

Water Docket
U.S. Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Re: National Pollution Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, EPA-HQ-OW-2011-0188, *76 Fed. Reg.* 65,431 (Oct. 21, 2011).

Dear Sir or Madam:

The undersigned agricultural organizations offer these comments on the proposed National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule. *76 Fed. Reg.* 65431 (Oct. 21, 2011) (Docket Number EPA-HQ-OW-2011-0188) (proposed CAFO Reporting Rule).

These organizations – or their members – own and operate facilities that produce or contribute to the production of the livestock and poultry that provide safe and affordable food to Americans all across the United States. These facilities include those that meet the definition of a CAFO, at 40 C.F.R. 122.23(b)(2), and would be directly affected by the proposed CAFO Reporting Rule and the accompanying ICR. These facilities include those CAFOs that do not discharge into waters of the United States and have a direct interest in any precedents that EPA may establish with respect to the Clean Water Act (CWA) regulation of entities that do not discharge. These facilities also include operations that provide supplies to and otherwise support animal feeding operations.

EPA is proposing to amend its NPDES permitting regulations for CAFOs at 40 CFR 122.23 to impose new regulatory requirements on CAFOs to submit information to EPA. EPA is co-proposing two options involving the collection of information under the authority of Section 308 of the CWA and has requested comment on a third option under which EPA would collect information using alternative approaches. Under Option 1, EPA would seek information from *all CAFOs* defined as a Large or Medium CAFO under 40 CFR 122.23(b). Under Option 2, EPA would seek information from *all CAFOs* defined as a Large or Medium CAFO under 40 CFR 122.23(b) that are located in a “focus watershed.” Under the alternative approach, EPA would either: (1) obtain data from existing sources, (2) use compliance assistance and outreach efforts in partnership with industry to proactively protect and maintain water quality, or (3) amend the regulations relating to state program authorization to require authorized states to submit CAFO information obtained under state regulatory programs to EPA, and, as a backup, promulgate the CAFO reporting rule under section 308 of the CWA to give EPA authority to require CAFOs to submit information directly if a state fails to do so.

As discussed below, we believe that the proposed CAFO Reporting Rule would exceed EPA’s authority under the Clean Water Act and put America’s food supply at risk. To address these issues, the undersigned recommend that EPA achieve its goal of improving water quality by

relying on publicly available information and partnerships to target its outreach and compliance assistance efforts, in lieu of promulgating this proposed rule.¹

I. EPA's Proposal Exceeds its Authority Under the Clean Water Act.

EPA's Clean Water Act information gathering authority is found in Section 308. Section 308 authorizes EPA to "require the owner or operator of *any point source*" to maintain and provide information "[w]henver required to carry out the objective of this chapter, including but not limited to" carrying out the NPDES permit program.² Although federal courts have broadly interpreted EPA's authority to require information submissions under CWA section 308, this authority is not unlimited and must be grounded in reasonableness. Significantly, EPA may exercise its information gathering authority under section 308 only (1) to obtain information from the owner or operator of a *point source*, and (2) to reasonably carry out an objective of the CWA.³

A. EPA's Proposed CAFO Rule Exceeds EPA's Authority Because it Requires Facilities That Are Not Point Sources to Submit Information.

In this proposed rule, EPA is proposing to amend its NPDES permitting regulations for CAFOs in a way that would regulate additional CAFOs. Specifically, EPA's proposal would regulate CAFOs that are not point sources. Thus, this proposal exceeds EPA's authority under the CWA.

The CWA defines a "point source" as "any discernible, confined and discrete conveyance, including . . . concentrated animal feeding operations . . . from which pollutants are or may be discharged." Accordingly, a CAFO is a point source if (1) it meets EPA's regulatory definition of a CAFO, and (2) it discharges or may discharge pollutants into waters of the United States. EPA may regulate a CAFO as a point source only if the CAFO meets both of these requirements. Because the regulatory definition of a CAFO can include animal feeding operations that do not and cannot discharge, EPA must determine whether a CAFO discharges or may discharge pollutants before regulating it as a point source. Because Section 308 of the CWA only authorizes the collection of information from point sources, EPA must determine that a CAFO discharges or may discharge pollutants before requiring it to submit information. This limitation on authority precludes the imposition of a regulatory reporting requirement on *all* CAFOs.

EPA is proposing to collect information from *all* CAFOs, even though EPA has not established a record that would support any contention that *all* CAFOs are or may be discharging pollutants.

¹ Some of the undersigned filed comments dated November 22, 2011, with the Office of Management and Budget on EPA's proposed information collection request. *See* Doc No. EPA-HQ-OW-2011-0188-0047, including attachments. Those comments and attachments are incorporated herein by reference.

² 33 U.S.C. § 1318(a) (emphasis added).

³ 33 U.S.C. § 1318(a); *Natural Res. Def. Council, Inc.* 822 F.2d 104, 118-119 (D.C. Cir. 1987) (upholding EPA promulgation of regulation under section 308 requiring information disclosure as part of NPDES permit application because disclosure requirement was "reasonable" and served legitimate regulatory purposes).

In fact, EPA has an extensive record that demonstrates the opposite: there are many closed manure management systems that do not and cannot discharge.⁴

EPA compiled this record as part of its proposals to establish effluent limitations guidelines for CAFOs in 2001 and 2006. For example, in EPA's 2001 proposal, in the case of egg laying operations, EPA said that "[t]he majority of egg laying operations use dry manure handling" and that these operations are constructed "where the birds are kept on the second floor and the manure drops to the first floor." Ventilation comes into the second story from the outside, over the birds and down into the manure storage area, where it "dries the manure as it piles up into cones. Manure can usually be stored in high rise houses for up to a year before requiring removal." See 66 *Fed. Reg.* 2960, 3063 (Jan. 12, 2001). Similarly, in the case of broiler and turkey operations, EPA has found that "[t]ypically, broiler and turkey operations are completely dry waste management systems."⁵

In the case of swine operations, many of the existing operations in the Midwest use "deep pit" systems where the animals are housed over a below-ground, concrete manure storage unit. This system is used in the vast majority of new facilities that have been built in the Midwest over the last several years. As described by EPA: "Deep pit systems start with several inches of water in the pit, and the manure is collected and stored under the house until it is pumped out for manure application, typically twice a year."⁶ The manure in a concrete "deep pit" that is being managed according to its usual and ordinary design standards should never come into contact with rainfall during the storage period, nor does the manure leak out of the concrete pit. Manure in a swine deep pit system does not come into contact with rainfall. The concrete "deep pit" is also therefore a "no-discharge" system. In the 2006 proposed rule, EPA stated that it "believes that facilities employing other manure handling technologies (*e.g.*, under house pits) will be able to ensure zero discharge of manure, litter, and process wastewater..." See 71 *Fed. Reg.* 37744, 37762 (Jun. 30, 2006). In some parts of the country, this manure is applied to cropland. However, swine producers in arid regions such as Texas, Oklahoma, and Utah, rarely land apply their manure.

EPA's record regarding the existence of many CAFOs that do not and cannot discharge is supported by state data regarding releases from livestock operations. For egg laying facilities, eleven of the top egg producing states reported average annual discharges of zero in eight states and an average of .006 incidents per facility in all eleven states. For swine operations, data from eight of the top ten swine producing states indicate average discharges ranging from zero

⁴ See generally, comments on Proposed Post-Waterkeeper CAFO NPDES Regulations submitted on behalf of National Pork Producers Council, United Egg Producers, American Farm Bureau Federation, National Council of Farmer Cooperatives, National Corn Growers Association, (EPA-HQ-OW-2005-0037), at 32-39 (submitted as attachment to Doc. No. EPA-HQ-OW-2011-0188-0047).

⁵ See "Cost Methodology for the Final Revisions to the National Pollutant Discharge Elimination System Regulation and the Effluent Guidelines for Concentrated Animal Feeding Operations," Dec. 1, 2002, at 1-20 (EPA-821-R-03-004), available at http://www.epa.gov/npdes/pubs/cafo_cost_method_p2.pdf.

⁶ See "Development Document for the Proposed Revisions to the National Pollutant Discharge Elimination System Regulation and the Effluent Guidelines for Concentrated Animal Feeding Operations," Jan. 2001, at 11-6 (EPA-821-R-01-003), available at http://www.epa.gov/npdes/pubs/cafo_proposed_dev_doc_ch9-11.pdf.

discharges annually to .036 discharges per facility. The average for all eight states was .007 discharges.⁷

Despite this extensive record demonstrating the existence of many CAFOs that do not and cannot discharge, EPA is proposing to require either *all CAFOs* to submit information to EPA (Option 1) or *all CAFOs* in a watershed identified by EPA. Both options suffer from the same legal flaw: they would require, under threat of penalty, the submission of information from CAFOs that not only do not discharge, but, due to location or design, *cannot* discharge pollutants to waters of the United States. EPA has no authority to subject such facilities to a regulatory requirement to submit information under EPA's NPDES regulations for CAFOs. EPA must limit its proposed CAFO Reporting Rule to facilities that meet the definition of point source.

Federal courts have already found similar efforts by EPA to regulate facilities that are not point sources to be *ultra vires* of EPA's authority. For example, in EPA's 2003 final CAFO Rule, EPA required *all CAFOs* to apply for a NPDES permit or otherwise demonstrate that they had no potential to discharge, regardless of whether the CAFO actually discharged pollutants. In *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 505 (2d Cir. 2005) (*Waterkeeper*), the Second Circuit rejected this requirement, explaining that the CWA "gives the EPA jurisdiction to regulate and control only actual discharges – not potential discharges, and certainly not point sources themselves." By imposing permit obligations on *all CAFOs* in the 2003 CAFO Rule, EPA exceeded its statutory authority.

In response to the Second Circuit's *Waterkeeper* opinion, EPA revised its CAFO rule in 2008 to require a CAFO to apply for a NPDES permit "only if the CAFO 'discharges or proposes to discharge pollutants.'" However, the definition of "propose to discharge" in these rules included CAFOs that neither wanted to discharge nor actually discharged. In *National Pork Producers Council v. U.S. EPA*, 635 F.3d 738, 751 (5th Cir. 2011) ("*NPPC*"), the Fifth Circuit rejected this new attempt by EPA regulate *all CAFOs*, regardless of the CAFOs' actual discharge of pollutants:

[T]here must be an actual discharge into navigable waters to trigger the CWA's requirements and the EPA's authority. Accordingly, the EPA's authority is limited to the regulation of CAFOs that discharge. Any attempt to do otherwise exceeds the EPA's statutory authority. Accordingly, we conclude that the EPA's requirement that CAFOs that "propose" to discharge apply for an NPDES permit is *ultra vires* and cannot be upheld.

Recognizing *NPPC's* limitation on EPA's regulatory authority over CAFOs, EPA asserts here that its "authority to collect information under Section 308 from 'point sources' is broader than EPA's authority to require and enforce a requirement to apply for an NPDES permit, as interpreted by *NPPC*." 76 *Fed. Reg.* at 65436. EPA further explains: "The court's holding [in *NPPC*] that EPA may regulate only those CAFOs that discharge is limited to the specific type of

⁷ See comments on Proposed Post-*Waterkeeper* CAFO NPDES Regulations submitted on behalf of National Pork Producers Council, United Egg Producers, American Farm Bureau Federation, National Council of Farmer Cooperatives, National Corn Growers Association, EPA-HQ-OW-2005-0037, at 28-32 (submitted as attachment to Doc No. EPA-HQ-OW-2011-0188-0047).

regulation at issue before the court: the duty to apply for a permit. Today's notice proposes options for gathering basic information from CAFOs; it does not require them to obtain permits." *Id.*

EPA is attempting to draw a distinction without a difference. Both Section 402 and Section 308 of the CWA regulate only point sources. The 2003 and 2008 CAFO rules and the proposed CAFO Reporting Rule all attempt to regulate facilities that do not meet the definition of a point source. As such, the proposed CAFO Reporting Rule suffers from the same fundamental defect as the CAFO rules reviewed by the Second and Fifth Circuits: that of regulating beyond the scope of EPA's statutory authority. Specifically, both Option 1 and Option 2 would amend EPA's NPDES regulations for CAFOs to impose ongoing reporting obligations on *all CAFOs*, without any inquiry into whether the CAFO is or may be discharging. Indeed, the information required by the Proposed Rule is nearly indistinguishable from what must be provided in an NPDES permit application. Thus, like the CAFO rules at issue in *Waterkeeper* and *NPPC*, in the proposed CAFO Reporting Rule EPA attempts to regulate CAFOs that are outside its statutory jurisdiction and essentially seeks the same information from CAFOs that two federal appellate courts have held cannot be obtained through NPDES permit application requirements. While EPA's persistence is notable, the statute simply does not authorize this attempt to establish a novel reporting regulation applicable to *all CAFOs*. Just as the statutory language prevents EPA from requiring non-discharging CAFOs to apply for NPDES permits in *Waterkeeper* and *NPPC*, the plain language of section 308 precludes EPA from amending its NPDES permit regulations for CAFOs to require CAFOs that do not and cannot discharge to submit information to EPA.

EPA attempts to support its proposed rule by arguing that it is not a novel exercise of Section 308 authority. However, we are not aware of, and EPA does not identify, any circumstance where EPA has used Section 308 of the CWA to promulgate a rule that would require the submission of information from classes of facilities that include facilities that do not meet the definition of point source. We do not dispute that EPA has the authority to promulgate NPDES regulations that require point sources to submit reasonable information. *See Natural Resources Defense Council v. EPA*, 822 F.2d 104 (D.C. Cir. 1987). However, the facilities that are subject to such reporting requirements are NPDES permitted point sources. We also do not dispute that EPA may use Section 308 to gather information from point sources for the development of effluent limitations guidelines. *76 Fed. Reg.* at 65437. Again, however, effluent limitations are only applicable to point sources.

EPA also suggests that it has used Section 308 to collect information from sources that are not required to obtain permits. Again, EPA overstates its prior use of Section 308 authority. EPA states that there is precedent for obtaining information under Section 308 from "entities not currently required to obtain NPDES permits." *76 Fed. Reg.* at 65437. EPA is referring to the questionnaires it sent to municipal separate storm sewer systems (MS4s), NPDES permitting authorities, and owners and operators of developed property to gather information to use in the development of a stormwater rulemaking. *Id.* These examples do not support the use of Section 308 authority against facilities from which no pollutants are or may be discharged. MS4s are dischargers so Section 308 authorizes the collection of information from these facilities. States (acting in their regulatory capacity) are not point sources so, following OMB review, in the final ICR directed to states, EPA dropped any reference to Section 308 of the CWA as authority to collect information. *Compare* draft state questionnaire to final state questionnaire. *See*

attachments to Doc No. EPA-HQ-OW-2011-0188-0047. Not all developed properties have point source discharges. So, following OMB review, EPA narrowed the scope of persons obligated to respond to the questionnaire in the final ICR from *all* owners and operators of developed property to those who are required to obtain NPDES permits. The final owner/developer questionnaire applies to entities that, within a certain time frame:

(1) disturbed one or more acres of land, or (2) disturbed less than one acre of land that was a part of a larger common plan of development or sale that disturbed one or more acres of land, or (3) was covered by a local or state NPDES permit for construction site stormwater discharge[.] (*Note: Projects meeting criteria 1 and 2 are required to obtain NPDES permit coverage for stormwater discharges, or would be required to do so in the absence of a project specific waiver. See 40 CFR 122.26(b)(14)(x) and 40 CFR 122.26(b)(15). Criterion 3 addresses projects required to obtain NPDES stormwater permit coverage under potentially more stringent state and local criteria.*)

Compare question draft owner/developer questionnaire to final owner/developer questionnaire. *See* attachments to Doc No. EPA-HQ-OW-2011-0188-0047 (italics in original). Thus, only dischargers were subject to the owner/developer stormwater questionnaire and none of these ICRs provide any precedent for invoking Section 308 as authority of facilities that are not point sources.

Indeed, the information surveys described by EPA are significantly different from the programmatic, over-inclusive requirements being proposed by EPA. Even assuming, *arguendo*, that EPA could perform one-time surveys of non-discharging operations outside of its regulatory jurisdiction to help it develop rules and guidelines, the proposed CAFO Reporting Rule would indisputably amend EPA's NPDES permit regulations for CAFOs in a manner that would place *all CAFOs* under EPA's continuing regulatory regime. Under this proposal, owners and operators of *all CAFOs* (or *all CAFOs* in a watershed) must comply with ongoing enforceable reporting obligations and are exposed to administrative, civil, and criminal penalties totally unrelated to unlawful discharges. This regulation of CAFO owners and operators, and especially the owners of CAFOs that cannot discharge, flouts repeated federal court holdings that "the [CWA] gives the EPA jurisdiction to regulate and control only actual discharges – not potential discharges, and certainly not point sources themselves." 399 F.3d at 505. EPA cannot plausibly claim that it has jurisdiction under Section 308 to regulate on a continuing basis CAFOs that have no actual discharges and are not even point sources that "may" discharge.

Thus, the proposed CAFO Reporting Rule exceeds EPA's authority because it would require the collection of information from facilities that do not and cannot discharge. Such a requirement would be unenforceable. For example, in *Service Oil, Inc. v. Environmental Protection Agency*, 590 F.3d 545 (8th Cir. 2009), the court held that EPA could not impose penalties under section 308 on a construction company for failure to comply with EPA's NPDES permit regulations before a discharge occurred. Before any land disturbance activity took place the construction company did not and could not discharge, and therefore was not subject to Section 308. According to the *Service Oil* court, EPA cannot enforce any obligations under section 308 of the CWA against a non-discharger because section 308 authority "is clearly aimed at ensuring proper and effective recording, monitoring, and sampling of *discharges of pollution*." 590 F.3d at 550 (emphasis added). Like a construction site before construction activity has begun, some

CAFOs, such as a CAFO with a closed manure management system and no land application, are not facilities from which pollutants are or may be discharged. Accordingly, EPA cannot use Section 308 to compel the collection of information from such facilities, either individually, or by rule.

The undersigned do not dispute that, if EPA has information that a specific individual CAFO may be discharging pollutants, EPA has authority to use Section 308 to investigate that potential discharge. It would be the actual evidence or information that leads to the conclusion that a specific CAFO may be discharging that makes such use of Section 308 permissible. In contrast, by applying categorically to *all CAFOs* or *all CAFOs* in a particular watershed, EPA's proposed CAFO Reporting Rule would use Section 308 to compel the submission of information from a class of facilities that includes facilities that EPA knows do not and may not discharge. This unprecedented use of Section 308 is invalid on its face.

B. EPA's Proposed Rule Exceeds Its Authority Because it is Not Reasonably Required to Carry Out an Objective of the CWA.

EPA is proposing to require CAFOs to report location information, contact information, NPDES permit information, information on the type and number of animals at a CAFO, and information on acres available for land application of manure. EPA has not demonstrated that collecting such information from *all CAFOs* nationwide (Option 1) or *all CAFOs* in a particular watershed (Option 2) is reasonably required to carry out an objective of the CWA.

1. The Collection of Information from Non-Dischargers Does Not Support an Objective of the CWA.

The proposed Information Gathering Survey Form for Concentrated Animal Feeding Operations (hereinafter Survey Form) instructs the recipients that: "Owners of CAFOs are required to submit the information specified at 40 CFR 122.23(k) regardless of whether the CAFO is required to seek NPDES permit coverage." Under Section 308 of the CWA, EPA has the authority to collect information from point sources whenever required to carry out an objective of the Clean Water Act, including the development and enforcement of effluent limitations. 33 U.S.C. 1318. The definition of "point source" under the CWA includes CAFOs from which pollutants are or may be discharged. 33 U.S.C. 1362(14)).

The proposed CAFO Reporting Rule would impose regulatory obligations on *all CAFOs*, including those that cannot discharge. These regulatory obligations include the substance, format, and timing of the submission of information to EPA. *See* proposed 40 C.F.R. 122.23(k) (Options 1 and 2). Failure to comply with these regulatory requirements would subject farmers to penalties up to \$37,500 a day.

According to EPA: "The purpose of this co-proposal is to improve and restore water quality by collecting facility-specific information that would improve EPA's ability to effectively implement the NPDES program and to ensure that CAFOs are complying with the requirements of the CWA, including the requirement to obtain an NPDES permit if they discharge pollutants to waters of the U.S." 76 *Fed. Reg.* at 65436. EPA also states that: "Facility location and basic operational characteristics that relate to how and why a facility may discharge is essential information needed to carry out NPDES programmatic functions ..." *Id.* Further, EPA states that

the information proposed to be collected is necessary “to ensure that CAFOs are meeting their obligations under the CWA regarding protection of water quality from CAFO *discharges* ...” *Id.* (emphasis added).

These stated purposes of EPA’s proposed information collection do not support the collection of information from *all CAFOs*. EPA has used its Section 308 authority to gather information about a specific CAFO in a situation in which EPA has information leading it to believe that the CAFO may be discharging. However, this facility-specific use of Section 308 is vastly different from this blanket information collection proposal. EPA is proposing to collect information from *all CAFOs*, even though, as noted above, EPA has an extensive record that demonstrates the opposite: there are many closed manure management systems.⁸

The limited justification that EPA provides for its proposed information collection applies only to dischargers. EPA argues that: “The plain language of Section 308 expressly authorizes information collection for a list of purposes including assistance in developing, implementing, and enforcing effluent limitations or standard, such as the prohibition against discharging without a permit.” 76 *Fed. Reg.* at 65436 (citing 33 U.S.C. 1318(a)). Effluent limitations and standards are limitations on discharges. In the Supporting Statement for EPA’s Information Collection Request, EPA states that: “Information related to CAFOs’ locations, size, and activities satisfies the purpose of CWA §308 because this data is necessary for EPA to implement, strengthen and enforce its *NPDES program* for CAFOs.”⁹ This statement in no way supports the collection of information from CAFOs that are not subject to EPA’s NPDES program because they do not discharge.

2. Even if the CAFO Reporting Rule Applied Only to Dischargers, EPA Has Not Demonstrated That the Information Proposed To Be Collected Is Reasonably Required To Carry Out an Objective of the CWA.

As noted above, to carry out the objectives of the CWA, it is not reasonably required for EPA to obtain information from *all CAFOs*. Moreover, EPA has not even made the case that it is necessary for EPA to obtain such information from CAFOs that discharge and are subject to EPA’s NPDES permitting regulations.

EPA suggests that “knowing the location of the CAFO’s production area ... is essential for determining sources of water quality impairments and potential mitigation measures.” 76 *Fed. Reg.* at 65438. This argument fails to support EPA’s proposed information collection because, as EPA admits in the proposed CAFO rule, this information is already known by the state permitting authorities. 76 *Fed. Reg.* at 65445. State permitting authorities are responsible for determining sources of water quality impairments and addressing such impairments in their states under Section 303(d) of the statute. 33 U.S.C. 1313(d). As a result, it is not necessary for

⁸ See generally, comments on Proposed Post-*Waterkeeper* CAFO NPDES Regulations submitted on behalf of National Pork Producers Council, United Egg Producers, American Farm Bureau Federation, National Council of Farmer Cooperatives, National Corn Growers Association, (EPA-HQ-OW-2005-0037), at 32-39 (submitted as attachment to Doc No. EPA-HQ-OW-2011-0188-0047).

⁹ See Supporting Statement for the Information Collection Request for Revisions to NPDES Rules for Concentrated Animal Feeding Operations --Proposed 308 Rule (October 2011) (EPA-HQ-OW-2011-0188-0055), at 4 (hereinafter Supporting Statement) (emphasis added).

EPA to obtain this information. In states where EPA is the CAFO permitting authority (Idaho, New Mexico, Oklahoma, New Hampshire, and Massachusetts), EPA admits that it already has the information proposed to be collected. 76 *Fed. Reg.* at 65439 (proposing that EPA submit information *to itself* relating to CAFOs in those states).

EPA suggests that information about the number and type of animals is important because it “provides an indication of the quantity and characteristics of the CAFO’s manure (i.e., wet or dry and possible constituents), which then informs EPA as to the possible environmental effects of that manure.” 76 *Fed. Reg.* at 65438. It is not reasonably required for EPA to obtain facility-specific information to investigate the possible environmental effects of wet versus dry manure. Further, as noted above, state permitting authorities already have information about the number and type of animals at CAFOs that discharge.

EPA suggests that information about the area of land available for land application is important because, “[a] CAFO’s available land application area is likely to affect the amount of manure that can be land applied for agronomic purposes and the potential amount of nutrients that could flow into surrounding waters of the United States.” *Id.* This information may be important *if* a CAFO land applies, *if* there is a water of the United States next to the field where manure is applied, and *if* the CAFO discharges pollutants from that field to the water of the United States. These are very site-specific considerations that do not support the contention that it is necessary to collect information regarding available area for land application of manure from all CAFOs, even all permitted CAFOs. Thus, EPA’s proposed amendments to the CAFO NPDES regulations are overly broad and not authorized under Section 308 even if directed to discharging CAFOs only.

II. EPA’s Proposed Rule Puts the Security of Our Food Supply and the Privacy of Farming Families At Risk.

Among the items of information EPA is proposing to require CAFOs to submit under Section 308 of the CWA is the location of the production area of the CAFO, either by street address or by latitude and longitude. Section 308(b) states that information obtained by EPA under that section “shall be made available to the public.” 33 U.S.C. 1318(b). The only exception to this general rule is for information relating to “methods or processes entitled to protection as trade secrets.” *Id.* The location of a CAFO production area may not be considered a method, process, or trade secret. Thus, if EPA were to utilize Section 308 of the CWA to collect information regarding the location of CAFO production areas, the undersigned organizations believe that EPA would be unable to ensure that such information is protected from disclosure. Even if EPA sought to protect such information, we believe that a court could determine that disclosure is required under the CWA.

The location of CAFO production areas is exactly the kind of information that should be protected from disclosure because there is an established record of misuse of such information. Specifically, there is a long record of illegal acts of trespass and property damage against CAFOs and other animal agriculture facilities by animal rights activists as well as other persons.

As recently as January 8, 2012, activists committed arson at an animal feeding operation in California, as “direct action” against “the horrors and injustices of factory farming.” *See* Jan. 9,

2012, Press Release from the North American Animal Liberation Press Office, and a related Jan. 10, 2012, news article from *The Fresno Bee* (attached).

In fact, the Website of the North American Animal Liberation Press Office has many “communiqués” announcing trespass and property damage activities.

<http://www.animalliberationpressoffice.org/> The activities announced include a September 1, 2011, invasion of an Elk Farm in Oregon; the Nov. 24, 2010, “liberation” of 20 turkeys in Vermont; the Oct. 16, 2010, fire-bombing of a poultry farm in Mexico; the Oct. 11, 2010, raid on a deer farm in Oregon; the Apr. 2, 2010, “liberation” of 72 hens from a poultry farm in Utah; the Apr. 23, 2010, “liberation” of pheasants and quail from a farm in Oregon; and the Jan. 17, 2008, “liberation” of two turkeys from a farm in South Carolina. See “communiqués” submitted as attachments to Doc. No. EPA-HQ-OW-2011-0188-0047.¹⁰

The Animal Liberation Front (ALF) is not the only animal activist group carrying out illegal activities. In 2004, a member of a New York animal rights group, “Compassionate Consumers,” broke into an egg farm in New York. In convicting the perpetrator of criminal trespass, the judge noted that the activist jeopardized the biosecurity of about 80,000 hens. See Agriculture Alliance Newsroom (submitted as attachment to Doc No. EPA-HQ-OW-2011-0188-0047). In March 1997, activists set fire to the Utah Fur Breeders Agricultural Cooperative. This arson was celebrated by John Goodwin, who currently is “Director of Animal Cruelty Policy” for the Humane Society of the United States. See March 11, 1997, Deseret News (quoting Mr. Goodwin as saying “We’re ecstatic”) (submitted as attachment to Doc No. EPA-HQ-OW-2011-0188-0047).

Additional recent farm break-ins are listed on the summary prepared by the Animal Agriculture Alliance (submitted as an attachment to Doc No. EPA-HQ-OW-2011-0188-0047) and in the report on “Ecoterrorism: Extremism in the Animal Rights and Environmentalist Movements,” prepared by the Anti-Defamation League (available at http://www.adl.org/learn/ext_us/ecoterrorism.asp?learn_cat=extremism&learn_subcat=extremism_in_america&xpicked=4&item=eco

These are just a sampling of the trespass and property damage inflicted on animal agriculture by activists. These actions have led to congressional investigations. On May 18, 2004, John Lewis, Deputy Assistant Director of the Federal Bureau of Investigation (FBI), testified before the Senate Judiciary Committee on the threat posed by animal rights extremists and eco-terrorists:

In recent years, the Animal Liberation Front and the Earth Liberation Front have become the most active criminal extremist elements in the United States. Despite the destructive aspects of ALF and ELF’s operations, their stated operational philosophy discourages

¹⁰ ALF activities appear to be concentrated in certain areas, including Oregon and Washington. See January 2006 Grand Jury Indictment of 11 individuals suspected of being members of the Animal Liberation Front and Earth Liberation Front, for many illegal acts, including arson against a USDA Animal, Plant and Health Inspection Service facility in Olympia, WA, Childers Meat Company in Eugene, and Cavel West, Inc. a meat packing company in Deschutes County, Ore. United States v. Joseph Dibee, et al, CR No. 06-60011-AA (D. Ore. Jan. 19, 2006) (submitted as attachment to Doc No. EPA-HQ-OW-2011-0188-0047). If EPA publishes the locations of CAFOs, ALF cells will be able to expand their illegal activities beyond their immediate environs, because they will know the locations of CAFOs across the country.

acts that harm “any animal, human and nonhuman.” In general, the animal rights and environmental extremist movements have adhered to this mandate. Beginning in 2002, however, this operational philosophy has been overshadowed by an escalation in violent rhetoric and tactics, particularly within the animal rights movement. Individuals within the movement have discussed actively *targeting food producers*, biomedical researchers, and even law enforcement with physical harm.¹¹

This increase in violent action is documented in a report issued by the FBI’s Counterterrorism Unit on domestic terrorist acts between 2002 and 2005. In that report, the FBI notes that: “With the exception of a white supremacist’s firebombing of a synagogue in Oklahoma City, Oklahoma, all of the domestic terrorist incidents were committed by special interest extremists active in the animal rights and environmental movements.” United States Department of Justice, Federal Bureau of Investigations, Terrorism, 2002-2005, at 1 (submitted as attachment to Doc No. EPA-HQ-OW-2011-0188-0047).

Such actions against farmers and other entities (including research laboratories) are considered acts of terrorism by the Department of Justice and by Congress. To address these threats, Congress developed the Animal Enterprise Terrorism Act, which expands the criminal penalties for damaging or interfering with animal enterprise operations, defined as enterprises that use, sell, or raise animals (or animal products) for profit or educational purposes. On May 23, 2006, the House Subcommittee on Crime, Terrorism, and Homeland Security of the Committee on the Judiciary received testimony from a variety of sources, including the Department of Justice, on the need for such legislation.¹² Congress enacted this legislation the same year. Animal Enterprise Terrorism Act. P.L. 109-374.

To help prevent terrorist acts against agriculture, on Jan. 30, 2004, the White House released Homeland Security Presidential Directive 9 (HSPD-9), “Defense of United States Agriculture and Food.” This directive establishes a national policy to protect against terrorist attacks on agriculture and food systems. HSPD-9 instructs the secretaries of Homeland Security, Agriculture, and Health and Human Services, the administrator of the Environmental Protection Agency, the attorney general, and the director of the Central Intelligence Agency to coordinate their efforts to prepare for, protect against, respond to, and recover from an agroterrorist attack. Agriculture and food systems also are considered critical infrastructure and key resources under HSPD-7, “Critical Infrastructure Identification, Prioritization, and Protection.” In furtherance of its responsibilities under these presidential directives, the Department of Agriculture (USDA) prepared and submitted to the Department of Homeland Security a Food (Meat, Poultry, and Egg Products) and Agriculture Critical Infrastructure and Key Resources Sector-Specific Plan as input to the National Infrastructure Protection Plan, in May 2007 (Food and Agriculture Sector-Specific Plan) (submitted as attachment to Doc No. EPA-HQ-OW-2011-0188-0047). According to this plan:

¹¹ Animal Rights: Activism vs. Criminality, Hearing Before the Committee on the Judiciary, United States Senate, May 18, 2004 108th Cong., 2d Sess. (S. Hrg. 108-764), at 71-72 (emphasis added) (submitted as attachment to Doc No. EPA-HQ-OW-2011-0188-0047).

¹² See Hearing on H.R. 4239, The Animal Enterprise Terrorism Act. 109th Congress, 2d Sess., Serial No. 109-125 (submitted as attachment to Doc No. EPA-HQ-OW-2011-0188-0047).

America's agriculture and food system is an extensive, open, interconnected, diverse, and complex structure providing potential targets for terrorist attacks. We should provide the best protection possible against a successful attack on the United States agriculture and food system, which could have catastrophic health and economic effects.

Food and Agriculture Sector Specific Plan, at 11

The Congressional Research Service (CRS) has also investigated the issue of "Agro-Terrorism: Threats and Preparedness" (updated March 12, 2007) (CRS Agro-Terrorism Report) (submitted as attachment to Doc No. EPA-HQ-OW-2011-0188-0047). According to CRS:

Once inside the U.S., many parts of the food production chain may be susceptible to attack with a biological weapon. For example, terrorists may have unmonitored access to geographically remote crop fields and livestock feedlots. Diseases may infect herds more rapidly in modern concentrated confinement livestock operations than in open pastures. An undetected disease may spread rapidly because livestock are transported more frequently and over greater distances.

CRS Agro-Terrorism Report, at 48.

To help protect against attacks, CRS recommends biosecurity measures, which include limiting access to animal production facilities by limiting visitors. *Id.* at 49; *see also, Terrorism on the Farm, Experts Say You Need to be Responsible For Your Own Defense*, Drovers, Nov. 2005 (recommending such measures as entry and exit procedures, decontamination of vehicles and people) (submitted as attachment to Doc No. EPA-HQ-OW-2011-0188-0047).

Beyond the risk posed to farms from individuals intent on causing criminal harm to livestock producers, there is also a significant risk of biosecurity breaches from other types of trespassers. Examples of these include citizen activists who choose to come on to a farm to protest in the name of animal rights – without the intent to destroy property – as well as investigative and other news reporters who routinely seek out the location of livestock operations to bring film and media crews inside barns. There are dozens of examples of this type of high profile trespassing, which places animal health, producer business investment, and the nation's food supply at considerable risk. Two significant examples include the seemingly unauthorized trespass by CBS news anchor Katie Couric's film crew in late December 2009 of an Iowa swine operation¹³ and the unauthorized trespass on an Iowa swine operation by New York Times columnist Mark Bittman in May of 2011¹⁴. Mr. Bittman's breach of biosecurity was particularly concerning because, according to his article, he spent the earlier part of the day on a different farm and in the presence of a different herd of swine, which could have exposed the entire herd in the barn he trespassed on to a fatal swine disease.

The undersigned organizations find it absolutely incomprehensible that, while other parts of the federal government are trying to protect the security of our food supply, EPA would even

¹³ <http://www.cbsnews.com/video/watch/?id=6191894n&tag=related;photovideo>

¹⁴ <http://bittman.blogs.nytimes.com/2011/05/18/another-day-in-the-hawkeye-state/>

consider undermining these efforts by making public the locations of animal production facilities. As noted in comments filed in this rulemaking by the American Veterinary Medical Association, in this proposed rule:

The EPA would in effect provide a roadmap to the nation's CAFOs, and by doing so would dramatically undermine concurrent anti-terrorism, biosecurity, and food defense efforts by the Department of Homeland Security, Federal Bureau of Investigation, U.S. Department of Agriculture, Food and Drug Administration, farmers, food processors, and other stakeholders.

EPA Doc. No. EPA-HQ-OW-2011-0188-0401, at 2. Such an action is not only ill-advised, we believe that it would violate Presidential Homeland Security Directive 9, which directs federal agencies, including EPA, to help protect agriculture from terrorist attacks.

In addition to the national security issues discussed above, releasing information on the location of farms to the public would be a privacy violation. Many farmers make their homes and raise their families close to, if not on the same piece of property, as their CAFO production areas. For example, Chris Chinn testified in 2007 before the Senate Committee on Environment and Public Works about her hog farm, which is also her home.

My husband, Kevin, and I farm in North East Missouri on our family's hog farm. We have two small children, Rachele and Conner. ... My children's safety and welfare are very important to me. Their favorite place to be on our farm is in our hog barns working beside their dad. I would never let my children do anything that wasn't safe. Working along side of their dad in our barns is as safe as sending my children to school. We have computer controlled ventilation systems to ensure healthy air for us and our animals. We built our home within 200 yards of our lagoon; visitors to our home think our lagoon is a lake because there is no odor.

We are not alone in protecting our environment. There are young farmers and ranchers all across the United States caring for their animals and environment just like Kevin and I are. Livestock is diversified in this country but one thing that is common is the desire of young farmers and ranchers to protect our environment so our children can raise their families on the same land.¹⁵

Thus, the public disclosure of the location of CAFO production areas may also be the public disclosure of the location of the homes of farmers and their families. Concern over the safety and security of these families is not speculative. The ALF has targeted homes and families as recently as December 24, 2011. *See* communiqué from the Animal Liberation Front boasting of a raid on the home of an employee of an investor in a company that ALF protests (attached). The undersigned agricultural organizations believe that this disclosure, without consent, would violate the Privacy Act of 1974, which prohibits disclosure of personal information about a U.S.

¹⁵ Oral Testimony of Chris Chinn before the Senate Environment and Public Works Committee. An email from Ms. Chinn with her oral testimony, a copy of Ms. Chinn's written testimony, a press release from American Farm Bureau Federation describing Ms. Chinn's testimony, and a photograph of her farm, including her home are in the docket as attachments to Doc No. EPA-HQ-OW-2011-0188-0047.

citizen without his or her consent. 5 U.S.C. 552a; *see also, Rice v. United States*, 245 F.R.D. 3, 5-6 (D.D.C. 2007) (noting that for farmers, ranchers, and small businesses, information about a business may also be information about an individual).¹⁶

These serious national security and privacy concerns are among the reasons, in Section 1170 of the Food Security Act of 1985, Congress prohibited any person from using data collected by USDA for a purpose other than the development or reporting of aggregate data in a manner that protects the identity of the person who supplied the information. 7 U.S.C. 2276. EPA should not undermine Congress' intent to protect information about individual farmers by releasing the same type of information that Congress has expressly prohibited USDA from releasing. In fact, we believe that any EPA effort to identify and make public the location of specific farms using data collected by USDA, as EPA suggests it may do in discussing alternatives to direct reporting by CAFOs (76 *Fed. Reg.* at 65445), may be a violation of Section 1170 of the Food Security Act of 1985.

There is a high risk of misuse of CAFO location information and a high magnitude of harm from such misuse. Given that fact, and given the public disclosure requirements of Section 308 of the CWA, EPA should refrain from collecting any information that would identify the location of any part of a CAFO.

III. Specific Comments on EPA's Proposals.

As noted above, the undersigned organizations have strong concerns regarding EPA's authority to issue a regulation requiring *all CAFOs* nationally or *all CAFOs* in targeted watersheds to submit information to EPA. In addition, we have strong concerns regarding the security and privacy implications of such an information collection. For these reasons, the undersigned organizations urge EPA to forego any rulemaking that would require the submission of information to EPA by individual CAFOs.

In fact, any regulation that imposes reporting requirements on individual CAFOs is likely to fail because the proposal would impact so many unregulated facilities. When crafting the 2003 final CAFO Rule, EPA estimated that there are approximately 10,526 Large CAFOs and 33,131 Medium AFOs.¹⁷ The 2003 CAFO Rule Economic Analysis further estimated that 14,978 CAFOs would be subject to NPDES permits (10,526 large CAFOs plus 4452 medium CAFOs with direct discharges). However, this 2003 estimate includes large CAFOs that do not discharge and are not subject to NPDES permitting. In the Supporting Statement for the CAFO Reporting Rule ICR, EPA estimates that 20,880 CAFOs will be required to report under this proposed rule. According to the Supporting Statement, these include 15,283 CAFOs that are permitted. Supporting Statement, at 12. However, as EPA points out in the preamble, about 8000 CAFOs, not 15,283, currently have NPDES permits. 76 *Fed. Reg.* at 65445. The number

¹⁶ We do not believe the exemption to the Privacy Act for information required to be disclosed under the Freedom of Information Act is applicable because FOIA exempts from disclosure personal information affecting a person's privacy. 5 U.S.C. 552(b)(6). We also do not believe the routine use exemption from the Privacy Act applies because the location of a farmer's home is not "routine" information used by EPA.

¹⁷ *See* "Economic Analysis of the Final Revisions to the NPDES and Effluent Guidelines for CAFOs" (2002), at page 3-5 and Table 1, available at http://www.epa.gov/npdes/pubs/cafo_econ_analysis_p3-5.pdf

of permitted CAFOs in the Supporting Statement appears to be based on the estimates of regulated entities in EPA's 2003 Economic Analysis, which includes non-discharging CAFOs that, following *Waterkeeper* and *NPCC*, are not required to obtain permits.¹⁸ EPA's Supporting Statement inaccurately describes the number of CAFOs subject to permitting requirements today. Thus, it greatly underestimates the number of currently unregulated CAFOs that will become newly subject to EPA's NPDES Permit Regulations for CAFOs under the Proposed CAFO Reporting Rule.¹⁹ In fact, it appears that more than 12,000 CAFOs that are not currently regulated under EPA's NPDES regulations could become newly regulated under this proposal. If a CAFO is not subject to NPDES permitting requirements, it is unreasonable to expect the CAFO owner or operator to monitor EPA's NPDES permitting regulations for the imposition of additional obligations on unregulated facilities. This regulation would potentially expose thousands of currently unregulated facilities to extremely large penalties, for no legitimate regulatory purpose. This result would be untenable.

In lieu of exposing farmers to unwarranted Clean Water Act enforcement actions, we believe that EPA can advance its goal of improving and restoring water quality by using data that is available from existing sources to decide where to focus outreach and compliance assistance measures.

A. Specific Comments on Option 1

Under Option 1, EPA is proposing to amend its NPDES permitting regulations for CAFOs to require all large and regulated medium CAFOs to report information to EPA including the legal name (or authorized representative) of the CAFO operator, the location of the CAFO production area identified by latitude and longitude or street address, NPDES permit information, the number of animals by type confined for 45 days or more, and the total area under the control of the CAFO operator that available for land application.

EPA proposes to allow a CAFO to report the address of an authorized representative in lieu of the address of the CAFO operator to help protect the privacy of the operator. *76 Fed. Reg.* at 65437. However, the privacy of the CAFO operator is not protected if the location of the production area is made publicly available because, as noted above, homes may be located at the same site. Further, as noted above, requiring CAFOs to submit location information to EPA will likely lead to the public disclosure of that information. EPA should not collect information that it must make public when that information will make it easier for terrorists to attack animal feeding operations or trespassers to enter such operations, potentially spreading disease.

EPA also is seeking comment on its decision to forego collecting information on the names of integrators, manure storage, the annual quantity of manure generated, the status of nutrient management plans and compliance with 40 CFR 122.23(e), alternative uses of manure if land application is not used, and off-site transfers of manure. *76 Fed. Reg.* at 65439. The undersigned agree that such information should not be collected from CAFOs.

¹⁸ EPA's estimate in the Supporting Statement that 15,283 CAFOs are required to get permits also appears to include a few hundred small animal feeding operations that EPA has designated as CAFOs.

¹⁹ This also means that EPA has underestimated the incremental cost of this proposal.

First, the undersigned do not believe that EPA is under any obligation to require any information from CAFOs or even to issue this proposed rule. This rule is being proposed pursuant to a May 25, 2010, agreement EPA made with Natural Resources Defense Council and other environmental groups (environmental petitioners) to settle a challenge to EPA's 2008 CAFO rule. The environmental petitioners' challenge was dismissed without prejudice by the Fifth Circuit on December 8, 2009, over five months *before* the date of the settlement agreement. If EPA fails to carry out the actions it has agreed to perform in this out of court settlement agreement, the environmental petitioners' only relief is to reinstate their challenge to the rule. *See* attachment to Doc No. EPA-HQ-OW-2011-0188-0047. If they do so, they are unlikely to prevail now that the Fifth Circuit has ruled on the petitions for review filed by NPPC and other agricultural groups, discussed above. Thus, we believe that the May 25, 2010, settlement agreement is non-binding and non-enforceable and should be given no consideration by EPA.²⁰

Second, if EPA decides as a matter of policy to proceed with this rulemaking, as discussed in comments submitted to OMB on the Paperwork Reduction Act (which are incorporated herein by reference), the PRA obligates EPA to demonstrate that information to be collected is necessary, that EPA has reduced reporting burdens, and that EPA has avoided collecting information that is reasonably available. All of these obligations support EPA's decision to forgo collecting the information that NRDC wants to obtain from CAFOs.

Finally, EPA is seeking comment on whether EPA should first seek information from states before seeking information from CAFOs. *76 Fed. Reg.* at 65439. In most cases, states are authorized to be NPDES permitting authority for CAFOs. In those locations, we do not believe that EPA needs the information it is seeking, either from CAFOs directly or from states. In those states where EPA is the permitting authority, it already has the information it is requesting. In either case, the information proposed to be collected is readily available to the persons who implement the NPDES program, which, according to EPA's Supporting Statement, is the purpose of this information collection request. *See* Supporting Statement, at 4.

B. Specific Comments on Option 2.

Under Option 2, EPA proposes to first identify watersheds "with water quality problems likely attributable to CAFOs, and then potentially identify CAFOs in the focus watershed to respond to a survey request." *76 Fed. Reg.* at 65442.

This proposal is an admission by EPA that EPA does not need to know the location of specific CAFOs to determine where to focus its outreach activities. EPA can use information available from state water quality reports submitted under Section 305(b) the CWA and the identification of impaired waters under Section 303(d) of the CWA to determine what water bodies are impaired by nutrients. EPA can then combine this information with information available from USDA on the aggregate number of CAFOs located in each county to identify areas where EPA may wish to work with states, USDA, and other stakeholders to focus its outreach and compliance assistance resources. These activities do not require rulemaking.

²⁰ Moreover, EPA cannot expand its statutory authority through a settlement agreement and, as noted above, the actions that EPA agreed to propose in the settlement agreement exceed EPA's authority under the Clean Water Act.

This proposal also is an admission that EPA cannot certify that its information collection request is necessary. Under Option 2, EPA will: “Conduct outreach in the focus watershed regarding the need for CAFOs to submit the information specified in paragraph (k)(4)....” See proposed 40 C.F.R. 122.23(k)((3)(i), at 76 *Fed. Reg.* 65457 (emphasis added), *see also* 76 *Fed. Reg.* at 65442 (“EPA would make every reasonable effort to assess the utility of publicly available data and programs to identify CAFOs by working with partners at the Federal, state, and local level before determining whether an information collection request is necessary.”). Thus, notwithstanding EPA’s assertions to the contrary, EPA has not determined that this information collection is necessary. *Compare* Supporting Statement, at 3-4.

For these reasons, the undersigned do not support Option 2. EPA has not demonstrated that a CAFO Reporting Rule that would apply to all CAFOs in a specific watershed is necessary and collecting information under Section 308 of the CWA presents the security and privacy concerns discussed above.

C. Specific comments on Alternative Approaches.

EPA also seeks comment on a third option: reliance on “alternative approaches to achieve rule objectives.” This approach does not require rulemaking unless EPA decides to require authorized states to submit information.

The undersigned organizations do not oppose use of alternative approaches to obtain information about CAFOs from existing sources. However, if EPA chooses to collect such information, we do oppose making such information publicly available. While information about the locations of CAFOs may be available in individual states, that information is not currently available in a central location. We are concerned that a central repository of CAFO location information, particularly if that information is posted on EPA’s Website, would create the security and privacy issues discussed above. If EPA obtains such information without using its CWA Section 308 authority, it will be under no obligation to make this information public.

In Section III.F. of the preamble to the proposed CAFO Reporting Rule, EPA states that the objective of this proposal is to develop a comprehensive national inventory of CAFOs. 76 *Fed. Reg.* at 65445. We do not believe that is an appropriate or valid objective. EPA does not need a comprehensive national inventory of CAFOs to focus its compliance assistance and outreach efforts in particular watersheds. The creation of such an inventory will lead to the security and privacy concerns discussed above.

In Section III.F. EPA also suggests that it may propose to change the reporting requirements under CERCLA and EPCRA to meet EPA’s objective of creating an inventory of CAFOs. 76 *Fed. Reg.* at 65447. We oppose such an action. CERCLA and EPCRA reporting are primarily for the purpose of emergency response and EPA has already determined that it does not need release reports from animal feeding operations for such response purposes. 73 *Fed. Reg.* 76948, 76953 (Dec. 18, 2008). Moreover, neither statute authorizes reporting for the purpose of obtaining an inventory of CAFOs.

EPA also seeks comment on whether it should require states to submit information about CAFOs to EPA. 76 *Fed. Reg.* at 65447. If EPA decides to pursue this option, EPA should first ensure

that that information collected from states will not become publicly available. EPA cannot act under the authority of Section 308 to obtain information from states, since states are not point sources. However, before proposing a change to its state authorization regulations, EPA should first determine if a submission from a state would become public under federal or state freedom of information laws and refrain from collecting any location information that would become public.

Finally, for all the reasons discussed above, we do not support requiring submission of information from individual CAFOs under Section 308 if states do not provide information to EPA. *See 76 Fed. Reg.* at 65447. The collection of information from individual CAFOs is not necessary and creates significant security and privacy concerns. Moreover, as noted above, EPA cannot claim that it is necessary for EPA to collect information that is already available to NPDES permitting authorities.

Conclusion

For all the forgoing reasons, the undersigned urge EPA to refrain from promulgating these proposed amendments to EPA's NDPES CAFO regulations. EPA can achieve its objective of improving water quality without rulemaking. If you have any questions regarding these comments, please contact Susan Parker Bodine at 202-371-6364 or susan.bodine@btlaw.com.

Respectfully submitted,

Agri-Mark Inc.
American Farm Bureau Federation
American Meat Institute
American Veal Association
Arizona Cattle Feeders Association
Arkansas Cattlemen's Association
Arkansas Farm Bureau Federation
Arkansas Pork Producers Association
California Cattlemen's Association
California Pork Producers Association
Colorado Cattlemen's Association
Colorado Livestock Association
Colorado Pork Producers Council
Dairy Cares
Dairy Farmers of America
Dairy Producers of Utah
Dairylea Cooperative Inc.
Delaware Maryland Agribusiness Association
Foremost Farms USA
Georgia Pork Producers Association
Hawaii Cattlemen's Council
Idaho Cattle Association
Idaho Dairyman's Association

Illinois Pork Producers Association
Independent Cattlemen's Association of Texas
Indiana Pork
Iowa Cattlemen's Association
Iowa Pork Producers Association
Kansas Livestock Association
Kansas Pork Association
Kentucky Pork Producers Association
Land O'Lakes, Inc.
Louisiana Cattlemen's Association
Louisiana Pork Producers Association
Maine Hog Growers Association
Michigan Cattlemen's Association
Michigan Milk Producers Association
Michigan Pork Producers Association
Milk Producers Council
Minnesota Pork Producers Association
Minnesota State Cattlemen's Association
Mississippi Farm Bureau Federation
Mississippi Pork Producers Association
Missouri Cattlemen's Association
Missouri Pork Producers Association
Montana Pork Producers Council

National Association of Conservation Districts
National Cattlemen's Beef Association
National Chicken Council
National Council of Farmer Cooperatives
National Milk Producers Federation
National Pork Producers Council
National Turkey Federation
Nebraska Cattlemen's Association
Nebraska Pork Producers Council, Inc
North Carolina Pork Council, Inc
North Carolina Poultry Federation
North Dakota Pork Producers Council
Northeast Dairy Farmers Cooperatives
Northwest Dairy Association
Ohio Cattlemen's Association
Ohio Pork Producers Council
Oklahoma Pork Council
Oregon Cattlemen's Association
Pennsylvania Cattlemen's Association
PotashCorp
South Carolina Pork Board
South Dakota Agri-Business Association

South Dakota Cattlemen's Association
South Dakota Pork Producers Council
South East Dairy Farmers Association
Southeast Milk Inc.
St. Albans Cooperative Creamery
Texas and Southwestern Cattle Raisers
Association
Texas Cattle Feeders Association
Texas Pork Producers Association
The Poultry Federation (AR, MO, OK)
U.S. Cattleman's Association
United Egg Producers
Upstate Niagara Cooperative, Inc.
Virginia Agribusiness Council
Virginia Pork Industry Association
Virginia Poultry Federation
Washington Cattlemen's Association
Western United Dairymen
Wisconsin Pork Producers Association
Wyoming Ag-Business Association
Wyoming Pork Producers
Wyoming Stock Growers Association

Attachments

cc: Secretary Thomas Vilsack, USDA (w/o att.)
Secretary Janet Napolitano, DHS (w/o att.)
Administrator Lisa Jackson, US EPA (w/o att.)
Kevin Neyland, OMB (w/o att.)
Jim Laity, OMB (w/att.)
Nancy Stoner, US EPA (w/att.)