

# CLIENT ALERT

## CAFO Rulemaking Litigation Enters the Briefing Stage

**November 1, 2003**

The new CAFO Clean Water Act regulations promulgated by EPA on February 12, 2003 (at 68 Fed. Reg. 7176) ("CAFO Rule") are subject to various litigation challenges that have been consolidated into the Second Circuit case *Waterkeeper Alliance, Inc. et al. v. EPA*, (No. 03-4470, *et al.*). The "Farm Petitioners" challenging the legality of several aspects of the CAFO Rule are the American Farm Bureau Federation, National Chicken Council, and the National Pork Producers Council. The "Waterkeeper Petitioners" include Waterkeeper Alliance, Sierra Club, NRDC, and the American Littoral Society.

On October 31, 2003, both sets of Petitioners filed their initial briefs with the Court, which granted expanded brief lengths of no more than 24,000 words. Farm Petitioners are challenging several aspects of the new CAFO Rule, including the following contentions:

- (1) That EPA cannot lawfully require CAFOs to apply for NPDES permits whether or not the CAFOs are discharging;
- (2) That EPA cannot lawfully impose operational requirements that have no relationship to preventing discharges;
- (3) That EPA cannot lawfully presume that all large CAFOs will discharge;
- (4) That EPA cannot regulate nonpoint source stormwater runoff from land application areas as if it were point source pollution;
- (5) That EPA cannot narrow the statutory exemption for agricultural stormwater to exclude operations that do not comply with EPA's new definition of appropriate agricultural practices; and
- (6) That EPA cannot regulate discharges to "surface waters" (which could include isolated ponding) even though the Clean Water Act regulates only discharges to "navigable waters."

Waterkeeper Petitioners contend:

- (1) That the Nutrient Management Plans required of CAFOs under the new regulations should be subject to permitting authority review and approval, and should be incorporated into the NPDES permit;
- (2) That there is inadequate public participation in the CAFO permitting process and enforcement, particularly with respect to the development and oversight of the Nutrient Management Plans;
- (3) That the agricultural stormwater exemption is not applicable to discharges from CAFOs and CAFO land application areas;
- (4) That it is arbitrary and capricious to exempt CAFO discharges from water quality based effluent limitation requirements;

(5) That the BAT and BCT technology standards selected by EPA for existing sources are arbitrary and capricious, and violate the Act's technology selection criteria; and

(6) That the New Source Performance Standard selected by EPA for the Swine, Poultry, and Veal Subcategory is arbitrary and capricious for lack of support in the administrative record.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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