



Defending Agriculture

Legal, environmental hot button issues that impact U.S. farmers.

Making a Federal Case out of Simple Farm Activities

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Something's in the air, and it's not good.

A Concentrated Animal Feeding Operation, according to Environmental Protection Agency, is a potential source of pollutants which includes dust, feed, litter or manure.

EPA, in guidance letters issued in 2009, claimed that feed, litter or dust released through confinement house ventilation fans is a pollutant if such material comes into contact with storm water and reaches a water of the United States.

This means any emission from your CAFO, which falls on the ground and is washed away by storm water requires a permit. STUNNING!

EPA's staff knows no limits when it comes to attempting to regulate air emissions from CAFOs. In 2008, EPA issued regulations claiming CAFOs that discharge or "propose to discharge" required a Clean Water Act NPDES permit. The National Pork Producers Council v. EPA case rebuked EPA's interpretation of its 2008 rules and said that EPA did not have the authority to regulate CAFOs until there was an actual discharge from the CAFO into a water(s) of the state or the United States.

So it is no surprise that EPA and its delegated states will attempt to regulate the dust, litter and other materials coming through CAFO ventilation fans. EPA, pursuant to its guidance letters of 2009, claims "Any point source discharge of storm water that comes into contact with these materials and reaches a water of the United States is in violation of the CWA..."

Delegated states such as North Carolina are claiming in a case involving a major egg producer that it has the authority under the CWA to regulate discharges that come through CAFO ventilation fans because the air in the ventilation fans may include feed, bedding, litter, feathers, particles and dust and that these pollutants pushed through the ventilation fans eventually end up in waters of the state.

North Carolina claims pollutants from CAFOs float into the air and the pollutants enter with ventilation fans and the fans subsequently spread pollutants throughout the local vicinity and fall to the ground. North Carolina further claims these pollutants fall into retention ponds, the pollutants may collect there and be discharged as storm water pollution.

North Carolina, like EPA, is claiming that air deposition of pollutants constitute discharges via atmospheric deposition to waters of the state.

If EPA and North Carolina are able to establish this position legally, then the spray drift from your spraying, the pollen from your corn, or the dust from your farming operation, if it falls into a nearby water of a state or the United States, is a violation of the CWA. And, you will be required to obtain a CWA permit!

Such an extension of EPA authority to regulate pollutants released into the air by agriculture will constitute an enormous expansion of EPA's authority over both CAFOs and tillage agriculture.

One court has said, "The fact that a pollutant might ultimately end up in navigable waters as it courses through the environment does not make its use a violation of the Clean Water Act...to so hold would bring within the purview of the Clean Water Act every emission of smoke, exhaust fumes or pesticides..."

Other courts have rejected EPA's and North Carolina's conclusion that air deposition of a pollutant into navigable waters would constitute a discharge into navigable waters.

One court has even stated such a conclusion would lead to irrational results. For example, if a court accepts EPA's and North Carolina's argument then it would be possible to regulate car emissions or diesel truck emissions because they end up in waters of the state or the United States.

As one court put it, regulating of such emissions exposes the "absurdity" of such a position.

Notwithstanding what the courts have upheld, EPA and North Carolina are attempting to enforce CWA NPDES permits on CAFO's emitting dust and litter from their ventilation fans if they fall into waters of the state.

In a March 4, 2009, letter, EPA's Region IV advised Perdue Farms that "all CAFOs must have permits prior to discharging pollutants and that 'pollutant' is defined broadly by the CWA and the regulations could include litter released through confinement house ventilation fans. North Carolina takes the position, in a recent case, that under its CWA authority, that a discharge into a water of the state "...occurs through the ventilation system."

The state further claims that such dust and other litter falls into a storm water pond and that water is discharged into waters of the state and as a result a CWA permit is required.

If EPA and North Carolina prevail with their position that air deposition of pollutants into waters of the state require a CWA permit, CAFO operations across the country will face another EPA regulatory permitting program. (*Disclosure: the author represents the CAFO in question in a North Carolina lawsuit.*)

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If EPA has its way, ordinary farm activity – including farm dust and pollen shed from a corn stalk – could violate the Clean Water Act.

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