Concentrated Animal Feeding Operations: Maryland Appellate Court Addresses Challenge to Maryland Department of the Environment Permits

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The Court of Special Appeals of Maryland ("Court") addressed an appeal of a Circuit Court for Anne Arundel County, Maryland, ("Circuit Court") decision upholding Maryland Department of the Environment ("MDE") permits for Concentrated Animal Feeding Operations ("CAFOs"), Animal Feeding Operations ("AFOs"), and Maryland Animal Feeding Operations ("MAFOs") under the Clean Water Act's ("CWA") National Pollutant Discharge Elimination System Permit Program ("NPDES"). See *Food & Water Watch v. Md. Dep't of the Env't,* No. C-02-CV-000786, 2018 WL 2203175 (Md. Ct. Spec. App. May 14, 2018).

Food and Water Watch and the Assateague Coastal Trust (collectively referred to as "FWW"), challenged Maryland's permit restrictions both during open public comments before promulgation and in Circuit Court following the permits finalization.

The United States Environmental Protection Agency ("EPA") is authorized to delegate Clean Water Act permitting requirements to the states. The states may promulgate regulations with a narrower scope. The issue in this case is whether MDE's restriction was consistent with the requirements with state and federal laws, including the CWA.

Maryland has adopted several rules and regulations regarding water quality and effluent standards in an attempt to pursue goals similar to the CWA. Namely, the MDE aims to restrict the discharge of pollutants and attain the nutrient reduction goals of the Chesapeake Bay Agreement. MDE is further tasked with issuing discharge permits, which allow for discharge of pollutants into surface or ground water. Similar to the federal permitting requirements, MDE has different classes of discharge that are susceptible to regulation under common terms and conditions.

Specifically, Maryland's permit scheme in question requires:

1. CAFOs, which are covered by the CWA, to obtain a NPDES permit issued by MDE;
2. an AFO that qualifies as a CAFO under federal regulations, but does not discharge or propose to discharge to surface water, to be classified as an MAFO; and

3. MAFOs to get a permit from MDE if they are discharging to groundwater, not surface water as described in federal regulations.

CAFOs, AFOs, and MAFOs are therefore a focus of the MDE's water permitting requirements.

The FWW advanced several arguments for striking down MDE's regulations.

First, they argued that MDE's permitting requirements do not require the CAFOs to conduct chemical, biological, and physical monitoring at any outfall or in-stream locations, nor do they set forth the number of required monitoring events, sampling methods, pollutants, and locations. The Court found this argument unpersuasive, primarily because the relevant portion of the regulations applied to storm water discharge—which were not at issue in this case.

Second, FWW argued that EPA regulations mandate that monitoring must be included in every permit. Relying on Natural Res. Def. Council, Inc. v. Cnty. of Los Angeles, 725 F.3d 1194 (9th Cir. 2013), FWW argued that an NPDES permit is unlawful if a permitee is not required to effectively monitor its permit compliance.

The goal in that case, however, was to restrict individual permittees to discharge an unlimited amount of pollutants. In this case, MDE's regulations prevented that type of disposal without FWW's suggested language because MDE's permit is a zero discharge permit. As a result, the Court found that MDE's permitting scheme is acceptable because it has measures in place to ensure compliance with the standards it sets.

Similarly, FWW attempted to persuade the Court that Nat. Res. Def. Council v. U.S. E.P.A., 808 F.3d 556 (2nd Cir. 2015) applied. The Second Circuit had determined EPA's monitoring and reporting requirements for Technology Based Effluent Limitations and ("TBELs") and Water Quality Based Effluent Limitations ("WQBELs") were not in accordance with the law because they were inadequate to guarantee compliance.

The FWW advanced Nat. Res. Def. Council in an effort to highlight that Best Management Practices ("BMPs") could not replace effluent limitations for compliance. The Court found that MDE's BMP's included nutrient management plans, and non-numeric Effluent Limitation Guidelines ("ELGs"), which are allowed under the CWA.

BMPs may be used instead of numerical ELGs when "numeric effluent limitations are infeasible" or "the practices are necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA." 40 C.F.R. § 122.44(k)(3)–(4). The Court therefore concluded that MDE's permit scheme is reasonable and necessary to carry out the intent of the CWA because it is zero discharge. Consequently, numeric limitation measurements were infeasible.

Finally, FWW argued that an NPDES permit must monitor for the mass of pollutants, the volume of effluents and other measurements as appropriate, according to sufficiently sensitive test procedures. MDE supposedly failed to require this in its permitting scheme, therefore violating federal law.

The Court found that the permitting scheme did not authorize pollutant discharges to waters of the state without monitoring. MDE requires voluminous records detailing where animal waste is distributed, recording of inspections, and testing of manure, litter, process wastewater, and soil, all of which must be kept on-site by the CAFOs for a period of five years. MDE's recording requirements were deemed just as stringent—and achieves the same result—as the monitoring of the volume of effluents produced and disposed of by CAFOs.

The holding arguably indicates that a delegated state may be given some flexibility in crafting their requirements as long as such state requirements are as effective as federal guidelines in preventing and limiting water pollution.

A copy of the opinion can be downloaded here.