

## Who Rules the Roost? CWA Liability After Md. Ruling

### CAFO Industry Faces Potential Expansion of Clean Water Act Liability in Wake of Maryland Decision

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In a decision that could herald significant change in the allocation of liability for violations of the Clean Water Act at animal feeding facilities, a federal judge in Maryland recently denied Perdue Farms' motion to dismiss claims seeking to hold it jointly responsible for the alleged discharge of animal waste from a concentrated animal feeding operation owned and operated by Hudson Farms in violation of Hudson's National Pollutant Discharge Elimination System permit. *See Assateague Coastkeeper et al. v. Alan & Kristin Hudson Farm et al.*, case number 10-CV-487 (D. Md. July 21, 2010).

Perdue, a so-called "integrator," owns the animals at issue (in this case, approximately 800,000 chickens) and provides their feed and medication but hires independent contractors like Hudson to raise them. As is traditionally the case, the CAFO owner held the NPDES permit.

In its motion to dismiss Perdue argued that, as it neither held the permit nor owned the facility at issue, it could not be liable under the CWA. Judge William Nickerson disagreed, finding that CWA liability potentially extends to all entities that exercise sufficient control to be responsible for causing the violation, including integrators like Perdue.

While this decision does not establish Perdue's liability — plaintiffs will be permitted to take discovery regarding their claim that Perdue exercised sufficient control to be held liable — it signals a potential shift from the historic protection that integrators have enjoyed from direct liability under the CWA.

### Who Needs a Permit, the CAFO or the Integrator?

EPA regulations at 40 C.F.R. § 122.21(b) establish what types of entities are required to obtain an NPDES permit under the CWA ("owners and operators"). The U.S. Environmental Protection Agency has twice developed CAFO-specific rules that designate large animal feeding

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operations as point sources requiring NPDES permits.

However, neither the EPA nor the Maryland Department of the Environment, which administers the NPDES program in the state, has clarified by rule whether anyone other than an owner or operator of a CAFO requires such a permit. Both have traditionally interpreted the obligation to obtain an NPDES permit to fall on the farm owners that actually own or operate the CAFO, and not integrators that use the farmers' services.

### **Not Putting All Its Eggs in One Basket?: Ambiguity in the Basis of the Court's Decision**

While the court clearly concluded that integrators like Perdue can be liable under the CWA even if they do not hold an NPDES permit, it never fully developed the rationale supporting its conclusion.

On the one hand, a plausible reading of the decision suggests that the court decided that, despite its argument to the contrary, Perdue is an "owner or operator" that must obtain a, NPDES permit. While such a theory runs counter to the EPA and the MDE's interpretation of their applicable rules, precedent for such a theory exists.

In regulatory preambles to proposed CAFO rulemakings, never adopted, the EPA indicated that all entities that exercise substantial operational control over a CAFO may be subject to NPDES permitting requirements as an "operator" of a facility.

Moreover, the EPA has interpreted the CWA to require multiple parties to obtain permits for the same discharge where each exercises control sufficient to satisfy the definition of "operator" in other circumstances, including permitting under the federal construction general stormwater permit.

Assuming this is the rationale employed by the court, the consequence of this decision would be a significant expansion of the NPDES permitting scheme.

If the decision is upheld, or the foregoing rationale adopted by the EPA, any entity that exercised sufficient control over a CAFO such that it could be deemed an "operator" would, going forward, be required to obtain an NPDES permit.

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In short, not just poultry integrators, but potentially a wide swath of parent companies, customers of so-called “toll processors” and other outsourcers could face serious questions about whether they, as well, might need to obtain NPDES permits for discharges that are not under their direct control.

The more likely basis for the decision is that the court believes liability attaches to parties even where the control they exert is not sufficient to require that they hold a permit.

For example, the court finds Perdue’s contention that it cannot be held liable because integrators need not obtain a permit “overstated ... because having a permit is not the basis of an integrator’s potential liability. Rather, an integrator’s liability is determined on the basis of its level of control over their contractors’ chicken operations.” Memorandum Opinion at 22.

Being liable as one who does not need a permit but is still required to comply with the CWA would represent an exponential and likely unprecedented expansion of liability under the CWA, which has always been predicated on the obligation to have, or to comply with, an NPDES permit.

Unfortunately, there is simply not enough legal analysis in the court’s opinion to determine whether, if in fact this is the court’s rationale, it committed an egregious error or, recognizing previous limitations in the statutory and regulatory permitting scheme, felt the time had come to close a perceived loophole.

Regardless, should courts continue down this path and explicitly extend CWA liability to non-permittees, that revolutionary line of reasoning will generate predictable, significant opposition.

### **Don’t Count Your Chickens: Industry Challenges May Be on the Horizon**

Regardless of the basis for its decision, the court found plaintiffs’ allegations that Perdue owned the chickens, provided their feed and dictated their care “sufficient to state a plausible claim against Perdue at the motion-to-dismiss stage,” but it remains to be seen whether the plaintiffs can prove their factual allegations and, if so, whether the court finds them sufficient to hold Perdue liable. Memorandum Opinion at 23.

Holding Perdue liable for the foregoing reasons — control over the animals

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and how they are raised — would suggest that control over the source of pollutants, rather than control over site compliance or the design or operation of pollution control technologies, is sufficient to impose CWA liability.

Should Perdue be found liable on that relatively paltry basis, a vigorous opposition should be expected not only from the livestock processing industry but from other industries that also rely on third-party operators to control site compliance or the design or operation of pollution control technologies.

Moreover, the EPA may decide to take further regulatory action in response to the *Assateague* decision, either to confirm the court's expansion of potential liability under the CWA or to limit CWA liability to permit holders.

Indeed, parties on both sides of this divide may well be pondering petitions to encourage rulemaking in the direction of their liking. Regardless of its genesis, any potential EPA regulatory action on the issue will almost certainly be challenged, either by industry or environmental groups.

In sum, this decision raises far more questions than it answers. What is the basis for integrator liability? Are permits only one route to legal liability? What constitutes the sufficient exercise of control? One thing, however, is virtually certain: a vigorous opposition either through the appellate process or regulatory rulemaking to this potential expansion of CWA liability.

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