

# DIRT

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## Welcome to DIRT

An agricultural newsletter produced by Gislason & Hunter LLP with guest writers who are experts in a variety of agribusinesses. This newsletter is designed to provide up-to-date industry news for all of those who have dedicated their lives to providing food for the world. The title DIRT is inspired by the Iowa poet, Paul Engle and his poem “The Many Faces of Our Land.”

## The Many Faces of Our Land

The Midwest is the Heartland of the Heartland. Its greatest single Force is dirt – fat dirt; out of its soil each year More wealth produced than in all of the gold mines of the world. Gently the land rises and falls, not flat, not broken into steep hills, But always tilting its fertile face to the sun.

—*In tribute to Paul Engle*

## RECENT CASES OF INTEREST



**By Gary Koch**  
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### *Syngenta Seeds, Inc. vs. Bunge North America, Inc.*

**The Parties.** Syngenta Seeds, Inc., a Delaware corporation with its principal place of business in Minnetonka, Minnesota, is a major commercial seed breeder and biotech company. Syngenta developed a genetic trait within corn sold under the Agrisure Viptera Trademark (“Viptera”).

Bunge North America, Inc., is a New York corporation with its principal place of business in St. Louis, Missouri. Bunge operates grain mills and grain warehouse facilities in the Central US – to include the State of Iowa.

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**The Dispute.** Syngenta brought legal action against Bunge in the United States District Court for the Northern District of Iowa. Prior thereto, Syngenta had launched commercialization of Viptera for the 2011 planting season. Bunge announced pursuant to a policy posted on July 5, 2011 (Policy), that it would not accept the delivery of Viptera to Bunge facilities. Syngenta disputed Bunge's decision and claimed that Bunge's decision was unfair and contrary to law. Bunge claimed that its decision was appropriate for reasons that included the lack of an import approval by China.

In the Complaint filed by Syngenta, Syngenta sought injunctive and other relief restraining Bunge from posting its Policy with regard to non-acceptance of Viptera for recovery of and damages associated with such policy. Syngenta filed a Motion for Preliminary Injunction seeking expedited review with regard to enjoining Bunge's Policy of non-acceptance. The District Court denied the relief requested by Syngenta pursuant to a Memorandum Opinion and Order entered on September 26, 2011.

**Factual Issues.** In making its legal analysis, the Court considered factual arguments which included the following: (i) the

impact of Syngenta's existing domestic and foreign approvals; (ii) the history of Bunge's posted policies to include what the Court called Bunge's "New Policy" of July 5, 2011; (iii) whether China is a "major importer"; (iv) Bunge's refusal to change its Policy at Syngenta's request; (v) the position of other elevator companies regarding Viptera; and, (vi) the harm to Syngenta's reputation and good will on account of Bunge's actions.

**Legal Issues.** Syngenta claimed that Bunge violated 7 USC § 241, et. seq. (the United States Warehouse Act) (USWA). The USWA includes the requirement that warehouse operators shall deal in a fair and reasonable manner with persons seeking to store grain. Syngenta claimed that Bunge's policy of refusal to accept Viptera was not fair and reasonable. The Court declined to find that Syngenta had an independent private right of action to remedy an alleged violation of the statute. Similarly, the Court found that Syngenta had no standing to assert a violation of Bunge's license agreements with the United States Department of Agriculture (USDA) on account of non-compliance with USDA.

Syngenta also claimed that Bunge violated 15 USC § 1125, et. seq. (the Lanham Act). Syngenta claimed that Bunge's posted Policy refusing delivery of Viptera because of being "unable" to accept the same constituted false or misleading advertising which is prohibited by the Lanham Act. The Court found that since Bunge and Syngenta were not commercial competitors; and because Bunge's posted Policy did not rise to the level of "commercial speech" Syngenta did not have a remedy under the Lanham Act.

Syngenta raised a number of other claims, based largely on Iowa law, and which were for the most part either deemed pre-empted by Federal regulation or deferred for a determination on the merits of the case.

**Conclusion.** The Court concluded that Syngenta was not entitled to a preliminary injunction. The Court in its conclusion stated that:

"While I acknowledge that Syngenta does face a substantial threat of reputational harm in the absence of a preliminary injunction, I am not convinced that the harm is of Bunge's making. Moreover, I find that disproportionate harm would fall upon Bunge, if I were to enjoin its actions in the manner that Syngenta requests. Bunge's decision to reject Viptera corn at all of its locations was a legitimate reasonable business decision; the injunction would impose prodigious costs on Bunge for a situation that Bunge did not create; and Bunge's purported promise in April 2010 to accept Viptera corn once that corn had received import approval in Korea and Japan simply does not make it inequitable for Bunge to decide for the following crop year not to accept Viptera corn, so that it could service substantial export contracts for corn to China."

The Court noted that:

"The public interest favors denying preliminary injunctive relief, because the public interest in fostering export markets for United States corn, in allowing business to make legitimate business decisions, and in allocating the risk of commercialization of a new trans-genetic corn trait upon the party that commercialized the trait would thereby be best served."

As noted above, the matter was heard on the basis of a request for preliminary injunctive relief. The Court has not yet made a determination as to the merits of the underlying action.



***Sheila Adams, et. al. vs. Pilgrims Pride Corporation.***

**The Parties.** Adams, and other named Plaintiffs (collectively “Growers”) are former poultry growers who produced poultry on their farms under contract with Pilgrims Pride Corporation (“PPC”). PPC is a large integrated poultry company that produces poultry at owned facilities as well as at facilities under contract with Growers.

**The Dispute.** The *Adams* decision is part of a larger and complex set of bankruptcy and non-bankruptcy proceedings involving the bankruptcy of PPC and disposition of various claims made in the PPC bankruptcy case. In *Adams*, after a bench trial that lasted from mid-June to mid-August of 2011, the Court considered evidence and heard argument regarding claims that PPC violated the Packers and Stockyards Act, the Arkansas Deceptive Trade Practices Act, and the Louisiana Deceptive Trade Practices Act.

The Trial Court entered judgment pursuant to some, but not all of the claims made by the Growers, and awarded damages to certain of the Growers.

**Factual Issues.** In making its legal analysis, the Court considered factual issues which included the following: (i) The contracts between PPC and its Growers – including termination provisions in those contracts; (ii) operational changes made by PPC to stem PPC’s financial losses; (iii) actions that the Court found PPC undertook to curtail the supply of chickens and apply a proactive stimulus to the market to raise prices; and, (iv) purposes and effect of idling plants;

**Legal Issues.** Growers complained that PPC had violated certain provisions as set forth in the Packers and Stockyards Act (the Act or PSA). Basically, Growers argued that alleged unlawful idling of plants led to cessation of performance of agreements with Growers that was in violation of law. In furtherance of their claims, Growers asserted a number of legal arguments.

Growers alleged that PPC had violated 7 USC § 192(a) (engaging in or using unfair, unjustly discriminatory, or deceptive practices). The Court found that PPC did not violate § 192(a) of the Act.

Growers alleged that PPC’s action violated 7 USC § 192(b) (the making or giving of undue or unreasonable preferences or advantage to any particular person or locality or subject any particular person or locality to any undue or unreasonable prejudice . . .”). The Court found that PPC did not violate § 192(b) of the Act.

Growers alleged that PPC’s action violated certain provisions of the Arkansas Deceptive Trade Practices Act and the Louisiana Deceptive Trade Practices Act (making materially false representations to Growers with respect to upgrading facilities and other matters). The Court found no violation of either of these state law provisions.

Growers alleged that PPC’s actions had violated 7 USC § 192(e) of the Act (engaging in any course of business or doing any act for the purpose or with the effect of manipulating or controlling prices, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article, or of restraining commerce). The Court found that PPC did violate § 192(e) of the Act. In

connection therewith, the Court noted that the Growers were required, under the Act, to prove that an alleged unlawful practice caused competitive injury. The Court found that the facts supported the existence of such competitive injury in connection with idling of the Eldorado, Arkansas plant. Idling the El Dorado plant, curtailed the supply of chickens which resulted in, and which had the purpose of, manipulating or controlling prices. This manipulation of prices was the unlawful practice causing competitive injury which was the prerequisite for Growers’ claim under the Act. Once the competitive injury was shown, then Growers would have standing to raise the impact of those anti-competitive actions on the Growers themselves; and, to assert damages arising therefrom in an adverse impact on Growers due to the refusal by PPC to continue to raise poultry with the Growers.

**Conclusion.** The Court found, in connection with its analysis of the Packers and Stockyards Act, that:

Enacted in 1921, the PSA’s primary purpose is “to assure fair competition and fair trade practices in livestock marketing and in the meat packing industry” and “to safeguard farmers . . . against receiving less than the true market value of their livestock.” . . . The “chief evil” Congress sought to guard against was the monopolistic practices of the packers, “enabling them unduly and arbitrarily to lower prices to the shipper, who sells, and unduly and arbitrarily to increase the price to the consumer, who buys.” The PSA is a remedial statute, and it is “to be construed liberally in accord with its purpose to prevent economic harm to producers and consumers at the expense of middlemen.”

The determination of the Trial Court is subject to Post-Trial Motions and Appeal.

# Allied Industries Commentary Agricultural Advocacy



**By Brian Foster**  
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As harvest accelerates in the Upper Midwest and we begin to get a clearer picture of what this year's corn and soybean crops will look like, the picture from Washington remains cloudy, especially related to federal budgets, deficits, the national debt, and the impacts on U.S. farm policy. In fact, as the Congressional Joint Select Committee on Deficit Reduction, known as the Super Committee, meets to attempt to hammer out \$1.5 Trillion in budget cuts over the next 10 years starting in Fiscal Year 2013, nothing is clear as to where and when those cuts will come from, how federal lawmakers will incorporate the Super Committee's recommendations into the coming fiscal years' appropriations (spending) bills for agriculture, or what the 2012 Farm Bill might look like.

The Super Committee must deliver its recommendations to the rest of the Congress by November 23, and the Congress must then approve the deficit/debt reduction package by the end of this year. If then signed into law by the President, the debt-reduction package would kick in October 1, 2012. Frankly, I find it highly unlikely the Super Committee will be able to agree on spending cuts of the magnitude required, and even if they do, keep in mind that anything Congress creates they can also dismantle or ignore, and when it comes to spending cuts and deficit reduction, that seems to be the norm.

The federal budget annual deficit and the accumulating national debt are complicating efforts to develop a new Farm Bill. The existing legislation, the "Food, Conservation, and Energy Act of 2008" expires next year. Although numerous oversight and field hearings have been held by both the Senate and House Agriculture Committees,

lawmakers don't know yet what budget baselines they will have to work with as they develop the next Farm Bill. The Chairs of the House and Senate Agriculture Committees have sent a joint letter to the Super Committee recommending a total of \$23 Billion in net deficit reduction from mandatory programs under the oversight the Agriculture Committees, but they did not spell out any detail of how to achieve those budget savings.

One thing is almost certain in my opinion; direct commodity payments will be scrapped in order to maintain a federal crop insurance



# Celebrating 75 Years

program. In a related Farm Bill development, Minnesota Congressman Collin Peterson is already out front with a new dairy program proposal that will include a voluntary risk management component.

There is some good news coming from Washington; the Congress has overwhelmingly passed legislation that will put into force the three previously-negotiated free trade agreements with South Korea, Colombia, and Panama. The three agreements will be highly beneficial to US agriculture, especially the pork and beef sectors. The U.S. Meat Export Federation estimates full

implementation of the three deals will increase annual U.S. agricultural exports by \$1.9 Billion, \$371 million, and \$46 million, respectively.

Many of us are wondering what has happened to the highly-controversial GIPSA (Grain Inspection, Packers and Stockyards Administration) proposed rule that was published by USDA on June 22, 2010 and supposedly generated over 60,000 comments! In USDA's words, the set of proposed rules were to "describe and clarify conduct that violates the Packers and Stockyards Act and allow for more effective and efficient enforcement by GIPSA." No other proposed rule by USDA has likely generated the acrimony that this rule has. Hundreds of Members of Congress have written to Agriculture Secretary Vilsack with their concerns about the scope and potential economic impact of the proposed rule. The House of Representatives, in its annual agricultural appropriations bill, would prevent USDA from spending any money to implement the proposed rule, and the Administration has finally, and reluctantly, sent the proposed rule to the Office of Management and Budget (OMB) for a full-scale economic analysis, something the USDA insisted for months was not necessary.

Very little new information has come out about the status of the proposed GIPSA rule in the past several months, but one can be sure that the next announcement about it coming out of USDA will generate a new firestorm from the agricultural community.

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# Client Commentary

## Feeding the Future — Agriculture for the next Forty Years



By Bob Christensen  
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A team of academics, led by Jonathan Foley at the Institute on the Environment at the University of Minnesota, recently published an article in the well-known scientific journal *Nature* called “Solutions for a cultivated planet” that drew attention to the fact that world food production will need to double in the next 40 years to feed another two billion people on the planet.

Pessimists fret that agriculture is not up to the task without destroying earth’s productive capacity in the process. In fact, a radio story about the article was called, “Facing Planetary Enemy No. 1: Agriculture.” I strongly disagree with that characterization – those of us involved in the “noble endeavor” of food production are optimistic that agriculture will continue to advance through new technologies to face the challenge of feeding another two billion people in a sustainable fashion.

The Foley article laid out five steps that the authors state could lead to sufficient world food production as well as protection of the environment over the next 40 years. Those five things are:

1. Stop agricultural expansion in tropical areas that are environmentally sensitive;
2. Close the yield gap on under-performing ag lands (in Africa, Ukraine, etc.);
3. Increase cropping efficiency by better use of fertilizer and irrigation water;
4. Reduce storage losses and food waste;
5. Reduce meat consumption.

I think the authors are on-target with the first four ideas, especially the theme of increasing the intensification of agricultural production. Technology has, over and over again, allowed

American farmers and agricultural producers around the world to increase production on a given area of land, while decreasing the inputs needed to produce the same amount of food.

I take great exception to the last recommendation – reducing meat consumption. I think that idea indicates an ignorance of what people around the world aspire to, and that is an increased amount of animal protein in their diets because they know that is a good and necessary thing for their families.

Livestock production allows for the production of much-needed protein using a wide variety of feedstocks that cannot be directly consumed by humans. In addition, the manure resource from livestock production is an important input for sustained crop production all over the world and decreases our dependence on fossil fuels that are used to produce fertilizers.

Consumers around the world are demanding different foods, including increased animal protein in their diets. Markets, in turn, respond to that increased demand and when prices increase, producers respond. In response to the article in *Nature*, noted agricultural economist Thomas Hertel from Purdue University had this to say: “When food gets scarce, markets do respond. Prices go up, farming gets more profitable, and farmers grow more food. Markets will balance supply and demand for food.”

It seems to me that, although well-meaning in their effort to bring attention to the challenges we face in feeding the future world with two billion more people, the authors ignore the realities of the marketplace and the aspirations of billions of people in the world to improve their family’s diets through increased consumption of animal proteins. Those of us involved in animal agriculture will do our part to feed the future.

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# REGULATIONS IN FLUX: THE EPA'S ONGOING ATTEMPTS TO REGULATE ANIMAL LIVESTOCK PRODUCERS THROUGH ITS NPDES PERMITTING PROGRAM



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In 2003, the Environmental Protection Agency (EPA) revised its regulations, implementing the Clean Water Act's (CWA) oversight of Concentrated Animal Feeding Operations (CAFOs). Several parties challenged these 2003 revisions, and the United States Court of Appeals Second Circuit (Second Circuit) reviewed the challenges in *Waterkeeper Alliance, Inc. v. Environmental Protection Agency*, 399 F.3d 486 (2d Cir. 2005). In 2008, the EPA, responding to *Waterkeeper*, revised its regulations. Subsequently, numerous parties challenged the 2008 revised regulations, which were again rejected in part as beyond the scope of the CWA, this time by the United States Court of Appeals Fifth Circuit (Fifth Circuit) in *National Pork Producers Council v. Environmental Protection Agency*, 635 F.3d 738, (5th Cir. 2011). In this article, I would like to give a brief overview of these regulatory changes and judicial decisions.

## A. Statutory Background.

In 1948, Congress enacted its first major legislation regulating water quality and pollution, the Federal Water Pollution Control Act (FWPCA). FWPCA encouraged states to enact uniform laws to combat water pollution, recognizing "that water pollution control was primarily the responsibility of state and local governments." In 1972, FWPCA was superseded by the CWA, which replaced the state-run regulation of discharges with an obligation to obtain and comply with a federally-mandated National Pollutant Discharge Elimination System (NPDES) permit program.

The NPDES permit program authorizes the EPA to "issue a permit for the discharge of any pollutant, or combination of pollutants . . ." If a facility requests a permit, it can discharge within certain parameters called effluent limitations and will be deemed a point source. A point source is regulated by its NPDES permit issued by the EPA or one of 46 States (including Minnesota) authorized to issue permits. If a point source discharges without a permit, it is strictly liable for discharging without a permit and subject to severe civil and criminal penalties. For example, monetary sanctions can accrue at a rate of up to \$50,000 per violation, per day, for criminally negligent violations, or up to \$100,000 per violation, per day, for repeated, knowing violations. Criminal violators may be subject to imprisonment.

## B. CAFO's Regulatory Background.

The EPA enacted the first set of CAFO regulations in 1976. Since that time, the EPA has made only two attempts at substantive change to these rules, in 2003 and 2008.

### 1. 1976 Regulations

The 1976 regulations specified that CAFOs that wanted to discharge were required to have a permit primarily based on the number of animal units housed in the facility. All large CAFOs, those with 1,000 or more animal units, were required to have an NPDES permit to discharge pollutants. Medium CAFOs, those with 300 to 1,000 animal units, were required to have a permit if they emitted certain discharges. Finally, most small CAFOs, those with 300 animal units or less, generally were not required to have a permit in most instances. Under this regulatory scheme, if a discharging CAFO was required to have a permit, but did not have one, it would be subject to civil or criminal liability.

The EPA was eventually sued by certain environmental advocacy groups, claiming that its CAFO regulations failed to address changes that have occurred in the size and concentration of CAFOs since 1976.

### 2. The 2003 Rule and *Waterkeeper v. EPA*.

Under the 2003 Rule, all CAFOs were required to apply for an NPDES permit whether or not they discharged. Specifically, every CAFO was assumed to have a "potential to discharge" and had to apply for an NPDES permit. The 2003 Rule also expanded the definition of exempt "agricultural stormwater discharge" to include land applications, but only if the land application complied with a site-specific Nutrient Management Plan (NMP). Otherwise, land application of manure from a CAFO would be considered by the EPA to be an unpermitted discharge in violation of the CWA.

The 2003 Rule also required all CAFOs to develop and implement a site-specific NMP and "best management practices" (BMPs), addressing storage of manure and wastewater, management of mortalities and chemicals, and site-specific protocols for land application. However, neither the NMPs nor the BMPs were to be included in the permit itself, nor



reviewed by the EPA or one of its delegated state regulatory agencies.

In *Waterkeeper*, both environmental groups and farm industry groups challenged the 2003 Rule on several grounds. 399 F.3d at 497. The Court held that the EPA cannot require CAFOs to apply for a permit based on a “potential to discharge.” *Id.* at 504–06. The Second Circuit decided that the CWA “gives the EPA jurisdiction to regulate and control only actual discharges—not potential discharges, and certainly not point sources themselves.” *Id.* at 505.

The Second Circuit further concluded that the EPA’s determination that appropriate land application practices were properly excluded as agricultural stormwater discharge, was a reasonable interpretation of the CWA. *Id.* at 507–09. But, the Court concluded that the EPA’s Rule exempting NMPs from the permitting process violated the statutory requirement that it must verify compliance with applicable effluent or discharge limitations. *Id.* at 502–03.

### 3. The 2008 Rule

On November 20, 2008, the EPA published rules intended to respond to and comply with the *Waterkeeper* decision. The 2008 Rule purported to “clarify” the “duty to apply” liability scheme by providing that CAFOs “propose to discharge” if they are “designed, constructed, operated, or maintained such that a discharge would occur.” Furthermore, each CAFO operator was required to make a case-by-case assessment of whether it discharges or proposes to discharge, considering, among other things, climate, hydrology, topology, and the man-made aspects of the CAFO. It further provided that a CAFO could be held liable for failing to apply for a permit, in addition to being held liable for the discharge itself. With regard to NMPs, the 2008 Rule restates that NMPs are an enforceable part of an NPDES permit and provides that the terms of NMPs would remain the same as the terms articulated in the 2003 Rule. In practical effect, implementation of the 2008 Rule would have

essentially required all CAFOs to obtain an NPDES Permit despite the limitations on the EPA’s regulatory authority identified by the *Waterkeeper* court.

### C. National Pork Producers Council v. EPA

In March 2011, the Fifth Circuit issued its decision in *National Pork Producers Council v. EPA*, 635 F.3d 738, (5th Cir. 2011), regarding numerous challenges brought to the 2008 Rule, and specifically the EPA’s revised “duty to apply” scheme and the Rule’s manner of regulating land application.

The Fifth Circuit concluded that the 2008 Rule’s attempt to impose liability for failing to apply for an NPDES Permit upon a CAFO that has a discharge but had not applied for a permit exceeded the EPA’s authority by supplanting the CWA’s comprehensive liability scheme. The Fifth Circuit noted that the *Waterkeeper* Court had already held that a rule requiring all CAFOs to apply for a permit exceeded the EPA’s authority under the CWA. The Fifth Circuit found the Second Circuit’s analysis “instructive and persuasive” and agreed that the EPA does not have the authority to require CAFOs, which only in its terms “propose to discharge,” to apply for an NPDES permit. The Fifth Circuit specifically held that “the EPA’s authority is limited to the regulation of CAFOs that discharge. Any attempt to do otherwise exceeds the EPA’s statutory authority.” However, the Fifth Circuit did recognize the EPA’s statutory authority to require all CAFOs that do discharge to obtain an NPDES Permit. The 2008 Rule also provides that a CAFO can be held liable for failing to apply for a permit. The Fifth Circuit agreed with the challengers that the EPA’s liability regulations as drafted were beyond the delegated authority given it under the CWA and therefore unenforceable.

The Farm Petitioners had also claimed that the 2008 Rule’s requirement that all NMPs address protocols for land application exceeded the EPA’s statutory authority. The 2008 Rule requires that “[a] permit issued to a CAFO must include a requirement . . . to develop and implement” an NMP. In essence, the Fifth Circuit construed the Farm challengers’ criticisms of the 2008 Rule to, in fact, be a challenge to the underlying requirement for extending NMPs and BMPs to land application in the first instance; a challenge the Fifth Circuit rejected as untimely, concluding that such challenges should have been raised in the *Waterkeeper* litigation.

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# Characterizing Commodity Positions –

## Hedging vs. Speculative Positions?



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Are you aware that there are layers of rules that you may need to follow with respect to your commodity futures contracts, swaps, and other derivative positions? For example, the U.S. Commodity Futures Trading Commission (the “CFTC”) has its own set of rules promulgated under the Commodity Exchange Act designed to curtail any excessive speculation in commodity trading, while the Internal Revenue Service (the “IRS”) treats any non-hedging transaction as a capital transaction and does not allow deduction of losses incurred in non-hedging transactions from ordinary income. Those who have outstanding loans from any Farm Credit System organization are prohibited from taking any speculative positions under the Farm Credit Administration regulations. Each set of rules, however, define the distance between “hedging” and “speculative” differently—for the most part, because of their different regulatory purposes.

For instance, under 17 C.F.R. § 150.2, certain positions are allowed regardless of whether they may or may not be characterized as *bona fide* hedging transactions or positions within the meaning of 17 C.F.R. § 1.3(z). In turn, the term “bona fide hedging transaction,” which is, in general, exempt from the position limit provided in 17 C.F.R. § 150.2, is defined to factor into whether the future positions are “economically appropriate to the reduction of risks in the conduct and management of a commercial enterprise.” See 17 C.F.R. § 1.3(z)(1).

On the other hand, the definition of “hedging transactions” under the Internal Revenue Code and the way the IRS enforces its regulations thereunder is much narrower and specific only to those actual kinds and quantities of commodities used for or produced in the taxpayer’s trade or business. Accordingly, under 26 USC § 1221(b)(2)(A)(i), the term “hedging transaction” means only such transaction entered into by the taxpayer in the normal course of the taxpayer’s trade or business primarily to manage risk of price changes with respect to ordinary property which is *held or to be held* by the taxpayer. In addition, 26 USC § 1221(a)(7) requires a hedging transaction to be clearly identified as such before the close of the day on which it was acquired, originated, or entered into. Accordingly, any commodity derivative transaction that is excessive; not identified or not identifiable; or, taken for others (even if for a related or affiliated parties), may be determined to be a non-hedging or speculative transaction under the Internal Revenue Code. If so, any loss resulting from a non-hedging transaction will be characterized as a capital loss and any such loss in excess of the taxpayer’s capital gain will not be allowed as a deduction under the Internal Revenue Code.

Considering the layers of complex requirements and limitations, a sound business practice may require having and regularly updating a written hedging policy that is designed to safeguard against unintended trouble and to optimize realization of the intended economic benefits from the commodity transactions.

Although the EPA has yet to formally respond to the Fifth Circuit's decision, its website does state that the "EPA plans to revise the NPDES CAFO regulations consistent with the Fifth Circuit's decision."

#### **D. EPA Proposed Reporting Rule**

On October 21, 2011, the EPA published a proposed rule for obtaining basic information from CAFOs to support its regulatory responsibility to maintain water quality protection under the CWA. The proposed rule has two options, either to require all CAFOs to report certain facility-specific information by mandating a required survey report except in situations where a state agency has the necessary information already, or to limit reporting to those CAFOs that fall within certain areas identified by the EPA to have water quality concerns, with an emphasis on obtaining the necessary information primarily from alternative sources rather than the CAFO operator itself. This proposed rule was promulgated by the EPA as part of its settlement with certain environmental challengers to the 2008 Rule.

Under the Proposed Rule, reporting CAFOs would have to provide site-specific information including:

- The name and address of the owner and operator;
- The name and address of the integrator, if a contract operation;
- The location, type, capacity, and number of animals at the CAFO;
- The land application process, available acreage, NMP, and record retention practices of the CAFO; and
- Whether the CAFO has applied for an NPDES Permit.

According to the EPA, its Proposed Rule is consistent with the Fifth Circuit's *NPPC* decision because the EPA's authority to collect information from point sources under the CWA is broader than its authority to require and enforce an NPDES permitting requirement. "Today's notice proposes options for gathering basic information from CAFOs; it does not require them to obtain permits."

The Proposed Rule is open for public comment through December 20, 2011. The EPA plans to hold informational Webinars in November, 2011, to provide an overview of the Proposed Rules and answer questions concerning its

requirements. Public access to the Webinar is available at <http://cfpub.epa.gov/npdes/af/aforule.cfm>. The EPA currently anticipates issuing a final rule in July 2012.

#### **E. Changes to Minnesota's Feedlot Permitting Requirements.**

During the 2011 Special Session of the Minnesota Legislature, among other things, the Legislature amended Subdivision 7c of Minn. Stat. § 116.07, which addressed the Minnesota Pollution Control Agency's (MPCA's) statutory authority to require CAFOs to obtain NPDES permits independently of the MPCA's authority as a delegated agency for the EPA to enforce the CWA. Previously, Minnesota law provided that the MPCA must require all CAFOs with 1000 animal units or more to obtain an NPDES Permit. However, the amendment now limits the MPCA's ability to mandate an NPDES Permit to feedlots "only as required by federal law," which suggests that the same limitations imposed on the EPA rulemaking authority by *Waterkeepers* and *NPPC* (namely, that only a CAFO that is discharging may be required to obtain an NPDES Permit) are now applicable to the MPCA's ability to mandate that a CAFO nonetheless obtain an NPDES Permit as an independent requirement of Minnesota environmental law.

The MPCA has not yet formally promulgated any proposed revisions to its feedlot permitting program or otherwise, on a formal basis, modified its existing regulations to address the changes in its permitting regime as a result of this legislative amendment.

#### **CONCLUSION**

After almost 30 years of relative stability in feedlot environmental regulation, the EPA embarked on a course of changes in 2003 that remain unsettled to this day. Twice, the EPA has attempted to expand its regulations to, in effect, require all CAFOs to obtain NPDES Permits, and twice, the EPA has been told by a Federal Circuit Court that such regulation exceeds its authority under the CWA. The extent to which these judicial decisions will ultimately impact the permitting regime in place for CAFOs, and Minnesota's own state legislative response to these judicial and regulatory changes, remains uncertain. What is certain, however, is that all animal livestock producers should closely monitor these developments as they play out at the federal, state, and local levels.



# *Gislason & Hunter* AGRICULTURE PRACTICE GROUP

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<b>Andrew A. Willaert Jr.</b>	Mankato Office, Des Moines Office
<b>C. Thomas Wilson</b>	New Ulm Office
<b>Sara Wilson</b>	Minneapolis Office



## *Ag Practice Services*

Gislason & Hunter is well-recognized within Minnesota and throughout the Midwest for our knowledge and experience in the agricultural industry. Our attorneys represent and advise a broad spectrum of national, regional, and local agribusiness clients – including livestock producers, packers, input suppliers, agricultural lenders, and individual farmers – in all aspects of their operations. Our work in agricultural matters includes both transactional advice and litigation in the following areas:

- Bankruptcy
- Business Formation and Restructuring
- Commercial Transactions
- Employment Issues
- Environmental Regulations
- Estate and Succession Planning
- Financing and Debt Restructuring
- Foreclosure and Debt Collection
- Governmental Regulations and Program Payments
- Insurance Disputes
- Intellectual Property Rights
- Manufacturing and Distribution
- Marketing and Production Contracts
- Personal Injury Claims
- Zoning and Permitting Issues

### REPRESENTATIVE MATTERS

- Negotiated and drafted long-term marketing agreements for large, multi-state swine producers
- Drafted both turn-by-turn and long-term independent grower agreements for swine producers
- Drafted credit agreements, forbearance agreements, and other loan documents for loans to agricultural producers
- Structured multi-state production and distribution systems
- Negotiated and drafted asset acquisition and disposition agreements of all sizes
- Provided advice and representation for banks, bank participations, and bank syndications related to agricultural loans
- Litigated commercial and corporate disputes in state and federal courts throughout the Midwest
- Represented agricultural producers and allied industries before local, state, and federal regulatory agencies

## LOCATIONS

### NEW ULM

2700 S. Broadway  
P.O. Box 458  
New Ulm, MN 56073-0458  
P 507-354-3111  
F 507-354-8447

### MINNEAPOLIS

701 Xenia Ave. S., Suite 500  
Minneapolis, MN 55416  
P 763-225-6000  
F 763-225-6099

### MANKATO

Landkamer Building, Suite 200  
124 East Walnut Street  
Mankato, MN 56001  
P 507-387-1115  
F 507-387-4413

### DES MOINES

Bank of America Bldg.  
317 Sixth Avenue Suite 1400  
Des Moines, IA 50309  
P 515-244-6199  
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