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## Waterkeeper Alliance, Inc. v. United States Env'd. Prot. Agency, 399 F.3d 486 (2d Cir. 2005)

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The court held there were no errors in FERC's orders and accordingly denied Knott's petition for review.

*Michael Graetz*

## SECOND CIRCUIT

**Waterkeeper Alliance, Inc. v. United States Env'tl. Prot. Agency, 399 F.3d 486 (2d Cir. 2005)** (holding some provisions of the United States Environmental Protection Agency regulation regarding concentrated animal feeding operation violated the Clean Water Act).

Waterkeeper Alliance, Sierra Club, Natural Resources Defense Council, Inc. and American Littoral Society (collectively "Environmentalists") and American Farm Bureau Federation, National Chicken Council, and National Pork Producers Council (collectively "Farmers") challenged a regulation promulgated by the United States Environmental Protection Agency ("EPA") regarding water pollutants released from concentrated animal feeding operations ("CAFOs") in the Second Circuit Court of Appeals. The EPA regulation ("CAFO Rule") follows from the Clean Water Act ("CWA"), which proscribes the release of pollutants from any "point source" into navigable waters, unless otherwise authorized by permit. The Environmentalists and Farmers asserted the CAFO Rule violated, or failed to advance the CWA's goals concerning the permitting scheme, the types of discharges regulated, and the effluent limitation guidelines the CAFO Rule established.

The Environmentalists objected to the EPA's permitting scheme because the CAFO Rule allowed the EPA to issue permits without comprehensive review and without enough specified terms in the permits as to meet the CWA's requirements. They also objected to the duty to apply for a permit imposed on CAFOs outside the jurisdiction of the EPA. The CAFO Rule required large CAFOs to develop nutrient management plans. However, the Environmentalists argued this requirement alone failed to ensure the CAFOs followed through with the implementation of those plans. The court agreed with the Environmentalists' allegation concerning the lax standards of review for permit issuance, allowing CAFOs to possibly misrepresent their compliance. The court also determined the CAFO Rule violated the CWA by failing to require CAFOs to include the terms of the nutrient management plans in their permits. The CWA specified that effluent limitations, or any restrictions enforced by the State regarding quantities, rates, and concentration of discharge, must be included in the permit. The court reasoned that the nutrient management plans constituted effluent limitations and must be included in the permit in order to comply with the CWA. Finally, the Farmers argued the permitting scheme outlined in the CAFO Rule allowed the EPA power over CAFOs, or the ability to

usurp rights, the CWA did not grant. Since the CAFO Rule demanded that all CAFOs either apply for a permit or prove the CAFOs had no potential to discharge, the Farmers asserted the EPA broadly regulated all *potential* polluters, rather than the actual polluters. The court agreed this policy, while possibly aligned with the goals of the CWA, superseded the powers that Congress gave the EPA through the CWA.

Secondly, the Environmentalists and Farmers challenged the CAFO Rule with regards its stormwater discharge exemption and its regulation of "uncollected" discharges. Under the CAFO Rule, all discharges of manure, litter, or process wastewater were subject to permit requirements and regulation; however, as long as the CAFOs were acting in accordance with their specific nutrient management plans, precipitation related discharge or agricultural stormwater were exempt. The Environmentalists contended the EPA should regulate stormwater like any other point source for discharge. The court looked to precedent case law and the express language of the CWA, which exempted agricultural stormwater, and held the CAFO Rule's exemption properly comported with Congress' intent to limit liability for discharge caused by nature. The court also dismissed the Farmers' assertion that the EPA could consider only discharges collected at the area of land application point sources or regulated as such. The court reasoned it was irrelevant whether the discharge was collected or uncollected at a certain point, because any discharge from a CAFO becomes subject to regulation.

Thirdly, the Environmentalists attacked the effluent limitations guidelines the CAFO Rule established. They objected to the guidelines' use of the best available technology ("BAT") standards, the guidelines' failure to regulate or reduce pathogens in the discharge, the guidelines' provisions for complying with the production area discharge ban through the creation of a facility or through alternative performance standards, and the guidelines' lack of water quality based effluent limitations. Regarding the BAT standards adopted in the guidelines, the Environmentalists opined that the EPA improperly chose the standards. The court relied on the record and the evidence that the EPA did extensive research in determining effective standards, including choosing the best BAT options for beef and swine regulation. However, the court did not determine the EPA had been as diligent in instituting standards to control pathogen levels. Under the CWA, the EPA must employ guidelines that advocate the use of the best conventional technology ("BCT") for controlling pathogens. The court held the EPA must adopt effluent guidelines specifically for controlling pathogens, rather than relying on the effect of the other guidelines to reduce pathogens. Similarly, the court concluded the EPA did not justify its adoption of alternative means for CAFOs to comply with the total prohibition on production area discharge, because the EPA failed to provide support for this decision in the record and precluded

public participation in its decision-making process. Finally, the court held no justification for the lack of water quality based effluent guidelines concerning any discharge, except stormwater existed.

In conclusion, the court vacated the following portions of the CAFO Rules permitting scheme: (1) the issuance of permits without a review of the nutrient management plans, (2) the allowance of permits that failed to specifically identify terms of the nutrient management plans, and (3) the requirement that all CAFOs to apply for permits or prove no potential for discharge. The court also held the EPA must select a BCT standard for pathogen control and clarify, through a publicly accessible process, why its CAFO Rule included an alternative measure for meeting the production area prohibition and why its guidelines lacked water quality based limitations.

*Lynn Noesner*

### THIRD CIRCUIT

**Interfaith Cmty. Org. v. Honeywell Int'l Inc., 399 F.3d 248 (3d Cir. 2005)** (holding the district court correctly determined the existence of an imminent and substantial endangerment to human health and the environment, and that the Resource Conservation and Recovery Act required permanent injunctive relief by Honeywell).

From 1895 until 1954, Mutual Chemical Company ("Mutual") dumped hexavalent chromium waste, creating a carcinogenic land-mass consisting of 1,500,000 tons of waste at a wetlands site along the Hackensack River in Jersey City, New Jersey. In 1982 the State of New Jersey ("State") sought a permanent remedy after observing a green stream and plumes on the site. The New Jersey Department of Environmental Protection ("NJDEP") ordered Honeywell, Mutual's ultimate successor, to clean up the site. Honeywell implemented an interim measure by pouring concrete over seventeen acres and placing a plastic cap over the remaining seventeen acres of the thirty-four acre site. After litigation in 1993, Allied Signal, a predecessor to Honeywell, promised 60 million dollars towards a permanent solution, but NJDEP reserved the right to compel cleanup at a higher cost. In 1995 Interfaith Community Organization with five individuals (collectively "ICO") sued Honeywell under the Resource Conservation and Restoration Act ("RCRA"), alleging the site presented an imminent and substantial danger to public health or the environment. The United States District Court for the District of New Jersey ruled for ICO and ordered Honeywell to clean up the site. Honeywell appealed to the United State Court of Appeals for the Third Circuit.

On appeal, Honeywell challenged ICO's standing, the district court's determination that an imminent and substantial endangerment existed, and the district court's remedial injunction requiring excava-