United States Environmental Protection Agency

Summary of the Second Circuit's Decision in the CAFO Litigation

The February 2003 CAFO regulations revise previous regulations from 1974 and 1976. Those regulations made changes to the NPDES regulations that define which facilities are CAFOs and included changes to the CAFO effluent guidelines, which set the technology-based limitations for CAFO NPDES permits. The 2003 revised regulations expanded the number of operations covered by the CAFO regulations to an estimated 15,500 and included requirements to address the land application of manure from CAFOs. The rule became effective April 14, 2003 and States were required to modify programs by February 2005 and develop State technical standards.

After EPA issued the 2003 regulations, petitions for judicial review were filed by CAFO industry organizations (American Farm Bureau Federation, National Pork Producers Council, National Chicken Council, and National Turkey Federation) and by environmental groups (Waterkeeper Alliance, Natural Resources Defense Council, Sierra Club, and American Littoral Society). The petitions for review, which were originally filed in several different circuit courts of appeal, were consolidated into one proceeding before the Second Circuit.

On February 28, 2005, the U.S. Court of Appeals for the Second Circuit issued its decision in Waterkeeper Alliance et al. v. EPA, 399 F.3d 486. In its decision, Second Circuit addressed a range of issues raised by the litigants. The Court both upheld many of the basic tenets of the regulations promulgated by EPA but also overturned certain sections.

Issues Upheld

Land application regulatory approach and interpretation of "agricultural storm water"

The Court upheld EPA's authority to regulate, through NPDES permits, the runoff to the waters of the U.S. containing manure that CAFOs have applied to crop fields. It rejected the Industry Petitioners' claim that land application runoff must be channelized before it can be considered to be a point source discharge subject to permitting. It noted that the CWA expressly defines the term "point source" to include "any ... concentrated animal feeding operation ... from which pollutants are or may be discharged," and found that the Act "not only permits, but demands" that land application discharges be construed as discharges "from" a CAFO.

The Court also upheld EPA's determination in the CAFO rule that storm water runoff of manure from a CAFO's crop fields qualifies as "agricultural storm water," which is exempt from regulation under section 502(14) of the Act, only where the CAFO has applied the manure to its crops at rates that represent "appropriate agricultural utilization" of the manure nutrients. EPA's interpretation of the Act in this regard was reasonable, the Court found, in light of the legislative purpose of the agricultural storm water exemption and given the precedent set in an earlier Second Circuit case, Concerned Area Residents for the Environment v. Southview Farm, 34 F.3d 114 (2d Cir. 1994).

Effluent guidelines

The Court upheld the CAFO effluent guidelines in all respects against challenges from the environmental organizations. Three areas upheld in particular are listed below. The areas that were remanded to EPA are listed in the following section.

Identification of best available technologies. The Court rejected the environmental organizations' claim that when EPA chose the pollution control technologies on which to base effluent guidelines for CAFOs, the Agency did not meet its duty to identify the single CAFO with the best-performing technology. The Court found that EPA had collected extensive data on the waste management systems at CAFOs and had considered approximately 11,000 public comments on the proposed CAFO rule, and on those bases, EPA had adequately justified its selection of "best available technologies" on which to base the regulations. This includes the zero discharge requirement from production areas when there is a very large storm event.

Ground water controls. The Court upheld EPA's decision not to include controls in the national regulations on CAFO discharges that reach surface waters through a ground water connection. EPA had determined that because such discharges depend greatly on local geology and other site-specific factors, the need for permit controls on ground water discharges was a matter to be evaluated by the permitting agency in each individual case rather than established in a national regulation.

Economic methodologies. The Court upheld the financial methodologies that EPA used for determining whether the technology-based permit requirements for CAFOs set in the new effluent guidelines would be economically achievable by the industry as a whole.

Issues Vacated by the Court

Nutrient Management Plans

The Court vacated rule provisions that allow permitting authorities to issue permits to CAFOs without including the terms of the CAFO's Nutrient Management Plan ("NMP" or "Plan") in the permit and without the Plan being reviewed by the permitting agency and available to the public. The Court relied on provisions of the Act that authorize discharges only where NPDES permits "ensure that every discharge of pollutants will comply with all applicable effluent limitations and standards," citing CWA sections 402(a)(1), (a)(2), and (b). Because the rule allows CAFOs to write their own nutrient management plans and because those plans are not required to be reviewed by the permitting agency or made available to the public, the Court found, the rule does not ensure that each Large CAFO has developed a satisfactory Plan. The Court analogized to the Ninth Circuit's decision in Environmental Defense Center, Inc. v. EPA, 344 F.3d 832 (9th Cir. 2003), in which the Court held that the failure to require permitting authority review of storm water management plans under EPA's Phase II storm water rule violated the Act. The Court also found that the terms of the NMPs themselves are "effluent limitations" as that term is defined in the Act and therefore must be made part of the permit. In addition, the Court found that by not making the NMPs part of the permit and available to the public, the CAFO rule violated public participation requirements in sections 101(e) and 402 of the Act.

Duty to Apply

The Court vacated the "duty to apply" provisions of the new CAFO rule. These provisions require all CAFOs to apply for an NPDES permit unless they can demonstrate that they have no potential to discharge. The Court found that the duty to apply, which the Agency had based on a presumption that all CAFOs have at least a potential to discharge, was invalid, because the CWA subjects only actual discharges to regulation rather than potential discharges. The Court acknowledged EPA's strong policy considerations for seeking to impose a duty to apply – "EPA has marshaled evidence suggesting that such a prophylactic measure may be necessary to effectively regulate water pollution from large CAFOs, given that Large CAFOs are important contributors to water pollution and that they have, historically at least, improperly tried to circumvent the permitting process" – but found that the Agency nevertheless lacked statutory authority to do so.

Issues Remanded by the Court

The Court also remanded other aspects of the CAFO rule to EPA for further clarification and analysis:

BCT effluent guidelines for pathogens

The Court held that the CAFO rule violated the CWA because EPA had not made an affirmative finding that the BCT-based ELGs – i.e. the "best conventional technology" guidelines for conventional pollutants such as fecal coliform – do in fact represent BCT technology. The Court remanded this issue to EPA to make such a finding based on the BAT/BPT technologies EPA studied or to establish specific BCT limitations for pathogens based on some other technology.

NSPS – 100-year storm standard

The CAFO rule set the new source performance standards for swine and poultry CAFOs at a level of "absolute" zero discharge. As an alternative to meeting this standard, however, the rule allowed a CAFO in these categories to show that either (1) its production area was designed to contain all wastewater and precipitation from the 100-year, 24-hour storm, or (2) it would comply with "voluntary superior performance standards" based on innovative technologies, under which a discharge from the production area would be allowed if it was accompanied by an equivalent or greater reduction in the quantity of pollutants released to other media (e.g., air emissions). The Court found that EPA had not justified either of these alternatives in the record and that EPA had not provided adequate public participation with respect to either provision. As a result, the Court remanded these provisions to EPA to clarify, via a process that adequately involves the public, the statutory and evidentiary basis for allowing either of these alternative provisions.

Water quality-based effluent limits

The Court agreed with EPA that agricultural storm water is exempt from NPDES regulation and therefore is not subject to water quality-based effluent limitations in permits. However, the Court directed EPA to "clarify the statutory and evidentiary basis for failing to promulgate water quality-based effluent limitations for discharges other than agricultural storm water discharges, as that term is defined in 40 C.F.R. § 122.23(e)," and to "clarify whether States may develop water quality-based effluent limitations on their own."