



**Poultry Industry Comments
National Pollutant Discharge Elimination System (NPDES)
Concentrated Animal Feeding Operation (CAFO) Reporting Rule**

January 19, 2012

VIA ELECTRONIC MAIL
Water Docket
Environmental Protection Agency
Mailcode: 28221T
1200 Pennsylvania Ave. NW.
Washington, DC 20460

RE: Attention Docket ID No. EPA-HQ-OW-2011-0188
Request for public review and comment
Proposed National Pollutant Discharge Elimination System (NPDES)
Concentrated Animal Feeding Operation (CAFO) Reporting Rule

Dear Sir or Madam:

These comments are submitted by the US Poultry & Egg Association (USPOULTRY), the National Turkey Federation (NTF) and the National Chicken Council (NCC) in response to US Environmental Protection Agency's (EPA's) request for public review and comment on the proposed National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule.

I. Industry Overview

The U.S. Poultry & Egg Association is the world's largest poultry organization, whose membership includes producers of broilers, turkeys, ducks, eggs and breeding stock, as well as allied companies. The Association progressively serves the industry through research, education, communication and technical services.

The National Turkey Federation is the national advocate for all segments of the turkey industry. NTF provides services and conducts activities which increase demand for its members' products by protecting and enhancing their ability to profitably provide wholesome, high-quality, nutritious products.

The National Chicken Council is a nonprofit member organization representing companies that produce and process over 95 percent of the chickens marketed in the United States. NCC promotes the production, marketing and consumption of safe, wholesome and nutritious chicken

products both domestically and internationally. NCC serves as an advocate on behalf of its members with regard to the development and implementation of federal and state programs and regulations that affect the chicken industry.

The associations represent the production from approximately 30,500 family farmers who raise broiler chickens, 8000 family farmers who raise turkeys and more than 30,000 family farmers who produce eggs for consumption by the public.

II. EPA request for Comment on the Proposed National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule

On October 21, 2011, EPA issued the proposed National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule. See 76 Fed. Reg. 65,431 (2011). EPA seeks comments on the proposed rule, which would require owners and operators of CAFOs to submit certain information to EPA. EPA proposes two options for requiring the submission of this information. The first option would require all CAFOs to submit information to the EPA, regardless of whether they discharge or not. The second option that would require the submittal of information from CAFOs in specific watersheds that have water quality concerns allegedly associated with CAFOs. In addition, EPA is seeking comments on alternative approaches for achieving improved water quality protection such as collecting information from existing data sources and the development of alternative mechanisms for promoting environmental stewardship and compliance.

III. Background

The proposed rule is the result of a settlement agreement between EPA and the Natural Resources Defense Council, Inc., Sierra Club and Waterkeeper Alliance. This group, otherwise known as the Environmental Petitioners, filed a petition for judicial review of EPA's final 2008 rule under the Clean Water Act (CWA) entitled "Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeepers Decision: Final Rule." (2008 CAFO Rule). This petition for review was transferred to the Fifth Circuit Court of Appeals and consolidated with a number of other petitions challenging the 2008 CAFO Rule. The Environmental Petitioners and EPA moved to sever the petition from the other groups challenging the Rule and suspend the petition in order to implement a settlement agreement.

The primary component of the settlement agreement was EPA's commitment to propose a rule to require all owners or operators of all CAFOs in the U.S. to submit information to EPA, regardless of whether they discharge or propose to discharge. The final facet of the settlement agreement requires EPA to respond to a petition for rulemaking to be submitted by the Environmental Petitioners if the Environmental Petitioners believe, based on the information collected, that there are "categories of operations that presumptively discharge." The settlement agreement requires EPA to grant or deny a petition for rulemaking that would require those CAFO's with "categories of operations that presumptively discharge" to obtain a NPDES permit.

IV. March 15, 2011 U.S. Court of Appeals for the Fifth Circuit decision in *National Pork Producers Council (NPPC) v. EPA* and EPA's Lack of Authority Over Non-permitted CAFOs

As stated above this proposed rule is the direct result of settlement agreement between the Environmental Petitioners and EPA after their case was severed from a judicial review of the 2008 CAFO Rule. The 2008 CAFO Rule was proposed and finalized after the Second Circuit Court of Appeals, in 2005, vacated the "Duty to Apply" provision of the then current CAFO rule. The Second Circuit admonished EPA for attempting to mandate a permit requirement for each and every CAFO simply because they had the mere potential to discharge pollutants. See *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005).

In spite of the Second Circuit's clear message in *Waterkeeper* that Congress only gave EPA the authority to regulate "actual" discharges in the CWA, EPA again attempted to impose a "duty to apply" provision in the 2008 CAFO Rule. In the 2008 CAFO Rule, EPA implied CAFOs were required to obtain a NPDES permit if they "proposed to discharge." 73 Fed. Reg. 70434. However, in March of 2011 the Fifth Circuit stated, "EPA's definition of a CAFO that 'proposes' to discharge is a CAFO designed, constructed, operated, and maintained in a manner such that the CAFO will discharge. Pursuant to this definition, CAFOs propose to discharge regardless of whether the operator wants to discharge or is presently discharging." *NPPC v. EPA*, 635 F.3d 738, 17 (5th Cir. 2011).

These issues are important and distinctly connected to this proposed rule as it continues a pattern EPA established over a decade ago by claiming authority over non-regulated sources. EPA asserts that Section 308 of the CWA provides them with the authority to require all CAFOs to submit the information sought merely because the term "CAFO" is included in the definition of point sources. This claim of authority is weak and further invalidated by the Fifth Circuit's decision. In discussing a decision by the D.C. Circuit court over 20 years prior, the Fifth Circuit pointed out in *Natural Resources Defense Council v. Environmental Protection Agency*, 859 F.2d 156 (DC. Cir. 1988), that the D.C. Circuit explained the CWA "does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants." *Id.* at 170. To emphasize their position, the Fifth Circuit also pointed to a 2009 Eighth Circuit Court decision that, "reiterated the scope of EPA's regulatory authority and concluded that '[b]efore any discharge, there is no point source' and EPA does not have any authority over a CAFO." *Service Oil, Inc. v EPA*, 590 F.3d 545 (8th Cir. 2009).

V. EPA's claim that Section 308 of the Clean Water Act gives EPA the authority to collect information from facilities that do not discharge.

In the proposed rule, EPA states, "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 standards, such as the prohibition against discharging without a permit." 76 Fed. Reg. at 65436. Unless one presumes, incorrectly, that all CAFOs discharge, none of the reasons listed above apply to the entire universe of CAFOs.

EPA asserts there is a precedent for obtaining information under Section 308 of the CWA from “entities not currently required to obtain NPDES permits.” Here EPA is referring to a survey sent to regulated and non-regulated Municipal Separate Storm Sewer Systems (MS4s), transportation MS4s, NPDES permitting authorities, and owners and operators of developed sites to collect information “to help assess the impact of potential changes that the Agency is considering to its existing stormwater requirements.” 76 Fed. Reg. at 65437. (“Information Collection Rule”).

These examples do not support the use of Section 308 to collect information from facilities that do not discharge. In fact, in the final information collection rule the agency removed any reference to Section 308 of the CWA as authority to collect information from states because states are not point sources. Furthermore in the final information collection rule, EPA narrowed the entities required to provide information from all owners and operators of developed property to those who are required to obtain an NPDES permit.

VI. EPA’s claim that the information sought will help them determine if a violation of the CWA has occurred.

Even if EPA’s overreaching claim that Section 308 of the CWA provides them with the authority to require CAFOs to submit the information sought is valid, the Agency has failed to demonstrate how the information will help them effectively implement the NPDES program and ensure that CAFOs are complying with the requirements of the CWA.

The information EPA seeks to collect includes contact information including the CAFO owners name, address and phone number, the location of the production area identified by latitude and longitude, if the CAFO has NPDES permit coverage, the types and number of animals confined at the facility, total number of acres available for land application and where the owner land applies manure. EPA alleges this information will help them effectively implement the NPDES program and ensure that CAFOs are complying with the requirements of the CWA. However, none of the information sought would provide any understanding as to whether the facility is discharging or violating the CWA.

Serious concern arises from the potential breach of biosecurity and food security necessary to ensure a safe supply of food to the U.S. and the world. The United States Department of Agriculture’s National Agricultural Statistics Service (NASS), which collects and reports useful statistics in service to U.S. agriculture, recognizes the vital importance of protecting the confidentiality of America’s farmers and ranchers. As such, NASS protects the names, addresses, and personal identifiers with the force of law. Concern for these threats was confirmed as recently as January 8, 2012 when the animal rights extremist group, Animal Liberation Front, admitted committing an act of arson at a California animal feed yard. In an anonymous communique’ provided to the media, the group acknowledged setting fire to a fleet of trucks used to transport cattle and urged other would-be terrorists to target additional animal agriculture businesses with further acts of violence.

A more serious threat comes from potential acts of bioterrorism. Knowing the exact location of every CAFO would provide a terrorist group set on disrupting America’s food supply chain, with

a road map that could take them to the doorstep of virtually every animal rearing facility in the country. An aspiring terrorist could simply drive or fly to each facility and deliver, by way of aerosol canister or test tube, a bacteria or agent that would render animals unfit for consumption. In November of 2003 during his testimony to the U.S. Senate Committee on Governmental Affairs, Lawrence J. Dyckman, Director Natural Resources and Environment discussed four reports prepared by the United States General Accounting Office (GAO) that identified "gaps in federal controls for protecting agriculture and the food supply." In his testimony Mr. Dyckman stated, "...there is now broad consensus that American farms, food, and agriculture systems, which account for about 13 percent of the nation's gross domestic product, are vulnerable to potential attack and deliberate contamination." Providing the latitude and longitude of every CAFO would only widen the gap and put American farmers at an even greater risk for an act of bio-terrorism.

Equally concerning is the knowledge that EPA would be required to make this information publically available. Knowing the great majority of CAFOs are located at or in very close proximity to the residence of the owner or operator provides very serious personal privacy and security concerns for tens of thousands of American families. EPA concedes this fact in the proposed rule by stating, "Specifically, EPA is aware that providing latitude and longitude information might raise security or privacy concerns for CAFO owner/operators, many of whom are family farmers." 76 Fed. Reg. at 65438.

No correlation can be drawn from the total number of acres available for land application and where the owner land applies manure or whether there has been a violation of the CWA. It appears EPA presumes facilities with little or no land available for the application of manure will violate the CWA, when in fact, the industry and its growers have implemented Best Management Practices (BMPs) and adhered to regulatory guidelines for more than two decades. EPA fails to recognize that often litter is sold to offsite users. Litter is a valuable and highly sought after source of organic nutrients that provide additional environmental benefits which include providing amendments to the soil and the sequestration of carbon. Furthermore, the use of organic nutrients to fertilize crops reduces the need for the manufacture of inorganic fertilizer which generates greenhouse gasses during the production process. Again, knowing acreage information will fail to provide EPA with knowledge of whether or not a violation of the CWA has occurred.

Likewise, knowing the animal type confined and the maximum number of each animal type confined at a CAFO gives EPA no indication of whether the facility discharges or if they are complying with the requirements of the CWA. Here EPA assumes that solely because an operation is a CAFO, it must generate more manure than the facility can utilize in an agronomic fashion. What EPA fails to recognize are the many methods for utilizing manure beyond the property boundary of the CAFO. For instance, Perdue operates a facility in Seaford, Delaware that processes poultry litter into a packaged organic fertilizer sold commercially. Since its establishment, Perdue AgriRecycle has shipped approximately 12 million pounds of nitrogen and 7.5 million pounds of phosphorous out of the Chesapeake Bay watershed. In Minnesota, Fibrowatt incinerates roughly 500,000 tons of turkey litter per year to generate electricity that is sold to the public.

Although EPA claims the information they seek to collect will “allow EPA to achieve more efficiently and effectively the water quality protection goals and objectives of the CWA”, the proposed rule fails to support this assertion. As delineated above, serious security and privacy concerns surround the information proposed to be required, while none of the information EPA proposes to collect will provide insight on the effectiveness of the NPDES permitting program or if a violation of the CWA has occurred.

VII. EPAs request for Comment on Option Two of the Proposed Rule – Collecting information from CAFOs in Focus Watersheds

EPA has also requested comments on a second option which collects information only from CAFOs that are located in watersheds that have been identified as having water quality concerns that are “likely” caused by CAFOs. Once again, EPA presumes the existence of a water quality concern is the result of a CAFO. If this were not the case, EPA would be proposing to collect information from *all* possible sources that could lead to water quality concerns. As stated earlier, for more than 20 years CAFO owners and industry have adhered to regulations and implemented BMPs including nutrient management plans that dictate manure application rates and methods. Conversely, other non-point sources including single family residences, commercially developed sites and individual onsite sewage treatment systems lack guidelines or mechanisms, like nutrient management plans, to control the application of nutrients.

This issue was substantiated in a research project performed by the University of Minnesota’s Dr. John Moncrief between 2007 and 2009 on Minnesota’s first Discovery Farm. As explained on the Minnesota Agricultural Water Resource Center’s website, “Discovery Farms Minnesota is a producer led effort to gather field-scale information on water quality impacts from a variety of farming systems in different settings across Minnesota.” The Minnesota Agricultural Water Resource Center also explains, “The mission of Discovery Farms Minnesota is to gather water quality information under real-world conditions, providing practical, credible, site-specific information to enable better farm management.”

The research compared storm water runoff from the town of Wilmar, MN. to the storm water runoff from a farm of that applies turkey manure and commercial fertilizer to supply nutrients required by crops grown on the farm. The town and the farm are separated by Lake Wakanda which receives storm water runoff from both sources. In the study, Dr. Moncrief found that total phosphorus losses were about 8 times greater from storm water runoff coming from the town of Wilmar when compared to farm fields. Additionally, sediment loss in storm water runoff from the town was about 40 times greater than sediment loss farm fields and ammonium loss was about 25 times greater from Wilmar’s storm water runoff when compared to farm fields.

Under EPA’s proposed Option 2 for collecting information from CAFOs, the listing of Lake Wakanda as a “focus” watershed” would immediately cause EPA to presume the cause of the water quality concern was the CAFO, merely because it exists. As revealed by Dr. Moncrief’s research, this assumption is flawed and as such this option would also fail to provide EPA with knowledge of whether or not a violation of the CWA has occurred.

VIII. EPAs request for comments on stewardship and recognition programs, education or assistance programs or incentive based programs, carried out in coordination with other partners such as states, industry or USDA, that could result in improvements in industry practices more quickly than a data collection effort.

In addition to the two options proposed for collecting information, EPA has requested comment on the development of alternative mechanisms for promoting environmental stewardship and compliance. EPA recognizes these types of programs could provide positive results more quickly than a data collection effort. While our industry believes the great majority of poultry and egg producers operate their facilities in a manner that ensures environmental protection and enhancement as a guiding principle, the pursuit for improvement is always prudent. The poultry industry can see benefit in a program that provides poultry and egg producers with clearly worded information that will assist them in evaluating their operation to identify issues that could lead to water quality concerns. However, the poultry industry is convinced this type of program would require EPA to depart from the false belief that a permit will effectively facilitate improvements in water quality. The poultry industry agrees that partnerships with states, industry, academia and the US Department of Agriculture aimed at developing a tool or program that identifies practices and measures that will bring tangible improvements to water quality is far superior to a data collection effort.

IX. Summary

While Section 308 of the CWA provides EPA the authority to collect information from dischargers, with this proposed rule the Agency is attempting to collect information from non-dischargers that would both raise serious privacy and security concerns and fail to provide a determination of whether a violation of the CWA occurred. As stated above, the settlement agreement signed by the Environmental Petitioners and EPA in May of 2010 requires EPA to grant or deny a petition for rulemaking that would require CAFOs with certain “categories of operations that presumably discharge” to obtain a NPDES permit. The clear fact that the information EPA seeks to gather will not provide explicit insight into whether an individual CAFO is violating the CWA, suggests the information is merely being collected to assist the Environmental Petitioners with their future petition for rulemaking.

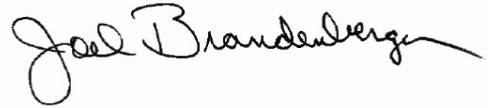
It appears that the intention for the petition for rulemaking is to rely on wording in the 2008 CAFO Rule which required CAFOs that “propose to discharge” to obtain a NPDES permit. Clearly, the Environmental Petitioner’s plan was to create a link between “proposing to discharge” and the existence of an action or process that typically occurs at a CAFO. As specified above, however, in March of 2011 the Fifth Circuit vacated this requirement and reaffirmed the Second Circuit’s ruling that the requirement to obtain a NPDES permit fell only on CAFOs that discharge. EPA signaled its recognition of the Fifth Circuit’s ruling in a memo issued by James A. Hanlon, Director – Office of Wastewater Management dated December 8, 2011. In the memo Mr. Hanlon stated, “In response to *NPPC*, which applies nationally, we will revise the CAFO regulations to remove from the federal regulations the requirement that CAFOs that “propose to discharge” have NPDES permits.”

The US Poultry & Egg Association (USPOULTRY), the National Turkey Federation (NTF) and the National Chicken Council (NCC) appreciate the opportunity provided by EPA to comment in response to EPA's request for public review and comment on the proposed National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule. We urge EPA to reconsider finalizing a rule that will not provide any meaningful improvements in water quality. The development of an alternative approach that focuses on tools to assist poultry and egg producers in expanding their stewardship efforts will be of greater benefit to the environment and water quality improvements. If you have questions or comments, please contact Paul Bredwell (pbredwell@uspoultry.org).

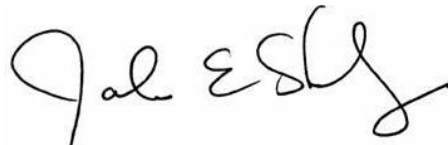
Sincerely,



Mike Brown, President
National Chicken Council



Joel Brandenberger, President
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