


COMMONWEALTH OF VIRGINIA
Department of Environmental Quality
Division of Water Quality Programs
Ellen Gilinsky, Ph.D., Director

SUBJECT: Guidance Memo No. 05-2013
Duty to Apply for VPDES CAFO Permit in Lieu of 2005 U.S. 2nd Circuit Court of Appeals Decision

TO: Regional Directors

FROM: Ellen Gilinsky, Ph.D., Director 

DATE: October 6, 2005

COPIES: Regional Water Permit Managers, Regional Water Compliance Managers, OWPP Staff, OWCP Staff, Amy Owens, Kathy Frahm

Summary: This guidance document outlines the DEQ response to the decision by the United States Court of Appeals for the 2nd Circuit in *Waterkeeper Alliance, Inc. et al. v. EPA* that negated the EPA CAFO rule provision that a large CAFO has a “duty to apply” based on size alone. The current VPDES permit regulation was modified to require that operators of all large CAFOs apply for a VPDES permit. The EPA has begun a revision process to modify the federal CAFO rule that will alter this duty to apply, and also address other issues raised by the U.S. Court of Appeals. The federal revisions will not be effective by January 1, 2006; therefore, guidance is needed to address the DEQ response until a final exempt change to the VPDES regulation can be initiated.

Electronic Copy:

An electronic copy of this guidance in PDF format is available for staff internally on DEQNET, and for the general public on DEQ's website at: <http://www.deq.virginia.gov/water>.

Contact Information:

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DISCLAIMER

This document is provided as guidance and, as such, sets forth standard operating procedures for the agency. However, it does not mandate any particular method nor does it prohibit any particular method for the analysis of data, establishment of a wasteload allocation, or establishment of a permit limit. If alternative proposals are made, such proposals should be reviewed and accepted or denied based on their technical adequacy and compliance with appropriate laws and regulations.

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Duty to Apply for VPDES CAFO Permit in Lieu of 2005 U.S. 2nd Circuit Court of Appeals Decision

Background

The US EPA promulgated amendments to the federal concentrated animal feeding operations (CAFO) rule that became effective on April 14, 2003. In response, the Virginia State Water Control Board approved amendments to the VPDES permit regulation on August 31, 2004 that required operators of large (CAFOs) to register for coverage under a VPDES permit by January 1, 2006. A new general permit regulation for CAFOs was also included in these amendments. The VPDES CAFO amendments became effective on November 3, 2004. The state law underlying the changes to the VPDES permit regulation and the development of the general permit directed the Board to require VPDES permit coverage for CAFOs only to the extent required by federal law.

The federal CAFO rule was challenged in 2004 in the case of *Waterkeeper Alliance, Inc. et al. v. EPA*. Petitioners included the Waterkeeper Alliance, American Farm Bureau Federation, National Chicken Council, National Pork Producers Council, American Littoral Society, Sierra Club, and the Natural Resource Defense Council. On February 28, 2005, the U.S. Court of Appeals for the 2nd Circuit held, among other things, that the federal CAFO rule violated the terms of the Clean Water Act (CWA) by requiring operators of all large CAFOs to apply for a NPDES permit, even if they were not discharging to surface waters. The court's position was that NPDES permitting requirements are reserved for facilities that have an actual discharge. The court upheld the EPA argument that storm water runoff from manure application fields did not constitute a discharge if the application had been made in accordance with an appropriate nutrient management plan (NMP).

The EPA did not appeal the court's decision, and a request for rehearing brought by the environmental petitioners was denied. The EPA has informed the states that revisions to the federal CAFO rule are being drafted. At this point, the federal timeline can only be estimated, with distribution of a revised CAFO rule for public comment expected in late 2005, followed by a fast-track rulemaking procedure that should yield final changes to the rule in 18-24 months, or by the end of 2007.

In any case, the federal revisions will not be finalized prior to the January 1, 2006 VPDES permit regulation deadline for operators of large CAFOs to apply for VPDES coverage. The Virginia Attorney General's office has offered the conclusion that the U.S. Court of Appeals decision in the 2nd Circuit cannot be the basis for a final exempt, statutory conformance change to the VPDES permit regulation. A final exempt modification to the VPDES permit regulation will be sought once EPA has completed modifications of the federal CAFO rule.

This guidance addresses the interim conflict that exists between the VPDES regulation and a pending change in federal regulation. This guidance was developed to assist in the implementation of the VPDES permit regulation (9VAC 25-31) and State Water Control Law §62.1-44.17:1 A1. in a manner consistent with the ruling in *Waterkeeper Alliance, Inc. et al. v. EPA*.

1. Enforcement Discretion for “Duty to Apply” Deadline

For large CAFOs that do not have a current discharge other than agricultural storm water, DEQ staff should not enforce the January 1, 2006 “duty to apply” deadline for requesting VPDES coverage. This discretion should continue until a VPDES permit regulation amendment addressing the U.S. Court of Appeals decision is finalized. The timeline for this action is expected to be approximately 18-24 months, and is based on the time necessary for the federal CAFO rule to be revised.

For purposes of this guidance, a discharge would be considered to have the following characteristics:

- a. Pollutants are discharged into surface waters of the state through a manmade ditch, flushing system, or other similar manmade device;
- b. Pollutants are discharged directly into surface waters of the state that originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation; or
- c. Pollutants are discharged into surface waters of the state through means other than agricultural storm water.

If operators of large CAFOs have a current VPA AFO or VPA Poultry general or individual permit, and are in compliance with that permit, no ongoing discharges should exist from the permitted facility other than agricultural storm water. These operators should be advised to maintain coverage under their existing permits. A standard letter for this purpose is attached to this guidance.

Operators of almost all large CAFOs in Virginia will have a VPA permit. Possible exceptions are beef feedlot operations that may confine 1000 or more animals and do not handle liquid waste. In any case, CAFOs that are in compliance with State Water Control Law should not have an ongoing discharge other than agricultural storm water.

In most cases where discharges are occurring, the best initial course of action is to seek correction of that discharge through state law, rather than through issuance of a VPDES CAFO permit.

2. Discharges after storm events greater than the 25-year, 24-hour storm

It is important to note that discharges from a CAFO occurring after a storm event greater than a 25-year, 24-hour storm event are allowed by State Water Control Law if the operator is appropriately managing a waste storage system designed to handle that storm. The U.S. Court of Appeals decision does not exempt discharges of this nature from the duty to apply for NPDES coverage. As a practical matter, this means that if a facility experiences a discharge to surface waters after a 25-year, 24-hour storm event, and is not covered under a VPDES permit, then that facility could be considered to be in violation of the CWA. This may be considered by some large CAFO operators as reason to apply for VPDES coverage, even if they do not have an ongoing discharge. The U.S. Court of Appeals decision was clear, however, that this “potential” to discharge did not require a NPDES permit.

As of the date of this DEQ guidance, the US EPA has not issued any definitive guidance regarding what permit action to take if a discharge that occurs is not expected to be an ongoing discharge. In the absence of such federal guidance, the DEQ should plan to require a VPDES permit if a discharge occurs after a storm event greater than the 25-year, 24-hour storm.

Discharges resulting from conditions not related to the 25-year, 24-hour storm that have been or are in the process of being corrected, and are not expected to reoccur, should be handled under the requirements of the VPA permit program and State Water Control Law.

3. Completed VPDES Registration Statements

Many of the swine, dairy, and beef CAFO operators completed a VPDES registration statement when they registered in November 2004 for continued coverage under the VPA AFO general permit. These operators completed this registration statement expecting that NPDES registration would be required by the federal CAFO rule. These operators should be contacted and offered a choice as to the action DEQ will take regarding their request for VPDES permit coverage. A standard letter for this purpose is attached to this guidance. At a minimum, they must maintain coverage under a VPA permit unless they are covered by a VPDES permit. They may pursue one of the following courses of action:

- a. Continue VPA coverage until changes to the federal CAFO rule is finalized, and then at that time consider whether they want to pursue VPDES coverage; or
- b. Request VPDES coverage as soon as possible.

If no response is received from the CAFO operator, coverage under a VPDES CAFO permit should not be initiated.

Option b. may be desirable for those large CAFO operators that wish to ensure no non-permitted discharges occur, specifically those that may occur after a storm event greater than the 25-year, 24-hour storm.

ATTACHMENT A. is a letter to operators of any AFO that submitted a completed VPDES registration statement.

ATTACHMENT B. is a letter to operators of large CAFOs that have not submitted a completed VPDES registration statement.

[INSERT DATE]

RE: **Receipt of Complete VPDES CAFO registration statement**

Dear [INSERT NAME OF FACILITY OPERATOR]:

You have submitted to this office a complete registration statement for coverage under the Virginia Pollutant Discharge Elimination System (VPDES) general permit for Concentrated Animal Feeding Operations (CAFOs). This registration was required of all CAFOs due to changes in the federal CAFO regulation that became effective on April 14, 2003.

However, due to a recent decision by the United States Court of Appeals for the 2nd Circuit in *Waterkeeper Alliance, Inc. et al. v. EPA*, the US EPA plans to modify the federal CAFO rule. The most significant change will be made in response to the court's opinion that National Pollutant Discharge Elimination System (NPDES) permits should only be required for those operations that have an actual discharge to surface waters. Two very significant points are as follows:

- 1) Storm water runoff from manure application fields is not considered a discharge if the manure was applied in accordance with an appropriate nutrient management plan (NMP); and
- 2) Discharges that occur after a storm event greater than the 25-year, 24-hour storm would still require an NPDES permit. (Depending on your location in Virginia, a 25-year, 24-hour storm is approximately 6 inches of rain falling in 24 hours or less)

What does this mean to you?

The Virginia DEQ does not plan to enforce the requirement for large CAFOs to apply for a VPDES (Virginia equivalent of NPDES) CAFO permit by January 1, 2006. However, your facility will still be required to maintain coverage under the VPA permit program as mandated by Virginia law. If large CAFOs are in compliance with state law, then no ongoing discharges should be occurring, and therefore it is unlikely that the revised federal rule will require coverage under a VPDES permit. The Virginia DEQ will continue to enforce state law that mandates no discharges from animal feeding operations except in the case of a storm event greater than the 25-year, 24-hour storm.

Your minimum requirements are to maintain coverage under a VPA permit; however, you may opt to obtain coverage under the VPDES program. Although potentially in compliance with Virginia law, discharges from manure storage areas or housing areas after a storm event greater than the 25-year, 24-hour storm will require a VPDES permit to comply with federal regulation. If you choose to seek coverage under the new VPDES general permit, your operation would regain this federal storm discharge exemption that is not completely insured by the VPA permit. The VPDES permit does require additional recordkeeping, and the maximum civil penalty for non-compliance is higher.

ATTACHMENT A

PLEASE CONTACT THIS OFFICE and advise of your desire to either:

- a) proceed with your application for a VPDES CAFO general permit as soon as possible; or
- b) hold your application until the EPA completes modifications to the federal rule. Once modifications are complete, you would choose whether to maintain coverage under your existing VPA permit or convert to the VPDES permit. At this point, the federal timeline is not definite, and modifications may not be complete until the latter part of 2007.

[INSERT REGIONAL OFFICE ADDRESS & CONTACT INFORMATION]

[INSERT DATE]

RE: **Requirement for VPDES CAFO registration statement**

Dear [INSERT NAME OF FACILITY OPERATOR]:

Your facility has been identified as a Concentrated Animal Feeding Operation (CAFO). This determination is based on the number of animals confined, as identified on the registration statement for your VPA permit. Based on changes to the federal CAFO regulation in 2003, registration was required of all CAFO operators by January 1, 2006 for coverage under a Virginia Pollutant Discharge Elimination System (VPDES) general or individual permit for CAFOs.

However, due to a recent decision by the United States Court of Appeals for the 2nd Circuit in *Waterkeeper Alliance, Inc. et al. v. EPA*, the US EPA plans to modify the federal CAFO rule. The federal timeline is not definite, and changes may not be complete until the latter part of 2007. The most significant change will be made in response to the court's opinion that National Pollutant Discharge Elimination System (NPDES) permits should only be required for those operations that have an actual discharge to surface waters. Two very significant points are as follows:

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Your minimum requirements are to maintain coverage under a VPA permit; however, you may opt to obtain coverage under the VPDES program. Although potentially in compliance with Virginia law, discharges from manure storage areas or housing areas after a storm event greater than the 25-year, 24-hour storm will require a VPDES permit to comply with federal regulation. If you choose to seek coverage under the new VPDES general permit, your operation would regain this federal storm discharge exemption that is not completely insured by the VPA permit. The VPDES permit does require additional recordkeeping, and the maximum civil penalty for non-compliance is higher.

ATTACHMENT B

In light of this information, if you desire to seek coverage under a VPDES general or individual permit for CAFOs, please contact this office. If you do not seek VPDES permit coverage, you will be required to maintain coverage under your existing VPA permit.

[INSERT REGIONAL OFFICE ADDRESS & CONTACT INFORMATION]