

CWA Sec. 308 CAFO Reporting Rule

On Oct. 21, EPA proposed a rule to require CAFOs to report a laundry list of information about their operations to EPA under Section 308 of the Clean Water Act (CWA). NCBA strongly opposes the proposed rule and questions whether EPA has the authority to gather this information from *all* CAFOs considering the 5th Circuit ruling in March 2011 that limited EPA's authority over CAFOs to only those that actually discharge. NCBA is also concerned about the fact that EPA plans to publish the data it receives on its website for public consumption, information which in the wrong hands, could jeopardize the security of our cattle herds and food safety.

Recall that EPA agreed to propose this rulemaking in May 2010 as part of a private settlement agreement with environmental groups reached in the 5th Circuit Court regarding their appeals of the 2008 CWA CAFO rule. Agriculture appellants were excluded from settlement negotiations. The stated purpose of the information request is to enable EPA to use the information to establish a regulatory presumption that a large CAFO actually discharges without proof of such a discharge. (Recall the 2nd Circuit Court hinted that such a presumption may be made in footnote 22 of the *Waterkeeper v EPA* case involving an appeal of the 2003 CWA CAFO rule.)

The agreement required EPA to issue a rulemaking requiring the submission of the following information from *all* CAFOs: the name and address of the farmer; longitude and latitude; number and type(s) of animals; types of manure storage; quantity of manure produced; quantity of land used for manure application; the presence of a nutrient management plan; and whether the farmer transfers manure off-site, and if so, the quantity transferred to recipients of the transferred manure.

A description of the proposed rule is as follows:

➤ **Option 1**

All owners or operators of CAFOs would be required to submit the following list of information to the agency through an EPA electronic information management system located on EPA's website (the only possible exception to the required electronic reporting is if EPA waives the requirement due to undue burden or expense to owners/operators to use the information management system):

- Legal name, mailing address, email address (if available) and primary telephone number of the owner of the CAFO or an authorized representative.
 - An authorized representative must be an individual who is involved with the management or representation of the CAFO, located within "reasonable proximity" to the CAFO, and must be sufficiently informed to respond to inquiries from EPA on behalf of the CAFO.
 - Owners/operators may provide a P.O. Box in lieu of a street address (but must live in reasonable proximity to CAFO).
- The location of the CAFO's production area identified by the latitude and longitude or by the street address.
- If owner/operator has a National Pollutant Discharge Elimination System (NPDES) permit (as of effective date of final rule), the date of issuance of that permit and the permit number must be submitted. If NPDES application or Notice of Intent has been filed with EPA but the CAFO has not received coverage, the date the owner/operator submitted the permit application or Notice of Intent.
- The animal type and maximum number of head for each animal type for the previous 12-month period that were confined either in open confinement including partially covered area or housed totally under roof at the CAFO for 45 days or more during the year.
- If the owner/operator land applies manure or process wastewater, they are required to report the total number of acres available for land application under the control of the owner/operator.

Instead of requiring individual CAFOS to submit the above information, the proposal sought comment on an alternative of allowing states with an authorized NPDES program to provide the above information for CAFOs within the state.

Time Frame (including exception for state reporting):

- Reporting Period for States: States that choose to submit information on behalf of their CAFOs would be required to submit the information within 90 days of the effective date of the rule.
 - Notification Period: Within 60 days after the completion of the 90 day state-reporting period, EPA will make publicly available a list of all CAFOs by name, permit number, and state (“listed CAFOs”)
 - CAFO Reporting Period: CAFOs that do not appear on the “CAFO list” would then be required to submit the information on their individual facility to EPA within 90 days after the end of the notification period. CAFOs that appear on the CAFO list may choose to review the information submitted by the state and override the state’s submission by submitting its own information but CAFOs must do so within the 90 day timeframe.
- CAFOs without NPDES permits must submit or update their information every 10 yrs.

➤ **Option 2**

EPA would identify focus watersheds with water quality problems likely attributable to CAFOs and the land application of manure and then identify CAFOs in those watersheds. The identified CAFOs would be required to respond to a survey requesting the same information as CAFOs in Option 1.

Focus watersheds would be identified based on water quality concerns including Nitrogen, Phosphorus, Pathogens, total suspended solids, and organic enrichment (low dissolved oxygen).

Possible avenues for making these determinations:

- State 303(d) list
- EPA’s ATTAINS database
- Nutrient monitoring data from state or federal agencies
- State numeric nutrient criteria development (March 2011 Memo to States)

Additionally, focus watersheds could be determined based on these criteria:

- High priority watershed due to other factors such as vulnerable ecosystems, drinking water source supply, watersheds with high recreational value, or outstanding natural resources waters (Tier 3 waters); includes pristine waters that EPA wants to protect.
- Vulnerable soil types;
- High density of animal agriculture; and/or
- Other relevant information (such as area with minority, indigenous, or low-income populations).

EPA would identify these watersheds through use of existing data sources.

EPA would attempt to obtain the necessary data regarding CAFOs in the focus watersheds before using its 308 authority to collect the information directly from CAFOs.

CAFOs would have 90 days from notification to complete and submit the survey. Information will be submitted to EPA in the same manner as required under Option 1.

➤ Under both Options 1 and 2, CAFOs that are required to submit information to EPA and fail to do so within the timeframe will be in violation of the CWA, which is subject to fines and/or criminal penalties.

➤ **Alternative Approaches:**

EPA also seeks comment on alternative approaches to a data collection request for CAFOs including: (1) an approach that would obtain data from existing data sources, (2) an approach that would expand EPA’s network of compliance assistance and outreach tools and (3) an approach requiring NPDES authorized states to submit the information required under this rule, which would require a rulemaking.

EPA’s authority to make this information request lays in CWA Section 308(a). That section gives EPA authority to collect information only from the owner and operator of any point source. EPA cannot simply use the settlement agreement with environmental groups to seek information from all owners or operators of CAFOs.