ASSATEAGUE COASTKEEPER, LOWER SUSQUEHANNA RIVERKEEPER, C. & B. SCHELTS AND WATERKEEPER ALLIANCE,	*	**BEFORE J. BERNARD MCCLELLAN,**
	*	**AN ADMINISTRATIVE LAW JUDGE**
	*	**OF THE MARYLAND OFFICE**
APPELLANTS	*	**OF ADMINISTRATIVE HEARINGS**
v.	*	
MARYLAND DEPARTMENT OF ENVIRONMENT	*	**OAH NO.: MDE-WMA-053-09-03516**
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RULING ON CROSS MOTIONS FOR SUMMARY DECISION

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STATEMENT OF THE CASE

On January 16, 2009, the members of Assateague Coastkeeper, Lower Susquehanna Riverkeeper, Waterkeeper Alliance, and Charles and Betty Schelts (collectively, Petitioners) filed a Petition for Contested Case Hearing on the Maryland Department of the Environment's (MDE's) final determination on the General Discharge Permit for Animal Feeding Operations (Permit). The Permit was made final on December 30, 2008 and is Maryland Permit No. 09AF and NPDES Permit No. MDG01. The case was transmitted to the Office of Administrative Hearings (OAH) shortly thereafter.

On March 27, 2009, both the Petitioners and MDE filed Motions for Summary Decision. On April 13, 2009, each party filed a Response in Opposition to the Motion for Summary Decision. This ruling will serve as a ruling on both Motions for Summary Decision.

The contested case provisions of the Administrative Procedure Act, as well as MDE and OAH procedural regulations, govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2004 & Supp. 2008); the Code of Maryland Regulations (COMAR) 26.01.02 and 28.02.01

ISSUES

1. Is the Final Permit's open storage allowance legally inconsistent with the Clean Water Act, Clean Water Act implementing regulations, and State law?
2. Is the Final Permit's 90 day poultry litter stockpiling provision based on an incorrect determination of relevant and material facts? Does it arbitrarily and capriciously allow open storage of poultry litter under conditions that are certain to result in unlawful discharges of pollutants to waters and groundwaters of the State of Maryland?
3. Does the Final Permit fail to ensure compliance with water quality standards and total maximum daily loads (TMDL) waste load allocations prior to permit coverage approval, as required by the Clean Water Act and 40 CFR § 122.4?

SUMMARY OF AFFIDAVITS AND EXHIBITS

The following is attached to the Petitioners' Prehearing Conference Statement:

1. Letter to Patsy Allen, General Permits Coordinator MDE, from Petitioners dated November 20, 2008

The following are attached to the Petitioners' Motion for Summary Judgment, in addition to an Index of Select Authorities Supporting Petitioners' Motion for Summary Judgment:

1. Email from Jennifer Wazenski to Jane Barrett and Michele Merkel dated February 20, 2009 with the attached "Basis for Requirements to Protect Water Quality During Field Storage of Litter Stockpiles in the Maryland General Permit for Animal Feeding Operations."
2. Email from Bob Summers to Edwal Stone dated December 20, 2004 with the attachments: "Best Management Practices for Temporarily Stockpiling Litter" and "Poultry Litter Stockpiling BMP Workshop."
3. Email from Hank Zygmunt to EPA staffers Wiedeman, Beatty, Shriner, Havinga, Parry, and Uttling dated July 23, 2004.
4. Powerpoint slide printouts from presentation entitled "Protecting Our Nation's Waters: Concentrated Animal Feeding Operations" by Hank Zygmunt, USEPA.
5. Email from Ashley Toy to Patsy Allen dated November 17, 2008
6. "Poultry Litter Experts Science Forum" Document dated October 29, 2008
7. Email from Joshua McGrath to Edwal Stone with included email thread.

The following documents are attached to the Petitioners' Opposition to Maryland Department of the Environment's Motion for Summary Decision:

1. Affidavit of Rick Dove, Waterkeeper Alliance Board Member, dated April 13, 2009
2. Letter to Patsy Allen from Douglas F. Gansler, dated December 19, 2008
3. Affidavit of Kathy Phillips, Assateague Coastkeeper, dated April 10, 2009
4. Final Judgment in *City of Waco Texas et al v. Texas Natural Resource Conservation Commission* from the 261st District Court of Travis County, Texas.
5. Baltimore Sun Article: "Chicken Growers face EPA Crackdown" March 15, 2009

The following documents are appended to the Petitioners' Opposition:

1. Environmental Protection Agency, Guidelines for Reviewing TMDLs Under Existing Regulations Issued in 1992
2. Environmental Protection Agency, Overview of Impaired Waters and Total Maximum Daily Loads Program
3. Natural Resources Conservation Service, National Planning Procedures Handbook, Part 600.51
4. Natural Resources Conservation Service, National Planning Procedures Handbook, Part 600.53
5. Maryland Department of Environment, TMDL

No documents were attached to MDE's Prehearing Conference Statement.

The following documents are attached to MDE's Motion for Summary Decision:

1. General Discharge Permit for Animal Feeding Operations. Final Determination, December 30, 2008.

2. Fact Sheet for Discharges from Concentrated Animal Feeding Operations.
3. List of Currently Permitted CAFOs in Maryland as of March 27, 2009.
4. Affidavit of Robert M. Summers, Ph.D. dated March 27, 2009 with attached "Basis for Requirements to Protect Water Quality During Field Storage of Litter Stockpiles in the Maryland General Permit for Animal Feeding Operations."

4.1 Nutrient Application Guidelines

5. Maryland Cooperative Extension Fact Sheet: The Maryland Phosphorus Site Index, Techinical Users Guide.
6. Estimated Mineralization Rates, Nitrogen Credits for Legumes and Ammonia Conservation Factor for Organic Nitrogen
7. USDA Natural Resources Conservation Services Standards
8. Affidavit of Dinorah Dalmasy, Environmental Engineer, dated March 27, 2009.

The following is attached to MDE's Opposition to Petitioners' Motion for Summary Decision:

Affidavit of Joshua M. McGrath, Ph.D with the following attachments:

1. Binford, G. and G. Malone, Evaluating BMPs for Temporary Stockpiling of Poultry Litter, Final Report, December 22, 2008
2. Binford, G. et al., Sumary of Chesapeake Research Consortium—Maryland Environmental Finance Center Science Forum, October 29, 2008
3. Collins, Jr., E.R. et al, Nutrient values of dairy manure and poultry litter as affected by storage and handling (pp. 343-353 in K. Steele, Animal Waste and the Land-Water Interface CRC Press, Boca Raton), (1995).
4. Costello, T.A. et al, Systems for Temporary, Low-Cost Storage of Dry Poultry Litter. August 2001, Am. Soc. Agric. Engin. Paper no. 012274.
5. Felton, G.K. et al, Nutrient Fate and Transport Associated with Poultry Litter Stock Piles. July 2003. Am. Soc. Agric. Engin. Paper no. 032251.
6. Felton, G.K. et al, Nutrient Fate and Transport in Surface Runoff from Poultry Litter Stock Piles. Transactions of the ASABE 50:183-192
7. Frame, D.P. et al, Understanding headland stacked poultry manure 2: Potential runoff from stacked poultry manure. University of Wisconsin Extension. February 2009.
8. Havenstein, G.B. et al., Comparison of the performance of 1966 versus 2003 type turkeys when fed representative 1966 and 2003 turkey diets: growth rate, livability, and feed conversion. Poultry Science 86:232-240. 2007.
9. Havenstein, G.B. et al, Growth, livability, and feed conversion of 1957 versus 2001 broilers when fed representative 1957 and 2001 broiler diets. Poultry Science 82:1500-1508. 2003.

10. McGrath, J.M. et al, Broiler Diet Modification and Litter Storage: Impacts on Phosphorus in Litters, Soils, and Runoff, pp.1896-1909, Vol. 34. (2005)
11. Mitchell, C.C. et al, Temporary Storage of Poultry Broiler Litter. Research Journal of Agronomy 1:129-137.
12. Ritter, W.F. et al, Nitrogen movement in poultry houses and under stockpiled manure. June 1994. Am. Soc. Agric. Engin. Paper no. 944057.
13. Sims, J.T. et al, Nutrient mass balances for the state of Delaware 1996 to 2006. Final project report to the Delaware Nutrient Management Commission. University of Deleware, Newark, DE. 2008
14. Weil, R. R. et al, Nitrate Contamination of Groundwater under Irrigated Coastal Plain Soils. Pp.441-448, Vol. 19. 1990.

The following documents are attached to the Petitioners' Reply Brief in Support of their Motion for Summary Decision, in addition to an Index of Select Authorities Supporting Petitioners' Reply Brief:

1. Affidavit of Kathy Phillips
2. Letter from David B. McGuigan, Ph.D., dated November 7, 2008, with attachments
3. E-mail, dated April 14, 2009
4. E-mail, dated April 15, 2009
5. Letter from Blair Ranneberger, dated February 19, 2009, withdrawing his previous request for a hearing
6. 40 C.F.R. 122.23; 40 C.F.R. 412.46
7. Letter from Kevin G. Seller, Executive Director, dated November 18, 2008

No documents were attached to MDE's Reply to Petitioners' Opposition to Motion for Summary Decision.

DISCUSSION

Summary Decision Standard

COMAR 28.02.01.016D describes the criteria for motions for summary decision.

D. Motion for Summary Decision

(1) A party may move for summary decision on any appropriate issue in the case.

(2) A judge may grant a proposed or final summary decision if the judge finds that:

(a) There is no genuine issue of material fact; and

(b) A party is entitled to prevail as a matter of law.

Maryland appellate cases on motions for summary decision under the Maryland Rules of Civil Procedure (Maryland Rules) are instructive regarding similar motions under the procedural regulations of the OAH. In a motion for summary judgment or a motion for summary decision, a party goes beyond the initial pleadings, asserting that no genuine issue exists as to any material fact and that the party filing the motion is entitled to prevail as a matter of law. *Compare* COMAR 28.02.01.16D *and* Maryland Rule 2-501(a); *see Davis v. DiPino*, 337 Md. 642, 648 (1995).

A party may move for summary decision "on any appropriate issue in the case" or as to the case as a whole. COMAR 28.02.01.16D(1). An Administrative Law Judge (ALJ) may grant summary decision if there is no genuine issue of material fact, and if a party is entitled to prevail on the issue as matter of law. COMAR 28.02.01.16D(2). The principal purpose of summary determination, whether it be summary decision or summary judgment, is to isolate and dispose of litigation that lacks merit. Only a genuine dispute as to a material fact is relevant in opposition to a motion for summary judgment or summary decision. *Seaboard Sur. Co. v. Kline, Inc.*, 91 Md. App. 236, 242 (1992). A material fact is defined as one that will somehow affect the outcome of the case. *King v. Bankerd*, 303 Md. 98, 111 (1985); *Washington Homes, Inc. v. Interstate Land Dev. Co.*, 281 Md. 712, 717 (1978). If a dispute does not relate to a material fact, as defined above, then any such controversy will not preclude the entry of summary judgment or decision. *Salisbury Beauty Sch. v. State Board of Cosmetologists*, 268 Md. 32, 40 (1973). Only where the material facts are conceded, are not disputed, or are uncontroverted, and the inferences to be drawn from those facts are plain, definite, and undisputed does their legal

significance become a matter of law for summary determination. *Fenwick Motor Co. v. Fenwick*, 258 Md. 134, 139 (1970).

When a party has demonstrated grounds for summary judgment, the opposing party may defeat the motion by producing affidavits, or other admissible documents, which establish that material facts are in dispute. *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 737-738 (1993). In such an effort, an opposing party is aided by the principle that all inferences that can be drawn from the pleadings, affidavits, and admissions on the question of whether there is a dispute as to a material fact must be resolved against the moving party. *Honacker v. W.C. & A.N. Miller Development Co.*, 285 Md. 216, 231 (1979).

General Permit Scheme

The Clean Water Act (CWA) embodies Congress's desire "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] 33 USCA § 1251(a). In order to accomplish its goals, the CWA establishes a federal-state joint effort in which the United States Environmental Protection Agency (EPA) promulgates regulations to "restrict the quantities, rates, and concentrations of specified substances" in discharges to the country's waterways and the states determine the desired condition of those waterways. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). The primary mechanism to implement both types of standards is the National Pollutant Discharge Elimination System (NPDES) permitting scheme.

[1] The Clean Water Act, or CWA, is codified at 33 USCA §§ 1251 through 1387 (2001 & Supp. 2008). Provisions related to the NPDES discharge permitting program are found in §§ 1311 through 1346. Citations to any of these sections herein refer to the 2001 volume of 33 USCA, unless otherwise noted.

Under the CWA, the discharge of any pollutant by any person is unlawful except in compliance with such a permit: "Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 USCA § 1311(a). Sections 1311 and 1312 require the establishment of effluent limitations on the pollutants of concern in any permitted discharge and mandate that such limitations "shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter." § 1311(e). The CWA addresses this permitting as follows:

> Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.
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> 33 USCA § 1342 (a)(1).[2]

Effluent limitations are thus incorporated into each permit issued under the CWA. Those limitations are based on pollutant-control technology and, if necessary, on water quality as well.

Maryland law also prohibits the discharge of pollutants to waters of the State unless the discharge is authorized by and in accordance with a discharge permit issued by the MDE. Md. Code Ann., Envir. § 9-322 (2007 & Supp. 2008). MDE is authorized to issue individual and group or general permits under both the federal CWA and State law.

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[2] Sections 1311 and 1316 address technology-based limitations and § 1312 water quality based limitations. The remaining provisions listed above or in sections 1311(a) and 1342(a)(1) deal with toxic pollutants and discharges to publicly-owned water treatment works (section 1317), aquaculture (section 1328), ocean discharges (section 1343), and dredged or fill material (section 1344) and are not relevant to this matter.

As with the general permit challenged in this case, the water discharge permits are typically combined federal/State permits.

> **Issue #1.** Is the Final Permit's open storage allowance legally inconsistent with the Clean Water Act, Clean Water Act implementing regulations, and State law?

The Petitioners argue that instead of implementing the CAFO permitting scheme developed by the EPA, the Maryland General Permit actually creates an unlawful loophole by designating some Concentrated Animal Feeding Operations (CAFOs) as Maryland Animal Feeding Operations (MAFOs). They contend that this loophole shields those operations by letting them discharge without obtaining an NPDES permit. The Petitioners assert that the MAFOs are, in reality, a subset of CAFOs and that permitting MAFOs to store manure in "a manner that almost insures discharges to surface waters"[3] is in violation of the CWA.

MDE argues that the permit's provisions allowing for the 90 day storage of poultry manure are not inconsistent with any state or federal law or regulation. Despite the Petitioners assertion, in their pre-hearing statement, that these provisions are in violation of the general purpose and goal language of the CWA, MDE counters that the permit contains "significant restrictions" on permittees who are going to store manure in a field.[4] MDE contends that the stockpiling provisions do not authorize discharges to State waters and that the fact that wastewater may be generated is not in and of itself enough to result in a discharge to surface waters. Instead, MDE contends that with a prohibition on surface discharges and significant management standards, no likelihood of such a discharge exists.

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[3] Petitioner's Motion p. 8

[4] MDE's Motion p. 14

The Petitioners' argument that MDE is attempting to mask CAFOs as MAFOs is not sound. The Petitioners state in their motion that "discharge or propose to discharge" as a qualification for being considered a CAFO is not found anywhere in EPA's regulation. This is patently false. The Court in *Waterkeeper Alliance, Inc. v. U.S.E.P.A., 399 F. 3d 496 (2005)* specifically stated that the EPA was not permitted to establish obligations for all CAFOs "regardless of whether or not they have, in fact, added any pollutants to the navigable waters."[5] The court, accordingly, overturned the duty to apply permits that required all CAFOs to come under the NPDES permit and then prove affirmatively that they were not a discharger to escape regulation.

> The pertinent portion of the regulation in 40 CFR 122.23 now reads as follows:
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> (d)(1) *Permit Requirement.* The owner or operator of a CAFO must seek coverage under an NPDES permit if the CAFO **discharges or proposes to discharge.** A CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur. [emphasis added]

The Petitioners even acknowledge later in their motion that discharging or proposing to discharge is what triggers the CWA's provisions: "the only difference being whether A[nimal] F[eeding] O[perations] flip the jurisdictional trigger of the Clean Water Act (*i.e.*, discharge or propose to discharge to surface waters)."[6]

The Permit states that the MAFOs are AFO operations that are of large size under the AFO table, but that do not come under the CAFO provisions of the CWA and the EPA regulations. By default, then, these MAFOs must be non-discharging CAFOs that do not trigger the CWA. Since they do not trigger the CWA, MDE is choosing to

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[5] *Waterkeeper*, at 505

[6] Petitioners' Motion p. 29

regulate them in excess of their responsibilities as a state under the EPA statutes and regulations. MDE is not narrowing the definition of CAFOs as the Petitioners suggest, but instead they are expanding the group of AFOs that must submit to some sort of permitting requirement in order to operate and store manure. The Petitioners also point out in their motion that only CAFOs have been designated by Congress as "point sources".[7] The EPA is only permitted to regulate point sources, which is further evidence in support of the MAFO provisions being an expansion of statutory and regulatory authority over AFOs rather than a narrowing of same.

The Petitioners also argue that the allowance for more than 14 days of open storage of poultry manure will transform the MAFO into an entity fitting the EPA's definition of a CAFO. Here the Petitioners rely again on the EPA Manual which instructs permit writers to consider open poultry manure systems exposed to rainfall to be a liquid manure handling system. Again, this manual has been outmoded by the new regulations (and, as MDE points out, is even listed on the EPA website as having been superseded). Furthermore, the possession of a liquid manure handling system in and of itself is not dispositive of CAFO status under the EPA regulations. There still is the requirement of discharging or proposing to discharge.

As MDE correctly points out, there is no mention of what constitutes as liquid manure handling system in the definitional sections of the existing federal CAFO rules nor is there anything in any of the new EPA regulations stating that this type of outdoor storage would constitute a liquid manure handling system or stating a time limit at which point a dry manure handling system becomes wet.

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[7] Petitioners' Motion p. 9

Petitioners also make the assertion that any outdoor storage of poultry manure would constitute runoff once the manure was rained upon. Both the state and federal regulations call for case by case inquiries as to whether a facility is discharging or proposing to discharge. The Permit does not permit discharging or proposing to discharge. The facilities granted coverage under the General Permit are subject to requirements to protect water quality such as set backs, shaping of the manure pile, etc. The Permit also specifically notifies all those who become permittees that there could be additional requirements imposed and MDE reserves the right to require individual permitting in lieu of extending coverage under the General Permit should a situation arise where the Permit's conditions are not sufficient to protect water quality. The Petitioners are correct in recognizing that there are a number of cases that state that runoff from manure stockpiles at CAFOs into waters of the United States constitute point sources and illegal discharges unless covered by an NPDES permit. However, we are not dealing with CAFOs regulated under the Clean Water Act in this case.

Petitioners assert that MDE is allowing open manure storage "without limitation" for up to 90 days.[8] This is not accurate. MDE has placed conditions on the open manure storage including the requirement that manure storage comport with technical standards established by the Maryland Department of Agriculture and that each MAFO submit a Soil Conservation Plan which is subject to public review and comment and MDE approval.

Finally, Petitioners do not cite any specific State law which the MAFO provision contravenes.

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[8] Petitioners' Motion at 14

Issue #2. Is the Final Permit's 90 day poultry litter stockpiling provision based on an incorrect determination of relevant and material facts? Does it arbitrarily and capriciously allow open storage of poultry litter under conditions that are certain to result in unlawful discharges of pollutants to waters and groundwaters of the State of Maryland?

The Petitioners argue that the MAFO provisions are far less stringent than the CAFO provisions, but it is within MDE's discretion to make such provisions as it sees fit. MDE's decision to regulate the MAFOs, as it has done in the Permit, can only be overturned by OAH if it is arbitrary and capricious. As the Petitioners correctly note in their Motion, the standard for determining if an agency decision in Maryland is arbitrary and capricious is found in *Harvey v. Marshall*, 389 Md. 243 (2005). An agency's decision is arbitrary and capricious where it is irrationally inconsistent with previous agency decisions or where "similarly situated individuals are treated differently without a rational basis for such deviation."[9] The Court of Appeals further remarks (quoting *Maryland Transportation Authority v. King)* that an "extreme and egregious" standard has been adopted as well as a synonym for arbitrary and capricious.[10]

The decision here on the part of MDE is not inconsistent with prior decisions of the agency and the Petitioners do not argue that that is the case. Rather, the Petitioners argue that the decision is arbitrary and capricious because it treats the similarly situated entities of CAFOs and MAFOs in a disparate manner. It is not accurate, as established above, to say that CAFOs and MAFOs are similarly situated because CAFO here refers to those AFOs regulated under the Clean Water Act and MAFO refers to those additional AFOs that MDE seeks to regulate under this Maryland General Permit.

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[9] *Harvey,* at 304

[10] *Harvey,* at 300

Even if we were to consider those two entities similarly situated in that they are both large sized AFOs, then the disparate treatment would only have to be rationally based. The Petitioners argue that there is no rational basis for treating the two entities disparately, but there is a clear rational basis in treating them as MDE is treating them. MDE wants to regulate both sets of AFOs but only one of them is currently covered under the EPA regulations and the CWA. It is sufficiently rational to allow MDE to regulate an additional subset of AFOs that would not otherwise be covered by statutory schemes or regulations.

Petitioners argue that by attempting to regulate MAFOs, MDE is acknowledging those entities as discharging point sources and therefore MDE has an obligation under its charter to implement regulations. The Petitioners base this assertion on a statement in the proposed permit that acknowledges that MAFOs could have the potential to impact the Maryland environment. The Petitioners also contend that because the Eastern Shore houses most of the State's large AFOs and also because the Eastern Shore is one of most significantly impaired areas of the Chesapeake Bay and its tributary waters, there is a rational connection between large AFOs and pollution in Maryland's surface and groundwater. Therefore, they assert, that by not regulating MAFOs as CAFOs under the regulations the Petitioners feel are more stringent at the federal level, the MDE is acting arbitrarily and capriciously by ignoring material facts.

The MDE again points out that there is a difference in MAFOs and CAFOs because the MAFOs are untouched by the federal jurisdiction of the CWA. However, because the MAFOs are squarely within the jurisdiction of MDE, MDE is able to make the rational determination within its discretion that the standards for MAFOs should be

distinct from those federal standards imposed on CAFOs, particularly with respect to manure storage.

The Petitioners further contend that the MAFOs are left to self-regulate because the MAFOs are given two years to operate with presumed compliance with no oversight from MDE. MDE counters that the primary difference (besides federal vs. state jurisdiction) between CAFOs and MAFOs are that CAFOs are regulated because of the known risks that pollutants may reach surface waters, but MAFOs are desirable to regulate because of the potential risk of polluting groundwater through improper facility maintenance or the over-application of nutrients. This is an important distinction and gives further credence to the discretion that MDE is entitled to exercise when determining the extent of oversight and appropriate regulatory mechanisms for MAFOs.

The MAFOs are required to file nutrient management plans and soil conservation plans and are not left unsupervised for two years while their facility is brought into compliance. MDE states that the primary difference between the nutrient management plans and soil conservation plans that the MAFOs file as opposed to the comprehensive nutrient management plans of CAFOs is that the source of the requirements differs and different professionals can perform the different plans. The nutrient management plans and soil conservation plans can be performed by agents other than Natural Resource Conservation Service (NRCS) agents, who are the only agents authorized to prepare comprehensive nutrient management plans. This way, if a NRCS agent is unavailable, a University of Maryland Extension Service agent or soil conservation district planner can prepare the MAFO plans.

Petitioners, in their Response, state that the 2008 EPA regulations for CAFOs under NPDES permits do not permit even accidental discharges or releases without an NPDES permit. This may be true, but EPA and MDE cannot regulate all possible discharges because *possible* discharges cannot be regulated under an NPDES permit. Only those CAFOs who do discharge or propose to discharge because of their design or operation can be regulated as CAFOs under the EPA regulations. Petitioners point out that, as part of the scheme under which CAFOs can certify that they will not discharge to surface waters, there must be a technical evaluation done as to whether the facility does actually propose to discharge or whether it is designed, constructed, operated, and maintained to achieve no discharge. This is also true, but it must be noted that the CAFO certification provisions as non-dischargers are optional. It is the burden of the EPA (or MDE) to demonstrate that the AFO should be covered under the CAFO regulations because it discharges or proposes to discharge rather than the CAFO affirmatively having to assert that EPA jurisdiction is not applicable—in keeping with the *Waterkeeper* decision. That is why the regulatory scheme for the federal regulations was changed to make the certification program an opt-in program rather than a mandatory duty to apply provision.

Petitioners also note in their Response that the MDE general permit is arbitrary and capricious because it allows AFOs to misunderstand or misrepresent their status as MAFOs rather than CAFOs and, therefore, have "an unlimited number and volume of uncovered manure stockpiles which necessarily result in rainwater runoff . . . ."[11] This simply is not the case. The Permit requires a nutrient management plan and a soil

[11] Petitioners' Response p.6

conservation plan to be filed with MDE in order to ensure that the MAFO will generate no rainwater runoff to surface waters. This, logically, would then prohibit an unlimited number and volume of manure stockpiling unless there was absolutely zero chance that the MAFO could become a discharger triggering the Clean Water Act, regardless of how much rain or where the MAFO was situated. That is why the MDE permit requires technical plans to be submitted and complied with.

Petitioners further assert that the permit is arbitrary because the MDE is suggesting in their documents that they are allowing stockpiling in order to prevent premature nutrient applications to soil. Petitioners state that basing the permit on such a goal is arbitrary and capricious because other mechanisms are already in place to prohibit such applications, including the federal law banning land disposal of hazardous wastes absent compliance with the Resource Conservation and Recovery Act. MDE responds by noting, in both their Motion and their Response, that the actual goal of the MAFO program, including its stockpile provisions, is to create a category of regulated AFOs for those large scale AFOs who could successfully argue that they are not subject to Clean Water Act provisions because they are non-dischargers but, without proper management, could still have environmental impact. The Permit incorporates several technical standards to ensure that proper management techniques are used including, but not limited to, prohibiting premature field application of manure that has been stockpiled.[12]

Petitioners also contend that the 3-year phased in nature of the Permit program is arbitrary and capricious, particularly because the reduction to a 30 day limit for manure stockpiling could be stayed at that 3-year mark if "reputable research is performed" that

[12] It should be noted that the 90 day stockpiling provision becomes a 30 day stockpiling provision once the Permit has been phased into full effect.

shows that the 30 days is more restrictive than is necessary.[13] MDE states in their Motion that the science regarding an upper limit on manure stockpiling is not consistent and that MDE has found no credible evidence that 15 days was significantly more environmentally protective than 30 days or 90 days.

Petitioners further argue that MDE did not put forth its own independent analysis of the studies used by University of Maryland and the Poultry Panel and, therefore, MDE improperly delegated their decision making authority. MDE did not delegate their decision making power. Instead, they took in all of the available information and made the determination that, in their expertise as an environmental agency, was based on the most credible available information.

It is within MDE's discretion as an agency to evaluate all the evidence available to them and decide what weight should be given to each study. Once MDE does that and decides that the 90 day limit and the 30 day limit are acceptable, it is not the province of the OAH to overturn that decision. Petitioners' apparent disagreement with the agency's findings and decision does not meet the legal standard for arbitrary and capricious in *Harvey*.

> **Issues #3.** Does the Final Permit fail to ensure compliance with water quality standards and TMDL waste load allocations prior to permit coverage approval, as required by the Clean Water Act and 40 CFR § 122.4?

The Petioners' final issue is that the Permit does not take sufficient steps to ensure that the CAFOs will comply with water quality standards and TMDL waste load allocations. The Final Permit does not violate the CWA by failing to ensure that CAFO discharges do not cause or contribute to violations of water quality. The EPA and MDE

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[13] Petitioners' Response p.10

cannot regulate discharges until they occur, as held in the *Waterkeeper* case, wherein the court found that the CWA subjects only actual discharges to permitting requirements rather than potential discharges. Should the MAFOs become dischargers, they would then fall under the umbrella of the CWA as CAFOs and their discharges would be then be regulated. Until such time, the MAFOs cannot be considered to be held to the same standards as CAFOs under the CWA and the EPA regulations.

Furthermore, MAFOs are required to submit nutrient management plans which the *Waterkeeper* case states are equivalent to effluent limitations and must be incorporated into the permits protections. These plans will sufficiently ensure that the MAFOs remain zero-discharge and, therefore, not affect water quality. The nutrient management plans under the EPA regulations, as well as the MDE Permit, have to be made available for public comment and hearing and any potential concerns about discharges can be addressed on a case by case basis.

The Petitioners contend that the Permit needs to contain water quality based effluent limitations (WQBEL) and that MDE needs to conduct a Reasonable Potential Analysis (RPA) in accordance with the EPA manual. As previously discussed, the EPA manual is a troublesome source to rely upon because of the recent overhaul of the regulations. RPAs are mandatory where there is evidence that violations of water quality standards have occurred, but there is no evidence presented that this permit is in response to known violations of water quality standards. MDE repeatedly has asserted, both in its documents related to this case and in the permit itself, that the designation of non-discharging large AFOs as MAFOs is a prophylactic measure to ensure that proper

management techniques continue and that those AFOs remain zero-discharge. There is no evidence available that supports the Petitioners' assertion that a RPA is a requisite.

Petitioners further argue that MDE has failed to justify the lack of WQBELs for CAFO discharges in the Permit. *Waterkeeper* did hold that the EPA had to include WQBELs for CAFO discharges other than agricultural stormwater discharges; but, again, we are not dealing with discharging CAFOs in this case, so that holding is not relevant. MDE asserts that the NOI process including the AFO specific nutrient management plans and soil conservation plans meet the legal requirements for quality and this assertion is supported by the fact that there aren't any federal standards for non-CAFO water quality. It is also supported by the fact that MDE is putting prerequisites in the permit, wherein the MAFO must be and must remain zero-discharge. MDE also repeats, in both their Motion and their Response, that there is no automatic coverage for every AFO that applies to be covered under the general permit.

The forms and plans are reviewed by MDE before approval and are also open to public scrutiny. The preamble to the new EPA regulation states that WQBELs will be infrequently required for CAFOs regulated at the federal level because of the site and farm specific comprehensive nutrient management plans providing effluent limitations that become incorporated into the NPDES permit by reference.

Petitioners also argue that the MAFO provisions will further diminish the water quality of impaired waterways within the states. MDE credibly refutes this assertion. All of Maryland's nutrient TMDLs to date have been approved by the EPA and calculate non point source loads using a watershed based approach. This means that all potential pollutant sources are considered and estimates are made of load reduction targets for

those sources so that State water quality standards can be attained. The AFOs/CAFOs/MAFOs are not quantified separately from the aggregate load and the new Permit is consistent with the existing approved TMDLs.

CONCLUSIONS OF LAW

Based on the foregoing discussion, I conclude that the Petitioners' Motion for Summary Decision should be denied as they have failed to establish their entitlement to summary decision on the issues. Further, based upon the Discussion above and the authorities cited therein, the MDE's Motions for Summary Decision should be granted, as the MDE has established that there are no issues of material fact in dispute and they are entitled to summary decision as a matter of law. COMAR 28.02.01.016D.

PROPOSED ORDER

IT IS HEREBY **ORDERED** that Petitioners' Motion for Summary Decision be **DENIED.** I further **ORDER** that MDE's Motions for Summary Decision be **GRANTED.**

IT IS FURTHER **ORDERED** that all further proceedings in this matter, including the hearing scheduled for June 1, 2009, are hereby **CANCELLED.**

May 5, 2009
Date Mailed

J. Bernard McClellan
Administrative Law Judge

Doc #104431

REVIEW RIGHTS

Any party adversely affected by this proposed decision has twenty-one days from the receipt of the decision to file written exceptions and to request the right to present written argument. COMAR 26.01.02.35C. Any such exceptions or requests shall be delivered to the Office of the Secretary, Maryland Department of the Environment, 1800 Washington Boulevard, Baltimore MD, 21230. The Office of Administrative Hearings is not a party to any review process.

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