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Concentrated Animal Feeding Operations/Clean Water Act: Washington Appellate Court Addresses Challenge to Combined State NPDES Permit

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The Court of Appeals of Washington – Division 2 (“Court”) addressed in a June 29th Decision a challenge to the Washington Department of Ecology’s (“WDE”) Concentrated Animal Feeding Operation (“CAFO”) Waste Discharge General Permit (state only) and Combined National Pollutant Discharge Elimination System (“NPDES”) and State Waste Discharge General CAFO Permit (combined permit). See *Washington State Dairy Federation, et al. v. State of Washington Department of Ecology*, 2021 WL 2660024.

Puget Soundkeeper Alliance and other organizations (collectively “Puget Soundkeeper”) appealed the Washington Pollution Control Hearing Board’s (“Board”) Order approving the previously referenced CAFO Permits.

Most states are authorized to issue Clean Water Act NPDES Permits. Washington is one of such states. Consequently, the operator of a CAFO in an authorized state requests permit coverage from the appropriate state agency.

CAFOs are agricultural operations where the animals are kept and raised in confined situations. It may include a lot or facility where the animals have been, are, or will be stabled or confined and fed for a certain prescribed period of time in a 12-month period. Animals housed in a CAFO may include dairy cows, sheep, hens, or other types of livestock and poultry.

Animal feeding operations that meet the regulatory definition of a CAFO are, therefore, regulated under the Clean Water Act NPDES program. This is due to the manure and wastewater that they can generate which have the potential to contribute pollutants such as nitrogen and phosphorus, organic matter, sediments, pathogens, hormones and antibiotics to the environment.

Puget Soundkeeper argued on appeal that the Board erred in its review of the permits because:

1. the permit conditions do not satisfy the “all know, available, and reasonable methods of prevention, control, and treatment” (“AKART”) requirement with respect to discharges emitted from manure storage lagoons, composting areas, and animal pens and corrals,
2. the permit conditions do not ensure that discharges from CAFOs will not violate water quality standards,

3. the permits do not provide for adequate monitoring,
4. the permits failed to provide for public comment on site-specific nutrient plans prior to issuance, and
5. WDE was required to consider the effects of climate change in drafting the permits but did not do so.

The Court held in its June 29th Opinion that:

1. the permit conditions meet AKART requirements for animal pens and corrals,
2. the permit conditions do not meet AKART requirements for existing manure lagoons or composting areas,
3. the permit conditions do not protect all covered activities from violating water quality standards,
4. monitoring beyond the soil sampling and visual inspections required by the permits is necessary to ensure compliance,
5. the combined permit fails to make site-specific information regarding how a CAFO will comply with permit requirements available for public comment and review as required under the federal U.S. Environmental Protection Agency regulations,
6. WDE had a responsibility pursuant to the State Environmental Policy Act to consider the effects of climate change before issuing the permit, and
7. The T-SUM 200 standard for field application satisfied AKART requirements as applied to Eastern Washington (issue raised by the Washington State Dairy Federation and Washington Farm Bureau).

Consequently, the Court affirmed in part and reversed in part the Board's Order and remanded the permits to WDE for rewriting consistent with its Opinion.

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