

United States Senate
WASHINGTON, DC 20510

March 3, 2006

The Honorable Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Johnson:

We have some concerns with how the U.S. Environmental Protection Agency (EPA) is handling its response to the 2005 ruling by the Second Court of Appeals in *Waterkeeper Alliance et al. v. EPA*. We were pleased with the February 10, 2006, final rule published revising the compliance dates for Concentrated Animal Feeding Operations (CAFOs), especially with the agency's statement that it could allow further extension in the final rule if necessary. We continue to be concerned about communications between EPA headquarters, EPA Regional Offices and the states regarding the application of the National Pollutant Discharge Elimination System (NPDES) permit program to CAFOs.

In *Waterkeeper Alliance v. EPA*, the court vacated some of the core provisions of EPA's 2003 CAFO rule, including EPA's requirement that CAFOs that do not discharge pollutants must get an NPDES permit. As a result, several state NPDES programs for CAFOs will need to be fundamentally changed. This should occur as quickly as possible because many CAFOs are being told by state regulatory agencies that they must get a state's federally enforceable NPDES permit now, even though these CAFOs are not discharging. It does not appear EPA and the Regional Offices are effectively working with the states to ensure they understand that unless a CAFO is discharging they cannot be required to get a federally enforceable NPDES permit.

In fact, several states, with EPA's apparent blessing, are continuing to move forward with requiring CAFOs to get federally enforceable NPDES permits. For example, on December 7, 2005, Region 5 sent a report to the six states in the region detailing how the states are applying their NPDES permit program to CAFOs. Five of these six states are requiring CAFOs to get NPDES permits even if they do not discharge. The Region 5 report failed to mention that the Second Circuit ruling will substantially reduce the number of CAFOs that need to be covered by the program. This Region 5 communication, which is enclosed, is being cited by state NPDES authorities as evidence

EPA intends to continue to require NPDES permits for all CAFOs regardless of whether they discharge pollutants.

It appears the cause of this problem is EPA's position on the issue. Greater clarity must be brought on the important differences between federal law and state law in the application of section 510 of the Clean Water Act. For example, EPA stated in the February 10, 2006, final rule that "states may choose to require CAFOs to obtain NPDES permits in advance of the dates set in the federal NPDES regulations, pursuant to the authority reserved to States under Section 510 of the Clean Water Act to adopt requirements more stringent than those that apply under federal law."


Section 510 does not allow states to require CAFOs to be subject to federally enforceable NPDES permit requirements when the federal government itself cannot require this. States can require under state law CAFOs to get state permits that are enforceable in state courts, but they cannot require CAFOs to get federally enforceable NPDES permits if the CAFO is not discharging.

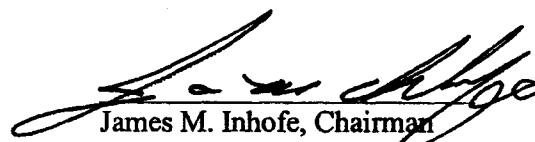
We want states to be able to continue operating successful water quality protection programs that work for them. However, section 510 does not extend to the states the ability to impose a federal requirement that carries federal penalties and liabilities when the federal government itself cannot lawfully do so.

We strongly encourage you to immediately reconsider EPA's position on this matter and make a clear statement to the regions and states that federally enforceable NPDES permits are required only for CAFOs that actually discharge pollutants to water, and that they are not required for those CAFOs that do not discharge.

We appreciate your attention to this matter and look forward to hearing from you.

Sincerely,


Saxby Chambliss, Chairman
Senate Committee on Agriculture,
Nutrition and Forestry


James M. Inhofe, Chairman
Senate Committee on Environment
and Public Works

Enclosure

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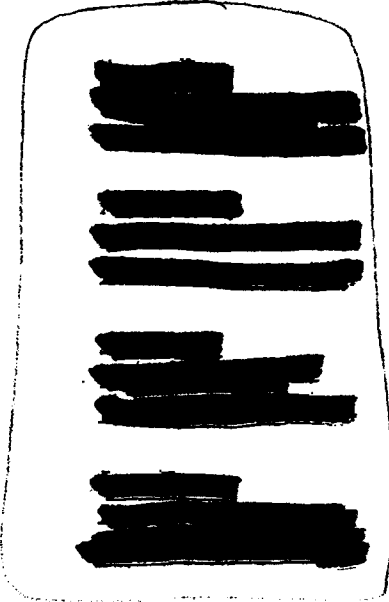
Zenas Baer

Magnus Wefald, (1900-1991)

Kevin Miller

Judy Agrevoid, Legal Assistant
Timothy J. Heier, Paralegal

March 27, 2006



Re: MPCA

Dear [Redacted]

Enclosed please find a letter I received from Leo Raudys, Divisional Director, Regional Division, St. Paul Office of MPCA regarding the need for obtaining an NPDES/SDS permit for your facilities. I have requested additional information to be able to analyze what an appropriate response is. It seems their authority is based on the 2000 legislative amendment to Chapter 116, which required the Agency to issue NPDES permits for feedlots with "1,000 animal units or more and that meet the definition of a concentrated animal feeding operation in 40 CFR 122.23".

The requirement for an NPDES/SDS permit is based on an Attorney General's interpretation, which I have not yet seen. An Attorney General interpretation (Mike Hatch) is not the law, but is typically given some weight by Courts. I suspect that this is not a typical Attorney General opinion which would be published.



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Once I receive the opinion and the request letter, I will better be able to analyze what position you should take.

Very truly yours,

ZENAS BAER AND ASSOCIATES

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ZB:ja

Enc.

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March 27, 2006

Leo Raudys, Division Director
Regional Division
Minnesota Pollution Control Agency
520 Lafayette Road N.
St. Paul, MN 55155-4194

Re: NPDES Application Requirements

Dear Mr. Raudys:

Thank you for your correspondence dated March 23, 2006, explaining the background of the Minnesota NPDES/SDS permit process. In the letter you make reference to the letter from Jo Lynn Traub, Water Division Director, Region 5, EPA, dated March 28, 2001, and the August 6, 2001 response letter from Mike Hatch, Attorney General, regarding the Attorney General's interpretation of *Minn. Stat.* 116.07, subd. 7c (2000). I would appreciate it if you could send me copies of these documents so I can review them before consulting with my clients regarding applications which might be necessary to meet state law. Once I receive those documents I will meet with my clients and respond accordingly.

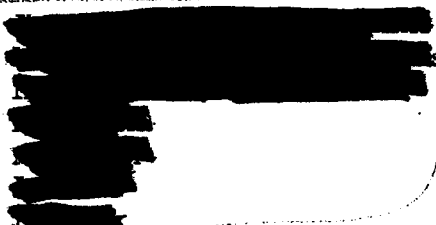
Very truly yours,

ZENAS BAER AND ASSOCIATES

Zenas Baer

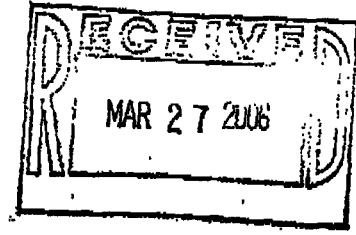
ZB:ja

cc:





Minnesota Pollution Control Agency



March 23, 2006

Mr. Zenas Baer
Zenas Baer and Associates
P.O. Box 249
331 Sixth Street
Hawley, MN 56549

RE: National Pollutant Discharge Elimination System Permit Application Requirements

Dear Mr. Baer:

This letter is in response to your inquiry pertaining to the requirements of an owner of a livestock or poultry operation for submitting an application for a National Pollutant Discharge Elimination System (NPDES) Permit in light of the ruling by the Second Circuit Court of Appeals (Court) on February 25, 2005. A portion of this ruling stated that only those large Concentrated Animal Feeding Operations (CAFOs) that actually discharge, or propose to discharge, are required to apply for an NPDES Permit.

The Minnesota Pollution Control Agency (MPCA) staff has discussed this issue with members of the Minnesota Attorney General's (Attorney General) staff and concluded that Minnesota State Statutes require all livestock and poultry operations which meet or exceed the large CAFO threshold to apply for an NPDES Permit. The following is the background information that was reviewed and used to develop this opinion.

MPCA General NPDES/State Disposal System (SDS) Permit Development

The 2000 Minnesota Legislature amended Minn. Stat. 116.07, subd. 7c. to require that:

“(a) The agency must issue National Pollutant Discharge Elimination System permits for feedlots with 1,000 animal units or more and that meet the definition of a "concentrated animal feeding operation" in 40 CFR § 122.23...”

As a result of this legislation the MPCA incorporated this requirement into Minn. R. 7020.0405, subp. 1. (which establishes permit requirements), and issued a General NPDES/SDS Permit (General Permit) for livestock facilities on May 30, 2001. At the time this became effective, the MPCA interpreted the statutory language as requiring a General Permit to be issued only to those sites that housed 1,000 or more animal units (AU) and also met the definition for a CAFO.

Since that time this interpretation has changed as the result of an interpretation of Minn. Stat. 116.07, subd. 7c. by the Attorney General, as requested by the U.S. Environmental Protection Agency (EPA).

520 Lafayette Rd. N.; Saint Paul, MN 55155-4194; (651) 296-6300 (Voice); (651) 282-5332 (TTY); www.pca.state.mn.us

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In his response, the Attorney General stated:

"The statute is properly interpreted as requiring any feedlot that meets the federal definition of a CAFO to obtain an NPDES permit regardless of the number of animal units they have. Additionally, the statute requires feedlots that might not meet the federal definition of a CAFO to obtain an NPDES permit if they have more than 1,000 animal units under state law."

Copies of the March 28, 2001, letter from Jo Lynn Traub, Water Division Director, Region 5, EPA requesting this information, and the August 6, 2001, response letter from Michael Hatch, Attorney General, are available if needed.

As a result of this interpretation and the 2003 revised Code of Federal Regulations (CFR) for CAFOs, the MPCA amended the NPDES/SDS permitting process in the following ways:

1. A General Permit (MNG920000) was issued on February 14, 2005, to provide permit coverage to all livestock facilities that met or exceeded the large CAFO threshold, but had a capacity of less than 1,000 AU under state law; and
2. A second General Permit (MNG440000) was developed that will become effective on June 1, 2006, and replace the General Permit issued in 2001 and MNG920000 so that all Minnesota livestock facilities that are required to have an NPDES Permit and meet the criteria for a General Permit can be covered under the same permit document. This permit will also provide coverage to those sites identified as "newly defined" under the federal regulations.

Existing facilities were required to apply for the revised General Permit MNG440000 by December 1, 2005.

Second Circuit Court of Appeals Decision

In response to the February 2003, revision of the regulations, the EPA received petitions for judicial review from four different livestock producer groups and four different environmental groups. The petitions for review were consolidated into one proceeding before the Court.

On February 28, 2005, the U.S. Court of Appeals for the Court issued its decision. This decision can be found on the internet at: <http://cfpub.epa.gov/npdes/afo/caforulechanges.cfm>

One of the issues that the Court ruled on is the requirement that a large CAFO is required to apply for an NPDES Permit because the facility has the "potential" to discharge. The Court vacated the "duty to apply" provisions of the new CAFO rule. These provisions require all CAFOs to apply for an NPDES Permit unless they can demonstrate that they have no potential to discharge. The Court found that the duty to apply, which the EPA had based on a presumption that all CAFOs have at least a potential to discharge, was invalid because the Clean Water Act subjects only actual discharges to regulation. The Court acknowledged EPA's strong policy

Mr. Zenas Baer
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considerations for seeking to impose a duty to apply – “EPA has marshaled evidence suggesting that such a prophylactic measure may be necessary to effectively regulate water pollution from large CAFOs, given that large CAFOs are important contributors to water pollution and that they have, historically at least, improperly tried to circumvent the permitting process” – but found that the EPA nevertheless lacked statutory authority to do so.

MPCA Response to the Court Decision

The MPCA reviewed the decision of the Court regarding the “duty to apply” and determined that the Court’s decision does not impact the NPDES permitting system for livestock facilities that has been established by the MPCA. The reason for this decision is based on the statutory requirement found in Minn. Stat. 116.07, subd. 7a. (discussed above) that requires livestock facilities that meet or exceed the CAFO definition provided in the CFR to apply for an NPDES Permit.

Although some states have laws that prevent any state statute or rule from being more restrictive than the federal regulations, no such law exists in Minnesota. Therefore, livestock facilities are required to follow the most restrictive requirement. In this case, the Minnesota State Statutes apply.

If you have any questions regarding this issue, please feel free to contact Kim Brynildson of the MPCA St. Paul office at (651) 296-7366.

Sincerely,



Leo Randys
Divisional Director
Regional Division
St. Paul Office

LJR:mte

cc: Robert Roche, Minnesota Attorney General’s Office
Jim Ziegler, MPCA – Detroit Lakes
Mark Stuart, MPCA – Detroit Lakes