

**LEGAL STRUCTURES GOVERNING ANIMAL WASTE MANAGEMENT**

Prepared by  
Terence J. Centner, University of Georgia

The federal government regulates Concentrated Animal Feeding Operations (CAFOs) under the constitutional authority of the Commerce Clause and the statutory authority of the Clean Water Act. Effluent guidelines for Feedlots Point Source Category are enumerated in the Code of Federal Regulations for large animal operations. These guidelines are implemented through National Pollutant Discharge Elimination System (NPDES) permits. Dissatisfaction with current federal provisions governing CAFOs led the Environmental Protection Agency to design a Proposed Rule to expand federal authority over polluting activities.

Livestock producers are concerned about the contamination of water, especially groundwater, and their potential liability for injuries. Persons injured by agricultural nutrients from Animal Feeding Operations (AFOs), including CAFOs, have several different legal arguments. Common law causes of action in strict liability, negligence, nuisance and trespass might be employed by aggrieved persons. Lawsuits based on these arguments would be brought by neighbors, not a very amicable situation in rural communities where most AFOs are situated. For nuisance causes of action, AFOs may qualify for the anti-nuisance protection of their state's right-to-farm law.

Due to shortcomings associated with the common law principles, governments have taken legislative steps to address the discord created by the activities and byproducts of animals. The federal Clean Water Act establishes federal standards for discharges from point sources of pollution and allows states to assume authority for regulating nonpoint-source pollution. The act's provisions complement the reserved authority of states to enact laws that enhance the welfare of their citizens. CAFOs in every state are subject to point-source pollution requirements. AFOs that are not CAFOs are governed by state nonpoint-source pollution regulations. In the past 10 years

most states have enacted special laws addressing potential pollution by AFOs. Some of these go beyond federal point-source requirements or may address groundwater and air pollution. Local ordinances also regulate AFOs and the activities and practices that are possible in zoned areas. Aggrieved persons may select from a variety of statutory and regulatory provisions to seek relief for harm or from a burdensome situation.

The designated authority used by states in regulating AFOs varies considerably. Some states have assumed that their existing water pollution legislation provides authority for state agencies to adopt more detailed regulations that apply to AFOs. In these states no new legislation has been passed. Agencies have proceeded under existing laws to adopt regulations that safeguard the environment by restricting polluting activities by AFOs. In other states legislatures have enacted special legislation concerning AFOs. The laws may list various requirements or may direct a state agency to carry out the law. Based on these directions, the designated state agency adopts more detailed rules or regulations setting forth specific requirements for AFOs.

AFOs that are within the definition of a CAFO are point sources of pollution and must have a permit under the NPDES Program. AFOs that are not CAFOs are not required to have a federal permit, but a state may impose its own permit requirements. The Proposed Rule being advocated by the EPA seeks to increase the number of operations that would be designated CAFOs. By requiring more operations to have permits, the government hopes to curb nutrient pollution. To justify the new provisions of the Proposed Rule, the EPA cites data from the National Water Quality Inventory. But are the data supportive of the submitted provisions? An evaluation of the data's age, the amount of data on animal sources of pollution, the reported indicia of pollution, the referenced support for regulating the off-site application of

manure, and pronouncements relating to agricultural storm water discharges disclose several conundrums. The shortcomings of the data raise the question whether some parts of the Proposed Rule might be set aside because they are arbitrary, capricious or lack a rational basis.

Our laws and regulations set forth a number of governmental enforcement mechanisms to respond to violations. In many cases a decision to prosecute involves the quality and quantity of resources and personnel available for responding to problems. Even with enough resources, there can be a problem with the agency's commitment to enforcement. Under the cooperative federalism incorporated in most environmental statutes, federal agencies commission states to enforce federal laws. For enforcement of laws under the management of the EPA, an annual enforcement agreement is executed between the state and EPA regional office setting forth enforcement commitments. Agencies in charge of carrying out environmental legislation may lack the authority to prosecute violations. Instead, they must refer violations to the attorney general.

The regulatory structure governing animal waste management suggests two major concerns. First, do governments have a problem with enforcing existing regulations, and what does this mean? Inadequate enforcement efforts by governments

appears to be leading to unauthorized pollutants being discharged into our country's waters. The unwillingness of governments to eliminate pollution from violators may culminate in the public calling for more regulations or recommending additional remedies for aggrieved persons.

Second, are nonpoint sources of pollution causing pollution that needs to be controlled? The lack of definitive data suggests that we do not have sufficient information to develop efficient regulations. Yet such does not mean that governments cannot continue with efforts to regulate nonpoint-source pollution. Because the Clean Water Act does not regulate nonpoint sources additional controls over this type of pollution are dependent upon other authority. Currently, state governments are in charge of devising appropriate controls on nonpoint-source pollution.

The Proposed Rule should facilitate greater remedial actions against point-source polluters. An allegation of a permit violation against a CAFO will provide a cause of action that is easier to prove than alternative grounds. Moreover, the Clean Water Act allows citizen suits. Enforcement action against CAFOs is not dependent on governmental action. With the expansion of operations classified as CAFOs under the Proposed Rule, citizens will have increased opportunities to sue polluters for permit violations.

The full text of the White Papers is available for \$25 from Midwest Plan Service,  
<http://www.mwpshq.org/>