

***47 THE EPA'S PROPOSED CAFO INFORMATION DISCLOSURE RULES AND THEIR POTENTIAL TO IMPROVE WATER QUALITY**

Taken together with other forms of agriculture, Concentrated Animal Feeding Operations, or CAFOs, comprise the single largest contributor to pollution entering the surface waters of the United States. Section 402 of the Clean Water Act confers authority on the Environmental Protection Agency (EPA) to regulate these facilities as point sources. The EPA's last two major efforts to create comprehensive rules regulating these facilities contained provisions either requiring or creating strong incentives for CAFO operators to apply for permits before they begin to operate or actually discharge pollution. Federal courts construing the Clean Water Act held that the EPA had exceeded its authority with these pre-discharge permitting requirements. Absent such requirements, however, the EPA is left without a means of gathering information on the existence of CAFOs and the risk these facilities pose to the nation's waters. The same litigation that led to the EPA's CAFO rule being struck down also led to a settlement agreement with environmental groups concerning CAFO information-sharing requirements. As a result of the settlement and resulting court order, the EPA initiated a rulemaking under section 308 of the Clean Water Act that would require CAFOs to divulge certain types of critical information. This rule would also give the EPA the ability to assess facilities, which was lost when the pre-discharge reporting requirements were struck down. This Article explains the proposed rule--still languishing in the agency--and considers its potential to enforce water quality laws.

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*48 INTRODUCTION

This Article concerns an ongoing struggle within the Environmental Protection Agency (EPA) to enact a rule pursuant to section 308 of the Clean Water Act¹ (CWA) requiring Concentrated Animal Feeding Operations, or CAFOs, to disclose basic information, including: their locations; the number and type of livestock they produce; their manner of waste disposal; their management practices; and the identities of their owners or operators.²

That a single rulemaking would deserve such attention should not be surprising, because this one rule enables the agency to address a whole range of urgent policy problems; the EPA's *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*³ finding on remand from *Massachusetts v. EPA*⁴ provides just one example. While a CAFO reporting rule may not seem as momentous as applying the Clean Air Act to climate change, one cannot underestimate the potential implications for the EPA's ability to regulate an industry that, together with other forms of agricultural production, is responsible *49 for much of the nation's water pollution.⁵ A rule grounded in section 308 and related provisions of the Clean Water Act could provide sorely lacking data on the proliferating American CAFO industry, as well as a means for the EPA to negotiate changes to facilities' current operation methods--methods that can lead to illegal discharges of waste into the nation's waters. A well-designed information-disclosure rule would have the potential to achieve much of what the EPA sought to accomplish in its two previously rejected CAFO-permitting programs under section 402 of the CWA. Those programs would have provided the agency with information and required CAFOs to obtain permits prior to making any discharges. An effective information disclosure rule could further the purpose Congress articulated for the Clean Water Act: to "restore and maintain the chemical, biological, and physical integrity of the Nation's waters."⁶

I. DEFINITIONS, POLLUTION ESTIMATES, AND UNCERTAINTY

A. CAFOs Defined

The EPA defines "animal feeding operations" (AFOs) as "agriculture enterprises where animals are kept and raised in confinement."⁷ The term "CAFO" applies to approximately 238,000 AFO facilities in the United States and denotes those with the largest number of livestock relative to other similar facilities.⁸ Including smaller operations, the EPA estimates that 450,000 AFOs operate in the United States.⁹ As the Second Circuit noted in *Waterkeeper Alliance, Inc. v. EPA*, the largest-scale CAFOs "raise ... staggering numbers of livestock--sometimes, raising literally millions of animals in one location Economically, these CAFOs generate billions of dollars of revenue every year."¹⁰ The AFO model has been applied to a wide variety of agricultural enterprises, including raising animals for slaughter, for dairy products, and for egg production.¹¹

The EPA has enacted rules under the authority of the Clean Water Act that define what pollution-control measures an AFO operator must take, including whether the facility *50 must obtain a National Pollution Discharge Elimination System (NPDES) permit. These rules focus on the number of animals a facility raises as well as characteristics of the facility that indicate how it disposes of waste.¹²

Regardless of size, the rules do not consider a facility an AFO unless it raises animals that "have been, are, or will be stabled or confined and fed or maintained for a total of forty-five days or more in any twelve-month period," and it consists of "crops, vegetation, forage growth, or post-harvest residues [that] are not sustained in the normal growing season over any portion of the lot or facility."¹³ If a facility qualifies as an AFO and raises a sufficient number of animals to be considered a medium AFO, one or both of the following characteristics determine whether such an AFO will be considered a CAFO for purposes of regulation under the Clean Water Act:

(A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or

(B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.¹⁴

A facility that qualifies as a medium AFO or as a CAFO must meet CWA requirements that prohibit the “discharge of a pollutant” by “any person” from any “point source” to navigable waters, except when authorized by a permit issued under the NPDES.¹⁵ *51 The Act’s objectives are not just to reduce, but to eliminate altogether such water pollution through the use of NPDES permits that, while authorizing some water pollution, place important restrictions on the quality and character of those authorized discharges.¹⁶

The federal rules also provide that either the EPA or a state environmental agency may regulate an AFO or a CAFO if it is “a significant contributor of pollutants to waters of the United States.”¹⁷ Cumulatively, these facilities contribute astounding quantities of pollution to the nation’s waters.

B. Pollution Estimates

In a 1998 report, the EPA cited statistics from 1992 indicating that the quantity of animal manure produced by AFOs in the United States (133 million dry tons) was thirteen times greater than the total quantity of human sanitary waste produced (10 million tons).¹⁸ By 2008, the total quantity of animal manure produced by AFOs had more than tripled, to 500 million tons.¹⁹ The ratio of untreated animal waste to treated human waste becomes more astounding in states with the highest concentrations of CAFOs. For example, Food and Drug Administration (FDA) statistics reveal that dairy cows, beef cattle, and egg-laying hens raised on CAFOs in Arizona produce as much untreated manure as 77 million people--roughly eleven times the state’s human population.²⁰ The 93,000 dairy cows in Maricopa County alone produce as much untreated solid waste as is produced by the 20 million people in the New York City metropolitan area.²¹

The EPA has focused on this industry because, when improperly managed, manure can contaminate water in ways that pose substantial risks to both the environment and public health.^{22,23} Manure produced by CAFOs releases a wide range of pollutants, including: nutrients, particularly nitrogen and phosphorus; organic matter; solids, including the manure *52 itself and other components mixed with it, such as spilled feed, bedding and litter materials, hair, feathers, and animal corpses; pathogens (disease-causing bacteria and viruses); salts; trace elements such as arsenic; antibiotics; pesticides; and hormones.²⁴ In 2000, the EPA released a report on the effects of CAFO waste on surface water, groundwater, soil, and air.²⁵ The report documented a wide range of human health and ecological impacts, including the degradation of the nation’s surface waters,²⁶ significant loss of aquatic life throughout the United States,²⁷ and pollution of drinking water sources.²⁸ The report identified agriculture--including CAFOs--as the chief source of pollutants impairing water quality in rivers and lakes.²⁹ In addition, thirty states and tribes reported that agriculture contributed to water quality impairment.³⁰

Water contaminated with animal waste can reach larger bodies of water through a variety of avenues, including soil runoff and erosion; direct discharges to surface waters; leaching into soil and groundwater; and releases to ambient air and subsequent deposition back to land and surface waters. Contamination from CAFOs is particularly intense because of the methods CAFO operators use to dispose of the substantial quantity of waste generated by the facilities. Livestock waste is placed either in “lagoons” or in dry piles of “litter,” and is then spread onto nearby land as fertilizer; however, the EPA’s regulations do not require any treatment of the waste prior to dispersal.³¹ To compound matters, water pollution from industrial farming continues to increase as more and more animals are raised on smaller and smaller parcels of soil.³²

****53 C. Underreported Polluters***

In 2008, the Government Accountability Office (GAO) conducted an extensive study of the information the EPA possessed on the existence and characteristics of CAFOs throughout the nation.³³ The report concluded in part:

EPA does not have data on the number and location of CAFOs nationwide and the amount of discharges from these operations. Without this information and data on how pollutant concentrations vary by type of operation,

it is difficult to estimate the actual discharges occurring and assess the extent to which CAFOs may be contributing to water pollution.³⁴

The GAO reached this conclusion based on a study that included forty-seven state environmental agencies and regional EPA offices. In addition to its conclusion that the EPA lacked fundamental information, the GAO found the EPA's information unreliable.³⁵ The study's authors recommended that the EPA "complete [its] effort to develop a national inventory of permitted CAFOs and incorporate appropriate internal controls to ensure the quality of the data."³⁶ The GAO's conclusions are cause for special concern given that the EPA has relied on this unreliable information to develop its proposed CAFO regulations--regulations based on assumptions that would exempt a quarter of all CAFOs from NPDES permit requirements because they are not "likely" to discharge.³⁷

The EPA must gather certain basic information from CAFOs to issue accurate permits and enforce them. However, previous attempts to force CAFOs to provide this information have failed. The EPA's first broad strategy was to use its authority under section 402 of the CWA to require CAFO facilities to apply for NPDES permits as point-source polluters.³⁸ As Part II explains, however, federal courts have rejected NPDES permitting schemes under which the EPA would either require or incentivize CAFO facilities to apply for permits and thereby disclose information.

Subpart III.A discusses the proposed rules promulgated by the EPA in October 2011 that would have required all CAFO corporations to disclose basic information about their facilities. These rules--or subsequent versions of them--promise to mitigate the *54 problem of undetected, unregulated CAFOs.³⁹ Subparts III.B and III.C consider the potential of such rules to improve water quality.

II. A DECADE-LONG PRE-DISCHARGE PERMITTING CONTROVERSY

The EPA's authority under the CWA to require CAFOs to seek permits as point-source polluters would appear the most obvious legal basis for gathering basic information on the characteristics of CAFOs. The problem, however, is the point in time when the agency's permitting authority arises. Logically, one would assume that a facility would have the obligation to register with the EPA, or its state equivalent, and seek an NPDES permit before commencing operation or, at the very least, before a violation has occurred.

In promulgating its 2003 CAFO permitting rules, the EPA reasoned that the term "discharge" in the CWA contemplated not only the actual, physical discharge of the pollutant itself, but also the risk factors at the facility that increased the risk of the discharge to begin with, such as the design of the facility, the method of applying solid waste to agricultural land, or other management practices. If a facility had the "potential to discharge" pollutants because of such heightened risks, the rules required a permit, even if a new facility did not anticipate discharges or, with respect to an existing permit, no actual discharge had occurred.⁴⁰ The EPA's 2008 rules changed the approach: a CAFO operator could decide whether to apply for a permit before a discharge had occurred. However, if the facility's characteristics suggested an increased risk of pollution discharge, the 2008 rules called this a "proposal" to discharge. A facility with risk-factor characteristics that constituted a proposal to discharge would face enhanced penalties for failing to obtain a permit if it subsequently discharged water pollutants. Thus, in different ways, both the 2003 and 2008 rules sought to permit a CAFO before it had actually discharged any pollutants.⁴¹

Despite the EPA's best efforts, the 2003 and 2008 CAFO permitting rules were both defeated by legal challenges. Federal courts have repeatedly rejected any rule that would confer authority on the agency to require or even to encourage CAFO facilities to seek NPDES permits before they actually discharge contaminants. In *Waterkeeper Alliance*, the Second Circuit rejected the "potential to discharge" language in the 2003 rule on the basis that, for a facility like a CAFO, the CWA required an actual discharge of water pollutants before the EPA had authority to require a permit.⁴² Subsequently, the Fifth Circuit in *National Pork Producers Council v. EPA*⁴³ rejected the "proposal to discharge" language in the 2008 CAFO rules based on the same textualist argument that the Second Circuit had relied upon in *Waterkeeper Alliance*. Purportedly, the plain meaning of the term "discharge" in the *55 CWA, as applied to facilities like CAFOs,⁴⁴ precluded any pre-discharge permitting.⁴⁵ As the Fifth Circuit in *Pork Producers* expressed, "The Second Circuit explained that the plain language of the CWA "gives the EPA the jurisdiction to regulate and control only actual discharges--not potential discharges'"⁴⁶ Using the language of *Waterkeeper Alliance*, *Pork Producers* reasoned further:

[I]n the absence of the actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance.⁴⁷

One may question the courts' reading of the EPA's permitting authority under section 402 of the Clean Water Act. But the fact remains that, in the eyes of two federal courts of appeals, the EPA's efforts to gather pre-discharge information on CAFO facilities and regulate them through the NPDES permitting process were a failure. In contrast, the CAFO information-disclosure rules proposed under section 308 of the CWA would avoid the whole controversy over when the EPA's permitting authority over CAFOs arises, and could achieve-- outside of the NPDES process--at least some of the agency's objectives.

III. THE EVOLUTION AND CONTINUED PROMISE OF A LANGUISHING CAFO INFORMATION-DISCLOSURE RULE

A. The Settlement Agreement

In addition to the legal challenges launched by the CAFO industry in *Waterkeeper Alliance* and *Pork Producers*, the EPA faced opposition to its 2008 CAFO rule from environmental groups. The Natural Resources Defense Council, the Sierra Club, and Waterkeeper Alliance had petitioned the Ninth Circuit for review of the rule, but they chose to sever their claims after the court consolidated their petition with those of CAFO industry representatives and transferred the case to the Fifth Circuit under the caption of *National Pork Producers Council v. EPA*.⁴⁸ Instead, the environmental groups agreed to a dismissal of their claims without prejudice and subsequently entered into a settlement agreement with the EPA.⁴⁹

This settlement agreement required the EPA, pursuant to its authority under section 308 of the CWA, to propose a rule that would impose on CAFOs the duty to provide information about their facilities to the EPA, regardless of whether or not a facility holds a *56 NPDES permit.⁵⁰ Section 308 authorizes the EPA to gather information from CAFOs by virtue of their status as point-source dischargers and to impose penalties if the facilities fail to produce the information.⁵¹ The EPA committed to take final action on the rule by July 13, 2012. The information to be obtained from CAFOs, as listed in the settlement agreement, included the following:

- (1) The name and address of the owner and operator;

- (2) If a facility operated on a contractual basis with another facility, the name and address of the integrator;

- (3) The location (longitude and latitude) of the operation;

- (4) The type of facility;

- (5) The number and types of animals;

- (6) The method and capacity of manure storage;

- (7) The quantity of manure, process wastewater, and litter the facility generated annually;
- (8) Whether the CAFO disposed of manure by applying it to agricultural lands;
- (9) The acreage a facility had available for applying waste to land;
- (10) If the CAFO applied waste to agricultural land, whether it did so in accordance with a nutrient management plan and applied manure at agronomically correct rates;
- (11) If the CAFO land-applies, whether it kept records on its application of waste to the land as federal rules required;⁵²
- (12) If the CAFO did not apply waste to agricultural lands, what alternative uses of manure it employed to dispose of litter or wastewater;
- (13) Whether the CAFO transferred manure off site, in what quantity, and the identity of the recipients; and
- (14) Whether the CAFO had applied for an NPDES permit.⁵³

On October 21, 2011, the EPA published notice of its proposed rule.⁵⁴ The proposed rule created alternative systems for gathering information from CAFOs and provided for penalties if facilities did not produce the requested information.⁵⁵ However, the *57 EPA took pains in the proposed rule to clarify that the duty to produce information under section 308 would not translate into the duty to obtain a permit under section 402: “Today’s notice proposes options for gathering basic information from CAFOs; it does require them to obtain permits.”⁵⁶

EPA officials have suggested that, in the past, the agency had not availed itself of its authority under section 308 of the CWA to obtain CAFO information.⁵⁷ In fact, the EPA’s lack of information on the existence of CAFOs and their characteristics required the agency to use extraordinary information-gathering measures. The agency had used satellite imagery and aerial photography to determine the locations of CAFOs.⁵⁸ It had also examined USDA data on meat and dairy production for a given state, compared those numbers with the production levels of known CAFOs in that state, and tried to determine whether unknown facilities existed if the statistics revealed a gap.⁵⁹ Clearly, an information-disclosure rule would enable the EPA to gather information in a more systematic way than through such detective work.

B. EPA’s Legal Authority Under Section 308 of the CWA

The question remains, however, whether the version of the proposed rule published on October 21, 2011, will actually produce more and better information on CAFO facilities. Further, once the information is gathered, one must ask for what purpose the agency may use this information under the terms of the Clean Water Act. The second question is easier to answer than the first. Of fundamental importance is that the duty to disclose information under section 308 is mandatory, and the EPA can penalize facilities that do not provide the required information.⁶⁰ Section 308 of the CWA authorizes the EPA to collect information from the “owner or operator of any point source” related to:

- (1) Developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or

effluent standard, pretreatment standard, or standard of performance;

(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) [Carrying out] any requirement established under [section 308]; or

***58** (4) Carrying out [other sections of the Act, including section 402].⁶¹

The information-gathering authority created under section 308 would be more effective if an accompanying pre-discharge permitting requirement existed--the kind that the federal courts of appeals rejected in *Waterkeepers* and *Pork Producers*. For example, an information disclosure rule would reveal whether the conditions at a given facility would have amounted to a "proposal to discharge" under the invalidated 2008 rules. However, this list also suggests that the agency could use an information-disclosure rule to regulate CAFO facilities that violate statutory requirements that apply regardless of whether a facility has a permit. Finally, because the agency can use the statute to require disclosure of information that may demonstrate that a facility is in violation, such mandatory information disclosure could actually result in a facility being required to obtain a permit. This is especially true because the CWA clearly contemplates that information gathered under section 308 should be used to carry out the purposes of section 402, which governs NPDES permits.

The logic behind the proposed information-disclosure rule further reveals the relationship between this proposed rule and CAFO permitting. The proposed rulemaking makes a risk-based argument similar to the way reviewing courts should view permitting under section 402. As the EPA explains: "Facility location and basic operational characteristics that relate to how and why a facility may discharge is essential information needed to carry out NPDES programming functions, which include ... [d]etermining the potential sources of water quality impairments and taking steps to address those impairments."⁶² Assessing whether a facility "may" discharge and determining "'potential" sources of discharge to prevent them from discharging were the objectives of the EPA's invalidated permitting rules.

C. Proposed Information-Gathering Techniques

It remains difficult to determine whether the rule as proposed in October 2011 would have produced the quality of information on CAFOs that the 2008 GAO report identified as lacking or unreliable. Comments on the proposed rule expressed strong opinions on the EPA's proposed methods of gathering information. As explained in the proposed rule, the EPA's first approach would simply have required all CAFOs to provide the skeletal information just described for each of its facilities. The second possible approach would have required the EPA to identify "focus watersheds," those that are likely to be suffering water quality impairments from industrial agriculture, especially CAFOs. With respect to either of these options, the "EPA would make every reasonable effort to assess the utility of existing, publicly available data and programs by working with partners at the federal, state, and local levels before determining whether requiring CAFOs to provide the information is necessary."⁶³

***59** Whether the EPA were to obtain data directly from CAFOs or indirectly through state and local authorities in "focus watershed" regions, the agency would be confronted with a similar problem. If the agency used direct disclosure, it would attempt to gather information from many facilities whose existence is unknown to the agency. If the EPA focused on "watersheds of concern" and utilized the databases of state and local authorities, information from segments of the United States would be ignored altogether, and the "focus watershed" data would only be as reliable as the state or local entity that provided it. The proposed rule made clear, however, that the "focus watershed" approach would entail gathering information directly from CAFOs to fill the gaps in the local data. The comment period on the proposed rule ended on December 20, 2011, and the agency continued to improve the rule for another seven months.

CONCLUSION: A VITAL, YET UNREALIZED, ASPECT OF CAFO REGULATION

The proposed information disclosure rule discussed here is moribund. In a decision that surprised all interested parties, the EPA announced on July 13, 2012, that the agency was withdrawing the rule from consideration.⁶⁴ The agency left open the possibility of future rulemaking, but provided only this statement as to its decision to withdraw the rule: “EPA believes, at this time, it is more appropriate to obtain CAFO information by working with federal, state, and local partners instead of requiring CAFO information to be submitted pursuant to a rule.”⁶⁵ In other words, the agency expressed a preference for gathering information on CAFOs as it was done before the agency ever drafted the proposed rule, despite the 2008 GAO report and court order in *NRDC v. EPA*.

Without a doubt, the agency will have to return to the creation of an information-disclosure rule for CAFOs: not only is it under a court order, but significant public pressure to do so is mounting. Such a rule will not replace a CAFO permitting rule that requires facilities to consider permitting before they have discharged, but an effective information rule has the potential to make all aspects of CAFO regulation—including permitting—much more effective. The decision to withdraw the proposed rule, however, is a less-promising harbinger of the EPA’s willingness to regulate CAFOs effectively in the future.

Footnotes

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¹ 33 U.S.C. § 1318 (2012).

² National Pollution Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 76 Fed. Reg. 65,431-01 (proposed Oct. 21, 2011) (to be codified at 40 C.F.R. pts. 9 and 122) [hereinafter Proposed CAFO Rule]. The EPA withdrew the proposed rule on July 20, 2012, but a court order continues to impose on the agency the duty to enact an information-gathering rule. *See infra* notes 48 (court order), 64 (rule withdrawal).

³ Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496-01 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. I).

⁴ *Massachusetts v. EPA*, 549 U.S. 497 (2007).

⁵ *See, e.g.*, Robert Adler, *CAFOs, Circularity and Certainty in the CWA: Fifth Circuit’s Decision in National Pork Producers Council v. EPA Raises Problems*, CPR BLOG (Mar. 18, 2011), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=CA38C6B5-AD59-AFD0-6775132BE5BA04F6> (stating that “CAFOs are one of the many reasons why pollution from agricultural operations remains the largest single source of water pollution nationally—a problem that EPA and the states have struggled to address for decades”).

⁶ 33 U.S.C. § 1251(a) (2012).

⁷ *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 492 (2d Cir. 2005) (citing National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7176, 7179 (Feb. 12, 2003) (to be codified at 40 C.F.R. pts. 9, 122, 123 and 412) [hereinafter CAFO Guidelines]).

⁸ CAFO Guidelines, *supra* note 7.

⁹ *About Animal Feeding Operations*, U.S. ENVTL. PROT. AGENCY (June 27, 2012), [http://www.epa.gov/oecaagct/anafoidx.html#About%20Animal%CC20Feeding% 20Operations](http://www.epa.gov/oecaagct/anafoidx.html#About%20Animal%CC20Feeding%20Operations).

¹⁰ *Waterkeeper Alliance*, 399 F.3d at 493.

¹¹ *See, e.g.*, 40 C.F.R. § 122.23 (2012).

¹² *Id.* § 122.23(b)(6)(i)(A)-(M). These rules include numerical requirements for small, medium, and large AFOs as well as small, medium, and large CAFOs. For example, to be defined as a medium CAFO, an AFO must maintain the types and numbers of animals listed here: (A) 200 to 699 mature dairy cows, whether milked or dry; (B) 300 to 999 veal calves; (C) 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs; (D) 750 to 2,499 swine each weighing 55 pounds or more; (E) 3,000 to 9,999 swine each weighing less than 55 pounds; (F) 150 to 499 horses; (G) 3,000 to 9,999 sheep or lambs; (H) 16,500 to 54,999 turkeys; (I) 9,000 to 29,999 laying hens or broilers if the AFO uses a liquid manure handling system; (J) 37,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system; (K) 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system; (L) 10,000 to 29,999 ducks (if the AFO uses other than a liquid manure handling system); or (M) 1,500 to 4,999 ducks (if the AFO uses a liquid manure handling system). *See also id.* § 122.23(b)(4) (classifying an animal feeding operation as a “large CAFO” if it exceeds the number of animals identified in the immediately preceding example).

¹³ *Id.* § 122.23(b)(1)(i)-(ii).

¹⁴ *Id.* § 122.23(b)(6)(ii)(A)-(B).

¹⁵ 33 U.S.C. § 1362(12)(A) (2012) (“discharge of a pollutant’ ... means any addition of any pollutant to navigable waters from any point source”); *id.* § 1362(5) (“‘person’ means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body”); *id.* § 1362(14) (“‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation ... from which pollutants are or may be discharged”).

¹⁶ 33 U.S.C. §§ 1251(a)(1), 1342, 1343 (2012).

¹⁷ 40 C.F.R. § 122.23(c).

¹⁸ OFFICE OF WATER STANDARDS & APPLIED SCIS. DIV., U.S. ENVTL. PROT. AGENCY, PRELIMINARY DATA SUMMARY, FEEDLOTS POINT SOURCE CATEGORY STUDY, APPENDIX IV: ENVIRONMENTAL DATA SUMMARY - ENVIRONMENTAL IMPACTS OF ANIMAL FEEDING OPERATIONS 6 (1998).

¹⁹ Office of Civil Enforcement, U.S. Env'tl. Prot. Agency, *EPA Targets Clean Water Act Violations at Livestock Feeding Operations*, ENFORCEMENT ALERT, Mar. 2009, at 1, 1.

²⁰ *Arizona Facts*, FACTORY FARM MAP, [http:// www.factoryfarmmap.org/states/az/](http://www.factoryfarmmap.org/states/az/) (last visited Nov. 7, 2012).

²¹ *Id.*

²² Myriad studies have documented harm to the environment and human health through CAFO-caused contamination of air, water, and soil. *See, e.g.*, CLAUDIA COPELAND, CONG. RESEARCH SERV., RL 31851, ANIMAL WASTE AND WATER QUALITY: EPA REGULATION OF CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOS) 3-5 (2010).

23 CAFO Guidelines, *supra* note 7, at 7180.

24 See NAT'L RISK MGMT. RESEARCH LAB., U.S. ENVTL. PROT. AGENCY, EPA-600-R-04-042, RISK ASSESSMENT
EVALUATION FOR CONCENTRATED ANIMAL FEEDING OPERATIONS 24, 28, 46, 52 (2004).

25 U.S. ENVTL. PROT. AGENCY, EPA-841-R-02-001, NATIONAL WATER QUALITY INVENTORY: 2000 REPORT 10-15
(2002).

26 *Id.* at 11-12.

27 *Id.* at 12 (34 percent of assessed river and stream miles only partially support or cannot support aquatic life); *see also* *Water
Sentinels: Factory Farms*, SIERRA CLUB, [http:// www.sierraclub.org/watersentinels/factoryfarms.aspx](http://www.sierraclub.org/watersentinels/factoryfarms.aspx) (last visited Feb. 18,
2011).

28 U.S. ENVTL. PROT. AGENCY, *supra* note 25, at 60.

29 *Id.* at 13.

30 *Id.*

31 See MICHELE M. MERKEL, EPA AND STATE FAILURES TO REGULATE CAFOS UNDER FEDERAL
ENVIRONMENTAL LAWS 1 (2006), available at [http://
www.environmentalintegrity.org/pdf/publications/EPA_State_Failures_Regulate_CAF0.pdf](http://www.environmentalintegrity.org/pdf/publications/EPA_State_Failures_Regulate_CAF0.pdf)

32 See, e.g., NOEL GOLLEHON ET AL., U.S. DEP'T OF AGRIC., AGRIC. INFO. BULL. NO. 771, CONFINED ANIMAL
PRODUCTION AND MANURE NUTRIENTS 31-32 (2001).

33 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-944, CONCENTRATED ANIMAL FEEDING OPERATIONS: EPA
NEEDS MORE INFORMATION AND A CLEARLY DEFINED STRATEGY TO PROTECT AIR AND WATER QUALITY
FROM POLLUTANTS OF CONCERN 3 (2008).

34 *Id.* at 31.

35 *Id.* at 4, 17.

36 *Id.* at 48.

37 Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated
Animal Feeding Operations in Response to the Waterkeeper Decision, 73 Fed. Reg. 70,418-01, 70,469 (Nov. 20, 2008) (to be
codified at 40 C.F.R. pts. 9, 122, and 412) [hereinafter Revised CAFO Guidelines] (estimating that 25 percent of large CAFOs do
not “discharge” and would not be subject to the NPDES permit program).

38 33 U.S.C. § 1342 (2012).

39 Proposed CAFO Rule, *supra* note 2, at 65,436.

40 *Id.* at 65,435.

41 Revised CAFO Guidelines, *supra* note 37, at 70,422-26.

42 Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 495-96 (2d Cir. 2005).

43 Pork Producers Council v. EPA, 635 F.3d 738, 748-52 (5th Cir. 2011) (adopting the reasoning and conclusion of *Waterkeeper Alliance*).

44 *Id.* at 749-50 (citing *Waterkeeper Alliance*, 399 F.3d at 504-05).

45 *Id.* at 751; *Waterkeeper Alliance*, 399 F.3d at 505.

46 *Pork Producers*, 635 F.3d at 744 (quoting *Waterkeeper Alliance*, 399 F.3d at 505).

47 *Id.* at 750 (quoting *Waterkeeper Alliance*, 399 F.3d at 504-05).

48 Settlement Agreement at 1, NRDC v. EPA, No. 09-60510 (9th Cir. May 25, 2010), *available at* <http://www.caes.uga.edu/extension/water/documents/settlementagreement.pdf>.

49 *Id.* at 1-2.

50 *Id.* at 2.

51 33 U.S.C. § 1318 (2012).

52 40 C.F.R. § 122.23(e) (2012).

53 Settlement Agreement, *supra* note 48, at 2-3. This list was incorporated into the rule notice for the Proposed CAFO Rule, *supra* note 2, at 65,436.

54 Proposed CAFO Rule, *supra* note 2.

55 *Id.* at 65,445.

56 *Id.* at 65,436.

57 Telephone Interview with Scott Stine, CAFO Specialist, EPA Region 6 (Dec. 6, 2011); Proposed CAFO Rule, *supra* note 2, at 65,446.

58 *Id.*

⁵⁹ Proposed CAFO Rule, *supra* note 2, at 65,446.

⁶⁰ 33 U.S.C. § 1318(a) (2012) (providing that, in furtherance of the stated objectives, the EPA shall require owners or operators of point sources to establish and maintain records; make reports; install, use, and maintain monitoring equipment; sample effluent; and provide such other information as the EPA may reasonably require to carry out the objectives of the CWA); *id.* § 1319 (authorizing the EPA to assess penalties for violations of section 308).

⁶¹ 33 U.S.C. § 1318(a).

⁶² Proposed CAFO Rule, *supra* note 2, at 65,434.

⁶³ *Id.* at 65,436.

⁶⁴ Meeting Notice, 77 Fed. Reg. 42,750 (July 20, 2012). For a description of public response, see *EPA Withdraws CAFO Database Rule*, SOC'Y OF ENVTL. JOURNALISTS (July 25, 2012), <http://www.sej.org/publications/watchdog-tipsheet/epa-withdraws-cafo-database-rule>.

⁶⁵ Meeting Notice, 77 Fed. Reg. at 42,750.