



MARYLAND DEPARTMENT OF THE ENVIRONMENT

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September 3, 2009

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RE: General Discharge Permit for Animal Feeding Operations
OAH NO: MDE-WMA-053-09-13516

Dear Ms. Greenston and Ms. Wazenski:

Enclosed is the Final Decision in the above-referenced case. If you have any questions concerning this matter, please contact me at 410-537-3085.

Sincerely,

Brigid E. Kenney
Final Decision Maker
Maryland Department of the Environment

Enclosure

cc: Secretary Shari T. Wilson
Ms. Joane Mueller



ASSATEAGUE COASTKEEPER,
LOWER SUSQUEHANNA
RIVERKEEPER, C. & B. SCHELTS
AND WATERKEEPER ALLIANCE,
PETITIONERS

* BEFORE THE FINAL DECISION
* MAKER OF THE MARYLAND
* DEPARTMENT OF THE
* ENVIRONMENT

v.

MARYLAND DEPARTMENT OF THE
ENVIRONMENT,
RESPONDENT

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* OAH NO: MDE-WMA-053-09-13516

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FINAL DECISION

Introduction

This is the final decision in a contested case challenging the final determination of the Maryland Department of the Environment (Maryland, MDE or the Department) to issue a General Discharge Permit for Animal Feeding Operations, Maryland Permit No. 09AF and NPDES Permit No. MDG01 (the General Permit or GP). The Department published the final determination on January 2, 2009. Assateague Coastkeeper, Lower Susquehanna Riverkeeper, Charles and Betty Schelts, and Waterkeeper Alliance (Petitioners) filed a timely request for a contested case hearing and MDE forwarded the matter to the Office of Administrative Hearings. Following the filing of cross motions for summary decision, oppositions to the same, and replies, the Administrative Law Judge (ALJ), without a hearing on the motions, issued a proposed decision on May 5, 2009. The ALJ granted MDE's motion for summary decision and denied

Petitioners' motion for summary decision. The Petitioners filed exceptions to the proposed decisions, MDE responded, the Petitioners replied. MDE Secretary Wilson appointed me Final Decision Maker on July 28, 2009. On August 19, 2009, I heard argument, and now issue the final decision.

In reviewing an ALJ's grant of summary decision, the agency final decision maker, like an appellate court, reviews the decision *de novo* as to the law. *Maryland Board. of Physicians v. Elliott*, 170 Md. App. 369, 383 (2006)(When an agency delegates to an ALJ the limited task of making proposed conclusions of law, the agency is ordinarily at liberty to make its own independent final decision.) Under the State law governing contested cases, the final decision maker must "identify any changes, modifications or amendments to the proposed decision and the reasons for the changes, modifications or amendments." Md. State Gov't Art. § 10-216(b). I issue this final decision in place of the ALJ's tentative decision. Because my analysis differs significantly from that of the ALJ, this final decision will serve to state and explain the reasons for the changes, modifications and amendments to the proposed decision.

The Regulatory and Permitting Structure

The federal Clean Water Act (CWA) prohibits the discharge of pollutants to "waters of the United States" (generally speaking, navigable waters, their tributaries, and wetlands adjacent to either), except as authorized by a permit issued under the National Pollutant Discharge Elimination System Program (NPDES permit). CWA, §§ 301 and 402, 33 USCA §§ 1311 and 1342. The CWA provides for the delegation of authority to States. CWA § 402, 33 USCA § 1342. As a delegated State, Maryland administers the federal NPDES program

and issues the federal permit. See *Chesapeake Bay Foundation, Inc. v. Bethlehem Steel*, 608 F. Supp, 440, 443 (D. Md. 1985); *Howard County v. Davidsonville Civic Assn. et al.*, 72 Md. App. 19, 24 at n. 3 (1985).

Maryland law prohibits the discharge of pollutants to “waters of the State,” *i.e.*, surface or ground water, except as authorized by a State discharge permit. Environment Article, §§ 9-101, 9-322 and 9-323. Because the federal program does not regulate discharges to ground water, Maryland’s program can and does regulate facilities that the federal program can not. Maryland issues both NPDES permits and State permits.

A State program must meet certain criteria to obtain and maintain the NPDES delegation. 40 CFR 123.25(a). Relevant to this case, a State program must have the legal authority to implement the federal regulations of concentrated animal feeding operations. *Id.* at (a)(6). Maryland’s legal authority to implement the federal regulations on these facilities rests on the Md. Environment Article, Title 9, Subtitle 3, and COMAR 256.08.01 - .04, and on regulations for animal feeding operations and permits for discharges from them, COMAR 26.08.03.09.¹

Both the federal and State regulations define categories of animal feeding operations (AFOs) and designate them large, medium or small, depending on the number of animals stabled or confined. The federal and State categories are identical except that the Department also classifies as “large” any AFO with chickens other than laying hens (with other than a liquid manure handling

¹ Maryland had adopted regulations and a general permit applicable to certain animal feeding operations in 1996. These regulations applied to a relatively small number of Maryland animal feeding operations. The regulations were amended in January 2009.

system) if it has a total house capacity of 100,000 ft² or more. COMAR 26.08.03.09A(3). While the federal regulations refer to all of these AFOs as concentrated animal feeding operations (CAFOs), small facilities are not subject to the federal effluent limitation regulations unless they are designated as CAFOs on a case-by-case basis. 40 CFR 122.23(b). Medium CAFOs are subject to these regulations only if, in addition to the requisite number of animals, they use one of two methods of discharge or are designated on a case-by-case basis. *Id.* Under the federal regulations, only a CAFO that “discharges or proposes to discharge to surface water” is required to obtain a federal discharge permit. 40 CFR 122.23 (d)(1).

Maryland’s regulations classify AFOs as CAFOs only if they are subject to CWA jurisdiction, that is, only if they discharge or propose to discharge to surface waters. COMAR 26.08.03.09.B. CAFOs must obtain coverage under an NPDES permit issued by Maryland. The Maryland regulations classify an AFO that is a CAFO under federal regulations, but that does not discharge or propose to discharge to surface water, as a Maryland Animal Feeding Operation (MAFO). COMAR 26.08.03.09 B (1) (c) and (d). MAFOs must obtain a State discharge permit. The regulations state: “A facility's status as a MAFO does not require, and the permit authorization for a MAFO does not confer, NPDES discharge permit authorization under the [Clean Water] Act.” COMAR 26.08.03.09.C(6). That is, a MAFO, because it does not discharge to surface water, does not require an NPDES permit. The State discharge permit does not authorize the MAFO to discharge to surface water.

At the same time it was developing its AFO regulations, the Department was developing a General Permit² (GP) for AFOs. Maryland published a final determination to adopt a general discharge permit for animal feeding operations and the text of the permit on January 2, 2009.³ The GP is both a federal permit (NPDES General Permit No. MGD01) for CAFOs and a State permit (State General Discharge Permit No. 09AF) for MAFOs. The GP is the mechanism by which the regulations are applied to facilities. In authorizing only certain discharges and under certain circumstances, the GP regulates the discharge by regulating the management of manure as it is stored, and also when it is land applied as fertilizer.

The GP contains some provisions that apply to both CAFOs and MAFOs, and others that apply to one or the other. Both CAFOs and MAFOs are required to comply with certain minimum standards to protect water quality. For example: both are required to:

Design, construct, operate, and maintain the production area and all animal waste storage structures to contain all animal wastes, including any runoff or direct precipitation from a 25-year, 24 hour storm. Store dry manure in a way that prevents polluted runoff. Properly operate and maintain all storage facilities.”

GP, Part IV B.1.

Both CAFOs and MAFOs are required to develop a Nutrient Management Plan (NMP) and Conservation Plan, but they may satisfy this requirement by different means. A CAFO must prepare and follow a Comprehensive Nutrient Management Plan (CNMP), whereas a MAFO may develop and follow a CNMP

² A general permit is a permit issued to a class of dischargers. The regulations set forth the method of obtaining coverage. COMAR 26.08.04.09. Maryland issued an earlier general permit for CAFOs in 1996 that expired in 2001.

³ The permit has not gone into effect because it was challenged in this case.

or, alternatively, a Nutrient Management Plan and Conservation Plan.⁴ GP, Part III.B. The NMP and Conservation Plan become part of the permit, and failure to implement them is a violation of the GP. GP, Part I.B.5.

In other respects, the differences are more substantive. For example,

- A CAFO's CNMP must be submitted to the Department for approval before the CAFO can be covered by the GP, whereas MAFOs are allowed to submit their plans after obtaining permit coverage. GP, Part III.C.2. and B.2.
- CAFOs cannot store poultry litter manure in the field for more than 14 days unless it is separated from ground water and storm water by a liner and a cover to prevent leaching or runoff of pollutants. GP, Part IV.B.6.b.
- MAFOs are allowed to store poultry litter manure for up to 90 days (scheduled to be reduced in the future to 30 days unless studies demonstrate that 30 days is more restrictive than necessary) without a liner or cover. GP, Part IV.B.6.c.

Legal Standard for Deciding Motion for Summary Decision

Summary decision may be granted if there is no issue of material fact, and the party is entitled to prevail as a matter of law. Md. Rule 2-501. All reasonable inferences must be drawn in favor of the non-moving party. *Sherman v.*

American Bankers Life Ins. Co. of Fla., 264 Md. 239 (1972).

Issues

Petitioners did not take exception to the ALJ's denial of their motion for summary decision, and instead requested that the Department's motion be denied and the matter remanded for determination of disputed facts. The parties' positions are virtually mirror images of each other, so that a decision on one motion determines the decision on the other.

I have reviewed and considered the following pleadings and their attachments:

⁴ These terms are defined in the GP.

- Petitioner's Motion for Summary Decision
- MDE's Motion for Summary Decision
- Petitioner's Opposition to MDE's Motion for Summary Decision
- MDE's Opposition to Petitioner's Motion for Summary Decision
- Petitioner's Reply Brief in Support of Petitioner's Motion for Summary Decision
- MDE's Reply to Petitioners Opposition to Motion for Summary Decision
- Petitioner's Exceptions
- MDE's Response to Exceptions
- Petitioner's Reply to MDE's Response to Exceptions

In addition, I considered a letter from the Petitioners dated August 13, 2009, and the EPA Administrative Order to Dolby Farm attached thereto. I have also considered oral argument presented by the parties. I shall base my analysis and decision on all of these, except that I have not considered the affidavit of Joshua McGrath, Exhibit 1 to the Department's opposition to Petitioners' motion for summary decision.⁵ Because of the simultaneous filing of the motions, issues were sometimes addressed out of order or multiple times. For this reason, I shall restate the issues and disputes.

The Department maintains that the GP is consistent with federal and State law; that there is no dispute of a material fact; and that the Department's decision is supported by the record. In support, the Department offered legal analysis and the affidavits of Robert Summers, Ph.D., and Dinorah Dalmasy. Petitioners challenge the GP as it relates to poultry operations. The specific issues are these:

⁵ For this reason, it is unnecessary for me to decide whether the Affidavit can be considered in support of the Department's own motion.

- I. Does the General Permit violate federal law because it uses a definition of CAFO that differs from the federal definition?
- II. Does the General Permit violate federal law by regulating as MAFOs, instead of as CAFOs, facilities that store manure uncovered for more than 14 days?
- III. Does the General Permit violate the CWA and Maryland law because it fails to ensure that poultry waste discharges do not cause or contribute to violations of water quality?
- IV. Is summary decision inappropriate because there a dispute of a material fact?
- V. Is the Department's decision unsupported by evidence or otherwise arbitrary and capricious?

I will address these in order.

I. Does the General Permit violate federal law because it uses a definition of CAFO that differs from the federal definition?

The CWA specifically includes CAFOs in the definition of point source, and the federal regulations do likewise.⁶ CWA § 502(14), 33 USCA § 1362(14); 40 CFR 122.23. The result is that all CAFOs are subject to regulation under the CWA. Maryland, however, takes the universe of federal CAFOs and divides them into two categories: CAFOs that discharge or propose to surface water; and MAFOs that do not discharge to surface water, although they may discharge to ground water. COMAR 26.08.01.01B(13-2) and (42-1). Petitioners contend that MDE impermissibly narrows the definition of CAFO by excluding large AFOs that do not “discharge or propose to discharge.”

As noted above, a State program must meet certain criteria to obtain and maintain the NPDES delegation, including implementing the federal regulations on concentrated animal feeding operations:

⁶ Runoff from land application of manure from a CAFO is exempt from the definition of point source as agricultural stormwater if the manure has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization. 40 C.F.R. § 122.23(e) and *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 506-09 (2d Cir. 2005).

All State Programs under this part must have legal authority to implement each of the following provisions and must be administered in conformance with each, except that States are not precluded from omitting or modifying any provisions to impose more stringent requirements:

...

(6) §122.23—(Concentrated animal feeding operations)....
40 CFR 123.25(a)

States, however, have some flexibility in this matter. A note to 40 CFR 123.25 states:

Except for paragraph (a)(46) [relating to receiving electronic documents] ..., States need not implement provisions identical to the above listed provisions. Implemented provisions must, however, establish requirements at least as stringent as the corresponding listed provisions.

The question becomes, then, whether the Maryland AFO classification system is at least as stringent as the corresponding federal provision.

Under the federal program, not every CAFO is required to obtain an NPDES permit. 40 CFR 122.23(d) provides:

Who must seek coverage under an NPDES permit? —(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.⁷ A CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur. Specifically, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit. If the Director has not made a general permit available to the CAFO, the CAFO owner or operator must submit an application for an individual permit to the Director.

The Maryland regulations provide at COMAR 26.08.01.01B(13-2):

“Concentrated animal feeding operation (CAFO)” means: (a) A medium AFO or large AFO, based upon the size categories established in Table 1 of COMAR 26.08.03.09A, that discharges or

⁷ “Discharge” means discharge to navigable waters. CWA § 502(12), 33 USCA 1362(12); 40 CFR 122.2.

proposes to discharge, as defined by the Federal Act, to surface waters of this State; (b) A small AFO designated a CAFO by the Department in accordance with COMAR 26.08.03.09B; or (c) An AFO designated as a CAFO by the Regional Administrator (RA) of the EPA in accordance with the Federal [Clean Water] Act.

The size categories for AFOs in the MDE regulations and general permit are consistent with EPA's size categories. The same universe of facilities that would be required to obtain permit coverage under the federal regulations is required by Maryland regulations and the general permit to obtain coverage under an NPDES permit.

Petitioners have not identified, and I have not been able to find, any consequence resulting from the two different ways of defining CAFOs that makes any substantive difference. On page 5 of Petitioner's motion for summary decision, Petitioners suggest two differences. First, the CWA definition of CAFOs as point sources puts them clearly within the ambit of the CWA should they discharge to surface water. This is not different, however, from the Maryland regulations and General Permit, which subject the same size AFOs to the applicable provisions of the CWA regulations if the AFO discharges or proposes to discharge to surface water. COMAR 26.08.03.09B and GP Part I.A. Second, Petitioners note that federal regulations require CAFOs to comply with certain management practices set forth in 40 CFR 122.42(e)(1)(i)-(ix). By its own terms, this requirement is applicable to NPDES permits; it does not apply to an AFO that does not discharge or propose to discharge to surface water and therefore is not required to obtain an NPDES permit. Maryland has incorporated these provisions into the GP at pages 11-15 for CAFOs. The distinction Petitioners rely on is a distinction without a difference.

Petitioners also argue that AFOs will misunderstand the permit terms and consider themselves MAFOs instead of CAFOs. I find this unpersuasive. Although the regulations and general permit require effort to read and understand, they are not ambiguous or misleading. The GP clearly states that an AFO is not a MAFO if it discharges or proposes to discharge to surface water. GP, Part 1.A.4, 5.b, and B.3.

I therefore find that the GP does not violate federal law because it uses a definition of CAFO that differs from the federal definition.

II. Does the General Permit violate federal law by regulating as MAFOs, instead of CAFOs, certain facilities that store manure uncovered for more than 14 days?

In Maryland, poultry litter manure is generally destined for application to cropland, where it can be used in place of chemical fertilizer. The litter must, however, be staged or stored after it is removed from the chicken house and before it can be applied to fields. The field application has long been subject to nutrient management plans under the Water Quality Improvement Act of 1998. Md. Agric. Art. Title 8, Subtitle 8.

The GP allows CAFOs to store the litter in uncovered piles for up to 14 days.⁸ GP, Part IV.B.6.b. If a CAFO wishes to store the litter for a longer period, it must use both a liner and cover to separate the pile from ground water and storm water to prevent leaching or runoff of pollutants. *Id.* Petitioners do not challenge this provision.

The GP, however, allows MAFOs store to poultry litter manure in uncovered piles for a longer time – up to 90 days. GP, Part IV.B.6.c. Petitioners

⁸ The piles must be engineered to meet certain design standards. GP, Part IV.B.1.

argue that uncovered storage for more than 14 days converts an AFO with a dry manure handling system to a facility with a liquid manure system. A poultry AFO with liquid manure handling becomes a large AFO when it raises 30,000 or more animals, while a poultry AFO with dry manure handling does not become a large AFO until it raises 82,000 animals or has a total house capacity of 100,000 or more square feet. COMAR 26.08.03.09A(3). Under the federal regulations, large AFOs are subject to all the requirements; medium AFOs are not unless they meet additional criteria. 40 CFR 122.23(b) and (d). If, in fact, federal law requires that storage beyond 14 days converts a dry manure handling system to a liquid manure handling system, Petitioners may be correct that the GP is not as stringent as federal law.

Petitioners have identified no federal law or regulation that defines a liquid manure handling system or that determines that uncovered storage will cause a dry system to be classified as a liquid one. Petitioners instead rely on the EPA NPDES Permit Writers' Guidance Manual and Example NPDES Permit for Concentrated Animal Feeding Operations (EPA-833-B-04-001)(2003) (Guidance Manual). Although parts of this Guidance Manual are outdated because of changes to the EPA regulations after 2003, it is still useful as guidance for those aspects of the program that have not changed since 2003. The Guidance Manual contains this paragraph at 3-6:

The thresholds for chicken and duck AFOs in the CAFO definition are based on the type of litter or manure handling system being used. The two systems are either a liquid manure handling system or other than a liquid manure handling system. A liquid manure handling system includes the use of pits, lagoons, flush systems (usually combined with lagoons), and holding ponds, as well as

systems such as continuous overflow watering, where water comes into contact with manure and litter. In addition, operations that remove waste from confinement areas and stack or pile it in areas exposed to rainfall are considered to have a liquid manure handling system. This would include those operations that remove litter from the confinement area and stockpile or store it in remote locations. Permitting authorities may authorize some limited period of temporary storage of litter of no more than 15 days that would not result in the facility meeting the definition of a liquid manure handling system (e.g., where this limited time is needed to allow for contract hauling arrangements). Once the litter is stockpiled beyond this temporary period the uncovered stockpile would constitute a liquid manure handling system and the lower threshold for chickens at 30,000 birds and ducks at 5,000 birds would be applicable to these operations.

Petitioners describe dry and liquid manure handling systems by referring to the Guidance Manual. This publication includes an NPDES CAFO Permitting Glossary in Appendix K with the following definitions:

Dry lot (dry operation) – An operation using confinement buildings and handling manure and bedding exclusively as dry material, an operation using a building with a mesh or slatted floor over a concrete pit, or an operation scraping manure to a covered waste storage facility is referred to as a “dry” operation. When such practices are used, and are not combined with liquid manure handling systems such as flushing to lagoons or storage ponds, these operations are referred to as “other than liquid manure handling systems” or “dry” manure systems, or “dry” operations.

Liquid manure handling system – An operation where animals are raised outside with swimming areas or ponds, or with a stream running through an open lot, or in confinement buildings where water is used to flush the manure to a lagoon, pond, or some other liquid storage structure

Guidance does not have the force of law. In addition, the assertion that “operations that remove waste from confinement areas and stack or pile it in areas exposed to rainfall are considered to have a liquid manure handling system” seems inconsistent with the definitions in that same Guidance Manual, quoted above. The differences between liquid and dry manure handling

systems, as they are commonly understood and defined in this Guidance Manual, are significant. Uncovered storage is not sufficiently similar to the pits, lagoons and flush systems used in liquid manure handling systems to convert a dry system to a liquid system. Petitioners' unsupported assertion that "prolonged uncovered storage necessarily results in liquefied manure" (Petitioners' reply brief in support of their motion for summary decision, page 7 at n.2) is insufficient to give this guidance additional weight or the force of law.

Petitioners also argue that MAFOs that take advantage of the extended storage time will, of necessity, discharge to surface waters and therefore must be classified as CAFOs and made subject to the NPDES permitting requirements. They posit an "obvious, and documented, risk of runoff and pooling from inevitable rainfall occurring within the 90 day period." They also allege that the GP creates an impermissible self-permitting scheme because each MAFO will make the determination whether it will discharge to surface water.

In an earlier, 2003, version of the federal regulations, EPA required every AFO defined as a CAFO to apply for an NPDES permit or to demonstrate to EPA that it had no potential to discharge. In *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005), the Court of Appeals struck down this provision. It held that EPA could not require a CAFO to demonstrate that it had no potential to discharge. *Id.* at 506. Consistent with the *Waterkeeper* decision, EPA promulgated new regulations. In the preamble to the new regulations, it noted

that the mere potential to discharge is insufficient to trigger the duty to apply for an NPDES permit.⁹ It went on:

EPA does not agree that the rule establishes a self-permitting scheme. As is the case with all point sources, it is up to the operator to determine whether or not to apply for a permit in the first instance, by assessing whether the point source (CAFO) discharges or proposes to discharge. Point sources that do not discharge or propose to discharge are not subject to CWA permitting requirements. See § 122.21(a)(1).

73 Fed. Reg. 70418 at 70425 (Nov. 20, 2008).

I agree with EPA's reasoning and find that, just as the CWA does not authorize EPA to require a permit based on a mere *potential* discharge, the *risk* of a discharge is inadequate to convert MAFOs to CAFOs. Entrusting an AFO with the decision whether it discharges or proposes to discharge is not contrary to federal law; it is consistent with the CWA. In addition, a MAFO that discharges to surface water loses its status as a MAFO and becomes a CAFO. The GP states at Part I.A.5.b:

Any MAFO automatically becomes a CAFO upon the occurrence of a discharge of pollutants to surface waters of the State or when the MAFO proposes to discharge, at which time the former MAFO must begin to comply with all CAFO permit requirements contained herein, including submission to the Department of an updated Notice of Intent (NOI), a current Comprehensive Nutrient Management Plan, and the required NOI fee within 90 days, as detailed in Part III of this General Permit.

Petitioners allege that a second type of self-regulation occurs because the GP allows a MAFO to operate under a NMP while it develops a Conservation Plan, and gives MAFOs an extended period (2 years) to submit the Conservation Plan. There is no federal law or regulation that would require an AFO that does

⁹ EPA included an option for certification of a no discharge design, which offers a safe harbor in the event discharges nevertheless occur. 73 Fed. Reg. 70424.

not need an NPDES permit to submit any kind of NMP or Conservation plan. Therefore, this provision does not violate federal law. The Department has discretion under State law to establish time limits for compliance.

I find that the General Permit does not violate federal law by regulating as MAFOs, instead of CAFOs, certain facilities that store manure uncovered for more than 14 days.

III. Does the General Permit violate the CWA because it fails to ensure that poultry waste discharges do not cause or contribute to violations of water quality?

Because I have concluded that Maryland permissibly established the class of MAFOs that are not subject to the CWA, this argument applies only to CAFOs. Petitioners make two related arguments that can be summarized as follows:

A) The federal regulations prohibit the issuance of a discharge permit that would allow a CAFO, as a new source or new discharger, to discharge pollutants into a waterway that is already impaired by those substances (“impaired waters” or “water quality-limited waters”). Petitioners contend there is only one exception to this prohibition. 40 CFR 122.4(i). Petitioners argue that the GP provides permit coverage to CAFOs that are discharging to impaired waters and that do not qualify for the exception.

B) The CWA and EPA regulations require MDE to determine, before the permit is issued, whether a proposed discharge has the reasonable potential to cause or contribute to a violation of an in-stream water quality standard; if so, the permit must include conditions necessary to achieve the water quality standard. These restrictions are called water quality-based effluent limitations (WQBELs).

40 CFR 122.44(d). Petitioners contend that MDE has not made the requisite analysis or imposed necessary WQBELs.

The Petitioners rely on CWA § 302(a), 33 USCA § 1312(a) and 40 CFR 122.4 (i). Section 302(a) provides in part:

33 USC 1312 Water Quality Related Effluent Limitations

(a) Establishment

Whenever ... discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311 (b)(2) of this title, would interfere with the attainment or maintenance of ... water quality in a specific portion of the navigable waters ... , effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

The regulation, 40 CFR 122.4(i) provides in part:

No permit may be issued:

...

(i) To a new source or a new discharger, if the discharge ... will cause or contribute to the violation of water quality standards. The owner or operator of a new source or new discharger proposing to discharge into a water segment which does not meet applicable water quality standards or is not expected to meet those standards even after the application of the [technology-based] effluent limitations ..., and for which the State ... has performed a pollutants load allocation for the pollutant to be discharged, must demonstrate, before the close of the public comment period, that:

(1) There are sufficient remaining pollutant load allocations to allow for the discharge; and

(2) The existing dischargers into that segment are subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards. The Director may waive the submission of information by the new source or new discharger required by paragraph (i) of this section if the Director determines that the Director already has adequate information to evaluate the request. An explanation of the development of limitations to meet the criteria of this paragraph (i)(2) is to be included in the fact sheet to the permit under §124.56(b)(1) of this chapter.

Petitioners interpret the first sentence of subsection (i) as an absolute prohibition against issuing permits to discharge to an impaired water for new sources or new dischargers unless a TMDL has been completed and the applicant has made the required demonstration. They cite *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2007) for the proposition that “a new discharger may lawfully discharge into an impaired waterway only when the regulatory exception in that section is met.” Petitioners’ motion for summary decision at 23. Moreover, Petitioners assert that the contrary reading has been rejected by numerous courts and accepted by none. Petitioners’ reply brief in support of motion for summary decision at 16-17.

The cases Petitioners cited are in the 9th Circuit, the Northern District of California, Minnesota, Montana, and Texas. None of the decisions cited by Petitioner for this proposition are binding in Maryland. Some of the cases Petitioners cite make conclusory statements without analysis. To the extent the cases explain the reasoning, I am not persuaded that the first sentence of subsection (i) functions as an absolute prohibition for the reasons explained below.

The first sentence of 40 CFR 122.4(i) reads: “No permit may be issued: ...To a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.” The phrase “cause or contribute to the violation of water quality standards” is susceptible to different interpretations. One view is that a new discharge does not “cause or contribute” to the impairment if the new discharge will result in a net

reduction in the loading of the substance causing the impairment. This is a view EPA has espoused.¹⁰ In addition, it seems to comport with the CWA, that requires limits “which can reasonably be expected to contribute to the attainment or maintenance of such water quality.” CWA § 302(a), 33 USCA § 1312(a). On the other hand, “cause or contribute” could mean the addition of any amount of the impairing substance to the impaired waterway.

The CWA itself does not mandate a complete ban on discharges into a waterway that is in violation of existing water quality standards. *Arkansas v. Oklahoma*, 503 U.S. 91, 197 (1992). Because the phrase “cause or contribute to the violation of water quality standards” is subject to more than one reasonable interpretation, and because it is well established deference should be given to an agency’s interpretation of the statutes it implements and its own regulation,¹¹ I find that deference should be given to EPA’s interpretation: the issuance of a permit that would result in a net reduction of the pollutant causing the impairment is permissible under the first sentence.

The question then becomes whether the GP ensures that the discharge will not cause or contribute to the water quality standard in the impaired waterbody. This requires some consideration of the regulations regarding impaired waterbodies.

¹⁰ “To the extent that dictum in the court of appeals’ opinion ... implies that the first sentence of Section 122.4(i) could not be reasonably interpreted to allow for the consideration of an offset, it is erroneous.” Brief of the Federal Respondent in opposition to the petition for a writ of certiorari in the Pinto Creek case at 20. <http://www.usdoj.gov/osg/briefs/2008/0responses/2007-1524.resp.pdf>.

¹¹ *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Pursuant to the CWA, the Department periodically prepares a list of impaired water bodies; that is, surface water segments that do not meet water quality standards. For some of these impaired water bodies, MDE has already prepared a Total Maximum Daily Load (TMDL); others are under development or planned. These terms and concepts are explained in 40 CFR Part 130 – Water Quality Planning and Management. There are specialized terms used in connection with TMDLs. The following definitions appear in 40 CFR 130.2:

(d) Water quality standards (WQS). Provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.

(e) Load or loading. An amount of matter or thermal energy that is introduced into a receiving water; to introduce matter or thermal energy into a receiving water. Loading may be either man-caused (pollutant loading) or natural (natural background loading).

(f) Loading capacity. The greatest amount of loading that a water can receive without violating water quality standards.

(g) Load allocation (LA). The portion of a receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources. Load allocations are best estimates of the loading, which may range from reasonably accurate estimates to gross allotments, depending on the availability of data and appropriate techniques for predicting the loading. Wherever possible, natural and nonpoint source loads should be distinguished.

(h) Wasteload allocation (WLA). The portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.

(i) Total maximum daily load (TMDL). The sum of the individual WLAs for point sources and LAs for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source WLA plus the LAs for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be

expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

The undisputed affidavit of Dinorah Dalmasy (Exhibit 8 to MDE's motion for summary decision) establishes that all existing Maryland TMDLs for nutrients and bacteria have waste load allocations (WLAs) for point sources and load allocations (LAs) for nonpoint sources. The WLAs are assigned to specific point sources, but the LAs are not assigned to specific facilities or properties.

"Maryland's TMDLs apply a watershed-based approach, which considers all potential pollutant sources ... and estimates load reduction targets for those sources necessary for the attainment of State water quality standards. The agricultural load allocation includes all source categories (i.e., cropland, pasture, AFOs/CAFOs/MAFOs) but they are not broken out or quantified separately from this aggregated load." Dalmasy Affidavit at 4.

EPA has approved such TMDLs. For example, I note EPA's *Decision Rationale: Total Maximum Daily Loads of Nitrogen and Phosphorus for Five Tidal Tributaries in the Northern Coastal Bays System, Worcester County, Maryland* (4/17/2002).¹² In approving Maryland's TMDL for Nitrogen and Phosphorus for Five Tidal Tributaries in the Northern Coastal Bays System, EPA noted that the TMDL met the federal requirement that the TMDLs include a total allowable load as well as individual waste load allocations and load allocations, even though Maryland did not distribute the total load allocation to specific land use categories

¹² http://www.epa.gov/reg3wapd/tmdl/MD_TMDLs/BishopvilleProng/NorthCoastalBay.pdf.

in the TMDL report, much less to individual facilities. *Id.* at 18. It further found that there is a reasonable assurance that the TMDLs can be met by methods that, in combination, will control all the sources. *Id.* at 20-21. EPA acknowledged that its regulations allow for tradeoffs between point sources and nonpoint sources. *Id.* at 18.

While no specific waste load is allocated to CAFOs in Maryland's TMDLs, a portion of the load allocation includes contributions from existing CAFOs. The TMDLs contain load reduction targets that are not specific for individual land uses or facilities. Methods available to Maryland to accomplish the load reduction targets include diverse programs that address air deposition, septic system discharges, environmental site design, and a host of BMPs, including not only those incorporated in the GP, but also such things as conservation tillage, off-stream watering, and forest buffers.

The pollutant contributions from CAFOs already in existence that will acquire NPDES permits for the first time under the GP are taken into account in the existing LA and therefore are included in the reduction targets. Further, the requirements of the GP are quite stringent, and it is reasonable to conclude that compliance with the GP will reduce the loading to the impaired waterbody. More specifically, the GP will regulate the discharges from a significant number of CAFOs that previously had not been required to obtain a general or individual permit. For the first time, these CAFOs will be subject to stringent requirements aimed at reducing pollutant discharges to State waters. Because this represents a net reduction, it is not prohibited by 40 CFR 122.4(i). As the TMDLs are further

implemented, additional reductions may be required of the CAFO and nonpoint sources to fully achieve the TMDL.

Where no TMDL has been prepared for an impaired water, an existing CAFO subject to the GP for the first time will also be reducing its contribution to the impaired water. At the time a TMDL is prepared, consideration will be given to the contribution of the CAFO, and it is possible that further reductions will be required.

Petitioners assert that the GP preserves the status quo by allowing CAFOs to operate as they always have. This is contradicted by a comparison of the terms of the 1996 General Permit and the 2009 GP. Compliance with the GP will result in a reduction in pollutants to State waters. Under the particular circumstances of this case, I find that the issuance of the GP to existing CAFOs in impaired waterways, regardless whether a TMDL has been promulgated, will not cause or contribute to the violation of water quality standards.¹³

In addition, Petitioners refer to 40 CFR 122.44(d) for the proposition that Maryland must undertake an analysis before issuing any NPDES permit to determine whether there is a reasonable potential (the Reasonable Potential Analysis or RPA) that the discharge will cause or contribute to a violation of in-stream water quality standards. If such a potential is found, the permit must include water quality-based effluent limitations (WQBELs) to ensure that water quality will be met. They also refer to the U.S. EPA NPDES Permit Writers'

¹³ Because new CAFOs will be subject to a zero discharge requirement, 40 CFR 122.4(i) does not prohibit issuance of a permit to them. 40 CFR 412.46, incorporated into the Maryland regulations by reference. COMAR 26.08.03.09B.

Manual (1996) for further discussion of the RPA. This manual offers guidance on how to conduct a RPA for both numeric and narrative criteria.

Petitioners are correct that CAFO permits could require WQBELs in order to assure that water quality standards will be met. In *Waterkeeper*, the Second Circuit directed EPA “to clarify the statutory and evidentiary basis for failing to promulgate water quality-based effluent limitations for discharges ... and ... to clarify whether States may develop water quality-based effluent limitations on their own.” 399 F.3d at 524. In its 2008 notice of final rulemaking and response to *Waterkeeper*, EPA noted that the federal regulations require that existing facilities operate to contain all animal waste, including runoff from a 25-year, 24-hour storm. Recognizing that it is conceivable that discharges could nevertheless occur, EPA continued:

Because the ELGs [effluent limitation guidelines] allow occasional overflow discharges from properly designed, operated, and maintained lagoons and storage ponds, the technology-based limitations in the ELGs may not be as stringent as necessary to meet applicable water quality standards. In that case, a WQBEL would be appropriate. 40 CFR 122.44(d). For example, a facility subject to ELGs in 40 CFR part 412, subpart C is allowed to discharge from the production area, provided the production area is designed, constructed, operated, and maintained to contain all process wastewater plus any stormwater runoff resulting from the 25-year, 24-hour storm. Thus, WQBELs would be necessary in a particular permit to further limit such discharges beyond the levels that are required under the CAFO ELGs, if necessary for the discharge to meet applicable water quality standards.

72 FR 70458-59. (Nov. 20, 2008).

The examples given by EPA, overflow from lagoons and storage ponds, relate to facilities with liquid manure handling systems. Petitioners' challenge to the GP, however, addresses the possibility of discharges from CAFO storage

piles of poultry manure, which under the applicable U.S. Natural Resources Conservation Service (NRCS) Standards, are piles suitable for “dry animal wastes” (Code 633) and “wastes that behave as a solid” (Code 313). Exhibit 7 to MDE’s motion for summary decision. Under the GP, CAFOs may store manure in uncovered piles only for 14 days. For longer storage, the pile must have both a base and a liner. The question, therefore, is whether Maryland must attach WQBELs to the General Permit because it is predictable that some event could cause a discharge from a CAFO that could cause or contribute to a violation of a water quality standard.

The Department claims that the GP satisfies this requirement and does ensure that applicable water quality standards will be met. The Department asserts that the NOI process, which requires the preparation of a CAFO-specific comprehensive nutrient management plan and subjects the NOI and related plans to public review and opportunity for a public hearing, and the process by which the Department can require an individual permit, satisfy any legal requirement in this regard.” MDE’s opposition to Petitioners’ motion for summary decision at 13.

Petitioners parry that the CNMP will not necessarily address in-stream water quality impairments, because the only required consideration of the watershed is that the plan must identify the “watershed location code.” They also point out that MDE may not have sufficient resources to review all the submissions.

The phrase “will cause ... or contribute to” a violation of in-stream water quality standards” in 40 CFR 122.44(d) can be interpreted as in 40 CFR 122.4(i): that a reduction in loading can satisfy the requirement that the discharge not “cause or contribute” to a violation.¹⁴ In addition, I find that the imposition of WQBELs is likely to be quite site-specific and therefore may be more appropriately imposed through the NOI process, including the approval of the CNMP. The NOI process is a reasonable way to identify facilities that could cause or contribute to water quality impairments and to require additional WQBELs. For these reasons, I conclude that the GP will adequately ensure that discharges do not cause or contribute to a violation of water quality standards.

IV. Is summary decision inappropriate because there a dispute of a material fact?

Petitioners contend that summary decision was wrongly granted because MDE relies on a “fact” that they dispute; namely, that the provisions of the GP that allow MAFOs to store poultry litter on bare ground, in uncovered piles, beyond 14 days (in this case for up to 90 days), adequately protect water quality. They assert that whether there are discernible water quality impacts between covered manure storage and uncovered storage is a disputed fact.

I find that Petitioners have not raised a genuine dispute of fact. In addition, they have failed to show that the allegedly disputed fact is material.

¹⁴ As noted above, new sources are subject to new source performance standards (NSPS) – here a “no discharge” standard. As EPA noted in its response to *Waterkeeper*, “Nevertheless, EPA continues to believe that WQBELs would not be needed for swine and poultry CAFOs subject to the no discharge NSPS. The provisions for implementing the NSPS BMP-based effluent limitation, based on advanced modeling, are meant to improve implementation of this provision by promoting up-front design, construction, operation, and maintenance to ensure that predictable discharges do not occur. Permitting authorities have full authority and responsibility to determine if the facility’s demonstration is adequate. Therefore, as a practical matter, EPA finds it difficult to imagine circumstances in which such a limitation would be necessary for permitted CAFOs subject to this NSPS no discharge standard.” 73 Fed. Reg. at 70459.

There is no dispute that piles of poultry manure release nitrogen and phosphorus to the environment, whether the piles are covered or uncovered. The GP is the mechanism by which the release to ground water is regulated and permitted. The literature cited in support of their respective positions by Petitioners and the Department document losses in various ways, but do not provide sufficient information to specifically quantify the differences, either by whether the piles are covered or uncovered, or how long an uncovered pile remains. Indeed, Petitioners cite with apparent approval¹⁵ a study that determined that the greatest losses occur during the first few days after the pile is constructed, which would seem to indicate that the risk of nutrient loss declines as time passes. It may be that the “fact” Petitioners wish to dispute cannot be answered with the available scientific data. Clearly, Petitioners have not alleged that they can better quantify the losses, or demonstrate that the differences between 14 day storage and 90 day storage would be measurable, much less presented an actual factual dispute by the use of affidavits or otherwise. Petitioners have failed to raise a factual dispute.

Even if Petitioners were able to quantify the losses from uncovered piles precisely over time, it would not answer the question whether the conditions “adequately” protect ground water, because the Petitioners have not identified any law or regulation that would provide the standard by which to judge “adequacy.” In oral argument, Petitioners indicated that the only acceptable time was “the shortest time possible.” If this were the legal measure of adequacy, the

¹⁵ Petitioners’ motion for summary decision at 40-41.

“fact” is not material. I find that Petitioners have not raised a genuine dispute of a material fact.

V. Is the Department’s decision unsupported or otherwise arbitrary and capricious?

The test for whether a decision is supported by the evidence is whether reasoning minds could reach the decision on the evidence. It is irrelevant if others might reach a different conclusion. A decision is arbitrary and capricious if it has no rational basis. *Maryland Transportation Authority v. King*, 369 Md. 274, 291 (2002); *Maryland Board of Physicians v. Elliott*, 180 Md. App. 369, 405 (2006); *Northwest Land Corp. v. MDE*, 104 Md. App. 471, 487-88 (1995). Under these standards, I find that the Department’s decision is not unsupported by the evidence or otherwise arbitrary or capricious.

Petitioner’s arguments on this issue can be grouped by common themes:

A) Petitioners argue that the Department’s decision to establish a class of animal feeding operations as MAFOs, and regulating them less stringently, is unsupported by the record. They claim there is no reason to regulate CAFOS and MAFOs differently, and that it is irrational to base the distinction on the “jurisdictional switch” of the CWA. They assert that MDE has no rational basis for establishing MAFOs and regulating them less stringently than CAFOs. Petitioners note that the Department recognizes the harm done by animal feeding operations in the past, and recognizes the potential that MAFOs will contaminate groundwater. They note that the Department admits that MAFOs do discharge via application of animal waste to soil, and that these discharges are authorized under the General Permit. They assert that MDE violated its statutory

duty to “prevent, abate, and control pollution of the waters of this State” (Md. Environment Code § 9-302(a)) by regulating MAFOs less stringently than CAFOs. They attached two photographs as Exhibits 3 and 4 to their Opposition to MDE’s motion for summary decision.¹⁶

Even if the only reason to regulate CAFOs and MAFOs differently is the “jurisdictional switch” of the CWA, the decision to regulate them differently would not be unsupported by evidence or arbitrary. The “jurisdictional switch” is whether the facility discharges to surface water. Discharges to groundwater and discharges directly to surface water are not the same and do not pose the same risk. Concentration of contaminants discharged to groundwater can be reduced by dilution, attenuation, chemical or biological reactions, and uptake by plants before that groundwater enters surface water. The GP does not leave MAFOs unregulated. They are subject under the GP to design and operational standards and a NMP.

B) Petitioners argue that there is no basis for the decision to allow MAFOs to store poultry manure uncovered for up to 90 days for the next 3 years. Petitioners argue that the scientific literature is not inconsistent and there was no basis for concluding that there was no appreciable difference in the risk to ground water from 14 day storage to 90 day storage. They claim that Maryland did not put forth its own independent analysis of the studies, but rather improperly delegated its decision-making and regulatory authority to third parties. They assert that there is no basis for allowing 90 day storage – a number they claim

¹⁶ Although the photographs are authenticated by affidavits, the affidavits do not provide any information about what the photographs purport to show. The Petitioners’ characterization of them is not evidence.

was chosen at random. Moreover, they assert that MDE's decision was based on the false idea that storage was necessary to avoid premature spreading of the manure on farm fields. They claim there is no reasonable explanation for the 3 year phase in period. They also claim that MAFOs are left to self regulate because they can operate for 2 years before submitting their Conservation Plan – without oversight by MDE – and are allowed to store manure without limitation, including without regard to proximity to water. They state that MAFOs are not required to consider feed management and other pollution prevention measures. Lastly, they claim that MDE's reliance on the Chesapeake Research Consortium is suspect because it came after the tentative determination.

There is a basis for MDE's decision to regulate MAFOs as it did. My independent review of the scientific literature referenced by Petitioners demonstrates that the scientific studies report quite different observations on the questions of whether a cover reduces the leaching of nutrients and how, in what amounts, and over what time period of time nitrogen and phosphorus are lost from a poultry manure litter pile. In some reports, the authors were careful to note that more study would be needed to better understand the behavior of the piles. In the absence of definitive data, MDE evaluated the available data and obtained advice from experts in the field.

The Affidavit of Dr. Summers, Exhibit 4 to MDE's motion for summary decision, describes the efforts MDE made to ascertain the effects of different types and duration of storage. This included inquiries to EPA, consultation with University of Maryland scientists at the Cooperative Extension Service and the

Wye Research and Education Center. In addition, MDE consulted regulatory program staff in other states. “Basis for Requirements to Protect Water Quality During Field Storage of Litter Stockpiles in the Maryland General Permit for Animal Feeding Operations”, attached to Dr. Summers’ Affidavit. MDE’s independent inquiry is also evident in Exhibit 7 to Petitioner’s motion for summary decision, which reveals that Edwal Stone, Program Manager for the Wastewater Permits Program, attended the conference.

The decision to allow 90 day storage is supported by the recommendation of the scientific panel. Attachment to Summers Affidavit at 2. Maryland’s decision to choose 90 days was not unreasonable. Petitioners claim there is no risk that limiting the storage time would encourage premature spreading of the poultry manure litter in the field, because CAFOs and MAFOs are required to follow a nutrient management plan that mandates when manure can be spread. This is incorrect. The nutrient management plans generally state the amount of poultry litter manure that can be spread on a particular farm field per year. See, e.g., Exhibit 6 to MDE’s motion for summary decision. Although the plans recognize that the optimum time to land apply the manure is when the crops are most ready to take up the nutrients, land application is forbidden only when the fields are frozen or snow covered. See, e.g., Exhibit 4.1 to MDE’s motion for summary decision. Thus there is a risk that limiting storage time would encourage premature spreading. Similarly, MDE was reasonable in concluding that MAFO operators might need additional time to adjust their house cleaning schedules to better coordinate house cleaning with field application, in order to

reduce storage time from 90 days to 30 days. MAFOs are not left “unregulated” during the three years of extended storage or the two years allowed for submission of the Conservation Plan. There are specific conditions on manure storage, including setback requirements. The information from the Chesapeake Consortium was provided during the comment period, and was rightly considered by MDE in making its final determination.

For all these reasons, I find that MDE had a rational basis for the decision to allow MAFOs to store poultry manure uncovered for up to 90 days for the next 3 years, and that the decision was not arbitrary and capricious.

C) Petitioners and others would have reached different conclusions from the same information. Petitioners note that some States regulate manure storage more stringently, and that some commenters urged a shorter time for uncovered storage or other more stringent requirements. They argued that temporary storage of poultry litter should be allowed only if accompanied by the immediate use of a liner and cover.

Provided MDE had a basis for its decision, it is irrelevant that others may have come to a different, or even a better, decision. *Maryland Board of Physicians v. Elliott*, 170 Md. App. 369, 387 (2006). The fact that Petitioners and others might have reached different conclusions from the same information is not sufficient to establish error.

CONCLUSION AND ORDER

I have evaluated all of Petitioners contentions and attempted to summarize and address them. I have concluded that Petitioners have demonstrated neither an error of law nor a dispute of material fact. MDE’s

issuance of the GP is in accord with federal and State law, is supported by substantial evidence, and is not arbitrary and capricious. For these reasons, MDE's motion for summary decision is granted, and Petitioners' motion for summary decision is denied.

September 2, 2009
Date

Brigid E. Kenney
Brigid E. Kenney
Final Decision Maker
Maryland Department of the
Environment

APPEAL RIGHTS NOTICE

Petitioners have the right to appeal this final decision by filing an Order for Appeal with the Clerk of the appropriate Circuit Court within thirty (30) days of receipt of this Final Decision Order in accordance with Section 10-222, State Government Article, Annotated Code of Maryland, and the Maryland Rule of Civil Procedure 7-203. Receipt of this Final Decision and Dismissal Order will be presumed to have occurred within three (3) days of mailing.