



Rare Victory for Ag over EPA

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The Natural Resources Defense Council, Sierra Club, and Waterkeeper Alliance and the U.S. Environmental Protection Agency were defeated in part, in a Clean Water Act decision issued by U.S. Court of Appeals for the 5th Circuit on March 15th.

The National Pork Producers Council, American Farm Bureau Federation and several other major farm associations defeated EPA and the environmentalists on a Concentrated Animal Feeding Operations rule. Big victory for animal agriculture! Farm groups and their attorneys deserve our thanks.

Some history

EPA enacted its first CAFO regulation in 1976. EPA did not change its CAFO rules for 27 years until 2003. Later, after another EPA legal defeat, new EPA rules were issued for CAFOs in 2008.

The CAFO rule in 2003 required CAFOs to have a Clean Water Act permit whether or not they discharged into a navigable water of the United States. This rule was overturned. In addition, the 2003 rule created a mandatory duty for all CAFOs having a CWA permit to develop and implement a site-specific Nutrient Management Plan.

The 2003 rule also included an exclusion of agricultural storm water discharges resulting from land application. This is very important! The environmental groups claimed that the agricultural storm water runoff exemption was not exempt from regulation. A federal court disagreed.

After the 2003 rule was overturned in part, EPA took until 2008 to issue a revised CWA rule to regulate CAFOs. The new rule declared all CAFOs have a duty to apply for a CWA permit and that a CAFO operator "...can be held liable for failing to apply for a permit, in addition to being held liable for the discharge itself."

EPA rewrote the CWA!

The Decision

The court disagreed with EPA. The 5th Circuit said that in the absence of an actual addition of a pollutant to navigable waters from any point, there is no point source discharge, and therefore no obligation to seek or obtain a CWA permit.

Moreover, citing another Court of Appeals decision, it said "...without a discharge, the EPA has no authority and there can be no duty to apply for a permit." There is no "discharge" from agricultural storm water runoff under the CWA! States seem to forget this point.

More than 20 years ago, in a 1988 case, the District of Columbia Circuit Court of Appeals told EPA that the CWA "...does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants."

The 5th Circuit Court of Appeals asserts EPA can require discharging CAFOs to apply for a permit. As we know, discharging of a pollutant into a navigable water without a permit is unlawful, but EPA can impose a duty to apply on CAFOs that are discharging. This leaves open the question regarding whether EPA can force a CAFO to apply for a permit for agricultural storm water runoff. EPA is not able to require a permit in this situation.

The CWA is very clear on EPA's authorities and penalties. If a CAFO has a discharge into a navigable water, it certainly can face a civil suit for injunction, penalties, or even criminal charges. EPA can bring enforcement actions if water-quality effluent limitations are violated by a discharge or if a toxic and pretreatment effluent standard is violated or permit condition violated. However, as the 5th Circuit noted, "Notably absent from this list is liability for failing to apply for an NPDES permit."

EPA, for the first time in 2003, attempted to regulate CAFOs which did not discharge. This grab for power over agriculture has now been rejected by two federal courts. EPA has failed in its attempt to rewrite the Clean Water Act and create new liability provisions for livestock producers.

There is some bad news in this case which has been discussed very little. The farm petitioners raised the issue of EPA's authority over land application and argued that EPA's 2003 requirement that all NMPs address protocols for land application exceeded EPA's statutory authority.

The 2003 rule established a mandatory duty that all CAFOs "applying for a permit" need to develop an NMP which requires Best Management Practices (BMPs). The BMPs are designed to ensure adequate storage and management of manure and wastewater plus how to handle land application. The 2nd Circuit ruled that EPA must incorporate the NMPs into each CAFOs permit. The farm petitioners really were challenging a requirement promulgated in 2003 and the 5th Circuit Court ruled that the farm petitioners did not challenge the NMP provision within the appropriate statute of limitations.

Poultry petitioners also lost their challenge regarding three guidance letters, not regulations, that claim poultry producers must apply for CWA permits if they release dust from their facilities through ventilation fans. The court dismissed the poultry petitioners' claim because they were challenging guidance documents vs. final regulations. This issue will surely be litigated by producers in the future.

The loss on these two issues does not take away from the CAFO victory achieved by agricultural associations and their attorneys.

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