

REGULATORY ADVISORY PANEL
Reissuance of VPDES CAFO General Permit Regulation

MEETING NOTES
RAP MEETING - MONDAY, MARCH 29, 2010
DEQ PRO TRAINING ROOM

Meeting Attendees

<i>RAP Members</i>	<i>Interested Public</i>	<i>Technical Support</i>
George Ashman – Poultry producer	Kathleen Van Der Hyde	Emily Aleshire – DCR
Hobey Baughan – Virginia Poultry Federation	Tony Banks – Virginia Farm Bureau	Cindy Berndt – DEQ
Kristen Hughes Evans – Chesapeake Bay Foundation		Betsy Bowles – DEQ
Katie Kyger Frazier – Virginia Agribusiness Council		Fred DiLella – DEQ
Dale Gardner – Water Stewardship		Ellen Gilinsky – DEQ
Jeff Kelble – Shenandoah Riverkeeper		Neil Zahradka – DEQ
John Parker – Virginia Pork Industry Association		Darrell Marshall - VDACS
Eric Paulson – Virginia Dairymen’s Association		
Wilmer Stoneman – Virginia Farm Bureau		
Roy Van Der Hyde – Dairy producer		
R.O. Britt – Murphy Brown		
William Wooding – Swine producer		

NOTE: The following RAP Members were absent from the meeting: Doug Baxter (Tyson Foods), Dale Gardner (Water Stewardship), Bill McKinnon (Virginia Cattlemen’s Association). R.O. Britt was the alternate in attendance for Kraig Westerbeek (Murphy Brown).

Meeting Notes

The meeting was convened at approximately 9:30 AM.

Ellen Gilinsky, DEQ Water Division Director, welcomed the Regulatory Advisory Panel (RAP) participants and thanked them for their attendance. Introductions followed.

DEQ staff reviewed the regulatory process and explained the purpose of the Regulatory Panel. The role of the RAP is to advise DEQ on the regulatory revisions, not make final decisions on the content of the regulation. It was noted that RAP participants were carefully selected from a wide array of backgrounds. DEQ expects that two meetings of the RAP will be necessary.

DEQ staff summarized the evolution of VPDES CAFO program in Virginia using the following handout:

Evolution of VPDES CAFO Program in Virginia

< 2003

CAFOs need NPDES permit only if they plan to discharge < 25 yr, 24 hr storm

VPA program required no discharge under those conditions – No VPDES permit required

2003

Federal CAFO rule changes

CAFOs have duty to apply if they discharge or have potential to discharge

2004

*Virginia DEQ - promulgates VPDES General Permit Regulation for CAFOs
- accepts registration statements for VPDES CAFO GP coverage*

Duty to apply – CAFOs that discharge or have potential to discharge

2005

Waterkeeper Alliance Inc., et al. v. EPA

2nd Circuit Court of Appeals determined (among other things):

- 1) Terms of NMPs must be included in permits*
- 2) Public Participation must include NMPs*
- 3) No duty to apply unless facility discharges or proposes to discharge*

2005-2008

EPA revises rule

VA DEQ does not issue VPDES CAFO GP coverage to any facilities, awaiting new rule

December 22, 2008 – Revised EPA CAFO rule effective

2009

DEQ accepts registration statements for VPDES CAFO GP coverage

DEQ modifies VPDES Permit regulation regarding CAFOs

RAP Discussion

DEQ staff highlighted the differences between the VA regulations and the Federal regulations, explaining that revisions to the Federal CAFO Rule are now effective and Virginia must meet the Federal requirements. At this time, animal feeding operations (AFOs), including those defined as concentrated animal feeding operations (CAFOs) are permitted in Virginia under the VPA permit program. The VPA program includes more AFOs than the Federal program requires to be permitted.

Participants reviewed the handouts and discussed the definitions of “discharge” and “propose to discharge.” A question was asked regarding how many Virginia CAFOs applied for VPDES coverage after the Federal rule was revised. Some questioned what the consequences would be if a producer had a duty to apply under the revised Federal CAFO rule and did not file by the deadline of Feb. 27, 2009. DEQ staff indicated that the agency received approximately 75 letters of intent to apply from CAFO operators by the deadline. The deadline was with respect to file for coverage, not to be covered under a VPDES permit. It is recognized that it would take some time for the states to develop approved permit programs for CAFOs. If a discharge occurs and the facility has not applied for VPDES coverage, the potential for Federal enforcement exists.

DEQ staff explained that the focus of the AFO permitting and compliance program in Virginia is to ensure “no discharge” conditions at these facilities. Currently this is accomplished under the VPA Permit Program. Virginia now must develop the most efficient mechanism to get the facilities that need NPDES permits covered under a VPDES permit that meets all the requirements of the Federal rule, including the new requirements for public notice.

Participants asked questions regarding the differences in term between general permits, VPA Permits and VPDES Permits. DEQ staff clarified that existing VPA general and individual permits are valid for 10 years, while VPDES general and individual permits are valid for 5 years.

Participants asked for clarification on the “discharge or propose to discharge” language for large producers. One participant voiced concern that this was a judgment call and that the definition of intent to discharge was unclear. Discussion followed on size of operation and discharge/intent to discharge definitions.

DEQ staff explained the three categories of CAFO: Large, Medium and Small. Large CAFOs are defined by number of confined animals and have a duty to apply if the facility “discharges or proposes to discharge”. Medium CAFOs, by definition, must have a discharge present and thus have a duty to apply. While Medium CAFOs have a direct discharge into state waters, that direct connection does not have to be a pipe; it could be a stream through the “production area.” Small CAFOs would be designated by the permitting authority after a site visit.

Discussion followed regarding production area, confinement area, and manure storage in the field.

DEQ staff explained that cows in the pasture outside the confinement area are not included in the prohibition on contact with state waters, and that a “confinement area” has no vegetation and animals are confined for at least 45 days in a 12 month period.

DEQ staff noted that what is considered a “discharge” has been a topic of much discussion between other states as well.

DEQ staff noted that Virginia has been acknowledged as having one of the best VPA programs in the country, and that the goal now is to make the minimum changes necessary in order to meet the requirements for those facilities that must be covered under the NPDES program. DEQ staff also noted that EPA has just announced rulemaking that may lower the permitting size threshold and bring more of the smaller CAFOs into the NPDES program.

DEQ staff summarized the changes needed in the regulations meet the new Federal requirements and referred to the following handout:

Federal EPA Regulations

The revised EPA CAFO Rule became effective on December 22, 2008. Key revisions include the following:

- *A CAFO that discharges or proposes to discharge has a duty to apply for a VPDES permit. There are 3 categories of CAFOs based primarily on number of animals: Large, Medium and Small.*
- *A CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur. EPA interprets that any operation that has open, uncovered storage that is designed to discharge in any storm event “proposes to discharge”.*
- *Public notice and comment period with opportunity for a public hearing is required for the permit application and the site-specific nutrient management plan (NMP).*
- *Public notice and comment period with opportunity for a public hearing is required for the permit and NMP when changes are made to the NMP. The rule establishes a two-tier process for modifying the permit:*
 - *non-substantial changes will be made without the need for public review and comment and reflected in the annual report available to the public;*
 - *substantial changes will be subject to public notice and comment and an opportunity for public hearing before the permit is modified.*

The final rule includes a list of changes to the NMP that constitute a substantial change to the terms of a CAFO’s NMP. Examples of such substantial changes include the addition of new land application areas not previously included in the CAFO’s NMP and the addition of any crop not included in the terms of the CAFO’s NMP and the corresponding field-specific land application rates.

- *A voluntary no discharge certification provision was added, which is not a program requirement and is a voluntary option for CAFOs that are not required to have NPDES permit coverage. This allows a CAFO to submit documentation that the operation will not discharge based on rigorous criteria determined by the EPA.*

Virginia DEQ Regulations

Two (2) DEQ regulations are used to implement the federal EPA CAFO requirements:

- 1) *The VPDES Permit Regulation (9VAC25-31)*
- 2) *The VPDES CAFO General Permit Regulation (9VAC25-191)*

The VPDES Permit Regulation was amended last year through a final-exempt regulatory action in order to conform to the changes that EPA made to the CAFO Rule; these amendments became effective on March 3, 2010. This action was exempt from public comment since the only changes were those made to conform to the federal rule.

Since the VPDES General Permit regulation is scheduled to expire this year, and a full participatory process is required for this action, the Agency decided to include the required changes that conform to the 2008 EPA CAFO Rule in the action to reissue the general permit. This is the regulation before this advisory panel.

RAP Discussion (cont'd)

DEQ staff noted that changes in public notice and comment periods would be required. For the nutrient management plan (NMP), if there is “substantive change,” such as changing crops or adding land, public notice would be required including the opportunity to request a public hearing.

NMPs are usually reviewed and renewed on a three year basis. The group discussed whether this would be substantive change, requiring public notice. If the VPDES permit is a five year permit, and the NMP must be renewed every three years, the question was raised as to whether or not renewal of the NMP would require public notice if there were no substantive changes. Hay and pasture plans can be written for five year periods. A RAP member suggested that increase of land, number of animals and construction of additional animal housing would be significant changes, but crop rotation would be just business as usual.

DEQ staff encouraged the RAP to not get caught up in definitions at this point. The questions regarding interpretation of “discharge” and “propose to discharge,” as well as what constitutes a substantive change to an NMP are good questions for EPA. EPA will be invited to the next RAP meeting in order to help clarify these issues.

DEQ staff discussed two options for implementing the EPA regulation changes: VPDES Individual Permits or General Permits.

DEQ staff explained that coverage under general permits are not public noticed. The group discussed the differences between General Permits and Individual Permits. The following handout was provided:

Summary of Public Notice Requirements for VPDES CAFO permits (Individual and General)

Federal regulation requires that coverage under a general permit (GP) and the content of the nutrient management plan (NMP) be subject to public notice and opportunity for public hearings in the same manner as an individual permit (IP).

In addition, Virginia State Water Control Law (§62.1-44.15:02 of the Code of Virginia) also contains

specific procedures for public comment as well as for public hearings.

The following represents the requirements necessary to meet both federal and state law and regulation:

Method: *For concentrated animal feeding operations (CAFOs) the public notice is the same as any other individual VPDES permit except that the general notice may be accomplished via website rather than newspaper notice.*

Comment Period: *The comment period must be at least 30 days.*

Permit fees: *CAFOs are exempt from any permit fees, and since newspaper notice is not required, no costs associated with public notice are expected.*

Requests for public hearings: *The public comment period must include the opportunity for “interested persons” to request a public hearing on issuing coverage under a general permit, terms of an individual permit, and terms of the NMP. The law also specifies the terms and conditions under which a public hearing would be held.*

Timeline for Issuance of Individual and General Permits

Individual:

- 1) Complete permit application received (day 1)*
 - 2) Administrative review (2 weeks - day 14)*
 - 3) Preparation of draft permit based on a boiler plate (2 days - day 16)*
 - 4) Owner review of draft permit (1-15 days – day 31)*
 - 5) Public notice of draft permit (30 days – day 61)*
 - 6) If no significant comments are received, permit may be issued*
- Total of approximately 1.5 - 2 months*

General:

- 1) Complete registration statement received (day 1)*
 - 2) Administrative review (2 weeks - day 14)*
 - 3) Preparation of general permit (2 days - day 16)*
 - 4) Public notice of proposed coverage under general permit (30 days – day 46)*
 - 5) If no significant comments are received, permit coverage may be granted*
- Total of approximately 1.5 months*

RAP Discussion (cont'd)

One participant asked where Virginia is more restrictive than EPA, referencing adjoining neighbor notification and poultry transfer. DEQ staff explained that a VPDES permit issued to a CAFO would need to be at least as restrictive as the VPA permit. Provisions included in the VPA program and not included in the Federal would need to be included in the VPDES permit. The VPDES permit would also include any additional requirements required by the Federal rule.

In response to a question from the RAP, DEQ staff discussed some of the key differences between the current VPA program and the VPDES. Differences include:

- 1) annual reporting requirements
- 2) public notice and public participation (comments and hearings)
- 3) modifications to NMP requiring public notice
- 4) Fines are capped differently per violation. The VPA general permit has a civil penalty cap of \$2,500 per violation. For VPDES, Virginia cannot be less restrictive than EPA which includes a maximum civil penalty of \$32,500 per violation per day.

The discussion continued regarding discharge, agricultural storm water discharge and point source discharge. The group discussed the meaning of waters of the state in VA as compared to the definition of US waters. DEQ staff will review these differences between the VPA regulation and the VPDES regulation prior to the next meeting.

Discussion continued about major and minor changes to the NMP and when these changes would be considered substantive enough to trigger a public notice. The NMP must be prepared by a Certified Nutrient Management Planner and approved by DCR. The Federal rule allows two methods of preparing an NMP: the linear method and the narrative method. The narrative approach is more flexible and planners do have some latitude in writing a more flexible plan to incorporate changes the producer will likely make. DEQ staff provided clarification that the requirements of the VPDES permit are approved by the State Water Control Board, and the requirements of the NMP are determined by DCR. DEQ does not intend to regulate the content of the NMP, but many of the provisions of the VPDES CAFO program rely on the NMP. Some requirements need to be in the permit and others in the NMP. DEQ does not intend to alter the DCR special conditions on the NMP. DEQ does not alter another agency's regulations. The permit applicant would need to discuss NMP requirements with DCR as it was being developed for the permit.

DEQ staff discussed some additional differences between individual and general permits. Individual permits include the opportunity to make adjustments in the permit conditions through modifications during the term of the permit. The general permit does not allow that flexibility, and the terms apply to all permits. DEQ can develop boilerplate language for individual permits, and involve the RAP members in the development of this language.

DEQ staff discussed requirements for public hearings. Procedures for hearings must meet statutory requirements of the new Board bill. DEQ provides a response, but may not change a permit based on each comment. If 25 people request a hearing, then a public hearing will be considered. Comments must be related to the permit and raise substantial issues. The review process includes a count of comments, assessment of technical merit of comments and the raising of substantive related issues. If there are 25 qualifying comments, then the Regional Director, DEQ Deputy Director and Director review and recommend whether or not to hold a public hearing. The SWCB then reviews and can concur with the Agency decision on hearing or delegate the request back to staff. The RAP discussed the importance and timing of effective comments.

DEQ staff noted that VPDES individual permits and the general VPDES CAFO permit would be obtained by virtually the same processes, including the time frame. Staff noted that the individual

permit has a step called “owner review” of draft permit. The applicant has 15 days to review the draft permit. The workload for DEQ is similar with individual permits using boilerplate language or general permits, considering the public notice requirements necessary for all CAFO permits.

A RAP member inquired as to the cost of an individual versus general permits. DEQ staff noted that there are no application or maintenance fees for any water permits for animal feeding operations. Staff noted that for other types of facilities, the cost of a general permit is usually lower (as an example \$600) and application fees for individual discharge permits range from \$2,000 to \$24,000, depending on flow.

RAP discussion revisited the issues of who must apply for the permit, definition of large and medium CAFOs, definition of discharge, propose to discharge, site specific decisions and hydrologic connections, manure transfer, how “substantive change” is identified and how this triggers public notification, Board bill requirements and changes to the governing VPDES regulation.

DEQ staff will seek clarification from EPA on the issues related to the Federal requirements prior to the next meeting. EPA representatives from Region III will be invited to the next RAP meeting to provide expert responses to some of the questions.

DEQ staff asked the RAP members to bring additional thoughts and considerations about individual versus general permits to the next RAP meeting. Specifically, DEQ asked the RAP to consider whether or not a general permit was necessary in light of the requirements for public notice. If a general permit is not used, DEQ efforts would be focused on the specific individual permit requirements.

Next Meeting

DEQ staff noted that RAP members would receive an email using the Doodle meeting planner in order to help set the date for the next RAP meeting.

Public Comment

There was one comment from members of the public present at the meeting. Kathleen Van Der Hyde commented that she had attended many of these type meetings over many years. She stated she hopes the Bay is getting cleaner because of all these efforts.

The meeting was adjourned at approximately 1:15 P.M.