

January 19, 2012

*Via [www.regulations.gov](http://www.regulations.gov)*

Lisa M. Jackson  
Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, DC 20460

**Re: Docket No. EPA-HQ-OW-2011-0188** – States Attorneys General Comments on the Proposed Rule

Dear Administrator Jackson:

The United States Environmental Protection Agency has proposed a new rule, “National Pollutant Discharge Elimination System (NPDES) Contained Animal Feeding Operation (CAFO) Reporting Rule,” Proposed Rule, 76 Fed. Reg. 65431 (October 21, 2011). Pursuant to the Proposed Rule, all livestock operations in the United States falling under the Clean Water Act’s definition of a CAFO would be required to respond to information requests from EPA.

The genesis of the Proposed Rule is to enable EPA to satisfy terms of a settlement agreement entered into with the Natural Resources Defense Council, Inc., Sierra Club, and Waterkeeper Alliance on May 25, 2010. The Proposed Rule co-proposes two options to acquire information about CAFOs operating in the United States. Option 1 would apply to all CAFOs operating in the United States. Option 2 would apply to CAFOs in a focus watershed. The information being sought by EPA in proposed paragraph § 122.23(k)(2) includes: the name of the owner of the CAFO or an authorized representative, along with address and telephone number; the location of the CAFO’s production area identified by the latitude and longitude or by the street address; NPDES permit status; animal type and number housed at the CAFO; and the number of acres available for land application.

### **EPA Lacks Jurisdiction Over Non-discharging CAFOs**

While EPA claims to derive authority for the Proposed Rule from its information gathering authority under section 308, EPA lacks jurisdiction to require CAFOs that do not actually discharge to waters of the United States to provide information. The plain language of the statute, legislative history, and recent federal court decisions indicate that EPA does not have authority over CAFOs merely because they fall under the definition of a “point source.” Rather, EPA’s jurisdictional reach under the CWA extends to only those facilities that actually discharge pollutants to waters of the United States.

The scope of EPA's authority to regulate "point sources" has been examined by a series of recent federal court decisions, some of which dealt directly with CAFO regulation. In 2005, the Second Circuit vacated that portion of the 2003 CAFO Rule that required CAFO's to apply for NPDES permits regardless of whether they had actual discharges. *Waterkeeper Alliance, Inc. v. United States Environmental Protection Agency*, 399 F. 3d 486. In vacating the "duty to apply" portion of the 2003 CAFO Rule, the Second Circuit explained that "the Clean Water Act 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 (later emphasis added).

The Fifth Circuit fortified the *Waterkeeper* holding by vacating that portion of the 2008 CAFO Rule requiring all CAFO's proposing to discharge to apply for NPDES permits regardless of whether they had actual discharges. *National Pork Producers Council v. United States Environmental Protection Agency*, 635 F. 3d 738 (5<sup>th</sup> Cir. 2011). Likewise, the D.C. Circuit found that 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." *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 859 F. 2d 156 (D.C. Cir. 1988). Further, the Eighth Circuit recently held that violation of EPA's regulation requiring a person "proposing a new discharge" to apply for a permit prior to commencing construction is not a violation of section 308 because the requirements are limited to "the owner or operator of any point source" and "[b]efore any discharge, there is no point source." *Service Oil, Inc. v. Environmental Protection Agency*, 590 F. 3d 545 (8<sup>th</sup> Cir. 2009).

The *Waterkeeper*, *National Pork Producers*, *Natural Resources Defense Council*, and *Service Oil* decisions are clear regarding EPA's inability to regulate point sources in the absence of an actual discharge. Yet, the Proposed Rule attempts to do just that. The Proposed Rule is thus *ultra vires* EPA action and should be withdrawn.

### **Nonpoint Source Pollution is Controlled by the States**

The Proposed Rule is also problematic because it usurps the role of state permitting authorities vested with the duty to collect information under section 303(d) of the CWA. EPA states that information related to acres available for land application is reasonably required 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."

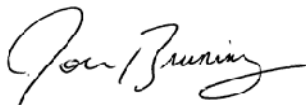
But EPA fails to identify its authority to collect data regarding diffuse runoff from land application under the CWA. In fact, diffuse sources such as agricultural stormwater runoff and irrigated agricultural return flows fall outside of the NPDES permitting program. Control of these non-point sources of pollution is conducted by state and local planning agencies pursuant to sections 208, 303(e), 305(b), 319 and several federally-funded programs under the CWA. Much of the information EPA seeks to obtain from CAFOs relates to water quality impairments,

a statistic that section 303(d) of the CWA authorizes the states to compile and address. As the Proposed Rule seizes authority from state and local agencies, it should be withdrawn.

**Conclusion**

The Proposed Rule's attempt to regulate non-discharging CAFO's and focus on nonpoint source pollution is beyond EPA's authority under the CWA and usurps authority vested in the States. Therefore, the rule should be withdrawn.

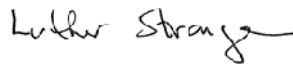
Respectfully,



Jon Bruning  
Nebraska Attorney General



Wayne Stenehjem  
North Dakota Attorney General



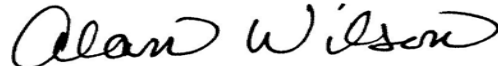
Luther Strange  
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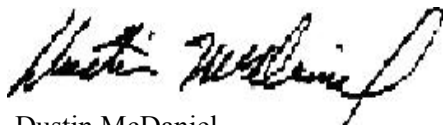
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