



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Concentrated Animal Feeding Operations/ Water Pollution Control: Maryland Circuit Court Addresses Whether Permit Should Have Included Gaseous Ammonia Prohibition

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A Montgomery County, Maryland, Circuit Court (“Court”) addressed in a Memorandum Opinion (“Opinion”) whether a reissued State Discharge Permit No. 19AF/National Pollution Discharge Elimination System Permit No. MDG01 (“Permit”) should have included a prohibition on gaseous ammonia. See *In Re Petition of Assateague Coastal Trust for Judicial Review of the Decision of the Maryland Department of the Environment – In the Matter of Land and Materials Administration Determination to Re-Issue General Discharge Permit for Animal Feeding Operations State Discharge Permit #19AF/NPDES #MDG01*.

Petitioner Assateague Coastal Trust raised the issue in an Administrative Appeal of the Maryland Department of the Environment’s (“MDE”) reissuance of the Permit.

In addressing the Petition the Court describes Maryland’s water pollution control statutory scheme as encompassing expanded definitions of several terms that:

... enlarge the MDE’s mandate and enables the MDE to regulate multiple categories of pollutants.

In 2019 MDE made a tentative decision to reissue the referenced Permit without limitations on the discharge of gaseous ammonia from concentrated animal feeding operations (“CAFOs”). A public comment on the draft referencing Section V, Monitoring, stated:

The Permit does not adequately address air pollution (particulate matter)/ammonia depositions) from poultry house exhaust fans and manure sheds that are deposited in the air and make their way to surface waters causing health and water quality impairments. . . . The Permit must be amended to reflect air emissions and monitoring requirements based on results from studies to be conducted by December 2, 2021. . . . How will MDE regulate these emissions in the Permit and determine impacts to resources? What is the monitoring strategy?

MDE responded in pertinent part:

EPA does not regulate odors or air quality through its CAFO permitting program. See generally 40 CFR 122.23. While MDE derives much of its NPDES permitting authority from EPA and the CWA, it is authorized, as a delegated program, to impose requirements that are more stringent than what is required by CWA or EPA’s regulations. Therefore, MDE included in the draft General Discharge Permit

provisions that require AFO owners or operators to implement BMPs [best management practices] in order to reduce nuisance odors and address any air quality resource concerns using appropriate NRCS Practice Standard(s). See General Discharge Permit at Part IV.D.1-2. . . . Ammonia emissions/ammonia deposition have been considered and addressed to the extent permissible under the Clean Water Act and the state's water pollution control law and implementing regulations with the requirement of several NRCS practices including litter amendments and hedgerows/shelterbelts.

MDE decided to reissue the Permit without a gaseous ammonia prohibition. The Petitioner then appealed the Permit to the Court.

Petitioner argued on appeal that the Permit was deficient under both federal and state law due to the lack of effluent limitations restricting the discharge of gaseous ammonia. They argued that MDE's determination that gaseous ammonia is not within the purview of the Clean Water Act is an erroneous conclusion of law based on the federal statutory definitions and the Environment Article of the Annotated Code of Maryland. The definitions were described by Petitioner as greatly expanding MDE's reach and, therefore, required the regulation of gaseous ammonia discharged by CAFOs.

The Court determined that Maryland legislation expanded the Clean Water Act to unambiguously include gaseous ammonia as it was stated to be codified in the Maryland Environment Article citing § 9-302. The definition of pollutant and discharge is described as broadened in the Environment Article. The Court, therefore, concluded MDE is required to regulate ammonia as a water pollutant. In supporting this conclusion it stated:

- Ammonia is a gaseous pollutant under § 9-101.
- CAFOs emit gaseous ammonia into the bay through the use of industrial fans.
- Regulating gaseous ammonia does not expand the Clean Water Act

The Court held that MDE erred as a matter of law in concluding that gaseous ammonia emissions are not governed by the Clean Water Act and the Environment Article. As a result, it reversed MDE's final determination and remanded to the agency with a mandate to impose effluent limitations for gaseous ammonia.

A copy of the Memorandum Opinion can be downloaded [here](#).