

Agriculture Advisory Board
Agenda Item

Chapter 92, NPDES

The proposed final amendments to Chapter 92, National Pollutant Discharge Elimination System regulations have the potential to impact agriculture. Those provisions of the amendments have been extracted from the more extensive text of the regulation and are listed as follows:

A number of definitions related to the permitting of CAFOs have been either added or amended:

§ 92.1. Definitions.

AGRICULTURAL OPERATION-THE MANAGEMENT AND USE OF FARMING RESOURCES FOR THE PRODUCTION OF CROPS, LIVESTOCK OR POULTRY AS DEFINED IN SECTION 3 OF THE NUTRIENT MANAGEMENT ACT (3 P.S. Section 1703).

ANIMAL EQUIVALENT UNIT (AEU)-ONE THOUSAND POUNDS LIVE WEIGHT OF LIVESTOCK OR POULTRY ANIMALS, REGARDLESS OF THE ACTUAL NUMBER OF INDIVIDUAL ANIMALS COMPRISING THE UNIT, AS DEFINED IN SECTION 3 OF THE NUTRIENT MANAGEMENT ACT (3 P.S. Section 1703).

CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFO)-[ANIMAL FEEDING OPERATIONS WHICH MEET THE CRITERIA IN 40 CFR PART 122, APPENDIX B (RELATING TO CRITERIA FOR DETERMINING A CONCENTRATED ANIMAL FEEDING OPERATION), OR WHICH THE DEPARTMENT DESIGNATES UNDER THE CRITERIA IN 40 CFR 122.23(c) (RELATING TO CONCENTRATED ANIMAL FEEDING OPERATIONS).] A CONCENTRATED ANIMAL OPERATION WITH GREATER THAN THREE HUNDRED (300) ANIMAL EQUIVALENT UNITS, ANY AGRICULTURAL OPERATION WITH GREATER THAN ONE THOUSAND (1000) ANIMAL EQUIVALENT UNITS OR AN AGRICULTURAL OPERATION WITH A DISCHARGE TO SURFACE WATERS DURING A STORM EVENT OF LESS THAN A 25 YEAR/24 HOUR STORM.

CONCENTRATED ANIMAL OPERATION (CAO)-AN AGRICULTURAL

OPERATION WHERE THE ANIMAL DENSITY EXCEEDS TWO ANIMAL EQUIVALENT UNITS PER ACRE, AS DEFINED IN SECTION 3 OF THE NUTRIENT MANAGEMENT ACT (3 P.S. § 1703).

Discharge—An addition of any pollutant to [navigable] SURFACE waters OF THIS COMMONWEALTH from a point source, INCLUDING ADDITIONS OF POLLUTANTS FROM SURFACE RUNOFF AND STORMWATER WHICH IS COLLECTED OR CHANNELIZED; DISCHARGES THROUGH PIPES, SEWERS OR OTHER CONVEYANCES WHICH DO NOT LEAD TO A TREATMENT WORKS; AND DISCHARGES THROUGH PIPES, SEWERS OR OTHER CONVEYANCES.

A subsection that was in the proposed rulemaking is being deleted. It would have incorporated federal regulations regarding CAFOs, by reference, into Chapter 92.

§ 92.2. INCORPORATION OF FEDERAL REGULATIONS BY REFERENCE.

(a) EXCEPT AS SPECIFIED IN SUBSECTION (c), THE FEDERAL NPDES REGULATIONS IN SUBSECTION (b), INCLUDING ALL APPENDICES, FUTURE AMENDMENTS AND SUPPLEMENTS THERETO, ARE HEREBY INCORPORATED BY REFERENCE TO THE EXTENT THAT THESE PROVISIONS ARE APPLICABLE AND NOT CONTRARY TO PENNSYLVANIA LAW. IN THE EVENT OF ANY CONFLICT AMONG FEDERAL AND PENNSYLVANIA REGULATORY PROVISIONS, THE PROVISION EXPRESSLY SET OUT IN THIS CHAPTER SHALL BE UTILIZED **UNLESS THE FEDERAL PROVISION IS MORE STRINGENT [WHENEVER THE REQUIREMENTS OF THIS CHAPTER ARE MORE STRINGENT THAN THE REQUIREMENTS OF THE FEDERAL ACT OR FEDERAL REGULATIONS, THE REQUIREMENTS OF THIS CHAPTER APPLY].**

(b) THE FOLLOWING FEDERAL REGULATORY PROVISIONS IN 40 CFR **PARTS 122, 124 AND 125** ARE INCORPORATED BY REFERENCE:

(1) 122.2 (RELATING TO DEFINITIONS).

(2) 122.4 (RELATING TO PROHIBITIONS).

(3) 122.5 (RELATING TO EFFECT OF A PERMIT).

(4) 122.7(b) (RELATING TO CONFIDENTIALITY OF INFORMATION).

(5) 122.21(g)(1)–(7), (g)(9)–(13), **[(h)(1) (h)-(l)]**, (m)(6) AND (p) (RELATING TO APPLICATION FOR PERMIT).

[(6) 122.23 (RELATING TO CONCENTRATED ANIMAL FEEDING OPERATIONS).]

[(7) (6) 122.24 (RELATING TO CONCENTRATED AQUATIC ANIMAL PRODUCTION FACILITIES).

[(8) (7) 122.25 (RELATING TO AQUACULTURE PROJECTS).

[(9) (8) 122.26(a)–(b), (c)(1), (d), (e)(1), (3)–(7) AND (f)–(g) (RELATING TO STORMWATER DISCHARGES).

[(10) (9) 122.27 (RELATING TO SILVICULTURAL ACTIVITIES).

[(11) (10) 122.29 (RELATING TO NEW SOURCES AND NEW DISCHARGES).

[(12) (11) 122.41(a)–(m) (RELATING TO CONDITIONS APPLICABLE TO ALL PERMITS).

[(13) (12) 122.42 (RELATING TO ADDITIONAL CONDITIONS APPLICABLE TO ALL PERMITS).

[(14) (13) 122.43 (RELATING TO ESTABLISHING PERMIT CONDITIONS).

[(15) (14) 122.44 (RELATING TO ESTABLISHING LIMITATIONS, STANDARDS, AND OTHER PERMIT CONDITIONS).

[(16) (15) 122.45 (RELATING TO CALCULATING NPDES PERMIT CONDITIONS).

[(17) (16) 122.48 (RELATING TO REQUIREMENTS FOR RECORDING AND REPORTING MONITORING RESULTS).

[(18)] (17) 122.50 (RELATING TO DISPOSAL OF POLLUTANTS INTO WELLS, INTO PUBLICLY OWNED TREATMENT WORKS OR BY LAND APPLICATION).

[(19)] (18) 122.61–122.64 (RELATING TO TRANSFER, MODIFICATION, REVOCATION AND REISSUANCE, AND TERMINATION OF PERMITS).

(19) 124.57(a) (RELATING TO PUBLIC NOTICE OF SECTION 316 REQUESTS).

(20) 125.1–125.3 (RELATING TO CRITERIA AND STANDARDS FOR IMPOSING TECHNOLOGY-BASED TREATMENT REQUIREMENTS UNDER SECTIONS 301(b) AND 402 OF THE ACT).

(21) 125.10–125.11 (RELATING TO CRITERIA FOR ISSUANCE OF PERMITS TO AQUACULTURE PROJECTS).

(22) 125..30-125.32 (RELATING TO FUNDAMENTALLY DIFFERENT FACTORS).

(23) 124.62(a)(3), (e)(1) AND (f) (RELATING TO THERMAL VARIANCES AND FUNDAMENTALLY DIFFERENT FACTORS).

[(22)] (24) 125.70–125.73 (RELATING TO CRITERIA FOR DETERMINING ALTERNATIVE EFFLUENT LIMITATIONS UNDER SECTION 316(a) OF THE ACT).

[(23)] (25) 125.100–125.104 (RELATING TO CRITERIA AND STANDARDS FOR BEST MANAGEMENT PRACTICES AUTHORIZED UNDER SECTION 304(e) OF THE ACT).

(c) ANY NEW OR AMENDED FEDERAL REGULATION ENACTED AFTER _____ *EDITOR'S NOTE: THE BLANK REFERS TO THE EFFECTIVE DATE OF ADOPTION OF THIS [PROPOSAL] FINAL RULE.*) WHICH CREATES A VARIANCE TO EXISTING [SUBSTANTIVE OR PROCEDURAL] NPDES PERMITTING REQUIREMENTS IS NOT INCORPORATED BY REFERENCE.

The Advance Notice of Final Rulemaking deleted language in the initial proposed rulemaking related to CAFOs. Subsequent comments and the finalization of the "CAFO Strategy" resulted in the inclusion of new language related to CAFOs. This new language is consistent with the DEP CAFO Strategy.

§ 92.5a. CONCENTRATED ANIMAL FEEDING OPERATIONS.

[(a) EXCEPT AS PROVIDED IN SUBSECTION (b), OWNERS OR OPERATORS OF CONCENTRATED ANIMAL FEEDING OPERATIONS WILL BE DEEMED TO HAVE AN NPDES GENERAL PERMIT BY RULE IF THE OPERATION MEETS THE FOLLOWING CONDITIONS:

(1) THE OPERATION HAS A NUTRIENT MANAGEMENT PLAN UNDER § 83.261 (RELATING TO GENERAL) WHICH HAS BEEN APPROVED IN ACCORDANCE WITH CHAPTER 83 (RELATING TO STATE CONSERVATION COMMISSION) AND THE OPERATION CONSISTS OF AT LEAST 301 BUT NOT MORE THAN 1,000 ANIMAL EQUIVALENT UNITS.

(2) THE OPERATION DOES NOT HAVE OR IS NOT PROPOSING A DISCHARGE TO SURFACE WATERS.

(3) THE OPERATION IS IN COMPLIANCE WITH APPLICABLE PROVISIONS OF CHAPTER 83.

(4) THE OPERATOR IMPLEMENTS AND MAINTAINS A NUTRIENT MANAGEMENT PLAN IN ACCORDANCE WITH CHAPTER 83.

(b) SUBSECTION (a) DOES NOT APPLY TO CONCENTRATED ANIMAL FEEDING OPERATIONS DESCRIBED IN PARAGRAPHS (1) AND (2). THESE OPERATIONS SHALL APPLY FOR AN INDIVIDUAL NPDES PERMIT.

(1) THOSE OPERATIONS WHICH HAVE OR ARE PROPOSING MORE THAN 1,000 ANIMAL EQUIVALENT UNITS AS DEFINED IN

THE NUTRIENT MANAGEMENT ACT (3 P. S. §§ 1701-1718).

(2) THOSE OPERATIONS WHICH THE DEPARTMENT REQUIRES TO OBTAIN A PERMIT ON A CASE-BY-CASE BASIS.]

(a) EACH CAFO SHALL APPLY FOR AN NPDES PERMIT ON THE FOLLOWING SCHEDULE:

(1) BY (6 MONTHS FROM PUBLICATION OF FINAL RULE) FOR ANY CAFO IN EXISTENCE ON (THE DATE OF PUBLICATION OF THE FINAL RULE) WITH GREATER THAN 1000 ANIMAL EQUIVALENT UNITS;

(2) BY FEBRUARY 28, 2002 FOR ANY OTHER CAFO IN EXISTENCE ON (THE DATE OF PUBLICATION OF THE FINAL RULE); AND

(3) PRIOR TO BEGINNING OPERATION FOR ANY CAFO THAT BEGINS OPERATION AFTER (THE DATE OF PUBLICATION OF THE FINAL RULE).

(b) THE NPDES PERMIT FOR EACH CAFO SHALL INCLUDE CONDITIONS REQUIRING THE FOLLOWING:

(1) A NUTRIENT MANAGEMENT PLAN MEETING THE REQUIREMENTS OF 25 PA CODE CHAPTER 83;

(2) AN EROSION AND SEDIMENT CONTROL PLAN MEETING THE REQUIREMENTS OF 25 PA CODE CHAPTER 102; AND

(3) FOR EARTH DISTURBANCES OF 5 ACRES OR MORE, AN NPDES PERMIT FOR STORMWATER DISCHARGES ASSOCIATED WITH A CONSTRUCTION ACTIVITY MEETING THE REQUIREMENTS OF 25 PA CODE CHAPTER 102.

(c) IN ADDITION TO THE REQUIREMENTS OF PARAGRAPH (B), THE NPDES PERMIT FOR EACH CAFO WITH GREATER THAN ONE THOUSAND ANIMAL EQUIVALENT UNITS SHALL INCLUDE CONDITIONS REQUIRING THE FOLLOWING:

(1) A WATER QUALITY MANAGEMENT PERMIT UNDER 25 PA CODE SECTION 91.36(a);

(2) A PREPAREDNESS, PREVENTION AND CONTINGENCY PLAN FOR CHEMICALS RELATED TO THE CAFO OPERATION; AND

(3) WRITTEN AGREEMENTS WITH IMPORTERS OR BROKERS RELATED TO THE LAND APPLICATION OF MANURE AND NUTRIENT BALANCE SHEETS FOR ALL EXPORTED MANURE.

During the CAFO Workgroup meetings DEP indicated that the fee for individual NPDES permits for specific types of animal feeding operations would be eliminated. That change is reflected in the following regulation:

§ 92.22. Application fees.

(a) [An NPDES Sewerage] A SEWAGE application, except those submitted for single residence sewage treatment plants, shall be accompanied by a check for \$500 payable to “Commonwealth of Pennsylvania.”

(b) [NPDES Sewerage] SEWAGE applications for single residence sewage treatment plants shall require no application fee.

(c) [NPDES] Industrial Wastes applications, except those submitted for mining operations, shall be accompanied by a check for \$500 payable to “Commonwealth of Pennsylvania.”

(d) [NPDES] Industrial Wastes applications submitted for mining operations shall be accompanied by a check for \$250 payable to “Commonwealth of Pennsylvania.”

(e) [Application] A NOTICE OF INTENT for coverage under A general NPDES [permits] PERMIT under § 92.83(a) (relating to inclusion of individual dischargers in general NPDES permits) shall be accompanied by a check payable to “Commonwealth of Pennsylvania” in the amount set forth in the public notice for the general permit. The amount [shall] MAY not exceed \$500.

(f) APPLICATIONS FOR INDIVIDUAL NPDES PERMITS FOR NEW OR EXPANDED CAFOs WITH MORE THAN 1000 ANIMAL EQUIVALENT UNITS SHALL REQUIRE AN APPLICATION FEE OF \$500. ALL OTHER CAFOs SHALL REQUIRE NO APPLICATION FEE.

[(f)] (g) The application fee specified in § 91.22 (relating to fees) [shall apply] APPLIES to all other [NPDES] applications.

The Department's final determination prohibiting the use of general NPDES permits in High Quality Waters is contained in the following provisions regarding general NPDES permits.

[NPDES] GENERAL PERMITS

§ 92.81. General NPDES permits.

(a) *Coverage and purpose.* The [Director] DEPARTMENT may issue a general NPDES permit, in lieu of issuing individual NPDES permits, for a clearly and specifically described category of point source discharges, if the point sources meet [all of] the following [paragraphs] CONDITIONS:

* * * * *

(5) Do not discharge toxic or hazardous pollutants as defined in sections 307 and 311 of the Federal Act (33 U.S.C.A. §§ 1317 and 1321) or any other substance which—because of its quantity; concentration; or physical, chemical or infectious characteristics—may cause or contribute to an increase in mortality or morbidity in either an individual or the total population, or pose a substantial present or future hazard to human health or the environment when discharged into the **[navigable waters] SURFACE WATERS.** **[EFFLUENT LIMITATIONS ARE ESTABLISHED IN THE GENERAL PERMIT FOR ANY TOXIC OR HAZARDOUS SUBSTANCE LISTED OR DESIGNATED UNDER SECTION 307(a) OR 311(b)(2) OF THE FEDERAL ACT (33 U.S.C.A. §§ 1317(a) AND 1321(b)(2)) WHICH MAY BE DISCHARGED.]**

(6) In the opinion of the [Director] DEPARTMENT, are more appropriately controlled under a general permit than under individual permits.

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(8) Do not discharge to waters classified as “special protection **[EXCEPTIONAL VALUE WATERS]**” under Chapter 93 (relating to water quality standards).

(b) *Administration of general permits.* General permits may be issued, amended, suspended, revoked, reissued[,] or terminated under this chapter. Issuance of a general NPDES permit does not exempt a person from compliance with this title. General NPDES permits shall have a fixed term not to exceed 5 years, and shall comply with §§ 92.31, 92.41, 92.51, **[AND]** 92.57 and 92.59 and other applicable provisions of this title.

(c) DEPARTMENT SPECIFICATION. THE DEPARTMENT MAY SPECIFY IN THE GENERAL PERMIT THAT AN ELIGIBLE PERSON WHO HAS SUBMITTED A TIMELY AND COMPLETE NOTICE OF INTENT IS AUTHORIZED TO DISCHARGE IN ACCORDANCE WITH THE TERMS OF THE PERMIT UNDER ONE OF THE FOLLOWING:

(1) AFTER A WAITING PERIOD **FOLLOWING RECEIPT OF THE NOTICE OF INTENT BY THE DEPARTMENT AS SPECIFIED IN THE GENERAL PERMIT.**

[(2) ON A DATE SPECIFIED IN THE GENERAL PERMIT.]

[(3)] (2) UPON RECEIPT OF NOTIFICATION OF [INCLUSION BY] APPROVAL OF COVERAGE UNDER A GENERAL NPDES PERMIT FROM THE DEPARTMENT.

[(4) UPON RECEIPT OF THE NOTICE OF INTENT BY THE DEPARTMENT.]

[(d) WHEN NOTICE OF INTENT NOT REQUIRED. DISCHARGES OTHER THAN THOSE DISCHARGES FROM PUBLICLY-OWNED TREATMENT WORKS, COMBINED SEWER OVERFLOWS, PRIMARY

INDUSTRIAL FACILITIES AND STORMWATER DISCHARGES ASSOCIATED WITH INDUSTRIAL ACTIVITY, MAY, AT THE DISCRETION OF THE DEPARTMENT, BE AUTHORIZED TO DISCHARGE UNDER A GENERAL PERMIT WITHOUT SUBMITTING A NOTICE OF INTENT WHEN THE DEPARTMENT FINDS THAT AN NOI REQUIREMENT WOULD BE INAPPROPRIATE.]

[(e)] (d) DEPARTMENT NOTIFICATION. THE DEPARTMENT [MAY] WILL NOTIFY A DISCHARGER THAT IT IS OR IS NOT COVERED BY A GENERAL PERMIT], EVEN IF THE DISCHARGER HAS NOT SUBMITTED A NOTICE OF INTENT TO BE COVERED]. A DISCHARGER SO NOTIFIED MAY REQUEST AN INDIVIDUAL PERMIT.

§ 92.82. Public notice and public hearing.

(a) Public notice of every proposed general NPDES permit will be published by the Department in the *Pennsylvania Bulletin*. The contents of the public notice will include at least the following:

* * * * *

(5) A brief description of the procedures for the formulation of final determinations, and other means by which interested persons may influence or comment on those determinations. [The] EXCEPT AS PROVIDED IN § 92.81(c)–(e) (RELATING TO GENERAL NPDES PERMITS), THE procedures shall comply, at a minimum, with the public notice and hearing requirements set forth in §§ 92.61(c)–(e) (relating to public notice of permit application and public hearing).

* * * * *

(7) The [application] NOTICE OF INTENT fee for coverage under the general NPDES permit.

(b) Upon issuance of a general permit, the [Director] DEPARTMENT will place a notice in the *Pennsylvania Bulletin* of the availability of the general

permit.

§ 92.83. Inclusion of individual dischargers in general NPDES permits.

(a) [Application] NOTICE OF INTENT FOR coverage under the general permit.

(1) Eligible dischargers, who wish to be covered by the general permit, shall file [an application] A NOTICE OF INTENT which complies with [the requirements of] §§ 92.21 **[(c) (d)]**, 92.22 and 92.23 (relating to application for permits). At a minimum, the [application] NOTICE OF INTENT shall identify each point source for which coverage under the general permit is requested; demonstrate **[CERTIFY]** that each point source meets the eligibility requirements for inclusion in the general permit; demonstrate **[CERTIFY]** that the discharge from the point sources, individually or cumulatively, will not result in a violation of an applicable water quality standard established under Chapter 93 (relating to water quality standards) and include other information the Department may require. The [applications] NOI shall be accompanied by a signed and notarized statement that the discharger agrees to accept all conditions and limitations imposed by the general NPDES permit.

(2) If the [application for coverage under the general permit] NOI is acceptable for one or more point sources, the [Director shall] DEPARTMENT, EXCEPT AS PROVIDED IN § 92.81(c)–(e) (RELATING TO GENERAL PERMITS), WILL formally notify the discharger of the coverage for each point source, and shall transmit a copy of the general permit to each discharger covered. Each copy of the general permit issued to a discharger shall bear an individual identification number.

(3) The Department will [provide notice] INDICATE IN THE PUBLICATION OF A GENERAL PERMIT IN THE PENNSYLVANIA BULLETIN WHETHER IT WILL PROVIDE ONE OF THE FOLLOWING:

(i) NOTICE in the *Pennsylvania Bulletin* of each [application for coverage] NOI under an applicable general NPDES permit, and of each approval for coverage under a general NPDES permit.

(ii) NOTICE OF EVERY APPROVAL OF COVERAGE ONLY.

[(iii) NO NOTICE OF NOIS OR APPROVALS OF COVERAGE.]

(b) *Denial of coverage.* The [Director shall] DEPARTMENT WILL deny any [application for coverage under a general permit] NOI when one or more of the following conditions exist:

* * * * *

(2) The discharger is not, or will not be, in compliance with any of the conditions of the general permit **[or has a significant history of noncompliance with a prior NPDES permit issued by the Department].**

(3) THE APPLICANT HAS FAILED AND CONTINUES TO FAIL TO COMPLY AND HAS SHOWN A LACK OF ABILITY OR INTENTION TO COMPLY WITH A REGULATION, PRIOR PERMIT OR ORDER ISSUED BY THE DEPARTMENT.

[(3)](4) * * *

[(4)](5) * * *

[(5)](6) * * *

[(6)](7) * * *

[(7)](8) * * *

[(8)](9) The discharge would be to waters classified as “special protection” **[EXCEPTIONAL VALUE WATERS]** under Chapter 93 (relating to water quality standards).

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(c) *Requiring an individual permit.* The [Director] DEPARTMENT may amend, revoke, suspend or terminate previously issued coverage under a

general NPDES permit, and require the point source discharger to apply for and obtain an individual NPDES permit for any of the reasons [set forth] in subsection (b). An interested person may petition the [Director] DEPARTMENT to take action under this subsection. Upon notification by the [Director] DEPARTMENT under this subsection that an individual NPDES permit is required for a point source, the discharger shall submit a complete NPDES application, in conformance with [the requirements of] this chapter, within 90 days of receipt of the notification, unless the discharger is already in possession of a valid individual NPDES permit. Failure to submit the application within 90 days shall result in automatic termination of coverage of the applicable point sources under the general permit. Timely submission of a complete application shall result in continuation of coverage of the applicable point sources under the general permit, until [such time as] the [Director] DEPARTMENT takes final action on the pending individual permit application.

(d) *ACTION OF THE* [Director] DEPARTMENT. Action of the [Director] DEPARTMENT denying coverage under a general permit under subsection (b), or requiring an individual NPDES permit under subsection (c), is not a final action of the Department until [such time as] the discharger submits and the Department takes final action on an individual NPDES permit application.

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(f) *Coverage under general permit.* A point source excluded from a general permit solely because it already has an individual permit may submit [an application for coverage under the general permit] A NOTICE OF INTENT under subsection (a). If the [application] NOTICE OF INTENT is acceptable, the [Director] DEPARTMENT will revoke the individual permit and notify the source that it is covered under the general permit.