

The following points provide some perspective on the Second Circuit decision, a few days ago, in the litigation brought by several industry and environmental petitioners challenging EPA's National Pollutant Discharge Elimination System (NPDES) and Effluent Limitation Guidelines and Standards (ELGs, or technology-based standards) for Concentrated Animal Feeding Operations (CAFOs) final rule (CAFO rule), promulgated on February 12, 2003.

Among the large number of issues raised in the litigation, the Court has required the EPA to revise or otherwise address a limited number of issues. As a result, the programmatic revisions to the NPDES regulations and the effluent standards promulgated by EPA in 2003, by and large, remain in effect and must be implemented by EPA and the States. EPA believes that this result ensures greater clarity and accountability in its regulatory program for CAFOs than under the previous regulations.

Among the successful outcomes of the Court's decision were the Court's determinations upholding EPA's interpretation of the Clean Water Act concerning land application and agricultural storm water exemption. The Court upheld the requirement that runoff from land application areas is part of a CAFO's point source discharges and is subject to regulation even if the runoff is not channelized. The Court also upheld EPA's interpretation that storm water discharges from land application areas that meet EPA's criteria for proper land application of manure are exempt from NPDES permit requirements and therefore are also not subject to water quality-based effluent limitations.

From another standpoint, the Court strongly upheld the best available technology (BAT) standards set by EPA and the economic analyses that support the technology choices the Agency made. Moreover, the Court recognized that effluent limitations can be expressed as non-numeric effluent limitations and best management practices (BMPs). All of the nutrient management requirements in the rule were upheld by the court and remain in effect.

The Court vacated two features of the CAFO rule. The first relates to the duty to apply for a permit. While it is illegal for all CAFOs to discharge without a permit, the Court vacated the approach taken by EPA in the CAFO rule, which required all CAFOs to apply for a permit (whether or not they had an actual discharge) or demonstrate no potential to discharge.

As CAFOs are now defined in the CAFO rule, any discharge from a production area is illegal without a permit (the previous exemption for discharging only in the 25 year/24 hour storm was eliminated in the new rules and was not affected by the court's decision). In addition, any land application discharge is subject to NPDES permitting, except where the runoff is eligible for the agricultural stormwater exemption. A facility that believes that it will not have any discharges from its production area or its land application area may not need coverage under a permit. However, facilities may choose to seek permit coverage as a shield from the risks of having unpermitted discharges.

The second feature of the rule vacated by the Court addressed the nutrient management plan requirements of the CAFO rule. The rule requires all CAFOs to develop a site-specific nutrient

management plan as a condition of the permit. The Court held that the terms of such plans actually established effluent limitations, should be part of the permit, and as such, must be reviewed by the permit issuance authority and be made available for public review. Since there was no specific regulatory provision actually eliminated by the Court's decision, EPA will be considering how best to respond to the Court's determination of this issue. In any event, the regulatory provisions of the rule remain intact, including the requirements to develop and implement a plan in accordance with state technical standards.

In addition, the Court remanded several issues for further consideration or explanation by EPA. Specifically, these include issues concerning (1) the applicability of water-quality based limits for the production area; (2) the Agency's decision to allow the new source standard for certain facilities to be set at the 100-year storm level instead of at "true zero"; and (3) consideration of the appropriate BCT technology for pathogens. EPA will be considering how best to respond to these issues remanded by the Court

Regarding issue (1), the court agreed with EPA that agriculture storm water is exempt from NPDES regulation and therefore was not subject to WQBELs. However, the court seemed troubled that this technology-based rule did not promulgate WQBELs (p. 61), and indeed construed the rule as exempting production area discharges from WQBELs and barring states from establishing WQBELs. We believe this is a misreading of the rule. However, the court has only asked EPA for a discussion whether production areas are exempt from WQBELs (which we believe is not the case) and, if we say they are exempt, to explain why.

Regarding issue (2), the court found that EPA's rulemaking record lacked support for the 100-year storm and for the voluntary superior environmental performance standards for new sources and remanded the issue to EPA to develop a better justification for those decisions.

Regarding issue (3), the court held that EPA violated the CWA by failing to make an affirmative finding that the BCT-based ELGs do in fact represent BCT technology. The court remanded this issue to EPA to make such a finding based on the BAT/BPT technology or to establish specific BCT limitations for pathogens based on some other technology.

Finally, EPA is aware that States, as well as the regulated community and other interested parties, are looking for guidance concerning how best to proceed in light of the Court's decision. States have been in the process of revising State programs for permitting CAFOs and issuing permits. Many CAFOs have taken steps to comply with the CAFO rule and are developing or have developed nutrient management plans to implement the requirements of the rule. EPA will soon provide guidance to States and the regulated community as to the appropriate manner in which to proceed with implementation of the CAFO rule.