INSIDE

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

Federal regulation of AFOs: the meaning of discharge

A previous discussion of animal feeding operations (AFOs) that will be considered to be a concentrated animal feeding operation (CAFO) subject to the point source pollution regulations of the Clean Water Act has generated a debate as to the meaning of the regulatory qualification concerning discharges. 16 *Agricultural Law Update* 3 (May 1999).

Appendix B defines two alternative directives to establish criteria as a CAFO. 40 C.F.R. § 122, Appendix B. The first alternative, directive (a), is based on animal units with a benchmark of 1,000 animal units. Directive (a) does not address discharges. This suggests that regardless whether there is or is not a discharge, AFOs with more than 1,000 animal units are considered to be CAFOs under directive (a).

The second alternative, directive (b), is based on a benchmark of more than 300 animal units and pollutant discharges. Since directive (b) is an alternative to directive (a), the assumption has been made that directive (b) applies to AFOs with 301–1,000 animal units. AFOs with 301–1,000 animal units may be a CAFO under two enumerated conditions, both of which involve discharges.

After delineating the criteria for the two directives, Appendix B delineates a "Proviso" stating: "Provided, however, that no animal feeding operation is a concentrated animal feeding operation as defined above if such animal feeding operation discharges only in the event of a 25 year, 24-hour storm event." 40 C.F.R. § 122, Appendix B.

The question is whether the Proviso serves as a qualification only for AFOs with discharges or whether an AFO needs to be discharging before it is a CAFO.

Qualification regarding design criteria

In the May *Agricultural Law Update*, it was stated that if an AFO with less than 1,000 animal units discharges wastes only in the event of a 25-year, 24-hour storm event, it would not constitute a CAFO required to have a National Pollutant Discharge Elimination System (NPDES) permit. Implied in this statement is the conclusion that AFOs with more than 1,000 animal units were CAFOs regardless of

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Federal courtfinds that CFTC cannot force newsletter publishers to register as commodity trading advisors

The United States District Court for the District of Columbia on June 21, 1999 found that the Commodity Futures Trading Commission could not require newsletter publishers to register as commodity trading advisors under the Commodity Exchange Act's registration requirements. U.S. District Judge Ricardo M. Urbina concluded that the registration requirement, as applied by the CFTC, imposed a ban on the "publishing of impersonal commodity futures trading advice" which constituted "an impermissible prior restraint upon the exercise of free speech and runs afoul of the First Amendment of the United States Constitution."

The plaintiffs in the federal lawsuit were described as companies "who publish books, newsletters, Internet websites, detailed written instruction manuals (known in the industry as "trading systems"), and computer software that provide information, analysis, and advice on commodity futures trading." The court found that the

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whether they discharged.

Such an interpretation treats the Proviso as a design criteria qualification regarding discharges. The qualification means that an abnormal discharge from an atypical storm event would not constitute a discharge within the meaning of Appendix B. More specifically, any discharge from an AFO with 301—1,000 animal units that only occurs in the event of a 25-year, 24-hour storm event would not elevate the AFO to a CAFO under the federal regulations. Such an interpretation is suggested on a web site maintained by the EPA Office of Enforcement and Compliance Assurance < *http://es.epa.gov/oeca/strategy.html* >.

Required discharge

Experienced counselors argue that there is no indication that the Proviso was not to apply to both directives. Under this interpretation, an AFO with more than 1,000 animal units must have a discharge beyond a discharge from a 25-year, 24-hour storm event before the AFO would meet the definition of a CAFO.

The interpretation applying the Proviso to directives (a) and (b) would mean that AFOs with thousands of animal units would not necessarily need a permit under the Clean Water Act.

The federal position

Communications with officials in the USDA and EPA have not yielded a common response to the meaning of the Proviso. Since the EPA is charged with enforcing the Clean Water Act, its interpretation of the Proviso is critical. However, the EPA does not seem to be consistent in its interpretation of the Proviso. Indeed, the EPA's "Guide Manual of NPDES Regulations for Concentrated Animal Feeding Operations" suggests that AFOs with more than 1,000 animal units are not CAFOs if they discharge only in the event of a 25-year, 24-hour storm (p. 16, EPA 833-B-95-001, December 1995). The EPA may re-address the interpretation of the Proviso in the near future.

Meanwhile, AFOs with more than 1,000 animal units that do not discharge may be regulated under state law. Moreover, although the Clean Water Act has the federal government directly regulating point source pollution, the CWA still applies to nonpoint sources. *Miccosukee Tribe of Indians v. United States*, 1998 U.S. Dist. LEXIS 15838 (Sept. 14, 1998). Counselors may desire to caution several thousand AFO operators that state and federal CAFO regulations are subject to change.

— Terence J. Centner, The University of Georgia, Athens, GA

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Commodity Exchange Act's provisions [7 U.S.C. §§ 1a(5) and 6m(1)] would have required each of the plaintiffs to register as commodity trading advisors because the furnishing of commodity trading advice was their primary business or profession.

The statutory penalties for failing to register include possible conviction of a felony punishable by fines of up to $500,000 and/or up to five years imprisonment.

The CFTC argued that the registration requirement constituted a permissible regulation of a profession, and that the application of the statute and CFTC regulations did not run afoul of the Constitution. Registration as a commodity trading advisor under the CFTC's regulations includes filing an application with the National Futures Association and paying an annual fee. Additionally, registrants are required to attend initial and ongoing ethics training, maintain books and records which are subject to CFTC inspection, and file reports as directed by the CFTC.

Judge Urbina noted that "the plaintiffs here never engage in individual consultations with their customers regarding their standard advice and recommendations and under no circumstances do they make trades for their customers." Consequently, the court found "that the CFTC's application of the CEA's registration requirement to the plaintiffs in this case constitutes an attempt to regulate speech, not a profession."

The court's opinion in *Taucher v. Brooksley E. Born, et al.*, can be accessed from the following Internet site: *http://www.ij.org/cftc/*.

—David C. Barrett, Jr.
Washington, D.C.

21st Century Ag Commission schedules public listening sessions

Six public listening sessions to obtain stakeholder input on the future of U.S. agricultural policy after 2002 have been announced by the Commission on 21st Century Production Agriculture. The commission is charged under the 1996 farm law with providing recommendations to Congress on the future direction of U.S. agricultural policy.

The sessions are intended to provide the commission, which is chaired by Dr. Barry L. Flinchbaugh of Kansas State University, Manhattan, KS, with input from all sectors of agriculture. "It is imperative that we, in developing future policy options for agriculture, gather as much input as possible for those who will be affected by those policies," Flinchbaugh said. He said the commission is seeking input on farm policy issues that need to be addressed, as well as views on those current policies that are working and those that are not.

The schedule for the meetings is as follows:

Aug. 12: Fresno, CA
Aug. 14: Spokane, WA
Aug. 16: Denver, CO
Sept. 21: Chicago, IL
Sept. 23: Montgomery, AL
Sept. 25: Scranton, PA

Those wishing to register for the meetings may do so by visiting the commission's website: *http://www.agcommission.org*. The deadline for signing up for the September listening sessions is September 3.

—Reprinted from the July 15, 1999 NGFA Newsletter

STATE ROUNDUP

PENNSYLVANIA. The facts in *Daniel Horne v. George A. Haladay, et al.*, Pennsylvania Superior Court, No. 324 Harrisburg, 1998, 1999 WL 170801 (Pa. Super.), March 30, 1999, were as follows: The Haladays own land in Columbia County on which they operate a poultry business. Daniel Horne is an adjoining property owner who owned the property prior to establishment of the Haladay poultry business. In November, 1993, the Haladays stocked their poultry house with 122,000 laying hens. The facility remained unchanged except for the construction of a decomposition building for waste, including dead chickens, which was built in August, 1994.

Daniel Horne complains that the Haladays' operation of the poultry business interferes with the use and enjoyment of his own property in several ways: (1) it creates an excessive amount of flies; (2) it creates a strong odor; (3) it creates excessive noise that can be heard at all hours of the day and night, and (4) it allows eggshells, feathers, and dead chickens to enter his property. As a result of these interferences and the Haladays' unreasonable performance, Horne alleged that the value of his home decreased by $60,000.

Horne started his action against Haladay by writ of summons filed on November 21, 1995. Subsequently a complaint was filed to which preliminary objections were filed. An amended complaint was filed basing the cause of action on the same set of facts and alleging liability based in nuisance and in negligence. The Haladays answered Horne's complaint by alleging that in operation of the farm, they exercised reasonable care to minimize the flies, odors, waste, and noise, and that their disposal methods for waste, including eggshells, feathers, and dead chickens, were proper methods. In addition, the Haladays alleged that Horne's claims were barred by reason of Pennsylvania's Protection of Agricultural Operations From Nuisance Suits and Ordinances Law, commonly referred to as the "Right to Farm" Act, as it existed prior to its 1998 amendments. Pa. State. Ann. tit. 3 §§ 951-957.

In the trial court, the Haladays moved for summary judgment. Horne did not respond to the motion or schedule any additional discovery. After the trial court granted the Haladays' motion for summary judgment on the nuisance and the negligence claims, Horne appealed that decision.

The issue was seen as: is a farming operation that has been in operation in a substantially unchanged condition for more than one year before a private nuisance complaint is raised against it by an adjoining property owner who has owned property in the area before the agricultural operation began covered by the Pennsylvania "Right to Farm" law if there is no proof that the farming operation has violated any federal, state, or local statute, law, or ordinance?

The general standard of review on the appeal of a grant of summary judgment is well settled in that summary judgment is proper when there exists no genuine issue of material fact that the party seeking the judgment is entitled to it as a matter of law. All doubts are resolved against the moving party and the record at trial is examined in a light most favorable to the non-moving party.

As to the nuisance claim, the court noted that the "Right to Farm" law in place at the time of this action required complaining parties to file their nuisance actions within one year of inception of an agricultural operation or within one year of a substantial change in that operation, or the complaint must be based on a violation of any federal, state, or local statute or regulation. § 954(a)(b). If the construction of the decomposition house in August, 1994 is considered a substantial change, Horne's write of summons was filed more than one year after the changed facility was operating.

Horne argued that the Right to Farm Law did not apply as he is a rural property owner making a residential use of his land prior to the Haladays' establishing a poultry operation in that area. Horne referred to the legislative policy of the Act, which states that the Act is intended to conserve and protect and encourage the development and improvement of agricultural land for production of food and other agricultural products. As the policy states, "…when non-agricultural uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits and ordinances." § 951. Horne's argument seems to be that a precondition to protection under the Act is extension of non-agricultural uses into agricultural areas (*see Herrin v. Oppatut*, 248 Ga. 140, 281 S.E.2d 575 (1981) which interprets the Georgia Right to Farm Law).

In rejecting Horne's argument, the court emphasized that the policy of the Act is to encourage the development of agricultural land that is consistent with the terms of the Act, i.e., in compliance with federal, state, and local statues and regulations.

Horne also argued that the "Right to Farm" does not extend protection to private nuisance complaints as the heading of section 954 states, "Limitation on Public Nuisances." The court noted that despite the heading language, the text of section 954(a) starts, "No nuisance action shall be brought…." Nowhere else in the text of the statute is a reference to a distinction between public and private nuisances in terms of whether the Act extends to them. Basing its decision on the operative words in the statute, rather than the section headings, the court concluded that the Act is not ambiguous and applies to all types of nuisance suits and ordinances.

Horne further argued that the Act does not bar nuisance causes of action as the Haladays operation has not been "lawfully" in operation for one year prior to the date of Horne's suit. Horne filed no response to Haladays' motion for summary judgment and took no further action to raise issue with performance of Haladays' operation. The only evidence that Horne submitted in support of this claim was a reference to the fact that the Haladays' farm was inspected by representatives of the Department of Environmental Protection and the Department of Agriculture. The Court noted that although this statement is made, the record does not indicate whether the Haladays were cited for failing to conduct their business in a lawful manner. Based on the review of this record, the court concluded that there is simply no evidence in the record that would raise a genuine issue of material fact regarding whether the Haladays operated their facility in an illegal manner. Therefore, the court concluded that the lower court did not err in granting the summary judgment.

As to Horne's negligence theory of liability, which would not protected by the "Right to Farm," the court noted that while nuisance is legally distinguishable from negligence, the distinction did not enable Horne to proceed with suit in this case. The court observed that the exact same facts support both Horne's nuisance and negligence claims and, in its opinion, Horne's negligence claim is really a nuisance claim that is time-barred by the "Right to Farm."

The court affirmed the grant of the summary judgment order.

—John Becker, Penn State University

EPA's Livestock Strategy in the context of state programs and judicial decisions

By Theodore A. Feitshans and Brandon A. King

Introduction

On March 9, 1999, the U.S. Department of Agriculture (USDA) and the U.S. Environmental Protection Agency (EPA) issued the final Unified National Strategy for Animal Feeding Operations (Livestock Strategy) *<http://www.epa.gov/owm/finafost.htm#1.0>*, after extensive public comment. The final Livestock Strategy is not a new regulation, changes no existing regulations, and is not binding upon USDA, EPA, the states, local governments, or livestock farms. Nonetheless, the final Livestock Strategy is an important policy statement that defines the USDA and EPA interpretation of existing laws and regulations and the overall regulatory approach that the livestock industry can anticipate.

The final Livestock Strategy does not cover livestock grazing on pastures, fields or rangeland. The final Livestock Strategy addresses only those animal or poultry farms where the animals or poultry are concentrated and the feed is mostly brought to the animals or poultry. The purpose of the final Livestock Strategy is to minimize water pollution from livestock and poultry farms while promoting the economic vitality of the livestock and poultry industries. The key to achieving this goal is the development of a technically sound, economically feasible, and site-specific Comprehensive Nutrient Management Plan (CNMP) for each livestock or poultry farm. For the majority of livestock and poultry farms, the USDA and EPA envision that development of CNMPs will be voluntary, with farmers encouraged to develop the plans through a combination of education and financial incentives. For large livestock and poultry farms, however, these plans will be a mandatory part of the existing concentrated animal feeding operation (CAFO) permit process. These federal regulations do not preempt state and local regulations that are more stringent. If adopted as envisioned, the final Livestock Strategy has the potential to reduce the CAFO litigation currently before federal and state courts.

Federal CAFO regulations

The federal regulations under the Clean Water Act that govern livestock operations were recently discussed in the *Agricultural Law Update.* Terence Centner, *Federal regulation of concentrated animal feeding operations,* 16 Agricultural Law Update 3 (May, 1999). To summarize, 40 CFR §122.23 defines CAFOs. Under 40 CFR §122.1, CAFOs are by definition point sources of surface water pollution that require permits under the National Pollutant Discharge Elimination System (NPDES) Program. All other animal operations are considered nonpoint sources not regulated under the NPDES Program. These operations are regulated, if at all, by the states. States are encouraged to adopt their own NPDES programs that may be more stringent than the federal. 40 CFR §§ 122.1(c)&(f). An applicant under the NPDES Program must use a form approved by the EPA or the state, if in a state with a delegated program; meet various technical requirements; and cooperate in public participation in the permit issuing process. 40 CFR §§122.1(d)&(e).

An animal feeding operation is defined as a CAFO if it meets any of the definitions in 40 CFR §122.23 and Appendix B of Part 122. Under 40 CFR §122.23(b) an animal feeding operation is a CAFO if the animals are "stabled or confined and fed or maintained" for 45 days or more out of any 12 month period, vegetation is not maintained during the normal growing period in the area of confinement, and the criteria in 40 CFR §122, Appendix B are met. Operations under common ownership are considered a single unit if they are adjacent.

Appendix B has two parts. Section (a) lists numbers of animals for most species of livestock and poultry that constitute a CAFO unless it is demonstrated that the "animal feeding operation discharges only in the event of a 25-year, 24-hour storm event." Section (b) applies to animal feeding operations where there are fewer animals or poultry but it is demonstrated that waste discharges to surface waters through a man-made conveyance or by direct contact of the animals or poultry with the water. All species are considered together using conversion factors in the regulation to determine whether the threshold numbers of sections (a) or (b) are met.

The EPA may also determine, on a case by case basis, that smaller animal feeding operations are CAFOs where it is determined that the animal feeding operation is a significant contributor to pollution of waters of the United States. 40 CFR §122.23(c). In order to make this determination, the EPA (or the state to which the program is delegated) must determine that waste is conducted to waters of the United States through a man-made conveyance or by direct contact of the animals with water. Such a determination must be made by an onsite inspection.

Given the complexity of the CAFO regulation it is not surprising that there should be disagreement about coverage of the rule. According to the *Update* article referred to above, there are currently issued about 2,000 NPDES permits (state and federal) for CAFOs out of a total of 10,000 animal feeding operations with more than 1,000 animal units. Under North Carolina's nondischarge program there are 2,714 permitted livestock facilities. N.C. Department of Environment and Natural Resources, July 1999. Of this total, 2,386 are for swine farms with 1,383 having a permitted capacity (actual numbers of swine at some facilities may be below permitted capacity) in excess of 2,500 swine. (2,500 swine is the cutoff under Appendix B(a) of Part 122.) These facilities currently have no NPDES permits. If other state data show similar patterns, this suggests that national data may substantially underestimate the number of animal operations that meet the definition of a CAFO under Appendix B(a). There are also likely additional operations that may meet the definition of a CAFO under Appendix B(b) or upon inspection on a case by case basis.

State programs

North Carolina is among the many states that have developed more stringent regulatory programs for livestock and poultry farms. Although North Carolina has a state NPDES program, CAFOs are regulated under its non-NPDES nondischarge program. North Carolina, with exceptions noted under the section on cases, does not issue NPDES permits to CAFOs. Under North Carolina's program, swine farms with 250 or more head are regulated. Numbers for other species of livestock and poultry are similarly lowered from the requirements in the

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federal CAFO program. In 1996 the General Assembly addressed livestock farm issues through the passage of Senate Bill (S.B.) 1217. S.B. 1217 amended requirements that restrict where new or expanded swine farms, lagoons, and spray fields can be sited, and rewrote requirements for animal waste management plans for certain livestock and poultry farms. S.B. 1217 also required certification of operators of animal waste management systems on livestock and poultry farms covered by the law. In 1997 the General Assembly passed House Bill (H.B.) 515 which further tightened swine farm siting requirements. H.B. 515 removed large swine farms from the agricultural exemption from county zoning. All other farms remain exempt from county zoning; however, no farm is exempt from municipal zoning either within corporate limits or within the extraterritorial zoning jurisdiction of municipalities. Importantly, H.B. 515 placed a moratorium on the construction or expansion of most swine farms. There is an exception for farms that use qualifying, innovative technologies. H.B. 515 also mandated a graduated violation point system for swine farms, and required a report on best management practices for controlling odor from livestock and poultry farms.

H.B. 1480, passed in 1998, extended the moratorium on new swine farm construction or expansion through September 1, 1999. H.B. 1480 modified the definition of innovative technologies under which new or expanded swine farms may be exempt from the moratorium. H.B. 1480 also required that swine farmers register each integrator with whom they have a contract, and that each such integrator be given notice of any farmer violation. On July 21, 1999, the General Assembly passed H.B. 1160 that extended the moratorium through September 1, 2001. H.B. 1160 also extended and expanded an existing pilot program for inspection of animal waste management systems, increased civil penalties, and required violators to make public notification of certain releases of animal waste. H.B. 1160 also directed the Department of Environment and Natural Resources to complete an inventory of inactive lagoons by March 1, 2000.

The N.C. Environmental Management Commission adopted temporary *Odor Rules for Animal Operations* on February 11, 1999, with an effective date of March 1 <*see http://daq.state.nc.us/Rules/Adopted/*>. The permanent draft rule is available for review <*http://daq.state.nc.us/Rules/Draft/*>.Under the temporary rule, the Department of Environment and Natural Resources, Division of Air Quality, is empowered to respond to complaints about odor from animal and poultry farms, and to require best management practices to reduce objectionable odors. Under the permanent draft rules, if adopted, all livestock and poultry farms covered under the rules would be required to submit an odor management plan to the Division of Air Quality. The Division of Air Quality has indicated flexibility in enforcing the temporary Odor Rules where producers can document that particular requirements are problematic for their situations. Interested persons should contact the division for details.

The Governor of North Carolina proposed conversion of anaerobic swine waste lagoons and spray fields to new technologies. This proposal can be found at <*http://www.state.nc.us/EHNR/files/hogs/hogplan.htm*>. While some of the elements of this proposal may be implemented administratively, most of the proposal will require action by the General Assembly. The General Assembly did not pass the legislation needed to fully implement the Governor's program during the recently completed 1999 session; however, it did extend existing pilot programs designed to address the issue. H.B. 1160, 1999.

Information on the North Carolina and other state programs may be found in *State Compendium: Programs and regulatory activities related to animal feeding operations*, (EPA) August 1999. This massive work (399 pages) contains information about the regulation of animal feeding operations in all 50 states, Puerto Rico, and the Virgin Islands. The work is not intended to be comprehensive. Some of the material is several years old and there are minor errors (such as in the names of state agencies); nonetheless, it is a valuable reference for anyone interested in state approaches to animal feeding operations. The *Compendium* may be found in pdf format on the EPA website at < http://www.epa.gov/owm/afo.htm>.

According to the *Compendium* there are 43 states with authorized state programs. The EPA identified 5 regulatory approaches that states use: federally administered NPDES programs, federally administered NPDES and state administered non-NPDES programs, state administered NPDES programs, state administered NPDES and state administered non-NPDES programs, and state administered non-NPDES programs. Of the 7 states not authorized to administer the NPDES program, 4 rely solely on the federal NPDES program to address CAFOs and 3 have non-NPDES programs addressed to CAFOs in addition to the federally administered program. Eight states regulate CAFOs solely under their state NPDES programs. Three states that have NPDES authority regulate CAFOs solely under state non-NPDES programs. Thirty-two states regulate CAFOs under state NPDES and state non-NPDES programs.

Court decisions

Citizen suits to address CAFO-related issues may be brought under section 505 of the Clean Water Act:

> [A]ny citizen may commence a civil action on his own behalf-
> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

33 U.S.C. §1365(a)

Before any action is commenced, section 1365(b) requires 60-day notice to the EPA Administrator, the state where the violation is located, and the alleged violator. Where the EPA or the state has already begun a compliance action, no citizen suit may be filed; however, any citizen may intervene as of right. For a person to have standing to file suit or intervene, that person must have "an interest which is or may be adversely affected." 33 U.S.C. §1365(g).

Citizen groups seeking jurisdiction under section 505(a)(1) and (2) to contest EPA's management of delegated state animal feeding operation programs have not received a favorable response in the courts. Section (a)(1) requires a violation of the Clean Water Act to support jurisdiction; mere "maladministration" by EPA is insufficient to support jurisdiction. *Cross Timbers Concerned Citizens v. Saginaw*, 991 F. Supp. 563, 1997 U.S.

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Dist. LEXIS 20346, at **8 (N.D. Tex. 1997). There is jurisdiction under section (a)(2) only where EPA's duty is nondiscretionary. *Cross Timbers Concerned Citizens v. Saginaw*, at **568-**570. As to state agencies, only section (a)(1) confers jurisdiction over violations by state agencies and that jurisdiction is expressly limited by the eleventh amendment to the Constitution. *Froebel v. Meyer*, 13 F. Supp. 2d 843, 1998 U.S. Dist. LEXIS 12085, at **17-**20 (E.D. Wis. 1998). Nonetheless, even in the current post-*Seminole* (*Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L. Ed. 2d 252 (1996)) environment at least one court has upheld the continued viability of jurisdiction over state officials in Clean Water Act citizen suits under the Ex parte Young exception. *Froebel v. Meyer*, at **24-**40.

The duty of the EPA, under the Clean Water Act, to regulate all discharges, through the NPDES permit program is well established. *American Mining Congress v. EPA*, 965 F.2d 759, 1992 U.S. App. LEXIS 11656 (9th Cir. 1992); *Natural Resources Defense Council, Inc. (NRDC) v. Costle*, 568 F.2d 1369, 1977 U.S. App. LEXIS 6029 (D.C. Cir. 1977). Nonetheless, it is within the discretion of EPA to use a general NPDES permit program rather than an individual NPDES permit program to regulate CAFOs:

> There is also a very practical difference between a general permit and an exemption. An exemption tends to become indefinite: the problem drops out of sight, into a pool of inertia, unlikely to be recalled in the absence of crisis or a strong political protagonist. In contrast, the general or area permit approach forces the Agency to focus on the problems of specific regions and requires that the problems of the region be reconsidered at least every five years, the maximum duration of a permit.

NRDC v. Costle, at **36.

There are limits, however, to regulation under the NPDES program. Emissions to air that ultimately reach surface waters are outside the scope of the NPDES program. *Chemical Weapons Working Group, Inc. v. U.S. Department of the Army*, 111 F.2d 1485, 1997 U.S. App. LEXIS 7926 (10th Cir. 1997). Cattle on pasture or ranchland are not included in the definition of a CAFO. *Oregon Natural Desert Association v. Dombeck*, 172 F.3d 1092, 1998 U.S. App. LEXIS 38314 (9th Cir. 1998); *see*, *United States v. Plaza Health Laboratories, Inc.*, 3 F.3d 643, 1993 U.S. App. LEXIS 22414 (2d Cir. 1993). Whether EPA can regulate discharges to groundwater, even where the groundwater is hydrologically connected to surface water, under the NPDES program is a source of disagreement. *United States v. Conagra*, 1997 U.S. Dist. LEXIS 21401, at *7-88 (D. Idaho 1997); *Umatilla Water Quality Protective Association, Inc. v. Smith Frozen Foods, Inc.*, 1997 U.S. Dist. LEXIS 16458 (D. Or. 1997).

The distinction between a point source of surface water pollution and a nonpoint source has been a source of conflict since the inception of the NPDES program. Point sources are easily identified concentrated sources of water pollution while nonpoint sources are more difficult to identify, diffuse sources of water pollution. Although the distinction is arbitrary, the consequences are enormous. Livestock farms that are nonpoint sources of water pollution are regulated through North Carolina's nondischarge permitting program. Very small livestock farms are deemed permitted and, as a practical matter, face very little regulation. These farms may be required to develop an animal waste management plan described above. Livestock farms that are point sources of water pollution must apply to the N.C. Department of Environment and Natural Resources (DENR) for a National Pollutant Discharge Elimination System (NPDES) permit.The *Compendium*, referenced above, describes the regulatory environment in the other states. Compared to North Carolina's nondischarge permitting process and the regulatory approaches used in many other states, the NPDES permitting process can be lengthy and expensive for both technical and procedural reasons. Before a state or EPA can issue an NPDES permit it must invite public comments on the terms of the proposed permit. Historically most livestock and poultry farmers assumed that, at worst, they were nonpoint sources of water pollution.

Courts have consistently found farmers mistaken in this assumption. In *Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055, 1991 U.S. App. LEXIS 9829 (5th Cir. 1991), the Fifth Circuit reversed the district court and allowed a citizen suit to continue against Alta Verde, the operator of a 20-30 thousand head feedlot. Alta Verde made several discharges in violation of the Clean Water Act prior to filing of the plaintiff's suit. The district court found as fact that although Alta Verde had since improved its waste management system, that it could not guarantee that no discharge, except for 25-year, 24-hour storm event, would occur in the future. Since Alta Verde could not prove that it would have no future discharges, the Fifth Circuit held that it did not meet the EPA's effluent limit for animal feeding operations, 40 CFR §412. The Fifth Circuit concluded that Alta Verde was a CAFO required to have a NPDES permit. Applying the Supreme Court's holding in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 US. 49, 108 S. Ct. 376, 98 L. Ed. 306 (1987), the Fifth Circuit held that the plaintiffs had standing to bring a citizen suit under the Clean Water Act both because the lack of a NPDES permit was a violation that continued after the suit was filed, and because Alta Verde might "continue to discharge in intermittent or sporadic episodes." *Carr v. Alta Verde Industries, Inc.*, at **13-**31.

In an expansive 1994 decision, the Second Circuit reached a conclusion similar to that reached by the Fifth Circuit. In that decision, *Concerned Area Residents for the Environment v. Southview Farm (Southview),* 34 F.3d 114, 1994 U.S. App. LEXIS 24248 (2d Cir. 1994), *cert. denied*, 1995 U.S. LEXIS 2889 (U.S. April 24, 1995), the Second Circuit held that Southview Farm, a large, upstate New York dairy, was a CAFO for which a NPDES permit was required. The Second Circuit reversed a district court decision setting aside a jury verdict finding that Southview Farm had five violations of the Clean Water Act. The Second Circuit held that manure that is diffuse runoff but which is subsequently channeled through a man-made conveyance such as a pipe can constitute a discharge by a point source. *Southview*, at **14-**15. The court also characterized liquid-manure-spreading vehicles as mobile point sources. *Southview*, at **14-**15. The Second Circuit held that juries may base their finding of a point source discharge on circumstantial evidence. *Southview*, at **18-**21.

Two recent district court cases addressing the CAFO issue have cited *Southview* favorably. In December, 1998, the U.S. District Court for the Eastern District of North Carolina applied *Southview* at the preliminary injunction stage in a case brought against a North Carolina hog farm. In *American Canoe Association, Inc. v. Murphy Farms, Inc.*, the Eastern District found that the hog farm subject of the lawsuit was a CAFO and required the defendants in the case to apply to DENR for a NPDES permit. One issue raised by the defendants was DENR's policy against issuing NPDES permits to livestock and poultry farms; however, the court noted in a footnote to its decision that DENR has agreed with EPA to issue NPDES permits to livestock and poultry farms. The district court noted that there had been at least two unauthorized discharges of swine waste

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into waters of the United States. *American Canoe Association, Inc. v. Murphy Farms, Inc.,* at *3-*4.

In *Community Association for Restoration of the Environment (CARE) v. Sid Koopman Dairy,* 1999 U.S. Dist. LEXIS 8348, at *5-*13 (E.D. Wash. 1999), the district court granted summary judgment for the plaintiffs on the issue of whether the defendants were CAFOs that require NPDES permits. The court noted that a broad definition of a point source should be applied but reserved for trial the issue of "the extent to which the Defendants [sic] lands, the operation of the facilities and the actions of the manure-spreading equipment are point sources." *CARE v. Sid Koopman Dairy*, at *13. The court also reserved for trial the issue of the extent to which drains, ditches and canals that eventually drain to the Yakima River are waters of the United States regulated under the Clean Water Act. *CARE v. Sid Koopman Dairy*, at *13-*14. On another threshold issue, the court held that plaintiffs may enforce Washington's effluent limits even though the Washington statute contains no private right of action. *CARE v. Sid Koopman Dairy*, at *14-*15. The court also addressed the applicable statute of limitations under the Clean Water Act. *CARE v. Sid Koopman Dairy*, at *16-*17.

Two other cases are worth noting. In *Texas Natural Resources Conservation Commission v. Accord Agriculture, Inc.,* 1999 Tex. App. LEXIS 4472 (Tex. Ct. App. 1999), the Texas Court of Appeals affirmed a lower court decision invalidating the state CAFO rules as unsupported by reasoned justification. In *Prestage Farms, Inc. v. The Board of Supervisors of Noxubee County, Mississippi*, 1998 U.S. Dist. LEXIS 16335 (N.D. Miss. 1998), a federal district court granted a preliminary injunction against the enforcement of local swine farm ordinances based upon due process and other grounds. These two cases illustrate some of the hurdles that states and particularly local governments face in developing rules to regulate the livestock industry.

Conclusion

The first key issue in regulating animal feeding operations is the definition of a discharge. Technically there is no bright line between a point source and a nonpoint source of water pollution; the distinction is a legal fiction. This is a source of difficulty for nondischarge non-NPDES programs such as those of North Carolina and thirty-seven other states. (Only six states rely solely on non-NPDES programs.) Non-NPDES programs rely on the assumption that the livestock farms regulated under those programs are not CAFOs. This is particularly problematic where the livestock farms regulated have animal numbers in excess of those listed in 40 CFR part 122, appendix B(a). For such a farm not to be a CAFO, it must be able to prove that no discharge occurs except in the event of a 25-year, 24-hour storm event. Given the sensitivity of modern detection equipment that can detect pollutants at parts per trillion or lower, this standard may be impossible to meet, if it is indeed the standard for a discharge under Appendix B of part 122. Such a standard would as a practical matter define all sources of water pollution as point sources. This result is contrary to judicial interpretation of the Clean Water Act that holds that the NPDES program does not apply to nonpoint sources. *Oregon Natural Desert Association v. Dombeck*, at *9. Nonetheless, the difficulty in defining the distinction between point and nonpoint sources remains. EPA's Livestock Strategy addresses but does not resolve this issue.

The second key issue in defining NPDES programs for animal feeding operations is to set the scope of the program in terms of which farms to include. This issue overlaps with the first since one can choose to limit the scope of the NPDES program to those farms for which regulation under the NPDES program is required by the Clean Water Act. At the other extreme one can regulate virtually all livestock farms under individual permits as has been suggested by the Environmental Defense Fund (EDF) for North Carolina swine farms. <*http://www.hogwatch.org/resourcecenter/onlinearticles/phaseout/execsummary.html*> While a program of individual NPDES permits for all or nearly all livestock producers would provide the highest level of regulatory oversight, the public has not indicated a willingness to pay for the cost of such a program, and the current low (or nonexistent) profit margins in the livestock industry mean that taxing the industry to support such a program is neither economically nor politically feasible. Furthermore, it is far from clear that such intensive regulation of the livestock industry is the most cost-effective way to produce improvements in surface water quality.

EPA's Livestock Strategy, at 24, implies that the costs associated with an individual NPDES program can be avoided by moving toward a general NPDES permit program for most animal feeding operations. It is EPA's goal to encourage the states to develop these general permit programs as delegated state programs. While this is a useful step toward reducing the cost of compliance for both regulators and the regulated community, a third key issue remains. Under the terms of EPA's effluent guidelines, 40 CFR §412, CAFOs regulated under either general or individual permits may not discharge. Unless the definition of a discharge can be better defined, all CAFOs permitted under either general or individual permits are at risk of citizen suits and the costs associated with litigation. Despite this difficulty, delegated general NPDES permit programs have a major advantage over any general or individual NPDES programs administered directly by EPA. States may use separate state authority to incorporate odor control, air pollution prevention, vermin (such as flies) control, and groundwater protection into an integrated permit program whereas EPA is limited to that authority contained in the Clean Water Act. For such a program to work states must have such authority; however, most states do and those that do not can enact such authority. The advantage to livestock producers is that they can obtain one permit from one agency rather than multiple permits from multiple agencies. In this regard it is essential that EPA's CNMPs be coordinated with existing mandatory and voluntary state programs.

Despite its flaws, EPA's Livestock Strategy is a useful attempt to address surface water pollution from animal feeding operations. The emphasis on voluntary programs will be particularly productive in reducing water pollution if EPA can better define the boundaries of its mandatory programs so that producers can participate in voluntary programs without fear that such participation will bring regulatory scrutiny upon them.

A step in this direction is EPA's Clean Water Act (CWA) Compliance Audit Program (CAP) for pork producers. The CWA CAP was established as a result of an agreement between the EPA and the National Pork Producers Council (NPPC). Its purpose is to offer independent, voluntary audits to pork producers to help them comply with the CWA. If violations of the CWA are found as a result of these audits, pork producers have 120 days to report them to EPA and then correct them within a specified time in order to avoid penalties. Note that avoidance of state penalties for violations found as a result of these audits are dependent on provisions of state programs. Many states including North Carolina waive or reduce penalties for prompt self-reporting of most violations. Information on the CAP may be found at *http://es.epa.gov/oeca/ore/porkcap/factsh.html*, or by calling the EPA Region 4 office at (404) 562-9900.