

Know Your Rights When the Environmental Protection Agency (EPA) Comes Knocking

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The **Environmental Protection Agency (EPA)** recently warned Wisconsin farmers that it will conduct more inspections of Wisconsin dairy and livestock producers under the Clean Water Act. A similar situation is transpiring in other regions of the country. According to the EPA, “We are going to knock on your door, and you aren’t going to know we are coming.”

These on-site inspections are apparently the next phase of an overall plan to step up investigations and potential enforcement of the Clean Water Act against concentrated animal feeding operations (CAFOs). EPA publishes for public comment the agency’s proposed National Enforcement Initiatives every two years. For fiscal year 2011 to 2013, addressing discharges to navigable surface waters from the nation’s CAFOs was among the six National Enforcement Initiatives pursued by EPA.

Recently, EPA requested public comments on its proposed list of National Enforcement Initiatives for the 2014 to 2016 fiscal years, and again investigation and enforcement of livestock operations landed on EPA’s “short list.” In recent years, EPA’s investigation efforts have included “flyovers” along with mandatory demands for the production of records and information.

Under what authority?

As background, the Clean Water Act and EPA regulations require certain livestock operations to obtain permits under the National Pollutant Discharge Elimination System (NPDES). Although the regulations can be complex, generally speaking, whether a farm needs an NPDES permit will depend upon the type of livestock kept, the size of the herd and the likelihood that manure or wastewater will reach surface water. Additionally, individual states — Wisconsin is one example — may have more restrictive permitting requirements.

The Clean Water Act authorizes the EPA to conduct inspections to ensure compliance. This authority includes entering land to determine whether farms should be designated as CAFOs and determining those that are required to obtain NPDES permits. The law also allows them to ensure that CAFOs with permits are complying with the terms of the agreement. However, EPA farm inspectors are also instructed by official policy “to evaluate whether the requirements of any other federal environmental

laws are applicable to the facility and, if so, whether the facility is in compliance with such requirements.”

The Clean Water Act provides for penalties ranging from civil orders requiring corrective measures to fines exceeding \$37,500 per day when businesses are found to be in noncompliance. In extreme cases, penalties can include criminal prosecution and jailtime. With stakes this high, it is important that every farmer understands his or her rights.

Getting on the premise.

Although exceptions exist, administrative agencies, including the EPA, gain access to private property in one of two ways: (1) by getting the consent of the business or (2) by going to a magistrate judge and obtaining an administrative search warrant.

The EPA will typically first try to gain access the easy way, by getting a farmer to consent to EPA's inspection. If denied voluntary consent, the EPA may then decide to go to court and attempt to obtain an administrative search warrant.

As a word of caution, a government inspector does not need the consent of the owner of private property in order to enter but can obtain consent from any person who the inspector “reasonably believes” is authorized to provide consent to enter.

In the case of EPA inspections, inspectors are directed to first ask for the owner of the premises, and if the owner is unavailable, EPA inspectors are directed to make a “good faith effort” to determine who is “in charge” at the time of the inspection. Accordingly, farms must make sure that their workers are properly trained on how to respond to the EPA's (or any government agency's) request to inspect the operation.

Get legal help.

If EPA inspectors appear at your farm, you should immediately contact your lawyer before answering any questions or allowing the inspectors onto the nonpublic areas of your property. Here are some key action steps.

1. Unless the inspectors have a warrant, you have the right to refuse the inspection and ask the inspectors to leave. The inspectors will then have two options, either negotiate a convenient time to conduct the search with you (and ideally your lawyer) or turn to the courts in an attempt to obtain a search warrant.

In all likelihood, denying consent will only delay the search. Nevertheless, you should not allow the inspection to go forward until you have had an opportunity to consult with your lawyer regarding your rights and obligations. You should also not consent to a search at a time when you are likely to be distracted by the day-to-day operations of your farm, where there may be safety or biosecurity concerns present or where you cannot otherwise devote undivided attention to the inspection. You may need time, for example, to be prepared to take photographs or split samples.

2. You can withdraw your consent to inspection at any time. Even if you initially grant consent to an inspection, you can change your mind and ask the inspectors to leave. The inspectors then have the same two options: negotiate a convenient time to resume the search or go to court to obtain a search warrant.

3. You can refuse consent to inspect certain areas of your property. The inspection, whether by consent or under a search warrant, should be focused only on those areas necessary for the EPA to determine compliance with the Clean Water Act.

Even under a search warrant, an agency cannot conduct a “wall-to-wall” search but must search only those areas specified by the warrant. However, if you consent to the search of an area where no animals or feed are located, you have little recourse if the EPA gathers evidence against you for alleged violations of other unrelated environmental laws.

4. You may have the right to “quash” a search warrant. If inspectors appear with a search warrant, you have less ability to deny entry onto your property. However, you should immediately contact your lawyer to determine whether you have a basis to “quash” (or have the court throw out) the warrant.

For example, if you can demonstrate that you maintain less than the threshold cattle at your farm, your farm will typically not be subject to the Clean Water Act permitting regulations. Other defenses can be asserted as well to challenge a warrant. Under those circumstances, you may be able to convince a court to quash an administrative warrant and stop the EPA’s inspection in its entirety.

Ultimately, when dealing with EPA inspectors, understand your rights and take great care to preserve them.

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