

Second Circuit Vacates Portions Of EPA's CAFO Rule

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In a decision with nationwide implications for regulation of wastewater discharges, on February 28, 2005, the Court of Appeals for the Second Circuit vacated portions of the Environmental Protection Agency's ("EPA's") CAFO Rule. *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486 (2d Cir. 2005), as amended 2005 U.S. App. LEXIS 6533 (April 18, 2005), petition for panel rehearing or clarification pending. The *Waterkeeper Alliance* decision subjects concentrated animal feeding operations ("CAFOs") to increased regulatory scrutiny by requiring permitting authorities to review and incorporate nutrient management plans into permits. It also circumscribes EPA's ability to regulate potential discharges when no actual discharges are occurring.

The Clean Water Act

The Clean Water Act ("Act") prohibits any discharge of a pollutant from any point source to navigable waters except when made in accordance with the terms and conditions of a national pollutant discharge elimination system ("NPDES") permit. Ordinarily, EPA or a state or tribal government to which EPA has delegated permitting authority may issue permits containing limitations based upon technology or water quality standards. Technology-based standards consider the degree to which available equipment and processes can control discharges of pollutants. For many industries, EPA has embodied technology-based standards in effluent limitation guidelines ("ELGs") that are applied to all dischargers in an industrial category nationwide. In the absence of ELGs, permitting authorities set technology-based limitations by applying best professional judgment.

When point source effluent limitations implementing technology-based standards are not sufficiently stringent to meet water quality standards established for a waterbody, the permitting authorities must include water quality based effluent limitations ("WQBELs") in permits. WQBELs relate to the conditions of the specific waterbody or segment affected by the discharge and generally require dischargers to control and treat effluent to reduce pollutants to a greater extent than would be achieved by using technology-based standards alone.

CAFOs have an unusual regulatory status that renders water quality based standards inapplicable. The Act's definition of point source expressly includes CAFOs, but excludes agricultural stormwater discharges. EPA has reconciled these two parts of the definition by classifying stormwater runoff from a CAFO complying with technology-based standards for nutrient management as agricultural runoff exempt from federal regulation. Consequently, when CAFOs comply with the Act by meeting technology-based standards, more stringent water quality based effluent limitations will not be applied to CAFO discharges.

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CAFOs

As the Second Circuit explained in its *Waterkeeper Alliance* decision, CAFOs constitute the largest of the nation's approximately two hundred and thirty-eight thousand animal feeding operations. *Id.*, slip op. at 6. These operations are defined as agricultural enterprises where animals are kept and raised in confinement. They may include from thousands to millions of animals at a single location. CAFOs are classified as Large, Medium or Small based on the number of animals present. *See generally*, National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7176 (February 12, 2003).

CAFOs pose several threats to water quality. CAFO wastes, consisting primarily of manure, include nutrients, organic matter, solids, pathogens, salts, trace elements such as arsenic, odorous compounds, antibiotics, pesticides and hormones. CAFO operators commonly apply the animal waste generated at the CAFO to the land as a fertilizer. Unless the manure is applied in accordance with a nutrient management plan designed to retain the nutrients and other materials on the land, in a storm event, the constituents of the manure may run off or leach into waterways or groundwater.

The CAFO Rule

On February 12, 2003, the EPA promulgated its final CAFO Rule requiring all CAFO owners or operators to apply for individual NPDES permits or submit notices of intent to be covered under an NPDES general permit. A general permit is a tool utilized by permitting authorities to regulate multiple facilities with similar characteristics. A discharger preferring to be regulated by the terms of a general permit rather than an individual permit must submit a notice of intent to the permitting authority.

EPA's regulations under certain circumstances allow a discharger to comply with the Act's standards by utilizing best management practices in lieu of meeting numerical effluent limitations. *See* 40 C.F.R. §§ 122.44(k) and 412.4. The CAFO Rule requires the CAFO operator to utilize land application best management practices including design and implementation of a nutrient management plan, sampling of manure and soil, inspections, use of equipment, adherence to various setback requirements and actions designed to minimize the possibility of overflows at production areas. The nutrient management plan ordinarily includes a waste application rate designed to minimize runoff of phosphorous and nitrogen from the field. The CAFO rule requires all CAFOs to develop nutrient management plans, but imposes the more specific effluent limitation guideline in the CAFO Rule only on Large CAFOs. For Medium and Small CAFOs, permit writers exercise best professional judgment.

Challenges To The CAFO Rule

In *Waterkeeper Alliance*, various environmental and farming organizations challenged the CAFO Rule. The Environmental Petitioners claimed that the Rule violated the Act because it failed to require the permitting authority to review the nutrient management plans that the CAFOs developed. The environmental groups contended that absent review, the permit cannot ensure that every discharge of pollutants will comply with all applicable effluent limitations and standards as required by the Act.

EPA responded that the nutrient management plans to be developed by CAFOs were not themselves non-numeric effluent limitations, but simply a planning tool to help

CAFOs comply with effluent limitations. EPA further asserted that because the CAFO Rule requires states to develop technical standards based on certain field specific assessments, and requires Large CAFOs to adopt application rates that comply with those technical standards, the standards could serve as a substitute for permitting authority review of the plans.

The Court rejected EPA's arguments and vacated the portion of the CAFO Rule allowing Large CAFOs to design and implement nutrient management plans without permitting authority review. The Court held that the requirement in the CAFO Rule to develop and implement a nutrient management plan is a best management practice. The terms of those plans constituted non-numerical effluent limitations. The Court reasoned that the Act defines an effluent limitation to include any restriction on the quantities, rates and concentrations of constituents which are discharged from point sources. The practice that the CAFO Rule imposes on Large CAFOs include limitations on the rate of waste application. Thus, they constituted effluent limitations.

The Court noted that although EPA disputed the Court's conclusion that nutrient management plans are themselves effluent limitations, EPA acknowledged that the requirement to develop and implement nutrient management plans is an effluent limitation. The Court found the distinction between the obligation to implement plans and the content of the plans to be without significance to the necessity for EPA or the state permitting authority to review the plans. The Court reasoned that even if the contents of the plans were not themselves effluent limitations, permitting authority review of the plans would nonetheless be essential to ensure that each Large CAFO develops and implements a nutrient management plan that satisfies the specific requirements set forth in the CAFO Rule.

The *Waterkeeper Alliance* Court noted that the Court of Appeals for the Ninth Circuit had required permitting authorities to review best management practices in an analogous situation. In *Environmental Defense Center, Inc. v. EPA*, 344 F.3d 832 (9th Cir. 2003), *cert. denied sub nom. Texas Cities Coalition on Stormwater v. EPA*, 124 S. Ct. 2811 (2004), the Ninth Circuit examined EPA's Phase II rule for municipal storm sewer systems. EPA allowed operators of these systems to develop stormwater management plans to comply with a general permit. EPA deemed a municipal storm sewer system operator submitting a plan to be in compliance with the substantive requirement that pollution be reduced to the maximum extent practicable, and did not require the permitting authorities to review the stormwater management plans. The Ninth Circuit held that to comply with the Act, the permitting authority must review the plans to ensure that each stormwater management program reduces the discharge of pollutants to the maximum extent practicable. The Ninth Circuit noted that absent review, the operator of a municipal storm sewer system might misunderstand or misrepresent its own stormwater situation and propose a set of minimum measures that would reduce discharges by far less than the maximum extent practicable. *Id.* at 855. The Second Circuit found that the same risk would be present under the CAFO Rule if a Large CAFO were allowed to develop a nutrient management plan not subject to permitting authority review.

Not only did the *Waterkeeper Alliance* Court conclude that the terms of nutrient management plans constituted effluent limitations that must be reviewed by the permit-

ting authority, the Court also held that the plans must be incorporated into dischargers' NPDES permits. The Act provides that all applicable effluent limitations must be included in NPDES permits. The Court's holding that nutrient management plans constituted effluent limitations signified that they must be incorporated into the permits.

The Court further held the CAFO Rule violated the Act's public participation requirements. The Act confers upon the public a right to participate in the development, revision and enforcement of an effluent limitation, regulation, standard, plan or program. 33 U.S.C. §1251(e). Notice and opportunity for public hearing are the cornerstones of a public participation program. Under the CAFO Rule, the nutrient management plan need not be disclosed to the public nor the subject of a public hearing. Because the Court determined the nutrient management plan to be an effluent limitation that must be incorporated into the permit, or alternatively constituted a regulation, standard, plan or program, the Court held that the Act required the permitting authority to provide for notice and hearing. The Court further noted that incorporating the plans into permits would facilitate citizen enforcement.

In one respect the Court granted an important victory to farming groups and held the CAFO Rule to be too restrictive. The Rule required all Large CAFOs to either apply for NPDES permits or demonstrate that they have no potential to discharge. The farming entities challenged the portion of the Rule addressing potential discharges.

Examining the Act's definition of discharge of a pollutant, the Court noted that a discharge consists of an addition of any pollutant to navigable waters from any point source. The Court stated, "the Clean Water Act gives the EPA jurisdiction to regulate and control only *actual* discharges, not potential discharges, and certainly not point sources themselves." *Slip op.* at 30 (citation omitted). In the Court's view, in the absence of an actual addition, point sources had no obligation to comply with EPA regulations relating to point sources or to seek or obtain an NPDES permit.

On April 14, 2005, the Environmental Petitioners filed a Petition for Panel Rehearing or Clarification seeking rehearing on the question of whether a Large CAFO with only the potential to discharge has a duty to apply for an NPDES permit. Environmental Petitioners contend that the Act authorizes EPA to regulate in order to prevent discharges, and to issue permits that require zero discharges. Environmental Petitioners also assert that the administrative record supports a presumption that Large CAFOs actually discharge.

Significantly, Environmental Petitioners argue that absent NPDES permits, Large CAFOs will determine their land application rates without first drafting a nutrient management plan. These CAFOs are likely to classify runoff from their fields as agricultural stormwater exempt from permitting requirement. The Environmental Petitioners request that the Court require all Large CAFOs to develop reviewable nutrient management plans rather than allow Large CAFOs with potential discharges to self regulate. Whether the Court over the vigorous objection of the Farming Petitioners will extend permitting requirements, or the obligation to develop a nutrient management plan, to potential dischargers that its initial opinion concluded were exempt from regulation remains for future decision.

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