

Opinion No. 2013-102

November 13, 2013

The Honorable David L. Branscum
State Representative
Post Office Box 370
Marshall, Arkansas 72650-0370

Dear Representative Branscum:

You have requested my opinion on the following question concerning permitting for a concentrated animal feeding operation:

Under Arkansas law, may the director of the Arkansas Department of Environmental Quality impose a moratorium or suspension of the processing of a permit for a concentrated animal feeding operation? If the answer is yes, under that circumstances may the director do so?

RESPONSE

The answer to this question is “no,” in my opinion. Your second question is consequently moot.

Some explanation of the permitting process at issue will be helpful before further explaining this response.

The Federal Water Pollution Control Act,¹ commonly referred to as the Clean Water Act (“CWA”), created a federal permitting program – the National Pollutant Discharge Elimination System (“NPDES”) – that requires a permit of any person discharging pollutants into a surface water body.² Concentrated, confined animal

¹ 33 U.S.C. §§1251 - 1387.

² *Id.* at §§ 1251(a)(1), 1311(a), 1342(a)(1).

operations which are covered by Environmental Protection Agency (“EPA”) regulations defining “*concentrated animal feeding operation*” (“CAFO”)³ are subject to the NPDES program.⁴ The EPA requires all CAFOs to apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit.⁵ An NPDES permit may be issued by the EPA, but states also are authorized to administer their own NPDES programs.⁶ If a state chooses to operate its own permit program, it must first obtain EPA permission and then ensure that it issues discharge permits in accord with the same federal rules that govern permits issued by the EPA.⁷

EPA and the Arkansas General Assembly have delegated to the Arkansas Department of Environmental Quality (“ADEQ”) the power to issue NPDES permits authorizing pollutant discharges. Pursuant to A.C.A. § 8-4-208(a), “the [ADEQ] is authorized ... to administer on behalf of the state its own permit program for discharges into navigable waters within its jurisdiction in lieu of that of the [EPA.]” ADEQ was further granted authority under A.C.A. § 8-4-208(b) to “accept a delegation of authority from the [EPA] under the [CWA] and to exercise and enforce the authority delegated.”

ADEQ is therefore the NPDES permitting authority in Arkansas.⁸ The Arkansas Pollution Control and Ecology Commission (“Commission”) adopted Regulation No. 6⁹ to govern NPDES permitting.¹⁰ Regulation No. 6 incorporates federal

³ 40 C.F.R. § 122.23 (emphasis added).

⁴ CAFOs are defined and categorized depending on the number of animals that they stable or confine. *Id.* at (b).

⁵ *Id.* at (d)(1).

⁶ 33 U.S.C. § 1342(a)-(b).

⁷ *Id.* at (a); 40 C.F.R. §§ 123.25; 122.41.

⁸ *See also* A.C.A. §§ 8-1-202(b)(2)(A) (Repl. 2011) (including among the duties of the Director of ADEQ “[t]he administration of permitting ... programs deemed necessary to protect the environmental integrity of the state[,]” and designating the Director as “the issuing authority for the state[.]”); 8-4-203(a) (Supp. 2013)(vesting ADEQ with “the power and duty to issue, continue in effect, revoke, modify, or deny permits, under such conditions as it may prescribe....”).

⁹ Reg. No. 6, *Regulations for State Administration of the National Pollutant Discharge Elimination System* (as amended Feb. 9, 2013).

regulations governing, *inter alia*, permit requirements for CAFOs.¹¹ The federal regulations for CAFOs provide as follows regarding NPDES permit authorization:

A CAFO must not discharge unless the discharge is authorized by an NPDES permit. In order to obtain authorization under an NPDES permit, 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.¹²

A general permit is issued to categories or classes of dischargers that are susceptible to regulation under common terms and conditions. As explained by one court:

A general permit is a tool by which EPA regulates a large number of similar dischargers. Under the traditional general permitting model, each general permit identifies the output limitations and technology-based requirements necessary to adequately protect water quality from a class of dischargers. Those dischargers may then acquire permission to discharge under the Clean Water Act by filing [Notices of Intent], which embody each discharger's agreement to abide by the terms of the general permit.¹³

Pursuant to Regulation No. 6 and its permitting authority, ADEQ developed a general permit covering CAFOs.¹⁴

¹⁰ See Reg. 6.101, 6.102. The Commission is charged under A.C.A. §§ 8-1-203(b)(1)(A) and 8-4-201(b)(1)(A) (Repl. 2011) with the power and duty to promulgate rules and regulations "implementing the substantive statutes charged to the [ADEQ] for administration." See also A.C.A. § 8-4-202 (Supp. 2013) (further addressing the Commission's rulemaking authority).

¹¹ Reg. 6.104(A). As noted above, CAFOs are defined in 40 C.F.R. § 122.23(b).

¹² 40 C.F.R. § 122.23(d)(1).

¹³ *Environmental Defense Ctr., Inc. v. EPA*, 344 F.3d 832, 853 (9th Cir. 2003). See also A.C.A. § 8-4-203(m)(1)(A)(i) (Supp. 2013) (authorizing the issuance of "general permits" by ADEQ, and identifying a "general permit" as "a statewide permit for a category of facilities or sources that ... (a) [i]nvolve the same or substantially similar types of operations or activities; (b) [d]ischarge or release the same type of wastes or engage in the same type of disposal practices; (c) [r]equire the same limitations, operating conditions, or standards; (d)[r]equire the same or similar monitoring requirements....").

¹⁴CAFO General Permit ARG590000 (Nov. 1, 2011) (available at http://www.adeq.state.ar.us/water/branch_permits/generalpermits/default.htm) (last visited Oct. 24, 2013).

With this background in mind, I will turn to your particular question concerning a moratorium or suspension. Because you have referred to a “permit for a [CAFO],” I assume you are asking about the general permit noted above, and possibly individual NPDES permits that may be issued to CAFO owners or operators.

While the *Commission* is clearly authorized to either declare a moratorium on, or suspend the processing of, a type or category of permit, it appears the *Director* of ADEQ has not been vested with such authority. The Commission’s authority to this effect is set forth in A.C.A. § 8-4-201, and further reflected in A.C.A. § 8-4-202. Section 8-4-201 addresses the Commission’s powers and duties generally, and provides in relevant part:

The Arkansas Pollution Control and Ecology Commission is given and charged with the following powers and duties:

Promulgation of rules and regulations, including water quality standards and the classification of the waters of the state and *moratoriums or suspensions of the processing of types or categories of permits*, implementing the substantive statutes charged to the department for administration.¹⁵

Section 8-4-202 details more specifically the matters that may be addressed by Commission rule or regulation, and includes the following notice requirement and “emergency” authority:

Before the adoption, amendment, or repeal of any rule or regulation *or before suspending the processing of a type or category of permits or the declaration of a moratorium on a type or category of permits*, the commission shall give at least thirty (30) days’ notice of its intended action.

* * *

If the commission determines that imminent peril to the public health, safety, or welfare requires immediate change in the rules or

¹⁵ A.C.A. § 8-4-201(b)(1)(A) (Repl. 2011) (emphasis added).

immediate suspension or moratorium on categories or types of permits, it may, after documenting the facts and reasons, declare an emergency and *implement emergency* rules, regulations, *suspensions, or moratoria*.¹⁶

I have found no comparable provision in law or regulation that would authorize the Director of ADEQ to declare a moratorium on, or suspend the processing of, a permit for a CAFO.

I should note that the Director very clearly may revoke or suspend, for cause, a permit under which a CAFO is operating:

The Arkansas Department of Environmental Quality or its successor is given and charged with the power and duty to *revoke, modify, or suspend, in whole or in part, for cause any permit* issued under this chapter, including, without limitation:

- (1) Violation of any condition of the permit;
- (2) Obtaining a permit by misrepresentation or failure to disclose fully all relevant facts; or
- (3) A change in any applicable regulation or a change in any preexisting condition affecting the nature of the discharge that requires either a temporary or permanent reduction or elimination of the permitted discharge.¹⁷

This authority is plainly distinct, however, from that noted above respecting moratoria or suspensions. Had the General Assembly intended to extend the latter authority to the Director, it could easily have done so.

In response to your question, therefore, it is my opinion that the Director of ADEQ lacks authority to impose a moratorium on, or suspend the processing of, a permit for a concentrated animal feeding operation.

¹⁶ A.C.A. § 8-4-202(d)(1)(A) and (e)(1) (Supp. 2013) (emphasis added).

¹⁷ A.C.A. § 8-4-204(Repl. 2011) (emphasis added).

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Deputy Attorney General Elisabeth A. Walker prepared the foregoing opinion,
which I hereby approve.

Sincerely,

DUSTIN McDANIEL
Attorney General

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