ABSTRACT: Many owners and operators of concentrated animal feeding operations (CAFO) need to secure National Pollutant Discharge Elimination System permits from the federal or state permitting authority. Because of the expense and inconvenience of permit applications, farm groups have challenged revisions to the federal CAFO Rule as well as state regulations claiming selected provisions exceeded the authority of the permitting agency. In 2011, 2 courts responded with decisions that clarify federal and state permitting regulations. Another goal of agricultural groups is to change the regulatory authority of the state from an environmental agency to a department of agriculture. These developments suggest that by altering the permitting authority, CAFO owners and operators may alleviate some of the burdens of the permitting process.

Key words: concentrated animal feeding operation, manure application, National Pollutant Discharge Elimination System permit, regulation, water pollution

INTRODUCTION

In an attempt to meet congressional directives to protect water quality, the US Environmental Protection Agency (EPA) has been pushed by environmental groups to do more and challenged by farm groups for doing too much (US EPA, 2008a). Notably, concentrated animal feeding operation (CAFO) owners and operators (referred to as owners) have been subjected to water pollution regulations imposed through the CAFO Rule (Centner and Newton, 2008). Concentrated animal feeding operations are defined by the EPA as animal feeding operations confining animals that have additional characteristics concerning the confinement, numbers of animals at a single facility, and discharges of pollutants [US CFR, 2010, § 122.23(b)]. Although the CAFO Rule has existed since the late 1970s, revisions in 2003 and 2008 have imposed National Pollutant Discharge Elimination System (NPDES) permitting requirements on additional CAFO owners with corresponding expenses (Copeland, 2010).

Two courts have found that EPA was overzealous in regulating CAFO: Waterkeeper Alliance Inc. v. EPA (2005) and National Pork Producers Council v. EPA (2011). In Waterkeeper, the Farm Petitioners were the American Farm Bureau Federation, National Chicken Council, and the National Pork Producers Council. In National Pork Producers, the Farm Petitioners were the National Pork Producers Council, American Farm Bureau Federation, Oklahoma Pork Council, United Egg Producers, North Carolina Pork Council, National Chicken Council, US Poultry & Egg Association, Dairy Business Association Inc., and the National Milk Producers Federation. Yet, although Farm Petitioners were successful in having some of regulatory requirements of the EPA overturned, they were unsuccessful with other arguments. Subsequently, a Michigan court upheld state permitting regulations that were challenged by farm groups (Michigan Farm Bureau v. Department of Environmental Quality, 2011). By agreeing on one or more issues with farm groups, environmentalists, and permitting authorities, the 3 court opinions highlight the difficulties of discerning what CAFO owners need to do to comply with NPDES requirements. As noted by Vansickle (2005), the lack of definitive information on how to meet the requirements of the CAFO Rules makes it difficult to comply. Moreover, the argumentative stances taken by special interest groups add to the confusion and make it difficult for owners to evaluate the risks of liability for unauthorized discharges.

In response to a request from the state of Ohio, the EPA issued a notice of proposed approval of an application for the Ohio Department of Agriculture to...
be the regulatory authority under the federal NPDES program (US EPA, 2008b). If EPA approves this request, Ohio would become the first state to authorize its agricultural agency rather than its environmental agency to oversee CAFO permitting (US EPA, 2010b).

This paper addresses these recent issues. The first section addresses the ability of a regulatory agency to regulate proposed discharges including the land application of manure. The second identifies the consequences of failing to comply with permitting and public participation requirements. Third, the proposal for the Ohio Department of Agriculture to be designated as the authority to issue permits for CAFO discharges may offer a preferred procedure to secure more friendly oversight of the permitting process. With the summaries of these issues, CAFO owners should have information to assist them in deciding how to structure their operations to minimize risk and achieve business objectives.

**REGULATING DISCHARGES**

Pursuant to the NPDES permitting program of the federal Clean Water Act, the CAFO Rule regulates discharges by requiring certain CAFO to secure NPDES permits (US CFR, 2010). Most states have been granted authority to administer a state NPDES permitting program, and the state’s program applies in lieu of the federal program. Under state programs, the standards and effluent limitations must be at least as stringent as those imposed by federal law (US Code, 2006, § 1370). This means that federal and state regulations governing proposed discharges and land application discharges may be different. This is confusing for national groups that seek to summarize the CAFO Rule across states and for CAFO owners with operations in more than 1 state.

**No Federal Authority to Regulate Proposed Discharges**

In addressing permit requirements under the 2003 CAFO Rule, the EPA decided to require more CAFO to secure NPDES permits to reduce the impairment of federal waters (US EPA, 2003). Thus, EPA maintained that “all concentrated animal feeding operations have a duty to seek coverage under an NPDES permit” unless they could demonstrate they had no potential to discharge (US CFR, 2004, § 122.21). This provision was overturned by the judiciary in Waterkeeper Alliance Inc. v. EPA (2005). The Farm Petitioners successfully argued that EPA lacked authority to require CAFO to secure a permit in the absence of actual discharges. Although CAFO constitute point sources under federal law, point sources do not need to secure permits. The Waterkeeper court found that the Clean Water Act grants EPA jurisdiction to regulate and control actual discharges, but not CAFO with a potential to discharge.

In 2008, EPA adopted a revised CAFO Rule that did not contain the duty provision that the Waterkeeper court had vacated (US EPA, 2008a). Instead, EPA rewrote its provision concerning permits: “The owner or operator of a CAFO must seek coverage under an NPDES permit if the CAFO discharges or proposes to discharge. A CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur” (US CFR, 2010, § 122.23).

Farm groups again objected, claiming the requirement that operators who “propose to discharge” must secure NPDES permits exceeded the authority provided to EPA by the Clean Water Act. In National Pork Producers Council v. EPA (2011), a federal court found that there was no statutory authority for regulating CAFO that propose to discharge. The court interpreted the definition of the EPA of “proposes to discharge” as requiring persons to apply for a permit even though they were not discharging. Because only CAFO with discharges may be required to apply for NPDES permits under federal law, the provision exceeded the authority of the EPA.

The holding by the National Pork Producers court is very helpful for CAFO owners who are governed by the federal CAFO Rule in 5 states: Idaho, Massachusetts, New Hampshire, New Mexico, and Oklahoma. However, the state of Oklahoma hopes to secure authority to issue permits for CAFO (US EPA, 2009b), so when this occurs the provisions of the state will apply (US EPA, 2011a). Because state programs regulate discharges in lieu of the federal requirements, the question of whether proposed discharges may be regulated is not answered by federal law nor the National Pork Producers lawsuit. States are able to adopt standards and effluent limitations that are more stringent than those set forth by federal law, and because of the wording of state water pollution provisions, many states have more demanding requirements.

**Authority for More Stringent Provisions**

Fourteen days after the National Pork Producers lawsuit, a state court in Michigan issued a decision that upheld the state’s regulation of proposed discharges. In Michigan Farm Bureau v. Department of Environmental Quality (2011), the court considered a state permitting provision modeled after the vacated 2003 federal CAFO Rule provision on a duty to secure a permit. The Michigan rule said: “All CAFO owners or operators shall apply either for an individual NPDES permit, or a certificate of coverage under an NPDES general permit, unless the owner or operator has received a determination from the department that the CAFO has ‘no potential to discharge . . . .’” (Michigan Administrative Code, 2010).

Despite the Waterkeeper ruling that struck the duty to secure a permit requirement, the Michigan court upheld the state rule. The court found that the Waterkeeper decision did not apply because the issue did not involve federal law. Given the rationale of the Michigan Farm Bureau decision, the National Pork Producers de-
cision based on federal law also does not apply. Michigan law broadly gives the state Department of Environmental Quality the authority to pass regulations designed to protect state water resources from waste disposal (Michigan Compiled Laws Service, 2010). Because the department has a duty to protect water resources, it was able to promulgate a rule to require CAFO to obtain an NPDES permit irrespective of whether the CAFO had actually discharged pollutants.

The Michigan Farm Bureau decision shows how complicated state permitting provisions have become. Although federal law contains no authority for EPA to regulate proposed discharges, variations in state water quality provisions allow states to regulate proposed discharges. Because state NPDES-permitting programs involve state law, the National Pork Producers decision does not resolve the issue of the regulation of proposed discharges. However, the decision does provide guidance that state courts might adopt if they are confronted with a challenge to the state’s regulation of potential discharges. The state’s regulatory scheme for water pollution needs to be analyzed as a whole to discern the authority granted to the permitting authority addressing water pollution. If an analysis shows that the state permitting system is limited to actual discharges, then the finding of the National Pork Producers case should apply: the state cannot require permits for proposed discharges.

An analysis of state NPDES permitting provisions shows a variety of provisions that allow more stringent effluent discharge limitations. Allen (2006) observed that several states have adopted CAFO regulations to regulate these businesses beyond the requirements imposed under the Clean Water Act. The notation by Craig (2008) of statutory terms and common law public trust doctrines disclosed additional support for the protection of water resources. These accounts suggest that other state courts might find their state’s law provides similar authority for regulating discharges as found in the Michigan Farm Bureau decision.

A few states explicitly provide for regulations that go beyond federal requirements. California delineates in its Water Code that more stringent effluent standards or limitations are permitted (California Water Code, 2011). Montana allows for the adoption of more stringent rules if “necessary to protect public health, beneficial use of water, or the environment” (Montana Code Annotated, 2010). Oklahoma’s comparison of state and federal regulations discloses numerous additional provisions that provide for greater regulation of CAFO activities (Oklahoma Agricultural Environmental Management, 2004a,b). For analytical methods required to meet effluent limitations, in addition to parameters listed in federal law, Oklahoma requires analysis of total phosphorus, electrical conductivity, sodium, potassium, calcium, magnesium, and pH (Oklahoma Agricultural Environmental Management, 2004b). Minnesota allows more regulation through 4 types of permits and by placing responsibilities on persons receiving manure from animal feedlots with 300 or more animal units (Minnesota Rules, 2010).

Other state statutes contain provisions similar to those in Michigan that express a legislative policy of protecting water resources. The Missouri legislature requires its Department of Natural Resources to “ensure that the quality and quantity of the water resources of the state are maintained at the highest level practicable to support present and future beneficial uses” (Missouri Annotated Statutes, 2011). In establishing a policy of restoring and maintaining water quality, the Wisconsin legislature enunciated a goal of eliminating discharges of pollutants (Wisconsin Statutes, 2011). In a lawsuit concerning the regulation of off-site overapplication of manure by a CAFO, a Wisconsin court found that the state permitting authority could regulate the activity under state law (Maple Leaf Farms Inc. v. Wisconsin Department of Natural Resources, 2001). Although off-site manure application is not regulated under the federal CAFO Rule, Wisconsin was able to regulate this activity to prevent discharges of pollutants into waters of the state.

Precluding More Stringent Regulations

Some state legislatures have decided to preclude regulations that are more stringent than those required by federal mandates by passing special legislation. These legislatures felt that more stringent water quality requirements are accompanied by unnecessary negative economic impacts on businesses and producers (Baer-enklau et al., 2008) and are impediments to competitiveness. To preclude more strict state regulations, the legislatures adopted a law saying that their state’s effluent standards “shall not be more stringent than” those established by the federal government (Iowa Annotated Statutes, 2010; Idaho Code, 2011). The objective of such regulations was to help courts interpret state law in a manner imposing fewer environmental controls and to tell businesses that the state had a favorable regulatory climate with a minimum of costs for pollution requirements (Bonanno and Constance, 2006).

The general proscription against more strict limitations by state anti-stringency provisions does not fully preclude additional requirements nor give a clear indication of the character of a state’s environmental controls. First, the provisions often are tempered by clauses that allow a stricter requirement if a “more restrictive effluent limitation is necessary to meet water quality standards” (Iowa Annotated Statutes, 2010). Under this additional provision, a state may circumvent the “more stringent than” requirement. Second, a state may supplement NPDES permits with other requirements, such as other types of permits (Minnesota Rules, 2010). Third, state regulations will differ in the number of activities regulated and the instructions given to inspection agents (Koski, 2007a,b). Moreover, some governments may decline to expend sufficient funds to adequately administer enforcement programs.
Thus, a cursory analysis of a state’s law with a provision saying effluent limitations “shall not be more stringent” may not accurately reflect the standards present in the state.

Land Application Remains Regulated

The 2003 CAFO Rule delineated effluent limitations for certain “Large CAFO” in part 412 of the Code of Federal Regulations that apply to the land applications of manure of these CAFO (US EPA, 2003). Large CAFO are those with more than an enumerated number of animals as defined by the CAFO Rule [US CFR, 2010, § 122.23(b)]. The Rule enunciated nonnumerical effluent limitations in the form of a nutrient management plan (NMP) containing best management practices (US CFR, 2010, § 412.4). For land applications of manure, an NMP incorporating application rates to “minimize phosphorus and nitrogen transport from the field to surface waters in compliance with the technical standards for nutrient management” is required (US CFR, 2010, § 412.4). In the Waterkeeper case, the court found the terms of an NMP to be effluent limitations so must be documented before the issuance of an NPDES permit or notice of intent under a general permit.

The Farm Petitioners in the National Pork Producers lawsuit challenged the requirement that certain Large CAFO needed to develop and implement NMP (US EPA, 2008a, p. 70437). The petitioners contended that by requiring CAFO owners that only seek permit coverage for production areas to also apply for coverage for land application areas, the 2008 Rule exceeded what is permissible under the Clean Water Act. The National Pork Producers court acknowledged the earlier interpretation of the Clean Water Act by the Waterkeeper court. Given that Waterkeeper upheld the CAFO Rule in all respects except those specifically noted by the court and the fact that the petitioners had not raised this challenge in the Waterkeeper case, the National Pork Producers court declined to consider the petitioners’ argument concerning the requirement of implementing NMP.

The CAFO Rule provides that land application discharges are subject to NPDES requirements, except when the discharges are agricultural stormwater discharges. Furthermore, for unpermitted Large CAFO, agricultural stormwater discharges are qualified (US CFR, 2010, § 122.23). They consist of precipitation-related discharges where manure is applied in accordance with site-specific nutrient management practices. Under the interpretation by the EPA of agricultural stormwater discharges, a Large CAFO needs to employ an NMP or some other documentation when applying manure to land to discern that there is no overapplication. The documentation would show that any discharges associated with the land application of a CAFO are agricultural stormwater discharges so no permit is required. Without an NMP, a CAFO owner cannot show that a discharge qualifies as an agricultural stormwater discharge.

CONSEQUENCES OF NONCOMPLIANCE

Litigation has shown that the EPA and interest groups do not agree on the Clean Water Act’s requirements concerning the ability to access a penalty on dischargers lacking a permit and for failing to provide an opportunity for the public to participate in the development of discharge standards. These issues led to challenges in the National Pork Producers and Waterkeeper cases, and the courts’ decisions are important for CAFO owners and operators.

No Penalty for Not Having a Permit

The issue of whether the Clean Water Act allows penalties to be imposed for not securing a permit was addressed by EPA in its preamble to the 2008 CAFO Rule. The preamble said that a CAFO could incur liability for failure to apply for a permit (US EPA, 2008a, p. 70426). Thus, the Rule anticipated enforcement proceedings for failure to seek a permit.

This was successfully challenged by the Farm Petitioners in the National Pork Producers lawsuit. Citing earlier precedents, the court found that the Clean Water Act did not authorize EPA to prosecute persons for failing to secure a permit. Rather, EPA can issue compliance orders, bring civil suits for injunctions or penalties, or bring criminal charges for penalties. Other provisions of the Act allow for EPA to impose liability for violations of a condition or limitation on discharge prohibitions, national standards of performance for new sources, toxic and pretreatment effluent standards, the agency’s information-gathering authority, permit conditions, and provisions governing the disposal or use of sewer sludge (US Code, 2006).

In the absence of a statutory provision enunciating liability for failing to apply for an NPDES permit, there was no authority for this requirement in the 2008 CAFO Rule. This means that a CAFO owner or operator cannot be penalized for failing to secure a permit under federal law. Instead, NPDES penalties are usually associated with false statements and the unauthorized discharge of pollutants. These penalties are considerable: $10,000 for a false statement (US Code, 2006, § 1319) and up to $37,500 per day for unauthorized discharges (US EPA, 2009a).

Public Participation Issues

Citizen participation is a major component of many environmental statutes. Turning to the directives set forth in the Clean Water Act, Congress intended citizens to be able to participate in the “development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program” established under
the act (US Code, 2006, § 1251). Under this legislative command, citizens can participate in the development of effluent limitations set forth in NPDES permits, including a permitting authority’s action to amend a permit. From a legal perspective, any permit modification, cease and desist order, consent order, compliance order, or other document that is intended to modify a permit may not be effective if the public does not receive notification and an opportunity to participate (Centner, 2011).

With this demanding directive on citizen participation, any deviation from the requirements by a permittee or any noncompliance by a permitting authority offers an argument that can be raised in a citizen lawsuit. Permits issued without an opportunity for public input may affect the validity of the permit. Moreover, if public participation is not allowed during the modification of a permit, the revised permit may be invalid (Centner, 2011). In the absence of a valid permit, a CAFO owner or operator may have an unauthorized discharge and incur liability for a violation of the Clean Water Act. This means permittees have an interest in helping their permitting authority follow legal directives on public participation. Permittees should want permitting authorities to follow the public participation requirements to reduce the risk of being liable for unauthorized discharges.

Related to participation is the agreement by EPA to propose a new rule to collect facility information from all CAFO (Stubbs, 2011). This would summarize numbers of animals, type and capacity of manure storage or treatment process, and quantity of manure generated annually by CAFO. Such information might be important for the future documentation of problems and violations.

**AUTHORIZATION FOR A DEPARTMENT OF AGRICULTURE**

In 2006, Ohio officially requested approval for transferring authority to administer the NPDES program for CAFO in Ohio from the Ohio Environmental Protection Agency to the Ohio Department of Agriculture (US EPA, 2006b). Thereafter, numerous communications between Region 5 of the EPA and Ohio resolved some of the issues and concerns about this transfer. In 2008, EPA issued a notice of proposed approval and hearing for the approval of the request (US EPA, 2008b). The state will submit a memorandum of agreement to the regional administrator that enumerates obligations for implementing the state permitting program.

Ohio requested this transfer because its Department of Agriculture is already overseeing the state’s Livestock Environmental Permitting Program (Ohio Administrative Code, 2011). The livestock industry feels that it would be advantageous to have a single state agency handling all livestock permitting. However, the change would mean that 2 Ohio state agencies are responsible for issuing NPDES permits. Moreover, some are concerned whether the mission of the Ohio Department of Agriculture (Ohio Department of Agriculture, 2009), which declines to address the environment, is consistent with facilitating adequate protection of the environment (US EPA, 2011b).

In evaluating Ohio’s regulatory structure, EPA will need to ascertain whether the regulations comply with federal law in safeguarding water quality. Given recent federal reports, this will necessarily involve an evaluation of enforcement oversight and the ability of the state to undertake suitable enforcement actions to address instances of noncompliance. In 2007, the Office of Inspector General of the EPA reported that bacteria-only violators including CAFO required greater enforcement action (US EPA, 2007, p. 41–42). Pollution from animal waste, with a focus on unpermitted CAFO, was identified by the Office of Enforcement and Compliance of the EPA as a top priority for fiscal year 2011 (US EPA, 2010a). In 2011, the Government Accounting Office (GAO) again identified agricultural pollution from large-scale animal feeding operations as a major source of pollution and noted that the EPA lacked information to ensure compliance with federal law (US GAO, 2011).

Under the Clean Water Act, EPA allows states to administer state NPDES programs that ensure compliance with federal law. If the governor of Ohio has submitted to EPA a full and complete description of a program that precludes unauthorized discharges and the Ohio attorney general has adequate authority to carry out the described program, EPA must approve the submitted program (US Code, 2006, § 1342).

**CONCLUSION**

Owners of CAFO remain concerned about their responsibilities and liability under NPDES permitting requirements. The federal CAFO Rule sets forth minimum standards that apply in 5 states. All other states have approved state programs that impose state law on permittees within their jurisdiction. Because of distinctions in statutory law, states have different permitting requirements that may impose requirements beyond those set forth in the CAFO Rule. Some states have requirements that are more stringent than established by the CAFO Rule, including the regulation of off-site disposal of manure and proposed discharges.

This legal framework precludes summarizing CAFO permitting requirements through an analysis of the federal CAFO Rule. Furthermore, because states have individualized water quality controls, any attempt to summarize CAFO regulations across the nation can only denote generalities. Various descriptions of CAFO permitting requirements by agricultural and environmental groups do not always convey accurate information for CAFO owners in states with specialized water quality regulations.

Court decisions and a proposal in Ohio provide insight for restructuring the oversight of CAFO permits. Because of state water quality concerns, many states
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have added provisions to state law beyond those required under federal law. The cases show that CAFO can have fewer obligations under federal NPDES permitting requirements than a state permitting program. Because states can assume partial authority and issue NPDES permits for only some classes of discharges (Gaba, 2007; US EPA, 2011a), it is possible for states to decline to oversee discharges from CAFO. Alternatively, a state might transfer authority over CAFO permits to its department of agriculture. Depending on a state’s regulatory objectives, changes in permitting oversight might alleviate some of the burdens that currently accompany NPDES permitting requirements. Concomitantly, such a change may be accompanied by greater regulatory costs because of the addition of a second state agency authorized to issue NPDES permits.

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