Confined Animal Feeding Operations: Arkansas Environmental Organization Joins Challenge to USDA Rule Changes for Loans to Medium-Sized CAFOs

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The White River Waterkeeper, of Arkansas, recently joined other environmental and animal rights advocacy organizations to file a lawsuit challenging the U.S. Department of Agriculture (USDA) Farm Service Agency's (FSA) 2016 final rule categorically excluding certain FSA funding decisions for medium-sized confined animal feeding operations (CAFOs). *Dakota Rural Action, et al. v. U.S. Dep't of Agriculture, et al.,* No. 1:18-CV-02852 (D.C.D.C.).

The White River Waterkeeper is "an Arkansas-based 501(c)(3) non-profit organization that advocates for the White River, its watershed, and its communities." Compl. at ¶ 20.

Background

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., requires federal agencies to include environmental values and issues in their decision-making processes. This federal mandate is accomplished by agency consideration of environmental impacts of proposed actions and reasonable alternatives. NEPA differs from action enforcing environmental statutory programs such as the Clean Air Act or Clean Water Act. It does not impose substantive mandates. Instead, it is limited to requiring federal agencies to meet procedural requirements such as preparation of an Environmental Assessment (EA) or Environmental Impact Statement (EIS) in certain defined instances. As a result, NEPA does not require any particular alternative or standard.

The statute authorizes federal agencies, in certain circumstances, to categorically exclude proposed actions that typically do no result in individual or cumulative significant environmental effects or impacts and, therefore, do not merit further environmental review in an EA or EIS.

2016 Final Rule

On August 3, 2016, FSA finalized a rule "consolidating, updating and amending its regulations implementing" NEPA. 81 Fed. Reg. 51274 (Aug. 3, 2016). The regulations, according to FSA, were in place since 1980. FSA completed review of the agency's categorical exclusions, and also expanded and clarified the list of proposed actions that require an EA.

Among the changes, FSA modified the NEPA review requirements for loan financing going to the construction or expansion of a CAFO. FSA previously prepared a Class I or Class II EA that depended on the number of animals and the potential impacts to the environment. This included a required Class I EA for loan financing to medium-sized CAFOs. The Environmental Protection Agency defines a medium-sized

CAFO as including: 200-699 dairy cows; 750-2,499 pigs over 55 pounds; 16,500-54,999 turkeys; and (at a non-liquid manure management facilities) 37,500-124,999 chickens other than laying hens. See 40 C.F.R. § 122.23(b)(6).

The final rule, however, abandoned the existing EA requirements. Specifically, in response to comments, FSA noted that it "revised the provisions to clarify that EAs will only be required for large CAFOs," 81 Fed. Reg. 51274, 51281, while review of small- and medium-sized CAFOs will be concluded, for the most part, with environmental screening worksheets to determine whether an "extraordinary circumstances" exists. Id.; see also, 7 C.F.R. § 799.32.

The Lawsuit

White River Waterkeeper joined with Dakota Rural Action, Institute for Agriculture and Trade Policy, Iowa Citizens for Community Improvement, Citizens Action Coalition of Indiana, Association of Irritated Residents, Food & Water Watch, and Animal Legal Defense Fund) sued USDA and sued FSA seeking an order: declaring the rule for medium-sized CAFOs null and void; vacating the final rule; declaring all FSA funding approvals for medium-sized CAFOs null and void; and, enjoining FSA from undertaking, approving or allowing any funding activity pursuant to the rule. Compl. at pp. 55-56.

The lawsuit's claims include:

- FSA's decision was arbitrary and capricious and not in accordance with NEPA or the Administrative Procedure Act (APA) because the agency failed to support its determination and failed to consider important aspects of the problem;
- FSA's decision was contrary to law and in excess of its jurisdiction for failing to determine that medium-sized CAFOs do not individually or cumulatively have a significant effect on the human environment;
- FSA's decision was contrary to NEPA, NEPA regulations, and Council on Environmental Quality (CEQ) regulations for failing to "substantiate" the determination; and
- FSA's decision was contrary to the APA for failing to comply with all of the public participation requirements for an agency rulemaking.

The lawsuit alleges:

- CAFOs are one of the larges sources of air pollution in the country;
- CAFOs are one of the larges sources of water pollution in the country;
- CAFOs contribute to the development and spread of anti-biotic resistant bacteria;
- CAFOs are water intensive and can cause significant reductions in water supply;
- CAFOs pose significant risks to endangered and threatened species;
- CAFO confinement practices and confinement numbers harm animals;
- CAFOs impact mostly historically under-resourced communities that live adjacent to the facilities; and
- FSA funding serves the interests of large, multi-national corporations over those of individual, independent family farms.

The FSA has until February 8, 2019, to file its Answer. And, given the number and the scope of comments on the final rule, the docket is likely to attract multiple parties from the animal agriculture sector.

A copy of the Complaint can be found here.