



CENTER FOR FOOD SAFETY

February 27, 2013

Docket No. EPA-HQ-OW-2012-0813

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Environmental Protection Agency,
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Comments to U.S. EPA on Regulatory Flexibility Act Section 610 Review of National Pollution Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines Standards for Concentrated Animal Feeding Operations (Docket No. EPA-HQ-OW-2012-0813)

On October 31, 2012, the United States Environmental Protection Agency (“EPA”) published a request for comments on three Regulatory Flexibility Act Section 610 Reviews, 77 Fed. Reg. 65840 (Oct. 31, 2012).¹ Pursuant to that request, the Center for Food Safety (“CFS”),² Environmental Integrity Project (“EIP”),³ Humane Society of the United States (“HSUS”),⁴ and 36 additional organizations⁵ submit the following comments concerning EPA’s review of the National Pollution Discharge Elimination System (“NPDES”) Permit Regulation and Effluent Limitation Guidelines Standards for Concentrated Animal Feeding Operations (“CAFOs” or “factory farms”), hereinafter “Rule” or “CAFO Rule.”

COMMENTS

¹ As originally published in the federal register, written comments were to be submitted to the EPA by December 31, 2012. 77 Fed. Reg. at 65841. On January 3, 2013, the public comment period was extended by sixty days to March 1, 2013. 78 Fed. Reg. 277 (Jan. 3, 2013).

² CFS is a non-profit, membership organization of 245,000 people that works to protect human health and the environment by curbing the proliferation of harmful food production technologies and by promoting organic and other forms of sustainable agriculture. See <http://www.centerforfoodsafety.org>.

³ EIP is a nonpartisan, nonprofit organization established in March of 2002 by former EPA enforcement attorneys to advocate for more effective enforcement of environmental laws.

⁴ The HSUS is the nation's largest animal protection organization, with nearly eleven million members and constituents, that works to protect all animals through education, investigation, litigation, legislation, advocacy, and field work. Among other issues, The HSUS campaigns to eliminate the most egregious factory farming practices and to promote practices that support animal welfare and environmental health.

⁵ The co-signing organizations include Waterkeeper Alliance, Inc. {insert wording re: RKAs}, Animal Legal Defense Fund, Assateague Coastkeeper, Center for Race, Poverty and the Environment, Community Association for Restoration of the Environment, Earthjustice, Environmentally Concerned Citizens of South Central Michigan, Friends of Family Farmers, Friends of the Earth U.S., Illinois Citizens for Clean Air and Water, Iowa Chapter of the Sierra Club, Lewis and Clark Animal Law Clinic, Midwest Environmental Advocates, National Sustainable Agriculture Coalition, Our Children’s Earth Foundation, Public Justice, and

Socially Responsible Agriculture Project.

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The Regulatory Flexibility Act (“RFA”), 5 U.S.C. § 601 et seq., requires agency review of the economic impact of its rules on small entities. Within ten years of a rule’s enactment, agencies are required to revisit the rule “to minimize any significant economic impact of the rule on a substantial number of small entities in a manner consistent with the stated objectives of applicable statutes.” 5 U.S.C. § 610(b). The RFA mandates agencies to consider the following five factors in its review:

- (1) the continued need for the rule;
- (2) the nature of complaints or comments received concerning the rule from the public;
- (3) the complexity of the rule;
- (4) the extent to which the rule overlaps, duplicates or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and
- (5) the length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

For purposes of the RFA, “small entities” includes small businesses and small organizations. *See* 5 U.S.C. § 601 (6); *see also*, 15 U.S.C. § 632. The Small Business Administration has further defined the size limits for small businesses by industry, and its definitions classify some CAFOs as “small businesses.”⁶ *See* 13 C.F.R. § 121.201. However, these definitions also encompass small farms that do not confine livestock or discharge pollution, and therefore are not directly regulated by EPA’s CAFO rules.

Many members and clients of the undersigned organizations are owners, operators and patrons of small farming businesses, and are directly concerned with and interested in the economic impacts of the Rule on their businesses. In addition, the undersigned organizations are aware that many other types of small businesses, such as recreational outfitters and small fishing operations, depend on surface water quality for their livelihoods. Since these small businesses fall within the definition of “small entities,” any reasonable economic review should consider not only the economic impact of the Rule on CAFOs, which are explicitly regulated under the Clean Water Act as point sources, but the impact of the Rule on all small farms and businesses that are affected by how discharges of pollutants from CAFOs are regulated. This should include an analysis of the economic advantages given to CAFOs that fail to comply with the Clean Water Act⁷ over small and sustainable farming operations, and the impacts of any decline in water quality from weakened or unenforced regulations on fishing and recreational outfitters.

⁶ EPA estimated that approximately 6,200 CAFOs qualified as small businesses in the 2003 CAFO Rule. EPA, *National Pollution Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations; Final Rule*, 68 Fed. Reg. 7176, 7246 (Feb. 12, 2003).

⁷ “Despite more than 25 years of regulation of CAFOs, reports of discharge and runoff of manure and manure nutrients from these operations persist.... [T]heir conditions are in part due to inadequate compliance with and enforcement of existing regulations.” *Id.* at 7179.

For decades, sustainable farmers and other small businesses have borne the competitive disadvantage and economic impact of the weak and incomplete NPDES permitting of CAFOs by EPA and state agencies. A complete Section 610 review that considers all impacted small entities will find that strong regulation of illegal CAFO pollution stands to level the playing field and economically benefit small and mid-size farms and other water-quality-dependent businesses.

1. There is a continued need for the rules

There is a significant continued need for the CAFO Rule. Indeed, it is because of the substantial potential for CAFO facilities to impair water quality with one or a number of pollutants, including biological materials and agricultural wastes, that the Clean Water Act mandates their regulation. *See* 33 U.S.C. § 1362 (14)(the term “point source” includes “any ... concentrated animal feeding operation.”); 33 U.S.C. § 1362 (6)(the term “pollutant” includes “biological materials ... and agricultural waste discharged into waters.”). Yet, over forty years since the Clean Water Act first required EPA to regulate CAFO pollution and a decade after EPA amended the CAFO NPDES regulations presently under review, factory farm water pollution persists in rural communities across the country.⁸

EPA’s current regulations do not go far enough to protect water quality and human health, and many states have yet to even fully implement or enforce them.⁹ As a result, thousands of CAFOs – including many known dischargers – have managed to avoid mandatory permitting requirements.¹⁰ In light of the ongoing illegal pollution from CAFOs nationwide, EPA should strengthen permitting requirements and audit state programs to ensure that states are actually implementing and enforcing EPA’s CAFO Rule. State programs that are not adequately enforcing the Rule should be considered for de-delegation.

Moreover, because the Clean Water Act obligates EPA to require NPDES permits of every discharging point source, including CAFOs, EPA’s authority to rescind or weaken its CAFO Rule based on perceived economic impact on small businesses is extremely limited. Rather, any CAFO that discharges must operate under a permit that meets technology-based requirements to protect water quality; these technology standards already consider

⁸ For examples of ongoing CAFO water pollution that has not been adequately controlled by EPA’s current regulations, *see, e.g.*, U.S. Government Accountability Office, Concentrated Animal Feeding Operations: EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality from Pollutants of Concern (Sept. 2008); EPA Region 7, Preliminary Results of an Informal Investigation of the National Pollutant Discharge Elimination System Program For Concentrated Animal Feeding Operations in the State of Iowa (July 2012); EPA Region 5, Initial Results of an Informal Investigation of the National Pollutant Discharge Elimination System Program for Concentrated Animal Feeding Operations in the State of Illinois (Sept. 2010).

⁹ *See id.*; James Hanlon, EPA, Memorandum: Concentrated Animal Feeding Operation Program Update after *National Pork Producers Council v. EPA* (Dec. 8, 2011); NPDES CAFO Rule Implementation Status Table – National Summary (Dec. 31, 2011).

¹⁰ *See, e.g.*, EPA, FY 2012 Office of Enforcement and Compliance Assurance (OECA) Final National Program Manager (NPM) Guidance, Pub. No. 300F1105 (Apr. 30, 2011).

what is economically feasible for the regulated community.¹¹ Weakening effluent limitations in subsequent permits would additionally constitute illegal backsliding in some cases.¹² Therefore, to comply with the Clean Water Act, EPA must strengthen, or at a minimum maintain, the core elements of its CAFO permit regulations.

2. CAFO industry complaints about the economic impact of the CAFO Rule are not based in fact

Environmental advocates, sustainable agriculture advocates, rural citizens, and CAFO industry groups have critiqued EPA's CAFO Rule. EPA should consider the frequent comments from environmental, farm, and rural groups that the regulations are not adequately protective of water quality, particularly in light of their poor implementation and lax enforcement. There can be little doubt that when it comes to regulation of CAFOs the problem is too little not too much. Litigation initiated by industry groups has significantly narrowed the universe of CAFOs required to obtain NPDES permits such that a CAFO can avoid being regulated under the CAFO Rule if it does not "actually discharge" pollutants into navigable waters.¹³ Moreover, even most CAFOs that "actually discharge" have avoided permits altogether.¹⁴

Even those CAFOs that obtain NPDES permits are not unduly burdened. Many CAFOs, in fact, receive federal and state public funding resources to assist them in complying with the Rule's zero discharge effluent limitation; these subsidies significantly reduce the economic burden of the Rule on regulated entities.¹⁵ Combined with continuing impacts to water quality and related human health impacts, this indicates that the economic burden of compliance with the Rule is, in fact, being placed on the American taxpayer.

3. EPA's CAFO Rule is not complex

EPA's CAFO Rule is not complex, and complying with Clean Water Act permitting requirements does not impose an unreasonable burden on factory farms. In fact, the CAFO Rule does not even require the basic water quality monitoring and reporting required of almost every other type of polluter regulated under the Clean Water Act. Further, states and industry groups provide many resources to help CAFOs come into compliance with the Rule, which reduces the economic burden to factory farms even further.¹⁶

4. There is no overlap with other rules

¹¹ See 40 C.F.R. § 412. See also, 33 U.S.C. § 1311(b)(2)(E); 33 U.S.C. § 1314(b)(4)(B).

¹² 33 U.S.C. § 1342(o)(1).

¹³ *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011).

¹⁴ See, e.g., EIP, HSUS and CFS Coalition Comments to EPA's 2014-2016 National Enforcement Priorities, EPA Docket No. EPA-HQ-OECA-2012-0956 (filed Feb. 27, 2013).

¹⁵ See, e.g., EPA, Financial Assistance Summaries for AFOs (Feb. 2005), available at http://www.epa.gov/npdes/pubs/financial_assistance_summaries.pdf.

¹⁶ *Id.*

To date CAFOs have escaped nearly all meaningful regulation under federal pollution control laws, and without EPA's Clean Water Act regulations pollution from the entire industry would be almost completely unregulated. Even with the CAFO Rule, many states fail to do what EPA requires and have not issued permits. While some states have CAFO construction permit or registration programs, these programs do not require CAFOs to control discharges, comply with water quality standards, or otherwise meet basic Clean Water Act requirements for point sources. The construction stormwater permits occasionally required for large CAFO construction do not regulate the same waste stream as the CAFO Rule, and most CAFOs required to obtain such a permit are unlikely to meet the RFA's small business definition. The existing rules fill a critical gap in the Clean Water Act, and do not duplicate or conflict with other state or federal programs.

5. Changes justify strengthening the rules to protect small entities

Nothing has happened in the past decade that makes compliance with EPA's permitting requirements difficult or economically impractical, and EPA has not required CAFOs to adopt new technologies that raise the cost of compliance. To the contrary, EPA has narrowed the scope of the CAFO rules twice since finalizing them in 2003, which weighs against a finding that the rules burden small entities.¹⁷ Over the past decade we have seen increases in subsidies paid to CAFOs, continued pollution discharges from CAFOs, greater difficulty for small farmers to access the market and compete with factory farms, and increased health problems resulting from industrially-produced food products. As a result, EPA should require more – certainly not less -- protective manure management and implementation of new pollution control technologies as required by the Clean Water Act.

CONCLUSION

In sum, in its Section 610 Review of the CAFO Rule, EPA should conclude that no changes are needed to protect CAFOs that meet the definition of "small entities." However, rather than focusing solely on those RFA-defined "small entities" that are large enough to be regulated by the Clean Water Act as CAFOs, EPA should consider the fact that the existing rules and their poor enforcement place a significant burden on other small businesses and small farms that are not CAFOs. EPA's CAFO Rule does not go far enough to protect water quality and should be strengthened to hold CAFOs responsible for their pollution, thereby helping to level the economic playing field for small farmers competing with large factory farms and helping other small businesses that depend on water quality, such as fishing businesses and recreational outfitters. Only stricter regulation of CAFOs will begin to shift the impact of these facilities from small businesses and the public onto the polluter. Stricter regulation of CAFOs is also consistent with the purposes of the Clean

¹⁷ Small Business Administration Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act at 80-82 (May 2012), *available at* http://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf.

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