

New Discharge and Emissions Reporting Requirements for CAFOs

EPA has recently issued two different rules potentially requiring concentrated animal feeding operations (CAFOs) to take action. First, any CAFO that “discharges or proposes to discharge” waste materials into nearby bodies of water must apply for coverage under a Clean Water Act (CWA) permit by February 27, 2009. Under the CWA, even discharges into manmade bodies of water such as irrigation ditches generally require permit coverage.

In 2003, EPA issued a rule under the CWA requiring all CAFOs to obtain permit coverage unless they are able to demonstrate that they have “no potential to discharge.” However, a federal appeals court found that rule not to comply with the CWA and therefore ordered EPA to revise it. On November 20, 2008, EPA issued a revised rule in order to comply with the court’s order.

Under the revised rule, a CAFO that “discharges or proposes to discharge” and that does not already have permit coverage should timely submit a Notice of Intent to operate under EPA’s general permit for CAFOs in Idaho. Please note that it is important to carefully review the provisions of that permit and to keep a copy accessible onsite at all times.

A CAFO that does not “discharge or propose to discharge” does not need to do anything, but could be liable for any subsequent accidental discharges. In this regard, if a CAFO certifies to EPA that it does not “discharge or propose to discharge,” then it may have at least some liability protection in the event of an accidental discharge. A CAFO that already has permit coverage need not do anything at this time, but must apply for permit renewal in accordance with the terms of its permit.

Second, EPA recently issued a rule providing a “limited exemption” for CAFOs from federal emissions reporting requirements. In general, federal regulations require industrial and agricultural facilities to report releases of threshold quantities of certain hazardous substances,

such as ammonia and hydrogen sulfide, to state and local emergency response authorities.

Recently, the agricultural community petitioned EPA for an exemption from these reporting requirements for releases of emissions from animal wastes. EPA granted the petition in part, but confirmed that releases of threshold quantities of hazardous substances from animal wastes at large CAFOs must still be reported to state and local authorities.

It is important to clarify that this limited exemption only affects releases directly from animal wastes; releases of threshold quantities of hazardous substances from other sources such as tanks are still subject to reporting requirements. In addition, it is also important to clarify that the limited exemption only applies to releases of emissions into the air; releases of threshold quantities of hazardous substances to soil, groundwater, and surface water are also still subject to reporting requirements.

EPA Adopts New Standard for Investigating Contamination at Rural Properties

On December 23, 2008, EPA adopted a new standard for investigating potential contamination on tracts of rural and forestland of 120 acres or more. Parties who are considering purchasing rural property may protect themselves from environmental liabilities by using this standard to investigate potential contamination prior to purchase. This new standard is known as “E2247-08,” and was drafted by ASTM International, a well-known standards development organization. Purchasers of agricultural land may find this new standard particularly useful, as such properties may have residual contamination from pesticides, herbicides, and other chemicals.

The federal Superfund law imposes broad liabilities for contamination on a variety of types of parties, even some who do not actually cause the contamination. Due to this sometimes harsh liability scheme, Congress and EPA have developed liability defenses for innocent buyers of contaminated properties. In order to take advantage of these defenses, the buyer must conduct “all

appropriate inquiry” to determine if contamination is present. For several years, a potential purchaser of any type of property could satisfy “all appropriate inquiry” by conducting a Phase I environmental site assessment. This recent rule by EPA adopts a standard satisfying “all appropriate inquiry” that is customized to the purchase of large rural tracts of land.

Comment Deadline Looming on EPA-Proposed Stormwater Regulations

The EPA is accepting public comment until February 26, 2009 on newly proposed stormwater regulations governing construction sites. If promulgated, the new regulations will set national effluent limitations for turbidity for construction sites 30 acres and larger and located in areas of the country susceptible to “high rainfall energy and with soils with significant clay content.”

The new regulations will also require the installation of a project site sediment basin to capture and remove sediment from stormwater runoff draining off of construction sites measuring 10 acres and larger. Last, the new regulations will require all construction sites, regardless of size, to provide and implement “recognized and accepted” sediment and erosion, and other pollution prevention measures to control and cleanse stormwater discharging from construction sites. EPA expects to receive many comments in opposition to the newly proposed regulations given that implementation of the proposed stormwater control measures is expected to cost roughly \$1.9 billion annually.

The newly proposed regulations are an outgrowth of prior efforts by EPA to enact stricter controls over stormwater discharges from construction sites. In 2002, EPA issued a proposed rule setting effluent guidelines for stormwater discharges emanating from construction sites, but opted in 2004 not to set the proposed guidelines, citing, in part, the high anticipated cost of implementing such rules.

This latest EPA rulemaking effort is the result of a lawsuit filed by the Natural Resources Defense Council and Waterkeeper Alliance seeking to compel EPA to promulgate stormwater discharge standards for the construction industry. The District Court for the Central District of California agreed with the environmental plaintiffs, and gave EPA until December 1, 2008 to propose the stormwater effluent guidelines for the construction and development industry. The Ninth Circuit affirmed the district court’s ruling.

9th Circuit: Grazing Permits Still Do Not Require Section 401 Certification

The U.S. Court of Appeals for the Ninth Circuit has confirmed that the section 401 water quality certification requirement of the Clean Water Act was only meant to apply to point source discharges. Before a federal agency issues a permit or license for an activity that results in discharge into navigable waters, section 401 of the Clean Water Act requires the state in which the discharge takes place to certify that the activity will not violate state water quality standards.

In *Oregon Natural Desert Ass’n v. U.S. Forest Service*, No. 08-35205, slip op. (9th Cir. Dec. 11, 2008), Oregon Natural Desert Association argued that livestock grazing may cause discharges into navigable waters and that the Forest Service’s issuance of a grazing permit required section 401 certification. The Ninth Circuit rejected the argument. Because federal grazing permits involve non-point source discharges, they do not require section 401 certification under the Clean Water Act.

Though Gaining in Popularity, Green Energy Projects Are Not Without Controversy

While green energy projects are gaining in popularity across the nation, as well as in Idaho, the siting of wind farms, solar farms, and geothermal energy projects is meeting some stern opposition. Among projects either planned or now functioning within Idaho, one shares land that could be inundated if a long-shelved flood control and irrigation storage dam is constructed on the Weiser River; others seek to build within endangered sage grouse habitat; and another is facing a “not in my backyard” backlash from influential local residents.

While many recognize the value of successful alternative energy projects as a means of benefitting both man and environment alike, the siting of these facilities can prove to be a delicate task. Those who are not sensitive to the local environment, including local communities, are drawing opposition that careful planning and communication would likely have avoided.