

Agricultural Management Committee Newsletter

Vol. 8, No. 1

December 2003

MESSAGE FROM THE CHAIR

Thomas P. Redick

The Agricultural Management Committee hosted a successful breakout session on Agricultural Environmental Management of Impacts to Water at the 11th Section Fall Meeting in Washington, D.C. (Oct. 8-12, 2003). To follow up on that successful session, and to let those who were not present know what they missed, we are providing in this issue of the newsletter a “point-counterpoint” by representatives of the Sierra Club (Barclay Rogers) and American Farm Bureau Federation (Don Parrish).

Our next big event will be a session on Agricultural Nuisances at the 33rd Annual Conference on Environmental Law at Keystone, Colorado in March 2004. Join us in Colorado for a meeting that will feature Keynote Speaker L. Hunter Lovins (co-author, with Amory Lovins, of “Natural Capitalism”) an attorney/activist who will be addressing sustainable development.

We are also planning to host a “quick teleconference” on the most pressing issues involving agriculture’s impacts on water resources – including CAFOs, TMDLs, and other alphabet soup consumed by ag water lawyers. We are actively recruiting law firms

in the Corn Belt who would like to host a remote link to this teleconference (which will be based in Washington, D.C.). The cost is minimal, and the publicity will promote your firm’s expertise in the burgeoning field of agricultural environmental law.

Our committee is also actively involved in the Section’s new sustainability initiative, which is raising the profile of sustainability analysis throughout the Section. From our perspective, the question of what “sustainable agriculture” should be remains open, and there may be many paths to sustainability. While these are hotly debated paths in some circles, we hope to create a forum for lawyers (even opinionated ones) to engage in civil discussions about these important issues.

Our editor Ellen Steen is always looking for good ideas for our next Agricultural Management Committee Newsletter. The Keystone edition of our newsletter will suggest some new visions for “sustainable” agriculture and touch upon emerging caselaw in “anticipatory” agricultural nuisances. Our membership prides itself on filtering through the muck of information about agricultural environmental law and providing the latest legal news on topics that are evolving quickly (from biopharming to CAFO regulation).

If you would like to get involved in this emerging area of environmental practice,

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Ellen Steen, Editor**

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AGRICULTURAL REGULATORY UPDATE

**Daniel Krainin, Thomas P. Redick
and Ellen Steen**

**Biosafety Protocol Enters Into Force:
Uncertainty In Grain Trade Rules**

The Cartagena Protocol of Biosafety (the "Protocol") entered into force on Sept. 11, 2003, following the deposit of the fiftieth instrument of ratification. The Protocol is the first legally binding multilateral agreement governing the transboundary movement of living modified organism (LMOs). With its entry into force, countries that are parties to the Protocol are expected to implement and comply with all of the Protocol's provisions. Given the Protocol's relatively quick ratification among the requisite 50 countries, however, many parties have not yet met all of their obligations under the Protocol, including the requirement that they disseminate certain information about their domestic biosafety regulatory regimes via the internet-based Biosafety Clearinghouse database. As a result, in the coming months, the Protocol is likely to pose some implementation and compliance challenges for countries that are party to it as well as companies that intend to export LMOs to those countries.

The first meeting of the parties to the Cartagena Protocol on Biosafety will be held in Kuala Lumpur, Malaysia, on Feb. 23-27, 2004. For more information regarding the Protocol and its implementation, see the Biosafety Protocol Web site at <http://www.biodiv.org/biosafety/default.aspx>.

CAFO Rule Litigation Proceeds in U.S. Court of Appeals for the Second Circuit

EPA's 2003 revised Clean Water Act (CWA) rules for "concentrated animal feeding operations" (CAFOs) went into effect April 14, 2003, mandating National Pollutant Discharge Elimination System (NPDES) permits for an estimated 15,000 such operations over the next several years. As CAFOs prepare to comply with the new rules, however, litigation is under way by both environmental groups and livestock producer groups challenging the rules. Waterkeeper Alliance and three other non-governmental organizations filed litigation challenging the rule as too limited, while various livestock producer trade groups have challenged the rule as exceeding EPA's CWA authority. *Waterkeeper Alliance, et al. v. EPA*, Case No. 03-4470 (2d Cir.) (direct appeal to the Circuit Court under CWA rulemaking procedures). Briefing began in late October with the filing of joint opening briefs by the environmental interest groups and the regulated groups, respectively.

The environmental groups have raised the following claims:

- Nutrient management plans (NMPs) must be reviewed and approved by the permit issuing agency (EPA or the State), incorporated as conditions of the NPDES permit, and subject to public participation (including an opportunity for a public hearing).
- Storm water runoff from CAFO land application areas must always be deemed a "point source" discharge (*i.e.*, it cannot be deemed an "agricultural storm water discharge," even if land application occurs at agronomic rates).
- EPA must impose more stringent limitations on land application where needed to achieve water quality standards.

- EPA unlawfully changed the technology-based standards originally proposed for the swine, veal, and poultry subcategory and for the beef, heifer, and dairy subcategory – *i.e.* for swine, veal, and poultry: absolute zero discharge from the production area (with no allowance for any storm-related overflow); and for beef, heifer, and dairy: groundwater monitoring and zero discharge to groundwater beneath production areas.
- EPA must require treatment of CAFO animal waste to reduce or eliminate pathogens.
- EPA unlawfully changed the "new source performance standard" originally proposed for the swine, veal, and poultry subcategory – *i.e.*, that newly constructed operations achieve absolute zero discharge to surface waters or groundwater from the production area, plus groundwater monitoring.

Meanwhile, the farm petitioners assert that:

- EPA cannot require that all CAFOs apply for NPDES permits regardless of whether the CAFOs discharge to waters of the U.S. (*i.e.*, EPA cannot simply presume that all CAFOs will discharge).
- EPA cannot regulate uncollected storm water runoff from land application areas.
- EPA cannot narrow the statutory exemption for "agricultural storm water discharges" to exclude operations that do not comply with EPA's definition of appropriate agricultural practices.
- EPA cannot regulate discharges to "surface waters" (which could include isolated low areas) that are not Clean Water Act "navigable waters" (waters of the United States).

EPA's response brief is due March 23. Final reply briefs (by the environmental groups and the regulated groups) will be filed May 11.

EPA Notice: Producers' Compliance Guide for CAFOs

In November 2003, EPA issued a "Producers' Compliance Guide For Concentrated Animal Feeding Operations" to help producers comply with its new CAFO rules (despite the pending lawsuit challenges to the rules). The guide is intended to provide (in "plain English") background information on EPA's program for regulating CAFOs to clarify why they are being regulated, in addition to criteria that producers can use to determine whether a facility is regulated. The guide includes:

- How to apply for a permit;
- What requirements a permit would contain;
- What is the compliance assurance process; and
- Contact information for each State's NPDES program.

EPA's guide is available through each of the EPA regional headquarters, state agricultural agencies, and other sources, including the EPA Web site at <http://cfpub.epa.gov/npdes/afo/cafofinalrule.cfm>. The EPA contact for further information about compliance issues is Nina Bonnelycke, 202/564-0764, bonnelycke.nina@epa.gov. When in doubt, however, producers would always be well advised to consult with private counsel familiar with these issues.

D.C. Circuit Dismisses Litigation over the July 2000 TMDL Rule

The D.C. Circuit Court of Appeals granted EPA's motion to dismiss the consolidated challenges to the July 2000 final total maximum daily load (TMDL) rule on Nov. 18. In March 2003, EPA withdrew the controversial

rule that would have revamped the agency's program for cleaning up impaired waters. The proposed TMDL rule received more than 34,000 comments (many negative). Ultimately, the final July 2000 rule was challenged in court by some two dozen parties. Following EPA's determination that the rule was unworkable and its withdrawal of the rule in March 2003, EPA moved to dismiss the D.C. Circuit challenges as moot. No petitions to review the March 2003 withdrawal were filed. More information on the TMDL program is available on EPA's Web site at <http://www.epa.gov/owow/tmdl/>.

EPA Taking Its Time with "Watershed Rule"

Having withdrawn the ill-fated July 2000 TMDL rule, EPA's plans to revise its TMDL and water quality planning regulations remains in limbo while the agency seeks input from a variety of stakeholders. An anticipated new regulation initiated under the Bush Administration has been dubbed the "Watershed Rule" for its emphasis on watershed planning programs rather than a narrow focus on TMDLs. The draft Watershed Rule has been posted on the Web in various locations and is discussed in the July/August 2003 issue of *Trends*, which all ABA Section of Environment, Energy, and Resources members receive via mail. A good summary of the draft rule also can be found at the website of D.C.-based Capitolink, <http://www.capitolink.com/wm/show.php?id=406>.

Advance Notice Regarding Regulation of Isolated Waters

The U.S. Army Corps of Engineers and EPA issued an advance notice of proposed rulemaking in January regarding the scope of waters and wetlands that are subject to the Clean Water Act in light of the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001) (SWANCC). 68 Fed. Reg. 1991 (Jan. 15, 2003). The

SWANCC opinion held that the Corps had exceeded its regulatory authority under the CWA in asserting jurisdiction over isolated intrastate non-navigable wetlands.

The January notice solicited input regarding issues associated with the definition of “navigable waters” under the CWA and on the implications of the SWANCC decision for CWA jurisdictional determinations. EPA and the Corps received approximately 133,000 comments during the public comment period, which closed in April. As an appendix to the notice, EPA and the Corps issued a joint memorandum intended to provide clarifying guidance regarding the SWANCC decision and addressing jurisdictional questions concerning the scope of “navigable waters.” The guidance was published separately at 68 Fed. Reg. 1995.

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POINT – COUNTERPOINT: EPA’S REVISED CAFO REGULATIONS

CONCENTRATED ANIMAL FEEDING OPERATIONS: AN UNSATISFACTORY SET OF NEW REGULATIONS

Barclay R. Rogers

Introduction

Agriculture is the leading source of water pollution in America and concentrated animal feeding operations (CAFOs) are among the worst offenders. The U.S. Environmental Protection Agency (EPA) currently estimates that CAFOs generate roughly 1 billion pounds of waste per year, approximately 90 percent of which is spread on fields, causing significant water pollution.

EPA estimates 40 percent of rivers and streams in America are unfit for swimming, boating, fishing, drinking, or other uses, and 45 percent of lakes, reservoirs, and ponds fail to meet basic water quality standards, with bacteria and nutrients being the leading source of pollution. CAFOs are major sources of both of these pollutants.

Inadequacies in CAFO Regulations

Clean Water Act

The Clean Water Act regulates two sources of water pollution: (1) “point sources” (e.g., pipes and ditches), which require permits under the National Pollution Discharge Elimination System (NPDES), 33 U.S.C. §§ 1311(a), 1342(a); and (2) nonpoint sources, which are essentially all sources of pollution other than point sources. CAFOs are expressly listed as point sources, so discharges from these operations must meet specific technology-based standards and must not cause

violations of water quality standards. 33 U.S.C. §§ 1342(a), 1311(b)(1); *Carr v. Alta Verde Industries*, 931 F.2d 1055 (5th Cir. 1991). Nonpoint source pollution is controlled mainly through non-regulatory statewide management plans. 33 U.S.C. § 1329(b).

Clean Water Act Regulations for CAFOs

On Feb. 12, 2003, EPA issued a new set of CAFO regulations to replace those that had been in effect since the 1970s. 68 Fed. Reg. 7176 (Feb. 12, 2003). An “animal feeding operation” (AFO) is a “lot or facility” where animals are confined for 45 days or more within a 12-month period and on which crops are not grown. CAFOs are AFOs that confine more than a specified number of animals and are divided into three subcategories: Large, Medium, and Small. Large CAFOs are those that confine more than a set number of animals (e.g., 700 mature dairy cows), medium CAFOs confine a smaller number of animals (e.g., 200 to 699 mature dairy cows) and discharge pollutants into waters of the United States, and small CAFOs are any AFOs designated by EPA or the state NPDES permitting agency that are not Medium or Large CAFOs. 40 C.F.R. § 122.23(b).

All CAFOs must apply for permit coverage, but a CAFO may be excused from the permit requirement if it can show that it has “no potential to discharge.” To qualify for this permit exception, a CAFO must establish that “there is no ... potential for a discharge of manure, litter or associated process wastewater that was generated while the operation was a CAFO, other than agricultural stormwater from the land application areas.” 40 C.F.R. § 122.23(f)(1). A CAFO that has received a “no potential to discharge” determination remains liable under the Clean Water Act for discharges to navigable waters.

All CAFO NPDES permits must include:
(1) Nutrient management plans, including

procedures to implement applicable effluent limitations and standards; (2) specific record keeping obligations, including maintenance of nutrient management plans and off-site manure transfer records; and (3) annual reporting of the number of animals in confinement and the amount of manure land applied. 40 C.F.R. § 122.42(e).

Additionally, each animal category must meet specific effluent limitation guidelines. For example, beef, dairy, swine, and poultry operations must implement best management practices for the land application of manure based upon the nutrient management plan and subject to certain setback requirements. Beef, dairy, swine, and poultry CAFOs are expressly allowed to discharge from the land application area so long as the CAFO land applied the waste in accordance with the nutrient management plan. In contrast, horse and sheep CAFOs cannot discharge except in an “overflow” event from a facility built to contain all wastes plus the runoff from a 10-year, 24-hour storm event. See generally 40 C.F.R. Part 412.

Problematic Provisions: Holes in the Regulatory Net

Agricultural Storm Water Exemption

CAFOs encompass both the production area and the land upon which the waste from the confined animals is applied. See *Concerned Area Residents for the Environment v. Southview Farm*, 34 F.3d 114 (2d Cir. 1994), cert. denied, 514 U.S. 1082 (1995). The new regulations state that “[l]and application discharges from a CAFO are subject to NPDES requirements,” but excuse from regulation those discharges that qualify as “agricultural stormwater discharges.” 40 C.F.R. § 122.23(e). The Clean Water Act excludes from the definition of point source, and thus from the permit requirement, agricultural stormwater discharges. 40 C.F.R.

§ 122.23(e); 33 U.S.C. 1362(14). Under the new regulations, “where manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices ... as specified in [the nutrient management plan], a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.” 40 C.F.R. § 122.23(e).

This regulatory sleight of hand is significant. EPA aims to regulate, through the nutrient management planning process, the water running off the fields. But the agency seeks to exempt this regulated runoff from standard Clean Water Act requirements. The Clean Water Act requires all point source discharges to meet both technological and water-quality based standards. However, under the new CAFO regulations, EPA attempts to sidestep this Clean Water Act requirement and apply just technological standards to the land application area, virtually ensuring that CAFOs will not meet water quality standards. The preamble to the regulations makes this abundantly clear:

[W]here a CAFO is land applying manure, litter, or other process wastewater in accordance with site specific practices designed to ensure appropriate agricultural utilization of nutrients, no further effluent limitations will be authorized, for example, to ensure compliance with water quality standards. Any remaining discharge of manure or process wastewaters would be covered by the agricultural storm water exemption and would be considered nonpoint source runoff.

68 Fed. Reg. 7198.

As point sources, CAFOs are prohibited from discharging pollutants from any aspect of the operation, including the land application area,

except in compliance with strict statutory requirements. *Southview Farm*, 34 F.3d at 123. Among those requirements is an explicit obligation not to violate water quality standards. 33 U.S.C. § 1311(b)(1). While stating that the land application area is “subject to NPDES permit requirements,” the new regulations insulate discharges from these areas from the water-quality based limits. However, as point sources under the Clean Water Act, CAFOs must meet the full panoply of statutory requirements, including water quality based limits.

Nutrient Management Plans

To complicate matters further, the nutrient management plans are not available for public review and are subject to only limited governmental oversight. While requiring all CAFOs to have nutrient management plans, the EPA has left the planning process almost entirely to the CAFOs themselves. CAFOs are required to keep a copy of the nutrient management plan on site, and the government may demand a copy. But the government lacks the authority to disapprove a plan, and the public is not given access to the nutrient plans.

Furthermore, the regulations are inadequate to overcome existing economic incentives to over-apply waste. Off-site transportation of animal waste is an added expense for CAFOs and, barring government intervention, an economically rational CAFO will seek to avoid these costs by applying as much waste as possible to the smallest land acreage available. As evidence of this phenomenon, the U.S. Department of Agriculture reports that the animal industry generates between 60 percent to 65 percent more nutrients than can be effectively used on available cropland, with the bulk of the excess nutrients coming from CAFOs.

The standards for nutrient management in the

new regulations are not sufficiently stringent to overcome the economic incentives to over-apply manure. Nutrient management plans must accommodate CAFO production goals and only “minimize nitrogen and phosphorus movement to surface waters.” 40 C.F.R. § 412.4(c)(1). Unlike the regulations of old which prohibited discharges from CAFOs, the new regulations set forth only a nebulous standard of discharge minimization. Nutrient management plans, the vehicles to achieve the discharge reduction, are written by the CAFO, are not required to undergo any governmental approval process, and are not subject to public scrutiny. Given the amorphous standards for the plans and the lack of governmental and public oversight in the planning process, CAFOs undoubtedly will be tempted to apply manure at the least cost, without concern for the environmental effects of the disposal.

The new regulations further encourage unsustainable manure application practices by insulating discharges from the land application areas from enforcement, because a discharge pursuant to a nutrient management plan is treated as exempt agricultural storm water. As long as the nutrient management plan satisfies the flexible standards set forth in the regulations, a CAFO will undoubtedly claim that it is immune from federal enforcement.

Citizen oversight, a key component of the Clean Water Act, is hampered by the secretive nutrient management planning process. NPDES permits are by law subject to public notice and comment and are available for public review. 33 U.S.C. § 1342(b)(3). Citizens use the public comment period to shape future NPDES permits and review NPDES permits and discharge reports to ensure the permittee is complying with its terms. Under the new regulations, however, nutrient management plans are not subject to public notice and comment. Accordingly, citizens lack the ability to review the plans and

ensure that they adequately protect water quality.

Conclusion

Agriculture is the biggest threat to our nation’s waters, and CAFOs are among the worst agricultural polluters. EPA claims that the recently promulgated CAFO regulations represent “an historic step forward in our efforts to make America’s waters cleaner and purer.” EPA Press Release, *EPA and Agriculture Working Together to Improve America’s Waters*, available at <http://cfpub.epa.gov/npdes/afo/cafofinalrule.cfm>. But the details of the new regulations cast serious doubt on this claim. The regulations expressly allow pollution that was previously prohibited by federal law, ignore impacts on water quality, and shield polluters from essential public oversight. If this is an historic step forward, I fear what the future may hold.

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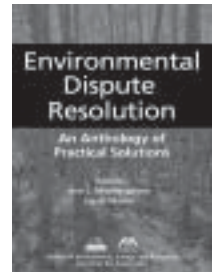
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The Agricultural Management Committee welcomes the participation of members who are interested in preparing this newsletter. If you would like to lend a hand by writing, editing, identifying authors, or identifying issues please contact Ellen Steen at 202/624-2539 or esteen@crowell.com.

New from ABA Publishing and The Section of Environment, Energy, and Resources

Environmental Dispute Resolution: An Anthology of Practical Solutions **Ann L. MacNaughton and Jay G. Martin, editors**

Environmental Dispute Resolution: An Anthology of Practical Solutions provides comprehensive and thoughtful treatment of the topic for the serious student and also highly practical guidance in specific substantive contexts to those who may wish to focus on one or a few of its chapters. This useful handbook provides a toolkit of diagnostics, systems, strategies, and methodologies proven effective in diverse substantive contexts. It can be read in order, or in any order, or chapters can stand alone for the reader with a particular substantive or procedural focus. The information in this book will be invaluable to anyone involved with environmental risk management, environmental management systems, environmental dispute resolution, or sustainable development system design and implementation.



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CONCENTRATED ANIMAL FEEDING OPERATIONS REGULATIONS: FOUR CONCERNS FOR FARMERS

Don R. Parrish

"[I]t is tempting to believe that social evils arise from the activities of evil men and that if only good men wielded power, all would be well." – Milton Friedman

The Environmental Protection Agency's Clean Water Act (CWA) Concentrated Animal Feeding Operations (CAFO) rule has caused great concern throughout the agricultural community. The CAFO rule blurs the clear statutory distinction between the discharge of pollutants from a point source and nonpoint source pollution resulting from the day-to-day agricultural activities of our nation's farmers and ranchers. EPA's regulations place livestock producers in financial jeopardy and may ultimately lead to the demise of many family farm operations. Farm Bureau has voiced four leading concerns about the CAFO rule.

Four Concerns Regarding the CAFO Rule

The CAFO Rule Ignores State Regulatory Plans

At the outset, it is important to note that Farm Bureau believes there is no regulatory vacuum at either the federal or state level and no need for a substantial increase in the federal regulation of animal feeding operations. States throughout the country have instituted their own non-National Pollutant Discharge Elimination System (NPDES) permitting schemes that address CAFOs. The existence and success of these permitting schemes indicate that increased federal regulation of CAFOs will result in increased coordination costs for federal and state governments and unnecessary heightened regulatory burdens for producers. Early in the regulatory process,

EPA documented that there were only 2,238 NPDES-permitted livestock facilities. They also documented that states, over and above the federal requirements, had issued 41,601 permits to livestock facilities. EPA Support Document, "Permitted Facilities by State/Region," Table 3-2 at 3-8 (Baseline description of Confined Livestock Animal Feeding Industry, Sept. 2, 1999. Prepared for Office of Wastewater Management, by DPRA, Inc.). These statistics fail to justify the need for additional federal permits by overlooking existing state regulatory programs.

EPA Lacks Data to Justify this Rule

In addition to financial and administrative problems, EPA's own inadequate, unscientific, and unreliable water quality data fail to support the need for increased federal regulation of CAFOs. EPA points to its "National Water Quality Inventory" (Inventory) – a summary of state water quality reports under section 305(b) of the Clean Water Act – as justification for revising its CAFO regulations, even though it acknowledges that the assessment methods suggest that the Inventory should not be considered a reliable indicator of water quality or used as a basis for regulatory decision-making. The General Accounting Office (GAO) also concludes that: "EPA uses information from the 305(b) report for many important national decisions, such as . . . making major regulatory decisions. Given the lack of representativeness of the data in this report and their inconsistency, they are of limited usefulness for these purposes." USGAO, *Key EPA and State Decision Limited by Inconsistent and Incomplete Data*, GAO/RCED-00-54 (March 2000).

Close analysis of the Inventory reveals that reporting state agencies: (1) only assess a small percentage of their waters, (2) ignore statistical methodologies (therefore the data cannot be used to extrapolate on the quality of non-assessed waters), (3) have a tendency to

focus on water bodies with suspected problems, (4) do not use consistent assessment methodology, and (5) lack consistent and reliable methodologies for determining the causes and sources of pollution.

Moreover, the 1996, 1998 and 200 Inventories reveal that animal agriculture was reported by states to be a problem in only about *three percent* of the Nation's assessed rivers and streams and about *one-half of one percent* of the Nation's assessed lake acreage. Accordingly, the Inventory does not justify the new CAFO rule. EPA appears to have ignored studies by an EPA contractor, and the U.S. Department of Agriculture (USDA), showing feedlot nutrient problems in a small number of the nation's counties. (Only 2.3 percent of the nation's 3,142 counties with a potential nitrogen issue and 5.1 percent potentially have a phosphorus issue). See, Kellogg, *et al.*, *Potential Priority Watersheds for Protection of Water Quality from Contamination by Manure Nutrients* (USDA 2000).

Another useful reference to consider is the number of livestock on the Nation's farms and ranches. USDA's National Agricultural Statistics Service (NASS) data show that the number of cattle (beef and dairy) raised in the United States has declined since 1960. (NASS 1961 and 2001). In 1960, NASS reported 96.2 million beef cattle and 19.2 million dairy cattle (115.4 million total). In 2000, however, NASS reported 98.1 million beef cattle but only 9.2 million dairy cattle (107.3 million total) – a decrease of 8.1 million. In the swine sector, NASS reported 59 million hogs in 1960 and a slight increase to 59.8 million hogs in 2000. As for poultry, NASS reported 1.4 billion chickens, turkeys, and ducks on farms and ranches in 1960, with an increase to 8.4 billion in 2000. Thus, poultry is the only category of livestock that has seen a significant increase in its numbers

in the last four decades. A unique aspect to poultry production is that the manure is handled almost exclusively as dry manure; it also has a relatively well-developed nutrient market infrastructure.

Gains in efficiency from genetics, better confinement technologies, and improved feed formulations have created measurable increases in feed conversion efficiencies. The ratio most commonly used to indicate feed efficiency is pounds of feed per pound of gain. A recent study indicates that in just six years (1992-1998), the amount of feed used to produce 100 pounds of meat *decreased by 20 percent*. The same feed producing more meat means less manure. Other efficiencies in feed formulations could soon help to reduce the levels of problem nutrients in CAFO waste. McBride and Key, February 2003, available at <http://www.ers.usda.gov/publications/aer818/>.

The data referenced above and characterized by EPA as “the best information the agency has,” do not suggest a national crisis, the need for a comprehensive regulatory initiative, or the need for a national-level solution. It is appalling to think that this entire regulatory scheme has been justified on “spin” and a perception of a national crisis generated by special interests.

Complying with New NPDES Regulations Will Be Too Costly for U.S. Producers

As environmental regulations are placed on livestock farms, this additional cost of production will stress our current farm structure and accelerate the transition to larger, more efficient operations. EPA's new CAFO regulations are not size neutral. Large farms will clearly be in the best position to absorb and reduce the per-unit cost associated with the new requirements.

The typical cost estimates to implement EPA's new permit conditions will likely fall within a

range of \$100,000 for smaller CAFOs, \$500,000 for medium CAFOs, and over \$1,000,000 for larger CAFOs. Farmers cannot readily pass these costs along to U.S. consumers, so agricultural investors and growers could abandon opportunities for proposed animal feeding/processing operations within the United States. Mexico, Brazil and Argentina will welcome the investment and jobs the industry will bring for the livestock production sector and its entire support system (e.g., meat processing and feed grain production). The resulting shift in global production could have a massive systemic impact on U.S. agriculture at all levels. If domestic food producers cannot compete internationally, the United States will have new food security and safety concerns and an equally troublesome vacuum in rural areas of the United States.

EPA's CAFO Rule Exceed Its Authority under the Clean Water Act

EPA's discretion to regulate CAFOs is circumscribed by Congress's intent at the time the relevant CWA permit provisions were passed (1972). The legislative history of the CWA clearly indicates that Congress was primarily concerned with direct, "end-of-pipe" discharges. EPA's new regulations exceed the agency's authority by requiring permits for livestock operations that have no such discharge. The CWA is based on a simple discharge prohibition expressed in very plain language in Section 301: "except as in compliance ... with this title ... the discharge of any pollutant by any person shall be unlawful." Accordingly, EPA's rule overreaches when it expressly requires all CAFO owners or operators to apply for an NPDES permit based on an arbitrary determination of "potential" to discharge and regardless of whether the CAFO *actually* discharges pollutants into waters of the United States.

The new CAFO regulation maintains that all CAFOs have a "duty to apply" for an NPDES permit unless they obtain a site-specific exemption after proving "with a high degree of certainty" that they have no potential to discharge. The site-specific exemption is available to operations only after: (1) the facility supplies roughly the same information that is required by a permit; (2) the permitting agency issues a public notice and gathers public comment; and (3) the facility demonstrates that "there truly is no potential for [the] CAFO's manure or wastewater to reach waters of the United States under *any* circumstances or conditions." (Emphasis added.) The new regulations overreach by making this "no potential to discharge" a conditional waiver: "the director may... require a permit" for a facility with no reasonable potential to discharge.

The new rules also assert regulatory authority over certain discharges from CAFO land application areas. The rule provides that "the discharge of manure, litter, or process wastewater to waters of the United States from a CAFO *as a result of [land application] by the CAFO* to land areas under its control is a discharge ... subject to NPDES permit requirements, except where it is an agricultural storm water discharge." The rule then provides that any such discharge is an exempt "agricultural storm water discharge" where the land application is "in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients."

A "concentrated animal feeding operation" does not include fields in which animals are not concentrated and where no feeding takes place. Farm Bureau believes EPA lacks the statutory authority under the CWA to expand the definition of a CAFO to apply the NPDES program to nonpoint source activities or agricultural storm water discharges. Congress, without qualification, exempted

agricultural storm water discharges from regulation by the NPDES program.

Some of the Best Management Practices required under EPA's new Effluent Limitation Guidelines are not rationally related to preventing discharges to waters of the United States and thus exceed EPA's CWA authority. Examples include sampling and record keeping related to any lagoon "overflow" and daily inspection of fresh water lines even in cases where a pollutant has never been discharged into waters of the United States.

Seeking a "Sustainable" New Paradigm for Animal Manure Management

Section 122.23(b)(5) of EPA's new CAFO rule defines manure as including "manure, bedding, compost and raw materials or other materials commingled with manure or set aside for disposal." Thus, manure includes anything "commingled" with manure and implies that it is a waste product in need of "disposal."

This definition not only institutionalizes negative connotations but also adds to existing significant barriers to the orderly development of functioning market-based solutions for animal manure management. In fact, there are at least three significant constraints on the development of non-traditional uses of manure. First, the characterization of manure as a waste rather than a useful nutrient inhibits the development of market-based approaches. Second, federal, state, and local regulations requiring that it be handled as a waste also limit other uses. Third, because of the first two constraints, there has been a complete lack of imagination and innovation to redefine the potential uses of animal manure.

Manure is partly made up of unused feed (e.g., partially digested corn and soybeans). If we see manure as unused corn and soybeans

an entirely new paradigm emerges. Products derived from manure can be processed into many of the products that corn or soybeans could create. Therefore the opportunity exists to move beyond managing anaerobic lagoon effluent to the development of new technologies and the infrastructure to market and distribute innovative new products made from unused corn and soybeans. Dr. Mark Jenner, *Constraints to Effective Non-Traditional Uses of Manure or, Aligning the Demand for Carbon-based Products with the Supply of Leftover Corn and Soybeans* (American Agricultural Economics Association seminar, 2000.).

Sophisticated conversion technologies exist that will allow unused corn and soybeans to be used in the following manner:

- Distillation of ethanol
- Conversion to biodiesel
- Gasification
- Fiberboard and containers
- Direct Combustion
- Organic fertilizers
- Compost – reclamation and remediation

This is a more "sustainable" approach to agriculture, which adapts the more "holistic" approach that critics of agriculture have urged upon farms.

To achieve this new paradigm, we must move beyond the negative regulatory definition of manure. Manure processing technologies will be slow to develop and it will take time for society's perspective to change. We are about 10 years into a 50-60 year process, unless command and control regulations like the CAFO rule mandate a "one-size-fits-all" solution and suppress innovation.

Conclusion

Farm Bureau finds the CAFO rule to be a more targeted approach than EPA's initial

proposals and environmental groups' ambitious plans for public oversight. Nevertheless, the new regulations create the opportunity for regulators and courts to impose whatever conditions they deem necessary to protect water quality, at all costs. This could lead to the development of open-ended requirements and conditions that will ultimately lead to burdensome and costly compliance issues for livestock operations.

The CAFO regulation is a classic command and control scheme and is predicated on a false premise. If your only tool is a hammer, then every project is likely to look like a nail. Agriculture is a delicate and interdependent economic activity with narrow profit margins and fierce international competition. If livestock production cannot survive and profit within the United States, one should rationally expect a huge percentage of the nation's feed grain producers and rural agricultural support businesses to perish. Consumers would then be left dependent on foreign food imports, with immeasurable loss of value for American food security, safety, and rural culture.

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BACK ISSUES

Back issues of this Newsletter can be viewed on the Agricultural Management Committee Web page at <http://www.abanet.org/enviro/committees/agricult/newsletter/>.

WANT TO GET WET AND DIRTY? JOIN OUR PUBLIC SERVICE EFFORT!

Alexandra Dapolito Dunn and Raissa Kirk

The Section's In-House Counsel Committee invites you to join our exciting community service project with *Earth Force – Youth for a Change!* This article gives you a brief overview of our efforts to date and provides information on how you can get involved in our activities. Earth Force is a national non-profit organization created in 1994 by The Pew Charitable Trusts in recognition of two emerging national trends: young people's desire to act on behalf of the environment and their wish to help their communities through voluntary service. Through a variety of programs, Earth Force – which serves 35,000 youth a year through 11 offices nationwide – helps young people discover and implement lasting solutions to environmental problems in their communities.

The In-House Counsel Committee's public service project works with Earth Force's GREEN program – the Global Rivers Environmental Education Network. This award-winning program, developed nearly a decade ago at the University of Michigan, matches middle and high school science classes with private sector sponsors to study and improve water quality in their community. A local watershed group also is involved in each GREEN project. Students and their teachers begin GREEN by doing a watershed assessment that includes physical, chemical, and biological monitoring. Using this data and other resources, they identify a problem they would like to address. Students research the problem in a balanced fashion, review applicable legal or community considerations, and decide on their preferred solution. They then design and implement an action plan to address the problem and conclude by reflecting on what they learned.

The private sector sponsors fund the students' water monitoring and testing equipment, which are kits pre-assembled by Earth Force. Professionals from the private sector serve as mentors to the students in the program and as resources for their teachers by assisting in monitoring events, attending a class session, or being available by phone to give input to the class. There is no fixed time commitment. Mentors can provide just a few hours or more routine support to their host schools. The cost of sponsoring the necessary training, manuals, kits, and support for a GREEN school in a city where GREEN infrastructure exists is \$5,000. Of course, this is often an excellent opportunity to meet other corporate leaders and to gain public recognition for your organization or firm. Bottom line, this is a "turn key" project – if we can raise the funds, Earth Force provides the training and does the work to match the sponsors with schools and a watershed partner!

By recruiting and pooling sponsors within a geographic area to reach the \$5,000 needed to move forward in a city with pre-existing GREEN activities, the In-House Counsel Committee already has started two projects to date. Our Indianapolis, Indiana project is funded and supported by Eli Lilly, the law firm of Krieg DeVault, and the law firm of Harrison & Moberly. Our Baltimore, Maryland, project is funded and supported by the Section, Constellation Energy, Quality Environmental Solutions, and the law firm of McGuire Woods. We thank all of these dedicated organizations for helping us kick this project off during the 2003 school year. The Indianapolis team has already been out in a waterbody with the students and their local nonprofit partner – Hoosier Riverwatch. Our Baltimore supporters recently had mentor training and will be out in the water in the spring.

We hope to start another project soon in one of the following cities: Lansing, Michigan; Detroit, Michigan; Spring Hill, Tennessee;

Shreveport, Louisiana; Houston, Texas; Austin, Texas; Philadelphia, Pennsylvania; Erie, Pennsylvania; Pittsburgh, Pennsylvania; Tampa/St. Pete, Florida; Charleston, South Carolina; Portland, Oregon; or Lordstown, Ohio. To begin GREEN efforts from scratch in a city beyond the aforementioned where GREEN activities already are ongoing, we need to raise \$25,000. We are hoping to accomplish this in Washington, D.C., to start. If your group, firm, or company is interested in committing all or part of the funds needed to start a project in one of these cities, please let us know by e-mail.

What makes GREEN so exciting is that our efforts and time contributions show quick returns. The GREEN program generally is implemented from start to finish during a school year. As you can imagine, GREEN builds essential academic skills including critical thinking, teamwork, problem solving, and decision making; teaches students how to assess watershed health with the proper tools; and encourages youth to undertake projects to improve environmental quality based on their findings. Visit <http://www.green.org> to learn more about GREEN. When we work together, young people and attorneys can improve their communities, learn, and have fun at the same time. We hope you join our efforts!

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ABA Section of Environment,
Energy, and Resources
12th Section Fall Meeting
Oct. 6-10, 2004

Save the Date!

**AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES**

Calendar of Section Events

Conference on Free Trade and the Environment

January 19-20, 2004

Santiago, Chile

(Co-sponsored with ABA Standing Committee on Environmental Law, for information call 202/662-1693.)

ABA Midyear Meeting

February 6, 2004

San Antonio, Texas

22nd Annual Water Law Conference

February 19-20, 2004

San Diego, California

33rd Annual Conference on Environmental Law

March 11-14, 2004

Keystone, Colorado

6th Annual Dispute Resolution Conference

April 15-17, 2004

New York, New York

Eastern Water Law Conference

May 6-7, 2004

Hollywood, Florida

12th Section Fall Meeting

October 6-10, 2004

San Antonio, Texas

For more information, see the Section Web site at <http://www.abanet.org/environ> or contact the Section at 312/988-5724.

