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The Clean Water Act's Impact on Arkansas Producers

Introduction

The Clean Water Act of 1972 (the "Act") established water quality standards for the United States and set into motion a permitting process for discharging pollutants into the country's waterways. The goal of the Act has been to improve water quality by reducing the amount of pollutants entering waterways.

Arkansas' abundance of waterways means farms in many parts of the state may not be too far away from a creek, river or wetland and could be regulated by the Act. Producers should be aware of federal and state water quality regulations to ensure their operations are in compliance with discharge laws and permitting requirements. Producers should also be aware that some agricultural practices may be exempt from the Act.

What Is a Pollutant?

Some agricultural activities can create pollutants. The Act defines "pollutants" as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water" [33 U.S.C. § 1362(6) (2006)].

Federal courts have broadly interpreted "pollutant" to include a wide range of substances. Depending on the circumstance, a pesticide could be considered a pollutant if it causes effects beyond its intended use. Discharges from aquaculture operations,

such as excess feed, farm-raised fish feces and chemicals used to treat lice on salmon, have been determined to be pollutants.

Point Source and Nonpoint Source Discharge

Waterbodies can be polluted directly or indirectly by human activities and land use.

Directly discharging a pollutant into a waterway is called "point source" pollution. The pollutant may be channeled by a pipe, ditch, tunnel, well, discrete fissure, concentrated animal feeding operation or a vessel. Courts have found earth-moving equipment, such as bulldozers, to be conveyors of "point source" pollution.

The Act exempts agricultural stormwater discharges or return flows from irrigated agriculture from point source permitting regulations. However, other agricultural activities are not exempt. In some cases, manure spreaders, deep ripping by a tractor, off-shore fish net pens and pesticide applicators have all been found by courts to be point sources regulated by the Act.

"Nonpoint source" pollution involves water that is not purposefully directed toward a waterway, such as stormwater runoff from pastureland or cropland. The Act does not require permits for nonpoint source pollution.

NPDES Permit

To legally discharge a pollutant directly into a waterway, a producer must first obtain a National Pollutant Discharge Elimination System

This publication is intended to provide general information about legal issues and should not be construed as providing legal advice. It should not be cited or relied upon as legal authority. State laws vary and no attempt is made to discuss laws of states other than Arkansas. For advice about how these issues might apply to your individual situation, consult an attorney.

permit (NPDES). The permit helps identify sources of pollution and establishes numerical limitations on each pollutant that can be discharged. There are two types of NPDES permits, an individual permit and a general permit.

- **Individual permit** – A permit that covers only the applicant's discharge. To receive this permit, a producer must submit an application to the Arkansas Department of Environmental Quality (ADEQ). The state agency reviews the application and gives the public an opportunity to comment before issuing a decision on the permit.

If granted, the permit will be effective 30 days after notice of the final decision. The permit would remain in effect for five years. If denied, an applicant can appeal the decision to the Arkansas Pollution Control and Ecology Commission. If the Commission rejects the application, a producer's last resort is filing an appeal with the circuit court.

- **General permit** – A permit that covers a specific geographic region and point sources that share common characteristics, such as for a stormwater sewer system or waste water processing plant. To be covered by a general permit, a polluter must file a "Notice of Intent" with ADEQ that he or she intends to discharge into a waterway and wants to be covered by this type of permit. A general permit contains limitations and conditions for pollutants.

For example, ADEQ has issued a general permit for pesticide applications near Arkansas' navigable waters. To be included under the umbrella of this permit, a producer would have to notify ADEQ of his or her intentions to be included and the location of the discharge, as well as pay an application fee. Arkansas' general pesticide permit expires February 28, 2017.

Appendix 1 can help you determine if your operation requires a general or an individual NPDES permit.

Concentrated Animal Feeding Operations

Concentrated Animal Feeding Operations (CAFOs) are the only agricultural operation specifically identified in the Clean Water Act as a point source discharger. Because of this designation, the Environmental Protection Agency (EPA) requires CAFOs to have an NPDES permit only when there is a discharge from the CAFO.

The EPA and ADEQ define CAFOs as those operations described below where animals are kept

and raised in confined situations. The Act divides CAFOs into sizes small, medium and large.

- **Large** – An operation that has no more than 700 mature dairy cattle; 55,000 turkeys; 30,000 laying hens or broilers if the house uses a liquid manure handling system; 125,000 broilers if the house uses a system other than a liquid manure handling system; or 82,000 laying hens if the house uses a system other than a liquid manure handling system.
- **Medium** – An operation that has between 200 to 699 mature dairy cows; 16,500 to 54,999 turkeys; 9,000 to 29,999 laying hens or broilers if the house uses a liquid manure handling system; 37,500 to 124,999 chickens (other than laying hens) if the house uses a liquid manure handling system; and 25,000 to 81,999 laying hens if the house uses a liquid manure handling system. The operation's wastewater comes in contact with surface water either by a pipe or man-made ditch or the animals come in contact with surface water.
- **Small** – An animal feeding operation that has fewer animals than a medium CAFO and has been designated by ADEQ to be a significant contributor of pollutants. This designation is made on a case-by-case basis.

Medium and large CAFOs are required by the EPA to have an individual NPDES permit if they are discharging pollutants into waterways. Small animal feeding operations may be required to seek an NPDES permit if ADEQ has designated the operation as a significant contributor of pollutants.

ADEQ has developed a general CAFO permit for operations that discharge manure, litter and process wastewater into waterways because of precipitation causing overflows. However, a CAFO would need to file a "Notice of Intent" to be covered by the general permit before any discharge occurs.

Appendix 2 is a checklist provided to help you determine if your operation is covered by the general permit or if you may need an individual permit. For more information on the CAFO general permit, see ADEQ's *Fact Sheet for 2nd Draft General Permit No. ARG590000 Concentrated Animal Feeding Operations (CAFO) in the State of Arkansas*.

Additionally, the EPA has identified potential sources of pollutants from poultry operations that operators should monitor to prevent discharges. The potential sources include manure handling and storage activities, feed storage, litter storage and litter released through confinement house ventilation fans.

Section 404 Permit

The Clean Water Act (CWA) also requires a permit to discharge dredge and fill material into waterways and some wetlands. The U.S. Army Corps of Engineers (Corps) is the permitting agency for Section 404 permits.

Dredge material is defined as material “that is excavated or dredged from waters of the United States.”

There are two types of Section 404 permits for which a discharger can apply:

- **Individual permit** – This permit requires an application. The Corps will review the application, allow for public comment and draft an environmental impact statement to determine the direct and indirect impacts of the proposed activity. If the project passes review, the Corps will issue a Section 404 permit for a period of no longer than five years. If the permit is denied, the applicant can appeal the decision through the Arkansas Pollution Control and Ecology Commission. If the Commission denies the permit, the applicant may appeal that decision to the circuit court.
- **General permit** – The Corps can issue general permits for certain activities when they will have minimal environmental impacts for a specific region or nationwide, such as for streambank stabilization or for minor discharges of dredge and fill material. A party seeking to use a general permit only has to follow the conditions set out in the permit and in some cases may be required to give Notification of Intent.

The CWA provides two agricultural exemptions from Section 404 permit requirements. The CWA allows producers to continue farming wetlands and other areas that would fall under the law’s protection. The farming practice must be part of an established practice, or an on-going practice. This exemption is a narrow exemption, but would allow producers to change types of crops grown. The producer would lose the protection of the exemption and be required to get a Section 404 permit when the producer brings new areas, protected by the CWA, into production.

The second exemption allows producers the ability to build or provide maintenance to farm ponds, stock ponds, and irrigation and drainage ditches. This exemption also includes discharges from siphons, pumps, head gates, wingwalls, weirs, diversion structures and such other facilities as are appurtenant and functionally related to irrigation

ditches. Arkansas producers could conduct maintenance and work on farm ponds and irrigation districts without needing to apply for a Section 404 permit.

Conclusion

The Clean Water Act limits point source discharges of pollutants into rivers and tributaries. Agricultural activities are exempt from the Act in some cases, but not in every circumstance. An agricultural producer should understand the reaches of the CWA in order to know when applying for a NPDES permit is necessary. If the agricultural producer believes he or she might need an NPDES permit, then he or she should not hesitate to consult with a licensed attorney.

References

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- South Florida Water Management District v. Miccosukee Tribe of Indians*, 543 U.S. 805 (2004)
- United States Pub. Interest Research Group v. Atl. Salmon of Me., LLC*, 215 F.Supp.2d 239 (D. Me. 2002).
- United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

Appendix 1: Non-CAFO NPDES Permit Checklist

		YES	NO
Step 1.	Discharge of a Pollutant		
	Are you discharging a pollutant? (If Yes, then go to Step 2, and if No, go to Step 6.)		
Step 2.	Point Source Discharge		
	Is the discharge from a confined, discrete and discernible conveyance such as a manure spreader, sprayer or other equipment? (If Yes, then move to Step 3, and if No, then please continue.)		
	Is the discharge from off-shore fish pens? (If Yes, then move to Step 3, and if No, then please continue.)		
	Is the discharge from an animal feeding operation? (If Yes, then move to the CAFO Worksheet, and if No, then please continue.)		
	Is the discharge from an exempted agricultural source such as irrigation return flows or agricultural stormwater such as runoff from a crop field after a rain. (If Yes, then move to Step 6. If No, then please continue.)		
Step 3.	Discharge Into Water	YES	NO
	Is the producer discharging into water located in the State of Arkansas (If Yes, on to Step 4. If No, on to Step 6.)		
Step 4.	General NPDES Permit	YES	NO
	Is the pollutant a pesticide discharged on the water or near the streambank? For more information on this general permit, see http://www.adeg.state.ar.us/water/branch_permits/general_permits/pdfs/arg870000.pdf (If Yes, then the party will need to fill out the proper form and pay the appropriate administrative fee with ADEQ each year to qualify for its use. If No, then move on to Step 5.)		
Step 5.	Individual NPDES Permit	YES	NO
	If the party does not qualify for a General NPDES permit, then the party will need to file for an individual NPDES permit with ADEQ. This means the party: (1) files the appropriate form with ADEQ; (2) allows for ADEQ to review the application; (3) public comment on the permit; and (4) ADEQ approval or denial of permit.		
Step 6.	The party is probably not required to file for an NPDES permit, either because they meet an exemption or are not discharging a pollutant into a body of water covered by the CWA.		

Appendix 2: Arkansas CAFO NPDES Permit Checklist

Step 1.	Are You an AFO?	YES	NO
	Do you operate a facility that feeds or keeps animals for a total of 45 or more days in a 12-month period? (If Yes, then proceed to the next question. If No, then proceed to Step 6.)		
	Is the lot or facility where the animals are kept unable to sustain vegetation, crops, forage growth or post-harvest residues during a normal growing season? (If Yes, then proceed to Step 2. If No, then proceed to Step 6.)		
Step 2.	Are You a CAFO?	YES	NO
	Are you a Medium CAFO?		
	Medium CAFOs have between 200 to 699 mature dairy cows; 16,500 to 54,999 turkeys; 9,000 to 29,999 laying hens or broilers if the house uses a liquid manure handling system; 37,500 to 124,999 chickens (other than laying hens) if the house uses a liquid manure handling system; and 25,000 to 81,999 laying hens if the house uses a liquid manure handling system. A medium CAFO would also require that wastewater come in contact with surface water either by a pipe or man-made ditch or the animals come in contact with a surface water.		
	If Yes to being a Medium CAFO, then proceed to Step 3. If No, then proceed to the next question.		
	Are you a Large CAFO?		
	A Large CAFO has no more than 700 mature dairy cattle; 55,000 turkeys; 30,000 laying hens or broilers if the house uses a liquid manure handling system; 125,000 broilers if the house uses a system other than a liquid manure handling system; or 82,000 laying hens if the house uses a system other than a liquid manure handling system.		
	If Yes to being a Large CAFO, then proceed to Step 3. If No, then proceed to the next question.		
	Are you a Small CAFO?		
	A Small CAFO is an operation that has fewer animals than a Medium CAFO and has been designated by ADEQ to be a significant contributor of pollutants. This designation is made on a case-by-case basis.		
	If Yes to being a Small CAFO, then proceed to Step 3. If No, then proceed to Step 6.		
	If No to any of these questions, please move to the Non-CAFO NPDES Permit Checklist.		
Step 3.	Discharge of a Pollutant	YES	NO
	Does the CAFO currently discharge into any water in Arkansas? (If Yes, proceed to Step 4. If No, proceed to Step 6.)		
Step 4.	ADEQ General CAFO Permit	YES	NO
	Is this discharge being caused by a rainfall event that overflows wastewater ponds or causes manure or litter to discharge into a body of water located in Arkansas? If Yes, then the CAFO will qualify for use of the General CAFO Permit in Arkansas. The CAFO will need to (1) file a Notice of Intent (NOI) to use the general permit with ADEQ; (2) submit a nutrient management plan with the NOI; (3) submit a disclosure form with ADEQ; (4) pay \$200 fee each year; and (5) submit ADEQ Form 1. If No, proceed to Step 5.		

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Appendix 2: Arkansas CAFO NPDES Permit Checklist (continued)

Step 5.	Individual Permit	YES	NO
	If the CAFO is discharging and does not qualify for the general permit, then the CAFO will need to file for an individual NPDES permit with ADEQ. This will require (1) submit ADEQ Form 1 to ADEQ and any other documents required for the application; (2) ADEQ will review the application and the engineer will complete a technical review of the application; (3) ADEQ will provide published public notice of the application to allow the public an opportunity to comment on the application; (4) after ADEQ review, the applicant is given a draft permit; (5) ADEQ will take into account all significant public comments and make a final decision; and (6) the permit becomes final 30 days after the final decision or the applicant will be able to challenge a permit denial through the appropriate agency appeals process.		
Step 6.	No Permit Required		
	If you have reached here, you are probably not required to get an NPDES permit for your animal feeding operation. The producer may want to consider checking with ADEQ to make sure this conclusion is proper and file any necessary paperwork to ensure ADEQ does not later consider the animal operation in violation of the CWA for not getting an NPDES permit.		

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