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NPPC Scores CAFO Suit Victory Over EPA

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In a unanimous decision issued today, a federal court ruled that the U.S. Environmental Protection Agency cannot require livestock operations to obtain Clean Water Act (CWA) permits unless and until they have a discharge of manure into a waterway of the United States. The decision is a major victory for pork producers, said the National Pork Producers Council.

The U.S. Court of Appeals for the 5th Circuit in New Orleans said that EPA exceeded its statutory authority in requiring concentrated animal feeding operations (CAFOs) that propose or that might discharge to apply for CWA permits.

NPPC, the American Farm Bureau Federation, the United Egg Producers and several other agricultural groups sued EPA over its so-called CAFO rule, which was issued in 2008 after EPA's core provision in the initial 2003 regulation was struck down by the U.S. Court of Appeals for the 2nd Circuit in New York City. In that 2005 decision, the court ruled that the CWA requires permits only for producers who actually discharge. EPA had sought to require permits even for operations that had a "potential" to discharge.

The 2008 regulation, which set a zero-discharge standard, included a duty to apply for a CWA permit for all CAFOs that discharge or "propose" to discharge. The rule essentially established a presumption that CAFOs "proposed" to discharge if any future discharge occurred. The rule covered production areas and crop land on which manure is applied and imposed fines of up to \$37,500 a day not only for illegal discharges but for the failure of a CAFO that had a discharge to apply for a CWA permit.

"NPPC is very pleased with the 5th Circuit's decision," said NPPC President Doug Wolf, a pork producer from Lancaster, Wis. "The court recognized a clear limit on EPA's authority and required the agency to comply with the clean water law."

In arguments before the 5th Circuit, NPPC said the 2008 rule's duty to apply "constitutes a thinly veiled effort to impose the same duty to apply that was invalidated" by the 2nd Circuit. It also argued that the "failure to apply" violation creates substantial economic pressure to apply for a CWA permit and that the regulation shifts the burden to a non-permitted CAFO that has a discharge to establish that it did not "propose" to discharge.

The 5th Circuit Court agreed with NPPC's arguments, ruling on the "duty to apply" provision that previous court cases "leave no doubt that there must be an actual discharge ... to trigger the CWA's requirements and EPA's authority." It also struck down the CAFO rule's "failure to apply" provision, stating that its imposition is "outside the bounds of the CWA's mandate."

"Pork producers have worked hard to meet, and are meeting, the zero-discharge standard, which the pork industry has embraced," Wolf said. "Getting a federal permit is irrelevant to meeting the standard. The time, effort and cost of getting one is a complete waste when all that permit will do is tell producers to do exactly what they already are required and fully intend to do – not have a discharge."