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## ENVIRONMENTAL LAW

# Raising the Bar on Raising Livestock

Livestock owners to confront new animal waste management regulations

By Donna T. Urban

New Jersey livestock owners may soon be faced with new and more stringent animal waste management requirements and compliance standards as part of the state's efforts to control pollution and protect water quality. The new rules, which are currently in draft form, have been proposed by the Department of Agriculture and set forth specific requirements for the development and implementation of animal waste management plans for all farms that generate, receive or export animal waste — even small operations that traditionally have not been part of the mandatory regulatory process. Because “farm” is broadly defined in the proposal to include agricultural operations involved in the “raising, keeping, care, treatment, marketing and sale of livestock,” the new rules will impact not just traditional farming operations, but all operations that house livestock — which includes animals

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such as horses, pigs, sheep, goats, poultry, certain large birds and rabbits.

This article highlights the general requirements of the proposed regulation and the impact these requirements, if implemented, will likely have on livestock owners as a result of the new compliance standards and reporting requirements. To assure compliance with the environmental obligations, a full reading and understanding of the criteria is critical, often calling for legal interpretation and guidance.

### Protecting Water Quality

With the intent to prevent, control and regulate water pollution, Congress passed the Clean Water Act in 1972. The primary objective of the act is to “restore and maintain the chemical, physical and biological integrity of the Nation's waters.” 33 U.S.C.A. § 1251. The act has identified concentrated animal feeding operations (CAFOs) as one among a number of “point sources” of pollution to the waterways and seeks to regulate point source discharges through a mandatory National Pollutant Discharge Elimination System (NPDES) permit program for actual or potential discharges. (The Environmental Protection Agency is also in the process of ramping up regulations by monitoring emissions from animal feeding operations in an effort to minimize air pollution.) For a

person to lawfully discharge any pollutant from a point source into the navigable waters of the United States, that person must obtain and comply with a NJDES permit. 33 U.S.C.A. § 1311(a); see also *EPA v. California ex rel State Water Resources Control Board*, 426 U.S. 200, 205, 96 S.Ct. 2022, 2025 (1976). Whether a particular animal feeding operation is designated as a CAFO (and therefore a point source) depends upon both the number of animals confined and a determination that an animal feeding operation is a significant contributor of pollutants into the waters of the United States. See 40 C.F.R. § 122.23(b) and (c).

In conjunction with national efforts to improve and protect water quality, New Jersey has adopted a statewide strategy for managing and regulating CAFOs for the protection of New Jersey's lakes, rivers and streams. The New Jersey Department of Environmental Protection administers New Jersey Pollutant Discharge Elimination System regulations, which set for specific criteria for CAFOs. See N.J.A.C. 7:14A-2.13. Historically, only those animal farms designated as CAFOs have been required to obtain permits for discharges (with the exception that a NJPDES permit could be required for animal feeding operations found to be discharging directly into surface waters). Other animal feeding

operations falling below the CAFO threshold have been encouraged, through the New Jersey Department of Agriculture's efforts, to voluntarily protect New Jersey's water quality by using "best management practices" prescribed for animal feeding operations. Currently in the works, however, are proposed new animal waste management regulations that will impact smaller operations that, at present, are excluded from the mandatory regulatory process. See Proposed New Rule N.J.A.C. 2:91.

### **New Standards Proposed**

In 1989, the Department of Agriculture was directed to adopt a comprehensive animal waste management program for the proper disposal of animal waste, which includes establishing criteria and standards for the "composting, handling, storage, processing, utilization and disposal of animal wastes." N.J.S.A. 4:9-38; see also N.J.S.A. 4:27 (the Aquaculture Development Act). The Department of Agriculture's proposal seeks to comply with that directive and is aimed at the development and implementation of animal waste management plans (AWMPs) by all farms that generate and/or handle animal waste, with the ultimate goal being enhanced water, soil and air quality. Currently, there are no federal laws or regulations imposing mandatory waste management activities on the smaller farms encompassed in the proposed new regulations.

The proposed criteria and standards establish requirements based on the number of "animal units" confined, and set forth specific conversion factors for calculating animal units. "Animal units" is defined as 1,000 pounds of live body weight and are determined based on the size, type and use of the animal. For example, a mature beef cow equals one animal unit, a mature dairy cow equals 1.5 animal units, and 55 mature turkeys equates to 1 animal unit. Thus, to correctly determine the number of animal units, it is important to properly classify the animal.

The current proposal establishes a three-tiered system for compliance

based on the number of animal units:

*Small Operations.* Farms with one to seven animal units are required to follow the animal waste management practices set forth in the regulations to protect the environment from any direct discharge or nonpoint sources of pollution. These farms are encouraged, but not required, to develop a written animal waste management plan. However, if pollution is documented as originating from a farm with one to seven animal units, the farm is required to follow the requirements in the next tier.

*Medium Operations.* Farms with eight to 29 animal units are required to develop and implement a written, self-certified animal waste management plan, which shall contain specific information about the farming operation, including, but not limited to, records of plan activities, measures used to prevent livestock from having uncontrolled access to the waters (i.e., fences or other barricades), the size and location of manure storage areas, a design of composting, and a nutrient management plan if applying the manure to the fields. Additional documentation is required if transporting animal waste.

*Large Operations.* Farms with 30 or more animal units, or farms that receive, export or apply 50 or more cubic yards of animal waste per year, are subject to the most stringent standard and are required to obtain a permit from the Department of Agriculture and to develop a state approved animal waste management plan. The animal waste management plan must satisfy specific criteria detailed in the regulations, including: protection measures for soil, water, air, plants and animal resources; the preparation of site maps; the design of agricultural waste management systems; and the development of nutrient management plans, which require the farmer to, among other things, identify manure and wastewater volumes, storage types and transfer equipment, maintain maps of nutrient applications to the land, conduct and maintain soil test results, maintain detailed records, provide details on nutrient application methods, and prepare an "emergency action plan addressing spills and catastrophic

events."

The proposed regulations also set forth specific time constraints for compliance depending on which tier is applicable. In addition, there is a one-time \$50 filing fee for the submission of the animal waste management plan. Larger farms falling within the third tier are required to pay additional fees, including a \$50 permit application fee and a \$200 permit fee, which must be renewed every three years.

Penalties can also be assessed on farmers for noncompliance. These penalties can be significant, starting at \$100 per day, up to a maximum penalty of \$10,000 for the first violation. Penalties for subsequent violations are assessed at \$150 per day, up to a maximum penalty of \$15,000. Under the proposed regulations, aggrieved parties are afforded the opportunity for a hearing to contest penalty decisions pursuant to the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq. and the Uniform Administrative Procedure Rules, N.J.A.C. 1:1.

### **Impact and Reaction**

These proposed regulations, if and when implemented, would impact a significant number of livestock owners statewide by imposing new compliance standards and strict record keeping and reporting requirements. And while some farmers may be eligible for compliance assistance from the DEP, farmers may need professional legal assistance for the development of a comprehensive and fully compliant animal waste plan.

Although there will likely be a need for professional services and initial capital expenditures by farmers for compliance with the new rules, the Department of Agriculture expects that there will be cost-share funding available to offset these costs to the farmer. Additionally, the Department of Agriculture maintains that, despite the initial outlay of expenses, in the end, management of animal waste and its proper utilization will reduce fertilizer costs and, therefore, save money for the farmer. Livestock owners, however, aren't so optimistic.

The proposed animal waste management criteria and standards were submitted to livestock owners for comment. Not surprisingly, many of the comments received were reportedly less than favorable. The Department of Agriculture is currently reviewing and compiling the comments and revisions to the proposed regulations are expected. One expected change is an increase in the three-tiered thresholds. And, as with the federal standards, the size of

the facility compared to animal density may be a consideration. Before the release of the next draft, public information sessions are anticipated to discuss the Department of Agriculture's goals, criteria for livestock owners' regulation of waste, and the availability of state assistance.

Whatever the changes to the proposal, one thing is certain: the regulations will affect numerous smaller-scale livestock owners throughout the state.

To assure compliance with these new environmental obligations, a complete understanding of the permitting and reporting requirements and standards for the proper development and implementation of an animal waste management plan is essential. This article only provides a general overview of the new proposed animal waste management criteria and standards. And based on the public comment, revisions to the proposal are expected. ■