

Court of Appeals Upends Agricultural Permitting in South Carolina

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The South Carolina Court of Appeals on Wednesday ruled that state regulator's issuance of "no-discharge" permits for agricultural animal facilities under agriculture-specific regulations could not substitute for a "no potential to discharge" determination required under general state wastewater discharge regulations. [Blackmon v. South Department of Health and Environmental Control and David Coggins](#), Case No. 2017-002598. The May 25, 2022 ruling, if unchallenged, would fundamentally alter the way animal feeding operations are permitting in the state, and likely require National Pollutant Discharge Elimination System (NPDES) permitting for all new agricultural facilities.

The [Blackmon](#) decision focused on a proposal by multiple applicants to build eighteen broiler (chicken) houses on a 255-acre tract in Laurens County, South Carolina. The Department of Health and Environmental Control (DHEC) has historically issued only no-discharge permits for such operations, requiring, among other things, that applicants have contracts with manure brokers to safely dispose of animal waste off-site through permitted land application sites. Consequently, DHEC has treated animal facilities as falling outside the requirements for Concentrated Animal Feeding Operations (CAFOs) which require an NPDES permit or a specific determination under NPDES regulations that the operation has "no potential to discharge" pollutants.

The Court of Appeals tacitly acknowledged that, following the 2nd Circuit's decision in [Waterkeeper Alliance, Inc. v. U.S.E.P.A.](#), the *federal* NPDES regulations do not require a CAFO to seek a permit "unless there is [an actual] discharge of any pollutant[.]" [Blackmon](#) at 13. However, because South Carolina regulations were adopted under both the federal authority of the Clean Water Act *and* the South Carolina Pollution Control Act, which grants DHEC authority to "abate, control[.] *and prevent* pollution" (emphasis in original) CAFO facilities in South Carolina are subject to a more stringent standard.

It is unclear at this point whether an appeal will be taken from the decision, but while this opinion remains precedent, it will have broad impact on the ability of new facilities to gain permitting in the state. At a minimum, it will require DHEC to make two appealable decisions for any new facility – a “no potential to discharge” determination under NPDES regulations and a permitting decision under existing agricultural permitting regulations. Because of the high showing required for a “no potential to discharge” determination, which many existing facilities likely could not meet, it is likely that any new facility will need to obtain a CAFO NPDES permit so long as Blackmon remains controlling law and the state regulations remain more stringent than federal standards.