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Agricultural Nutrients and Water Quality: Recent Litigation in the United States

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Agricultural nutrients are an increasing concern due to their impacts on water quality. Some of these concerns, such as manure generated at confined animal feeding operations, are not new; in fact, they have persisted for years. What is ever evolving, however, are the mechanisms for addressing nutrient pollution impacts on water quality. Since the advent of the Clean Water Act (CWA), states have attempted to "get it right" and address agricultural nutrient pollution through the National Pollutant Discharge Elimination Permit (NPDES) system. But legal challenges have plagued state NPDES permit programs from their beginnings, and litigation has become a common tool for reducing water quality impacts from manure and other agricultural nutrients. States have developed their own water quality laws and policies, and there have been legal challenges to those as well. These legal challenges arise from environmental interests and impacted neighbors and communities and can be pre-emptive or reactionary.

In our continuing examination of this important issue, we've compiled cases that illustrate the current state of litigation efforts to address water quality impacts from agricultural nutrients. We've grouped cases from 2018 through 2020 into several categories. The cases indicate ongoing attempts to address water quality impacts from agricultural nutrients through legal challenges to agency issuance of NPDES individual and general permits, and interpretations of environmental statutes.

NPDES permits for individual farms: when are they properly issued by states, and when are they necessary?

Commercial agricultural operations often need to obtain permits. Such permits may be required by both state and federal regulatory bodies. Many of these permits pertain to water quality and environmental standards. NPDES permits have played an important role in recent litigation. These permits are required for certain agricultural operations under the Clean Water Act. Specifically, an NPDES permit will be required for an animal operation of a certain size, called "Concentrated Animal Feeding Operations," or CAFOs.

According to 40 C.F.R. §122.23, an animal feeding operation (AFO) is a lot or facility where animals, not including aquatic animals, have or will be confined and fed for 45 days or more in a 12-month period without growing crops or vegetation over the lot or facility and a *concentrated* animal feeding operation is an animal feeding operation that exceeds a minimum number of animals, such as more than 1,000 beef cattle, 700 dairy cows, 2,500 swine over 55 pounds, 125,000 broiler chickens, or 82,000 laying hens or pullets. Furthermore, AFOs, no matter what the number of animals, are *always* considered CAFOs if manure or wastewater is released into a waterway. The administration of permitting for CAFOs has been delegated by the federal Environmental Protection Agency to the states. Every state except Idaho, Massachusetts, New Hampshire, and New Mexico administers the CAFO permitting program within its borders. In the aforementioned states, as well as in the District of Columbia, U.S. territories, and tribal lands, the federal EPA runs the program.

Most states administer the NPDES permitting program within their borders. Often times, the program is carried out by the state environmental agency or another similar agency. While reviewing these cases it is important to keep in mind that the actions of these state regulatory agencies are generally given great deference by the courts. This deference is known as an arbitrary and capricious "standard of review." Under 5 U.S. Code § 706 (2) "The reviewing court shall… (2) hold unlawful and set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law..." While this is a difficult bar to hurdle, it is still possible for a plaintiff to prevail.

***Clean Wisconsin, Inc. v. Wisc. Dep't of Natural Res.*, 2019 WL 1948963 (Wis. Ct. App. 2019)**

Kinnard Farms is a dairy operation in central Wisconsin. In 2012, Kinnard Farms requested that the Department of Natural Resources (DNR) reissue a Wisconsin Pollution Discharge Elimination System (WPDES) permit in order to add a second CAFO site with around 3,000 dairy cows. After the DNR approved the WPDES permit, Clean Wisconsin sought administrative review, alleging that the permit was issued in error because the DNR failed to require monitoring to evaluate impacts to groundwater near manure application sites and did not set a maximum number of animal units, both of which would result in drinking well contamination in the area.

In response, the state of Wisconsin submitted that the DNR lacks the authority both to regulate the number of animals on a dairy and to require such agricultural operations to monitor off-site groundwater. Conversely, Clean Wisconsin argued that the legislature "explicitly provided" the DNR with the "broad authority and a general duty ... to manage, protect, and maintain waters of the state." The issue boils down to the degree of authority DNR holds to regulate Wisconsin's waters.

The Administrative Law Judge (ALJ) found in favor of Clean Wisconsin, determining that there was "a crisis with respect to groundwater quality in the area" and "a massive regulatory failure to protect groundwater in the Town of Lincoln." The ALJ concluded that the permit was unreasonable for its failure to specify the number of animal units permitted at the Kinnard Farms facility and that the DNR must use its regulatory authority to ensure that Kinnard Farms would not contaminate well water with its manure application activities and wastewater. The ALJ also required the DNR to approve a plan for groundwater monitoring at the facility.

The case ended up before the circuit court after the DNR denied a request to review the ALJ's decision. The circuit court determined that the case wasn't yet subject to judicial review because DNR had not imposed the conditions. DNR proceeded to begin imposing the ALJ's conditions but also asked the Wisconsin Attorney General (AG) to determine whether DNR had the authority to do so. The AG then issued an Order stating that "the DNR did not have the authority to impose an animal-unit limit or off-site groundwater monitoring" due to Wisconsin's Act 21, Wis. Stat. §227.10(2m). Act 21, among other things, narrowed state agency rulemaking authority to standards, requirements, and thresholds explicitly required or permitted by statute and limited agency authority to that which is explicitly rather than generally conferred by the Legislature. The AG's order also relied on Act 21 to determine that DNR did not have authority when considering high-capacity water well permits to consider the impacts of such wells on local bodies of water, which directly conflicted with the Wisconsin Supreme Court's holding to the contrary in *Lake Beulah Management District v. DNR*, 2011 Wis. 54. Based upon the AG's Order, the DNR reconsidered its denial to review the ALJ's decision and proceeded to reverse the portions of the decision mandating that DNR to establish animal unit limits and require groundwater monitoring at Kinnard Farms. Note that the DNR also relied upon the AG's opinion to approved several high-capacity well permits, resulting in separate legal challenges by Clean Wisconsin that the agency was failing to consider the impacts of the wells on waters of the state contrary to *Lake Beulah*. The circuit court vacated all but one of the permits, and DNR appealed.

Clean Wisconsin appealed the DNR's decision to the circuit court. Concluding that there "is ample explicit authority in the statutes and rules that gives DNR the power—and the duty—to impose [the conditions] where it is deemed necessary to assure compliance with WPDES requirements" based upon *Lake Beulah* and stating that the DNR could not reconsider the ALJ review petition nearly a year after its denial, the circuit court reversed the DNR's decision and remanded the case to the DNR for implementation of the ALJ's order. The DNR and Kinnard Farms appealed this decision to the Wisconsin Court of Appeals, which certified the matter to the Wisconsin Supreme Court because "the questions presented have statewide concern and implication."

A turn of events occurred on May 1, 2020, however, when the newly elected Wisconsin Attorney General withdrew the Order of the prior AG, admitting that the order was inconsistent with the Supreme Court's holding in *Lake Beulah*. The DNR followed with an announcement that it would no longer abide by the previous AG order and would consider environmental impacts when reviewing high-capacity well permit applications "if presented with sufficient concrete, scientific evidence of potential harm." While the AG and DNR's stances have changed, they did not directly address the issues of groundwater monitoring and maximum animal-units at issue in the Kinnard Farms case, which is still pending before the Wisconsin Supreme Court. There has yet to be a resolution but a ruling from the Supreme Court is expected soon.

***K Tre Holdings v. Mo. Dep't of Natural Res.*, No. SD35512, 2019 WL 3369270 (Mo. Ct. App. 2019)**

In yet another case questioning the validity of state agency decisions, a company filed suit against the Clean Water Commission (CWC) in the Missouri Department of Natural Resources, for approving a General Operating Permit for a poultry CAFO for RNR Farm, LLC. The "No Discharge" permit first issued by the Administrative Hearing Commission and approved by the CWC stated that the wastes from the CAFO would be collected and managed as fertilizer spread onto agricultural fields at rates specified in the permit. K Tre Holdings, a limited partnership owning land in the area, challenged the permit issuance.

The plaintiff argued that approval of the permit was improper for three reasons. First, because RNR Farm did not give the Department of Natural Resources (DNR) an aerial map pointing out setback distances in the production area, and second, because RNR Farm did not give DNR a copy of their proposed building plans for the CAFO. K Tre also argued that four of the commissioners on the CWC were appointed illegally. Under Missouri regulations, a CAFO poultry production barn the size of RNR Farm's "must be set back at least 1000 feet from the nearest public building or occupied residence," and the applicant must "give notice to neighbors within 1.5 times the … setback distance." DNR asked RNR Farm for aerial maps so they could determine whether the farm was in compliance with the regulations. Here, the state court of appeals found that the evidence given during the hearing by the Administrative Hearing Commission was sufficient to show that the two aerial photographs RNR Farm gave to DNR were acceptable and counted as aerial maps. Similarly, the court agreed that the form with a seal from the project engineer was a sufficient response to DNR's request for a copy of proposed building plans with the engineer's seal. The court pointed out that the regulations requiring a construction permit for CAFOs were amended in 2013, meaning that in most cases, construction permits are no longer required in a CAFO permit application.

K Tre's final argument about the appointment of CWC commissioners was transferred to the Missouri Supreme Court because it involved a question of the constitutionality of a statute. Ultimately though, based on the evidence submitted about aerial maps and building plans, the court of appeals affirmed CWC's approval of RNR Farm's CAFO permit. Although this case took place in Missouri and involves that state's law and regulations, it suggests that the agencies and courts were willing to accept documentation required to obtain a permit that is "close enough" to application requirements.

***Olympic Forest Coal. v. Coast Seafoods Co.,* 884 F.3d 901 (9th Cir. 2018)**

While regulatory agencies are often at the center of litigation efforts to address agricultural nutrients in waterways by environmental organizations, agricultural producers have also been targeted. Such was the case in 2016, when the Olympic Forest Coalition (OFC) filed a citizen suit under the CWA directly against a fish hatchery. The OFC contended that the hatchery's waste and repeated discharges of chlorine into Quilcene Bay, Washington, constituted a point source of pollution that required an NPDES permit. OFC argued that the discharges should be filtered in order to keep the bay clean and protect the local economy. Coast Seafoods Company owns and operates the world's largest oyster hatchery on the coast of Washington State. When the suit was filed in 2016, Coast wrote to the Washington Department of Ecology (WDE) requesting a determination from the department on whether a permit was required for the operation of its facility. In a letter to Coast, the agency stated that because the hatchery did not meet the criteria to be considered a "Concentrated Aquatic Animal Production Facility" (CAAPF), a permit was not required. Additionally, WDE questioned whether discharges from the facility were likely to "alter the quality of (the bay)." Based upon the letter, Coast asked the district court to dismiss the citizen suit, but the court denied the request because the facility was a "point source" as it used pipes, ditches and channels to discharge pollutants into the bay.

The main issue on the appeal by Coast was the proper definition of a "point source" in relation to aquatic production facilities. The Ninth Circuit agreed that the pipes, ditches, and channels that were discharging pollutants are point sources that require a permit, even if the facility was not a CAAPF. The court held that

Coast had been improperly operating its facility without a permit, and the fact that WDE had incorrectly informed Coast that no permit was necessary was not controlling.

Is the government correctly interpreting its self-imposed legal requirements?

The prior cases primarily involve disputes over the issuance of permits or lack thereof, to agricultural producers who may discharge nutrients into waterways. However, government projects and regulatory actions can also be the target of litigation stemming from nutrient runoff, water pollution, and even the failure to obtain permits. This category of case law often involves large geographic areas and can have wide-ranging effects on the agricultural sector. The following cases, *Monterey Coastkeeper* and *Pacific Coast*, arise in California and involve the management of extensive water systems. At issue in both cases are discharges from the Central Valley basin.

Over the last two centuries, the historically arid Central Valley has developed to support one of the world's most important agricultural regions. An extensive network of irrigation and drainage systems enables this production. Both state and federal agencies oversee the management of these systems. This management has wide-ranging effects on both agricultural production and environmental quality. In turn, agricultural producers, residents, and environmental groups all have strong interests in agency decisions, compounded by California's unique climate and the Central Valley's proximity to large urban population centers and the Pacific Ocean.

***Monterey Coastkeeper v. State Water Res. Control Bd.,* 28 Cal. App. 5th 342 (2018)**

A 2018 case out of the third appellate district of California highlights the state's unique approach to protecting water quality. In this case, the appellate court considered whether the State Water Resources Control Board (State Board) followed California water law and policy when waiving some waste discharge requirements for nutrients, nitrates, and other pollutants running from irrigated agricultural land.

Delving into this case requires a little bit of background knowledge of water law in California. Under state law, the State Board "formulates and adopts state policy for water quality control." The state is divided into nine regions, where the regional boards must "formulate and adopt water quality control plans for all areas within the region." These regional plans are referred to as "basin plans." In section 13269 (a), the Water Code allows conditions placed on waste discharges implemented in either the state or a regional plan to be waived if the state or regional board finds that such a waiver is "consistent" with the state and regional plans and policies and "is in the public interest." Here, the Central Coast Regional Quality Control Board created a waiver for "discharge requirements for irrigated agricultural operations in the region," and the State Board later modified said waiver. Monterey Coastkeeper and other groups challenged the modified waiver, arguing that it did not follow the California Water Code and "applicable state water policies." The trial court sided with Coastkeeper, and the State Board and agricultural groups appealed, leading to the case at hand.

The *Coastkeeper* case is long and complicated, and includes thorough explanations of state law, the history of the case, and considerations about whether each of the trial court's findings were correct. For our purposes, what this case boils down to is whether the modified waiver follows California's Policy for the

Implementation and Enforcement of Nonpoint Source Pollution Control Program, or the NPS policy. There are five elements in the NPS Policy that all implementation programs and waivers that address nonpoint pollution must include, which are to:

(1) Address NPS pollution in a manner that achieves and maintains water quality objectives and beneficial uses, including any applicable antidegradation requirements;
(2) Have a high likelihood that the program will attain water quality requirements, including consideration of the management practices to be used and the process for ensuring their proper implementation;
(3) Include a specific time schedule, and corresponding quantifiable milestones designed to measure progress toward reaching the specified requirements;
(4) Include sufficient feedback mechanisms to determine if the program is achieving its stated purpose;
(5) Make clear, in advance, the potential consequences for failure to achieve the program's stated purposes.

The appellate court found that the State Board's modified waiver did not meet all of these requirements. First, the court concluded that the State Board's determination that "dischargers need only make 'a *conscientious effort* to identify and implement the management practices that effectively address the water quality issue'" (emphasis added) was too vague and did not establish a "specific time schedule" or "quantifiable milestones" toward meeting water quality goals as required by NPS Policy (3). The court also pointed out that precedent does not allow the State Board to rewrite NPS policy in order to "delay, diminish, or dilute a requirement." In short, the court's answer to whether or not the State Board's waiver followed state water law and policies was "no," so the Board was ordered to create a new waiver or program that does. As a result, state and regional water boards in California must follow requirements for agricultural nonpoint pollution precisely.

***Pacific Coast Fed'n of Fishermen's Ass'ns v. Glaser*, 945 F.3d 1076 (9th Cir. 2019)**

The Central Valley drainage system supplies water for California's Central Valley, a region characterized by a high concentration of irrigated agriculture. The Grasslands Bypass Project (GBP) is an initiative administered by the U.S. Bureau of Reclamation and the San Luis & Delta Mendota Water Authority and created to carry salty water remaining after crop irrigation in the Central Valley away from the area to prevent leaching of pollutants into groundwater. The GBP collects irrigated water through a series of subsurface drainage tiles and discharges the water to numerous waterways in and around the Central Valley. Conservation organizations and a group of fishermen and scientists brought suit against the agencies, alleging that the GBP drainage of contaminated waters represents a discharge of pollutants that requires a NPDES permit under the CWA.

The district court dismissed the case, agreeing with the agencies that the GBP discharges were exempt pursuant to the irrigation return flow exemption in 33 U.S.C. § 1342(l)(1), which exempts "discharges composed entirely of return flows from irrigated agriculture" from NPDES permitting. On appeal, plaintiffs alleged that the trial court incorrectly placed the burden to prove the discharges were not exempt upon the plaintiffs and incorrectly interpreted the meaning of the term "irrigated agriculture" to include flows from fallowed and retired crop ground and that "entirely" meant "majority" for purposes of the irrigation return flow exemption.

The Ninth Circuit agreed with plaintiffs that the burden to establish the applicability of the irrigation return flow exemption rested with the defendant, then turned to the district court's interpretation of the exemption language. While the Ninth Circuit agreed with the district court that the term "agriculture" should be broadly construed to include all activities related to crop production, it rejected the district court's conclusion that the term "entirely" suggested that the exemption applied if a "majority" of the discharges were from irrigated agriculture. Instead, the court said that "Congress intended for discharges that include return flows from activities unrelated to crop production to be excluded from the statutory exception, thus requiring an NPDES permit for such discharges." Based upon this final determination, the appellate court remanded the case back to the district court to determine the extent to which the discharges from GBP contained water from agricultural land as opposed to a solar array in the area and other non-agricultural sources, reiterating that the burden of proof is on the defendant agencies.

Are state CAFO General Discharge permits valid under state and federal law?

The previous section described situations in which state agency actions involving permits for a single operation were challenged. This section, on the other hand, focuses on state General Discharge permits for CAFOs, and whether they are properly issued under state and federal laws and regulations. While individual permits apply to one discharger, a general permit is more like a blanket permit for a group of dischargers in similar situations. Furthermore, general permits always cover distinct geographical areas. Therefore, a general permit will usually cover a number of comparable CAFOs within the state. Again, EPA delegates the authority to issue general permits to state agencies. Also, recall that when a court reviews the decisions of administrative agencies, the arbitrary and capricious standard is applied; in other words, agencies are often given the benefit of the doubt as long as their decisions are reasonable under the governing law.

Food & Water Watch v. Md. Dep't. of Env't, **No. 2602 (Md. Ct. Spec. App. May 14, 2018)**

In this case, Food & Water Watch (FWW) and other environmental groups sued the Maryland Department of Environment (MDE) over the state's CAFO General Discharge Permit. On appeal, the circuit court examined whether the permit was "consistent with all applicable state and federal laws and regulations," namely the federal EPA's effluent limitation guidelines for CAFOs.

FWW specifically contested that Maryland's CAFO general permit did not follow the CWA because the permit did not place sufficient "conditions on data and information collection" and reporting. FWW argued that MDE's requirements in the permit—that CAFOs "analyze the nitrogen and phosphorous content of manure annually and the phosphorous content and pH of soil samples from land application fields every three years"—were not strict enough to meet the CWA's data and information collection requirements. Instead, FWW reasoned that MDE's permit should require CAFOs to "conduct regular water sampling for nitrogen, phosphorus, and fecal coliform where wastewater flowed off the CAFO via drainage ditches, or in other locations identified by the facility's certified nutrient management planner."

Ultimately, the circuit court determined that MDE's permit did follow EPA regulations under the CWA. First of all, the court pointed out that the regulations only call for specific data and information collection and reporting "*when applicable*" (emphasis added). Thus, the EPA provides flexibility to state agencies in how they carry out effluent limitations. Here, the court found that the BMPs, NMPs, and effluent standards and

guidelines were enough to meet the requirements. The permit was a zero discharge permit—in other words, MDE's permit does not allow any discharges from CAFOs. Therefore, strict monitoring and data collection are not required to prove that the CAFOs are not meeting the limitation on effluent discharge—they either are or they aren't. Furthermore, during the rulemaking for the permit, MDE was in regular contact with the EPA, and the EPA did not raise any flags about the effluent monitoring provisions. This case is a great example of the flexibility of the CWA and its regulations, and also demonstrates that courts are likely to side with an agency's discretion as long as it is reasonable.

***In the Matter of Riverkeeper, Inc. v. Seggos,* 75 N.Y.S. 3d 854 (N.Y. Sup. Ct. 2018)**

Much like the Maryland case, the *Riverkeeper* case centers on a challenge by environmental groups to the state of New York's CAFO general permit and their claim that the permit was incompatible with state and federal water law and regulations. The groups asserted that the state CAFO general permit issued by the Department of Environmental Conservation (DEC) did not meet the requirements put forth by the federal CWA and its implementing regulations in three ways:

(1) The permit did not require the DEC to review and approve a CAFO's nutrient management plan (NMP) and notice of intent (NOI);
(2) There was no chance for public review and comment on NMPs;
(3) Under the permit, the NMPs were not required to have "enforceable, site-specific restrictions for activities that have a "high risk" of pollution.

The court discussed the first two claims jointly, and ultimately found that New York's CAFO permit did not meet the agency and public review requirements. The court pointed to the federal regulations, explaining "[u]nder EPA regulations, a permitting authority may not grant permit coverage without first reviewing the CAFO's NOI and NMP, and providing a public opportunity for notice and comment." Then, the court went on to explain why New York's permit did not meet these requirements. First of all, the head of the state agency that oversees CAFOs in the state must review the CAFO's notice of intent (NOI) to operate. The NOI also contains an NMP that must be reviewed by the state agency. If the state agency determines that the NOI and NMP meet all of the federal standards, then they must make the documents "available for public review and comment." New York's permit required two different NMPs to be included—an annual nutrient management plan (ANMP), and a comprehensive nutrient management plan (CNMP).

The court examined each of the required NMPs in turn and found that CNMPs did not satisfy EPA's CWA regulations because CNMPs were confidential, and therefore did not meet the public notice and comment requirements. Addressing the question of agency review, the court reasoned that review by private, state-certified NMP planners could not be substituted for review by a state agency, especially since the CAFOs pay the planners and the planners write the NMPs in the first place. What is more, the court said state law requiring confidentiality for CNMPs was inconsistent with federal regulations. In addition, the state law didn't really "require" confidentiality because the agency had the power to waive confidentiality requirements.

The court similarly found the ANMP to be lacking when it came to federal requirements. EPA says that "a CWA-compliant NMP is a 'comprehensive…tool [] used to guide a wide range of practices regarding nutrient production, storage and use.'" The court was not convinced that New York's ANMPs were comprehensive; they were really just an "outline" with some of the information in the CNMP. Although the ANMPs, unlike the CNMPs, had to be reviewed by the agency, and were made subject to public notice and comment, the court determined that there was not enough information in the ANMPs to meet the federal requirements.

The court did not agree with the *Riverkeeper* plaintiffs on the third claim, that New York's CAFO permit did "not mandate that CAFOs develop and implement NMPs containing enforceable site-specific effluent limitations or best management practices." The court found that the standards employed by New York, which were created by the Natural Resources Conservation Service (which falls under the United States Department of Agriculture) were sufficient to meet the EPA regulations.

In contrast with the Maryland *Food & Water Watch* case, the court in this case found that New York State's CAFO permit *did not* follow EPA's regulations under the CWA, chiefly because the NMPs did not require suitable agency and public review. The New York and Maryland courts also had different outcomes in terms of deference to the both the state agency and the contents of EPA's correspondence with the state agency. First of all, the court did not go against DEC's interpretation because the agency's decision was "unreasonable" or "arbitrary and capricious." Instead, New York's Albany County Supreme Court explained that it did not defer to the DEC's interpretation because *federal,* not state regulations were in question. Therefore, it was really the federal EPA that deserved deference. As a result, the court then turned to examining the correspondence between the EPA and DEC. As in Maryland, the New York DEC went back and forth with EPA about their CAFO permit. Unlike the Maryland case, however, EPA contradicted itself in its correspondence. EPA first said that the CNMPs should be reviewed by both the public and DEC. Then, a year later, even though DEC did not make changes in response to EPA's first letter, EPA determined the permit satisfied federal regulations. Because the EPA contradicted itself without "any reasonable justification for its change of course," the New York court found EPA's final letter to DEC to be unpersuasive. Examining the *Riverkeeper* and *Food and Water Watch* cases together reveals that similar cases can have very different outcomes based on seemingly small details like language in a letter, or whether federal or state regulations are in question.

***Food & Water Watch v. Del. Dep't of Natural Res. and Envtl. Control,* No. N17A-03-006 AML (Del. Super. Ct. 2018)**

Another decision regarding a state's General Permit for CAFOs widens the pool of plaintiffs who may legally challenge such permits. The challenge occurred when members of Food & Water Watch appealed a decision of the Delaware Environmental Appeals Board that denied organizational standing to the environmental group. Food & Water Watch (FWW) had filed suit against the Delaware Department of Natural Resources and Environmental Control (DNREC) and Delaware Department of Agriculture (DDA) for its issuance of the NPDES General Permit program for Delaware CAFOs. The General Permit program required poultry CAFOs to submit a Notice of Intent and Nutrient Management Program to the agencies in order to receive a general permit for operation. FWW alleged that the permit failed to require standards for groundwater monitoring at CAFOs or in nearby water ways for pollutants emitted from the facilities in violation of the CWA.

The agencies claimed that FWW lacked standing to challenge the General Permit Order, and the Appeals Board agreed. The Board concluded that FWW could not demonstrate standing because its individual members were not "substantially affected" by the General Permit Order as required by Title 7, Section 6008(a) of the Delaware Code. The statute confers the right to appeal the agency decision to someone who is "substantially affected" by the decision, as indicated by proof that the party had suffered a concrete and particularized injury in fact that is fairly traceable to the challenged action that is likely to be redressed by a favorable decision. The fear of agricultural pollution potentially causing harm was conjectural rather than concrete and particularized, the claim of harm could be not fairly traced to the Order or exclusively caused by CAFOs, and the alleged injury of having to curtail recreational activities due to water pollution was not unique to the members but would be shared by the public generally, the court determined.

FWW appealed the Board's determination and the appellate court reversed. The court distinguished alleged environmental injury from other types of injury, stating that it could be aesthetic and need not have an effect on property, economic, or tangible interests. Instead, the court stated that environmental injury could encompass loss of intangible benefits derived from natural resources such as camping, hiking, fishing, and sightseeing. The FWW members had sufficiently alleged such harm by stating that the fear of contamination due to the lack of pollution monitoring at CAFOs would cause them to decrease recreational activities or avoid the waters altogether. Likewise, the court determined that the injuries were fairly traceable to the General Permit and would be redressed by a favorable decision that would require pollution monitoring. The Board had agreed with the agencies' claims that FWW members could not prove that CAFOs, rather than other forms of pollution, had actually polluted state waterways. But the court held that the Board should not have questioned the members' affidavits in which they stated that the potential of pollution from the CAFOs created their fears and should not have speculated about additional sources of pollution. The court remanded the case to the Board for further consideration.

Do neighbors have redress for potential agricultural runoff under the CWA and RCRA?

Cases discussed in the previous sections were mostly about federal and state governments—whether a state properly issued a permit, whether a permit was necessary, whether the actions of a government entity followed state or federal water laws and regulations. The case below is somewhat different in that it involves allegations of actual runoff or pollution from a farm. Additionally, the next case does not really involve the state or federal government, there are no claims that a permit is needed even if the government said otherwise; there aren't any questions about whether an agency correctly interpreted the law and regulations when issuing a permit or carrying out its duties. Instead, this final case simply involves a farm operation being sued under the CWA and the Resource Conservation and Recovery Act (RCRA) for agricultural nutrient runoff onto a neighbor's land.

***Garrison v. New Fashion Pork LLP*, 2020 WL 1494063 (N.D. Iowa 2020)**

New Fashion Pork LLP, operates numerous CAFOs as well as farms in Iowa to which they apply manure nutrients from the CAFOs to croplands. Garrison, an adjacent neighbor of a hog CAFO owned by New Fashion, filed suit in federal court, claiming that manure runoff caused runoff of pollutants onto his property on two occasions when New Fashion applied manure under wet and frozen soil conditions. Garrison alleged

that the applications constituted violations of CWA and RCRA, as well as other Iowa statutes and common law. After a series of dismissals and amended complaints, New Fashion moved for summary judgment on the claims.

Garrison alleged that the applications posed "an imminent and ongoing threat," but the court disagreed and granted summary judgment in favor of New Fashion. The court reasoned that harm is imminent under RCRA if it threatens to occur immediately. RCRA's language is clear that a remedy is not available for wholly past violations, the court concluded, and a plaintiff must allege that the defendant's RCRA violation is "current and ongoing." The CWA similarly does not support citizen suits for wholly past violations, the court concluded.

Garrison had claimed an ongoing violation by asserting that "manure was applied once or twice a year." The court was not persuaded, saying a "single specific violation" is not enough to prove an "ongoing violation." Additionally, the runoff incidents had been redressed through an Administrative Consent Order with the DNR, which included an administrative penalty and an order for New Fashion to develop a standard procedure for applying manure.

While the court's dismissal of the case appears simple at first glance, what is of most interest is the depth of the court's examination of New Pork's application activities. The court thoroughly reviewed New Pork's decision to remediate potential harm by moving its manure application activities to a different property and Garrison's claims of physical observations, water tests, and "open dumping," searching for an ongoing threat of increased nitrate levels and imminent and ongoing threats to Garrison. In the end, the analysis favored New Fashion's argument that its activities were not illustrative of a pattern of ongoing violations and a message that neighbors seeking redress for individual incidents of nutrient pollution from manure applications do not have recourse through RCRA or CWA.

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