Southeastern Environmental Law Journal

Volume 8 | Issue 2 Article 6

Spring 2000

Legislative Developments

LEGISLATIVE DEVELOPMENTS

THE UNIFIED NATIONAL STRATEGY FOR ANIMAL FEEDING OPERATIONS: ANOTHER FEDERAL-STATE PARTNERSHIP IN ENVIRONMENTAL REGULATION

Prior to 1970, environmental protection legislation in the United States was either nonexistent or was enacted within a state by way of its police power.[1] Ultimately, it became apparent environmental concerns were steadily mounting and pollutant discharge, while originating in one state, potentially threatened entire regions of the nation. Congress introduced environmental regulation into a mature federal system under the aegis of the federal commerce power.[2] Complicated legislative frameworks have been erected, increasing skepticism as to whether the two systems can function together to further their respective goals.

Federal participation in environmental legislation has been particularly resolute in the regulation of nationally marketed commodities.[3] One such area is that of national agriculture. Until the mid-90's, most livestock operations essentially were local in nature and involved a relatively small number of animals raised in nomadic settings.[4] Recent trends, however, have been toward combining hundreds of thousands of animals into fewer, larger operations situated on limited acreage to meet more efficiently consumer demand.[5] These Animal Feeding Operations (AFOs) produce vast amounts of waste, but more importantly, they can be detrimental to public health.

In March 1999, the Environmental Protection Agency (EPA) and the United States Department of Agriculture (USDA) collaborated on The Unified National Strategy for Animal Feeding Operations (Unified National Strategy)[6] to lead state governments in addressing issues of water quality and health impact.

The Unified National Strategy, while not binding upon state and local governments, continues the recent trend of federal law targeted at creating a "junior

---

[1] Kurt A. Strasser, *Environmental Law in the United States' Federal System*, 9 CONN. J. INT'L L. 719, 720 (1994).

[2] *Id.* at 722.

[3] John P. Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons from Environmental Regulation*, 60 LAW & CONTEMP. PROB. 203, 219 (1997).

[4] Larry C. Frarey & Staci J. Pratt, *Environmental Regulation of Livestock Production Operations*, 9 NAT. RESOURCES & ENV'T 8 (1995).

[5] *Id.*

[6] U.S. DEPARTMENT OF AGRICULTURE & U.S. ENVIRONMENTAL PROTECTION AGENCY, UNIFIED NATIONAL STRATEGY FOR ANIMAL FEEDING OPERATIONS § 4.2 (last modified June 27, 1999) <http://www.epa.gov/owm/finafost.htm>.

partnership" position for the states in carrying out environmental legislation.[7] The elaborate framework created by the Clean Water Act (CWA)[8] and the National Pollutant Discharge Elimination System (NPDES)[9] provided the guiding principles for creating this plan targeting a chief culprit of our nation's water pollution. The Unified National Strategy appears to be the culmination of the federal government's assertion of authority in this field.

I. The Federal Government's Performance Expectation

Regulations of the Environmental Protection Agency (EPA) define an AFO as a "lot or facility" where animals "have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period and crops . . . are not sustained."[10] It is estimated that each year, AFOs produce 130 times more waste than humans in the United States.[11] The resulting discharge of this waste has the potential to create numerous health risks. For example, the introduction of excess nutrients such as nitrogen and phosphorus into ground water can result in eutrophication and anoxia (i.e., low levels of dissolved oxygen), toxic algal blooms, and microbial outbreaks of organisms such as *Pfiesteria piscicida*.[12] In addition, the introduction of heavy metals, hormones, antibiotics, ammonia, and pathogens like *Cryptosporidium* are intrinsic health hazards.[13]

Focusing on the AFOs that create the most risk, the EPA and USDA have essentially established a national environmental performance expectation. The Unified National Strategy relies upon the coordination and partnership of state and local governments, the recognized governing forces of environmental defense. The expectation is these players will assist owners and operators of AFOs in taking site-specific action to minimize water pollution through various methods of compliance.

A. Regulatory Compliance

The CWA provides for issuing NPDES permits primarily to large AFOs. EPA regulations expressly authorize states to issue these permits to owners and

---

[7] Dwyer, *supra* note 3.

[8] 33 U.S.C.A. § 1251 (West 1986 & Supp. 1999).

[9] 40 C.F.R. § 122.23 (1997).

[10] *Unified National Strategy* at § 2.1.

[11] MINORITY STAFF OF THE U.S. COMMITTEE ON AGRICULTURE, NUTRITION, AND FORESTRY, ANIMAL WASTE POLLUTION IN AMERICA: AN EMERGING NATIONAL PROBLEM 3 (Dec. 1997).

[12] *Unified National Strategy* § 2.2.

[13] *Id.*

operators of AFOs.[14] The permits generally are written to implement the national minimum standards (effluent guidelines) and to reflect the applicable requirements for water quality standards as established by the state and local governments.[15]

The EPA and USDA explicitly offer aid in forming state and tribal programs and assert the Unified National Strategy is not intended to limit the ability of states and tribes to establish more stringent requirements than those proposed.[16] Regional leaders of the EPA and USDA will work with states and tribes in determining how existing and proposed programs can achieve the performance expectation of the Unified National Strategy.[17]

All but a few states have adopted NPDES regulatory schemes to realize these performance goals. Under these schemes, states can follow federal guidelines for issuing permits, which vary according to the size, location, storage method, and discharge of the AFO seeking the permit. In addition, state permit-issuing agencies are vested with the discretion to determine what level of compliance is mandated for the various classes of AFOs.[18]

B. Voluntary Compliance

The Unified National Strategy envisions voluntary efforts, based on an ethic of land stewardship and sustainability, as being the principal approach to reducing the environmental and health impacts of AFOs.[19] The guidance of the state and the support of local leadership and participation are crucial to the success of this strategy. Locally-led conservation, environmental education, and both technical and financial assistance programs are material to achieving the ultimate goal of zero discharge.

It is expected that owners and operators of AFOs in voluntary programs will develop and implement Comprehensive Nutrient Management Plans (CNMPs) to minimize the impact of discharge.[20] CNMPs often feature two common techniques of reducing the impact an AFO: deliberate reduction of the nutrient content of animal manure and meticulous containment of manure storage.

AFOs can modify animal diets by feed management. Low phosphorus corn and enzymes like phytase can reduce the amount of phosphorus and create manure with

---

[14] *Id.* at § 4.2.
[15] *Id.*
[16] *Id.* at § 4.3.
[17] *Unified National Strategy* at § 4.3.
[18] *Id.*
[19] *Id.* at § 4.1.
[20] *Id.* at § 3.1.

a better nitrogen-phosphorus ratio.[21] AFOs also can employ handling and storage techniques that reduce the amount of discharge. Diverting clean water, preventing leakage, providing adequate storage, utilizing manure treatments, and adopting cautious methods of dead animal disposal, all can greatly diminish the impact of discharges.[22]

C. Incentive-Based Compliance

Various incentives are offered to AFOs that implement CNMPs in accordance with the Unified National Strategy performance expectation. The primary aim of the Unified National Strategy is to compel owners and operators of AFOs to minimize the impacts of animal waste, not to punish them. For this reason, the actions of the owners and operators in modifying their AFOs to achieve compliance are considered in determining what future conduct is required.

Larger AFOs with more than 1,000 animals are referred to as Concentrated Animal Feeding Operations (CAFOs) and are subject to more stringent regulation.[23] Smaller CAFOs that demonstrate successful compliance after the end of a 5-year NPDES permit term may be eligible to exit the regulatory scheme and maintain voluntary compliance.[24] Only in the event of a discharge would the CAFO again be subject to an NPDES permit.[25]

Certain discharges require a permitting agency to classify an operation that would otherwise be an AFO as a CAFO. Many such AFOs currently are taking early voluntary actions to minimize the impact of their animal waste by implementing CNMPs. The Unified National Strategy gives the permitting agency the discretion to consider these good faith actions in determining exactly what level of compliance should be required of the AFO.[26]

The CWA created an interagency task force to identify and assess potential tax incentive proposals related to preventing water pollution.[27] A final report is due soon that will purportedly identify any changes along with their appropriate offsets, and give recommendations for future budgets. This potentially offers a notable financial incentive for AFOs to implement CNMPs.

II. South Carolina's Performance Expectation

---

[21] *Id.* at § 3.3.
[22] *Unified National Strategy* at § 3.3.
[23] *Id.* at § 4.2.
[24] *Id.* at § 4.7.
[25] *Id.*
[26] *Id.*
[27] *Unified National Strategy* at § 4.7.

South Carolina is one of a majority of states that adopted the NPDES permitting scheme.[28] The Department of Health and Environmental Control (DHEC) adopted the EPA definition of an AFO codifying its ability to exercise discretion in determining what factors affect AFO designation and what level of compliance is mandatory.[29] DHEC also adopted the detailed and exacting definition of what constitutes a CAFO found in the NPDES regulations.[30]

In 1996, South Carolina passed one of the nation's toughest comprehensive swine feeding operation statutes.[31] The state legislature specifically codified requirements and restrictions for Confined Swine Feeding Operations (CSFOs).[32] The statute imposed setback limits which must be considered in siting requirements. For example, lagoons or waste storage ponds on farms with a lower production of live animal weight must be at least 1,000 feet from the real property of another person.[33] However, the legislation allows owners of real property adjoining a CSFO to record a written waiver of the setback limits.[34] It is interesting to note the statute only requires a distance of 500 feet from a public or private drinking well.[35] The statute allows DHEC to order remediation of CSFOs that emit odor; however, it expressly states this action does not supplant a private nuisance action.[36] The foregoing might suggest the South Carolina legislature is more concerned with preserving remedies under the common law action of private nuisance than it is with ameliorating potential public health risks.

There is dissension about exactly how AFOs affect public drinking water. According to some, health risks, which are the premise upon which the Unified National Strategy is based, may not be a material concern.[37] For example, the University of Georgia Cooperative Extension Service conducted a study in 1997 which revealed that only 13 of 509 drinking water wells tested exceeded the EPA limit for nitrate nitrogen, and of those 13, 12 had inadequate wellhead protection that allowed direct contact with surface water. This study and others like it reveal

---

[28] S.C. CODE REGS. 61-9, § 122.23 (1999).

[29] *Id.*

[30] S.C. CODE REGS. 61-9, § 61-9.122, Pt. D, Appx. B (1999).

[31] Charles W. Abdalla & John C. Becker, *Jurisdictional Boundaries: Who Should Make the Rules of the Regulatory Game?* 3 DRAKE J. AGRIC. L. 7, 41 (1998).

[32] S.C. CODE ANN. § 47-20-10 (1998).

[33] *Id.* at § 47-20-20 (B).

[34] *Id.* at § 47-20-30.

[35] *Id.* at § 47-20-20(B)(5).

[36] *Id.* at § 47-20-70.

[37] Gregory W. Blount et al., *The New Nonpoint Source Battleground: Concentrated Animal Feeding Operations*, 14 NAT. RESOURCES & ENV'T 42, 43 (1999).

the plausibility of efficiently protecting the nation's drinking water from contamination by maintaining water integrity at the source, as opposed to harnessing the potentially threatening organic compounds at their source.

The CSFO statute directs DHEC to promulgate separate and distinct regulations for smaller feeding operations.[38] Not only will these regulations consider many of the same factors as those considered for larger producers, they will also consider the impact the regulations will have on agribusiness in the state.[39] The CSFO statute expressly states violation of either set of regulations is severable and individually enforceable.[40] However, it also provides for the automatic repeal of analogous CSFO provisions as the separate regulations are adopted by the General Assembly.[41] Further complicating this already complex framework is a provision of the CSFO statute making violations of the statute punishable under the Pollution Control Act.[42] However, the CSFO statute does not specifically provide the same punishment standard for violations of DHEC regulations made pursuant to the CSFO statute.

It seems South Carolina's purpose in enacting this statute was to preempt county governments from enacting measures affecting AFOs.[43] What in fact has resulted is another complicated legislative framework that provides for, and indeed requires, significant local involvement.[44] This outcome may paint a vivid picture of what is to come in the future of the federal-state partnership in environmental regulation.

III. The Future of the Partnership

Now that Congress has entered this area of environmental regulation, its current limited role of senior partner will likely grow and states potentially may become mere associates. The Supreme Court has largely supported Congress' expansion of federal power at the expense of state power.[45] However, the reality of contemporary water pollution problems is that the state roles must grow.[46] Federal regulatory agencies do not have the resources to administer such environmental regulations on a national scale. For this reason the state likely will

---

[38] S.C. CODE ANN. § 47-20-165 (1998).

[39] Abdalla & Becker, *supra* note 29 at 41.

[40] S.C. CODE ANN. § 47-20-165 (C).

[41] *Id.* at (E).

[42] S.C. CODE ANN. § 40-1-10 (1998).

[43] Abdalla & Becker, *supra* note 29, at 50.

[44] *Id.*

[45] Dwyer, *supra* note 3, at 207.

[46] Strasser, *supra* note 1, at 732.

continue to play the active part of junior partner.

Many states will continue to comply with federal programs for fear of losing federal funds.[47] South Carolina, three years ahead of the game in addressing issues of AFO water contamination, appears to have needed no such threat or directive to comply. State governments visited environmental regulation first because the state always has a direct interest in the health and welfare of the people within its borders. So long as the state and federal objectives remain aligned, the partnership will likely function.

Amy Willbanks

[47] Dwyer, *supra* note 3 at 220.