form requesting the following data: (1) the legal owner's name or the name of an authorized representative, and that person's address and telephone, and email (if available); (2) the CAFO's production area location by latitude and longitude or street address; (3) if the CAFO has an NPDES permit, the permit number, or if the CAFO has filed a Notice of Intent for NPDES permit coverage, the date of such filing; (4) the animal types in open, partially covered or covered confinement for 45 days or more in the prior 12 months and the maximum number of livestock so confined during that period; and (5) whether animal waste (manure, litter, process wastewater) is land applied and the total available land application acreage under the CAFO owner or operator's control.

The EPA proposes 90-day deadlines for reporting the information using a survey form published with the Proposed Rule. The start dates on the 90-day deadlines vary depending on whether a state with delegated NPDES permitting authority chooses to report to EPA on behalf of the CAFOs.

Other Alternatives Suggested by EPA. Although not embodied in the Proposed Rule language, EPA invites comment on other suggested alternatives for collecting the data it perceives it needs. These include using existing data sources, developing more compliance assistance and outreach tools, and requiring states with delegated NPDES programs to submit the information.

When are Comments on the Proposed Rule Due? Since this rule is only in the proposal stage, CAFOs need not comply now, but are encouraged to comment to EPA on the various proposals. The Notice for the Proposed Rule sets December 20, 2011, as the deadline for submitting comments on the two proposed options as well as the other suggested alternatives. EPA will consider the comments and issue a final rule, at which point CAFOs will need to meet the requirements that appear in the final rule.

Our Agribusiness & Food attorneys have significant experience in the administrative process and can assist clients in commenting on the Proposed Rule.



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