

# ENVIRONMENTAL REGULATIONS & NUISANCE CASE UPDATE

IOWA PORK CONGRESS  
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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
  - Environmental groups and agricultural groups filed suit against EPA
  - EPA entered into settlement agreement with environmental groups

# EPA CAFO RULE SETTLEMENT AGREEMENT

- May 26, 2010
- With Sierra Club, NRDC, Waterkeepers
- EPA agreed to:
  - Issue CAFO Guidance by 5.28.10
  - Propose new rule within 1 year requiring all CAFO's "regardless of whether they discharge or propose to discharge" to submit the following detailed info to EPA:

# EPA CAFO RULE SETTLEMENT AGREEMENT

- Name & address of CAFO owner & operator & owner of animals
- Location of the CAFO
- Type of facility & no. & type of animals
- Land application acreage & if has NMP
- Whether CAFO transfers manure off-site & if so, the quantity transferred
- Whether CAFO has applied for NPDES permit

# EPA CAFO RULE SETTLEMENT AGREEMENT

- EPA also agreed to:
  - Require this info to be submitted every 5 years, or explain why not
  - Take final action on the proposed rule within 2 years (May 26, 2012)
  - Release the info to the public, except confidential business info
  - Accept a petition for rulemaking (requiring NPDES permits) from Sierra Club, NRDC & Waterkeepers if the orgs believe the info shows there are categories of CAFO's that "presumptively discharge"
  - Pay \$95,000 in attorney fees & costs

# EPA CAFO RULE GUIDANCE

- Objective assessment:
  - CAFO's conduct objective assessment to determine if they discharge ~~or propose to discharge~~
  - Ongoing process
  - Of animal confinement, feed storage, manure storage, confinement house ventilation exhaust, land application, & any pathways for pollutants to reach waters of U.S.

# EPA CAFO RULE GUIDANCE

- Objective assessment:
  - Factors to be assessed include:
    - Proximity to waters of U.S.
    - Precipitation
    - Discharge history
    - Waste storage
    - Mortality management
    - Equipment maintenance protocols
    - Drainage
    - Nutrient management planning

# EPA CAFO RULE GUIDANCE

- Confinement barns – exhaust
  - Whether “pollutants” exhausted by ventilation fans will then be transported in precipitation runoff to waters of the U.S. ~~If so, EPA takes the position that the facility is proposing to discharge and must apply for an NPDES permit~~
  - However, an NPDES permit is required only if there is an actual discharge of pollutants to waters of the U.S. So any exhaust fan pollutants that may come in contact with precipitation runoff from around confinement buildings must enter a water of the U.S. for an NPDES permit to be required

# EPA CAFO RULE GUIDANCE

- Other key points:
  - Mortalities-protect from precip or runoff controlled
  - Manure app on frozen/snow covered ground:
    - Discharges are non-exempt land application discharge, even if app complies with state law
    - ~~Considered proposing to discharge if CAFO is operated such that a discharge will occur~~
  - Factors specific to swine :
    - Maintenance of hoses for land application
    - Pipe or hose ruptures or overflows in shallow pit to outside manure storage systems

# EPA CAFO RULE - HISTORY

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
- Comment period closed Jan. 19, 2012
- 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 Office of Management and Budget issued the following Notice regarding the proposed EPA reporting rule and the Paperwork Reduction Act:

“ . . . the changes corresponding to the proposed CAFO reporting rule are not approved. It is not clear that the reporting and recordkeeping requirements associated with this proposed rule have practical utility and reduce to the extent practicable and appropriate the burden on persons who shall provide information to or for [EPA] .

“  
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# 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 LARGE CAFO

- More than the number of animals in any one of the following categories:
  - 700 mature dairy cows
  - 1,000 cattle
  - 2,500 swine weighing 55 pounds or more
  - 10,000 swine weighing less than 55 pounds
  - 500 horses, 10,000 sheep, 55,000 turkeys
  - 30,000 laying hens or broilers (liquid manure)
  - 125,000 chickens other than laying hens OR 82,000 laying hens (other than liquid manure)
  - DNR rules: 1,000 animal units where more than one category is kept in the same type of operation

# 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

- A discharge also includes discharges from land application
- However, ag stormwater discharges do not require an NPDES permit
- An ag stormwater discharge – CAFO must apply manure in compliance with a site specific nutrient management plan
- This plan is not required to be submitted to EPA or DNR, but must be kept with records on site or “at a nearby office”

# 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

- No Discharge Certification Option
  - Voluntary
  - For CAFOs that do not discharge ~~or propose to discharge~~
  - Why do it?
    - If discharge occurs, penalties for discharge but not for failure to have an NPDES permit
    - If discharge occurs without NPDES permit or voluntary certification option, CAFO has burden to prove it did not discharge ~~or propose to discharge~~

# EPA CAFO RULE

- No Discharge Certification Option
  - EPA and DNR do not review the certification
  - Requirements for certification are:
    - Technical evaluation
    - Signed certification statement
    - Statement submitted to DNR

# 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

# IOWA DNR - AFO – CFO & OFO

- Confinement Feeding Operation (CFO)
  - An AFO in which animals are confined to areas which are totally roofed
- Open Feedlot Operation (OFO)
  - Unroofed or partially roofed AFO if crop, vegetation, or forage growth or residue cover is not maintained as part of the AFO while the animals are confined
- CFO cannot discharge under Iowa law

# 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  $>1,000$

# CONFINEMENT OPERATIONS

One or two?

- 2010 DNR rule: common area or system for manure disposal:
  - Includes same manure storage, confinement structure, stockpile, permanent manure transfer piping system or center pivot.
  - Does not include:
    - Manure application fields in MMP
    - Anaerobic digesters

# 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

# CONSTRUCTION-FORMED STOR.

1,000 animal units or more

- 2010 DNR rule: Permit application should be submitted 120 days before construction is planned to begin (recommendation but not required)
- 2010 DNR rule: No permit for 120 days after completion of construction without a permit (previous rule was one year)

# CONSTRUCTION-FORMED STOR.

1,000 animal units or more

- 2010 DNR rule: any changes to design during construction must be DNR approved first
- See [www.iowadnr.gov/Environment/Land Stewardship/AnimalFeeding Operations/AFOResources/AFOForms.aspx](http://www.iowadnr.gov/Environment/Land%20Stewardship/AnimalFeeding%20Operations/AFOResources/AFOForms.aspx) for forms

# CONSTRUCTION-FORMED STOR.

1,000 animal units or more - permit

- DNR rules require the owner of the site or the structures to be the permit applicant
- 2010 DNR rule: Owner means person who has legal or equitable title
- Purchase contract contingent upon permit being issued should qualify the permit applicant as an owner as an equitable titleholder

# EARTHEN MANURE STORAGE

- 2010 DNR rule: need soils report with permit application
- 2010 DNR rule: Must control berm erosion with perennial grass on outer, top and inner (to freeboard line) berm areas unless covered by concrete, riprap synthetic liner or similar erosion control materials or measures

# SEPARATION DISTANCES

Water bodies – rivers, creeks, wetlands, etc.

- Distances for water sources, major water sources or designated wetlands do not apply to:
  - CFO structures using secondary containment barriers
    - 2010 DNR rule:
      - Can have relief outlet or valve – must remain closed & any liquid due to overflow must be land applied per MMP
      - Must submit site-specific plan with permit app. or CDS if no permit required
      - Liquid manure: barrier must be designed by an engineer or NRCS
      - Dry manure storage:
        - No on-site stockpiling outside of structure
        - Contain 10% of manure stored
        - Percolation & design standards do not apply

# MANURE MANAGEMENT PLANS

Original (new) filed with DNR & county

- Formed storage
  - More than 500 animal units capacity (
  - Constructed or expanded after 5/31/85
- Earthen storage- DNR construction permit
- 2010 DNR rule: For MMP's after 9/15/10, "dominant critical area" determined under NRCS Tech. Note 29
- 2010 DNR rule: Upon transfer of operation
  - New MMP within 60 days – can use existing MMP for manure application until then
  - MMP fees and indemnity fund fees
  - Family transfers & forming a corporation - check with DNR to see if new MMP needed

# 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

- Legislation went into effect July 1, 2009
- New DNR rule on this legislation went into effect on Sept. 15, 2010
- Remember Iowa law requirement that manure must be applied so as to not cause water pollution

# 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:
  - 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

# STOCKPILING DRY MANURE

- Four different categories of regulation depending on type of livestock operation
  - Dry Animal Nutrient Product –regulated by Iowa Department of Agriculture
  - Open feedlot operations – 2006 legislation
  - Confinement operations – 2009 legislation - dry bedded cattle and hog barns
  - Confinement operations – 2009 legislation - other than dry bedded cattle & hog barns
- Federal EPA & DNR rules: CAFO's cannot discharge manure from production areas unless the discharge is pursuant to an NPDES permit. Definition of production area includes stockpiles

# STOCKPILING DRY MANURE

## Dry bedded confinements– 2009 legislation

- Dry bedded confinement cattle and hog barns
- Stockpiling:
  - At least 1,250 feet from a residence (other than barn owner's), business, church, school or public use area unless waiver is granted or the manure is from a SAFO (less than 500 animal units)
  - At least 400 feet from a designated area or 800 feet from a high-quality water resource
  - At least 200 feet from a surface tile inlet unless steps taken to ensure runoff won't reach tile inlet
  - Not in a grass waterway, where water pools, or where water will enter the stockpile
  - Not on more than 3% slopes unless measures to contain runoff are implemented
- Must remove and land apply manure within 6 months.

# STOCKPILING DRY MANURE

## Dry bedded confinements– 2009 legislation

- If the stockpile is on Karst terrain or an alluvial aquifer area (both of these areas are marked on maps from DNR) the stockpile must have a concrete floor and any underlying soluble rock, sand or gravel must be at least 5 feet below the surface
- Dry bedded manure: dry manure with “crop, vegetation, or forage residue or similar materials” used for the care of livestock
- In addition to stockpiling, this legislation also establishes other beneficial requirements such as a 200 ft. separation distance from deep bedded confinements barns to watersources (creeks, etc.) instead of the 500 ft. distance for other confinement barns

# APPEALS OF CONSTRUCTION PERMITS TO EPC

- County has 14 days to file appeal but 30 days to file all documentation
- EPC has authority to designate experts (at least 7 days before hearing) to give testimony at the hearing – parties may ask them questions
- All appeal materials, including the complete DNR file on the permit application, will be on the DNR website beginning no later than 5 days after county files demand for hearing
- Any person may submit written material up to 15 days before the hearing and the material will be considered for inclusion in the appeal record by the chair of the EPC

# 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
- 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:
  - Farmer may self-certify if farm has total storage capacity 1320 to 10000 gal. above ground & good spill history
    - Use EPA SPP template if no storage container has 5000 gal. or more capacity
    - <http://www.epa.gov/oem/content/spcc/tier1temp.htm>.
  - Profess. engineer must certify if farm has capacity of 10000 gal. or more or has had oil spill

# 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>