

Topic: Deadline for implementation

Our Concern:

The Federal Register (p. 37748) states that “EPA extended the date by which operations defined as CAFO's as of April 14, 2003, who were not defined as CAFO's prior to that date, must seek NPDES permit coverage, from February 13, 2006, to July 31, 2007. EPA also amended the date by which operations that become defined as CAFO's after April 14, 2003, due to operational changes that would not have made them a CAFO prior to April 14, 2003, and that are not new sources, must seek NPDES permit coverage, from April 13, 2006, to July 31, 2007. Finally, EPA extended the deadline by which CAFO's are required to develop and implement nutrient management plans, from December 31, 2006, to July 31, 2007.”

EPA, in their preamble to the proposed rule, appears to assume that states have already adopted the provisions of the 2003 rule. Thus, states would simply need to rescind provisions of the vacated rule and replace them with the language of the 2006 proposed rule. Because critical parts of the rule were under judicial challenge, this was not the procedure followed by Missouri and likely by other states as well. Given the fact that many states stopped their rulemaking adoption of the 2003 rule pending resolution of the *Waterkeeper* issues, EPA must realize that the proposed July 31, 2007 deadline is unrealistic and unattainable for either states or producers. We document the process through which Missouri will make its state-level regulations meet the EPA requirements and the method for producers to come into compliance with state and federal rules to illustrate this point.

Missouri must wait until this regulation is finalized by EPA before it can make the necessary changes in the state rules and regulations. In particular, EPA's draft rule leaves significant uncertainty in how the nutrient management plan requirement can be met by operations. Missouri is in compliance with the current EPA regulation and all those CAFO's in Missouri needing NPDES permits, under both existing and proposed regulations, have current Missouri operating permits. Thus, the changes needed in

Missouri's rules are largely those that will be required to meet the changes proposed in this proposed 2006 regulation. Given the large questions unresolved in the current draft, Missouri can not work forward until those issues are resolved in EPA's final regulation.

Under the Missouri Department of Natural Resources plan for public involvement, which has been approved by EPA, the department will form a work group to resolve issues related to the new CAFO regulation. We anticipate that the group will take at least 6 months after EPA finalizes the regulation to complete this part of rulemaking. The department will then provide for public comment on the proposed rulemaking, requiring another 4-6 weeks. Only after the department has addressed the comments received during this time can the rule be brought before the Missouri Clean Water Commission for approval. The rule must then be published in the Missouri State Register before becoming effective. From start to finish, rulemaking takes a minimum of 12 months and commonly takes 18 months.

Once rulemaking has been completed, the Missouri Department of Natural Resources can begin to accept permit applications from those who wish to meet the new rules (and therefore EPA's regulation). Upon receipt, the permits, including the nutrient management plans, will have to be reviewed by staff and approved before a new permit can be issued. The Missouri CAFO General Permit was issued in 2006, and includes most of what is needed for a strategic NMP. EPA's requirement that all the existing permits be reissued with nutrient management plans will create a huge backlog of work for the permitting agencies. This backlog will take months to resolve and will not allow operators to meet the EPA deadline of July 31, 2007 for the implementation of nutrient management plans.

The ability of operators to create nutrient management plans in time to meet the deadline is also very questionable. There are simply not enough trained NMP writers to meet the deadline. If EPA adopts NMP criteria that vary greatly from those of NRCS, producers not enrolled in NRCS programs will face the additional hurdle of finding

someone who understands the version of a nutrient management plan that EPA requires. Unless EPA commits to this training an all fifty states, NMP preparation will suffer significant delays. In other words, EPA can compound the scheduling problem significantly by not allowing states to implement the NMP requirement based on conditions and expertise in their states.

Our permitting staff is sized to meet the on-going permitting load, not a greatly inflated reviewing load, including hundreds of nutrient management plans. For Missouri to review all the nutrient management plans on such an expedited schedule would severely impact Missouri's ability to implement the CAFO program due to the added burden of the review and approval of nutrient management plans with the compressed timeframe indicated in the proposed rule. Thus the dates proposed would actually compromise Missouri's ability to protect water quality during the significant time needed to meet EPA's deadline.

Unless EPA moderates their demand for compliance with the new regulations, many producers will be forced out of compliance by this unreasonable deadline because of the lack of trained NMP creators and state regulatory review demands.

Recommendation:

We strongly urge EPA to allow states to allow current permit holders to operate under their current permits until expiration regardless of the issuance date of the permit. This will allow states to work on getting state rules aligned with the new requirements and working with applicants building new or expanding facilities to meet conditions of the new regulations.

Missouri would like to offer EPA an alternative approach to the proposed implementation schedule. If a state could show that meeting the July 31, 2007 for nutrient management plans would be less protective of water quality than allowing current permits to run their course, EPA should allow a waiver to that requirement. We believe that Missouri could present a compelling case.