

MARYLAND DEPARTMENT OF
THE ENVIRONMENT

v.

PAUL W. BISHOP, ET AL.,¹
APPELLANTS

* BEFORE DAVID HOFSTETTER,
* AN ADMINISTRATIVE LAW JUDGE
* OF THE MARYLAND OFFICE
* OF ADMINISTRATIVE HEARINGS
* OAH NO.: MDE-LMA-051-17-29567

* * * * *

PROPOSED DECISION

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STATEMENT OF THE CASE

On August 24, 2017, the Maryland Department of the Environment (the Department or MDE) approved a comprehensive nutrient management plan (CNMP) submitted by Zaheer and Ishfaq Ahmed Farm (Ahmed Farm) in Berlin, Maryland. On September 9, 2017, Paul and Mary Lou Bishop, the Assateague Coastal Trust, and the Environmental Action Center (collectively, the Appellants) requested a contested case hearing concerning the MDE's approval of the CNMP.

On November 21, 2017, I held a telephone prehearing conference at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland. Stephanie Cobb Williams, Assistant Attorney General, represented the MDE and participated by telephone; MDE staff members were also present. Kimber Veltri, Esquire and David L. Reed, Esquire, represented the Appellants and participated by telephone.

¹ The Appellants are Paul and Mary Lou Bishop, the Assateague Coastal Trust, and the Environmental Action Center.

On December 28, 2017, the Appellants filed a Motion for Summary Decision. On January 16, 2018, the MDE filed an Opposition to Appellants' Motion for Summary Decision and a Cross Motion for Summary Decision. On January 18, 2018, the Appellants filed a Motion to Strike Defendant's Cross Motion for Summary Decision. On January 22, 2018, the MDE filed a Response to Appellants' Motion to Strike its Cross Motion for Summary Decision. On January 31, 2018, the Appellants filed a Response to Defendant's Cross Motion for Summary Decision. On February 8, 2018, I held a second prehearing conference and made an oral ruling denying the motions for summary decision and ordered that the hearing on the merits proceed.

I held a hearing on February 12 and 13, 2018 at the OAH in Hunt Valley, Maryland. Mr. Reed and Ms. Veltri represented the Appellants. Matthew D. Standeven, Assistant Attorney General, represented the MDE. Following the close of evidence and oral closing arguments, the parties timely submitted post-hearing memoranda, at my request.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the MDE's contested case regulations, and the OAH's Rules of Procedure. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2017); COMAR 26.01.02; COMAR 28.02.01.

ISSUE

Was the MDE's final approval of the CNMP for Ahmed Farm proper under State and federal law?

SUMMARY OF THE EVIDENCE

Exhibits

The Appellants offered the following exhibits² which were admitted into evidence, except as otherwise noted.³

- App. Ex. 1 – Notice of Intent (NOI) and CNMP for Ahmed Farm, various dates
- App. Ex. 2 – General Discharge Permit (GDP) for Animal Feeding Operations (AFO), Permit No. 14AFa, National Pollution Discharge Elimination System (NPDES) Permit No. MDG01A, dated August 1, 2016
- App. Ex. 3 – MDE Summary of Findings and Recommendations: Response to Comments, dated August 24, 2017
- App. Ex. 4 – Natural Resource Conservation Service (NRCS), Conservation Practice Standard (CPS), Animal Mortality Facility, Code 316, dated September 2015
- App. Ex. 7 – NRCS, CPS, Waste Storage Facility, Code 313, dated May 2016
- App. Ex. 8 – NRCS, CPS, Composting Facility, Code 317, dated September 2016
- App. Ex. 13 – Temporary Measure to Satisfy Manure Storage and Mortality Management Requirements for New Construction and Expanded Poultry Operations in Response to Limited Maryland Agricultural Cost Share (MACS) Funding, undated
- App. Ex. 15 – Marked for identification; not offered into evidence
- App. Ex. 16 – Correspondence Log, compiled by Pamela Harris, Natural Resources Planner, MDE, various dates
- App. Ex. 17 – New Registration Review Process for NOI and Required Plans for Coverage under the GDP for AFO, dated Mary 2017
- App. Ex. 20 – Satellite Picture of Production Area, including hand-drawn components, undated
- App. Ex. 21 – Maryland Environmental Resources and Land Information Network (MERLIN) Satellite Photo of Production Area, dated July 10, 2017

² At the commencement of the hearing, the Appellants provided a binder of exhibits numbered 1-39. As the hearing progressed however, the Appellants did not offer into evidence all of the exhibits in the binder. For the sake of clarity, however, I have maintained the numbering system provided in the binder. Those exhibits in the binder which were not offered have not been reviewed or considered by me.

³ The parties stipulated to the admissibility of Appellants' exhibits 1-4; 7-8; 13, and 17.

App. Ex. 26 – Wilkins-Noble, LLC, Site Plan Requested by Zaheer Ahmed: Grading and Sediment Erosion Control Sheet, revised November 4, 2016

App. Ex. 36 – Report of Todd Hurd, dated January 11, 2018

The MDE offered the following exhibits which were admitted into evidence:

MDE Ex. 1 – GDP for AFO, State Permit No. 14AFA/NPDES Permit No. MDG01A, dated August 1, 2016

MDE Ex. 2 – NOI and CNMP for Zaheer and Ishfaq Ahmed Concentrated Animal Feeding Operation (CAFO), dated August 24, 2017

MDE Ex. 3 – Registration Review Process for NOI and Required Plans for Coverage under the GDP for AFO, dated May 15, 2017

MDE Ex. 4 – MDE Report of Findings Regarding a Public Hearing for Coverage under the GDP for AFO for Ahmed Farm in Worcester County, Maryland, with attachments, dated August 17, 2017

MDE Ex. 5 – NRCS, CPS, Waste Storage Facility, Code 313, dated May 2016

MDE Ex. 6 – NRCS, CPS, Animal Mortality Facility, Code 316, dated September 2015

MDE Ex. 7 – Resume of David D. Kahn, undated

Testimony

The following witnesses testified on behalf of the Appellants:

- Pamela Harris, Natural Resources Planner, MDE
- David D. Kann, Independent Consultant, offered by MDE as an expert and accepted as an expert in the development of CNMPs and CAFO regulatory compliance
- Carol Morrison, former poultry farm owner, offered by the Appellants as an expert and accepted as an expert in the operation of poultry CAFOs
- Gary F. Kelman, MDE, Chief, AFO Department

- Todd Hurd, PhD., offered by the Appellants as an expert and accepted as an expert in hydrology, hydrogeology, and wetland systems

David D.Kann and Gary F. Kelman testified on behalf of the MDE.⁴

PROPOSED FINDINGS OF FACT

Having considered all of the evidence presented, I find the following facts by a preponderance of the evidence:

1. As proposed, Ahmed Farm was to be a 292,800 square foot Concentrated Animal Feeding Operation (CAFO) with eight poultry houses storing 396,000 chickens at any given time. (App. Ex. 1, p. 3).
2. It was estimated Ahmed Farm would produce approximately 1,330 tons of litter, manure, and wastewater per year. (App. Ex. 1, p. 4).
3. On June 19, 2016, the MDE received a Notice of Intent (NOI) for a General Discharge Permit (GDP) to operate a CAFO at Ahmed Farm. (MDE Ex. 2).
4. Before Ahmed Farm could operate as a CAFO, Ahmed Farm needed to create a CNMP to submit to the MDE.
5. The CNMP was developed with the assistance of David Kann, a Natural Resource Conservation Service (NRCS) Certified Nutrient Planner with AET Consulting, Inc. Mr. Kann developed the CNMP in cooperation with the NRCS based on information Mr. Kann obtained through observations and information obtained by the Ahmeds. (App. Ex. 1, p. 8).
6. On November 3, 2016, the MDE received a CNMP for Ahmed Farm for its consideration in approving a GDP for the CAFO. (App. Ex. 1, p. 8).

⁴ Although the MDE did not “call” any witnesses, the MDE asserted that it would have called David Kann and Gary Kelman, if they had not first been called by the Appellants. In order to avoid the necessity for these witnesses to be called separately by the MDE and as a matter of economy, the MDE was permitted to conduct a combined direct and cross-examination of these witnesses following the Appellants’ direct examination. During this process, Mr. Kann was offered and accepted as an expert witness on behalf of the MDE.

7. The CNMP included nine minimum standards to protect water quality. The nine minimum standards included the following three items.

- a. (Standard 1): Ensure adequate storage capacity. Design, construct, operate, and maintain the production area and all animal waste storage structures to contain all animal waste, including any runoff or direct precipitation from a 25-year, 24-hour storm. Need to store dry manure in a way that prevents polluted runoff. Properly operate and maintain all storage facilities.
- b. (Standard 2): Ensure proper management of mortalities to prevent the discharge of pollutants into waters of the State. Do not dispose of mortalities in an animal waste or other storage or treatment system that is not specifically designed to treat animal mortalities without written permission from the Department, which may be granted if the Department determines catastrophic circumstances.
- c. (Standard 6): Conservation practices to control nutrient loss, including site-specific conservation practices. An AFO shall maintain a setback of 100 feet or a 35 foot vegetated filter strip between stored poultry litter and manure and waters of the state, as well as field ditches . . .

(App. Ex. 1, p. 19).

8. In accordance with the CNMP's requirement for "adequate storage capacity," Mr. Kann determined two storage facilities (Storage Facilities) needed to be constructed on Ahmed Farm. These Storage Facilities were necessary to manage manure and wastewater. One building was to be a 50-foot by 140-foot structure with a 670 ton volume. The second building was to be a 40-foot by 180-foot structure with a 690 ton volume. (App. Ex. 1, p. 43).

9. The Storage Facilities were to be constructed in accordance with NRCS Conservation Practice Standard (CPS) Code 313, which requires the waste storage facility to be "[a]n agricultural waste storage impoundment[,] . . . [a] containment made by constructing an embankment, . . . a pit or dugout, or [a] fabricat[ed] . . . structure." (MDE Ex. 5, p. 254).

10. In accordance with the CNMP's requirement for "proper management of mortalities," Mr. Kann determined two multi-channel composting facilities (Composting Facilities) needed to be constructed on Ahmed Farm. (App. Ex. 1, p. 44).⁵

11. The Composting Facilities were to be built in accordance with NRCS CPS Code 316, which dictates that the size of animal mortality facilities using composters should be based on "normal mortality loss records for the operation" or if there are no records, "locally established mortality rates for the type of operation." (MDE Ex. 6, p. 265).

12. To satisfy NRCS CPS Code 316, Mr. Kann determined there needed to be two Composting Facilities to handle the anticipated mortalities. These Composting Facilities were to be framed-up, roofed, sixteen feet wide,⁶ and constructed alongside the two Storage Facilities on Ahmed Farm. (App. Ex. 1, p. 44).

13. Ahmed Farm was hopeful the Storage Facilities and Composting Facilities would be partially funded with Maryland Agriculture Cost Share Funding (MACS Funding).

14. Starting around January 9, 2017, Pamela Harris, a Natural Resource Planner with the MDE, started to review the NOI and the CNMP submitted by Ahmed Farm. Ms. Harris worked with Ahmed Farm to obtain information necessary to determine if the CNMP could be approved.

15. Around May 1, 2017, it became apparent MACS Funding may not be available to subsidize the cost of building the Storage Facilities and the Composting Facilities. (App. Ex. 16, p. 337).

⁵ Composting "is the controlled aerobic biological decomposition of organic matter into a stable, humus-like product, called compost. Decomposition is enhanced and accelerated by mixing organic waste with other ingredients in a manner that optimizes microbial growth." (App. Ex.1, p. 56).

⁶ Mr. Kann did not spell out the length. However, the length would have been twenty to thirty feet.

16. On May 5, 2017, Ahmed Farm submitted an Implementation Schedule Addendum to Meet the Requirements of a Waste Storage Structure and Animal Mortality Facility (Addendum) for the MDE's consideration. (App. Ex. 1, p. 80).

17. The Addendum would allow Ahmed Farm to windrow its poultry litter within the confines of the existing poultry houses instead of removing the poultry litter to the proposed Storage Facilities for the first two years, or until MACS Funding became available, or until Ahmed Farm self-funded the permanent Storage Facilities.⁷ (*Id.*).

18. The Addendum would also allow Ahmed Farm to construct one 18-foot by 25-foot long temporary steel shed instead of the two proposed Composting Facilities until either MACS Funding became available or until Ahmed Farm self-funded the permanent Composting Facilities.⁸ (*Id.*).

19. On May 10, 2017, Ms. Harris determined the CNMP, including the changes made through the Addendum, met the nine minimum standards to protect water quality and could be approved. (App. Ex. 17, p. 346).

20. On May 17, 2017, the MDE published its preliminary approval of a GDP for a CAFO at Ahmed Farm.

21. Between May 17, 2017 and June 16, 2017, the NOI and CNMP were published for public review.

22. On July 11, 2017, the MDE held a public hearing on its preliminary approval of the NOI and CNMP. The MDE heard oral comments during the public hearing.

23. On August 24, 2017, after reviewing the public comments, the MDE published its final approval for Ahmed Farm to receive a GDP for a CAFO.

⁷ Windrowing is a process in which poultry litter is turned and pushed into elongated piles or rows.

⁸ It is not apparent from the record when Ahmed Farm would self-fund the endeavor if MACS Funding remained unavailable.

DISCUSSION

The Regulatory Scheme

The Clean Water Act (CWA) embodies Congress's desire "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." 33 U.S.C.A. § 1251(a) (2016). In order to accomplish its goals, the CWA establishes a federal-state joint effort in which the United States Environmental Protection Agency (EPA) promulgates regulations to "restrict the quantities, rates, and concentrations of specified substances" in discharges to the country's waterways. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). The primary mechanism to maintain the integrity of the nation's waters is the National Pollution Discharge Elimination System (NPDES) permitting scheme. 40 C.F.R. § 122.42 (2017); *see also* 33 U.S.C.A. § 1311-1330 (2016). Ahmed Farms is a CAFO and, as such, is subject to NPDES permitting requirements. 40 C.F.R. § 122.23(a) (2017). Under the NPDES permitting scheme, operators, such as Ahmed Farms, must obtain an NPDES permit from the EPA prior to the discharge of any pollutant. 33 U.S.C.A. § 1342 (2016). The EPA has delegated the MDE with the authority to administer NPDES permits in Maryland. *Id.* § 1342(b)(1)-(9); COMAR 26.08.04.01A, 07.

COMAR 26.08.04.09N(2)(a) governs the MDE's approval of a CAFO under a GDP. Before the MDE issues a GDP, the MDE shall review a NOI along with the required plans. COMAR 26.08.04.09N(3)(g). The "plan" or "required plan" means a CNMP, NMP, or a conservation plan. COMAR 26.08.04.09N(3)(b). Ahmed Farms applied to receive a GDP by submitting a NOI and a plan, a CNMP. A CNMP is defined as "a nutrient management and conservation plan *that is developed in accordance with the Natural Resources Conservation Service (NRCS) planning policy and meets NRCS technical standards.*" COMAR 26.08.01.01A(13-1) (emphasis added).

A contested case hearing conducted under this paragraph shall be limited to contesting the terms of the approved plans. COMAR 26.08.04.09N(3)(I)(iii). The Appellants, as the “party contesting the Department’s intent to issue . . . a permit . . . bear the burden of going forward to establish a prima facie case that grounds exist for denying the . . . permit and the burden of persuasion that the . . . permit is to be denied.” COMAR 26.01.02.28B(2). The Appellants bear this burden of proof by a preponderance of the evidence. COMAR 26.01.02.28D(2).

Analysis

Storage Facilities

The CNMP laid out nine minimum standards to protect water quality. One of these minimum standards required Ahmed Farm to have adequate storage capacity. To meet this minimum standard, Mr. Kann determined the CNMP needed to include two Storage Facilities. Since the CNMP, as defined, needs to be “developed in accordance with NRCS planning policy and meet[] NRCS technical standards,” COMAR 26.08.01.01A(13-1), these Storage Facilities needed to be constructed in accordance with NRCS CPS Code 313. NRCS CPS Code 313 requires waste storage facilities to be “[a]n agricultural waste storage impoundment[,] . . . [a] containment made by constructing an embankment, . . . a pit or dugout, or [a] fabricat[ed] . . . structure.” (MDE Ex. 5, p. 254). As such, Mr. Kann specified in the CNMP that the Storage Facilities would be two fabricated buildings, one a 50-foot by 140-foot structure, and another a 40-foot by 180-foot structure. MACS Funding was unavailable to subsidize the cost of these structures. As a result, the MDE approved an Addendum to the CNMP that allowed Ahmed Farm to allow for windrowing for two years rather than constructing these Storage Facilities.

The Appellants argue the MDE’s approval of the CNMP’s Addendum was improper under State and federal law since the Addendum was not in compliance with NRCS CPS Code 313. In other words, windrowing was not an appropriate alternative to the fabricated Storage

Facilities. The Appellants argue the MDE's determination should not be afforded deference because it incorrectly exempted the Storage Facilities from following the requirements of the NRCS CPS Code 313. I agree with the Appellants.

COMAR 26.08.01.01A(13-1) defines a CNMP as "a nutrient management and conservation plan *that is developed in accordance with the Natural Resources Conservation Service (NRCS) planning policy and meets NRCS technical standards.*" The original CNMP drafted by Mr. Kann was developed in accordance with NRCS planning policy and met NRCS technical standards; however, the Addendum diverged from these policies and standards. The Storage Facilities would have complied with NRCS CPS Code 313 since they are fabricated structures which would have contained all animal waste. Windrowing, on the other hand, is not a fabricated structure. Windrowing is a management practice to reduce the amount of manure needing storage and, as such, is not compliant with NRCS CPS Code 313. Mr. Kann confirmed this in his testimony. Mr. Kann testified as follows:

Question by the MDE: Based on your expert experience as a certified CNMP plan writer, is it your opinion that this Addendum satisfies the requirements of the NRCS federal standards and the Maryland State standards for waste storage?

Answer by Mr. Kann: Oh wow, you added that waste storage. Um. NRCS would not recognize two years of windrowing as a waste storage. That is a management practice within the housing. So, as long as soil and water resources are not affected by the management of this operation, NRCS would be fine with that management and the results of that management. But it cannot be called a waste storage structure.

Question by the MDE: So what would the storage structure be in this case?

Answer by Mr. Kann: The waste storage structure would be like we initially said, a walled structure with a roof that is solely the temporary storage of litter. If it has to come out of a house, it is going in that facility. If it is not going in that facility, it is being trucked off that site.

Question by the MDE: Can a poultry house be considered a waste storage facility?

Answer by Mr. Kann: It can because the same mechanics, same design as a waste storage facility. But I don't think you will ever get NRCS to officially label it as a 313 waste storage facility. That is why it is considered temporary. But that does not take away that the main goal which is to make sure that water and soil

resources are protected. If NRCS can see that that particular management is doing that, they don't have to call it a 313, the management solves the issue.

I afforded great weight to Mr. Kann's testimony. Mr. Kann was accepted as an expert witness in the development of CNMPs and CAFO regulatory compliance. As such, Mr. Kann's statements that "NRCS would not recognize two years of windrowing as a waste storage," "it [windrowing] cannot be called a waste storage structure," and "I don't think you will ever get NRCS to officially label it [windrowing] as a 313 waste storage facility" convinced me windrowing was not an appropriate substitute for the Storage Facilities which are necessary to satisfy one of the minimum standards found in the CNMP. (App. Ex. 1, p. 19). In other words, this alternative method was "not developed in accordance with the [NRCS] planning policy" and does not "meet[] NRCS technical standards." COMAR 26.08.01.01A(13-1). As such, the MDE's approval of the CNMP with the Addendum is legally inconsistent with COMAR 26.08.01.01A(13-1). COMAR 26.08.04.08K(2)(b)(i); COMAR 26.08.04.09N(3)(l)(iii).

Although Mr. Kann testified "NRCS would be fine with that management [windrowing] and the results of that management [windrowing]," this comment does not negate the fact the CNMP called for constructing waste storage facilities, windrowing is not a NRCS recognized alternative to waste storage facilities, and by definition, the CNMP must be developed in accordance with the NRCS planning policy and meet NRCS technical standards.

The MDE argues its approval of the CNMP was valid because the Addendum was entirely consistent with NRCS CPS Code 313. MDE acknowledges that while the measures provided for in the Addendum are distinct from the permanent Storage Facilities envisioned by Mr. Kann, windrowing is allowed as an alternative because it would minimize the likelihood of any discharge of pollutants into waters of the State. For the reasons stated above, I disagree with this argument. Even if windrowing minimizes the likelihood of any discharge to waters of the

State, CNMPs must be developed in accordance with NRCS planning policy and technical standards. Windrowing is not compliant with NRCS CPS Code 313.

Further, the MDE argues the measures provided for in the Addendum are consistent with a guidance document the MDE issued entitled “Temporary Measures to Satisfy Manure Storage and Mortality Management Requirements for New Construction and Expanded Poultry Operations in Response to Limited [MACS] Funding” (Temporary Measures Document). (App. Ex. 13, pp. 308-10).⁹ The Temporary Measures Document allows windrowing of poultry manure. The MDE argues that while the Temporary Measures Document is not promulgated, it is nevertheless deserving of substantial deference since “an administrative agency’s interpretation and application of the statute which the agency administers should ordinarily be given considerable weight by reviewing courts.” *Motor Vehicle Admin. v. Delawter*, 403 Md. 243, 256-57 (2008). The MDE is not entitled to deference on this issue, however, because the MDE’s approval of the CNMP with the Addendum incorrectly exempted the Storage Facilities from following the requirements of NRCS CPS Code 313 and, thus, is legally inconsistent with COMAR 26.08.01.01A(13-1). COMAR 26.08.04.08K(2)(b)(i); COMAR 26.08.04.09N(3)(l)(iii).

Composting Facilities

Another minimum standard found in the CNMP required Ahmed Farm to ensure proper management of mortalities. To meet this minimum requirement, Mr. Kann determined the CNMP needed to include two Composting Facilities. Since the CNMP, as defined, needs to be

⁹ The Temporary Measures Document explains these temporary measures were developed by the MDE’s AFO program, Maryland Department of Agriculture, and the NRCS. Nevertheless, the Temporary Measures Document also states that “[a]ll practices to satisfy resource concerns identified by Certified Nutrient Management Advisors must meet NRCS Practice Standards. Practice Standard 313 for manure management and Practice Standard 316 for mortality management must be used.” (App. Ex. 13, p. 308) (emphasis added). Mr. Kann, a Certified Nutrient Management Advisor put in place the necessity for the two Storage Facilities and the two Composting Facilities. Hence, Ahmed Farms was required to follow NRCS CPS Code 313 and NRCS CPS Code 316.

“developed in accordance with NRCS planning policy and meet[] NRCS technical standards,” COMAR 26.08.01.01A(13-1), these Composting Facilities needed to be constructed in accordance with NRCS CPS Code 316. NRCS CPS Code 316 states the size of animal mortality facilities using composters should be based on “normal mortality loss records for the operation” or if there are no records “locally established mortality rates for the type of operation.” (MDE Ex. 6, p. 265). As such, Mr. Kann specified in the CNMP that the two Composting Facilities should be constructed. These Composting Facilities were to be approximately 16-foot by 25-foot structures. MACS Funding was unavailable to subsidize the cost of these structures. As a result, the MDE approved an Addendum to the CNMP allowing Ahmed Farm to construct one 18-foot by 25-foot long temporary steel shed instead of the two proposed Composting Facilities until either MACs Funding became available or until Ahmed Farm self-funded the permanent Composting Facilities.

The Appellants argue the MDE’s approval of the CNMP’s Addendum was improper under State and federal law since the Addendum was not in compliance with NRCS CPS Code 316. In other words, having only one temporary composting structure was not an appropriate alternative to the two Composting Facilities Mr. Kann believed would handle the anticipated mortalities. The Appellants argue the MDE’s determination should not be afforded deference because it incorrectly exempted the Composting Facilities from following the requirements of NRCS CPS Code 316. Again, I agree with the Appellants.

NRCS CPS Code 316 states the size of animal mortality facilities using composters should be based on “normal mortality loss records for the operation” or if there are no records “locally established mortality rates for the type of operation.” (MDE Ex. 6, p. 265). Mr. Kann determined two Composting Facilities were necessary to meet the NRCS CPS Code 316 requirement when he helped to draft the CNMP. Nevertheless, the Addendum only calls for one

composting facility – half of what Mr. Kann determined was necessary to handle the anticipated mortalities. Hence, the temporary shed allowed under the Addendum is not in keeping with NRCS CPS Code 316 as it would not effectively handle anticipated mortalities. As such, the Addendum to the CNMP was not developed in accordance with the NRCS planning policy and does not meet the NRCS technical standards. COMAR 26.08.01.01A(13-1). The MDE's approval of the CNMP with the Addendum is legally inconsistent with COMAR 26.08.01.01A(13-1). COMAR 26.08.04.08K(2)(b)(i); COMAR 26.08.04.09N(3)(l)(iii).

Mr. Kann testified that the one building in the Addendum would be sufficient to treat animal mortalities at Ahmed Farm. Mr. Kann's testimony is inconsistent with his previously expressed opinion. If this were the case, Mr. Kann would not have required *two* Composting Facilities be built; as such a venture is at least double the price.

The MDE asserted the same two arguments discussed above; its approval of the CNMP was valid because the Addendum was entirely consistent with NRCS CPS Code 316, and the measures provided for in the Addendum are consistent with the Temporary Measures Document. Again, I disagree that the Addendum allowing for a temporary shed in place of the two Composting Facilities was consistent with NRCS CPS Code 316. Even if the temporary shed minimizes the likelihood of any discharge to waters of the State, CNMPs must be developed in accordance with NRCS planning policy and technical standards. The temporary shed is not compliant with NRCS CPS Code 316 since it would not be sufficient to treat the animal mortalities at Ahmed Farm. In addition, the Temporary Measures Document is not afforded any deference because the MDE's approval of the CNMP with the Addendum incorrectly exempted the Composting Facilities from following the requirements of NRCS CPS Code 316 and, thus, is legally inconsistent with COMAR 26.08.01.01A(13-1). COMAR 26.08.04.08K(2)(b)(i); COMAR 26.08.04.09N(3)(l)(iii).

Conservation practices to control nutrient loss

Another minimum standard found in the CNMP required Ahmed Farm to adopt conservation practices to control nutrient loss. As relevant, this minimum standard sets out the following:

6. Conservation practices to control nutrient loss, including site-specific conservation practices.
 - a. An AFO shall maintain a setback of 100 feet or a 35 foot vegetated filter strip between stored poultry litter and manure and waters of the State, as well as field ditches. . . .
 - b. For a poultry CAFO, permit condition IV.B.1. applies to the storage of poultry litter manure. . . .**

(App. Ex. 1, p. 19) (emphasis added).

Permit condition IV.B.1. states:

Part IV. Special Conditions

....

B. Nine Minimum Standards to Protect Water Quality. The permittee's required plan(s) shall meet the following standards:

(1) Ensure adequate storage capacity. Design, construct, operate, and maintain the production area and all animal waste storage structures to contain all animal waste, including any runoff or direct precipitation from a 25-year, 24-hour storm. Store dry manure in a way that prevents polluted runoff. Properly operate and maintain all storage facilities.

(App. Ex. 2, p. 158).

The Appellants argue that a combination of the location of Ahmed Farms and the exemptions created by the Addendum violate these required conservation practices. Permit condition IV.B.I. is the same as the minimum standard that requires a poultry CAFO to ensure adequate storage capacity. As discussed above, the MDE improperly approved the CNMP which allowed windrowing in place of the two proposed Storage Facilities – contravening NRCS CPS Code 313's requirement that a waste storage facility be “[a]n agricultural waste storage impoundment[,] . . . [a] containment made by constructing an embankment, . . . a pit or dugout, or [a] fabricat[ed] . . . structure.” (MDE Ex. 5, p. 254). Hence, because the minimum standard

requiring adequate storage capacity was not met, the minimum standard requiring conservation practices to control nutrient loss was not met. The MDE's approval of the CNMP with the Addendum is legally inconsistent with COMAR 26.08.01.01A(13-1). COMAR 26.08.04.08K(2)(b)(i); COMAR 26.08.04.09N(3)(1)(iii).

Ammonia

Finally, the Appellants argue that the MDE failed to consider ammonia deposition to waters of the State, violating the requirements of the New Source Performance Standards or with the minimum standard requiring Ahmed Farm to adopt conservation practices to control nutrient loss. As support, Dr. Todd Hurd opined that Ahmed Farm is "vulnerabl[e] to intermittent flooding and to intensive nitrogen deposition directly to surface waters, and therefore [is unable] to manage nutrients." (App. Ex. 36, p. 541). I afforded little weight to Dr. Hurd's report and supporting testimony. Dr. Hurd did not base his conclusions on visiting the proposed site on Ahmed Farm; instead, Dr. Hurd analyzed mappings and inventoried findings. As such, Dr. Hurd's report and associated testimony could not establish that pollutants would be discharged from Ahmed Farm. Moreover, the MDE does not regulate air emissions of poultry CAFOs and, as such, neither the CNMP or the GDP contemplate ammonia emissions.


PROPOSED CONCLUSION OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the MDE's final approval of the CNMP for Ahmed Farm was improper under State and federal law. COMAR 26.08.01.01A(13-1); COMAR 26.08.04.08K(2)(b)(i); COMAR 26.08.04.09N(3)(1)(iii).

PROPOSED ORDER

I hereby **PROPOSE** that the Department of the Environment's approval for coverage for the Ahmed Farm Concentrated Animal Feeding Operation under the General Discharge Permit be **REVERSED**.

May 30, 2018
Date Decision Issued


David Hofstetter
Administrative Law Judge

DH/cj
#172355

REVIEW RIGHTS

Any party adversely affected by this proposed decision has twenty-one days from the receipt of the decision to file written exceptions with, and present written argument to, the Maryland Department of the Environment. COMAR 26.01.02.35. All exceptions shall be sent to the Office of the Secretary, Maryland Department of the Environment, 1800 Washington Boulevard, Baltimore, MD 21230. The Office of Administrative Hearings is not a party to any review process.

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