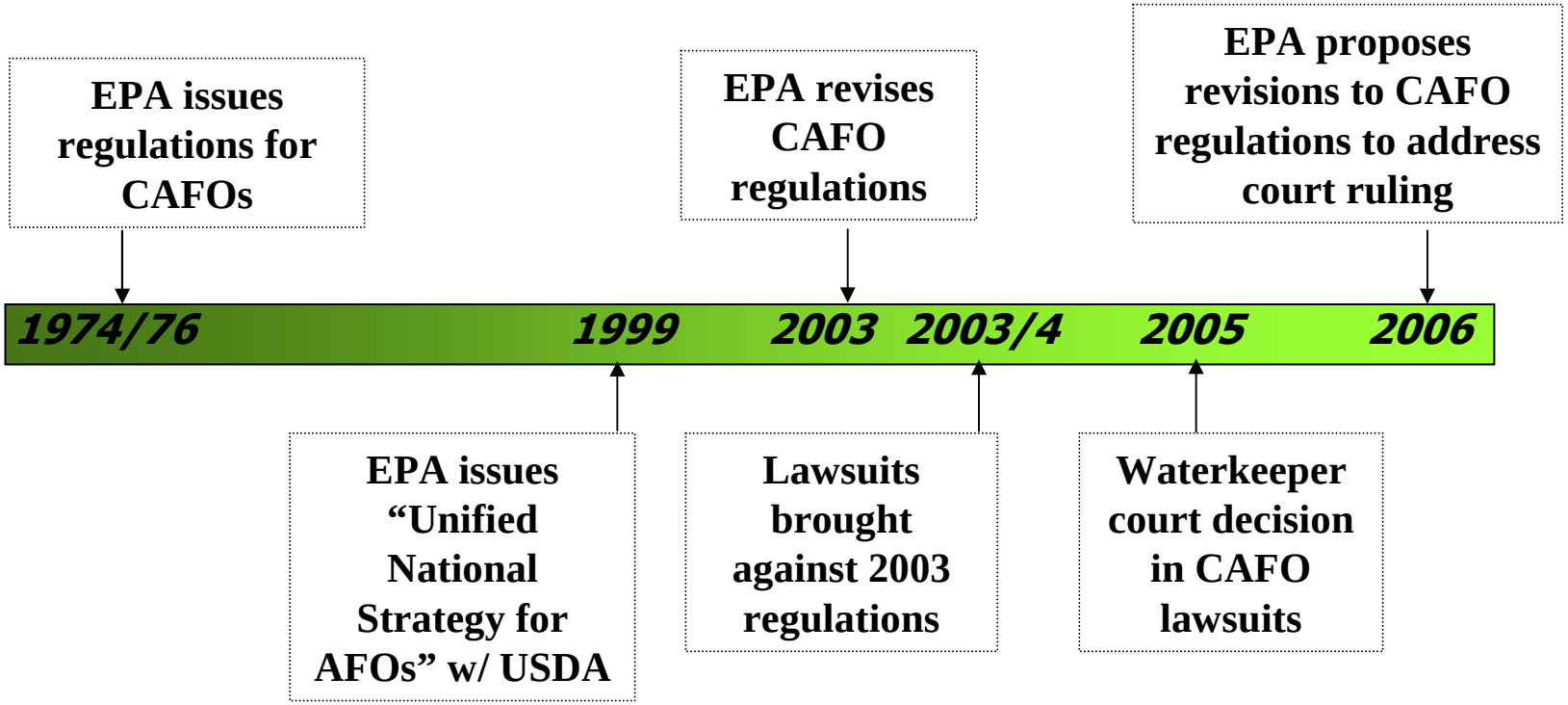
Overview of CAFO Proposed Rule

August 2006

Presentation Overview

- CAFO regulatory history
- *Waterkeeper* court case
  - Requirements upheld
  - Vacature: Duty to apply
  - Vacature: NMP provisions
  - Remands
- Date-change mini-rule
- Schedule for final revisions

Regulatory History for CAFOs



Court Decision in *Waterkeeper* Case

- February 28, 2005 -- 2nd Circuit Court of Appeals (New York)
- Unaffected by the Court:
  - Definition of a CAFO
  - Agricultural stormwater definition: Regulation of runoff from land application areas
  - Production area “No Discharge” requirement
  - NMP requirements for land application

Aspects of *Waterkeeper* decision requiring EPA action

- The Court vacated:
  - The 2003 rule requirement that all CAFOs need permits or to demonstrate no potential to discharge
  - Issuance of NPDES permits without permitting authority and public review of NMPs, and incorporation of NMP terms into the permit
- The Court remanded for further explanation:
  - Applicability of Water Quality Standards
  - New Source standards for veal, pork & poultry
  - Best Conventional Technology (BCT) for pathogens

Duty to Apply

- The Court vacated:
  - The requirement that all CAFOs must apply for a permit
- EPA proposed action:
  - Replace with requirement that CAFOs that either *discharge or propose to discharge* must apply for permit
  - Emphasize in preamble that no unpermitted discharges from the production area are allowed

Duty to Apply: Factors to consider

Operator needs to decide whether to seek permit coverage. CAFOs falling into one of the following categories have a higher likelihood of discharging and should consider seeking permit coverage.

Where a CAFO:

- is located in close proximity to waters of the United States with land classified in USDA Land Use Capability Classes III - VIII
- has a production area not designed and operated for zero discharge
- land applies but does not implement nutrient management planning designed to ensure any runoff from land application qualifies for the agricultural stormwater exemption
- had a discharge in the past and has not corrected the factors that caused the discharge to occur

Duty to Apply: Agricultural stormwater exemption

NPDES permit is not needed if the only discharge from a CAFO is due to agricultural stormwater:

- Agricultural stormwater is defined at 122.23(e) as a precipitation-related discharge from a land application area where an operator land applies in accordance with nutrient management planning requirements outlined in 122.42(e)(1)(vi)-(ix)
- EPA is seeking comment on the relationship between the agricultural stormwater exemption and need to adhere to State technical standards for land application
- Nutrient management planning and documentation will be necessary to support an operator's claim to the exemption

Nutrient Management Plans

- The Court vacated:
  - Issuance of NPDES permits without Permitting Authority and public review of NMPs, and incorporation of NMP terms into the permit
- EPA proposed action:
  - NMP requirements unchanged from 2003 rule
  - Establish a process for NMP public review and comment
  - Establish a process to incorporate terms of the NMP into the permit and also make available for public review and comment
  - Address how to modify a permit, including a general permit, when a facility's NMP changes

NMPs: Permitting process

- Individual Permit Process
  - NMP submitted with application prior to permit issuance
  - Terms of NMP incorporated into permit through normal public review process

- General Permit Process
  - Permitting Authority issues General Permit
  - CAFO submits Notice of Intent (NOI) with NMP
  - Process modified to allow terms of NMP to be reviewed and incorporated into general permit upon permit coverage

NMPs: Adding NMP provisions to General Permits

CAFO
Submits NMP w/ permit application or NOI

Permitting Authority
Determines adequacy of NMP; develops NMP terms for permits

Permitting Authority
Provides public notice of NMP availability and NMP terms*

Public
Reviews NMP & NMP terms; provides comment

Permitting Authority
finalizes permit based on public comment; grants permit coverage

* Process and timeframe for public notice of NMP is established by Permitting Authority

NMPs: Changes to NMPs after permit coverage

- Proposed approach recognizes dynamic nature of NMPs
- Regulatory language describes changes that warrant public notice; provides examples
- Regulatory language describes process for NMP-related modifications

NMPs: Flexibility

- NMPs can be developed to accommodate typical variations
- Flexibility built into NMP would allow changes to practices without modifying the NMP
- Operators can build in contingencies and options to reduce the need for modifications

NMPs: Permit modifications related to Minor Changes

- Some changes at a facility would require modifications to the NMP and permit
- Proposal provides examples of minor changes with no need for public review
- Revised NMP would be submitted to Director and permit modified

NMPs: Permit modifications for "Substantial" changes

Substantial changes to the NMP require public review. Examples include:

- Increase in runoff
- Increase in the rate of nutrients land applied
- Significant change in the nutrient balance
- Changes in handling, storage, treatment, or land application
- Significant increase in the number of animals
- Significant reduction of manure, litter, or process wastewater transferred
- Addition of land application areas

NMPs: 180-Day Allowance for Substantial Changes

For “substantial changes” to NMPs, EPA is proposing permit authorities may grant CAFOs up to 180 days to proceed with implementing the change to the NMP, provided that:

1. The approval is temporary
2. The CAFO demonstrates that the NMP change would not cause increased runoff
3. The permit authority agrees with the CAFO’s claim of no increased runoff
4. The permit authority would need to notify the public and add the expedited decision to the public record
5. Changes would need to undergo public review prior to completion of the 180-day period

NMPs: NMP template

- EPA is exploring the feasibility of using a template to facilitate NMP processing
- Seeking public comment
- Possible uses include:
  - Template for operator to complete
  - Template for incorporation into the NPDES permit
  - Guide for operator development or permit writer review
- Draft template available in public docket and EPA website

Key Remand Issues for Proposed Rule

- Court remanded for further explanation:
  - Applicability of Water Quality Standards for production area
  - New Source standard for veal, pork & poultry
  - Best Conventional Technology (BCT) for pathogens

Water Quality Standards for Production Area

- Court agreed w/ EPA that WQBELs are unavailable for precipitation-related land application discharges
- Proposal clarifies that WQBELs might apply to:
  - *Non-precipitation-related land application discharges*

  OR
  - *Production area discharges*

New Source Standards for Swine, Veal, and Poultry

- The Court upheld:
  - The no discharge requirements for new sources
- The Court remanded:
  - The compliance alternative that a lagoon designed for the 100-year storm is equivalent to no discharge
  - The voluntary “Superior Alternative Performance Standards” provision
- EPA proposal:
  - Provide a process for a CAFO to model their site-specific open containment system for no discharge
  - Demonstrate the system is a no discharge system

Best Conventional Pollutant Control Technology (BCT) for Pathogens

- The Court directed EPA:
  - To evaluate pathogens in the context of BCT
- EPA's BCT methodology

  Methodology answers the question of whether it is **"cost reasonable"** for industry to control conventional pollutants at a level more stringent than Best Practicable Technology already requires.

Best Conventional Pollutant Control Technology for Pathogens

EPA proposal:

- BCT methodology:
  - Cost Test Part 1: POTW test
  - Cost Test Part 2: industry test
- All candidate technologies failed the 2-part Cost Reasonableness Test
- No new requirements for pathogens

Important Dates for CAFOs

- On February 10, 2006 (71 FR 6978), EPA revised key applicability dates for CAFOs to ***July 31, 2007***
- Current regulations as follows:

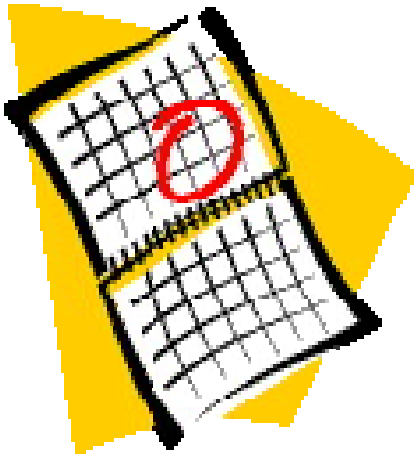
	2003 Rule	Feb. 2006 Rule (Date-change rule only)
Newly defined CAFOs must apply for permits	February 13, 2006	***July 31, 2007***
All existing CAFOs must develop and implement NMPs	Dec 31, 2006	***July 31, 2007***

Note: Dates may differ for CAFOs already covered by permits.

- Proposed Rule: NMPs to be submitted by July 31, 2007, and implemented upon permit coverage.

Schedule for Rule Revision

- 60-day public comment period ends August 29, 2006
- 5 public outreach meetings – NC, IA, CO, TX, CA
- Webcast scheduled for August 8, 2006 (check webpage)
- Final rule: *Spring 2007*



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Questions