

STATE OF CALIFORNIA  
California Regional Water Quality Control Board  
Santa Ana Region

Staff Report

October 26, 2012

ITEM: 11

SUBJECT: **Status Report on the Development of a New Dairy Permit**

Regulatory Background

Currently, there are 154 large dairy-related animal feeding operations in the Santa Ana Region. The Clean Water Act (CWA) defines these large facilities as Concentrated Animal Feeding Operations (CAFOs), and, historically has required the issuance of National Pollutant Discharge Elimination System (NPDES) permits to these CAFOs. Accordingly, these 154 facilities are currently covered by an NPDES permit adopted by this Board in 2007.

In 2008, the United States Court of Appeals, Fifth Circuit, issued an opinion in *National Pork Producers Council v. United States Environmental Protection Agency* (2011) 635 F.3d 738, that restricted the applicability of the NPDES program to CAFOs. This status report discusses some options for regulating the 154 CAFOs in the Santa Ana Region.

Water Quality Impacts from Dairies

CAFOs produce manure, litter, and process wastewater, collectively referred to as dairy biomass. This biomass generally contains high levels of bacteria, decomposable materials, salts (total dissolved solids, TDS), and nitrogen and phosphorus compounds (nutrients). Most of these waste products have beneficial applications such as: use in agricultural operations as fertilizers; biogas production through dairy waste digestion; and energy production. These waste products may also emit odors, methane, nitrous oxide, carbon dioxide, antibiotics and ammonia. Unless properly regulated, the use and disposal of these dairy waste products could adversely impact surface and groundwaters.

2007 NPDES Permit

In 2007, there were 168 dairy-related animal feeding operations within the Santa Ana Regional Board's jurisdiction. On September 7, 2007, the Regional Board adopted Order No. R8-2007-0001, NPDES CAG 018001, to regulate discharge of wastes from the 168 CAFOs in the region. Order No. R8-2007-0001 is a General NPDES permit issued under the U.S. Environmental Protection Agency's (USEPA) regulations and the federal Clean Water Act (CWA) requirements. All dairy facilities within the Santa Ana Regional Board's jurisdiction are currently regulated under the General NPDES permit. This General NPDES permit expired on September 6, 2012.

### Fifth Circuit Court of Appeals Decision in the Pork Producers Case

In the *Pork Producers* case, various industry representatives challenged revised federal regulations requiring that CAFOs obtain an NPDES permit if they either discharge or propose to discharge. The regulations, as well as other U.S. EPA guidance, provided general criteria for when a CAFO was proposing to discharge. However, the Fifth Circuit vacated those provisions of the federal regulations that require a CAFO to seek an NPDES permit only if they propose to discharge. The Fifth Circuit reasoned that NPDES permits are required for actual discharges to federal waters, not for speculative discharges that may not occur. Thus, the Fifth Circuit decision limited the requirement to obtain an NPDES permit to only those CAFOs that are actually discharging to waters of the United States.

### Regional Board's Options for Regulating CAFOs in the Region

Currently there are 154 dairy related animal feeding operations, with a total animal population of 187,000 animals, located within the jurisdiction of the Santa Ana Regional Board and they are all regulated under the General NPDES permit. (Fourteen of the 168 facilities that were regulated under the 2007 General NPDES permit either moved out of the region or ceased their operations.) Based on the federal statutes and regulations and the court decisions, the Regional Board has several options to regulate the CAFOs in the region:

1. Continue to regulate all dairies under a General NPDES permit.
2. Regulate those dairies with a discharge under a General NPDES permit and issue General Waste Discharge Requirements (WDR) for the rest of the facilities;  
or
3. Regulate all dairies under a General WDR.

Currently, regions with a substantial number of dairy facilities (Central Valley Region, North Coast Region, San Francisco Bay Region) have adopted both a General NPDES permit and General WDRs and have allowed dairy facilities to choose under which permit to enroll. Most facilities have chosen to enroll under the General WDRs.

However, in discussions with the dairy industry in this region, some dairy representatives have expressed a preference for being regulated under a General NPDES permit. This is due, in part, to concerns over dairy facility liability should there be a discharge to waters of the U.S. during an extreme storm event. Enrollment under General WDRs alone will not permit any discharges to waters of the U.S. - even during a 25-year, 24-hour storm event. Thus, there could be some liability for facilities, both as part of an enforcement action from the Regional Board and from third parties, should a discharge occur during an extreme weather event.

### Other Concerns and Issues

As indicated above, the biomass from dairy related activities contain high levels of bacteria, biodegradable materials, salts (TDS) and nutrients. The Basin Plan for the Santa Ana River Basin includes water quality objectives for bacteria, chemical oxygen

demand (COD, a good indicator for biodegradable materials) and nutrients for surface and groundwaters. Most groundwater basins in the region have no assimilative capacity for TDS and/or nutrients. In addition, the Regional Board adopted total maximum daily loads (TMDLs) for bacteria and nutrients for some of the waters impacted by discharges from these dairies and other sources. The TMDLs are regulatory tools to control the discharge of pollutants causing impairment to a waterbody. As such, any regulatory mechanism used to regulate dairy related facilities should include innovative and economically viable control mechanisms to control the discharge of these pollutants.

Staff is also evaluating the need for regulating other types of concentrated animal feeding operations, such as poultry farms.

### Proposed Actions

Regional Board staff is proposing to meet with stakeholders in the region to identify the best course of action to regulate the dairy-related facilities within the region. A preliminary meeting was held in the Regional Board office on August 27, 2012. At that meeting, a number of proposals were made by the stakeholders to address the dairy waste disposal and beneficial reuse issues. These proposals are being evaluated by staff.

After determining the best option to regulate the dairy facilities, staff proposes to develop an administrative draft of the permit for discussions with the stakeholder group with the goal of developing a draft permit that is supported by stakeholders.

Due to an apparent preference among the majority of dairy facility owners to be regulated by a General NPDES permit, Regional Board staff is currently working on a General NPDES permit without ruling out the other options outlined above.

### Tentative Schedule

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| Complete administrative draft General NPDES permit: | October 29, 2012  |
| Meeting with stakeholders:                          | October 31, 2012  |
| First draft of the General NPDES permit:            | November 16, 2012 |
| First permit workshop:                              | December 14, 2012 |
| Comments due on first draft:                        | December 17, 2012 |
| Meeting with stakeholders:                          | December 21, 2012 |
| Final draft permit:                                 | January 11, 2013  |
| Adoption Hearing:                                   | March 2013        |