

Administrative Law Assignment

ANSWERS

**Advanced Legal Research
Prof. Furnish & Janoski-Haehlen
Due Date: 4/20/09**

Your Name Here: _____

You are a new associate assigned to work on the firm's John Morrell & Co. account. John Morrell & Co. is a well known Cincinnati company which manufactures and distributes pork products in the Midwest and parts of the Northeast. A company representative will be meeting with the firm to discuss changes to the EPA's regulations of livestock feedlots. John Morrell & Co. is interested in cutting transportation costs and building animal feedlots closer to their processing plant operations in Cincinnati. The trade terminology used to describe animal feedlots is Animal Feeding Operations (AFOs) and Concentrated Animal Feeding Operations (CAFOs).

You will be working with the Morrell Account team, and you have been asked to report back with the text of the final regulations and sources comparing the old regulations with the new revisions. You will be distributing information to the team, so you need to keep an accurate and detailed paper trail of your research efforts. Because you are a smart researcher, you plan to compile a list of the key search terms and to keep track of your research efforts.

The team leader routed the following newspaper article to you:

"EPA Changes Pollution Controls for Farms" By H. JOSEF HEBRT Associated Press posted in The Cincinnati Enquirer date Saturday 11/1/2008 page A5.

WASHINGTON: The U.S. Environmental Protection Agency issued new pollution control requirements for large livestock feedlots **Friday [10/31/08]** that would allow farm operators to avoid having to get a permit if they affirm that the facility will not put harmful discharges into nearby waterways.

EPA officials said the new requirements call for a "zero discharge standard" and also will require farm operators to develop management plans that prevent the runoff of excessive environmentally damaging nutrients such as nitrogen and phosphorous into lakes and streams.

The new rules provide "a strong national standard for pollution prevention and environmental protection while maintaining our country's economic and agricultural competitiveness," Benjamin Grumbles, the EPA's assistant administrator for water, said in a statement.

Environmentalists have long complained that animal feedlots, large farm operations where hogs and cattle are fattened before slaughter, pollute waterways because of their huge buildup of manure, which is piled up or spread across the land.

The EPA issued new pollution control requirement on such feedlots in 2003, but that regulation was overturned by the courts two years later. The rules issued Friday, to go into effect next February, are an attempt to comply with the court ruling.

Under the rules, a feedlot would not automatically have to obtain a pollution discharge permit

and could be certified as voluntarily complying with the "zero discharge" standard. Operators would determine whether their facility was releasing or would release pollution into waterways based on the design of the facility and its operation. If they conclude no discharges will take place, they can operate without applying for a federal permit.

Environmentalists complained this provision will let many of the feedlot operators off the hook.

"This regulation allows these industrial meat farms to avoid the Clean Water Act altogether by certifying that they have taken voluntary action to avoid discharges," said Eric Schaeffer, a former EPA enforcement official who now is director of the Environmental Integrity Project, an advocacy group.

Because feedlot owners are allowed to determine whether they should seek a pollution permit, "it literally puts the foxes in charge of their gigantic hen houses, as well as hog and dairy confinement operations," said Schaeffer.

The EPA estimated that the requirements will prevent the release into streams, lakes and other waterways of 56 million pounds (25.4 million kilograms) of phosphorous, 110 million pounds (50 million kilograms) of nitrogen and 2 billion pounds (910 million kilograms) of sediment a year.

The National Pork Producers Council called the new rules "tough but fair" and said they set a high environmental standard for the feedlots, known within the industry as Concentrated Animal Feeding Operations (CAFO).

"Pork producers are ready and willing to comply with the new regulations," said Randy Spronk, a pork producer from Minnesota, who is chairman of the council's environment committee.

Spronk acknowledged that "many CAFOs may choose not to get a federal permit because they are confident they will not discharge." But he added "with or without a permit, swine operations that are not well managed and have discharges are facing severe penalties."

You did not find the regulations in the Federal Register dated Friday 10/31/08. You suspect that the newspaper reporter must be talking about an EPA Press Release announcing forthcoming regulations. From your Advanced Legal Research Class, you remember that newspaper articles are not precise and that regulations can appear in the Federal Register anywhere from a few days to thirty days after a Press Release.

1. Go to the **U.S. EPA web site** and find the **Press Release** concerning large animal feeding operations. Provide the contact information given: EPA contact, telephone # and email address.

[2008 Press Releases – Dave Ryan 202-564-4355 ryan.dave@epa.gov](#)

2. Use the **U.S EPA web site** to further your knowledge of the issues. The EPA web site is massive so use the **SEARCH BOX** or the **A-Z Index** features to answer the following questions.
 - a). Locate the **U.S. Environmental Protection Agency's Office of Wastewater Management (OWM) web site**. Describe the agency's responsibilities.

<http://www.epa.gov/OWM/> oversees a range of programs contributing to the well-being of the nation's waters and watersheds. Through its programs and initiatives, OWM promotes compliance with the requirements of the Federal Water Pollution Control Act.

b). Still using the Office of Wastewater Management (OWM) web site, locate the *Animal Feeding Operations* web page. Provide definitions for Animal Feeding Operation AFOs and Concentrated Animal Feeding Operation CAFOs. Try a Google search if the definitions on this page are unclear. Please let me know where you found your definitions if you use additional sources.

AFOs - Animal feeding operations (AFOs) are agricultural enterprises where animals are kept and raised in confined situations. AFOs congregate animals, feed, manure and urine, dead animals, and production operations on a small land area. Feed is brought to the animals rather than the animals grazing or otherwise seeking feed in pastures, fields, or on rangeland. There are approximately 450,000 AFOs in the United States. **Concentrated animal feeding operations (CAFOs) are a relatively small number of AFOs that are regulated by the EPA.** An AFO is a lot or facility (other than an aquatic animal production facility) where the following conditions are met: Animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

CAFOs - Concentrated (confined) Animal Feeding Operations are point sources, as defined by the CWA [Section 502(14)]. To be considered a CAFO, a facility must first be defined as an Animal Feeding Operation (AFO). A concentrated animal feeding operation (CAFO) is defined as any facility with more than 1000 animal units (see **Animal Units Table Below**) confined on site, or an AFO of any size that discharges pollutants (e.g. manure, wastewater) into any ditch, stream, or other water conveyance system, whether man-made or natural. Consider these key points: Operations with more than 1000 animal units are not considered CAFOs if the animals are housed or fed on areas where crops are produced during the normal growing season. A facility of any size can be designated as a CAFO if pollutants are discharged into water passing across, through, or adjacent to the facility. Any water that comes into contact with animals or manure must be contained on site.

Approximate number of animals equivalent to 1000 animal units

Animal Type	Number
Slaughter/feeder cattle	1,000
Mature dairy cattle	700
Swine	2,500
Sheep or lambs	10,000
Horses	500
Turkeys	55,000
Laying Hens or broilers	100,000

c). Link to the agency's *CAFO Rule History* web site and describe four events which led to the EPA's regulation changes in late 2008. These key events include proposed rulemaking; final rulemaking; rulemaking extensions; court decisions, etc. [For example in 2/2003 revised CAFO regulations made changes to the previous regulations from 1974 and 1976.]

1. The **February 2003 CAFO regulations** revised the previous regulations from 1974 and 1976. Those regulations made changes to the NPDES regulations that define which facilities are CAFOs and included changes to the CAFO effluent guidelines, which set the technology-based limitations for CAFO NPDES permits. The 2003 revised regulations expanded the number of operations covered by the CAFO regulations to an estimated 15,500 and included requirements to address the land application of manure from CAFOs.

2. After EPA issued the 2003 regulations, **petitions for judicial review** were filed by CAFO industry organizations (American Farm Bureau Federation, National Pork Producers Council, National Chicken Council, and National Turkey Federation) and by environmental groups (Waterkeeper Alliance, Natural Resources Defense Council, Sierra Club, and American Littoral Society). The petitions for review, which were originally filed in several different circuit courts of appeal, were consolidated into one proceeding before the Second Circuit.

3. On **February 28, 2005**, the U.S. Court of Appeals for the Second Circuit issued its decision in *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486. In its decision, Second Circuit addressed a range of issues raised by the litigants. The Court both upheld many of the basic tenets of the regulations promulgated by EPA but also overturned certain sections.

4. Concentrated Animal Feeding Operations **Proposed Rulemaking: Fact Sheet**
This proposal would revise several aspects of EPA's current regulations governing discharges from CAFOs.
Document Type: Factsheets and Outreach Materials
Date Published: 06/01/2006

5. **Concentrated Animal Feeding Operations Proposed Rulemaking: Date Extension**
EPA seeks comments on a proposal to extend the dates for newly defined concentrated animal feeding operations (CAFOs) to seek National Pollutant Discharge Elimination System (NPDES) permit coverage and for permitted CAFOs to develop and implement nutrient management plans (NMPs) as required by EPA's 2003 CAFO rule.
Date Published: 05/01/2007

6. **Concentrated Animal Feeding Operations Supplemental Notice of Proposed Rulemaking** This document proposes a new provision that would allow CAFO operators to voluntarily certify that they do not discharge or propose to discharge and as such have no duty to apply for a permit. **Document Type:** Factsheets and Outreach Materials
Date Published: 03/01/2008

3. Locate the final regulations in the Federal Register using the **GPO Access Federal Register web site** <http://www.gpoaccess.gov/fr/index.html> . Use the "Advanced Search" features to search for the final regulations concerning CAFOs released in late 2008.

a). List the search terms you have developed and other methods of limiting your search when using this "Advanced Search" web page. HINT: List the features on the page which you can use to limit/improve your search.

2008 FR, Vol. 73 [Search CAFO](#)

Federal Register, Volume 73 (2008) Search For: "CAFO" Total Hits: 7

[1] fr20no08R Revised National Pollutant Discharge Elimination System Permit
[HTML](#) , [PDF](#) , [SUMMARY](#)

[2] fr07mr08P Revised National Pollutant Discharge Elimination System Permit
[HTML](#) , [PDF](#) , [SUMMARY](#)

[3] fr18de08R CERCLA/EPCRA Administrative Reporting Exemption for Air Releases

, [HTML](#) , [PDF](#) , [SUMMARY](#)

[4] [fr15oc08N State Program Requirements; Application To Administer the HTML , PDF , SUMMARY](#)

[5] [fr16oc08P Approval and Promulgation of Implementation Plans: 1-Hour Ozone HTML , PDF , SUMMARY](#)

[6] [fr15se08N Notice of Final 2008 Effluent Guidelines Program Plan HTML , PDF , SUMMARY](#)

[7] Query Report for Search of: 2008_register

b). Cite the final regulations found in the Federal Register. [**Bluebook format required**].

Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision, 73 Fed. Reg. 70417 (Nov. 20, 2008) (to be codified at 40 C.F.R. pts. 9, 122, and 412).

c). Read the final regulation to answer the following:

1. Why did the EPA revise the CAFO regulations?

In response to the order issued by the U.S. Court of Appeals for the Second Circuit in *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005). This final rule responds to the court order while furthering the statutory goal of restoring and maintaining the nation's water quality by ensuring that CAFOs properly manage manure generated by their operations.

EPA is modifying the requirement to apply for a permit by specifying that an owner or operator of a CAFO that discharges or proposes to discharge must apply for an NPDES permit. The final rule also includes an option for an unpermitted CAFO to certify to the permitting authority that the CAFO does not discharge or propose to discharge

2. When are the final regulations effective?

DATES: These final regulations are effective December 22, 2008. For judicial review purposes, this final rule is promulgated as of 1 p.m. Eastern Daylight Time, on December 4, 2008, as provided in 40 CFR 23.2

3. What is the statutory basis for the regulation?

Federal Water Pollution Control Act (Clean Water Act or CWA)

4. Where will the final regulations appear in the CFR?

40 CFR Parts 9, 122, and 412

5. Provide the contact for further information. Include name, office title, phone number, and email address.

Rebecca Roose, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460,

telephone number: (202) 564-0758, e-mail address: roose.rebecca@epa.gov. Source Performance Standards and BCT Limitations contact Paul Shriner, Engineering and Analysis Division, Office of Science and Technology (4303T), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460, telephone number: (202) 566-1076, e-mail address: shriner.paul@epa.gov.

4. Use the e-CFR, Electronic Code of Federal Regulations, to answer the following:
- Describe the purpose of the e-CFR and how it differs from the Code of Federal Regulations?

The Electronic Code of Federal Regulations (e-CFR) is a currently updated version of the Code of Federal Regulations (CFR). It is not an official legal edition of the CFR. The e-CFR is an editorial compilation of CFR material and Federal Register amendments produced by the National Archives and Records Administration's Office of the Federal Register (OFR) and the Government Printing Office. The OFR updates the material in the e-CFR on a daily basis.

- The e-cfr is current to what date? How can you update your research to make sure there have been not additional changes? [Answer both questions].

X date + Current List Sections Affected

5. You need to learn more about a state's role and responsibilities in implementing AFOs and CAFOs. You will search Title 40 CFR for a discussion of state programs as part of the national pollutant discharge elimination system [NPDES].

- Search TITLE 40 of the CFR using your key words. Describe your searches using the e-CFR.

Title 40 state permit cafo

- What sections/parts of the CFR discuss state programs for regulating concentrated animal feeding operations?

40 CFR Part 122 and 40 CFR Part 123

121.1 to 121.30 STATE CERTIFICATION OF ACTIVITIES REQUIRING A FEDERAL LICENSE OR PERMIT and 123.1 to 123.64 STATE PROGRAM REQUIREMENTS

6. See what your favorite research engine, Google, provides on this issue and be sure to use the "Advanced Search" features. You are looking for reliable information on animal feeding operations and concentrated animal feeding operations. You want to know what states have AFOs and CAFOs, if the states tend to favor this industry, and if specific problems are mentioned. Remember to check the Chase Law Library Web Page – Research Links – State & Local Sources- State Legislatures – Issue Areas.

- List the key terms you used and how you applied the "Advanced Search" features.

b). List your three best search results. I need the titles of the web sites, the web addresses, and the dates you visited the sites. Describe briefly how each web site has added to your research.

From National Conference of State Legislatures - Issue Areas - CAFOs Search

Title= CAFO ENVIRONMENTAL CONCERNS (File Date: **5/5/2008**)

Summary: The landscape has increasingly been swamped with large-scale farms known as Concentrated Animal Feeding Operations (CAFOs). C.R.S. 25-8-501.1 (2003) (state requirements for commercial swine feeding operations); C.R.S. 25-8-504 (federal permitting requirements to apply to all non-commercial swine feed operations). Monroe Township Noxious Agricultural Odors Ordinance establishes a conditional use permitting system to control noxious odors from large agricultural operations. (Score=0.9961; Size= 24 kb)

2) **Title= CONCENTRATED ANIMAL FEEDING OPERATIONS** (File Date: **5/14/2008**)

Summary: These facilities, known as concentrated animal feeding operations (CAFOs), offer a more efficient system to feed and house animals through specialization, increased facility size and close confinement of animals. Because more waste is generated in CAFOs than other less-dense animal farm facilities, the potential for greater air, water and land pollution increases in nearby areas. In 2003, the U.S. Environmental Protection Agency (EPA) projected that the nation's 257,000 animal feeding ... (Score=0.9416; Size= 7 kb)

3) **Title= STATE CAFO STATUTES** (File Date: **5/14/2008**)

Summary: AlabamaAlabama Water Pollution Control Act, Ala. Code §22-22-1 et seq. ArkansasArkansas Water and Air Pollution Control Act, Ark. Code Ann. Water Code §13140 et seq. (Score=0.7742; Size= 10 kb)

4) **Title= LRL - MN ACQUISITIONS, AUGUST 2008** (File Date: **9/16/2008**)

Summary: Mandated by: 2007 Minn. Laws Chap. Minn. Dept. of Public Safety. Mandated by: 2006 Minn. Laws Chap. (Score=0.7742; Size= 45 kb)

NOTE: Google search results can be disappointing when you are looking for a specific date range. The date search feature applies the time period in which the web page was indexed by Google and has nothing to do when a page was created.

You had your 1st meeting with the Morrell Account Team. You distributed copies of the new regulations, offered a history of the regulations, and discussed AFOs/CAFOs in the states. The leader of the Morrell Account is pleased and asks you to research two additional issues.

7. He wants you to locate a Government Accountability Office (GAO) study which reviewed the use of large animal feedlots or CAFOs in the U.S. He heard the study was fairly critical of the EPA and the study was completed sometime in 2008. Use the GAO web site to answer the following questions:

a). What does the GAO do and who is the head of the GAO? State why or you think this web site is biased or unbiased?

The U.S. Government Accountability Office (GAO) is an independent, nonpartisan agency that works for Congress. Often called the "congressional watchdog," GAO investigates how the federal government spends taxpayer dollars. The head of GAO, the Comptroller General of the United States, is appointed to a 15-year term by the President from a slate of candidates Congress proposes. Gene L. Dodaro became Acting Comptroller General of the United States on March 13, 2008.

b). Browse the "Reports and Testimony" web site and look for a description of how GAO Reports get their start – who requests them and why.

How Does GAO Report Its Findings and Recommendations? GAO's primary products are reports, often called "blue books," and testimony before Congress. GAO also issues correspondence (letters), which are narrower in scope, of more limited interest, and do not contain recommendations. With virtually the entire federal government subject to its review, the agency issues a steady stream of products, usually over 900 separate products a year.

How Do GAO Studies Get Their Start? Most reports are done at the request of members of Congress--often committee chairpersons and ranking minority members. The agency also responds, whenever possible, to requests from individual members. Other program reviews are required by law or are self-initiated under the agency's own authority. All unclassified GAO reports are available to the public. However, congressional requesters of GAO work are allowed to restrict reports for up to 30 days before public release. This restriction can sometimes mean that the public release date of the report is up to 30 days after the publication date. That is why you can see a report listed on the site released today that has a publication date well before today.

c). Look for the GAO Report on animal feedlots or CAFOs. Provide the title of the study, GAO Study Number and report date.

Concentrated Animal Feeding Operations: EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality from Pollutants of Concern
[GAO-08-944](#), September 4, 2008

d). Read the first pages, the summary and recommendations portions, of the report. The GAO faults the EPA for what? Your answer should be brief one to two sentences.

Because no federal agency collects consistent, reliable data on CAFOs, GAO could not determine the trends in these operations over the past 30 years. However, using USDA data for large farms that raise animals as a proxy for CAFOs, it appears that the number of these operations increased by about 230 percent, going from about 3,600 in 1982 to almost 12,000 in 2002. Also, during this 20-year period the number of animals per farm had increased, although it varied by animal type. Moreover, GAO found that EPA does not have comprehensive, accurate information on the number of permitted CAFOs nationwide. As a result, EPA does not have the information it needs to effectively regulate these CAFOs.

8. The research attorney wants you to locate Kentucky regulations on animal feedlots and CAFOs. He thinks the state regulations generally tend to be more restrictive than the federal regulations. This will impact whether the animal feedlots will be located in Kentucky.

a). Use Google to locate the agency in Kentucky which regulates AFOs and CAFOs.

1). List the state agency and describe the agency's mission.

The mission of the Kentucky Division of Water is to manage, protect and enhance the water resources of the Commonwealth for present and future generations through voluntary, regulatory and educational programs.

2). Locate the agency web site which describes AFOs and CAFOs and list where the regulatory requirements for CAFOs generally appear in the Kentucky Administrative Regulations [KAR].

<http://www.water.ky.gov/permitting/wastewaterpermitting/KPDES/cafo/>

Operations that are defined as Concentrated Animal Feeding Operations (CAFOs) pursuant to 401 KAR 5:060, Section 10, are required to obtain a Kentucky Pollutant Discharge Elimination System (KPDES) permit. Selected AFO/CAFO Definitions Note 401 KAR 5:002 Section 1 (11, 12 and 48). Selected Application and Permit Requirements Note 401 KAR 5:060 Sections 4 and 10.

3). Locate and copy the sample permit for Concentrated Animal Feeding Operations – Swine Feeding Facilities. [Posted on the agency web site].

Administrative Decision Question

9. Another attorney for the firm asks if you are free to do some quick research. You jump at the chance to be rescued from more pig farm research. She needs the following:

Edward Tiemann was the subject of a disciplinary proceeding under the Packers and Stockyards Act of 1921 before a judicial officer of the United States Department of Agriculture in 1988. Locate the administrative law decision and provide the docket number. Also list the attorney for the Agriculture Department (the Complainant in this case).