

Clay R. Smith
Chief Editor, AILD
CWAG & AG Alliance
1807 W. Bannock St. I Boise ID 83702
208.350.6426 (Direct Dial) I 208.724.9780 (Cell)
Clay.Smith@cwagweb.org

Food & Water Watch v. USEPA—Ninth Circuit invalidates Idaho CAFO discharge permit for insufficient monitoring requirements

The Environmental Protection Agency regulates point-source discharges from concentrated animal feeding operations through permitting under the National Pollutant Discharge Elimination System. *See* 40 C.F.R. § 122.42(e). This regulation derives from the presence of various pollutants in animal waste, including disease-causing viruses and bacteria, and focuses on two discrete areas affected by CAFOs—production and land application. “Production area” means that area of an animal feeding operation “that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas.” *Id.* § 122.23(b)(8). “Land application area” is defined as “land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied.” *Id.* § 122.23(b)(3). CAFO permits must specify, *inter alia*, “[r]equirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate)” and “[r]equired monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring[.]” *Id.* § 122.48(a) & (b); *see NRDC v. County of Los Angeles*, 725 F.3d 1194, 1207 (9th Cir. 2013) (“[T]he Clean Water Act requires every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit. ... That is, an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.”).

In 2020, EPA issued a permit for Idaho CAFOs. Final Reissuance of NPDES General Permit for Concentrated Animal Feeding Operations in Idaho, 85 Fed. Reg. 28,624 (May 13, 2020). The permit prohibits pollutant discharges from production and land-application areas for all but one CAFO except under certain limited circumstances. It also contains daily or weekly inspection, recordkeeping and annual report requirements. However, two environmental organizations filed a petition for review in the Ninth Circuit arguing that the permit “does not require monitoring that would ensure detection of unpermitted discharges.” After rejecting a challenge to the petition’s timeliness, the court agreed and vacated the permit. *Food & Water Watch v. USEPA*, No. 20-71554, 2021 WL 4203496 (9th Cir. Sept. 16, 2021).

As to production areas, the panel held that “[t]he Permit has sufficient monitoring requirements for above-ground discharges from production areas” by virtue of CAFOs’ obligation “to perform daily inspections of water lines, and weekly inspections of storm water diversion devices, runoff diversion structures, devices channeling contaminated storm water, and waste storage containers.” But “the Permit has no monitoring provisions for underground discharges from production areas”

such as lagoons. The absence of such provisions was fatal because “[w]ithout a requirement that CAFOs monitor waste containment structures for underground discharges, there is no way to ensure that production areas comply with the Permit’s zero-discharge requirement.”

As to land-application areas, the panel began by explaining that while “CAFO regulations allow discharges from CAFO land-application areas during wet weather, provided the CAFO has complied with its [nutrient management plan][,] … the Idaho Permit flatly prohibits discharges from land-application areas during dry weather.” But “[t]he Permit has no monitoring provisions for dry weather discharges from land-application areas, even though the record before the EPA showed that such discharges can occur during irrigation of fertilized CAFO fields.” The panel then added:

The Permit assumes that because the NMP requires CAFOs to apply manure, litter, and process wastewater at the agronomic rates established by the NMP, irrigation-produced runoff of pollutants will never occur. There is little in the record to support that assumption. Without a requirement to monitor runoff from irrigated CAFO fields, there is no way to ensure that a CAFO is complying with the Permit’s dry weather no-discharge requirement for land-application areas.

Decision link: <https://cdn.ca9.uscourts.gov/datastore/opinions/2021/09/16/20-71554.pdf>