



C E N T E R F O R FOOD SAFETY

Via Online Submission and First Class Mail

Docket No. EPA-HQ-OW-2011-0188
Water Docket, Environmental Protection Agency
Mailcode: 28221T
Attention Docket ID No. EPA-HQ-OW-2011-0188
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

Comments to U.S. EPA on National Pollutant Discharge Elimination System (NDPES)
Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 76 Federal Register 65431-
65458 (Oct. 21, 2011)

January 19, 2012

Docket No. EPA-HQ-OW-2011-0188

Pursuant to a May 25, 2010 settlement agreement (Agreement) reached between the U.S. Environmental Protection Agency (EPA) and Sierra Club, National Resources Defense Council (NRDC), and Waterkeeper Alliance in *National Pork Producers et al. v. U.S. EPA*, No. 08-61094 (5th Cir.), EPA was to issue a rule “to require all owners or operators of CAFOs [concentrated animal feeding operations], as point sources under the [Clean Water] Act, regardless of whether they discharge or propose to discharge, to submit information to EPA.”¹ EPA’s proposed rule was published in the Oct. 21, 2011 Federal Register Notice at 76 Fed. Reg. 65431-65458 (Proposed Reporting Rule). The Center for Food Safety (CFS) submits the following comments addressing the inadequacy of the Proposed Reporting Rule (Docket No. EPA-HQ-OW-2011-0188).

CFS is a non-profit, membership organization 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.² CFS represents nearly 200,000 members throughout the country that support safe, sustainable and organic agriculture and regularly purchase organic products. CFS members support the public’s right to choose food and

¹ Agreement, ¶ 2.

² See generally <http://www.centerforfoodsafety.org>.



crops not sourced from industrial farming practices such as animal feeding operations. CFS has a number of program areas to explore policy and litigation options to serve its members. CFS has an anti-CAFO program, and has previously been involved in regulatory matters and litigation where necessary. For example, CFS is a plaintiff in *John Doe, Darla Cherry and Jennifer Lopez v. Thomas Suehs et al.*, D-1-GN-10-004362 (261st Dist. Ct. Travis Co., Texas) (filed 2011) (challenging failure to enforce health and safety laws in egg factories), CFS was a plaintiff in *Waterkeeper Alliance et al. v. EPA*, No. 09-1017 (D. D.C. 2010) (petition for review of “CERCLA/EPCRA Administrative Reporting Exemption for Air Releases of Hazardous Substances From Animal Waste at Farms,” 73 Fed. Reg. 76,948 (Dec. 18, 2008)), CFS petitioned the U.S. Food & Drug Administration (FDA) for withdrawal of approvals for all animal drug applications for arsenic-containing compounds used in animal feed, and submitted comments to the FDA on issues such as the judicious use of medically important antimicrobial drugs in food-producing animals, and BSE. CFS staff have also authored numerous publications regarding factory farming, such as in *The CAFO Reader*.

EXECUTIVE SUMMARY

For approximately thirty years CAFOs have been a known danger to human health, welfare, wildlife and the environment. EPA, however, does not even know exactly how many CAFOs exist in the U.S., how much waste they produce, or where the waste goes. Older estimates put the number of animal feeding operations (AFOs) at 238,000.³ The Agreement is a method for EPA to begin identifying a *portion* of the information necessary to conduct a national inventory of all CAFOs. The need for this information is clearly established: in 2008, the U.S. General Accounting Office (GAO) issued a report entitled “EPA Needs *More Information* and a Clearly Defined Strategy to Protect Air and Water Quality from Pollutants of Concern.”⁴ (GAO Report). The GAO Report instructed EPA to conduct a comprehensive inventory, and EPA consented to do so.⁵ There is clearly a need for casting a wide net to obtain information to begin to get a handle on this problem, and the Courts have recognized this issue. For example, just last week the Eastern District of Washington issued an opinion requiring a CAFO to report numerous data points to enable local citizens to monitor the dairy’s water and soil pollution and to keep the habitual offender in check.⁶ The information sought by the Agreement is essential. It is critical data necessary for EPA to begin its promised comprehensive national inventory, and to implement and enforce the Clean Water Act (CWA).

³ See *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 492 (2nd Cir. 2005) citing NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 68 Fed. Reg. 7176, 7179 (Feb. 12, 2003) (codified at 40 CFR Parts 9, 122, 124 and 412) (defining AFO).

⁴ “EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality from Pollutants of Concern.” GAO-08-944 (2008) (italics added).

⁵ 76 Fed. Reg. 65431, 65435 (Oct. 21, 2011), citing 2008 GAO Report at 76-78.

⁶ *Community Association for Restoration of the Environment (CARE) v. Nelson Faria Dairy, LLC*, No. CV-04-3060, (E.D. Wa. Jan. 12, 2012).

Whether considering and issuing site-specific national pollution discharge elimination system permits (NPDES) under the CWA, establishing effluent limitations, water quality standards, or developing plans or programs, EPA must take information pertaining to a CAFO into consideration.⁷ EPA has concluded that basic information about CAFOs would assist it in addressing water quality impacts from CAFOs due to the industry's inadequate compliance with existing regulations and limitations in CAFO permitting programs.⁸ CFS's comments highlight the need to establish the strictest reporting requirements possible to prevent the kind of problems associated with CAFOs that are currently experienced throughout the country. EPA has the statutory legal authority to obtain this information, the obligation to the citizens of this country to enforce the Agreement, and to require stricter reporting requirements than those presently provided by the Proposed Reporting Rule. The quality of our nation's public health and environment depends on obtaining, and making public, this information.

In response to industry pressure following the issuance of the 5th Circuit decision in *National Pork Producers*, EPA caved on its Agreement with the environmental petitioners and issued a proposed rule that undermines the Agreement. EPA's Proposed Reporting Rule is in no way justified by the Fifth Circuit's decision as EPA's CWA § 308 authority is broader than the issue addressed by that court, namely which CAFOs must apply for NPDES permits. By only seeking to require the reporting of a paltry and weakened number of 5 of the 14 agreed-upon data points, EPA proposes to evade its statutory responsibilities.

COMMENTS

I. Purpose of the Clean Water Act and § 308 of the Act

Congress enacted the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation's waters,”⁹ and established as a national goal the elimination of all pollutant discharges to surface waters by 1985. The CWA seeks to eliminate pollution by requiring *all* polluters to obtain NPDES permits for point source discharges.¹⁰ NPDES permits contain pollution limits, which are established by EPA through a system of technology-based effluent limitation guidelines, supplemented by water quality-based limitations.¹¹ Water-quality related effluent limitations protect specific bodies of water.¹² The NPDES permit takes the applicable effluent limitations and other standards and turns them into the obligations borne by

⁷ 33 U.S.C. § 1342(a)(2).

⁸ 76 Fed. Reg. 65434.

⁹ 33 U.S.C. §§ 1251-1378.

¹⁰ 33 U.S.C. § 1311 (*italics added*).

¹¹ “Whenever a technology-based effluent limitation is insufficient to make a particular body of water fit for the uses for which it is needed, EPA is to devise a water-quality based limitation that will be sufficient to the task.” 33 U.S.C. § 1312(a); *see also NRDC v. EPA*, 822 F.2d 104, 111 (D.C. Cir. 1987).

¹² 33 U.S.C. § 1312.

the individual polluting entity.¹³ The intended effect of the CWA permit and effluent limitation process is to gradually reduce pollution to the point of elimination. With respect to CAFOs under a duty to apply for individual NPDES permits, these permits are site-specific and include tailored specific pollution measures. Individual permits allow for the imposition of meaningful monitoring requirements that both protect water quality and produce records and reports useful for gauging compliance, which is absolutely critical considering the fact that this industry is notorious for skirting its obligations to comply with the CWA.

CWA § 308 is a reporting rule of the CWA, statutorily authorizing EPA to obtain a wide array of information from the owner or operator of a point source “[w]henever required to carry out the objective of the Act” including but not limited to:¹⁴

- (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this Act;
- (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance;
- (3) any requirement established under this section; or
- (4) carrying out sections 305, 311, 402, 404 (relating to state permit programs), 405, and 504 of this Act.

Section 308 authority is broad.¹⁵ Information-gathering under the statute can occur whenever EPA wants data. It can occur via formal request from the agency, or be regulated as a reporting requirement. Many different industries are subject to the CWA § 308 reporting requirements.¹⁶ No polluting industry should receive special treatment and be exempt from mandatory reporting rules. Animal waste can be as dangerous, if not more so, than untreated human waste and some industrial wastes.¹⁷ CWA § 308 also carries consequences. Failure to respond to a CWA § 308 request is punishable under the civil and criminal provisions of CWA § 309 which provides for the assessment of penalties, injunctive relief and imprisonment. Providing misleading or false information may subject a person to civil and criminal sanctions, and EPA may use information obtained pursuant to CWA § 308 in administrative, civil or criminal proceedings.

¹³ See *NRDC v. EPA*, 822 F.2d 104, 110 (D.C. Cir. 1987).

¹⁴ 33 U.S.C. § 1318(a).

¹⁵ See, e.g. *Natural Resources Defense Council, Inc. v. U.S. EPA*, 863 F.2d 1420, 1433 (1988) (finding a visual sheen test to be a “generally validated and useful standard” to monitor prohibited discharge of oil).

¹⁶ Some examples include: publicly-owned treatment works (40 C.F.R. § 403.12); the plastics molding and forming point source category (40 C.F.R. § 463.3); pharmaceutical manufacturing point source category (40 C.F.R. § 439.2); and meat and poultry products point source category (40 C.F.R. § 432.1).

¹⁷ “Putting Meat on the Table: Industrial Farm Animal Production in America.” Pew Charitable Trusts and Johns Hopkins Bloomberg School of Public Health Final Report (2008) at 89. (Pew Report).

Since the 1970's, EPA has "routinely" used its authority under section 308 of the Act to collect information from large groups of point sources when developing and reviewing effluent limitation guidelines.¹⁸ *It does not matter if the point sources are or are not required to apply for NPDES permits*; EPA has authority (and a history of requiring such information) under CWA § 308 to require reporting of any information for purposes including assistance in developing implementing and enforcing effluent limitations or standards.¹⁹ For example, EPA recently sent questionnaires to regulated municipal separate storm sewer system authorities that are not currently required to obtain NPDES permits.²⁰ These large collections of information, or surveys, "typically" request industrial sources to provide information such as the type and amount of pollutants discharged, technologies available to treat waste streams, the performance capability of these technologies, and financial data.²¹ Obtaining this information is the heart of making the CWA a flexible tool. By EPA's own statement, "EPA uses this information to determine the appropriate control requirements and to assess the economic feasibility of such additional controls."²²

The Fifth Circuit's decision in *National Pork Producers* incorrectly held that potential CAFO dischargers are exempt from the duty to apply for a NPDES permit. Whether or not a CAFO has or does not have a duty to apply for a NPDES permit, permitted and unpermitted CAFOs are not eliminated from the scope of EPA's CWA § 308 authority. CWA § 308 is not limited to permitted facilities. The CWA clearly requires consideration of the potential to discharge, and CWA § 308 is an example of EPA's statutory right to more broadly evaluate, monitor and assess pollution problems. Under the Act, and in the reality of CAFO waste management, it is incorrect to adopt an assumption that a CAFO does not discharge; it must be assumed that all CAFOs do indeed discharge. The 33 U.S.C. § 1362(14) specifically includes *potential* dischargers within the scope of the statute, and defines a point source as any CAFO "from which pollutants are or may be discharged."²³ Furthermore, *National Pork Producers* noted that the CWA does not empower the agency to "regulate" point sources, only to "regulate" the discharge of pollutants.²⁴ Simultaneously, the CWA relies on point sources to employ best practicable control technology and best available technology and contemplates facilities using these tools to achieve effluent reductions.²⁵ The information sought by the Agreement, and the subsequent Proposed Reporting Rule, does not seek to "regulate" point sources but to identify information pertaining to the discharge of pollutants to better understand the nature of the

¹⁸ 76 Fed. Reg. 65436.

¹⁹ 76 Fed. Reg. 65436-37.

²⁰ 76 Fed. Reg. 65436.

²¹ *Id.*

²² *Id.*

²³ 33 U.S.C. § 1362(14).

²⁴ *National Pork Producers Council et al. v U.S. EPA*, No. 08-61093 at 18 (5th Cir. 2011), citing *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 859 F.2d 156, 170 (D.C. Cir. 1988).

²⁵ *See, e.g.* 33 U.S.C. § 1314.

pollution problem. Thus, the holding of *National Pork Producers* does not absolve EPA from requiring all CAFOs to report under CWA § 308.

The CAFO industry is “[u]nlike many other point source industries” because EPA “does not have facility-specific information for all CAFOs in the United States.”²⁶ While effluent limitation guidelines only apply to large CAFOs, the *entire* CAFO industry discharges such substantial pollution, that the Agreement called for, and EPA agreed to obtain information from *all* CAFOs regardless of size.

The Agreement specified fourteen different factors EPA was to propose to obtain from *all* CAFOs pursuant to EPA’s § 308 authority.²⁷ If EPA chose to not propose one or more of these factors, the Agreement instructed EPA to explain in the proposed 2011 Reporting Rule why it declined to propose certain factors.²⁸ EPA’s subsequent failure to explain its action, as was specifically required by the Agreement, is a classic case of an agency acting arbitrarily and capriciously.

When the technology standard and permitting rule for CAFOs was originally promulgated in the 1970’s, animal feeding operations existed on a much smaller scale and in fewer numbers than they do today.²⁹ Today, large-scale animal factories, which raise tens of thousands of animals and produce enormous quantities of manure, dominate animal production. Annually, a single animal feeding operation can generate 1.6 million tons of waste, or more than 1.5 times the sanitary waste produced by the 1.5 million residents of Philadelphia, Pennsylvania in one year.³⁰ In 2002, just five North Carolina counties are estimated to have produced 15.5 million tons of manure in one year.³¹ This increasing concentration and industrialization of livestock production is devastating our waterways. Conservative estimates reported by states and tribes in 28 states indicate that animal feeding operations pollute 27,751 miles of rivers and streams.³² EPA’s Proposed Reporting Rule estimates that 8,000 from a “total universe” of 20,000 CAFOs have NPDES permits.^{33,34} If EPA’s and GAO’s estimations are approximately

²⁶ 76 Fed. Reg. 65436.

²⁷ Agreement, ¶ 2.

²⁸ *Id.*

²⁹ *See, e.g.* Pew Report at 5 (“The diversified, independent, family-owned farms of 40 years ago that produced a variety of crops and a few animals are disappearing as an economic entity, replaced by much larger, and often highly leveraged, farm factories.”).

³⁰ GAO Report at 5. The figures of waste produced annually vary wildly. Hence the need for EPA to identify this information. In the late 2000’s the USDA estimated 500 million tons of waste were produced annually and EPA estimated 150 million tons of waste. *See* Pew Report at at 23.

³¹ GAO Report at 5.

³² *See* U.S. Environmental Protection Agency, National Water Quality Inventory: 1998 Report to Congress, Chapter 3 at 65. (2000).

³³ 76 Fed. Reg. 65445.

³⁴ Note that the GAO estimated that as of 2002 there were 12,000 CAFOs in the U.S. *See* GAO Report at 14.

correct, there has been a 456% increase in CAFOs in the U.S. in the last 30 years, not a 234% increase.³⁵

II. Why the Information Sought Under the Agreement Is Critical and Essential

In signing the Agreement, EPA agreed “to require *all* owners or operators of CAFOs, as point sources under the Act, regardless of whether they discharge or propose to discharge” to submit the information below to EPA.³⁶ Yet, EPA still agreed for *all* CAFOs to be required to report the following information:

1. Name and address of the owner and operator;
2. If contract operation, name and address of the integrator;
3. Location (longitude and latitude) of the operation;
4. Type of facility;
5. Number and type(s) of animals;
6. Type and capacity of manure storage;
7. Quantity of manure, process wastewater and litter generated annually by the CAFO;
8. Whether the CAFO land-applies;
9. Available acreage for land application;
10. If the CAFO land-applies, whether it implements a nutrient management plan for land application;
11. If the CAFO land-applies, whether it employs nutrient management practices and keeps records on site consistent with 40 C.F.R. § 122.23(e);
12. If the CAFO does not land-apply, alternative uses of manure, litter, and/or wastewater;
13. Whether the CAFO transfers manure off-site, and if so, quantity transferred to recipient(s) of transferred manure;
14. Whether the CAFO has applied for an NPDES permit.

EPA was to propose requiring this information to be submitted every five years.³⁷ For factors EPA did not propose to collect, EPA’s Proposed Reporting Rule was to discuss the items, explain why it chose not to require submission of that information, and to request public comment on those items.³⁸ Furthermore, if EPA’s Proposed Reporting Rule did not seek submission of the information every five years, EPA was to explain why it chose not to require such re-submittals.³⁹

³⁵ If the GAO calculated a 234% increase from 1982 to 2002 as follows: $11,995 - 3,594 = 8,401 / 3,594 = 234\%$, then the calculation showing a 456% increase from 1982 to 2008 is as follows: $20,000 - 3,594 = 16,406 / 3,594 = 456\%$.

³⁶ Agreement, ¶ 2 (italics added).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

“The very nature of a CAFO and the amount of animal wastes generated constitute a large threat to the quality of the waters of the nation.”⁴⁰ It is well-documented that CAFOs contaminate groundwater, surface water, and the air with nutrients, pathogens, and other pollutants.⁴¹ CAFO pollutants leak from lagoons and other storage structures, leach and run off from spray fields and volatilize to the air.⁴² CAFO-polluted groundwater and surface water can be dangerous to human health and the environment when people and wildlife come into contact with or consume it.⁴³ Surface water pollution from CAFOs has already been seen to cause massive fish kills and the loss of other aquatic life.⁴⁴

Those who have suffered most from the water pollution problems associated with CAFOs are those who live in close proximity to these factory farms. In many ways, the growth of the CAFO industry has destroyed the rural economy.⁴⁵ For example, in 1915 the number of hogs produced in the U.S. was similar to the number of hogs produced eighty years later, in 1980.⁴⁶ What changed, however, was the number of operations as there was a precipitous decline in the number of hog farmers.⁴⁷ But, today these millions of animals have been taken from the family farmers, who were active in every state in this nation, and concentrated in a few locations around the country.⁴⁸ The result is a complete imbalance in nature’s delicate ecological cycles as well as a reduction in the quality of traditional rural life.⁴⁹ This practice has created a corresponding imbalance in rural economic support systems. Independent, rural family farmers are no longer able to compete with the animal factories, even though independent producers create three times as many jobs as corporate contract production.⁵⁰ Big corporate livestock operations are also less

⁴⁰ *CARE v. Henry Bosma Dairy*, 305 F.3d 943, 955 (9th Cir. 2002).

⁴¹ See, e.g. GAO Report at 6, 22 and 30 and Pew Report at 11, 23, 25, and 29.

⁴² See, e.g. GAO Report at 9, 20, 30 and Pew Report at 11, 25, and 29.

⁴³ See, e.g. GAO Report at 23, 30, and Tables 5 and 6. Pew Report at 13.

⁴⁴ See, e.g. GAO Report at 6 and 24-25 and Pew Report at 25.

⁴⁵ See, e.g. Pew Report, Chapter 4 “Rural Life” at 40-49.

⁴⁶ Kendall M. Thu, “Neighbor Health and Large-scale Swine Production.” National Ag Safety Database. <http://nasdonline.org/document/1829/d001764/neighbor-health-andlarge-scale-swine-production> (citing USDA National Agriculture Statistics Survey).

⁴⁷ *Id.*

⁴⁸ See, e.g. Food & Water Watch “Factory Farm Map” <http://www.factoryfarmmap.org/#animal:all;location:US;year:2007> (showing increase in factory farms 2002-2007 and geographic proximity of factory farms to meat plants).

⁴⁹ See, e.g. Pew Report at 42-43 (“The siting of large-scale livestock facilities near homes disrupts rural life as the freedom and independence associated with life oriented toward the outdoors gives way to feelings of violation, isolation and infringement. Social gatherings are affected through the disruption of routines that normally provide a sense of belonging and identity – backyard barbecues, church attendance, and visits with friends and family.”)

⁵⁰ University of Missouri Study. ICRP Discussion Points: Family Farms vs. Hog Factories (1997) www.farmweb.org/b/icrppoints.htm (direct link no longer available).

likely to do business locally than are small and medium sized family farmers, thus having a further detrimental impact on the rural economy.⁵¹

EPA must consider the social and economic consequences of large-scale CAFO production not only at the facility and production sector levels but also at the community level. Without basic information identifying CAFOs, their activities, processes and practices, EPA cannot evaluate the impacts CAFOs have on communities. Many of the environmental and public health burdens of CAFO pollution are unfairly imposed on local communities.⁵² In addition to dealing with problems such as the contamination of private and public drinking supplies, these communities and surrounding landowners may also be faced with falling land values and a shrinking resource base.

EPA needs regulatory tools to obtain information about this out-of-control industry, and to enforce environmental laws against CAFOs because its approach to date has not worked. Current CAFO monitoring and reporting requirements are so weak that there is no possible way to ensure that EPA's own current standards are being met, and there is nothing in NPDES permits that encourages facilities to come into compliance. The Agreement provided EPA with a roadmap to implement these tools for *all* CAFOs; yet EPA failed to honor the Agreement by refusing to seek all fourteen points of agreement, by proposing to limit the CAFOs required to report the information to only those located in focus watersheds, and by proposing various speculative methods to obtain the information. EPA's act is an overt refusal to recognize the exponential growth of CAFOs,⁵³ their sordid history of water pollution, and to take responsibility for protecting human health and the environment. It is clear that EPA's action is arbitrary, capricious, and otherwise unlawful.

Without requiring the reporting of the information points specified in the Agreement, EPA cannot issue accurate NPDES permits and cannot protect water quality from the unfettered growth of the CAFO industry. A facility's compliance history, *or lack thereof*, should not have to be demonstrated by a litany of citizen complaints filed by neighbors and affected members of the public who want to protect their property, health, the environment, and rural ways of life.

There is no reason to treat CAFOs differently than any other discharger in any other industry. In fact, given the well-documented history of water pollution caused by CAFOs, there is even more compelling evidence for EPA to immediately begin collecting *at a minimum* the agreed-upon fourteen factors from all CAFOs.

⁵¹ Pew Commission on Industrial Farm Animal Production, Technical Report "Community and Social Impacts of Concentrated Animal Feeding Operations" at 49.

⁵² See, e.g. Pew Report at 41-49.

⁵³ Which growth has been an increase of 234% in 30 years (see GAO Report at 4), and characterized as occurring with "warp speed." See Pew Report at 7; see also *supra* n. 35 calculating growth at 456%.

III. Proposed Reporting Rule – Option 1

EPA’s Proposed Reporting Rule only requires reporting of five (5) of the fourteen (14) factors in the Agreement; and of those five factors, EPA has watered them down from the terms of the Agreement. For the nine factors EPA refused to publish in the Proposed Reporting Rule, EPA failed to include an explanation as is required by the Agreement. Therefore, for its failure to require all 14 factors from all CAFOs, Option 1 is inadequate.

A. Option 1 Is Inadequate Because the Information Sought Does Not Correspond to the Critical Factors Agreed to in the Settlement Agreement

Option 1 is inadequate because it would only require the reporting of a scintilla of the information essential to building an inventory and an understanding of the scope of the CAFO industry and pollution in the United States. The 14 factors listed in the Agreement must be part of EPA’s Proposed Reporting Rule. Elimination of any one of these factors makes the Proposed Reporting Rule inadequate. Furthermore, EPA’s required “explanation” of its reasoning for refusal to include all 14 factors is merely a three-paragraph statement of what information it is not requiring to be reported.⁵⁴ EPA attempts to justify its failure to require reporting “because the Agency believes it can effectively obtain site-specific answers for the remaining questions directly from states, other Federal agencies, specific CAFOs, or other sources when necessary.”⁵⁵ As the GAO’s findings clearly indicated, nothing could be further from the truth.⁵⁶

1. Name and address of CAFO owner and operator

The Agreement requires EPA to obtain the name and address of *all* CAFO owners and operators. Requiring this information as part of a CWA § 308 reporting requirement is not unusual or remarkable. Other industries are regulated to provide this information.⁵⁷ The Proposed Reporting Rule proposes weakening the agreed-upon requirement to allow a CAFO to report either a CAFO owner *or an authorized representative* to EPA. The Proposed Reporting Rule requires the authorized representative to be an individual who is involved with the management or representation of the CAFO and within reasonable proximity to the CAFO. Under the Proposed Reporting Rule, a CAFO could elect to simply report to EPA the name of the CAFO manager, not the person ultimately responsible for the management and liabilities of the CAFO. Furthermore the Proposed Reporting Rule would allow owners or authorized representatives to provide a post office box address in lieu of a street address. Such information may be useful to EPA for contacting a CAFO, but is useless in analyzing a CAFO’s geographical

⁵⁴ 76 Fed. Reg. 65439 (one of the three paragraphs explains the Agreement, and another lists what EPA was supposed to do but did not).

⁵⁵ *Id.*

⁵⁶ GAO Report at 4.

⁵⁷ *Supra* n. 16.

location, topography, or hydrology. EPA claims that by allowing the release of a named, authorized representative, and allowing for a post office box address, CAFO owners' privacy will be protected.⁵⁸

This argument should be rejected because the CWA § 308 specifically requires that any records, reports or information obtained under CWA § 308 shall be available to the public unless the information would divulge methods or processes entitled to protection as trade secrets.⁵⁹ Public access to information is a recurring theme in the CWA.⁶⁰ It is clear that Congress intended to favor disclosure of information, especially where protection of the environment and public health are at stake. For example, the D.C. Circuit has previously upheld EPA's determination that "[i]nformation contained in NPDES permits and permit applications is not entitled to confidential treatment because Section 402(j) of the CWA mandates disclosure of this information to the public, notwithstanding the fact that it might be trade secrets or commercial or financial information."⁶¹ The court concluded that a business could be required to "provide confidential information where the Government had a legitimate regulatory interest in protecting the environment and public health."⁶² Such is the case here. In the case of the Proposed Reporting Rule, the privacy interest of CAFO owners and operators in concealing their identity, and their address, is far outweighed by public health interest in identifying CAFOs, their owners and operators, and their locations.

2. If a contract operation, the CAFO must provide the name and address of the integrator.

EPA failed to include a requirement that CAFOs report the name and address of the integrator if the CAFO is a contract operation, and arbitrarily and capriciously failed to explain why. Divulging the identity and contact information for an integrator is a critical piece of information. Most of the thousands of CAFOs in the United States are created by a large corporation (the integrator) contracting with a farmer. EPA's Proposed Reporting Rule acknowledges that there are at least 20,000 CAFOs in the U.S.⁶³ Sources indicate that there may be between 16 – 25 "major" integrators (based on revenue), but the numbers for the entire industry are wholly uncertain.⁶⁴ There are likely even more medium-sized revenue integrators,

⁵⁸ 76 Fed. Reg. 65437-38.

⁵⁹ 33 U.S.C. § 1318(b).

⁶⁰ See, e.g. 33 U.S.C. §§ 1251, 1254, 1294, 1296, 1313, 1314, 1317, 1318 and 1319.

⁶¹ 66 Fed. Reg. 2960, 3035 (Jan. 12, 2001) (referencing Class Determination 1-78) (Mar. 22, 1978); *Natural Resources Def. Council v. EPA*, 822 F.2d 104 (D. D.C. 1987).

⁶² *Id.* (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984)). See also discussion in Section VIII. *infra*.

⁶³ *Supra* n. 33, 34.

⁶⁴ See, e.g. "Top 25 U.S. Pork Powerhouses 2011"

(<http://www.agriculture.com/uploads/assets/promo/external/siteimages/Pork-Powerhouses-2011.pdf>) (listing top 25 U.S. pork powerhouses as of approximately 2011); "Factory Farm Offenders – Worst Industry Offenders In U.S. Food Animal Production", Farm Sanctuary (<http://www.farmsanctuary.org/mediacenter/reports.html>) (listing 16 corporations as of approximately 2006).

but EPA does not know how many integrators exist. A farmer operates the CAFO, but under the specific management requirements and control of the integrator.⁶⁵ The integrator dictates to the CAFO demands for product which heavily influence most farmers' practices, including the generation of waste.⁶⁶ Farmers are often abandoned by integrators once a beef, poultry, dairy or egg product has been turned over to the integrator for processing and are left to address waste storage, treatment, and land applications alone. Integrators' production requirements are the backbone of CAFO waste generation and the pollution problem. EPA must obtain this information to identify practices in the industry which consistently create pollution problems, and also practices which are able to curb polluting practices.

3. Location by longitude and latitude

The Proposed Reporting Rule does adopt the requirement of the Agreement that all CAFOs must report the location by longitude and latitude of its operation.⁶⁷ However the Proposed Reporting Rule also offers a CAFO the option of reporting its location by street address.⁶⁸ In fact, the Proposed Reporting Rule in the "Alternatives" section also proposes that a CAFO should simply be allowed to identify its location by indicating the nearest waterbody.⁶⁹ This alternative should be rejected. Only the latitude and longitude information is sufficient to enable EPA to identify actual and potential pollution issues based on a CAFO's precise location. A street address could be miles away from the actual CAFO production area on a particular property and topographically entirely different. Allowing a CAFO to simply self-identify the nearest waterbody would only have the effect of informing EPA where to possibly look for pollution *after* discharges occur. For CAFOs that are located in arid regions of Arizona, New Mexico and Texas, for example, the nearest water body may be several miles away. Allowing this alternative would be too little too late; it would not address groundwater pollution, surface water pollution or drinking water pollution between the point source (the CAFO) and the waterbody.

Some CAFOs are located in flood plains, converted wetlands, adjacent to wetlands and surface waters, on agricultural fields with surface drainage ditches or on land with extremely shallow groundwater aquifers.⁷⁰ Also, some CAFOs are quite close to wells that are used for domestic purposes. Wet weather frequently saturates spray fields, producing large amounts of discharges of animal waste and wash water to both surface and ground water, which necessarily

⁶⁵ See, e.g. *Sierra Club Inc. v. Tyson Foods, Inc.*, 299 F.Supp.2d 693, 714-715 (W.D. Ky. 2003); *City of Tulsa v. Tyson Foods, Inc.*, 258 F.Supp.2d 1263, 1296 (N.D. Okla. 2003) *vacated pursuant to settlement* (Jul. 16, 2003).

⁶⁶ *Id.*

⁶⁷ 76 Fed. Reg. 65437.

⁶⁸ *Id.*

⁶⁹ 76 Fed. Reg. 65438.

⁷⁰ See, e.g. Pew Report at 6 ("While some CAFOs have been sited properly with regard to local geological features, watersheds, and ecological sensitivity, others are located in fragile ecosystems, such as on flood plains in North Carolina and over shallow drinking water aquifers in the Delmarva Peninsula and northeastern Arkansas.")

impairs water quality and human health. Individual permits are site-specifically crafted to take into account these differences; and thus to get a handle on the entire CAFO industry the reporting of latitude / longitude information for all CAFOs should be automatically required.

Further, EPA also must require individually-tailored management practices specific to the unique conditions on CAFO sites for NPDES permitted facilities. Site-specific information can be used to impose specific design or operational permit limitations. Individual permits can allow for the evaluation and accounting of the suitability of the land for the application of manure, including the soil and subsoil permeability, the presence of aquifers, the vulnerability of groundwater resources, soil slope, erodibility, the land use of proposed disposal sites and surrounding land uses, and the existence of water withdrawals downstream of the proposed disposal site. Site-specific permit terms might, for example, require the siting of a manure storage facility in the least ecologically vulnerable location on a property, despite the owner's plans to put it elsewhere. This simply demonstrates how there is a great need for information regarding CAFOs regardless of whether or not they are privileged with a NPDES permit. With publicly-accessible tools through the Internet, such as Google Earth or Mapquest, all CAFOs are easily be able to obtain their latitude and longitude information.

4. Type of facility

The Agreement requires that EPA obtain information from a CAFO that identifies the type of facility,⁷¹ however the Proposed Reporting Rule failed to require reporting of this information and failed to explain EPA's reasoning.

This information is essential to EPA's ability to develop a national inventory of CAFOs and to evaluate pollution trends within the industry based on the type of facility. For example, poultry CAFOs generally produce dry litter, but beef, dairy and hog CAFOs produce wet manure. Each of these wastes carry different risks of pollution and must be managed differently. Additionally, using different housing methods for different animals affects the creation and transmission of air pollution. Hoop barns, for example, may create better ventilation for hog CAFOs, and change the consistency and therefore management required for hog manure.⁷² As part of the national inventory of CAFOs EPA is to perform, it must require CAFOs to divulge their type of facility. Without this information, EPA cannot fully understand the nature of the problem, or begin to understand where to find potential solutions.

5. Number and type(s) of animals

Under the Agreement, EPA must require CAFOs to report the number and type(s) of animals. The Proposed Reporting Rule proposes reporting the type of animals in open, partial or

⁷¹ Agreement, ¶ 2.

⁷² See, e.g. Pew Report at 33.

closed confinements and those which are confined for 45 days or more. The Proposed Reporting Rule also suggests instead that CAFOs only provide “ranges” for the number of animals, and that those ranges mimic the ranges used by the regulations for defining small, medium and large size CAFOs.⁷³ EPA’s approach is unacceptable because it does not provide information related to determining the amount of waste being generated by a CAFO, and the kind of waste generated (as discussed above). For example, under EPA Regulations, the “range” for mature dairy cattle is 200-699 head for a medium size CAFO, and “700 or more” for a large size CAFO.⁷⁴ EPA Regulations do not have a ceiling for the number of head in large size CAFOs. For example, many CAFOs have thousands and thousands of mature dairy cattle. Using the “large” CAFO size alone would only identify a percentage of the facilities in an enormous industry. Furthermore, there may be instances of factory farms maintaining a size just below the CAFO-defined threshold of “large” to avoid being categorized as a CAFO, yet two or three AFOs in close proximity to each other that are in fact larger than one CAFO. CAFOs must report the number of animals to EPA, and if EPA requires such reporting in ranges, the ranges cannot mimic the sizes set forth in the current size threshold regulations of 40 C.F.R. § 122.23(b)(4), (6), and (9). Without knowing the number of animals on a particular CAFO, EPA cannot evaluate pollution problems on a regional, statewide, or nationwide basis.

6. Type and capacity of manure storage

The Agreement requires that EPA obtain information from a CAFO that identifies the type and capacity of manure storage, however the Proposed Reporting Rule completely failed to require reporting of this information and failed to explain EPA’s reasoning.

Storage of waste is a major problem for CAFOs; the Pew Report states that “[s]torage and disposal of manure and animal waste are among the most significant challenges for [CAFO] operators.”⁷⁵ In many cases, the large amounts of waste created can no longer be properly managed without regulation as the risks and consequences of human and environmental exposure to the waste are too great. The manure produced by CAFOs can be, for example, 75 times more concentrated than raw human sewage, and 500 times more concentrated than treated effluent from an average municipal wastewater facility.⁷⁶ Runoff is laden with nutrients, synthetic fertilizers, pesticides, heavy metals, antibiotics, pharmaceuticals, nitrates, phosphorus, agricultural chemicals, and ammonia, to name just a few of the contaminants.⁷⁷ The security of manure storage problems are only exacerbated by natural storm events, such as Hurricane Bertha in 1996 that created waves on a 3 acre lagoon, caused the lagoon to burst its berm, and sent 1.8 million gallons of pig waste spewing into creeks and rivers in North Carolina.⁷⁸ With climate

⁷³ 76 Fed. Reg. 65438.

⁷⁴ 40 C.F.R. § 122.23(b)(4).

⁷⁵ Pew Report at 23.

⁷⁶ See, e.g. Pew Report at 24-25.

⁷⁷ Pew Report at 25.

⁷⁸ See, e.g. David Kirby, *Animal Factory* at 150 (2010).

change creating an increased likelihood in extremes of precipitation, droughts and floods,⁷⁹ such events may unfortunately become more commonplace. Some states have already recognized the hazardous risks of manure lagoons, for example, and have prohibited them for new facilities.⁸⁰ CAFOs therefore must document to EPA that they have the necessary storage, describe the type of storage so that EPA and the public can assess the health and environmental security and safety and quality of the particular storage, and the capacity of such storage. EPA should require this information to analyze the scope of the pollution problem presented by the CAFO industry, and to determine whether modernization or technology changes should be required.

7. Quantity of manure, process wastewater and litter generated annually by the CAFO

The Agreement requires that EPA obtain information from a CAFO that identifies the quantity of manure, process wastewater and litter generated annually a CAFO, however the Proposed Reporting Rule failed to require reporting of this information and failed to explain EPA's reasoning.

This information is essential to determining the scope of the pollution problem of CAFOs locally, regionally and nationally. It is also critical to compare with other information such as the number of animals, type and capacity of manure storage, and available acreage for land applications so that EPA can confirm the relationship between number of animals, waste production, and uses for waste. As indicated above, the estimates vary wildly, but clearly can range into the millions of gallons per year per CAFO.⁸¹

8. Whether the CAFO land-applies

The Agreement requires that EPA obtain information from a CAFO as to whether the CAFO land-applies waste. The Proposed Reporting Rule failed to require reporting of this information and failed to explain EPA's reasoning.

The millions of gallons of waste generated annually by a single CAFO, and the millions, if not billions, of tons of waste the nation as a whole produces (the precise amount which is not currently known by EPA) must go somewhere. Many farmers choose to apply the waste to land to dispose of it. While this practice was historically generally acceptable and possibly without consequence where farmers "managed fewer animals, widely dispersed among agricultural lands, and relied on natural ecosystems for attenuating pathogens and absorbing or diluting nutrients"⁸², improper management of highly concentrated waste "can and does overwhelm the natural

⁷⁹ See, e.g. Pew Report at 53.

⁸⁰ Pew Report at 89.

⁸¹ *Supra* n. 30.

⁸² Pew Report at 23.

cleansing processes.”⁸³ To attempt to manage CAFO waste, CAFOs sometimes apply waste to land under the control of a CAFO, but the amount of waste generated is so great that what was once a valuable byproduct is now a waste that requires disposal.⁸⁴ CAFOs must distribute the waste to other fields in the region because the CAFO controlled, owned or leased land does not have the capacity for the amount of CAFO-generated waste. Therefore what used to be a closed-loop agricultural system has exploded, spreading manure everywhere. While in limited amounts such land applications may have justifiable agronomic purposes, there are numerous cases where CAFOs over-apply waste, or apply when weather conditions increase the chances of waste entering the U.S. water supply. When CAFO operators over-apply or mis-apply their waste to land, it causes this toxic cocktail to run off into surface water, overflow onto roads and into ditches, and seep into groundwater. Some farmers are reportedly attempting to find other uses for the waste, including using it as a fuel source;⁸⁵ this use raises additional questions which EPA is under a duty to examine. In order to understand and address the risk CAFO land applications and other uses pose to human health and the environment, EPA must identify CAFOs that land-apply waste.

9. Available acreage for land application

The Agreement requires that EPA obtain information from a CAFO as to the available acreage for land applications of waste. The Proposed Reporting Rule includes this information as one of the five factors all CAFOs must report; however the Proposed Reporting Rule limits the reporting requirement to only the land “under the control” of the owner or operator.

As referenced in Section 8 above, one method CAFOs use for disposal of waste is by applying it to land. A plot of land can only absorb and process so much waste; smothering land with waste is unlikely to have a justifiable agronomic purpose.

EPA’s current proposal is arbitrary, especially in light of the agency’s own acknowledgement of the need for such information in its Proposed Reporting Rule (“[i]n addition to soil nutrient level, estimating areas where manure production is more than the surrounding crop lands can utilize may also be an indicator to focus information collection requests.”⁸⁶

10. If a CAFO land-applies, whether it implements a nutrient management program

The Agreement requires that EPA obtain information from a CAFO that identifies whether a CAFO land-applies and if it does, whether it implements a nutrient management

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ Methane digesters, for example, allow farmers to capture methane and use it as a fuel source. Pew Report at 53.

⁸⁶ 76 Fed. Reg. 65443.

program (NMP). A NMP is a tool for managing nitrogen and/or phosphorus through best management practices (BMPs) and procedures necessary to implement applicable effluent limitations and standards. A key component of a NMP is the balancing of manure/wastewater nutrients applied to the land with the nutrient needs of the crops grown. Currently, only NPDES-permitted CAFOs are required to prepare NMPs.⁸⁷ The Agreement expanded the requirement to all CAFOs that land-apply waste, regardless of whether they have a NPDES permit or not. Despite this, the Proposed Reporting Rule fails to require reporting of this information for *all* CAFOs and failed to explain EPA's reasoning.

CAFOs with NPDES permits are required to include a NMP that, at a minimum, contains BMPs.⁸⁸ Some state laws are broader, and may require NMPs for unpermitted CAFOs as well. The federal NPDES permit condition applies to permits issued to CAFOs for operational discharges, as well as for permits relating to a CAFO's land application discharges. It is imperative for all CAFOs, permitted or unpermitted, to identify whether or not there is even a baseline practice being employed by CAFOs regarding land applications of waste. Such an effort was called for over a decade ago in the Unified National Strategy for Animal Feeding Operations (The "USDA and EPA's goal is for AFO owners and operators to take actions to minimize water pollution from confinement facilities and land application of manure.")⁸⁹

In refusing to request this information, EPA is giving carte-blanche to CAFOs to land-apply waste with no oversight. By EPA's own estimates, only 58% of CAFOs EPA knows about have NPDES permits.⁹⁰ Without acquiring the necessary data, however, EPA cannot know what percentage of the CAFOs operating in the U.S. implement NMPs.

11. If a CAFO land-applies, whether it employs nutrient management practices and keeps records consistent with 40 C.F.R. § 122.23(e).

The Agreement requires that EPA obtain information from a CAFO that identifies if a CAFO land-applies, whether it employs nutrient management practices, and whether it keeps records consistent with 40 C.F.R. § 122.23(e). Yet the Proposed Reporting Rule failed to require reporting of this information and failed to explain EPA's reasoning.

The information sought by this requirement builds on the prior agreed to data point. Under the Clean Water Act regulations, a permitted CAFO's NMP must contain BMPs.⁹¹ By

⁸⁷ See 40 C.F.R. § 122.42(e)(1).

⁸⁸ See 40 C.F.R. Part 122 for "best management practices."

⁸⁹ Unified National Strategy for Animal Feeding Operations, § 3.1 (March 9, 1999)

(<http://www.epa.gov/npdes/pubs/finafost.pdf>). Note that on December 13, 2011 the U.S. Department of Agriculture announced it had revised its national conservation practice standard on nutrient management. (See <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/landuse/crops/npm>).

⁹⁰ 76 Fed. Reg. 65447.

⁹¹ 40 C.F.R. § 122.42(e)(1).

way of example, pursuant to EPA regulations the NPDES BMPs for permitted CAFOs must include the following:

- (i) Ensure adequate storage of manure, litter, and process wastewater, including procedures to ensure proper operation and maintenance of the storage facilities;
- (ii) Ensure proper management of mortalities (i.e., dead animals) to ensure that they are not disposed of in a liquid manure, storm water, or process wastewater storage or treatment system that is not specifically designed to treat animal mortalities;
- (iii) Ensure that clean water is diverted, as appropriate, from the production area;
- (iv) Prevent direct contact of confined animals with waters of the United States;
- (v) Ensure that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater, or storm water storage or treatment system unless specifically designed to treat such chemicals and other contaminants;
- (vi) Identify appropriate site specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the United States;
- (vii) Identify protocols for appropriate testing of manure, litter, process wastewater, and soil;
- (viii) Establish protocols to land-apply manure, litter or process wastewater in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater; and
- (ix) Identify specific records that will be maintained to document the implementation and management of the minimum elements described in paragraphs (e)(1)(i) through (e)(1)(viii) of this section.⁹²

The Agreement requests that *all* CAFOs report whether they employ nutrient management practices. In proposing to eliminate the requirement to report this information EPA has given every non-permitted CAFO in the United States free rein to continue applying waste without any accountability.

With respect to the record-keeping requirement of 40 C.F.R. § 122.23(e), under the current regulation the requirement only applies to NPDES-permitted CAFOs. The effect of the

⁹² 40 C.F.R. § 122.42(e)(1)(i)-(ix).

Agreement was to pull in the thousands of non-permitted CAFOs to, at a minimum, begin tracking land application discharges of waste. The land application of waste is a major vehicle for CAFO waste to enter ground and surface waters. Requiring all CAFOs to report this information would provide EPA with the opportunity to begin to get a handle on this enormous problem.

12. If a CAFO does not land-apply, what are the alternative uses of manure, litter, and / or wastewater.

The Agreement requires that EPA obtain information from CAFOs that do not land-apply waste, what alternative uses it employs for waste. The Proposed Reporting Rule failed to require reporting of this information and failed to explain EPA's reasoning.

As mentioned earlier in this Comment, some farmers are reportedly attempting to find other uses for the waste, including using it as a fuel source; this use raises additional questions which EPA is under a duty to examine to determine, for example, whether such uses result in discharges of pollutants under the Clean Water Act, or emissions under the Clean Air Act. Without this information, EPA is again allowing potentially rogue practices to continue unidentified and unmonitored. Conversely, by failing to identify this information EPA could be letting the opportunity to identify creative processes simply slip away. EPA's approach to embrace ignorance is unjustifiable.

13. Whether a CAFO transfers manure off-site, and if so the quantity transferred to recipient(s) of transferred manure.

The Agreement requires that EPA obtain information from CAFOs as to whether they transfer manure off-site, and the quantity transferred. The Proposed Reporting Rule failed to require reporting of this information and failed to explain EPA's reasoning.

As discussed above, the generation of billions of gallons of manure and the question of what to do with it is an enormous problem endemic to the CAFO industry. It is unlikely that a CAFO can apply all the manure it generates to its own lands; hence it must find willing recipients to accept the manure. Such a practice compounds the effects of the CAFO on the local community and spreads the polluting components of the CAFO's manure. This practice is akin to a chemical plant putting its waste in drums and giving it to its neighbors to dump into the river, free from regulation. It is imperative that EPA recognize that the off-site transfer of manure has become the norm. This is the case because the CAFOs have become so large that the amount of land that is available is typically only large enough to contain the animals.

To ensure that the off-site transfer of CAFO wastes does not create a loophole for CAFOs to evade land application requirements, the recipient of the waste must be a part of a CAFO's NMP, whether the NMP is prepared in connection with a NPDES permit or not. This is the only

way to ensure that the recipients of the waste apply it in accordance with proper agricultural practices. In the certification that the recipients provide to the CAFO supplying the waste, the recipient should acknowledge that its waste-application activities are subject to both the supplier-CAFO's NMP and (when applicable) NPDES permit. The recipient's failure to comply with the terms and conditions in a CAFO's NPDES permit and the supplier's NMP must remain the responsibility of the CAFO because the CWA is a strict liability statute.

Furthermore, it is essential for the CAFO to maintain export information, transport records, and to provide the manure hauler or manure recipient with site-specific management information. CAFOs should be required to report any loss of manure during transport to an off-site application location as there is a high likelihood that it will run-off into roadside ditches and canals in violation of the CWA. These provisions must be included to prevent the CAFOs from exempting themselves from CWA liability by simply transporting their wastes off site.

14. Whether a CAFO has applied for a NPDES permit

The Agreement requires that EPA obtain information from CAFOs as to whether they have applied for a NPDES permit. The Proposed Reporting Rule requires both holders of NPDES permits, and those that have submitted applications for permits (or a Notice of Intent) but not yet received coverage, to report their status.

EPA should request, additionally, CAFOs to report (a) whether they have been denied a NPDES permit, (b) whether they have ever had a NPDES permit revoked, (c) explain the reason for the denial or revocation, and (d) whether any changes have been made since that time to prevent the reason for denial or revocation from recurring.

B. Option 1 - Additional Suggestions for Factors to Include in Reporting Requirements

The Proposed Reporting Rule requests commenters to provide additional suggestions. Only by expanding the scope of information reported from CAFOs will EPA's inventory provide an accurate picture of the pollution problem this industry poses. By way of example, in addition to the fourteen factors required by the Agreement, EPA should also require reporting of similar information listed below from all CAFOs. The example below pertains in many ways to dairy manure, but similar requirements could be readily fashioned for hog, chicken, beef, egg, and other facilities. Such a requirement would raise the standard of the entire industry to one that is generally validated and a useful standard, as was recently done in *CARE v. Nelson Faria Dairy*⁹³ for a dairy.

⁹³ *Supra* n. 6.

- a. Amount of fresh water and graywater used (in addition to polluting water, CAFOs use an inordinant amount of fresh water, which a CAFO may or may not recycle for use as graywater);⁹⁴
- b. Identification of crops grown on land-application sites regardless of whether the land-application site is or is not under the control of the CAFO owner (these lands may be growing usable crops, or simply crops that just absorb manure better because the manure problem is so great);
- c. Identification of whether lands adjacent to or nearby a CAFO farm animals, grow crops for human consumption, or grow crops for other purposes (e.g. animal feed, fuel);
- d. Identification of whether any lands within a certain distance of a CAFO are certified organic, or have organic certification pending;
- e. Identification of whether the CAFO conducts a water balance, and what are its procedures are for doing so;
- f. Identification of whether the CAFO has designed, installed, maintained, and operated a flow measurement system to measure wastewater input to primary and secondary waste lagoons, and if so to describe the system and the measurements it is capable of taking;
- g. Identification of whether the CAFO has installed, maintained and operated ultrasonic level sensors with continuous level recording in primary and secondary lagoons;
- h. Identification of whether the CAFO has installed a recording rain gauge capable of continuously recording rainfall at the CAFO site to 0.01 inches;
- i. Identification of whether the CAFO has installed an on-site evaporation measurement system, the size of the system and its placement;
- j. Identification of the date the CAFO last substantially pumped down primary and secondary lagoons, cleaned them, inspected lagoon liners for tears, repaired any tears, and whether the CAFO has protocols and a schedule for the clean-out / repair;
- k. Identify the calculation used by the CAFO to estimate its waste generation and storage capacity;
- l. Identify whether the CAFO conducts water quality analyses of the CAFO's treatment and storage lagoons, how frequently, and what the analyses consist of;
- m. Identify whether the CAFO conducts water balance evaluations and how frequently;
- n. Identify whether the CAFO has records of land-applications and the method of delivery of the waste to the land locations (e.g. irrigation pipelines, trucks);

⁹⁴ For example, it takes nearly 420 gallons of water to produce one pound of grain-fed broiler chicken. *See* Pew Report at 27.

- o. Identify whether the CAFO conducts soil sampling on all land-applications of waste, regardless of whether the land is owned, leased, operated, or otherwise controlled by the CAFO;
- p. Identify the calculation the CAFO uses to determine its manure application rates and quantities;
- q. Describe overland surface water flow on the CAFO and identify any surface water bodies receiving overland flow;
- r. Identify known tile drains on fields receiving manure or waste;
- s. Identify and locate on maps irrigation wells and drinking water sources within a certain distance of the CAFO production, and land-application areas;
- t. Identify the characterization of dominant soil series, associated key nutrient and infiltration-related characteristics, and cropping;
- u. Identify whether the CAFO evaluates leaching indexes to determine the potential for groundwater contamination;
- v. Identify whether the CAFO has installed soil testing, groundwater monitoring, and surface water monitoring equipment on the CAFO property, and/or on the lands that pass through and/or adjoin the CAFO's property, and identify the longitude / latitude locations of this equipment;
- w. Identify the number of waste spills or discharges in the last reporting period;
- x. Identify whether the CAFO has training programs for new and current employees responsible for manure and wastewater management;
- y. Provide a copy of its Certification of insurance;
- z. Provide a copy of a CAFO's contract with its integrator; and
- aa. Identify whether the CAFO is subject to a local or state tax to account for its impact on the environment.

Each of the above-listed factors are, in addition to the 14 factors in the Agreement, essential for EPA to begin to inventory and analyze the scope of the CAFO problem in this country. For EPA to ignore the magnitude of this problem and the lack of information is arbitrary and capricious.

IV. Option 2 -- Restricting Reporting Requirements to CAFOs in "Focus Watersheds" Utterly Fails to Acknowledge the Existing Widespread Health and Pollution Problems

Option 2 of EPA's Proposed Reporting Rule suggests that *before* requiring CAFOs to report the factors discussed above (of which EPA only chose to support – in part – five of the fourteen factors), the number of CAFOs responsible for reporting should be limited. EPA proposes that only CAFOs located in "watersheds with water quality problems likely attributable to CAFOs" be targeted to then "potentially" be identified in a "focus watershed" and responsible for responding to an EPA survey.⁹⁵ Option 2 simply eliminates too many CAFOs from the reporting rule. EPA's Option 2 contains four levels of pro-CAFO protections before a CAFO

⁹⁵ 76 Fed. Reg. 65442.

even qualifies to report under Option 2 – first a CAFO must be located in a watershed area, second the watershed area must already have water quality problems, third the water quality problems must be likely to be attributable to CAFOs, and fourth EPA then might “potentially” target that CAFO to report. The barricades of Option 2 create an illusory reporting requirement that cannot produce any meaningful information.

Even after passing the levels of protection above, Option 2 institutes another hurdle. The Proposed Reporting Rule also proposes potentially identifying focus watersheds on four criteria:

- (a) high priority watersheds 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);
- (b) vulnerable soil types;
- (c) high density of animal agriculture; and/or
- (d) other relevant information (such as an area with minority, indigenous, or low-income populations).⁹⁶

The problem with EPA’s suggestion of using the four criteria above to determine which CAFOs are in “focus watersheds” and need to report is that these four criteria should be *additional considerations* when evaluating information contained in a submitted CAFOs report; they should not be the starting point or defining parameters which determine whether or not a CAFO even needs to submit a report to EPA. Moreover, EPA’s proposals regarding the four criteria above would not result in EPA making concrete changes to the effects CAFOs have on human health and the environment. For example, in high priority watersheds, EPA merely proposes to “promote” improved nutrient management practices for CAFOs. EPA should be *requiring* improved NMPs in those areas, not simply “promoting” them. Another example concerns the vulnerable soil type determination. EPA suggests evaluating nutrients levels based on 14-year old studies, then collecting data from universities, before even *identifying* vulnerable soils. Such a method is a delay tactic to avoid even identifying CAFOs required to report.

Option 2 also fails to recognize that CAFOs purposefully are located close to water supplies to facilitate their disposal processes. It is not just imperiled watersheds that are at risk from CAFOs; it is all waters. Given the history of water pollution associated with CAFOs, these facilities would invariably discharge pollutants that would exacerbate an already impaired watershed and it is important to identify CAFOs in watersheds and to require additional protections in those areas; it is however also important to identify *all* CAFOs, as is required by the Agreement.

Option 2 also imagines the creation of a collaboration at the federal, state and local levels from which it could potentially obtain information “*before* determining whether an information

⁹⁶ 76 Fed. Reg. 65443.

collection request is necessary.”⁹⁷ Only after the creation of this collaboration would EPA then propose a rulemaking suggesting the criteria used to define the focus of watersheds, specify the methods to determine the geographic scope of the focus watersheds, and survey CAFOs if the information was not available from other sources. EPA offers no proof, only speculation, that the information from other sources might report the data EPA needs. Option 2 is merely EPA’s (and the industry’s), attempt to evade any regulation of CAFO waste indefinitely.

EPA proposes that it will then create criteria that could be used to define and identify the watersheds to be targeted.⁹⁸ EPA even admits in the Proposed Reporting Rule that impaired waterbody information under CWA 303(d) “is limited because many waterbodies have not been assessed or the impairment cause has not been identified. Additionally, in these impaired waterbodies some states have not established water quality standards for all of the pollutants in these impaired waterbodies that might be associated with CAFO discharges.”⁹⁹ EPA’s Option 2 is too speculative to have any meaningful value and should be rejected.

V. Obtaining the Information from Any Source Other Than a CAFO Lifts Any Responsibility for Reporting from the CAFO Point Source

The Proposed Reporting Rule suggests allowing states, not CAFOs, to submit the required information to EPA. This wisdom of this approach is not explained by EPA, especially in light of the 2008 GAO Report conclusion that EPA’s data “obtained from state agencies ‘are inconsistent and inaccurate and do not provide EPA with the reliable data it needs to identify and inspect permitted CAFOs nationwide.’”¹⁰⁰ EPA had obtained this data from 47 states relating to permits issued to CAFOs between 2003 and 2008; the Proposed Reporting Rule does not suggest that there have been notable changes in NPDES-states’ data gathering which would enhance the information these states would provide to EPA. The 2008 GAO Report also concluded that “no Federal agency currently collects accurate and consistent data on the number, size, and location of CAFOs.”¹⁰¹ Based on conclusions of the 2008 GAO Report and without further explanation, EPA cannot substitute state data for information EPA can easily obtain by issuing CWA § 308 reporting requirements. EPA actually responded to the 2008 GAO Report by saying that it would develop a comprehensive national inventory of CAFOs.¹⁰² Yet EPA now proposes to rely on state data for its CAFO information, and says that “[i]t is likely that a number of states already have the information that would be required.... for NPDES permitted CAFOs.”¹⁰³ But EPA estimates 58% of CAFOs nationally do not even have NPDES permits,¹⁰⁴

⁹⁷ 76 Fed. Reg. 65442. (italics added).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ 76 Fed. Reg. 65435 quoting 2008 GAO Report at 17.

¹⁰¹ GAO Report at 4.

¹⁰² 76 Fed. Reg. 65435 and 2008 GAO Report at 76.

¹⁰³ 76 Fed. Reg. 65447.

¹⁰⁴ *Id.*

therefore omitting unpermitted CAFOs would not remedy EPA's lack of information. EPA's Proposed Reporting Rule is a spiritless response to its promise to the GAO, and to its promise to the environmental petitioners under the Agreement.

The CAFO industry complains about the "burden" of any reporting requirements.¹⁰⁵ EPA worries whether CAFOs are capable of understanding the questions asked and on the technical appropriateness of the questions.¹⁰⁶ Yet under Option 2, EPA proposes inconveniencing numerous other entities (federal and state agencies, universities, research centers, interested stakeholders) so that CAFOs do not have to be bothered to report.¹⁰⁷ CAFOs are regulated by EPA and Congress granted EPA the express statutory authority to require reporting any information necessary to carry out the provisions of the Clean Water Act; it should not be EPA that is regulated by CAFOs.

VI. Timing Issues of Proposed Reporting Rule

A. Proposed Reporting Rule Unreasonably Suggests a 10-Year Reporting Requirement

The Agreement requires that EPA instruct all CAFOs submit reporting information every five years, or if EPA does not make this proposal that it explain its action.¹⁰⁸ The Proposed Reporting Rule suggest that unpermitted CAFOs only be required to report every 10 years¹⁰⁹ because EPA "does not expect information to change significantly within this ten-year period."¹¹⁰ EPA does not even propose that these CAFOs be required to start reporting an iota of information until *one full decade from now*, in 2022. The information sought is so basic to CAFO operations, and so necessary to protect public health and the environment, that it is completely unreasonable and unjustifiable to delay the reporting of this data ten years. There is no reason that unpermitted CAFOs cannot report this information to EPA by December 31, 2012, and every five years thereafter.

Furthermore, EPA suggests that NPDES-permitted CAFOs would be exempt from CWA § 308 reporting requirements because the permits and annual reports would allow EPA to maintain an updated inventory.¹¹¹ Recent history demonstrates the potential for growth of CAFO waste problems and the exponential increase in risk to our nation's water supply. For example,

¹⁰⁵ EPA estimates however that a CAFO would only need one (1) hour to gather and submit the information in the currently proposed survey in its current form. 76 Fed. Reg. 65448. Given the amount of pollution CAFOs create and their impact on surrounding communities, is such a minimal burden on their part equitable?

¹⁰⁶ 76 Fed. Reg. 65438.

¹⁰⁷ 76 Fed. Reg. 65442.

¹⁰⁸ Agreement, ¶ 2.

¹⁰⁹ 76 Fed. Reg. 65440.

¹¹⁰ *Id.*

¹¹¹ *Id.*

in 2003 EPA received estimates from USDA that CAFOs produced more than 300 million tons of manure annually.¹¹² In 2007, the estimate of CAFO-generated waste increased to 500 million tons of manure annually, and in 2008 the GAO Report estimated that 1.6 million tons were generated annually.¹¹³ Clearly a shorter reporting period is required to get a handle on the problem. If EPA alters NPDES permit applications and annual reporting requirements to account for the 14 factors of the Agreement, and additional information as suggested by these Comments, perhaps it would be reasonable to exempt NPDES-permitted CAFOs from separate reporting requirements only for the purposes of EPA's inventory of CAFOs. Such a change would be contingent on the NPDES permit period remaining 5 years, or less. In fact, if EPA intends to exempt NPDES permitted-CAFOs from the reporting requirements, it must amend the NPDES permits and annual report requirements immediately to enable CAFOs to enable reporting the required information. Public notice and comment, however, should be sought on any such proposal.

Lastly, under the Proposed Reporting Rule CAFOs that receive NPDES permits before 2022 will not be required to submit or update any reporting information.¹¹⁴ Again, there is no reason for currently unpermitted CAFOs to not provide this information by December 31, 2012, and should they apply for a NPDES permit before 2022 that the information be reported at that time.

B. Proposed Reporting Rule's Deadline to Report is Unjustified

The Proposed Reporting Rule suggests allowing states 180 days to submit information to EPA instead of 90 days.¹¹⁵ EPA explains this allotment of time by suggesting that it will allow unpermitted CAFOs to apply for permit coverage.¹¹⁶ Regardless of the duty to apply for a NPDES permit, under the rule all CAFOs must report information so the 180 day timeframe is in fact irrelevant.

VII. Proposed Reporting Rule "Alternatives" Should Supplement, Not Replace, the Specific Reporting Requirements

EPA's Proposed Reporting Rule also solicits comments on "alternative approaches to meet the objectives of this proposed rule."¹¹⁷ EPA proposes alternative data collection including:

1. Obtaining data from existing data sources;
2. Expanding EPA's network of compliance assistance and outreach tools; and

¹¹² 76 Fed. Reg. 65433, 68 Fed. Reg. 7176, 7180 (Feb. 12, 2003).

¹¹³ See n. 30 *supra*.

¹¹⁴ 76 Fed. Reg. 65440.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ 76 Fed. Reg. 65445.

3. Requiring NPDES-authorized states to submit the information.

All of these “alternatives” should simply supplement the information EPA obtains through its CWA § 308 reporting requirements; they should not supplant the 14 factors of the Agreement. The GAO Report’s opening statement identified EPA’s lack of information, and lack of quality information, as a problem in 2008 (“Because no federal agency collects consistent, reliable data on CAFOs, GAO could not determine the trends in these operations over the past 30 years.”).¹¹⁸ The GAO Report further summarized its findings: “no federal agency collects accurate and consistent data on the number, size, and location of CAFOs.”¹¹⁹ Expanding EPA’s network even further to attempt to obtain compliance assistance and outreach tools is highly unlikely to result in tangible reporting to the agency at any point in the near future. Lastly, requiring NPDES-authorized states to submit the information removes accountability from CAFOs to submit the information, and is subject to the pitfalls discussed above.

VIII. Transparency

EPA’s proposal to further limit the information it obtains by not making it public on the grounds of confidentiality and security concerns. These claims do not justify overriding the public interest and public’s right to have access to this information, and is contrary to the Agreement.¹²⁰

A. Privacy, Confidential Business Information / Trade Secret Reporting Exceptions Do Not Apply

Through the press and its public comments, industry has attempted to re-cast the information sought as “private” and “confidential” and “trade secrets.” EPA has no basis for endorsing the industry’s claims, which it elected to do in the Proposed Reporting Rule. The issues of privacy and the confidential business information (“CBI”) reporting exception cannot come into play in the Proposed Reporting Rule. CBI is information which, if disclosed, “is likely to cause substantial harm to the business’s competitive position.”¹²¹ The CWA § 308 reporting rule requires that all information requested be reported and be made available to the public, with one exception for trade secrets.¹²² Congress apparently intended for the trade secret

¹¹⁸ GAO Report, Opening Statement.

¹¹⁹ GAO Report at 4.

¹²⁰ Agreement, ¶ 3.

¹²¹ 76 Fed. Reg. 65438, 40 C.F.R. § 2.208.

¹²² 33 U.S.C. § 1318(b). In the Uniform Trade Secrets Act, for example, “a trade secret means information including a formula, pattern, compilation, program, device, method, technique or process, that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and that is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” 59 ALR 4th 641 (1988). Under the Restatement of Torts, “a trade secret may consist of any formula, pattern, device or compilation of information

exception to be the *only* exception to the CWA § 308 reporting rule.¹²³ None of the information required to be reported under the Agreement, or the Proposed Reporting Rule, qualifies as “trade secrets”, or CBI, and therefore is not subject to exemption from public disclosure.

It would be arbitrary, capricious and otherwise unlawful for EPA to conclude that any part of a CAFO’s reporting information qualifies as private, subject to the CBI exemption or as a trade secret. Although this section of the statute provides for confidentiality of certain business secrets, section 402(j) of the CWA provides that “[a] copy of each permit application and each permit issued under this section shall be available to the public.”¹²⁴ In 1978, EPA made a determination to reconcile the two sections (§ 308(b) and § 402(j)) of the CWA. This determination concluded that: Information contained in NPDES permits and permit applications is not entitled to confidential treatment because Section 402(j) of the CWA mandates disclosure of this information to the public, notwithstanding the fact that it might be trade secrets or commercial or financial information. The D.C. Circuit, in *NRDC v. EPA*, 822 F.2d 104 (D.C. Cir.1987) upheld this interpretation and its application. The court concluded that a business could be required to “provide confidential information where the Government had a legitimate regulatory interest in protecting the environment and public health.”¹²⁵ Clearly then, a data collection that is part of a CAFO’s NPDES permit coverage cannot qualify for the confidential business information exemption.

B. Security Concerns are Unjustified

The industry’s concerns are legally impermissible, inferior to its duty to report, and are based on a limited number of trumped-up examples. EPA must make the reported information available to the public. Several different industries are subject to reporting requirements making their reported information public.¹²⁶

The industry has attempted to make much ado about a threat of eco or bio terrorists to the nation’s food supply, and wants EPA to justify not requiring CAFOs to report basic information under CWA § 308 on the grounds that such reporting will directly result in attacks on U.S. dairy, beef, chicken, pork, and egg food production facilities. Historically there have been a very, very limited number of such incidents against CAFOs. Even industry has pointed out, through its own Comments submitted in this matter, that there have been only a handful alleged incidents.¹²⁷ One such alleged “terrorist” incident involved New York Times journalist Michael Bittman

which is used in one’s business, and which gives one an opportunity to obtain an advantage over competitors who do not know or use it.” *Id.*

¹²³ See *Gersh & Danielson v. EPA*, 871 F.Supp. 407, 410 (D. Colo. 1994).

¹²⁴ 33 U.S.C. § 1342(j).

¹²⁵ *NRDC v. EPA*, 822 F.2d 104 (D.C. Cir.1987) at 120.

¹²⁶ See references to other industries, *supra* n. 16.

¹²⁷ See, e.g., Comments from National Pork Producers Council et al. (Nov. 22, 2011) (Docket No. EPA-HQ-OW-2011-0188).

taking photographs at a hog CAFO.¹²⁸ There have been incidents such as the recent tractor burning in Fresno, California,¹²⁹ however these kinds of incidents, and certainly of this gravity, have been extremely rare and are unusual, uncommon, and outlier events. Furthermore, none of the information that we seek to have reported pursuant to CWA § 308 would increase the risk of a CAFO's exposure to such events; any resident within a few miles of a CAFO knows its location purely by the stench, so not providing longitude / latitude information would not serve to protect a CAFO from this perceived threat.

C. There is a Public Need for Information to be Publicly Available

The CWA requires the opportunity for meaningful public participation throughout the statute. Under 33 U.S.C. § 1251(e), "Public participation ... shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the states, shall develop and publish regulations specifying minimum guidelines for public participation". Public participation occurs throughout the NPDES permitting process,¹³⁰ the development of effluent limitations,¹³¹ and water quality standards.¹³²

Not making CWA § 308 reporting information available to the public – certainly as part of NPDES permitting -- prevents the public from calling for a hearing about and the meaningfully commenting on NPDES permits before they issue. Courts have routinely found impermissible the failure to involve the public in the NPDES permitting process, and noted that the NPDES permitting process encourages making all information publicly available.¹³³ In EPA's Proposed Reporting Rule, all of the 14 data points are necessary to evaluate the appropriateness of a NPDES permit, of effluent data, and of water quality standards. Therefore the information cannot be withheld from the public.¹³⁴

Other commenters to the Proposed Reporting Rule have indicated that there is a need for CWA § 308 information to conduct municipal source water assessments. For example, the City

¹²⁸ http://www.whitehouse.gov/sites/default/files/omb/assets/oira_2040/2040_09082011-3.pdf.

¹²⁹ See <http://www.fresnobee.com/2012/01/10/2677557/animal-rights-activists-take-credit.html>.

¹³⁰ 33 U.S.C. § 1342(a). Further, even *after* a permit is issued, an operators' NMP must be made available to the public at large – at a location other than the CAFO site – so that CAFO neighbors can be made aware of how the CAFO is *supposed* to operate and so that they may assist in the oversight and regulation of the permit conditions. Anything less fails to comply with the public participation requirements of the CWA.

¹³¹ 33 U.S.C. § 1314

¹³² 33 U.S.C. § 1313.

¹³³ See 40 C.F.R. § 2.302(a)(2)(i) (any information "necessary to determine the identity, amount, frequency, concentration, temperature, or other characteristics (to the extent related to water quality) of any pollutant" constitutes "effluent data" that cannot be withheld); *RSR Corp v. Browner*, 924 F. Supp. 504, 510-12 (S.D.N.Y. 1996), *aff'd RSR Corp. v. Browner*, 27 ELR 20822 (2d Cir. 1997) (holding that when a NPDES permit describes effluent limitations in terms of allowable discharge per unit of production, information revealing rate of production is not confidential business information protected from disclosure under FOIA).

¹³⁴ See also discussion *supra* Section III.A.1.

of Tulsa is currently conducting a source water assessment for three different watersheds which straddle multiple states.¹³⁵

Furthermore, it is ironic that EPA is concerned about disclosing the reported information to the public, yet simultaneously EPA wants to use stakeholders and the public as a source of obtaining information.¹³⁶ Such an arbitrary and capricious agency decision is legally impermissible under the statute.

In making public the reported information, EPA would benefit greatly from the public's input on the practices of individual CAFOs – some of which may rise to a level of “non-compliance” And which might strip a CAFO of the *privilege* of NPDES permit coverage, but such a result might be necessary under the CWA in the interest of protecting the public health and the environment.

IX. Conclusion

The CAFO industry has been transforming the United States in ways never foreseen, and has already had devastating impacts on this country. However, it remains clear that EPA still does not recognize the documented health and pollution problems caused by these facilities. The GAO Report recognized this in 2008.¹³⁷ EPA's Proposed Reporting Rule issued pursuant to the Agreement is evidence of this failure. Nor does EPA seem to take into account this industry's deceitful, and often times openly defiant, history of noncompliance. Such is clear by EPA's claims that it will obtain information from an amalgamation of sources and not require the CAFOs themselves to be responsible or accountable for reporting. EPA's failure gives the industry more opportunity to sidestep reporting requirements. EPA must come to grips with the reality of the situation in order to craft a CAFO program that would adequately protect Americans.

It is improper for EPA to allow the CAFO industry to continue to operate without accountability or responsibility. It is hard to fathom that there ever could be an instance that major water pollution would serve an overriding consideration of the public interest. The only interest that is served by allowing CAFOs to exist without simply reporting basic information to EPA *and to the public* would be the financial interests of the CAFOs. How can EPA put such a price tag on the protection of public health? It is difficult to understand how CAFOs' financial gain is ever reason to allow pollution. We are pleased that EPA has issued a Proposed Reporting Rule, but the factors proposed by EPA do not demonstrate that it has seriously considered the

¹³⁵ See, e.g. Comments, City of Tulsa, Oct. 24, 2011. (Docket No. EPA-HQ-OW-2011-0188).

¹³⁶ See, e.g. 76 Fed. Reg. 65442.

¹³⁷ GAO Report at 6 (“...EPA has not yet assessed the extent to which air and water pollution from CAFOs may be impairing human health and the environment because it lacks key data on the amount of pollutants that CAFOs are discharging.”)

Agreement, the public interest, its obligation to public health, to the environment, and its authority under CWA § 308. American citizens deserve more protection than this and it is imperative that EPA institute the strictest measures possible in order to carry out the agency's mandate to protect human health and the environment from this industrial activity.

By implementing the above recommendations, the public health and environment will be better for at a minimum having a start on identifying the scope of this enormous pollution problem in our country. Further action will be necessary to build health and environmental protections once the information is obtained. We strongly urge you to carefully consider our comments in response to the Proposed Reporting Rule.

Respectfully Submitted By,

s/ Elisabeth A. Holmes
Elisabeth A. Holmes, Staff Attorney
Center for Food Safety

s/ Eric Hoffman
Eric Hoffman, Biotechnology Policy Campaigner
Michal Rosenoer, Biotechnology Policy Campaigner
Friends of the Earth