

No, EPA Can't Require a NPDES Permit Without an Actual Discharge! (Take II)

Article By:

David A. Crass

The livestock production industry scored a big win yesterday, as the U.S. Court of Appeals for the Fifth Circuit issued an opinion declaring there is no “duty to apply” for a National Pollutant Discharge Elimination System (“NPDES”) permit in the Clean Water Act and the only Concentrated Animal Feeding Operations (“CAFOs”) that have to obtain permits are those that are actually discharging pollutants to waters of the United States. In other words, Environmental Protection Agency (“EPA”) cannot require a CAFO to apply for or obtain a wastewater discharge permit unless there is an **actual discharge** of pollutants from the facility into a navigable water. The case was decided following the consolidation of multiple challenges in no less than six federal circuit courts.

This particular issue, whether EPA can require a CAFO to obtain a NPDES permit without an actual discharge, has been litigated **twice** and both times, agriculture has prevailed. This issue dates back to EPA’s first attempt to revise the CAFO Rule in 2003. The 2003 CAFO Rule required all CAFOs with the “potential to discharge” to obtain a NPDES permit. In 2003, industry petitioners challenged the provision, and the U.S. Court of Appeals for the Second Circuit agreed that the Clean Water Act did not authorize EPA to regulate facilities that do not actually discharge. In 2008, EPA issued a revised CAFO Rule, which required all CAFOs that discharge or “propose to discharge” to obtain a NPDES permit. Again, industry petitioners, including the Wisconsin Dairy Business Association, challenged the rule; and again the Court of Appeals agreed that EPA **cannot regulate** facilities pursuant to the Clean Water Act **unless there is an actual discharge of pollutants to a navigable waterway**.

The 2008 CAFO Rule also included a provision that would impose two layers of liability on a CAFO that did not originally apply for a NPDES permit, then had a discharge. Under that scheme, a facility operator could be liable for the actual discharge and also for its failure to apply for a NPDES permit in the first place. The court also declared this provision to be *ultra vires*, or beyond the scope of EPA’s authority, because the Clean Water Act provides a specific list of violations that a facility can be found liable for, and failure to apply for a NPDES permit is not on that list. The Court did reject a challenge to the 2008 CAFO Rule concerning the inclusion of Nutrient Management Plans as an enforceable term of a CAFO’s NPDES permit. The Court upheld the 2008 Rule’s provisions that allow permitting authorities to include land application regulation within the CAFO’s permit.

Certain states, such as Wisconsin, regulate via both Clean Water Act delegated authority and state statutes in a manner more stringent than EPA, so producers are advised to seek legal counsel concerning the specific impact of this decision.

©2025 MICHAEL BEST & FRIEDRICH LLP

National Law Review, Volume I, Number 75

Source URL: <https://natlawreview.com/article/no-epa-can-t-require-npdes-permit-without-actual-discharge-take-ii>