

# REGULATORY, ENVIRONMENTAL & NUISANCE CASE UPDATE

## 2012 IOWA PORK REGIONAL CONFERENCES

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# Iowa Environmental Regulations Handbook

- In depth discussion and analysis of environmental regulations, with practical points for analysis and compliance
  - DNR Construction Requirements
  - DNR Manure Management Requirements
  - Updates on these chapters and other state and federal environmental regulations and nuisance
- <http://www.iowapork.org/ForProducers/ResourcesInformation/EnvironmentalRegsHandbook/tabid/1564/Default.aspx>

# AG NUISANCE CASES

## Iowa

- No cases went to trial in 2009, 2010 or 2011
- 2 currently pending in Iowa District Courts
  - Swine
    - Allamakee County 2,400 head finisher
      - Filed Sep. 26, 2011
      - Jury trial scheduled March 6, 2013
    - Dallas County 2,480 head finisher
      - Filed Jan. 5, 2012
      - Jury trial - no trial date yet

# NUISANCE

## Steps to help to avoid lawsuit

- Location
  - Separation distance
  - Prevailing winds
- Tree buffers
  - Existing trees
  - Fast growing trees planted with slower growing species
- Biofilters
- Clean pigs and buildings
- Manure treatments and additives
- Timing of manure agitation and application

# NUISANCE

## Protection for producer

- Insurance
  - Standard farm liability policies normally don't cover – but producer should always check with the insurance company and/or an attorney
  - Environmental policies available
    - Coverage for claims and costs of defense

# EPA CAFO RULE - HISTORY

- 2003 EPA rule required an NPDES permit (discharge permit) if an operation discharged or had “no potential to discharge” pollutants to waters of the U.S.
- Waterkeeper v. EPA (2005)
  - Court struck down EPA rule that required NPDES permit unless CAFO could show “no potential to discharge” and ruled there must be an actual discharge for an NPDES to be required under the Clean Water Act

# EPA CAFO RULE - HISTORY

- 2008 EPA rule required an NPDES permit if operation discharged or “proposed to discharge”
- NPPC et. al. v. EPA (March 2011)
  - Court struck down EPA rule requiring NPDES permit if operation proposes to discharge and ruled, as in Waterkeeper, there must be an actual discharge for NPDES permit to be required

# EPA CAFO RULE - HISTORY

- Oct. 21, 2011 EPA proposes reporting rule as required by settlement agreement with Sierra Club, etc., comment period closed 1/19/12
- EPA proposing:
  - All CAFOs submit the information required in the settlement agreement or state DNR's voluntarily submit the info; or
  - CAFOs in designated watersheds submit the information
- Alternative: require state DNR's to submit information



# EPA CAFO RULE - HISTORY

Dec. 8, 2011 EPA memo to Regional EPA Offices:

“In response to *NPPC*, which applies nationally, we will revise the CAFO regulations to remove from the federal regulations the requirement that CAFOs that ‘propose to discharge’ have NPDES permits. We also will update the Implementation Guidance on CAFO Regulations – CAFOs that Discharge or Are Proposing to Discharge . . . to provide guidance consistent with the court’s decision.”

# EPA CAFO RULE

- CAFO must obtain a federal discharge permit (NPDES) if the CAFO discharges ~~or proposes to discharge~~
- Iowa confinement operations cannot discharge by law
- Without an NPDES permit, can be no discharge – with an NPDES permit, can discharge from greater than 25-year, 24 hour storm event

# EPA CAFO RULE

Is NPDES permit needed for an “accidental discharge”?

- If the cause of an accidental discharge that has occurred in the past has been changed or corrected, the CAFO would not be considered to discharge and an NPDES permit would not be required due to the accidental discharge

# EPA CAFO RULE

- Mixed animal CAFOs
  - Do not add animal numbers from different categories to determine if CAFO threshold is triggered, as long as all animal numbers are below the threshold
  - Once the CAFO number threshold is met for one category, all manure generated by the AFO is subject to NPDES requirements
    - Example, hog CFO with more than 2,500 head on the same site as cattle OFO with less than 1,000 head -- NPDES permit required for the cattle OFO

# EPA AIR EMISSIONS REPORTING

- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) & Emergency Planning and Community Right-to-Know Act (EPCRA) air release reporting requirements:
  - Qualifying Releases must be reported: more than 100 pounds of H<sub>2</sub>S or NH<sub>3</sub> per 24 hour period
  - Not required at this time if farm was signed up under EPA Air Compliance Consent Agreement – reporting may be required for these farms once the monitoring study is completed
  - Exemptions

# EPA AIR EMISSIONS REPORTING

- EPA Rule – issued 12/18/08, effective 1/20/09: Exemption to CERCLA & EPCRA air release notification requirements:
  - CERCLA – Any release of a hazardous substance from animal waste from farms.
  - EPCRA - Any release of a hazardous substance from animal waste from farms that have fewer than the number of animals in any of the following categories:
    - 700 mature dairy cows
    - 1,000 veal calves
    - 1,000 cattle (other than above)
    - 2,500 swine – 55 pounds or more
    - 10,000 swine – less than 55 pounds
    - Also includes horses, sheep, turkeys, chickens, and ducks

# EPA AIR EMISSIONS REPORTING

## 3 Step Process

- Telephone DNR & Local Emer. Response Committee
- Initial written report within 30 days
- Follow-up written reports:
  - If significant increase
    - Increase in emission levels above the reported normal range of the continuous release
  - Status report
    - Filed within 30 days of the one year anniversary of the initial written report

# PARTIALLY ROOFED AFO

- 2010 DNR rule definition of partially roofed AFO to qualify as OFO:
  - Animals must have unrestricted access between inside and outside areas
  - Unroofed area must be at least 10% of square footage inside area
- If these requirements not met, the AFO is a CFO even though animals are not confined to areas which are totally roofed



# CONFINEMENT OPERATIONS

## One or two?

- To determine if a permit or manure management plan is required, and if concrete standards apply:
- Two CFO's are considered to be one operation when:
  - At least one of the two is constructed after 5/21/98
  - There is common ownership or management, and
  - They are adjacent; or
    - Utilize a common area or system for manure application
- Adjacent – CFO's within:
  - 1,250 feet if the combined AUC is <1,000
  - 2,500 feet if the combined AUC is >1,000

# CFO'S & OFO'S

One or two?

- Common ownership: sole or at least a majority ownership interest
  - Includes ownership by spouse or dependent child
- Common management
  - Significant control of day-to-day operations
  - 2010 DNR rule: Does not include control by an owner of animals being fed under contract in two or more CFO's or OFO's
  - This 2010 DNR rule changed previous DNR interpretation for CFO's

# MANURE MANAGEMENT PLANS

## Annual updates

- DNR no longer sending reminder notices of due date
- Compliance fee - \$.15/a.u. – if contract feeding, livestock owner required to pay fee
- Phosphorus Index must be calculated every 4 years, more often if PI inputs change - submitted to DNR as annual update

# MANURE APPLICATOR CERTIF.

- 2010 DNR rule: Confinement site applicator who misses course one year must pass exam to remain certified
- Commercial manure service: in the business of transporting, handling, storing, or applying manure for a fee
- DNR interpretation: If a producer applies the producer's manure (from a site that requires applicator certification) to someone else's land and receives money (for either the manure or the application), then the producer must be certified as a commercial applicator instead of as a confinement site manure applicator

# MANURE APPLICATION

## Frozen or snow covered ground

- Does not apply to:
  - Manure from open feedlot operations
  - Dry manure (can't be pumped & doesn't flow under pressure) (2010 DNR rule: clarifies that frozen liquid manure does not qualify as dry manure)
  - Liquid manure from confinement operations using formed storage with less than 500 animal units
  - Liquid manure injected or incorporated on the same date of application

# MANURE APPLICATION

## Frozen or snow covered ground

- No surface application of liquid manure from a confinement operation on
  - Snow covered ground from Dec. 21 to Ap. 1
  - Frozen ground from Feb. 1 to April 1except in an emergency
  - Frozen ground
    - Impermeable to soil moisture
    - Does not include ground frozen only in top 2" or less
  - Snow covered ground
    - At least 1" of snow or ½" of ice

# MANURE APPLICATION

Frozen or snow covered ground

- An emergency is when there is an immediate need to apply manure due to unforeseen circumstances beyond the producer's control
  - Includes, but is not limited to:
    - natural disaster
    - unusual weather conditions, or
    - equipment or structural failure

# MANURE APPLICATION

## Frozen or snow covered ground

- To apply liquid manure on frozen or snow covered ground due to an emergency, a producer must:
  - Telephone DNR field office before application - 2010 rule: caller must give:
    - Owner's name & facility ID No.
    - Reason for emergency app. & app. Date
    - Estimate of gallons to be applied & fields in MMP to be applied on
  - Apply the manure on land identified in the MMP – either in the original MMP or the next updated MMP submitted to DNR after the manure is applied
  - Apply the manure on land with a P Index 2 or less



# MANURE APPLICATION

## Frozen or snow covered ground

- To apply liquid manure on frozen or snow covered ground due to an emergency, a producer must:
  - During manure application and for 2 weeks after, block any surface tile intake on land in the MMP & down grade
  - Properly manage the manure storage structure – 2010 rule: beginning Dec. 21, 2015, must have storage to avoid application from Dec. 21 to April 1 – before then, can still use emer. app. procedures even though not enough storage
  - For structures built after July 1, 2009, have at least 180 days of storage

# MANURE APPLICATION

## Frozen or snow covered ground

- Other considerations:
  - Remember Iowa law requirement that manure must be applied so as to not cause water pollution
  - Does it comply with EQIP requirements?
  - Will it impact federal NPDES permit requirements?
  - If the operation has a master matrix and took points for injection or incorporation of manure (item 26(e)), to surface apply because of an emergency producer must obtain written approval for a waiver from a DNR field office
  - Contact DNR as soon as possible for assistance, even if not required by law
  - Community and neighbor relations

# OPEN BURNING

- DNR rules prohibit open burning of combustible materials unless:
  - DNR grants a variance
  - Exemptions include:
    - Trees and tree trimmings & landscape waste
    - Recreational fires
    - Residential waste
    - Paper or plastic pesticide containers and seed corn bags. Must be ¼ mile to someone else's building, livestock area, wildlife area or water source. Cannot exceed one day's accumulation or 50 pounds. If causes a nuisance, DNR may order relocation of burning.
- Effect of rule: Burn barrels at livestock buildings are prohibited.

# DNR ENFORCEMENT

## Environmental self audits

- Initiated by business owner to determine environmental compliance
- Benefits:
  - Immunity from penalties if a violation discovered during audit and promptly reported to DNR, before DNR investigates
  - Confidentiality of audit report
- No immunity from penalties if:
  - DNR not properly notified
  - Violations are intentional or result in injury to persons, property or environment
  - Substantial economic benefit giving violator a clear economic advantage over competitors

# EPA – ON-FARM OIL SPILL PREVENTION PLANS

- Any farm that:
  - Stores, transfers, or consumes oil or oil products
  - Stores more than 1320 gal. above ground or more than 42000 gal. below ground (any container with at least 55 gallon capacity)
- Must develop Spill Prevention Plan (SPP) if an oil spill could reasonably be expected to reach a water of the U.S.

# EPA – ON-FARM OIL SPILL PREVENTION PLANS

- Farms that began operation after Aug. 16, 2002 must have SPP in place by May 10, 2013
- Farms in operation before Aug. 16, 2002 are already required to have a SPP in place, but have until May 10, 2013 to update their SPP's

# EPA – ON-FARM OIL SPILL PREVENTION PLANS

- Storage on separate farms are not added together to determine threshold storage capacity
- Farmers can determine whether storage structures are on separate farms based on ownership or operation of buildings, structures, and equipment on the same site and types of activity at the site

# EPA – ON-FARM OIL SPILL PREVENTION PLANS

- Options for preparing SPP:
  - Total storage capacity 1,320 to 10,000 gal. above ground & good spill history: Farmer may self-certify
    - Use EPA SPP template if no storage container has 5000 gal. or more capacity
    - <http://www.epa.gov/oem/content/spcc/tier1temp.htm>.
  - Total storage capacity of 10,000 gal. or more or has had oil spill: Professional engineer must certify



# EPA – ON-FARM OIL SPILL PREVENTION PLANS

- SPP must include:
  - List of oil containers
  - Procedures to prevent spills
  - Measures to prevent oil from reaching waters
  - Methods to contain and cleanup oil spill to water
  - List of emergency contacts and first responders

# EPA – ON-FARM OIL SPILL PREVENTION PLANS

- These measures should be implemented and in the SPP:
  - Suitable storage containers
  - Overfill prevention for storage containers
  - Storages: earthen/concrete secondary containment, or double walled tanks
  - Transfer areas secondary containment: sorbent materials, drip pans or curbing
  - Inspection & testing for pipes & containers
  - Assistance for cleaning up a spill

# EPA – ON-FARM OIL SPILL PREVENTION PLANS

- SPP must be updated every 5 yrs. or when new storage added
- SPP must be kept at the site, unless not attended to for more than 4 hrs./day, then kept at the nearest farm office
- SPP need not be submitted to EPA, but must be at the farm for EPA inspection

More info:

<http://www.epa.gov/osweroe1/docs/oil/spcc/spccfarms.pdf>