

Fact Sheet: Status of Federal and Colorado CAFO Permit Regulations and Requirements

What is the current status of the CAFO permit regulations and requirements?



Colorado Department
of Public Health
and Environment

There have been several changes in the federal requirements for concentrated animal feeding operations (CAFOs) since 2002. These federal changes have affected how the Colorado Department of Public Health and Environment (the department) regulates CAFOs to protect surface water. This fact sheet describes the recent regulatory revisions and an important court case that affect the discharge permit requirements for Colorado's CAFOs. This fact sheet does not address the department's ground water protection requirements for CAFOs, which apply to all CAFOs, with or without a permit. These ground water protection requirements can be found in Regulation No. 81, the Animal Feeding Operations Control Regulation.

U.S. EPA's 2003 revised CAFO regulations

On February 12, 2003 the United States Environmental Protection Agency (EPA) published revised federal regulations for CAFOs. These regulations required all CAFOs, except those that could demonstrate "no potential to discharge" under any circumstance or climatic condition, to apply for a discharge permit by April of 2006. This was known as the "duty to apply" provision. In addition, the revised regulations required any permit issued to a CAFO to include, among other things, a requirement to develop and implement a nutrient management plan (NMP) by December 31, 2006.

State's initial response to revised regulations

When the 2003 federal regulations were published, Colorado did not have CAFO permit regulations. Because of the "duty to apply" provision of the federal regulations, the Colorado Water Quality Control Commission (commission) adopted permit regulations for CAFOs in May 2004. These regulations are found in section 61.17 of the Colorado Discharge Permit System (CDPS) Regulations (Regulation No. 61) and are substantially similar to the 2003 federal regulations.

You can find Regulation No. 61 on the Internet at the following Web page:

<http://www.cdphe.state.co.us/op/reg/waterregs/100261dischargepermitsystem.pdf>

U.S. Court of Appeals for the Second Circuit, February 28, 2005 decision in Waterkeeper Alliance et al. v. EPA

Shortly after the 2003 revised CAFO regulations were published, several environmental and agriculture organizations sued EPA, alleging that the rule was deficient in certain areas. The lawsuit was decided by the federal Second Circuit Court of Appeals on February 28, 2005. Two significant rulings of the court are: 1) the Clean Water Act gives EPA jurisdiction to regulate and control only actual discharges – not potential discharges; and 2) NMPs constitute effluent limitations and the 2003 CAFO rule deprived the public of its right to assist in the development, revision and enforcement of an effluent limitation. Therefore under the ruling, only a CAFO that discharges to waters of the U.S. is required to seek permit coverage and submit a NMP that must be approved by the regulatory authority and made available for public review before the CAFO is granted permit coverage.

EPA's February 10, 2006 revised compliance dates

On February 10, 2006, EPA issued a rule extending certain compliance dates established in the 2003 CAFO regulations. This rule was necessary to allow EPA time to issue revised regulations in response to the Second Circuit Court decision. The extension also relieved CAFOs of responsibility for meeting the 2006 deadlines while the regulations were being revised. The February 2006 rule established a new deadline of July 31, 2007 to

seek permit coverage for: 1) operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date (primarily veal and dry poultry operations and CAFOs that qualified for the “25-year, 24-hour storm exemption” under the previous regulations), and 2) operations that meet the CAFO definition after April 14, 2003 because of an operational change that would not have made the operation a CAFO prior to April 14, 2003. The new deadline for a permitted CAFO to develop and implement a NMP is also July 31, 2007.

EPA’s June 30, 2006 revised CAFO regulations – proposed

On June 30, 2006 EPA proposed revisions to its 2003 CAFO regulations to fully respond to the 2005 Second Circuit Court decision. The changes proposed by EPA include:

- Requiring only those CAFOs that discharge or propose to discharge to seek coverage under a permit.
- Requiring a CAFO seeking coverage under a permit to submit an NMP with the permit application.
- The NMP must be reviewed by the permitting authority and made available for public review.
- The terms of a CAFO’s NMP must be incorporated as conditions in the CAFO’s discharge permit.

EPA anticipates publishing its final rule in the Spring of 2007. After the rule is finalized, the department will work with the commission and stakeholders to revise the CAFO permit regulation in section 61.17 to have it mirror the new federal regulation. Once this process is complete, the department will develop and issue a new general permit that contains the new requirements.

What does all this mean for CAFOs in Colorado?

It is important to know that while the “duty to apply” provision was eliminated, a CAFO that discharges pollutants to waters of the U.S. without holding a CDPS permit is in violation of the Colorado Water Quality Control Act and is subject to a fine of up to \$10,000 per day of discharge. Thus, a CAFO operator should carefully consider the likelihood that the CAFO will discharge and decide whether to apply for a permit before a discharge occurs. A permit allows a CAFO to discharge to waters of the U.S. as long as the CAFO is operating in accordance with permit requirements.

As of December 1, 2006 the department will have a general permit available under which a CAFO can request coverage. A CAFO will be able to apply for coverage under this permit until the state regulations are revised to reflect the new federal CAFO regulations that will be issued in 2007. In general, the technical requirements for permitted CAFOs, such as the production area design standards and the required content of NMPs, will be the same as they have been since the permit regulations were issued in 2004.

The revised regulations and new permit will include the existing technical requirements and the provisions described below.

1. Any CAFO that discharges is required to seek coverage under a CAFO permit.

“Discharge” means the introduction or addition of a pollutant into waters of the U.S. A discharge could be the result of a spill or overflow from a lagoon, or uncontrolled runoff from confinement areas, manure storage areas, feed and commodities storage and handling areas, or land application areas. If you believe that your CAFO will not discharge pollutants into waters of the U.S. under any circumstances, then you are not required to have permit coverage. You should be aware that any discharge from the production area of a CAFO that is not covered under a CDPS permit is considered a violation of the Clean Water Act and that discharge from a land application area may be a violation if manure, litter and/or process wastewater is not applied in accordance with appropriate, site specific nutrient management practices.

2. CAFOs do not need to submit NMPs with their permit applications.

As discussed above, the Second Circuit Court ruling required that a NMP be submitted with your permit application. However, this requirement is part of EPA's June 30, 2006 proposed CAFO regulation and will not be part of any final federal CAFO regulations by the time the department issues a new general permit. Therefore, NMPs are not required to be submitted as part of a complete permit application, but a permitted CAFO will need to develop and implement a NMP by July 31, 2007 or by the date of permit coverage, whichever is later. CAFOs that intend to seek coverage under the new general permit are encouraged to begin developing NMPs as soon as possible to ensure that they will be able to meet the July 31, 2007 deadline.

Please contact the department for a copy of the current NMP template. The template is also available at: <http://www.cdph.state.co.us/wq/PermitsUnit/wqcdpmt.html#CAFO>.

3. CAFOs must provide certification of proper facility design with their permit applications.

If you still want to seek permit coverage, keep in mind that your permit application cannot be considered complete until you provide the department with an engineer's certification that the following conditions exist at your operation:

- The volume of process wastewater runoff generated for each impoundment was calculated as required in 61.17(5)(d)(ix)(A).
- Drawings of each impoundment have been prepared as required under 61.17(5)(d)(ix)(B).
- A properly designed and constructed spillway is in place at each discharging impoundment, unless the department has determined that a spillway is not required pursuant to 61.17(8)(b)(ii).
- Accurate, permanent depth markers are in place as required under 61.17(5)(d)(ix)(D).
- Two feet of freeboard, or other freeboard level approved by the department, exists in each open surface impoundment and terminal tank, as required under 61.17(5)(d)(ix)(E).
- Structures used to divert stormwater from running onto production areas, manure stockpiles, and composting areas are sized as required under 61.17(5)(d)(ix)(F).
- Structures used to divert process wastewater from the production areas are sized as required under 61.17(5)(d)(ix)(G).
- All impoundments, tanks, manure stockpiles, or composting areas located within a 100-year floodplain are protected from inundation and damage from 100-year or smaller flood events.

Please contact the department for a copy of the current permit application form. The form is also available at: <http://www.cdph.state.co.us/wq/PermitsUnit/wqcdpmt.html#CAFO>.

Non-permitted CAFOs are subject to land application requirements.

CAFOs choosing not to apply for permit coverage must ensure that they meet the conditions described below in order to qualify for the exemption for stormwater runoff from land application fields, known as the "agricultural stormwater exemption." The runoff must be precipitation-related and must occur from land where manure, litter, and/or process wastewater has been properly applied in accordance with appropriate site specific nutrient management practices. In particular, to qualify for the agricultural stormwater exemption, non-permitted CAFOs must:

- Identify appropriate site specific conservation practices to be implemented, including as appropriate, buffers or equivalent practices to control runoff of pollutants to surface waters.
- Identify protocols for appropriate testing of manure, litter, process wastewater, and soil.
- Establish protocols to land apply manure, litter, or process wastewater in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater.

- Identify specific records that will be maintained to document the implementation and management of the measures described above.

If stormwater runoff is discharged to surface water from a land application area at a CAFO that has not implemented the measures described above, it will be considered an unpermitted discharge. Unpermitted discharges are subject to enforcement action by the department.

Non-permitted CAFOs should be aware that the discharge of irrigation return flow from a field where manure or process wastewater has been land-applied does not qualify for the agricultural stormwater exemption since the discharge is not precipitation-related. Such discharges, however, are allowed from a permitted CAFO that is in compliance with its permit requirements.

Will the department change the CAFO requirements again?

The department is required by state and federal laws to ensure that the requirements for CAFOs in Colorado are as stringent as, but no more stringent than, the federal CAFO regulations. Since EPA is in the process of revising the federal CAFO regulations, it is likely that the department will have to revise the CDPS regulations again in 2007 or 2008 to match EPA's regulatory revisions. The department, however, does not expect any future revisions to have a substantial impact on the permit requirements for CAFOs.

If the federal or state requirements change, the department will notify CAFOs of the changes. CAFOs that are already covered under a discharge permit when the requirements change will not be affected by any new regulatory revisions until their permit expires or is reissued by the department.

Who can I contact for more information?

The department's Environmental Agriculture Program staff can help you with your questions about the regulatory revisions and permit requirements.

Contact us at (303) 692-3523 or via email at cdphe.cafo@state.co.us with any questions.