Topic: Who is Required to Have a Nutrient Management Plan to Qualify for the Agricultural Storm Water Exemption?

Specific EPA Questions:

- *EPA also seeks to clarify how unpermitted CAFOs may meet the agricultural storm water exemption when they land apply manure, litter, or process wastewater. (FR pg. 37748).*
- *EPA is considering requiring explicitly that Large CAFOs that are not permitted because they do not discharge or propose to discharge comply with the technical standards for land application established by the Director (in addition to meeting the requirements of 40 CFR 122.42(e)(1)(vi-ix)) in order for runoff from their fields to be considered agricultural stormwater (which is exempt from permitting requirements). Even if EPA does not adopt this requirement explicitly, EPA believes that un-permitted Large CAFOs should incorporate the technical standards established by the Director into their NMPs. EPA also recommends that small or medium AFOs use nutrient management practices consistent with 40 CFR 122.42(e)(1)(vi-ix) and comply with the applicable technical standards in their land application of manure, litter, or process wastewater. EPA requests comment on this issue. (FR pg. 37750).*

Our Concern:

The 2006 revised rule proposal could make all nutrient management plans and associated record keeping on animal feeding operations regulatory documents fundamentally changing the nature and intent of nutrient management plans on most animal feeding operations.

Everyone agrees that animal feeding operations should have a nutrient management plan and keep records. This debate is about underlying nature of the nutrient management plan and associated records.

In the past, nutrient management plans on un-permitted operations have been voluntary, strategic planning documents. The 2006 revised rule proposes that nutrient

management plans and farmer records would become a regulatory document subject to inspection and potential regulatory liabilities for deficiencies under the Clean Water Act.

EPA has presented competing visions for a nutrient management plan in the proposed rule. In other comments we emphasize regulatory nutrient management plans will be difficult to implement if EPA fails to define the nutrient management plan as a strategic document.

The requirement that un-permitted operations have an obligation to meet certain terms and conditions of a permit that does not apply to them is a unique regulatory construct. Insufficient information is provided in the preamble on the justification and implementation of the nutrient management requirement on un-permitted operations.

Recommendation:
EPA explicitly states that provisions of the proposed rule limiting the applicability of the agricultural storm water exemption on animal feeding operations do not apply to small and medium animal feeding operations.

EPA should clarify their jurisdiction and the mechanisms used for enforcement of nutrient management plans on un-permitted concentrated animal feeding operations.

Comment:
In section 502 (14) the Clean Water Act in the definition of the term ‘‘point source’’ it explicitly states that “This term does not include agricultural storm water discharges and return flows from irrigated agriculture.”

In the February 12, 2003 revision of the CAFO rule EPA stated that “EPA is clarifying in today’s rule that discharges of manure, litter, and process wastewaters from the land application areas of a CAFO are agricultural storm water discharges where the manure or process wastewater has been applied in accordance with site-specific nutrient

management practices that ensure appropriate agricultural utilization of the nutrients in the manure or process wastewater." The February 28, 2005 2nd Circuit Court ruling on the revised CAFO rules did not explicitly accept or reject this interpretation of the agricultural storm water exemption.

It is clear that permitted CAFO's require a nutrient management plan to qualify for the agricultural storm water exemption if you accept EPA's view that such plans are needed to qualify for the exemption. The primary issues this comment addresses are:

- Do un-permitted operations require a nutrient management plan to qualify for the agricultural storm water exemption, and
- The implications if such a requirement exists for un-permitted operations.

EPA clearly intends that un-permitted CAFO's, the large animal feeding operations that do not get a permit because they do not discharge, be required to have a nutrient management plan and associated record keeping in order to maintain their agricultural storm water exemption. In an expansion of the wording from the 2003 rule, EPA states in the preamble to the 2006 proposal that all CAFO's must have a nutrient management plan in order to qualify for the agricultural storm water exemption. Their logic is that such a plan and the associated record keeping is needed, by definition, for the runoff from the fields to considered agricultural storm water runoff. Without the nutrient management plan the runoff from the field would be considered a point source, requiring a permit, according to EPA logic in the preamble of the proposed rule.

One of our questions is what prevents this logic from being applied to all animal feeding operations, resulting in a regulatory requirement that all animal feeding operations must have a regulatory nutrient management plan. It seems that if EPA requires un-permitted CAFO's to have a regulatory nutrient management plan that it is difficult to not imply that medium and small animal feeding operations also must have such a regulatory plan unless EPA explicitly states otherwise.

EPA currently does not require small and medium animal feeding operations to obtain a permit unless they have some form of conveyance that discharges to the waters of the United States. If an operation has such a conveyance, it must have an NPDES permit, independent of size. Following this logic, small and medium operations who failed to also show they were following a nutrient management plan would, like large un-permitted operations, now be considered point sources. It does not seem intuitive that discharge rules could apply to medium and small CAFO's and nutrient management rules do not.

If EPA does not want to have a regulatory requirement that a medium or small CAFO have a nutrient management plan and associated record keeping in order to qualify for the agricultural storm water exemption, EPA needs to explicitly state in the rule that the regulatory requirement does not apply to these smaller operations. Such clarification was apparent in the 2003 revised rules when EPA explicitly stated that requirements for animal feeding operations to qualify for the agricultural storm water exemption were not intended to apply to the applicators of fertilizers and pesticides.

Everyone agrees that all animal feeding operations should have a nutrient management plan and keep records. Shifting a nutrient management plan from a voluntary strategic planning tool to a required regulatory document could have far reaching effects on the implementation of nutrient management on un-permitted operations. There is a significant change in the nature of a nutrient management plan when it is an EPA requirement to maintain an agricultural storm water exemption. When the document becomes a regulatory document the following fundamental changes take place:

- The plan must meet the requirements of a regulatory plan or the USDA comprehensive nutrient management plan standards.
- The plan and associated records must be maintained on location and available for inspection.
- If, in the course of an inspection, the inspecting authority requests a copy of the nutrient management plan and/or records, they become public documents.

- Failure to meet EPA requirements for the nutrient management plan and record keeping will make the operation liable for citation for violating the clean water act and potentially required to obtain an NPDES permit.

A nutrient management plan, as required by EPA, is fundamentally different from the nutrient management plan currently used by un-permitted animal feeding operations.

The current voluntary plans used by these operations are strategic documents providing a suggested course of action for the management of manure and fertilizers on a farm. There is an expectation that the farmer will not be able to follow all the details in the plan because of the impact of weather and other unforeseen circumstances. Voluntary plans acknowledge their strategic nature by including guidance on when conditions at the time of manure application require a tactical decision to deviate from a specific date and rate of manure application on a field.

In current voluntary plans there is an expectation the farmer will not be able to meet all the dates and rates of application stipulated in the plan. The plan is guidance on how to proceed and when circumstances force the farmer to deviate extensively from the plan the farmer is advised to consider having the plan revised to meet the new conditions. Revisions are typically contemplated on an annual basis at the shortest in this voluntary nutrient management planning world.

The exact nature of a regulatory plan has not been fully resolved in the current EPA proposal. We have submitted other comments on the guidance EPA should provide on the definition of a nutrient management plan. The full burden of converting a nutrient management plan to a regulatory document cannot be assessed until the plan has been defined by EPA or the states.

If regulatory standards embrace the concept that terms of a nutrient management plan determine the rate of manure application for a field, the regulatory burden of nutrient management plans on un-permitted operations will be mitigated. A more inflexible

definition focused on incorporating specific dates and rates into the terms of the nutrient management plan would create the greatest potential problems for un-permitted operations maintaining a nutrient management plan to maintain their agricultural storm water exemption. Farmers frequently have good reason to apply manure at rates that do not coincide with the planned rates in a nutrient management plan. An inflexible definition of a nutrient management plan focused on dates and rates will leave smaller operations liable for violations when they make these changes.

This rule may result in un-permitted operations having a regulatory requirement to have a nutrient management plan and require those operations to keep records to demonstrate they have been following the plan. EPA needs to better define the relationship these operations have with regulatory authorities and the general public. In reviewing the proposed rule we believe the following is true:

- It is our understanding that the nutrient management plan will not be a public document on un-permitted operations. The operations must maintain the plan and associated record keeping on-site.
- There is no mechanism or intention that the nutrient management plan for an un-permitted operation will ever require any sort of public review.

In short, EPA is implying in the proposed revision that the plan that is written for un-permitted operations and the associated record keeping are not public documents and not subject to inspection by the general public.

The preamble of the proposed rule EPA does a poor job of describing how the expectation that an operation has a nutrient management plan fits into the regulatory world of permitted operations. It is unclear in the proposed rule the situations where an un-permitted operation could be inspected by a regulating authority and which regulating authority would be responsible for these operations. We have the following questions:

- Can an un-permitted operation that is apparently doing nothing wrong have their nutrient management plan and associated records inspected? We contend that there is no basis for an operation that has no complaint filed against it to be

inspected by a regulatory entity. Currently, inspectors cannot inspect a small or medium animal feeding operation unless they have cause to believe the operation is discharging manure into waters of the state. Does this same standard apply to inspections of the nutrient management plan on un-permitted operations?

- What is the standard for a valid inspection of an un-permitted operations nutrient management plan? The proposed rule provides no guidance on what indicators would be considered justification to the regulating entity for an inspection of an un-permitted operation's nutrient management plan. Some standard needs to set for justifiable concern that the operation is not following a nutrient management plan. Would the following neighbor complaints be considered sufficient justification?
    - I observed what seemed like excessive erosion from a field that receives manure.
    - It seems like they always put manure on that field, they must be putting too much on.
    - We are having a drought year. I expect they over estimated yield goals on this field so too much manure must have been applied.
    - No crop was planted on that field this year. Did they really plan on leaving that field fallow in their plan?

  The nutrient management plan touches on many aspects of farm management opening the farmer to a wide range of potential complaints. EPA needs to consider what safeguards can be put in place to protect farmers from nuisance complaints and give a reasonable expectation that they will not be subject to inspection if they are following a nutrient management plan.
- What level of inspection of an un-permitted facility results in the release of their nutrient management plan as a public document? The nutrient management plan on an un-permitted operation should not be, by default, a public document. However, if the operation is inspected there is potential for the plan and associated records to become part of the public record as part of the documentation of a complaint investigation.
- Who will have jurisdiction on handling complaints based solely on potential violations of the agricultural storm water exemption? EPA is asserting an *expectation* that un-

permitted operations must have a plan. This expectation may not be codified in state rules that are developed for permitted operations.

EPA has entered new territory with the regulatory requirement for a nutrient management plan on an un-permitted facility. In the past un-permitted operations had to violate the clean water act through a release of manure or waste water to waters of the state before they could be held to the permit standards. So, for example, an operation could have a storage that did not meet the design standards for permitted operations as long as the storage never had a discharge. If a discharge took place, then they could be required to get a permit and the storage would need to meet the design standards for permitted operations. In the case of nutrient management plans, EPA is requiring an un-permitted operation to meet a standard with no evidence that they are impairing waters of the state. They are claiming an operation must meet conditions of a permit that does not apply to their operation. EPA must acknowledge the unusual nature of this request and provide much clearer guidance and justification for the regulatory structure that un-permitted operations will need to negotiate.

We recommend EPA consider returning to an approach that applies an obligation to meet the terms of a permit only to operations that have a need for a permit.