RESEARCH OUTLINE

Regulation of Concentrated Animal Feeding Operations under the Federal Clean Water Act

Introduction

Agricultural animal feeding operations come in all shapes, sizes and configurations. A point of controversy surrounding such operations is how to determine which ones to designate as a "concentrated animal feeding operation"; or "CAFO", because the term in the legal context is a term of art used in the body of the federal Clean Water Act (the Act). 33 U.S.C. Secs. 1251 et seq. The term is important in its legal context because it appears as an example of what Congress thought should be regulated as a potential "point source" of pollutants to the nation's waterways.

Much of the current debate surrounding regulation of agricultural contributions of pollutants to water centers on whether a specific contribution involves what is known as a point source because the amount of regulation applied to an agricultural producer under the Act varies depending on whether a point source is present. Point sources have a number of important regulatory distinctions, one being that a point source cannot discharge pollutants without first obtaining a National Pollution Discharge Elimination System (NPDES) permit. 33 U.S.C. Secs. 1311 (a). In addition, private citizens may commence "citizen suits"against any person "alleged to be in violation of" the conditions of an effluent standard or limitation. 33 U.S.C Secs, 1365 (a) (1).

Point Source

The Act defines "point source," includes concentrated animal feeding operation in the list of what it considers to be point sources, but does not define the term concentrated animal feeding operation. 33 U.S.C. Secs, 1362 (14). The definition in the Act identifies two basic distinguishing characteristics: 1) a point source is a conveyance, and 2) a point source must have a potential for a discharge of pollutants.

The Act lists examples of point sources and specifically includes the term "concentrated animal feeding operation," but does not describe the distinguishing characteristics of an animal operation that would make it the concentrated animal feeding operation that is to be treated as a point source under the law. 33 U.S.C. Secs, 1362 (14).

The Act also states that agricultural storm water discharges and return flows from irrigated agriculture are not to be regulated as point sources. 33 U.S.C. Secs, 1362 (14). Since those items are often related to and sometimes inextricably intertwined with animal operations, their statutory exemption from regulation as point sources sets up a dynamic in this area.
Current Regulation of Concentrated Animal Feeding Operations

The Environmental Protection Agency (EPA) has defined the term “concentrated animal feeding operation” in its current rules. See 40 C.F.R. Secs, 122.23 and 40 C.F.R. Pt. 122, App. B. Under the current EPA regulations, an operation must first be an animal feeding operation (AFO) before it can be a concentrated animal feeding operation (CAFO). To be an AFO, an operation must be a lot or facility where animals have been, are or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period; and crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

The current EPA regulations provide that an AFO can become a CAFO in either of three ways:

1. Some AFOs are CAFOs because of their size – If an AFO has more than 1000 animal units (AU) it is a CAFO;

2. Some AFOs are CAFOs because of size and the presence of a "discharge" – If an AFO has more than 300 AU it is a CAFO if either pollutants are discharged into navigable waters through a manmade ditch, flushing system, or similar man-made device, or pollutants are discharged directly into waters that either originate outside of and pass over, across, or through the facility, or come into direct contact with the confined animals;

3. An AFO can be designated as a CAFO because it is a significant contributor of pollution -- The EPA may designate an operation with more than 300 animal units as a CAFO if the facility "is a significant contributor of pollution to the waters of the United States" or if the facility "is a significant contributor of pollution to the waters of the United States" and either pollutants are discharged into navigable waters through a manmade ditch, flushing system, or similar man-made device, or pollutants are discharged directly into waters that originate outside of and pass over, across, or through the facility or come into direct contact with the confined animals.

The regulations provide further that the Director, in making such a designation, shall consider size, location relative to waters and "the means of conveyance." At this point the regulations contain the following statement. "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."

According to EPA’s current rules, the term "animal unit" means a unit of measurement for any animal feeding operation calculated by adding the following numbers: the number of slaughter and feeder cattle multiplied by 1.0, plus the number of mature dairy cattle multiplied by 1.4, plus the number of swine weighing over 25 kilograms (approximately 55 pounds) multiplied by 0.4, plus the number of sheep multiplied by 0.1, plus the number of horses multiplied by 2.0. 40 C.F.R. Pt. 122, App. B.

NPDES Permits

Under current EPA regulations, if an operation is a CAFO it is a point source and therefore cannot discharge unless it has an (NPDES) permit. 40 C.F.R. Secs, 122.23 (a). NPDES permits define specific discharge or effluent limits derived through the consideration of two factors:

a) technology-based effluent limitations that must be both economically achievable and technologically attainable through the operation of control technologies and process changes, and

b) water quality-based effluent limitations that are set to meet regional or site-specific water quality standards.
**Effluent Limitation Guidelines (ELG)**

The EPA has established effluent limitations guidelines for NPDES permits associated with concentrated animal feeding operations to assist in developing NPDES permits.

The current ELG for CAFOs apply only to those with more than 1000 animal units (AU) and provide guidance on technology-based effluent limitations. See 40 C.F.R. Secs, 412.10

The current ELG establish a restriction and an exception for NPDES permits granted to concentrated animal feeding operations. See 40 C.F.R. Secs, 412.12 and 40 C.F.R. Secs, 412.13 (Note that special ELG are established for ducks. See 40 C.F.R. Secs, 412.20.) There must be no discharge of process wastewater pollutants to navigable waters except when chronic or catastrophic storm events cause an overflow from a facility designed, constructed and operated to hold process-generated wastewater plus runoff from a 10-year, 24 hour rainfall event for best practicable control technology currently available and a 25-year, 24 hour rainfall event for the best available technology economically achievable.

**Best Professional Judgment**

Best professional judgement is also used in developing NPDES permits for concentrated animal feeding operations. Given the current effluent limitations guidelines, the permit writer must use Best Professional Judgement (BPJ) to determine the appropriate technology-based effluent limitations for CAFOs with 1000 or fewer AU. The permit writer must also use BPJ to develop more stringent effluent limitations where technology-based effluent limitations are not sufficient to meet water quality standards for CAFOs of any size.

**Changes**

Rules, regulations and statutes are always subject to change. The location of the Environmental Protection Agency Web page is [http://www.epa.gov/](http://www.epa.gov/) and often contains information on current rules and regulations as well as proposed rules or program changes. Locations to view federal statutory law and federal rules and regulations are [http://www4.law.cornell.edu/uscode/](http://www4.law.cornell.edu/uscode/) and [http://www.access.gpo.gov/nara/cfr/cfr-table-search.html/](http://www.access.gpo.gov/nara/cfr/cfr-table-search.html/), respectively.

**Federal Cases**

A search of federal cases involving concentrated animal feeding operations reveals minimal development of judicial interpretation in this area. Two federal Circuit Court cases are highlighted here:

- In *Carr v. Alta Verde Indus.*, 931 F2d 1055 (5th Cir. 1991), Plaintiff sought civil penalties and injunctive relief for violations of the Clean Water Act against a cattle feedlot with between 20,000 and 30,000 head of cattle on 230.9 acres. Waste drained into a system of six holding ponds. The water was used to irrigate and fertilize adjacent fields. The district court dismissed the case for lack of standing reasoning that no violations were likely in the future because the defendant fit the 25 year, 24 hour, storm event criteria in the effluent limitation guidelines for CAFOs. The circuit court ruled that the effluent limitation guidelines do not create an exception to the NPDES permit requirement.

- In *Concerned Area Residents v. Southview Farm*, 34 F.3d 114 (2nd Cir. 1994), Plaintiffs sued the defendant dairy operation under federal and state laws including the Clean Water Act over their liquid manure spreading operations. The dairy managed 2,200 head of cows, heifers and calves. The circuit court ruled that if the farm itself is a CAFO the associated liquid manure spreading operation is a point source within the meaning of the Clean Water Act. The court also ruled that the liquid manure operation is not protected from designation as a point source by the agricultural storm water discharges exception under the Act.
Bibliography

Readers are cautioned that the precedent value and the relevance of a particular case with respect to a question of law are a matter of legal interpretation. The following are included without judgement as to their relevance or value as precedent. They are included solely as information and a reference point for further individual research and study.

Federal Appellate Decisions

*Carr v. Alta Verde Industries, Inc.*, 931 F.2d 1055 (5th Cir. 1991)
*Concerned Area Residents v. Southview Farm*, 34 F.3d 114 (2nd Cir. 1994)
*Oregon Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092 (9th Cir. 1998)

Federal District Court Decisions


This outline was prepared in October, 2000.

This material is based on work supported by the U.S. Department of Agriculture under Agreement No. 59-8201-9-115. Any opinions, findings, conclusions or recommendations expressed in this article are those of the author and do not necessarily reflect the view of the U.S. Department of Agriculture.

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