



2100 M ST., N.W.  
STE 170-317  
WASHINGTON, D.C. 20037  
202-495-1403  
TSPIGGLE@SPIGGLELAW.COM

To: North Carolina Composting Council, Inc.

From: J. Thomas Spiggle, Esq.

Date: February 16, 2010

Re: Application of Clean Water Act wastewater-permitting procedures to composting operations

---

### **QUESTIONS PRESENTED**

- 1) Does the North Carolina Division of Water Quality (“NCDWQ”) have a basis in law to find that runoff from a) finished compost or b) from the composting process is wastewater requiring an NPDES permit?
- 2) What options exist for the Council if NCDWQ maintains its current position?
- 3) What liability exists for composting operations that violate an NPDES permit?

### **I. RESEARCH PARAMETERS**

In conducting research the primary focus was placed on any court decisions directly relevant to the NPDES storm-water/wastewater runoff issue. Other relevant topics are included in this memorandum – e.g., potential liability for permit violations – but these sections are not the result of exhaustive research. Key supporting documents are attached.

### **II. BACKGROUND INFORMATION**

The Clean Water Act (“CWA”) establishes national regulatory standards and practices for the control of water impurities and pollutants. The act gives the Environmental Protection Agency (“EPA”) and some state agencies the power to regulate discharges to waterways. The CWA creates a floor, not a ceiling, on state regulation of water quality. The states, through their statutes and agencies, are still free to go above and beyond the CWA’s baseline. However, state agency decisions still must be rationally related to the statute, whether federal or state, that they are seeking to enforce and must be reasonable given the evidence for and against the decision. See [In re Entergy Nuclear Vt. Yankee Discharge Permit 3-1199, 2009 VT 124 \(Vt. 2009\)](#)

### III. ANALYSIS

A. *Does The NCDWQ Have A Basis In Law To Find That Runoff From Finished Compost Is Wastewater?*

Short answer: No.

The nationwide legal research conducted for this memorandum did not produce any legal opinions that directly addressed this issue. As noted below, some courts have issued opinions that are tangentially relevant.

The CWA defines “Process Wastewater” as “any water which, **during manufacturing or processing**, comes into direct contact with or results from the production or use of any raw material, intermediate product, finished product, byproduct, or waste product.” See [40 CFR 122.2](#) (emphasis added).

Reading the definition to include any water that comes into contact with a finished product would allow for a “process wastewater” designation for any water that touches any manufactured object, from an automobile to a fork. Not only would such a regulatory scheme be impossible to apply, courts have rejected similar irrational interpretations of the CWA. See [United States v. Plaza Health Lab., 3 F.3d 643 \(2d Cir. N.Y. 1993\)](#) (reversing conviction under CWA for dumping human blood into river, ruling that human beings do not constitute “point sources” of pollution).

In fact, the EPA’s own guidance suggests that runoff from finished compost are not a pollutant. In no less than three of the best management practices published by the EPA for construction sites, finished compost was recommended as a tool for preventing soil erosion and storm water management. In listing the advantages of using finished product compost blankets, compost filter berms, and compost socks for storm-water management the agency cites a study finding that “[c]ompost can remove pollutants, such as heavy metals; nitrogen; phosphorus; oil and grease; and fuel, from storm water, thus **improving** downstream water quality.” See Best Practices: Compost Blankets, [http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=factsheet\\_results&view=specific&bmp=118](http://cfpub.epa.gov/npdes/stormwater/menuofbmps/index.cfm?action=factsheet_results&view=specific&bmp=118).

Furthermore, EPA studies show that, even though the nutrient and heavy metal content of composts tends to be statistically higher than average topsoils, this “does not necessarily translate into higher metals and nutrient concentrations or loads in storm water runoff.” Moreover, “although the composts used in the study contained statistically higher metal and nutrient concentrations than the topsoils used, the total masses of nutrients and metals in the runoff from the compost-treated plots were **significantly less** than plots treated with topsoil.” *Id.* Another study “found that nitrogen and phosphorus

## MEMORANDUM - CWA

loads from hydroseed and silt fence treated plots were significantly greater than plots treated with compost blankets and filter berms.” *Id.*

Thus, EPA’s own guidance are at odds with DWQ’s proposed rule stating that runoff from finished compost at a composting site is process wastewater subject to NPDES permitting.

### SIC Codes

Most states classify composting under SIC code 2875, listed as the mixing of fertilizers. This code requires storm water, not wastewater, NPDES permitting. See Category (ii) of [40 CFR 122.26\(b\)\(14\)](#). The NCDWQ claims that composting falls under SIC code 2879, pesticides and agricultural chemicals, not elsewhere classified. More research is needed to determine whether this classification is reasonable, but so far there is no evidence that any other states classifies compost as an agricultural chemical, which suggests that the NCDWQ may not have a rational basis for such a classification.

While states have broad authority to regulate discharges from agricultural and industrial operations, courts requires that any regulation be rational. For the reasons noted above – *e.g.*, that finished compost actually improves the quality of storm-water runoff – an NCDWQ regulation requiring an NPDES wastewater permit would likely not pass the rational-basis test.

B. Does The NCDWQ Have A Basis In Law To Find That Runoff From Pre-finished Compost Is Wastewater Requiring An NPDES Permit?

Short Answer: Arguable not.

Both the NCDWQ and the Council agree that water runoff from pre-finished compost requires some treatment, but this does not mean that the agency is compelled by the CWA to consider it wastewater. In fact, evidence from other state agencies suggests the contrary.

Without conducting an exhaustive search one cannot say that absolutely no state has viewed runoff from finished composting as requiring a wastewater NPDES permit. However, in the relatively extensive research compiled for this memorandum, none were found. In fact, many states seem to be reluctant to require composters to undergo NPDES permitting of any kind, exempting small operations (Oregon) and exempting others who use yard waste feedstock (Minnesota).<sup>1</sup> Listed below are approaches other states have

---

<sup>1</sup> In the event that the NCDWQ moves forward with its proposed rule, an exhaustive survey of all states with NPDES permitting programs could serve as helpful evidence in any court challenge.

## MEMORANDUM - CWA

taken. Note that unlike the proposed NCDWQ regulation, these states used a tailored approach to regulating runoff from composting operations.

### Minnesota

State regulators require only industrial storm-water permits for most compost operations in the state with an exception for composters who deal only in yard waste, who are completely exempted from NPDES permitting. Minnesota considers composting to be covered under Category (ii) of 40 CFR 122.26(b)(14), which includes SIC code 2875 – Fertilizers, mixing only which includes compost. See A Guide to Minnesota’s Industrial Storm-water Permit for Solid Waste Facilities, <http://www.bvsde.paho.org/bvsacd/cd48/wq-strm3-09.pdf>.

### Oregon

Oregon similarly assigns composting operations to SIC code 2875 and therefore does not require NPDES wastewater permits. In addition, after being contacted directly via phone a representative of the Oregon Department of Environmental Quality (“ODEQ”) indicated that Oregon specifically did not consider composters to be creating “process wastewater” because they do not add water during composting and therefore are not “processing” anything.

Oregon recently published new regulatory scheme for composters based on feedstock composition and the size of the operation. Operations are to be screened to determine whether they pose a high or low risk of water contamination. Those that pose low risks will be able to operate under a registration permit. Those that pose a higher risk must create an operations plan for ODEQ approval and then will receive a compost permit. See New Rules Regulating Composting Facilities, <http://www.deq.state.or.us/lq/pubs/factsheets/sw/NewRulesRegulatingCompostingFacilities.pdf>.

While these new regulations do not bear specifically on NPDES permitting they exhibit the necessity of tailored regulation of the industry and that one-size-fits-all determinations, such as those proposed by the NCDWQ, without consideration of actual risks, are unreasonable.

Bottom Line

The fact that other states have not to date not required wastewater permitting for compost operations could be used to argue that NCDWQ's proposal is not groundbreaking. To the contrary, it is irrational given the other tools that the agency could use to prevent harmful discharges. Oregon's regulatory scheme serves as direct evidence that a heavy-handed NPDES permitting is not required to accomplish environmental objectives.

**IV. CHALLENGING AGENCY ACTION**

There are two ways to challenge an administrative rule. The first is to contest the procedure the agency used to promulgate the rule. Every agency must adhere to its relevant federal or state Administrative Procedure Act, and if it fails to do so a court may invalidate the rule. Common law dictates that this option is not available until after the rule has been made and all agency appeals have been exhausted.

The second is to challenge the substantive findings of the agency. Under the federal Administrative Procedure Act and its state counterparts, courts may overturn administrative decisions if they are "arbitrary and capricious." See [N.C. Gen. Stat. § 150B-51](#). It is left to the courts themselves to expound on what this standard means in practice: "The actions of an administrative agency may be considered arbitrary and capricious only when there is a lack of fair and careful consideration and when they fail to indicate any course of reasoning and the exercise of judgment." See [In re Petition of Utils., Inc., 147 N.C. App. 182 \(N.C. Ct. App. 2001\)](#). This standard, both in federal and state law, is notoriously vague and flexible, serving as a general guideline to courts, but offering little advice on actual application. It is well within reason that given the number of state and federal agencies that do not consider finished compost runoff to require an NPDES process wastewater permit, and the fact that the North Carolina Department of Water Quality itself acknowledges that, outside of the production facility, finished compost does not require NDPEs permitting, that a North Carolina court would rule the NCDWQ's finding as arbitrary and capricious.

The National Environmental Policy Act

According to the National Environmental Policy Act ("NEPA") federal agencies are required to report on the effects their decisions and programs will have on the environment by producing an Environmental Impact Statement, 42 U.S.C. § 4321. It is possible that courts may require state agencies to file such statements when it acts to enforce federal statutes. This may be an avenue for challenging NCDWQ action. North Carolina also has its own version of the NEPA, which may provide another avenue for challenging the NCDWQ's proposed rule.

**V. LIABILITY ISSUES**

Perhaps the best explanation of civil liability under the CWA for wastewater violations comes from [Northwest Env'tl. Def. Ctr. v. Grabhorn, Inc., 2009 U.S. Dist. LEXIS 101359 \(D. Or. Oct. 30, 2009\)](#):

CWA enforcement actions may be initiated by the EPA, states, and citizens. 33 USC §§ 1319, 1365(a). Citizens may bring an action in federal district court to enforce against any ongoing violations of the CWA. Section 505, 33 USC § 1365(a), authorizes citizens to bring suit against any person, including a corporation, who is alleged to be in violation of an effluent standard or limitation under the CWA. Effluent limitation is defined broadly to include 'any unlawful act under subsection (a) of [section 301] of this title.' 33 USC § 1365(f). Section 309, 33 USC § 1319(d), adjusted by 40 CFR § 19.4, provides for civil penalties of up to \$32,500.00 per day per violation. Violations occurring before March 15, 2004, carry penalties of up to \$27,500.00 per day." *Id.* at 12.

However, the CWA does not permit citizen suits for one time or wholly past violations unless they can show there is a reasonable likelihood that there will be future violations. [See Or. State Pub. Interest Research Group, Inc. v. Pac. Coast Seafoods Co., 361 F. Supp. 2d 1232 \(D. Or. 2005\)](#). Otherwise citizen suits are limited to ongoing or intermittent violations. *Id.*

In addition to liability under the CWA, tort liability may exist with regard to riparian rights for violations of an agency permit. The cases reviewed for this memorandum did not address tort liability. Thus, further research would be necessary to address this issue.

**CONCLUSION**

While no courts have tackled the issue directly, there is good evidence that the NCDWQ's proposed rule would not hold up against a legal challenge. Some states and the EPA have classified finished compost as posing no threat to the environment. For this reason, the NCDWQ will likely have a difficult time proving its decision is reasonable. Moreover, while the state clearly has an interest in regulating discharge from the composting process, it can easily do so without using the blunt instrument of the NPDES wastewater permitting process.