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HOT ENVIRONMENTAL ISSUES IN AGRICULTURE

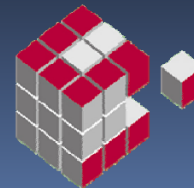
Kansas Bar Foundation and Kansas Farm Bureau Legal
Foundation for Agriculture.

October 29, 2010



Agenda

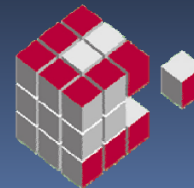
- Hot Environmental Issues in Agriculture
 - Air
 - Water
 - Other Regulatory Issues
 - Pesticides
 - Antibiotics in Feed
- Responding to a Notice of Violation
 - Practical Guide to responding to an Enforcement Action



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EPA Enforcement Priorities

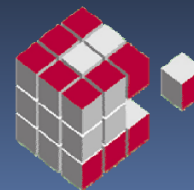
- 2011 -2015 Enforcement Initiatives/Priorities include:
 - Keeping raw sewage and contaminated storm water out of the nation's waters;
 - Preventing animal waste from contaminating surface and groundwater;
 - Cutting toxic air pollution that affects communities health; and
 - Reducing Widespread Air Pollution from the Largest Sources, especially the Coal-Fired Utility, Cement, Glass, and Acid Sectors.



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Air and Agriculture

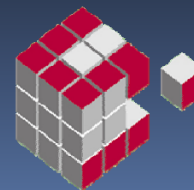
- Air Quality Compliance Agreement
- CERCLA/EPCRA
- Greenhouse Gases



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Air Quality Compliance Agreement

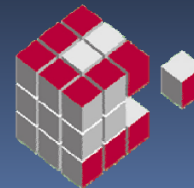
- Announced by EPA on Jan. 21, 2005
- Four Primary Goals
- August 2006: EAB Approves Two Voluntary Agreements
- Environmental Appeals Board approves two final voluntary agreements to gather air emissions data from AFOs



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CERCLA/EPCRA

- February 2009: EPA issues final rule on CERCLA/EPCRA Reporting for Air Releases of Hazardous Substances from Animal Waste at Farms
- All Farms Exempt from CERCLA Reporting
- Also Exempts Farms that Stable or Confine Fewer than Certain Prescribed Number of Animal Species



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EPCRA

- Section 304 Requires Reporting of Releases of Hazardous Substance that Meets or Exceeds Reportable Quantity
- State-Specific Guidance on Reporting:

- Iowa

<http://www.iowadnr.gov/epcra/index.html>

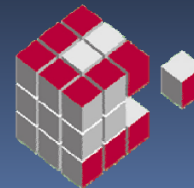
- Missouri

http://nmplanner.missouri.edu/regulations/CERCLA_EPRCA.asp

- Nebraska

<http://water.unl.edu/epcrareporting>

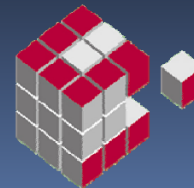
- Civil Penalties and Imprisonment for Failure to Report



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Greenhouse Gases

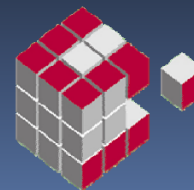
- *Massachusetts v. EPA* (2007)
- Dec. 2009: Endangerment Finding
- National Cattlemen's Beef Association Lawsuit
- Sept. 2009: Final GHG Mandatory Reporting Rule
- Congress Suspends Reporting Req. for MMS' for FY2010; also Prohibits EPA in FY2010 from Requiring Title V Permits Under CAA for GHG Emissions from Livestock Production
- March 31, 2012: GHG Report Due



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Water and Agriculture

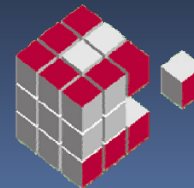
- Concentrated Animal Feeding Operations
- SPCC Rule
- Land Application of Manure
- Pesticides



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Concentrated Animal Feeding Operations (CAFOs)

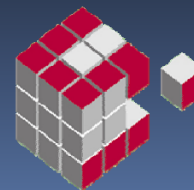
- 2003 CAFO Rule
- Waterkeeper Decision
- 2008 CAFO Rule
- National Pork Producers Council Challenge



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CAFOs

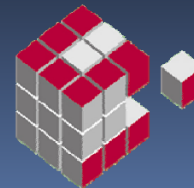
- On May 28, 2010, the EPA issued new guidance on CAFO regulations for CAFOs that discharge or propose to discharge.
- The clarification is not a rule but helps explain which CAFOs need permits.
- Calls for a case-by-case evaluation of design, construction, operation, and maintenance of a CAFO to determine whether it proposes to discharge



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CAFOs

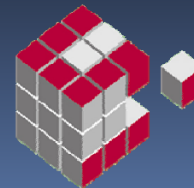
- Regulation of discharges – NPDES Permit
 - Permitted CAFO may discharge according to permit
 - Unregistered – can never discharge
- Regulation of Agricultural stormwater runoff
 - Currently being challenged by *National Pork Producers Council v. EPA* (5th Cir. 2008), with hearing set for Oct. 4, 2010.



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Spill Prevention, Control, and Countermeasure (SPCC) Rule

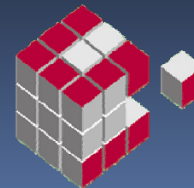
- Goal of the SPCC program is to prevent oil spills into waters of the United States and adjoining shorelines.
 - Farms may be required to have an oil spill prevention plan, called an *SPCC Plan*
- October 14, 2010 -- Final Rule, “Oil Pollution Prevention; Spill Prevention Control and Countermeasure (SPCC) Rule – Compliance Date Amendment.”
 - Extension (to November 10, 2011) for many different types of industries (including agriculture) for compliance with the SPCC rule amendments.



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Land Application of Manure

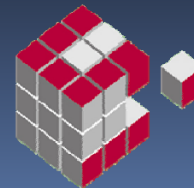
- All CAFOs in the State of Kansas are required to develop and implement an approved nutrient management plan (NMP) as a condition of National Pollutant Discharge Elimination System (NPDES) Permit coverage.
- All CAFOs in the State of Kansas must follow the technical standards set forth 40 CFR 412.4(c)(2) when land applying livestock manure, litter, compost, or process wastewater to farmland.
- Separate technical standards for swine verses non-swine CAFOs.



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Pesticides

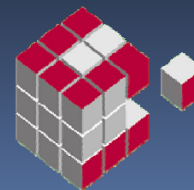
- *Headwaters v. Talent*
- 2007 Aquatic Pesticide Rule
- *National Cotton Council v. EPA*



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Emerging Trends

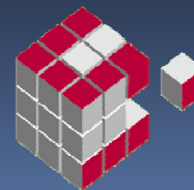
- Antibiotics in Feed
 - On June 28, FDA issued a draft Guidance to Industry document for the use of antibiotics in farm animals.
- Terrestrial Carbon Sequestration
 - Possible source of additional revenue.
 - Dependent upon cap-and-trade
- Wind /Photovoltaic Leases



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Responding to an Notice of Violation

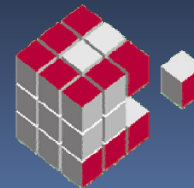
- EPA Enforcement Process
- Notice of Violation
- Strategy for Responding to a Notice of Violation



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EPA Enforcement Process

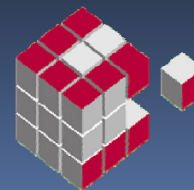
- Notice of Violation
- Administrative or Civil Action
- BEWARE of Concurrent State Enforcement



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Notice of Violation

- Facts (what the inspector found)
- Legal standard
- Process



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Sample Notice of Violation

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[REDACTED]

Re: [REDACTED]
Administrative Order and Offer to Conduct Pre-filing Negotiations
Deadline to Respond: February 8, 2008

This letter concerns the compliance of two construction sites, namely, [REDACTED] and [REDACTED] with the requirements of the Clean Water Act (CWA). The United States Environmental Protection Agency (EPA) inspected the sites on August 28, 2007 and October 2, 2007 respectively.

Based on our evaluation of the results of the August and October inspections, EPA has determined that there was significant non-compliance with the CWA. Significant violations at the Site include(d) failure to implement and maintain Best Management Practices at each Site, and failure to maintain records and discharges in violation of the state water quality standards.

The violations identified at both Sites have resulted in the discharge of sediment-laden storm water to waters of the United States. Excessive sedimentation due to runoff and erosion from construction sites is a major source of water quality problems in this country. Construction activities greatly increase runoff and erosion, thus increasing sediment transported to receiving waters. In addition to sediment, as storm water flows over a construction site, it can pick up other pollutants like debris, pesticides, petroleum products, chemicals, solvents, asphalts and acids which also contribute to water quality problems.

You need to take action to ensure these non-compliance problems are corrected and do not occur again. Enclosed is an Administrative Order for Compliance (Order), issued by the EPA to [REDACTED] and [REDACTED] (Respondents) under the authority of Section 309(a) of the CWA, 33 U.S.C. § 1319(a). The Order identifies violations of the CWA at the Site and requires you to take actions to ensure the violations are corrected and the Facility remains in compliance in the future. The Order is effective immediately upon receipt. Please read the Order carefully. It contains a number of specific requirements and deadlines, and compliance with the Order is mandatory. The deadlines established in this Order may only be extended by written permission from the EPA. The EPA has notified Missouri Department of Natural Resources (MDNR) of the issuance of this Order.

EPA also believes that an enforcement action in the form of a civil penalty is appropriate for the violations that occurred at these Sites. Under the CWA, EPA is authorized to bring an administrative action seeking penalties not to exceed \$11,000 per day per violation, up to a statutory maximum of \$157,500. Based on the information the EPA now has before it, we believe a penalty of \$87,930 is appropriate for [REDACTED] and \$121,423 for [REDACTED].

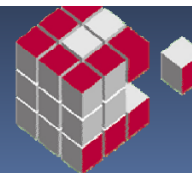
Although the EPA has not yet filed a civil penalty action against the Respondents, our intent is to file an administrative complaint sometime within the next 60 days. By this letter, we are offering the Respondents an opportunity to negotiate a resolution of the proposed penalty prior to EPA's filing of this complaint. As part of these pre-filing negotiations, the EPA will consider any additional information that the Respondents have that is relevant to the penalty. EPA's preference is to resolve this matter through re-filing negotiations. However, if we are unable to resolve the matter by March 25, 2008 EPA intends to file a formal complaint in which the terms of this offer will no longer be available.

If you wish to settle this matter, but you believe you do not have the financial ability to pay EPA's proposed penalty, this is also an opportunity for you to provide EPA with appropriate financial documentation to substantiate such a claim. Please include in your reply the completed Financial Data Request Form, the Disclosure Form and IRS Form 8821, which are enclosed with this letter, along with the tax records identified in the Financial Data Request Form.

In addition, you may wish to consider mitigating a portion of the penalty by performing a Supplemental Environmental Project (SEP). A SEP is a project purchased or performed by a violator that provides significant environmental benefits and has a nexus to the environmental harm threatened or caused by the violations. A full description of EPA's policy concerning the use of SEPs in settlement actions can be found at EPA's web site at <http://www.epa.gov/compliance/civil/sepindex.html> or by contacting [REDACTED] at the phone numbers listed below.

We trust that you recognize the importance of protecting the quality of our Nation's surface waters, and that you will take the steps necessary to comply with the Order. Please be advised that failure to comply with the Order may result in an additional enforcement action by the EPA, including the imposition of civil penalties. The EPA firmly believes that pre-filing negotiations offer both the party and EPA an opportunity to quickly and amicably reach settlement without protracted litigation. If you would like to take advantage of this opportunity, we would welcome your submittal of any relevant information regarding the violations. Any written materials you wish to present to us, including the Ability-to-Pay submittals, should be sent to [REDACTED] at the following address:

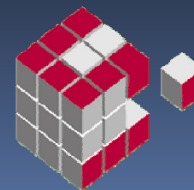
[REDACTED]



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Strategy for Responding to NOV

- Information Gathering
 - Cause of Violation, if any
 - Key Players
 - Document Request
- Has Facility Been Brought Into Compliance
- Penalties
- Meeting with Regulators
- Settlement Negotiations



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Questions Down the Road

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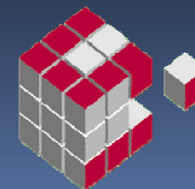
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