

## Topic: What are the Benefits and Liabilities of Getting a Permit?

### **Our Concern:**

As stated in the Federal Register (p. 37749), under this proposal, “...it would be the CAFO’s responsibility to decide whether or not to seek permit coverage based on whether they discharge or propose to discharge.” We believe the question to consider regarding the protection of the permit is “Is it more detrimental to have a discharge without holding a permit than to have a discharge that is not authorized by a permit?”

As stated in the Federal Register, “Any CAFO that discharged or proposed to discharge and failed to obtain an NPDES permit would be in violation of the NPDES regulatory requirement to seek coverage under an NPDES permit. A facility with an actual discharge would also be in violation of the CWA prohibition against discharging without an NPDES permit...Any discharge from a CAFO, even one that is unplanned or accidental, is illegal unless it is authorized by the terms of a permit.” The only authorized discharge from a CAFO (aside from those covered under the agricultural stormwater exemption) is a precipitation-related discharge that exceeds the design standard for the manure storage structure. “The owner or operator of a CAFO that fails to obtain an NPDES permit and has a discharge is subject to State or federal enforcement, as well as liability from citizen suits under CWA Section 505(a).”

The claim has been made that holding an NPDES permit will protect the producer from EPA involvement. However, it seems that whether a facility is operating under the guidelines of a permit or not, there is liability and potential for regulatory action in the event of a spill reaching waters of the state and, regardless of whether an NPDES permit is held, the state regulatory agency and the federal EPA have the right to litigate in the event of a spill.

Though the Federal Register contains discussion on liability of an operation that has a discharge without the protection of a permit, no discussion is included to state the liability that exists for a permitted facility that has an unauthorized discharge.

**Recommendation:**

For beef and dairy operations and existing swine, poultry and veal operations (i.e. those not designated as “new sources”) designed using the 25-year, 24-hour storm or other precipitation event standard, a permit provides the protection to avoid liability for precipitation-induced discharge if proper management practices are documented. Therefore, these operations should acquire the protection offered by an NPDES permit. We agree with maintenance of this design standard for beef and dairy operations, and existing swine, poultry and veal operations.

For existing “dry manure handling” operations, such as poultry facilities that do not land-apply their own litter, a permit appears to be necessary only if the operation wishes to have protection from liability for discharges that occur due to “an act of God” such as flooding, hurricanes, tornadoes, etc.

New source swine, poultry and veal operations are to be operated as zero-discharge facilities, so any discharge will be open to litigation, regardless of the terms of the permit. However, permit “...*upset provisions can protect permittees from legal liability when emergencies or natural disasters cause discharges beyond the permittee’s reasonable control... This protection is not available to unpermitted CAFOs.*” Therefore, new source swine, poultry and veal operations, regardless of their method of manure collection, treatment, and storage, will require a permit.

The liability for an unauthorized discharge by a facility operating under an NPDES permit needs to be detailed in the CAFO rule to assist producers in making a decision of whether or not to seek coverage under an NPDES permit.

Additionally, specific circumstances in which the upset and bypass measure can be applied to new zero-discharge swine, poultry and veal operations operating under the coverage of an NPDES permit should be identified to assist state regulatory authorities implementing the NPDES program.