COMMENTS ON PROPOSED POST-*WATERKEEPER* CAFO NPDES REGULATIONS

Docket ID No. EPA-HQ-OW-2005-0037
71 Fed. Reg. 37,744 (June 30, 2006)

Submitted on behalf of:

National Pork Producers Council
United Egg Producers
American Farm Bureau Federation
National Council of Farmer Cooperatives
National Corn Growers Association

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I. INTRODUCTION

A. Statement of Interest in the Proposed Rule

The following comments on the proposed Revised National Pollutant Discharge Elimination System Permit ("NPDES") Regulation and Effluent Limitation Guidelines ("ELG") for Concentrated Animal Feeding Operations ("CAFOs") in Response to the *Waterkeeper* Decision (referred to below as the proposed rule), 71 Fed. Reg. 37,744-787 (June 30, 2006), are being submitted by the National Pork Producers Council ("NPPC"), the United Egg Producers ("UEP"), the American Farm Bureau Federation ("AFBF"), the National Council of Farmer Cooperatives ("NCFC"), and the National Corn Growers Association ("NCGA"). We appreciate the opportunity to submit these comments. Below we describe each of our organizations and our members.

1. National Pork Producers Council ("NPPC")

NPPC conducts public policy outreach on behalf of its 44 affiliated state association members and the thousands of pork producers in this country. The U.S. pork industry continues to treat as its top goal meeting worldwide consumer demand while simultaneously protecting water, air and other environmental resources that are in our care or potentially affected by our operations. Pork production in the United States is a vital part of the economy. Nearly 19 billion pounds of pork were processed from about 97 million hogs in 2001.

The economic impact of the industry on rural America is immense. Annual farm sales typically exceed $11 billion, while the retail value of pork sold to consumers reaches $38 billion each year. Pork also provides employment well beyond the farm. The U.S. pork industry is responsible for over $72 billion in total domestic economic activity. In addition, the pork industry supports over 800,000 jobs and adds over $27 billion of value to basic production inputs such as corn and soybeans. NPPC is proud of the reputation it and its members have earned for

initiating innovative environmental improvement programs. NPPC and its producer members take an active role in advocacy at both the federal and state levels for clean water environmental initiatives.

2. United Egg Producers ("UEP")

UEP is a farmer cooperative representing over 90 percent of egg operations nationwide. Our industry is important to national, state, and local economies, supplying approximately 257 eggs per year to each of the nation's 294 million people. Most of our producer members own their flocks and do not make contractual arrangements for production responsibilities to be assumed by independent farms as is the practice in other sectors of the poultry industry. Most egg production operations are integrated from the point of production through the final marketing of the eggs. Although on a percentage basis most manure or litter is sold or given away to neighboring farmers for use as fertilizer on crops, many egg producers apply a portion of their chicken litter, manure, or process wastewater as fertilizer on farmland they own or control. UEP producer members take very seriously the need to protect water quality, and they are committed to high levels of environmental stewardship and management. They use high quality litter and manure retention, storage, and handling facilities and techniques, and they use high quality manure and nutrient management systems when land applying manure. Composting of manure for further use is also growing in popularity among our producers. Our producer members are committed to responsibly managing poultry manure as a valuable resource for improving soil tilth and soil quality and for providing valuable nutrients for crop production.

3. American Farm Bureau Federation ("AFBF")

AFBF is an independent, non-governmental, voluntary organization governed by and representing farm and ranch families united for the purpose of analyzing their problems and formulating action to achieve educational improvement, economic opportunity and social

advancement and, thereby, to promote the national well-being of farmers and ranchers. AFBF is the nation's largest general farm organization, representing farm and ranch families in all 50 states and Puerto Rico. Farm Bureau members produce virtually every commodity grown or raised commercially in the United States. AFBF is an advocacy organization that regularly represents its members' interests before Congress, federal regulatory agencies, and the Courts. Many of AFBF's members produce livestock and poultry and these producers will be directly affected by this CAFO rulemaking.

4. National Council of Farmer Cooperatives ("NCFC")

NCFC has been the recognized national association advancing the interests of America's farmer cooperatives and their nearly two million farmer, rancher and grower members since 1929. NCFC members include nearly 50 national, regional and federated farmer cooperatives which, in turn, are comprised of some 3,000 local cooperatives. NCFC's membership also includes 27 state and regional councils of cooperatives. In 1922, Congress passed the Capper-Volstead Act, which gives farmers and ranchers the legal right to join together in cooperative associations for their mutual benefit. Three years later, the American Institute of Cooperation (AIC) was formed by cooperative leaders to serve as an educational tool on behalf of cooperatives. These same leaders recognized that cooperatives also needed a political voice at the national level in order to survive and flourish. Today, NCFC's mission is to protect the public policy environment in which farmer-owned cooperative businesses operate, promote their economic well-being, and provide leadership in cooperative education. NCFC remains the only organization serving exclusively as the national representative and advocate for America's farmer-owned cooperative businesses, many of whom are directly or indirectly affected by the rulemaking that is the subject of these comments.

5. National Corn Growers Association ("NCGA")

NCGA is the largest trade organization for corn growers in the United States, representing the interests over 300,000 farmers across the nation concerning federal legislative and regulatory policies. Corn growers are concerned with the health and well-being of American citizens and are mindful of the need to balance environmental stewardship with the need for a long-term, dependable food supply and long-term profitability in farming. It is for these reasons that NCGA supports voluntary, locally led, incentive-based programs which recognize the unique abilities and limitations of farmers. Furthermore, NCGA's largest single group of customers is U.S. livestock and poultry producers, many of whom are subject to these proposed regulations. The livelihood of these customers is directly affected by the decisions being made in this rulemaking, which in turn will affect U.S. corn producers.

B. The 2003 CAFO Rule, Combined with Revisions Made Necessary by the *Waterkeeper* Ruling, Provide a Framework for Effective, Efficient, and Enforceable Environmental Protections for CAFOs.

This proposed rule must be considered in the context of the extensive water quality protections already in place as a result of EPA's 2003 CAFO NPDES rule and ELG ("2003 CAFO rule"), 68 Fed. Reg. 7,176 (Feb. 12, 2003), which dramatically extended and altered the CWA regulatory provisions applicable to animal feeding operations. EPA seeks comments on several fundamental changes to the 2003 CAFO rule, which were made necessary by litigation that invalidated several key provisions of that rule. *See Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2d. Cir. 2005). While this proposal deals with several extremely important aspects of CAFO regulation under the NPDES program, these issues must be viewed in the context of the NPDES regulations for CAFOs before 2003, when that rule became final. The 2006 proposed rule leaves fully intact the most important elements of the 2003 final rule that had far-reaching operational implications and environmental benefits.

In particular, we note that any animal feeding operation (pork, poultry, beef, dairy or horse) of almost any size faces potential enforcement and severe penalties for even a single discharge from the operations to waters of the United States. This was not the case (and was certainly not perceived to be the case) prior to 2003. Perhaps even more important, the 2003 rule extended CWA protections to the application of manure to CAFO lands. Under this change, the application of manure to these lands without appropriate and documented agronomic and conservation best management practices would make any resulting storm water runoff of pollutants to waters of the United States a CWA "discharge" potentially subject to substantial penalties. This new regulation of land application practices was introduced in 2003.

These changes are monumental shifts in the federal policies and regulations that govern animal feeding operations. They have created substantial and effective incentives for CAFOs to prevent any discharge from CAFO production areas and to use sound and effective manure application practices in their land application areas. They represent substantial improvements in water quality protection. Moreover, these benefits will be realized even for CAFOs that choose not to get a federal NPDES permit. This is a sound and wise policy outcome because certain aspects of the *Waterkeeper* ruling will make the permitting process for CAFOs that do seek permit coverage more bureaucratic, more cumbersome, and less adaptable to changing operational circumstances.

We commend EPA for issuing a proposed rule that in most respects would result in a final CAFO rule that remains effective, workable, and within the legal constraints imposed by the Second Circuit's *Waterkeeper* decision. Our comments below offer refinements to many of these sound proposals. In a few important instances we will address critical concerns that call for a different treatment in the final rulemaking. Our goal is a final rule that achieves the goals

of the CWA without needless reliance on NPDES permits for CAFOs. All CAFOs now must eliminate discharges and properly manage CAFO nutrients under the effective standards set in the CAFO rule, and the fact that this will be done by many CAFOs without a federal NPDES permit does not diminish in the least the protections to water quality.

II. COMMENTS ON THE PROPOSAL

A. The Proposed "Duty to Apply" for All CAFOs That "Discharge or Propose To Discharge" Exceeds EPA's CWA Authority.

One key element of the *Waterkeeper* decision was the court's ruling that the CWA does not authorize EPA to require a CAFO to obtain NPDES permit coverage simply because the CAFO has the potential to discharge. The Court explicitly ruled that the CWA authorizes the regulation of *actual* discharges of pollutants to navigable waters – not potential discharges and not point sources themselves. According to the court:

> . . . unless there is a "discharge of any pollutant," there is no violation of the Act, and point sources are, accordingly, neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit.
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> Congress left little room for doubt about the meaning of the term "discharge of any pollutant." . . . Thus, *in the absence of an actual addition of any pollutant to navigable waters from any point source, 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.*

399 F.3d at 504 (emphasis added). Because the case concerned only whether EPA could impose a "duty to apply" on CAFOs with the *potential* to discharge, the court was not called upon to address whether, or under what circumstances, the CWA authorizes a "duty to apply" for *actual* discharges.

On the basis of the *Waterkeeper* ruling, EPA now proposes to eliminate the 2003 CAFO rule's "duty to apply" for all CAFOs that have the potential to discharge. In place of the 2003 duty to apply, EPA has proposed a new "duty to apply." Proposed § 122.23(d) provides that:

> (1) *All owners or operators of a CAFO that discharges or proposes to discharge pollutants must apply for a permit.* All owners or operators of a CAFO that discharges or proposes to discharge pollutants must seek coverage under an NPDES permit. Specifically, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit. . . . (Italics in original.)

According to EPA's explanation, this new "duty to apply" would establish an enforceable legal obligation to apply for permit coverage – including CWA liability and potential penalties for "failure to apply" – for all CAFOs that "discharge or propose to discharge."

We submit that the proposed revised "duty to apply" is unlawful for the reasons described below.

1. The CWA Does Not Authorize Any "Duty to Apply" for an NPDES Permit.

a. The CWA does not authorize any affirmative obligation to seek permit coverage.

The proposed duty to apply for CAFOs that "discharge or propose to discharge pollutants" is unlawful in part because the CWA does not authorize an affirmative requirement to seek permit coverage for regulated "discharges." The CWA does not require anyone to apply for an NPDES permit. It simply prohibits – and provides for substantial penalties for – most discharges that occur without a permit.[1]

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[1] We say "most" because not all point source discharges of pollutants are regulated under the CWA. In particular, discharges of pollutants via *storm water* are regulated only to the extent that they have been designated for regulation pursuant to CWA § 402(p) and EPA's storm water regulations at 40 C.F.R. § 122.26. *See* Section II.A.4., below.

Title III of the CWA is based on a discharge prohibition, found in § 301: "Except as in compliance with this section and [other] sections . . . of this title [including section 402], the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). CWA § 402 establishes the NPDES permitting program and provides, among other things, that: "[T]he Administrator *may*, after opportunity for public hearing, issue a permit *for the discharge* of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title . . . ." 33 U.S.C. § 1342(a)(1) (emphasis added). Nowhere in the CWA, however, is there a requirement for anyone to apply for or obtain an NPDES permit. Rather, the CWA *allows* EPA to issue NPDES permits in order to authorize discharges of pollutants under conditions spelled out in the permit. The CWA also imposes severe sanctions for discharging without an NPDES permit.

An NPDES permit is analogous to a driver's license. Just as people do not need a driver's license if they do not drive, CAFOs (like other point sources) do not need an NPDES permit if they do not discharge. Moreover, the law does not affirmatively "require" people to apply for a driver's license if they who have driven or intend to drive – instead, it punishes them if they drive without one. Similarly, the CWA does not affirmatively "require" people who discharge (or who may discharge) to apply for an NPDES permit – it simply provides severe penalties for discharging without one. In the NPDES context, a person who unlawfully discharges without a permit may be subject to penalties, court-ordered injunctive relief, or even criminal sanctions (for negligent or willful violations) for the unlawful discharges. But the CWA does not "require" a person to apply for an NPDES permit simply because that person has previously discharged.

In sum, EPA's proposed rule requiring that CAFOs that discharge or propose to discharge "must apply for a permit" is unlawful and is unprecedented in the NPDES program (see Section II.A.1.c. below). EPA should abandon its attempts to impose a CAFO "duty to apply."

b. The CWA does not authorize separate liability for "failure to apply."

Even if EPA could lawfully establish a "duty to apply" in the sense of placing an affirmative responsibility on CAFOs to seek NPDES permit coverage, it cannot lawfully impose separate liability for CWA enforcement and penalties based on a CAFO's "failure to apply." EPA's preamble discussion explains that a CAFO's failure to seek permit coverage in accordance with proposed § 122.23(d) would give rise to a separate and independent basis for CWA liability – in addition to any liability for unauthorized discharges and, indeed, regardless of whether any actual discharge has occurred. Under this proposal, according to EPA:

> Any CAFO that discharged or proposed to discharge and failed to obtain an NPDES permit *would be in violation of the NPDES regulatory requirement to seek coverage* under an NPDES permit. *A facility with an actual discharge would also be in violation of the CWA prohibition against discharging* without an NPDES permit.

71 Fed. Reg. 37,743 (June 30, 2006), at 37,749 (emphasis added).

This separate and independent basis for CAFO liability would have several anomalous results. For example, if a CAFO has "*proposed* to discharge" but has not actually discharged, the operator would be liable for CWA enforcement and penalties for "failure to apply" for permit coverage *notwithstanding the absence of any actual discharge*. This amounts to liability for "proposing to discharge without a permit" – not discharging without a permit – and has no basis in the CWA.

Likewise, a CAFO that has never "proposed" to discharge, but experiences an unanticipated accidental discharge, would, under EPA's proposal, be liable for two violations:

(1) the unlawful accidental discharge to waters of the U.S., and (2) failure to apply for permit coverage for the *accidental* discharge. Yet there can be no rational basis, nor any sound policy justification, for imposing CWA enforcement liability for failure to seek permit coverage in advance of discharges that were unexpected.

Returning again to the driver's license analogy, one might argue that people have an affirmative "duty" to obtain a driver's license before driving. Yet in terms of liability and punishment, a person who drives without first obtaining a license will be ticketed only for driving without a license; he will not be ticketed for driving without a license ***and*** failure to obtain one. Similarly, under the CWA, even if a person has a "duty" to seek NPDES permit coverage before generating regulated discharges, no *liability* arises until a discharge occurs. Moreover, if a discharge does occur, the liability is for discharging without a permit, not for discharging without a permit ***and*** failure to obtain a permit.

We urge EPA to adhere to the fundamental structure of the CWA as it applies to all regulated point source discharges and clarify that there is no separate CWA liability for "failure to apply" for NPDES permit coverage.

c. The proposed CAFO "duty to apply" is not the same "duty to apply" that exists for other point sources.

EPA's preamble discussion maintains that the agency is simply imposing on CAFOs the same "duty to apply" that exists for all other "point sources" under 40 C.F.R. § 122.21(a). The language of the proposed rule and the language and history of § 122.21, however, indicate otherwise.

In contrast to the proposed rule for CAFOs, § 122.21(a) does not establish an independent basis for CWA liability and penalties in the event that dischargers fail to seek permit coverage. Rather, § 122.21(a) is a *procedural* regulation that specifies *how* permit coverage is obtained.

Under § 122.21(a), "[a]ny person who discharges or proposes to discharge pollutants" and who is not covered under an effective NPDES permit and is not eligible for a general permit (*i.e.* a person who will need a new individual permit to cover planned discharges) – "must submit a complete application to the Director in accordance with this section and part 124 of this chapter." Section 122.21 then goes on to specify detailed requirements concerning the application forms to be used, the time to submit the application, completeness of the application, and the information required of various types of discharging facilities.[2]

The clear import of these generally applicable provisions is that any person who plans to discharge and will need an individual NPDES permit to do so "must" submit a complete application and comply with the remaining permit application procedures of § 122.21 *in order to get permit coverage*. Those who fail to apply for coverage *will not get permit coverage*. Yet nothing in these provisions suggests that those who fail to seek permit coverage will face liability for "failure to apply" in addition to liability for unpermitted discharges.

Indeed, although this procedural regulation has existed for decades, EPA has only very recently suggested that it might be interpreted to establish liability for "failure to apply" in addition to liability for any unpermitted discharges. We submit that any such interpretation is contrary to the agency's contemporaneous intent in promulgating § 122.21(a) and to the plain language and structure of the CWA. Therefore, § 122.21(a) cannot serve as meaningful precedent for the requirement to seek permit coverage now proposed for CAFOs.[3]

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[2] With regard to the information required for a CAFO's permit application, proposed § 122.23 simply refers to § 122.21.

[3] Nor have we identified any other meaningful precedent in EPA's parallel provisions regarding other "Special NPDES Program Requirements" for aquatic animal production, aquaculture projects, and silvicultural activities. *See* 40 C.F.R. § 122.24 (aquatic animal production) – "are

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2. The CWA Does Not Authorize Any "Duty To Apply" (or Liability for "Failure To Apply") for Accidental Discharges.

a. Past accidental discharges cannot trigger a "duty to apply."

EPA's statements and the phrasing of proposed § 122.23(d)(1) could be construed to suggest that CAFOs who experience any accidental discharge thereafter have a duty to apply for permit coverage. *See* 71 Fed. Reg. at 37,748 ("This revised duty to apply applies to all owners or operators that discharge or propose to discharge, regardless of the volume or duration of the discharge except for discharges of agricultural storm water.") CAFOs that have experienced an accidental discharge, however, may still have only a "potential" to discharge in the future. Indeed, they may have no greater likelihood of future discharges than a CAFO that has never discharged. Under the *Waterkeeper* ruling, such CAFOs may not be required to seek permit coverage. EPA therefore must clarify that the existence of past accidental discharges does not give rise to the obligation to seek permit coverage where there is only a "potential" for future discharges.

b. The risk of future accidental discharges cannot trigger a "duty to apply."

Any duty to apply for CAFOs that "propose to discharge" must be limited to CAFO operators who *actually intend* to discharge (*e.g.*, a CAFO that may seek approval to discharge

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point sources *subject to the NPDES permit program*"; 122.25 (discharges into aquaculture projects) – "are *subject to the NPDES permit program* through section 318 of CWA . . .; 122.27 (silvicultural activities) silvicultural point sources "[are] point sources *subject to the NPDES permit program*". Each of these provisions essentially mirrors the pre-2003 version of § 122.23 for CAFOs, which specified that CAFOs "are point sources *subject to the NPDES permit program*," but which did not articulate an affirmative legal obligation to apply for permit coverage.

clean, process wastewater under the 2003 rule's voluntary alternative performance standards option.) Only CAFO operators who *plan* to discharge – not CAFOs with a risk of accidental discharge – can reasonably be directed to seek permit authorization to do so.

Under the *Waterkeeper* ruling, EPA may not impose permitting obligations based on a mere *risk* (or even a likelihood) of discharge – this amounts to nothing more than a *potential* to discharge. Although the factors and geographic/physiographic conditions listed by EPA (71 Fed. Reg. at 37,749) should be considered by CAFOs seeking to minimize their risk of discharge, CAFOs with these risk factors nevertheless still have only a "potential" to discharge – they do not "propose" to discharge. CAFO operators who intend *not* to discharge – even if there is some degree of "risk" – are well within their rights under the CWA to not seek permit coverage and to manage their operations to prevent any discharge. Of course, they must face the consequences (CWA discharge liability and penalties) for any discharge that occurs despite their efforts.[4] Under *Waterkeeper*, any such CAFO operator has only the potential to discharge and cannot be required to seek NPDES permit coverage.

c. Accidental discharges cannot give rise to liability for "failure to apply."

Because a risk of future accidental discharges cannot trigger a "duty to apply" for permit coverage, there can be no "failure to apply" liability in the event that accidental discharges do occur. EPA's preamble statements suggest that an unpermitted CAFO that experiences an unanticipated accidental discharge would be liable for two violations: (1) the unlawful

[4] Indeed, given that permit coverage will in many ways increase a CAFO's liability exposure, the most prudent decision for many CAFO operators would be to eliminate all risk factors within the control of the operator (which would be required as a condition of permit coverage in any case), manage the operation to prevent any regulated discharges to waters of the U.S., and *not* seek permit coverage.

accidental discharge to navigable waters, and (2) failure to apply for permit coverage for the accidental discharge. *See* 71 Fed. Reg. at 37,749 ("Any CAFO that discharged or proposed to discharge and failed to obtain an NPDES permit would be in violation of the NPDES regulatory requirement to seek coverage.") There is no basis in the CWA, however, for the retroactive imposition of liability for failure to seek permit coverage for unintended potential discharges. While the CWA does impose strict liability for the accidental discharge itself, regardless of the cause or the absence of fault, it cannot be construed to authorize retroactive liability for failing to seek advance permit coverage for accidental discharges.

3. If Any "Duty To Apply" Arises from Accidental Discharges, the Duty Can Only Arise *After* the Discharge and *If* the CAFO Operator Fails to Address the Cause of the Accident.

If, despite these objections, EPA finalizes a "duty to apply" provision for CAFOs based on an accidental discharge, then EPA should at least clarify that any such duty could arise only *after* the discharge occurs and *if* the CAFO operator fails to take reasonable measures to address the cause of the discharge.

First, as to timing, *Waterkeeper* makes clear that CAFO operators have no obligation to seek permit coverage in advance for accidental discharges that may, *or may not*, occur. For this reason, any "duty to apply" triggered by accidental discharges could arise (if at all) only *after* an actual discharge has occurred.

Second, CAFO operators who experience an accidental discharge, but who then address the cause of the discharge (*e.g.*, repairing or replacing a ruptured pipe), may have no greater likelihood of discharging than any other similarly situated CAFO that has never discharged. Such CAFOs, under the *Waterkeeper* ruling, have only the *potential* to discharge and therefore cannot be required to seek permit coverage. Thus, CAFOs are within their rights under the CWA to promptly correct the conditions that have caused an accidental discharge (if corrective

measures are needed) and to not seek permit coverage for future discharges. Accordingly, we urge EPA to limit any "duty to apply" based on an accidental discharge to CAFOs who have failed, after a reasonable period of time, to identify the cause of the discharge and undertake appropriate corrective measures.

We also encourage EPA to clarify the type of corrective measures that will be deemed sufficient to remedy a prior accidental discharge. We recommend that, in the case of an accident involving some element of the production area, the element must be corrected in accordance with the applicable Director's technical design standard for that element for a similarly situated permitted CAFO with a similar manure management system and style of production area. As we have shown in section II. B. below, the available discharge record from several states, the predominant management practices for many CAFOs with open impoundments designed to contain a 25-year, 24-hour storm, and EPA's own simulation model analysis in the proposed rule, shows that these usual and customary systems and measures are effectively achieving zero discharge. A CAFO that experiences an accidental discharge and that addresses the factor or factors that caused the accident through the adoption of measures consistent with the applicable Director's technical design standard for a similarly situated permitted CAFO therefore has established that the operation has, at most, only a potential to discharge in the future. In the case of an accident involving some element of the land application area, we recommend that the correction be what would otherwise be considered appropriate to qualify for the agricultural storm water exemption for similar land and crop circumstances. This will establish that any discharge from the relevant land application area would be exempt agricultural storm water.

4. Unregulated Storm Water Discharges Cannot Trigger a "Duty To Apply"

CWA § 402(p) and EPA regulations at 40 C.F.R. § 122.26 establish specific and limited authority to regulate point source pollutant discharges that occur via storm water. Only storm water discharges that have been specifically designated for regulation in accordance with these provisions are subject to NPDES permitting. Moreover, any storm water discharge comprised of *agricultural* storm water cannot be designated for regulation due to the statutory agricultural storm water exemption.

The proposed "duty to apply" cannot lawfully be imposed for storm water discharges that have not been designated for regulation pursuant to CWA § 402(p) and 40 C.F.R. § 122.26(a). For this reason, EPA should clarify that *unregulated* storm water discharges at a CAFO do not trigger any duty to apply or CWA discharge liability. Such discharges include any discharge that qualifies as agricultural storm water *and* any other storm water discharge that has not been designated for regulation pursuant to § 402(p) and 40 C.F.R. § 122.26(a).

Some have taken the position that storm water discharges from areas *near* (but outside) CAFO production areas will constitute a "discharge of pollutants" from the CAFO within the meaning of proposed § 122.23(d). This position would trigger a duty to seek permit coverage – if these storm water discharges carry CAFO-related materials such as manure, feathers, or dust that have been emitted from the CAFO production areas through ventilation fans or carried by the wind. Their position would result in CWA regulation of storm water runoff from any area where CAFO manure, feathers, or dust may have been deposited by the wind or other means, no matter how far from the perimeter of the production area. Runoff from the roofs of barns or land between or around barns (all of which are outside the perimeter of the production area as characterized and analyzed by EPA in the 2003 CAFO rule's effluent limitation guidelines),

would also constitute a "discharge of pollutants" that would trigger the proposed "duty to apply" at § 122.23(d).

Their assertion seems to rest on an overbroad interpretation of the definition of "process wastewater" at 40 C.F.R. § 122.23(b)(7) that would include this storm water, even though the "waters" involved were never used in the operation of the animal feeding operation or mixed with animal waste or other materials within the production areas. Based on the contention that the water in question constitutes "process wastewater," some have suggested that any such storm-water runoff should not be viewed as a "storm water" discharge – even though any such discharge would be entirely the product of rainfall.[5]

EPA has never designated these near-production-area storm water discharges for regulation pursuant to CWA § 402(p) and 40 C.F.R. § 122.26(a).[6] These provisions specifically govern the scope of NPDES permitting requirements for *all storm water discharges, including storm water discharges containing pollutants*. Regardless of whether storm water discharges contain "pollutants" from a CAFO, storm water discharges are subject to regulation *only* to the extent that they have been designated for regulation pursuant to CWA § 402(p) and 40 C.F.R. § 122.26(a). Because EPA has never purported to designate for regulation storm water from outside CAFO production areas (including the roofs of barns, lands adjacent to barns, and other areas outside the defined "production area") – and, importantly, has never assessed in its CAFO NPDES and ELG rulemakings the tremendous cost that would be associated with the need to

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[5] EPA regulations define "storm water" as "runoff, snow melt runoff, and surface runoff and drainage." 40 C.F.R. § 122.26(b)(13).

[6] We believe that such discharges also constitute exempt "agricultural storm water discharges." Even setting that issue aside, however, such discharges are not subject to NPDES permitting and cannot trigger a "duty to apply" because they are storm water discharges that have not been designated in accordance with the requirements applicable to storm water discharges.

capture storm water from all areas where CAFO-related pollutants may be deposited by wind or other means – EPA lacks authority to require permit coverage for such storm water discharges.

For example, EPA states in its report on the cost methodology used to assess the economic achievability of the ELG technology standards for swine and poultry in the 2003 CAFO rule that "[a] cost model was developed to determine the average facility costs and total industry costs of the proposed regulation revisions to animal feeding industries." EPA goes on to divide costs into four broad categories: (1) nutrient management planning, (2) facility upgrades, (3) land application, and (4) practices that reduce excess nutrients on the farm. (*See* "Cost Methodology Report for Swine and Poultry Sectors" ("Report for Swine and Poultry") EPA-821-01-018, January 2001, Page 30).

Facility upgrades are the technologies and practices that are applicable to the production area, including the proper understanding of what is the perimeter of the animal housing area and what water and wastes need to be managed. Within this "facility upgrades" category, EPA goes on to detail nine specific technologies and practices to which costs will be assigned in the EPA analysis. These are a mortality composting facility, manure storage (for poultry litter), lagoon liners, lagoon covers, lagoon depth markers, anaerobic digesters, high rise hog facility upgrades, storm-water diversions, and lastly, field runoff control. Of these nine practices, all but field runoff control apply to the production area. The field runoff controls are applicable to "fields used for manure application." (*See* "Report for Swine and Poultry," page 66). There is no mention anywhere in any of the narrative descriptions of these other eight practices of controlling materials like dust, feathers, or other materials that could blow out of an animal house and onto the ground outside or onto an animal house roof. (*See* "Report for Swine and Poultry," pages 54-67).

In the case of the high rise hog facility the discussion of what the facility entails from a manure and pollutant management perspective relate entirely to what goes on within the interior surfaces of the roof and walls and floor. Ventilation and air movement is discussed explicitly in this system without any mention whatsoever of controlling pollutants from ventilated air carrying dust or small manure particles out of the house, and that includes no mention that such dust or manure would be considered for management under the ELG. (*See* "Report for Swine and Poultry," page 65).

In the case of storm-water diversions, there is no mention of storm water entering an animal house. EPA does say that "[t]o prevent runoff from entering manure storage facilities, storm water can be diverted by constructing berms on two sides up-gradient of the storage facility or lagoon." (*See* "Report for Swine and Poultry," page 65). The perimeter of this aspect of the production area, the manure storage facility, is the top of the berm, and the purpose of this berm is to contain manure and keep out exterior storm water. These storm-water diversions themselves therefore are not addressing, in EPA's economic achievability analysis, the cost of preventing storm water outside of the manure storage facilities from reaching a water of the United States.

Further evidence of EPA's specific concept of a swine and poultry production area with respect to the perimeter defining the limit of the regulation, can be seen in EPA's treatment in the 2001 proposed rule of the Option 5 zero-discharge best available technology for existing swine and poultry facilities. There is *no* discussion in this zero-discharge proposal that the requirement addresses storm water that may carry dust or small manure particles or feathers. In fact, EPA makes clear that "there are no open animal confinement areas to generate contaminated storm

water" and where there are open, liquid impoundments, they can comply by "diverting uncontaminated storm water away from the structure . . ." (*see* 66 Fed. Reg. at 3,063).

EPA also prepared a cost methodology report for beef and dairy operations (*See* "Cost Methodology Report for Beef and Dairy Animal Feeding Operations" ("Report for Beef and Dairy") EPA-821-01-019, January 2001)). Again, none of the discussions of the technologies and practices considered make any mention of dust or manure particles outside of the perimeter of the animal confinement area, nor make any mention of managing runoff outside of these areas. *See* Report for Beef and Dairy, pages 3-10 to 4-33. The runoff that is explicitly discussed is that from the drylot itself ("Only runoff from the drylot is considered to be contaminated with manure solids; therefore it requires collection and storage." *See* Report for Beef and Dairy, pages 3-11. "The precipitation and area of the drylot are used to determine the total amount of runoff from the drylot." *See* Report for Beef and Dairy, pages 3-12.) The runoff from within the interior of the drylot, and only that, is what must be collected and stored in this cost analysis, and it is only that runoff that is subject to the resulting final ELG technology standard.

EPA should clarify that unregulated storm water discharges from a CAFO (*e.g.*, from areas at the CAFO that are outside the production areas) do not constitute the "discharge of pollutants" from the CAFO within the meaning of proposed § 122.23(d), even if such storm water discharges contain pollutants from the CAFO. (Of course, there is also no permit requirement for storm water runoff from land application areas, which are nonpoint source agricultural storm water discharges so long as land application has been conducted in accordance with § 122.42(e)(1)(vi)-(ix).) Failure to make this clarification could subject CAFO operators to unlawful permit demands and would leave proposed § 122.23(d) in apparent conflict with CWA § 402(p) and EPA's existing storm water regulations.

5. The "Duty To Apply" Could Arise Only from Discharges to "Navigable Waters" Subject to CWA Jurisdiction.

"Discharge" is a term of art under the CWA that refers to the addition of a pollutant from a point source to "navigable waters," which in turn are defined as "waters of the United States." The scope of the term "waters of the United States" has been litigated frequently for many years and has been further narrowed by the recent Supreme Court ruling in *Rapanos v. United States*, 126 S. Ct. 2208 (2006). Nevertheless, whatever the scope of "navigable waters," there should be no dispute that the proposed duty to apply could arise only where CAFOs discharge (or propose to discharge) to "navigable waters" within the meaning of the CWA.

While there *should* be no dispute that the term "discharge" as used in this rulemaking has the meaning prescribed by the CWA, some have taken the position that *any* release of pollutants at a CAFO – even a spill to dry ground on the CAFO property – constitutes a "discharge" from the CAFO that gives rise to CWA liability and NPDES permit requirements. Under the plain language of the CWA and as observed by the Second Circuit in *Waterkeeper*, CWA obligations and liability can apply to CAFOs only to the extent that pollutants actually reach navigable waters. (*See Waterkeeper*, 399 F.3d at 504) ("Thus, in the absence of an 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.") (emphasis added). For this reason, we urge EPA to state explicitly that there is no "discharge" from a CAFO, no CWA liability, and no "duty to apply" based on a mere release of pollutants that never reaches "navigable waters."

6. The Proposed Permit Application Deadlines Are Irrational and Unlawful.

The proposed rule would establish a deadline for all operations defined as a CAFO as of the effective date of the rule (*i.e.*, all existing operations that meet the 2003 definition of a CAFO) that "discharge or propose to discharge" must apply for permit coverage no later than July 31, 2007. 71 Fed. Reg. 37,784 (proposed § 122.23(f)(1)). For existing operations that become defined as CAFOs after the effective date of the rule (*e.g.*, from an increase in the number of animals) and that "discharge or propose to discharge," the deadline is "as soon as possible, but no later than 90 days after becoming defined as a CAFO." For "new sources" – *i.e.*, large CAFOs newly constructed after the promulgation of applicable new source performance standards – that "discharge or propose to discharge" the permit application deadline is "at least 180 days prior to the time that the CAFO commences operation."

a. EPA should clarify which CAFOs are subject to a permit application deadline.

A deadline for the submission of CAFO NPDES permit applications can only apply to operations that are subject to a "duty to apply" as of the date of the deadline. Thus, for the same reasons explained above, there can be no deadline for permit applications by any CAFO. Certainly, no permit application deadline can legally apply to a CAFO that does not intend to discharge and either (1) has never had an actual discharge or (2) has addressed the cause of any prior discharge (see above at Section II.A.3.).

Setting aside for now, however, the fact that the "duty to apply" for all CAFOs that "discharge or propose to discharge" as currently proposed is unlawful, EPA itself must agree that a deadline for applications by such CAFOs could apply only if the operation "discharges or proposes to discharge." Thus, for each of these deadlines, EPA must clarify that the deadline applies only to CAFOs that "discharge or propose to discharge" *as of the date of the deadline.* With regard to existing CAFOs, this means that only CAFOs that "discharge or propose to

discharge" as of July 31, 2007, are subject to the proposed deadline of July 31, 2007.[7] Because EPA has proposed no subsequent deadlines, CAFOs that do not "discharge or propose to discharge" as of July 31, 2007, but who at some later date do "discharge or propose to discharge," would be subject to no regulatory deadline for permit application. Likewise, CAFO operators who never "discharge or propose to discharge," but who decide to voluntarily seek NPDES permit coverage, will be subject to no regulatory deadline for permit application.

It is critical that EPA clarify which operations are, and which are not, subject to the proposed deadlines. Many CAFO operators who do not discharge and do not plan to discharge are under the impression that they will be subject to the July 31, 2007, deadline simply because the proposal does not make any provision for later permit application. The existence of the July 31, 2007, deadline and the absence of any provision for later permit applications has created the impression that the July 31, 2007, deadline will somehow apply to these CAFOs if they ever *in the future* "discharge or propose to discharge" or if they ever *in the future* decide that they simply wish to obtain permit coverage (although they still intend not to discharge).[8] EPA should

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[7] With regard to operations that become defined as CAFOs after the effective date of the rule, they need only apply for coverage within 90 days after becoming defined as a CAFO if they "discharge or propose to discharge" as of the date 90 days after they become defined as a CAFO. With regard to "new source" large CAFOs, the proposed deadline of 180 days prior to commencing operations would apply only to CAFOs that "discharge or propose to discharge" as of that time (*i.e.*, presumably only CAFOs that 'propose to discharge', since operations will not have commenced and no "discharge" will have occurred).

[8] Given EPA's hope to encourage many CAFOs that do not "discharge or propose to discharge" to voluntarily seek the benefits of NPDES permit coverage, a July 31, 2007, deadline for voluntary applicants would be completely counterproductive. Even if EPA takes final action on the proposed rule by June 2007 as currently expected, a July 31 permit application deadline can only operate to dissuade CAFO operators who might otherwise wish to apply. For this reason, although the proposed deadline already refers to CAFOs that 'discharge or propose to discharge,' we strongly encourage EPA to clarify that CAFOs voluntarily seeking permit coverage are subject to no deadline and may apply at any time.

eliminate this confusion by clarifying in the final rule that CAFO operators who do not "discharge or propose to discharge" as of July 31, 2007, are not subject to that deadline. EPA may also wish to clarify whether CAFO operators subject to the deadline, but who do not submit an application on time, may submit applications after that date.

If, on the other hand, EPA does intend for the proposed July 31, 2007, deadline to apply to all CAFOs that "discharge or propose to discharge" as of July 31, 2007, or at any time in the future, then its proposed deadline is unlawful. A July 31, 2007, deadline for permit application by CAFO operators who currently *or at any time in the future* "discharge or propose to discharge" would be inconsistent with the *Waterkeeper* ruling rejecting EPA's previous "duty to apply" for all CAFOs with the "potential" to discharge. CAFOs with only the potential to discharge have no obligation to seek permit coverage, and they cannot lawfully be coerced into seeking coverage by the threat of retroactive liability for "failure to apply" in the event that unplanned discharges ever do occur.

b. EPA should extend the proposed July 31, 2007, deadline.

Finally, the proposed July 31, 2007, application deadline is one month after the estimated date of EPA's final action on this rule. One month is simply not enough time for states to revise their programs and for CAFOs to decide whether to apply for a permit, prepare the necessary permit application materials, and bring their NMPs into conformity with the new regulatory requirements. As noted below in section 7, we are of the view that several states will need to make significant modifications to their permit programs to comply with *Waterkeeper* and this final rulemaking. If any permit application deadline is included in the rule at all, it should allow much more time – at least for any CAFO that: (1) has not experienced an actual discharge to navigable waters, or (2) has addressed the cause of any prior actual discharge in the manner

discussed in section 3, above. For any such CAFO, we urge EPA to allow at least one year after states have amended their programs to bring them into conformity with the final rule.

7. EPA Needs to Make Clear in the Final Rule That State Requirements for Permit Coverage in the Absence of an Actual Discharge are not Federally Enforceable.

Many states issue operating permits to animal feeding operations. Of course, states have the authority, under section 510 of the CWA, to impose more stringent requirements in those permits than those imposed under federal law. Those more stringent requirements, however, are not subject to federal CWA enforcement.

Unfortunately, in response to the 2003 CAFO rule, when several states integrated their state permitting programs with the federal CAFO permitting requirements, they created situations where a CAFO that is not discharging or proposing to discharge could mistakenly be subjected to federal enforcement of those more stringent state permitting requirements. To avoid confusion, EPA should provide a clear statement in the final rule that such state requirements are not subject to federal enforcement, either by the United States (33 U.S.C. § 1319) or citizen groups (33 U.S.C. § 1365). Furthermore, as requested in section II.A.6. above, we encourage EPA to provide states ample time to correct this significant problem in their state permitting programs.

All states should exercise great care as they revise their state permitting programs consistent with *Waterkeeper*. If their state permitting program is to require facilities to get an operating permit under state law, although an NPDES permit is not required, then the resulting permitting requirements – including those that are similar to federal requirements – that they also adopt should clearly be adopted and applied to CAFOs separately from any CWA requirements. Of course, such states could also modify their state programs to require a state permit to include

CWA requirements where a CAFO is discharging or proposing to discharge. In this case, the state and federal permit programs could be integrated.

In support of this point, we attach three letters between EPA Assistant Administrator Grumbles and Senators Inhofe and Chambliss. See Appendix B. These communications address this precise issue, and we hope that EPA will acknowledge and repeat in the final rule's preamble Assistant Administrator Grumbles' statement that: "The Agency has consistently communicated to States that, under section 510 of the Clean Water Act and 40 C.F.R. 123.1(i)(2), while they may operate a program with greater scope of coverage than required by the Clean Water Act, the additional coverage is not part of the federally approved program, and requirements imposed pursuant to that greater scope of coverage are not federally enforceable and are only imposed under State law.'" (See Appendix B, letter from Benjamin Grumbles, EPA Assistant Administrator for Water, April 20, 2006).

8. Non-Discharging CAFOs Must Be Allowed To Terminate Permit Coverage or Withdraw from the Permitting Process.

Apparently, one goal of this regulation is to encourage CAFOs to seek the benefits (and to bear the costs) of NPDES permit coverage, even where no actual discharge is planned. For a variety of reasons, however, non-discharging CAFOs who have sought permit coverage may later decide that they no longer wish to be covered under an NPDES permit. It is possible, for example, that the agency review and public participation process will lead to burdensome new provisions that were not anticipated by the CAFO operator. Since the decision to submit to permit coverage was voluntary, there is no reason that a *non-discharging* CAFO should be prohibited from withdrawing an application/Notice of Intent or terminating permit coverage at any time. Yet there is no clear mechanism in the existing regulations for withdrawing a permit

application/NOI or terminating permit coverage based on the absence of a discharge.[9] EPA should clarify (through preamble discussion and revised regulations as necessary) that non-discharging CAFOs are entitled to withdraw their application/NOI or terminate permit coverage at any time (although they are obligated to comply with permit terms so long as the permit is in effect).

B. The Record Demonstrates That There Is No Basis for Any Presumption That Most or All CAFOs Discharge.

The *Waterkeeper* court issued a very clear ruling that CAFOs with only a *potential* to discharge cannot be required to get an NPDES permit. The court did not address whether and to what extent the CWA would authorize a "duty to apply" for CAFOs that experience *actual* discharges (and, as discussed above at Section II.A.1., the CWA in fact does not authorize any requirement to seek permit coverage – it simply penalizes unlawful discharges). Nevertheless, we are aware that some groups are advocating that EPA can and should impose a broad "duty to apply" applicable to all CAFOs based on a presumption that all or most CAFOs *actually* discharge.

In addition to the clear legal objections to any such "duty to apply," it would be grossly incorrect as a factual matter to presume that all or most CAFOs experience actual discharges to navigable waters. The evidence clearly demonstrates that CAFOs as a class cannot be presumed

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[9] Indeed, existing regulations indicate that termination must await action by the permitting authority and that expedited termination is not available if there is any pending state or federal enforcement action, including citizens suit litigation. *See* 40 C.F.R. § 122.64(b). In addition, although general permits often include a provision for termination upon filing a notice of termination ("NOT"), some previous CAFO general permits have provided only for "termination for cause" without specifying the causes that will suffice and without providing any timeframe for approval of the permittee's request for termination. *See* NPDES General Permit for Discharges from Concentrated Animal Feeding Operations, EPA Region 6 (March 10, 1998) at § V.M.

to be discharging, that the vast majority of CAFOs do not discharge, and that the probability is extremely high that a CAFO will not have a discharge in the future under the CWA regulatory provisions as amended by this proposal. These conclusions are evident from:

1. The factual data available in many states for the last several years about the number of releases of manure and/or the number of discharges of manure to water;

2. The information collected and analyzed by EPA in the development of the 2003 CAFO rule about the standard manure containment, treatment and management technologies in use today, which served as the foundation for the Effluent Limitations Guidelines in the 2003 rule; and

3. The information and analysis presented by EPA as justification for the proposed New Source Performance Standard allowing a CAFO to demonstrate that it has designed an open containment system that will comply with the "no discharge" requirements.

This record is discussed in detail below.

1. State Incident of Discharge Reports.

The major livestock, poultry and egg producing states have state regulatory programs that involve some form of permitting requirements. Under those programs, many states keep records of manure releases or discharges from livestock operations. Some also have strict requirements that CAFOs report not only "discharges" to the waters of the state or U.S., but also other types of permit violations, as well as manure spills, releases, or other incidents regardless of whether they involve waters of the U.S. Some of these states actively accept and act on public complaints about incidents, releases, or violations and they record the complaints and the actions taken in response. Some of these states require each regulated CAFO to have a periodic visit from a state regulator to check compliance. The scope, extent and consistency of these publicly available release or discharge records have grown extensively since the late 1990s. While there are

differences in the information collected and reported or otherwise available at the state level, there is a sufficient quantity of information available to indicate how rare CAFO discharges to waters of the U.S. really are.

For example, Table 1 below summarizes this information for egg laying operations from 11 of the top 13 egg producing states in the country that accounted for 60 percent of U.S. egg production in 2005. Phone interviews were held with the state agency staff who reported on the state regulatory data, gave their best professional account of the record in this regard, or supplied the publicly available electronic information from these states.[10] Looking at the number of incidents reported, the number of years covered by the reports, and an estimate of the number of regulated entities in the state, it is possible to estimate the average historical rate of incidents in a state, per year, per facility. The average of these 11 estimates results in a single estimate for all 11 states. The 11 egg producing states in this survey were Iowa, Ohio, Indiana, Georgia, Texas, Arkansas, Nebraska, Minnesota, Florida, North Carolina and Alabama.

Per facility, per year, the average rate of discharge over the available data period for egg producers was zero in eight of the states and did not go higher than 3.3 percent. The 11-state average was .006 incidents per facility per year, or 0.6 percent. Clearly, in the case of egg laying

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[10] This data and information was collected on behalf of the the United Egg Producers and the National Pork Producers Council by C&M Capitolink, LLC between April and July, 2006. For some of the states reported, the manure "release" data is available on their websites. Some other states will provide this data in written form upon request. In others, the data was gathered through phone interviews with state agency staff responsible for the CAFO permitting program. The number of regulated egg laying sites is estimated as the total number of layers reported in the state in 2005 by USDA divided by 500,000, an approximation for the average size of all laying operations in a state. The number of estimated swine production sites is based on USDA/NASS data on the number of hog farms in the U.S. in 2005 with more than 500 head, except in the case of Illinois, North Carolina and Oklahoma, whose state agencies reported the number shown. See Appendix A for further detail on state specific sources of data and for comments on the extent that the data includes incidents and releases not necessarily lending to discharges.

operations, these results indicate that these CAFOs as a class cannot be presumed to be discharging.

This conclusion is further strengthened by the fact that in several of these 11 states the reported number of incidents includes instances where a "release" may have taken place but the pollutants never reached surface waters, or waters of the U.S. Some of the state regulatory agency personnel interviewed reported that all such circumstances would be recorded without distinguishing whether the release may have constituted an actual CWA discharge. Furthermore, in the case of Iowa and possibly other states, the reported incidents certainly include some that involve land application and very well could qualify for the agricultural storm water exemption. Where the state agency could not firmly distinguish between the number of incidents and the number of actual discharges, the number of incidents reported was the number used in these calculations. As a result, the state level data in total on "incidents" are an over-statement of the number of discharges. The historical rate of discharge calculated in Table 1 is overestimated as well.

As in the case of egg laying operations, Table 1 also presents the results of a similar examination for swine operations. The states included in the swine analysis are Iowa, North Carolina, Minnesota, Illinois, Nebraska, Missouri, Oklahoma and Ohio. These eight are among the top ten swine producing states in the U.S. and collectively account for 76 percent of the swine produced in the country. The average rate of discharge or release incidence for swine producing facilities for each of these eight states over the available data period ranged from a low of zero to 3.6 percent. The average for all eight states was 0.7 percent. As in the case of the egg laying operations' data, this number is an overestimate of the actual historical rate of

discharge as some of these incidents or releases did not constitute a CWA discharge as they never reached a water of the U.S.

These results for a considerable majority of swine and egg laying operations across the U.S. provide a sound factual justification for why CAFOs as a class cannot be presumed to discharge. These rates may vary in other states, but they should not vary greatly. Certainly, in the case of other poultry producers where dry litter management systems also predominate, a similar history of rare discharges will be found. It is entirely reasonable to expect that the actual probability of a discharge from a particular CAFO in a particular year for all of these other livestock species will be quite low.

Table 1 – History of manure release incidents involving egg laying or swine operations during 2000 to 2005, selected states

Egg Laying Operations – 11 States Representing 60 Percent of Production						
State	Rank in Production	# Regulated Sites (Estimated)	# Years Reported	# Incidents Reported, Total	Average # Incidents Per Year	Average Rate of Incidents Per Facility Per Year
IA	1	80	4	4	1	0.013
OH	2	60	7	10	1	0.024
IN	4	47	3	0	0	0.000
GA	5	39	7	0	0	0.000
TX	7	35	5	0	0	0.000
AR	8	29	3	0	0	0.000
NE	9	24	10	0	0	0.000
MN	10	22	7	0	0	0.000
FL	11	22	5	0	0	0.000
NC	12	22	7	0	0	0.000
AL	13	18	5	3	1	0.033
Total		399		17	3	0.006
Swine Operations – 8 States Representing 76 Percent of Production						
IA	1	5,250	4	30	7.5	0.001

NC	2	2,300	2.5	64	25.6	0.011
MN	3	2,300	6	2	0.3	0.000
IL	4	3,400	4	6	1.5	0.000
NE	6	950	6	10	1.7	0.002
MO	7	570	6	5	0.8	0.001
OK	8	220	5	40	8	0.036
OH	10	690	6	23	3.8	0.006
Total		15,460		140	5.9	0.007

The rarity of these discharges as a percent of all the regulated facilities subject to or covered by the reporting requirements shows that a presumption that CAFOs are commonly discharging in a manner requiring an NPDES permit is unwarranted. The past occurrence of a relatively small number of highly visible incidents cannot serve as the basis for requiring CAFOs in general to seek NPDES permit coverage.

2. Effluent Limitation Guidelines and Best Available Technology.

It should not be a surprise that the record for egg laying and swine operations discussed above indicates that the overwhelming majority are not discharging. EPA's own analysis and subsequent proposals in the proposed 2001 CAFO rule for the best available technology standard to be applied to swine, egg, other poultry producing and veal CAFOs was predicated on the prominent use in these sectors, particularly by those constructed in the last 10 years, of animal and manure management systems that are essentially enclosed. EPA's findings in this regard are discussed below.

EPA proposed in the 2001 rule a "zero discharge" standard for the production areas of swine, egg, poultry (meat bird), and veal producing CAFOs. While there were numerous sound policy, technical, and economic reasons for EPA to ultimately reject that "zero-discharge" standard in the final 2003 rule, the fact remains that for many properly operated manure management systems, these CAFOs do not have to discharge – as EPA correctly noted.

In the case of egg laying operations, EPA wrote that "[t]he majority of egg laying operations use dry manure handling" and that these operations are constructed "where the birds are kept on the second floor and the manure drops to the first floor." Ventilation comes into the second story from the outside, over the birds and down into the manure storage area, where it "dries the manure as it piles up into cones. Manure can usually be stored in high rise houses for up to a year before requiring removal." [*See* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 3,059 (Jan. 12, 2001) at 3,063.] EPA then went on to describe problems that can occur with a poorly managed system, as when drinking water systems leak water into the manure storage area, or when this manure is stored outside, uncovered. But these are the exceptions, not the rule, and result from poor management. When one of these systems is managed under the usual industry and state regulatory design standards, rainfall never comes into contact with this manure while it is in storage. As a result, contaminated storm water or manure itself does not leave the manure storage area. These are inherently "no-discharge" systems.

In the case of swine operations, many of the existing operations in the Midwest use "deep pit" systems where the animals are housed over a below-ground, concrete manure storage unit. This system is used in the vast majority of new facilities that have been built in the Midwest over the last several years. As described by EPA, "Deep pit systems start with several inches of water in the pit, and the manure is collected and stored under the house until it is pumped out for manure application, typically twice a year." [See Development Document for the Proposed Revisions to the National Pollutant Discharge Elimination System Regulation and the Effluent Guidelines for Concentrated Animal Feeding Operations, Page 11-6 (January 2001)]. The manure in a concrete "deep pit" that is being managed according to ordinary design standards

should never come into contact with rainfall during the storage period, nor does the manure leak out of the concrete pit. It only comes out when the producer pumps it out so it can be applied to cropland. Like the egg high rise system (described above), manure in a swine deep pit system does not come into contact with rainfall. The concrete "deep pit" is also a "no-discharge" system.

EPA acknowledged as much in its explanation in the 2001 proposed CAFO rule when it explained the "Option 5" technology standard for swine, veal, egg and poultry operations. Option 5 required "zero discharge of manure and process wastewater" and provided "no overflow allowance for manure and wastewater storage" from swine, veal, egg and poultry CAFOs. EPA justified its Option 5 proposal by stating that:

> . . . swine, veal and poultry operations can house the animals under roof and feed is also not exposed to the weather. *Thus, there is no opportunity for storm water contamination.* Laying hens with dry manure handling usually store manure below the birds' cages and inside the confinement building . . . thus there are no open animal confinement areas to generate contaminated storm water. Those operations with liquid manure storage can comply with the restrictions proposed under this option by diverting uncontaminated storm water away from the structure. . . .

66 Fed. Reg. at 3,063 (emphasis added).

EPA went on to say that those swine and other Option 5 CAFOs with open liquid manure management systems and open manure impoundments or lagoons that were exposed to rainfall could comply with Option 5's zero discharge requirement by "covering the lagoons or impoundments." *Id.* EPA ultimately rejected Option 5 as the technology standard in the 2003 final rule because the costs of retrofitting existing open air impoundments and lagoons with covers was found to be so costly that it would have put a large percentage of swine operations out of business. The rejected option therefore failed to meet the economic achievability standard required by the CWA. But this decision, which centered on the cost of covers for the open

manure storage units, does not change the fact that all the "enclosed systems" presented "no opportunity for storm water contamination" and as they were currently designed and operated could achieve zero discharge, as recognized by EPA.

EPA again recognizes in the 2006 proposed rule that these closed systems are zero discharge systems. In its discussion of the application of modeling techniques that can demonstrate how classes of new CAFOs with open systems can effectively achieve zero discharge, EPA notes that it "believes that facilities employing other manure handling technologies (*e.g.*, under house pits) will be able to ensure zero discharge of manure, litter, and process wastewater..." 71 Fed. Reg. at 37,762. The fact that swine and egg operations have such a high probability that they will not discharge, as reflected in Table 1 above, simply bears out EPA's judgments in the matter.

3. Open Manure Management Systems and Zero Discharge.

Some critics of the swine sector have argued that an open lagoon manure treatment system must necessarily discharge as it is exposed to rainfall. EPA's ultimate rejection of Option 5's impoundment covers for open systems, as discussed above, is thought by some to justify the view that open systems must regularly discharge. The facts do not support this view. Swine operations in North Carolina, for example, rely almost exclusively on open lagoon systems that are exposed to rainfall. As reported in Table 1, the per facility, per year incidence of discharge from North Carolina swine facilities is estimated to be 1.1 percent. Each year, therefore, essentially 99 percent of the open lagoon facilities in North Carolina do not discharge.

There are several reasons for this strong performance record. One of the most important is the lagoon's basic design. A swine lagoon in North Carolina is commonly designed according to state and USDA-NRCS lagoon storage and treatment design standards. The state has a highly developed regulatory system and these standards are enforced. A swine lagoon in North

Carolina built before the mid-1990s must be able to contain a certain number of inches of manure waste water ("minimum volume"), plus a specific, maximum number of inches of manure waste water that represents where the anaerobic treatment process will take place ("treatment volume"), plus a certain number of inches that represents the volume of rain that could fall directly into the lagoon in a 25–year, 24-hour rainfall event ("emergency storm storage"), plus 12 inches of "freeboard." The only liquid entering this system is the manure waste water coming from the animal house and the rainfall that falls directly into the lagoon.

In North Carolina, the number of inches of "emergency storm storage" that corresponds to the 25-year, 24-hour rainfall event ranges from six to seven inches. Added to the freeboard volume, swine lagoons in North Carolina have an effective emergency storm storage of 19 inches. By regulation, a properly managed lagoon in North Carolina must land apply its manure waste water so that in the normal course of operation the total number of inches of manure waste water in the lagoon does not exceed the combined minimum volume and treatment volume. This means that these systems are managed so that they can contain a minimum of 19 inches of rainfall. But beyond this minimum amount, the majority of North Carolina lagoons are being managed today under normal conditions so as to maintain approximately 36 inches of effective emergency storm storage at any time.[11] The U.S. Geological Survey reports that a 100-year, 24-hour storm in North Carolina ranges between eight to nine inches, and that 500-year storm levels are not generally calculated for most parts of the country. But even if a 500-year storm is double the 100-year amount, the 19 inches of minimum available emergency volume could contain those 16 to 18 inches of rainfall. The fact that most swine operators in North Carolina today take

[11] Personal e-mail from Kraig Westerbeek, Director of Environmental Compliance, Murphy-Brown, LLC, Aug. 7, 2006.

the added precaution of properly applying enough of their manure waste water so that they have an effective storm water volume of 36 inches makes these systems effectively able to meet a zero discharge standard. It is no wonder that when it comes to North Carolina swine lagoons and production areas, the discharge data indicate that discharges from these facilities are very rare.

4. EPA-USDA Use of AWM and SPAW to Demonstrate Zero Discharge from Open Systems.

The analysis presented in the 2006 proposed CAFO rule regarding the New Source Performance Standard also clearly demonstrates that the commonly used design and operating standards for open, liquid manure management systems using impoundments or lagoons make them effectively zero-discharge systems. 71 Fed. Reg. at 37,760-762. In this section, EPA presents the analytical and case study record of models of open system operations based on the usual and customary design standards resulting from the application of USDA-NRCS's Animal Waste Management ("AWM") design software, and simulation analysis of actual field and rainfall conditions using the USDA-NRCS Soil Plant Air Water Hydrology tool ("SPAW").

EPA presents this information as part of its decision, in light of *Waterkeeper,* to change the New Source Performance Standard for swine, poultry and veal CAFOs to a zero-discharge rather than the 100-year, 24-hour design that was in the 2003 rule. The simulation modeling results are presented in this context to support EPA's proposal to let state agencies allow a new source CAFO establish that their open system will attain zero discharge through "a rigorous modeling analysis that it has designed an open containment system that will comply with the no discharge requirements." 71 Fed. Reg. at 37,760. EPA also uses these results to support its proposal to not require that an individual new source conduct a detailed simulation of its proposed operation of an open system to justify a zero discharge designation. Instead, EPA proposed to allow the state agency to create categories of pre-approved types of facilities that

have been shown through simulation modeling to achieve zero-discharge as a class when used in certain areas of the state with certain climactic and other physical conditions. ("EPA solicits comment on this approach to streamlining the evaluation process for those CAFOs submitting ''pre-approved'' designs and operational procedures." 71 Fed. Reg. at 37,762.)

The proposed rule discusses several case studies that EPA has entered into the record at DCN 1–01225 and 1–01226. These case studies are of systems designed according to AWM standards based on actual Comprehensive Nutrient Management Plans for livestock operations with open systems in Georgia, South Carolina, Nebraska, North Carolina and Iowa. These modeled operations were designed to contain a 100-year, 24-hour storm and then were simulated with 100 years of actual or projected rainfall data to see if the system discharges. On the basis of these results, EPA states that "[i]f the facility shows no discharge over the 100-year simulation, then EPA has concluded that the lagoon or pond has been designed to achieve the requirement of no discharge." 71 Fed. Reg. at 37,762.

As a practical matter, any open impoundment with 25-year, 24-hour emergency storm storage capability that also has 12 inches of freeboard has an effective emergency storm water storage equal to or in excess of the 100-year storm design standard. This fact, combined with the SPAW simulation modeling results, is further indication as to why the incidence of actual discharges from these CAFOs is so rare.

Conclusion – In summary, the record demonstrates that CAFOs as a class cannot be presumed to be discharging, and that the probability that most of these CAFOs will not have a discharge in the future under the CWA regulatory provisions as amended by this proposal, is extremely high. This is evident in:

1. The analysis of historical egg and swine producing CAFOs' discharge and release data for several years from state release and discharge reports, where the probability of a single egg laying operation having a discharge in a particular year is 0.6 percent or less, and the probability for a swine facility is 0.7 percent or less.

2. EPA's own analysis and conclusions about closed animal production and waste management systems during the development of the 2003 final CAFO rule, as discussed in the 2001 proposed rule and as referenced again in the 2006 proposed rule – where "there is no opportunity for storm water contamination." 66 Fed. Reg. at 3063; and

3. The information and analysis presented by EPA in the 2006 proposed rule about the performance of open manure impoundments or lagoons as modeled by USDA-NRCS using simulation tools, where these systems were shown not to discharge under common design and operating conditions.

The rarity of discharges from CAFOs as a class of operations, as reported above, as well as EPA's own views and analysis of the performance of many CAFOs, indicates that there is no basis in fact for a presumption that CAFOs actually discharge.

C. EPA's View of CAFO Risk Is Factually Incorrect and Reflects A Problematic Policy Approach.

EPA states that NPDES permit coverage reduces CAFO operators' liability risk because, among other reasons, "most CAFO NPDES permits will incorporate Effluent Limitation Guidelines provisions that allow for discharge when precipitation causes an overflow from a structure that is properly designed, constructed, operated, and maintained, in accordance with the applicable design standards." 71 Fed. Reg. at 37,749. EPA then cites many "factors" that purportedly increase the risk of discharge and that a CAFO therefore "should consider in determining whether to seek permit coverage." *Id.*

We support as a matter of policy any effort to assist CAFOs in understanding the circumstances that may increase the risk of discharge to "navigable waters" and in eliminating such circumstances where they are within the operator's control. We urge EPA to be cautious, however, in discussing whether, and under what circumstances, various CAFOs "should" seek permit coverage. As EPA has recognized, it is ultimately for the CAFO owner or operator to determine whether permit coverage is advisable. Statements from EPA about factors that CAFO operators "should consider" may easily be misconstrued to mandate permit coverage.

Having said that, we agree that several of the factors identified by EPA could tend to weigh in favor of seeking permit coverage. These include "if the CAFO is in a flood plain, subject to high annual precipitation, or subject to lengthy rainy seasons." *Id.* Such factors may increase the risk of discharge from certain operations, even where the CAFO is "properly designed, constructed, operated and maintained," such that CAFOs may benefit from permit coverage authorizing overflow discharges. (It should be noted that permit coverage would not reduce the likelihood of discharge from such operations, but, assuming permit conditions reflect the ELG, would provide the operator with authorization to discharge in certain limited circumstances.)

Several of the other so-called risk factors, on the other hand, simply depict inappropriate practices by a CAFO and should be eliminated, rather than prompting the operator to seek permit coverage. (They may, or may not, involve a risk of discharge to navigable waters, depending on the location of the facility, among other factors.) The factors in question are "runoff from open feed bunkers, field storage, or other stockpiles exposed to precipitation; lagoons that are not sufficiently pumped down for the upcoming winter season; holding of process wastewater for summer irrigation that precludes adequate capacity for chronic rainfalls; and inadequate

containment due to unavailability of land for manure, litter, or process wastewater application due to timing constraints associated with, for example, saturated ground or imminent rain." EPA also states that a discharge may occur from "land application due to improper maintenance or operation of manure handling equipment that may lead to spills, and application of manure, litter or process wastewater to land in such a way that it does not qualify for the agricultural storm water exemption." *Id.* EPA's suggestion that CAFOs with such "risk factors" should consider seeking permit coverage wrongly sends the message that permit coverage would authorize discharges resulting from these circumstances. The reality is that these practices would have to be corrected pursuant to the NPDES permit – and they should be corrected by each and every CAFO, with or without a permit, if resulting overflows or runoff may reach navigable waters.

We further object to EPA's discussion of these factors because it creates the implication that only the permitted CAFO can properly deal with the situations that create these risks. As discussed above and shown in Table 1, the factual record of discharges clearly indicates that most CAFOs, many without federal NPDES permits, are very successful at managing their operations to prevent discharges.

It is entirely appropriate for EPA to point out, as it does in the proposed rule preamble, that if an unpermitted CAFO has regulated discharges for any reason it will be subject to CWA enforcement and possible penalties. It is also entirely appropriate, and we believe highly desirable, that EPA discuss the risks that may be created by poor design, construction, operation, or maintenance of a CAFO's production and land application areas. Whether or not a CAFO gets a permit under these circumstances, however, is immaterial, as discharges caused by inappropriate practices will constitute a violation of the CWA in either case. The risk of

discharge – and the risk of liability – will be reduced by improving the CAFO's practices, not by simply obtaining permit coverage.

EPA requests comments specifically on whether large CAFOs that fall into one or more of four specific categories should seek permit coverage. These categories are:

> 1. Where a CAFO is located in close proximity to waters of the United States with land classified in USDA Land Use Capability Classes III through VIII.
>
> 2. Where the CAFO's production area is not designed and operated for zero discharge, including where the containment structure is not designed or maintained to contain all manure, litter, process wastewater, precipitation and runoff that may accumulate during periods when the facility is unable to land apply in accordance with a nutrient management plan;
>
> 3. Where a CAFO that land applies does not have or is not implementing nutrient management planning that is designed to ensure that any land application runoff qualifies for the agricultural storm water exemption; and
>
> 4. Where the CAFO has had a discharge in the past and has not corrected the factors that caused the discharge to occur.

EPA seeks comment on the completeness and accuracy of the above list of situations to "further assist CAFOs in decisions regarding whether or not to seek permit coverage." *Id.*

Again, we urge EPA to use caution in discussing the circumstances under which CAFOs "should consider" seeking permit coverage, so that the regulated public and others are not misled as to the scope of the CAFOs legal obligations. However, we agree that some of these conditions may tend to weigh in favor of permit coverage, depending on site - and operation – specific circumstances.

The second category, for example, does indicate a situation where a CAFO may be able to manage to contain a 25-year, 24-hour storm, but runs greater risk of discharge from storms greater in size.

Relative to the second category, certainly if a CAFO's production area can contain a 25-year, 24-hour storm but *cannot* – under any circumstances – be operated so as to achieve zero discharge, then the CAFO should consider seeking permit authorization for potential future overflow discharges. In practice, a CAFO that is truly designed and operated to contain a 25-year, 24-hour storm will more often than not be able to contain 100-year and even larger storms and effectively achieve zero discharge as well. (See the discussion about the record of discharges and the performance of open impoundments in II.B.1, 3 and 4 above). But if they cannot manage to zero discharge, CAFOs would be wise to consider seeking permit coverage for potential future discharges.

Similarly, CAFOs in the first and third category, with or without a permit, should do the planning and implementation necessary to ensure appropriate agronomic and conservation practices for the land application of manure to land that the CAFO controls. This is necessary for unpermitted CAFOs to qualify for the agricultural storm water exemption (for any runoff that reaches navigable waters) and would be required of permitted CAFOs as a condition of the permit. In either case, if there are discharges to navigable waters, CAFOs may be at risk of CWA liability and enforcement for as long as their practices are substandard. That risk should end when appropriate practices are in place, rather than simply when permit coverage is obtained.

Finally, CAFOs in the fourth category should take action to identify the cause of any prior discharge and undertake any appropriate corrective measures. As discussed above in Section II.A.3., corrective measures should be based on the Director's technical standards for similarly situated permitted CAFOs. Whether or not permit coverage is sought, the operator will need to take any appropriate corrective measures to avoid a recurrence of the prior discharge. In

addition, whether or not permit coverage is sought, the operator will face potential enforcement and penalties for the prior discharge (which assumes that the manure actually reaches navigable water). Thus, the decision to seek or not seek permit coverage should have no bearing on the implementation of appropriate corrective measures or on the liability risk of the CAFO.

D. Agricultural Storm water Exemption.

In the 2003 CAFO Rule, EPA defined for the first time the scope of discharges from a CAFO land application area that qualify as "agricultural storm water" and are therefore statutorily exempt from CWA regulation. Specifically, EPA's 2003 regulation (at § 122.23(e)) states that:

> . . . where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural storm water discharge.

The Second Circuit in *Waterkeeper* upheld this interpretation of "agricultural storm water" as promulgated in § 122.23(e).

In the current proposed rulemaking, EPA appropriately makes clear that CAFOs are not required to apply for and obtain NPDES permits to qualify for the agricultural storm water *permitting exemption* as defined at § 122.23(e). In addition, however, EPA suggests several modifications that would unlawfully further narrow the scope of the regulatory definition, even though EPA explicitly disclaims any intention to modify that definition. As explained below, we fully support EPA's proposal with respect to the lack of an NPDES permitting requirement, but we strongly object to any narrowing of the regulatory definition as promulgated in § 122.23(e).

1. EPA Has Correctly Determined That CAFOs Need Not Obtain an NPDES Permit To Qualify for the Agricultural Storm Water Exemption from NPDES Permitting.

EPA states in the proposal that "Large CAFOs that have only agricultural storm water discharges from their land application area, and no other discharges or proposed discharges from their production or land application areas, would no longer be required to seek permit coverage." We strongly support EPA's proposal, which is in fact the only rational interpretation of the *Waterkeeper* decision. It would be nonsensical to require CAFOs to obtain NPDES permit coverage in order to qualify for an exemption from NPDES permitting – particularly where the court ruled that EPA may not impose permitting obligations in the absence of *actual discharges*. The logical and appropriate interpretation of *Waterkeeper* and § 122.23(e) is that storm water runoff from CAFO land application areas is agricultural storm water, and is therefore exempt from any NPDES permitting requirement, where the land application is conducted in accordance with the standards set forth at § 122.42(e)(1)(xi)-(ix).

2. EPA May Not Narrow the Scope of the Agricultural Storm Water Exemption by Requiring Compliance with the "Director's Technical Standards."

EPA's preamble discussion states that "[t]he Second Circuit upheld EPA's definition of agricultural storm water, and EPA is not proposing to change the definition at this time, or requesting comment on such a change." 71 Fed. Reg. at 37,750. The following sentence, however, states that "EPA is considering requiring explicitly that Large CAFOs that are not permitted because they do not discharge or propose to discharge *comply with the technical standards for land application established by the Director (in addition to meeting the requirements of 40 CFR 122.42(e)(1)(vi-ix)) in order for runoff from their fields to be considered agricultural storm water* (which is exempt from permitting requirements)." *Id.* (emphasis added). These two statements cannot be reconciled. Moreover, any attempt to further narrow the agricultural storm water exemption as suggested would be unlawful.

First, contrary to EPA's suggestion, there is no requirement, either implicit or explicit, in § 122.23(e) that Large CAFOs comply with "technical standards [for nutrient management] established by the Director" in order for discharges from their land application areas to qualify as agricultural storm water. To qualify for the exemption from point source regulation as defined under § 122.23(e), CAFOs must satisfy 40 C.F.R. § 122.42(e)(1)(vi)-(ix) – period. EPA may not – without engaging in further rulemaking (which the agency expressly disclaims) – impose additional conditions further narrowing the exemption.[12] "It is well-established that an agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation." *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000). If EPA intends to add further requirements to § 122.42(e)(1)(vi)-(ix) or § 122.23(e), it must do so through a legislative rule and in accordance with notice and comment procedures. *See SBC, Inc. v. FCC*, 414 F.3d 486, 497-98 (D.C. Cir. 2005); *Syncor International Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997). Because EPA's proposal to require CAFOs to comply with "technical standards" appears only in preamble language and does not involve an amendment to § 122.42(e)(1)(vi)-(ix) or § 122.23(e), it would be unlawful to alter the regulation in this manner.

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[12] For the same reason, we urge EPA to clarify that the recordkeeping required under § 122.23(e) and § 122.42(e)(1)(ix) to qualify for the agricultural storm water exemption does *not* include a "comprehensive nutrient management plan in accordance with . . . the appropriate technical standards [established by the Director]." 71 Fed. Reg. at 37,750. Requiring a CNMP in accordance with all the Director's "technical standards" as the *only* mandatory option to comply with 122.42(e)(1)(ix) would not be a reasonable interpretation of EPA's regulation or of the agricultural storm water exemption at 33 U.S.C. § 1362(14). So long as "appropriate" practices are in place for conservation, testing, land application, and recordkeeping, it would be unreasonable and inappropriate for EPA to require one particular form of documentation as a mandatory condition for qualifying for the agricultural storm water exemption.

Further, even if EPA proposed a formal amendment to § 122.23(e), the suggested change would be unlawful for at least two reasons: (1) it would create state-by-state substantive variation in the scope of a federal statutory exemption; and (2) it would unlawfully delegate to State agency staff EPA's authority to interpret and administer the CWA. *See, e.g., United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004) ("while federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities – private or sovereign – absent affirmative evidence of authority to do so").

Under the plain language of the CWA, the authority to administer and interpret the CWA, in general, lies exclusively with EPA. 33 U.S.C. §§ 1251(d); 1361(a). The limited exceptions to that grant of authority (*e.g.*, Corps of Engineers authority over some CWA § 404 matters) do not extend to interpreting the statutory definition of "point source" or "agricultural storm water." Therefore, while compliance with state technical standards may be required as a matter of state law or as a condition of a CAFO's NPDES permit (as would presumably be the case for Large CAFOs subject to the 2003 ELG), states are not be authorized to impose requirements that define the scope of a federal CWA statutory exemption, nor can there be disparate substantive requirements for the "agricultural storm water" exemption across state lines. *See, e.g., Planned Parenthood Federation of America, Inc., et al. v. Heckler, et al.*, 712 F.2d 650, 663-64 (D.C. Cir. 1983) ("It is elementary that under the Supremacy Clause of the Constitution states are not permitted to establish . . . standards for federal . . . programs that conflict with the existing federal statutory or regulatory scheme"); *Northern Plains Resource Council v. Fidelity Exploration*, 325 F.3d 1155, 1165 (9th Cir. 2003) ("[A]bsent statutory authority in the CWA for [states] to create exemptions [from permit requirements], it cannot possibly be urged that . . .

state law in itself can contradict or limit the scope of the CWA, for that would run afoul of our Constitution's Supremacy Clause") (citation omitted).

Notwithstanding these objections to any mandatory requirement that unpermitted CAFOs comply with the Director's "technical standards" as a condition of qualifying for the agricultural storm water exemption, those "technical standards" may well be used as a tool to provide certainty to CAFOs seeking to rely on the exemption. Thus, EPA could provide guidance to CAFOs that compliance with the Director's "technical standards" would be an acceptable *option* to demonstrate compliance with § 122.23(e) and would be deemed to constitute compliance with the agricultural storm water exemption as defined at § 122.23(e).

3. EPA Should Retract Its Statement That Documentation Required for the Exemption Must Be Maintained On-Site.

There is no basis in the statute or the relevant regulatory provisions (§ 122.23(e) and § 122.42(e)(1)(ix)) for EPA's preamble statement that: "Whatever form the documentation takes [to document qualification for the agricultural storm water exemption], it must be maintained on site." 71 Fed. Reg. at 37,750. This statement could easily be interpreted to suggest that *only* records kept on site may be relied on by the CAFO to document and establish the appropriateness of its land application practices and its qualification for the agricultural storm water exemption. This would place CAFOs whose operations fully adhere to all appropriate nutrient management practices in the position of losing the exemption, potentially being deemed to be a source of regulated storm water discharges, and possibly facing enforcement penalties for unlawful discharges, all because some documentation later deemed to be critical was not present on site. This outcome is fundamentally unjust and would contradict the language and spirit of the statutory exemption. We urge EPA to retract its statement and clarify that documentation used to demonstrate qualification for the exemption may include records not kept on site.

E. Nutrient Management Plans

1. EPA May Impose Land Application-Related Permit Conditions Only If a CAFO Seeks Coverage *for Land Application Discharges.*

EPA's proposed rule and preamble discussion may be interpreted to require: (1) that any NPDES permit issued to a CAFO must include the requirement to develop and implement a Nutrient Management Plan (NMP) with all of the elements identified in the 2003 CAFO Rule, including land application requirements, and (2) that any such NMP must be submitted, in its entirety, with the CAFO's permit application or Notice of Intent, must be reviewed by the Agency and the public, and must have its terms incorporated into the applicable permit. These aspects of the proposal are inconsistent with the CWA and the *Waterkeeper* ruling to the extent that they impose land application-related permit requirements on CAFOs that have no *actual discharge* (*i.e.* non-agricultural storm water discharge) from land application areas and that seek coverage only for *production area discharges*. This would include CAFOs that transfer all manure or litter to third-parties, as well as CAFOs whose land application areas qualify for the agricultural storm water exemption.

40 C.F.R. § 122.42(e)(1) (finalized with the 2003 CAFO rule) provides that the NMP required pursuant to a permitted CAFO's NPDES permit must include "best management practices and procedures necessary to implement *applicable* effluent limitations and standards." (Emphasis added.) The same provision further states that the NMP "must, to the extent *applicable*: [ensure adequate storage, ensure proper mortality management, ensure clean water is diverted, establish protocols for land application, etc.]." (Emphasis added.) For CAFOs that qualify for the agricultural storm water exemption for their land application areas – i.e., CAFOs for whom land application has been conducted in accordance with § 122.42(e)(1)(vi)-(ix) – no effluent limitations are *applicable* to their land application discharges, and no land application-

related permit conditions are *applicable* to their operations. Likewise, for CAFOs that transfer all manure or litter to third parties, no land application-related requirements are applicable to their request for permit coverage.

Many CAFO operators have been led to believe that, if they seek NPDES permit coverage for production area discharges, they must also submit to permit coverage for land application discharges – including agency review and approval of the operation's entire NMP, public review and comment on the entire NMP, and incorporation of all NMP "terms" into the CAFO's NPDES permit. Based on the *Waterkeeper* ruling, the agricultural storm water exemption, and the plain language of §§ 122.23(e) and 122.42(e), however, this is not the law. Instead, CAFO operators may seek coverage for production area discharges but decline to seek or submit to coverage for exempt agricultural storm water discharges from the CAFO's land application areas. EPA must clarify in the final rule that land application-related permit conditions are required – along with agency and public review of the land application-related elements of the NMP and incorporation of land application NMP "terms" into the permit – *only* where the CAFO affirmatively seeks permit coverage for land application discharges. In furtherance of this policy, EPA would need to revise the permit application form "2-B" to explicitly allow a CAFO to note that they are not seeking permit coverage for some or all of their land application activities.

We offer the following in further support of this point:

1. EPA's 2003 CAFO rule assumed that all CAFOs would be required to seek permit coverage and that all CAFO permits would include any land application areas under the CAFO's control. This was based on EPA's asserted authority to regulate "potential" discharges from CAFO production areas and land application areas. (Essentially, any CAFO that land

applies would have "potential" land application discharges – unless the land application areas were isolated from any potential receiving waters – because there would always be the "potential" for excessive nutrient application or spills.) The *Waterkeeper* court found, however, that EPA lacks authority to require permitting for "potential" discharges, because the CWA regulates only *actual* discharges. Thus, EPA can no longer require permit coverage for CAFO production areas or for CAFO land application areas based on the mere potential of those areas to discharge.

2. The *Waterkeeper* court upheld EPA's 2003 regulation providing that CAFO land application area runoff is "agricultural storm water" if the CAFO has land applied in accordance with appropriate nutrient management practices (as specified in 40 C.F.R. § 122.42(e)(1)(vi)-(ix)). Thus, where the CAFO has land applied in accordance with these practices, land application discharges are not regulated discharges and are not subject to NPDES permitting requirements.

3. The *Waterkeeper* court's rationale for requiring agency and public review of the NMP and incorporation of NMP terms into the NPDES permit was that the permit requirements concerning NMPs constitute *effluent limitations*. The court repeatedly stressed that the NMP requirements were the only restriction established under the 2003 CAFO rule to regulate *land application discharges*. Land application-related NMP requirements are only "effluent limitations," however, to the extent that land application discharges are regulated "point source" (non-exempt) discharges. *See* CWA § 502(11) (definition of "effluent limitation"). Where a CAFO operator seeks coverage only for production area discharges, nothing in the *Waterkeeper* decision suggests that the operator must submit to land application-related permit requirements – let alone that the NMP terms concerning land application must be subject to agency and public

review. In fact, such requirements completely run afoul of the court's agricultural storm water and "duty to apply" rulings (since there is no "actual discharge" from CAFO land application areas where the agricultural storm water exemption is in effect).

2. Procedures for Agency Review and Public Participation.

The *Waterkeeper* decision rejected the 2003 CAFO rule's NMP requirement because the NMP was to contain all of the site-specific restrictions applicable to a permitted CAFO's land application discharges, but there was no vehicle for agency and public review of the terms of the NMP prior to permit authorization. EPA has responded to *Waterkeeper* in the proposed rule with procedures that will secure the required agency and public review, while at the same time attempting to preserve the utility of the general permitting system.

We fully support EPA's efforts to preserve general permitting as the primary and most prevalent mechanism for CAFO NPDES permitting. General permitting is far preferable to individual permitting for CAFOs for several reasons. First, general permitting ensures that all similarly situated CAFOs in a state or EPA region will be subject to the same regulatory requirements, thus guaranteeing a level regulatory playing field among competitors. Second, general permits generally require less time and fewer resources for compliance assurance, because technical consultants can apply the same standards and requirements across multiple CAFOs, resulting in greater efficiencies and effectiveness. Finally, the general permitting process generally involves a simpler application process and fewer time delays than the individual permitting process. We urge EPA to preserve these benefits to the maximum extent possible under the new NMP procedural regulations.

We generally support EPA's proposal on this issue, subject to the comments below.

a. We support the use of a revised NMP template.

EPA can preserve some of the efficiencies afforded by general permits through the use of an NMP template, as offered in the proposed rule. We support the development of a template that would guide a permitted CAFO as it develops the required NMP.

Such a template could also be used by an unpermitted CAFO as it decides on the appropriate land application practices it will use to qualify for the agricultural storm water exemption. While we support a template that will serve as a guide for the planning and implementation of land application activities to qualify for the agricultural storm water exemption, it would be improper and unlawful for EPA to *require non-permitted* CAFOs to use this template.

We also encourage EPA to recommend to states that they develop their own version of the template as part of the development of general permits, including public notice and comment and regional public hearings. The scope and depth of the agency and public review and any hearing on an individual CAFO's NMPs (as part of a general permit NOI) could therefore be limited to only that information that is truly unique to the CAFO seeking general permit coverage.

We have carefully reviewed the content of the template that EPA has made available on its website for review as part of this proposed rule.[13] Much of the information and the planning process in the template is sound, but the template has one major flaw: it fails to include the management choices and planning needs of CAFOs that are making third party transfers of their manure. The template does mention the recordkeeping requirements when manure is being so transferred, but there is nothing in the template that provides for: (1) identifying how much of

[13] http://www.epa.gov/npdes/pubs/cafo_draft_nmp_template.pdf.

the manure produced is being transferred to third parties; (2) how this template could be used when *all* of the manure is being transferred to a third party; and (3) how application of manure to land the CAFO controls relates to the transfer of manure to third parties. Third party transfers of manure are so common in all of the livestock and poultry sectors that it is critical that the template fully and properly reflect these circumstances. Furthermore, it is critical that the template address third party transfers to help resolve the inevitable confusion there will be among CAFOs as to how they reflect in their NMP changes that are associated with changes in their third party transfers.

b. EPA should further streamline the process for agency review and public participation on a permitted CAFO's NMP.

We are concerned that the new proposed agency review and public participation requirements will lead to substantial permitting backlogs and delays in permit coverage, and we encourage EPA to make further refinements to avoid unnecessary delays.

EPA has proposed no time limitation for the agency review process. Thus, a CAFO that submits a NOI for general permit coverage and an accompanying NMP under the new proposed regulations is subject to the same uncertainty as an individual permit applicant with regard to when permit coverage will be secured. We recommend that a period of 60 days be established for the completion of the NOI/NMP review and issuance of permit coverage.

If EPA declines to include any specific timeframe, then it should, at the least, provide for enforcement protection (from government and citizen enforcement) for discharges that would be authorized under the permit where a CAFO has applied for but not yet obtained permit coverage and has operated in accordance with permit conditions. EPA should clarify, however, that noncompliance with permit conditions are not permit violations until permit coverage is in place. Some EPA regional enforcement personnel have taken the position that general permit

conditions are legally binding on CAFOs that have not applied for or obtained permit coverage. We are concerned that similar reasoning will be used to impose on CAFOs the legal *obligations* of permit coverage before they are granted the *benefits* of permit coverage (discharge authorization).

With respect to EPA's proposed public review procedures, we urge EPA to make clear that the appropriate scope of public participation concerning the NMP is limited to issues concerning adherence to the requirements of § 122.42(e) and, if applicable, the ELG. We also encourage EPA to take full advantage of available technology to increase the efficiency of the public review process. Through the use of the internet and electronic mail distribution lists (akin to the lists EPA maintains for distribution of its press releases to interested citizens), the public can receive notice of newly filed NOIs and NMPs extremely quickly. Such technologies, especially when combined with the use of standardized templates, should shorten the time required for public review and comment. In light of the increased efficiencies that will be realized through electronic notification and EPA's proposed template (as compared to historic public review methods), we suggest that a 7 to 15 day public review period is more than reasonable to accommodate the mandates of the *Waterkeeper* decision.

Finally, we support EPA's proposal to have the Part 124 regulations govern the procedures for any public hearings springing from an NOI for general permit coverage and the accompanying NMP. Those regulations allow the regulatory authority to hold a public hearing based on a finding of a "significant degree of public interest" in the NMP. 40 C.F.R. § 124.12(a). This finding should be applied rigorously in the general permitting setting, where the public will have already had one hearing (on the terms of the permit itself) before the submittal of any NOIs. We urge EPA to make clear in the preamble to the final rule that

hearings on NMPs should be granted only in extraordinary circumstances and that the "significant public interest" must be specifically linked to the terms of the NMP. Generalized grievances about a CAFO's location or operation are irrelevant to NPDES permitting and should never be a basis for finding "significant public interest" that would justify a hearing.

3. EPA Has Correctly Focused on the "Terms" of the NMP for Incorporation into the Permit.

The *Waterkeeper* decision also requires that the "terms" of an NMP be included in the terms and conditions of a CAFO's NPDES permit. We agree with EPA that there is a difference between all the data and requirements in an NMP and the "terms" of the NMP that need to be incorporated into the NPDES permit as required by the Second Circuit. We urge EPA to provide greater clarity, guidance, and certainty in the final rule on the meaning and significance of this distinction between the NMP and the NMP's NPDES "terms." We strongly support the use of the proposed NMP template in identifying the NPDES "terms," and would support a provision in the final rule that defines the scope of the NMP NPDES "terms" as limited to the data fields in the NMP template. Such an approach with the proposed template would allow for faster and more efficient agency and public review and would provide a uniform set of expectations and requirements to the regulated community.

We further agree with EPA's proposal that the NMP NPDES "terms" not include the calculations used to derive land application rates for the CAFO's currently anticipated cropping and manure application scenarios over the permit's five year term. That should not mean, however, that the NMP submitted with the NOI must contain every calculation for every permutation of crop and field combinations. As noted in section II. E. 4. a. below, such a requirement could lead to literally thousands of hypothetical calculations being included in the underlying NMP submitted with the NOI. The NMP permit terms could simply be the specific

formula that must be used when calculating the appropriate agronomic application rate and information regarding the fields receiving manure, their soils, and the crops to be grown. This information could include the planned use of expected yields or yield goals that are appropriate for the soils and crops being grown. These yield goals could change from year to year in conformity with the state's applicable technical standards. All of these terms would reflect the universe of land application activities envisioned in the original NMP. The NMP permit terms would then not include any specific calculation using this permit term formula and data, nor any specific yield goals. The underlying complete NMP, available for agency and public review, would show the correctness, using this formula, of the calculation of application rates for the CAFO's currently anticipated cropping and manure application scenarios over the permit's five year term. A CAFO operator then, in the implementation of the NMP, would simply run the calculations using this formula and the appropriate values for these variables, which were "terms" of the original NMP and were included as permit terms.

We support EPA's alternative three-category approach for NMP requirements, in which broadly applicable NMP terms are made part of the general permit, thus narrowing the scope of NMP terms for agency and public review to site-specific provisions. For example, these terms would include the formula to be used to calculate land application rates for the fields included in the NMP, and the use of expected yields or yield goals that are appropriate for the soils and crops being grown and that could change from year to year in conformity with the state's applicable standards. We support the three category proposal to the extent that it could speed review of individual NMPs and preserve the goals of the general permitting process. We urge EPA, however, to ensure that CAFOs may opt for alternative, but equally effective, measures in their

NMPs whenever necessary for their operations (as contemplated in the "second category" of permit conditions).

4. EPA Should Clarify That the NMP "Terms" Included in the Permit Must Relate to the "Discharge" for Which Permit Coverage Is Sought.

Finally, EPA should clarify that the permit will incorporate only the "terms" of the NMP relevant to the "discharge" for which coverage is sought. If the CAFO seeks coverage only for production area discharges but not land application area discharges (*e.g.*, because land application areas are covered by the agricultural storm water exemption), then only NMP "terms" related to the production area should be incorporated into the NPDES permit. *See* Part ___, *supra* (explaining that there are no "effluent limitations and standards" applicable to the CAFO's land application area runoff if it is "agricultural storm water," so the land application-related NMP requirements (*e.g.* § 122.42(e)(1)(viii)) would not be relevant to the CAFO's permit coverage). Likewise, if the CAFO seeks coverage for production area discharges and for land application discharges from Fields A, but not for Field B and Field C, then only NMP "terms" related to the production area and Field A should be incorporated into the NPDES permit.

5. EPA Must Accommodate the Unique Needs of Agricultural Operations in the NMP Modification Process.

A critical new issue created by the Second Circuit's mandate involves the procedural treatment of changes to NMPs during a permit's five-year term. We appreciate EPA's efforts to accommodate the unique needs of an agricultural operation, but we have some concerns with and suggestions for EPA's proposal, as set forth below.

a. EPA Should Maximize Opportunities for Flexibility in the NMP, in Order to Minimize the Need for Changing the NMP During the Permit's Term.

We fully support EPA's efforts to understand and accommodate the nature of agricultural operations and to provide essential flexibility in the NMP development and modification process. As EPA mentions in the preamble, there are many circumstances and conditions that could cause a farmer to modify planned nutrient management and farming practices during any particular five-year period. Extreme weather events, changing market conditions, changing feed rations that change the nutrient content of manure, and variable soil conditions are among the many factors that may force a farmer to alter cropping and related nutrient management practices. In addition, when such changes are needed, they usually have to be implemented quickly – more quickly than the typical time allowed for formal NPDES permit modification under the Part 124 regulations. Thus, we support EPA's efforts to accommodate changes to NMPs without invoking the Part 124 procedures.

We support EPA's suggestion in the preamble that such changes can be accommodated by maximizing operator flexibility in the development of NMPs and by anticipating future changes to the extent feasible. We agree that the competing goals of providing information to the agency and public and providing flexibility to the farmer can be balanced and accomplished by submitting the following information in the NMP accompanying the NOI: (1) the maximum amount of manure that may be applied to land and transferred to other parties, (2) an inventory of fields that might receive nutrients during the permit's five-year term, and (3) a listing of possible crops for each field.

We disagree, however, with the suggestion that the information on cropping patterns should include "accompanying field-specific calculations" so that the agency and the public can review "all anticipated operational scenarios and associated field-specific . . . application rates, including the calculation on which these rates were based." Providing *all* possible calculations

would be unreasonably burdensome. For example, a CAFO with 30 possible fields to receive manure, could be dealing with five to ten different soils, each with different yield potentials for each of the three crops the CAFO plans to raise during the permit term. In addition, nutrient content of the manure can vary according to possible feed ration content changes. All of these variables added together results in 2,000 to 3,000 different calculations to show the possible and realistic permutations. It is more reasonable to have the NMP submitted with the NOI include a complete listing of fields and crops, along with a representative set of calculations and land application rates for what the CAFO anticipates is the most likely scenario involving these variables. Even if these exact same fields and crops are used over the five-year term of the permit, the actual manure application rates will likely be different than the representative values calculated. The actual application rates will still be agronomically appropriate as dictated by the formula that is the permit term from the NMP. Furthermore, to the extent that the CAFO deviates from that initial plan and uses other combinations of fields and crops reflected in their original NMP but not used in the representative set of calculations, the permit term formula would still be used to calculate the land application rates, and these rates and the associated calculations can be transmitted to the Agency either at the time the change is made or as part of an annual report to the Agency (as proposed at 71 Fed. Reg. 37,757). Thus the Agency and the public will still receive information on the calculations and land application rates that are actually used, without requiring the CAFO to perform and submit literally thousands of calculations that may never be relevant during a permit's five-year term.

b. EPA Must Limit the Meaning of "Substantial" Change to those Changes That (1) Alter the NMP Terms That are Part of the Permit, and (2) Relate to Nutrient Management *Practices*, Not to the Makeup or Volume of the *Discharge*.

We support EPA's effort to distinguish between "substantial" and non-substantial changes to an NMP and to require permit modification only for "substantial" changes. EPA should clarify in the final rule that an NMP change cannot be deemed "substantial" unless, as an initial matter, it will alter the "terms" of the NMP that have been incorporated into the permit. Thus, changes to the NMP that do not translate to an accompanying change in the NMP NPDES "terms" can never be "substantial" changes requiring agency approval and public notice and comment. Because only the NMP NPDES "terms" constitute the terms and conditions of the NPDES permit, only changes to the "terms" can trigger the analysis of whether a change is "substantial" so as to require agency approval and public notice and comment.

EPA also should provide better descriptions and guidance on what constitutes a "substantial" change to these NMP NPDES permit terms. The current language as proposed in § 122.42(e)(5)(iv) is vague and confusing, particularly the first example where "changes that could result in an increase in runoff of manure, litter, or process wastewater from the facility that would otherwise not occur under the terms of the nutrient management plan that were incorporated into the permit." This example is particularly troublesome because it is an inappropriate application of the 2003 Effluent Limitation Guideline (ELG) (which was not affected by the Second Circuit's decision). The 2003 ELG does not impose a *discharge standard* on land application runoff, but is a *technology standard* mandating various practices that work to minimize runoff. The purpose of the NMP and the provisions of 122.42(e) (1)(vi)-(xi) is to require a field-specific set of appropriate practices that are designed to minimize, for the specific field and the circumstances found there, the amount of manure or manure nutrients that actually reach waters of the U.S. due to a rainfall event. This is a technology standard and the question

that should be asked is "whether practices being used *at that site* will appropriately minimize the amount of manure that may be transported by a rainfall event"

For example, it is highly likely that, as land application of manure is conducted at different sites, each site will have different rates of runoff, even where each site is using the "appropriate" set of practices for that site. Use of erosion control conservation measures to reduce the movement to surface water of phosphorous absorbed to soil particles are understood by EPA in the 2003 rule's development documents to be based on achieving "T," an erosion rate at the soil loss tolerance level. But the number of tons of soil eroding per acre varies greatly for different soils even when they are all being managed to "T." A CAFO moving the land application of manure from one field where erosion is being kept to "T" which for that field is equal to five tons of soil per acre per year, to another new field being managed to "T" which equals seven tons per acre per year, would still be meeting the standard called in 122.42(e)(1)(vi)-(xi) even though the erosion and runoff rate is higher. The CAFO would be using a field specific set of appropriate practices that minimize, *for the specific field and the circumstances found there*, the amount of manure or manure nutrients that actually reach surface water in a rainfall event.

This is a technology standard, and the comparison from field to field is not whether the rate of runoff stays the same or decreases or increases, but whether the "appropriate" practices are being used, as dictated by the site specific circumstances. The focus of the 2003 rule is on the *practices* that serve to reduce the nutrient content of discharges, not on the volume or actual nutrient concentrations of the *discharges* themselves. As a result, to properly apply the standard established in the 2003 rule in determining whether or not to approve a substantial change to an

NMP, EPA should look at whether the appropriate practices are being used under those changed circumstances, not whether the absolute rates of erosion have increased.

The meaning of a "substantial" change should track EPA's focus in the rest of the rule – on "substantial" changes to nutrient management *practices* and not to changes in the physical makeup or volume of the *discharge* (which would be extremely difficult, if not impossible, to measure, quantify, and report – the very reason why the ELG is based on Best Management Practices (BMPs) rather than a discharge standard). Therefore, if EPA is going to require the NMP "terms" to include the maximum amount of manure to be land applied, the maximum amount of manure that may be transferred, a complete inventory of all fields (including all information on conservation measures, setbacks, acreage, etc.), and a list of all crops, then any changes in nutrient management practices that exceed the scope of those "terms" (*e.g.* more manure for land application or transfer than the stated "maximum") would be a "substantial" change requiring agency approval and public notice and comment. Other than that, so long as a CAFO operates within the range of options disclosed in the initial NMP, nutrient management changes should not be considered "substantial."

This "substantial" change analysis can be applied to adding new fields for land application by looking to whether proposed new fields possess substantially different characteristics from the fields already subject to agency approval and public review in the NMP terms. Specifically, EPA should allow CAFOs to add new fields as a non-substantial change if the new field's yield potential, soil type, slope, setbacks, conservation measures, and Phosphorus Index values are equal or substantially similar to those characteristics in the fields listed and described in the initial NMP. The similarities in these new fields' characteristics and properties to those fields in the original NMP mean simply that it is fully reasonable to expect that the

originally planned complement of agronomic and conservation practices will continue to result in appropriate minimization of transport of manure nutrients in rainfall events.

Only if a new field's characteristics differ substantially from those for the fields already listed in the approved NMP terms should the new field be subject to agency approval and public notice and comment prior to inclusion as an NMP "term." A similar analysis can be applied to proposed new crops – if the expected yield and expected nutrient requirements of a new crop are substantially the same for those crops already approved in the original NMP and the permit terms, then adding that crop to the NMP would not be a "substantial" change.

EPA also needs to specify that a change is only "substantial" if it affects the terms of the NMP concerning a regulated discharge. For example, changes to cropping practices do not constitute "substantial" changes if the NMP "terms" do not include land application provisions (*e.g.* because the CAFO has not sought permit coverage for land application discharges). Likewise, even if a CAFO has permit coverage for certain land application discharges (discharges from certain fields), the addition of new fields would not constitute a "substantial" change if the CAFO does not intend not to seek permit coverage for discharges from those fields (because they will constitute exempt agricultural storm water discharges).

Finally, EPA should explain in the final rule that treatment of certain changes as "substantial" does not suggest that they should not be approved. A change such as adding a new and substantially different field or increasing animal headcount so as to exceed the previously identified "maximum" amount of manure in the NMP may be "substantial," but it may also be entirely appropriate agronomically and therefore should be approved so long as the CAFO will continue to comply with all applicable technical requirements and minimize nitrogen and phosphorus transport based on field-specific assessments of land application conditions.

c. EPA's Proposed Procedures for NMP Revision Are Adequate, But EPA Needs to Specify Clear Deadlines for the CAFO, the Public, and the Agency.

We support EPA's proposal that non-substantial changes to an NMP require only that the CAFO submit to the agency a revised NMP and that the agency notify the public of the change without public comment. We agree that NMP changes should be reviewed to ensure continuing compliance with § 122.42(e)(1)(i)-(x) and § 412.4(c) and applicable technical standards. We encourage EPA to clarify in the final rule that upon submittal of changes to the agency that the CAFO believes to be non-substantial, the CAFO may proceed with implementation of such changes and need not await the Director's determination that the changes are not substantial (unless EPA imposes a short deadline on the agencies for such determinations). In addition, EPA should provide some guideline on the timeframe within which a CAFO must submit a revised NMP with non-substantial changes (*e.g.* prior to implementation of the change or within a certain period (*e.g.* 30 days) after implementation of the change).

For "substantial" changes, we support the proposal for expedited implementation during the agency and public review period. As an initial matter, in describing the steps the Director must take in analyzing whether a change is "substantial," EPA should include an express requirement for the agency to notify the CAFO of the Director's determination.

We strongly object to the preamble phrasing (71 Fed. Reg. at 37,756) that the Director, in deciding whether to allow expedited 180-day implementation of a "substantial" change, should determine if the "change is not likely to result in increased runoff of manure, litter, or process wastewater from the facility." We note that this language does not match the regulatory language as proposed in § 122.42(e)(5)(v). But in general, and as stated in detail in the section above, there are no grounds to compare the appropriateness of proposed changes to an NMP on the basis of possible changes to the absolute value of runoff that will occur from the fields in

question. As explained above, the standard under the 2003 ELG is whether appropriate practices will be used for the site specific conditions in the new field so as to minimize the transport of manure nutrients in rainfall. The new field could have a higher runoff rate and still be using practices that are fully appropriate for the site specific conditions in the new field, and therefore fully appropriate under the 2003 rule. Both § 122.42(e)(5)(v) and the preamble should remove any reference to a determination that a proposed "substantial" change will be judged on the basis of any absolute change in runoff amounts.

Instead, the agency should allow for expedited implementation if, on the basis of the information submitted, it appears that all of the appropriate practices will be used under the new circumstances.

While we support expedited implementation of "substantial" changes during the agency and public review period, we have serious concerns that agency staff workload or other concerns beyond the CAFO's control may cause delays in the approval of "substantial" changes beyond the allowed 180 days. An absolute 180-day limit on expedited implementation of "substantial" changes, without a corresponding 180-day deadline for agencies to act on submitted "substantial" changes, may potentially force CAFOs to "undo" an important operational change that has been in place for six months – even if the proposed change should be and ultimately will be approved. EPA should impose a deadline on the agencies to act within the 180-day timeline, or take some other action, such as an automatic extension of the 180-day period, so that CAFOs are not forced into such a difficult position in managing, and un-doing, "substantial" changes to their NMPs.

The final rule also needs to specify, just as with non-substantial changes (discussed above), how far in advance of the planned change a CAFO should submit the revised NMP for

review (*e.g.* 30 days), and how quickly the agency must respond to a request to proceed with expedited implementation (*e.g.* 15 days). Without specified deadlines for CAFOs, the public, *and* the agency, the NMP modification process may degenerate into mass uncertainty and confusion for CAFOs and chaos for the agency. Looking at the entire process globally, we propose the following time line:

TIMEFRAME	**ACTION**
No later than 30 days prior to planned implementation of NMP change.	CAFO submits revised NMP to agency for review.
Within 15 days after receipt of proposed revised NMP.	Agency notifies CAFO whether change is "substantial" or "non-substantial" and if proposed "substantial" change may proceed under 180-day expedited implementation. CAFO can proceed immediately with implementation of these "expedited implementation," substantial changes, and with the "non-substantial" changes.
Within 30 days after agency determination of "substantial" change.	Agency makes proposed "substantial" change publicly available and subject to 15-day notice and comment period.
Within 180 days after granting expedited implementation of "substantial" change.	Agency notifies public and CAFO of agency decision on "substantial" change, including response to significant public comment. If "substantial" change is approved, CAFO can proceed with permanent implementation.

We support EPA's proposal that the entire NMP modification process outlined above be treated as a "minor modification" under the NPDES regulations. Treating NMP modification under § 122.63(h) recognizes the unique needs of agricultural operations to sometimes make rapid, unplanned changes to their operations, but still complies with the ruling in *Waterkeeper*.

d. EPA Should Adopt The Proposed Annual Reporting Process for Permitted CAFOs.

We also strongly support EPA's alternative proposal (71 Fed. Reg. at 37,757) to have CAFOs report NMP changes through an annual reporting process. It is not clear from EPA's discussion whether this reporting is intended to be in lieu of the process for "non-substantial" NMP changes or whether it might also apply to "substantial" changes. It is our preference that the annual reporting proposal governs all changes to an NMP, so long as the CAFO remains in substantial compliance with the existing "terms" of the NMP.

EPA's alternative annual reporting approach would treat CAFOs like other point sources in the NPDES program – *i.e.* point sources disclose in their permit application how they *plan* to meet their applicable ELG, and then during the permit's term they submit periodic reports (in most cases, Daily Monitoring Reports) to the Agency, which are made available to the public, demonstrating whether or not the point source is *actually* meeting the ELG. In the NMP submitted with a permit application or NOI, the CAFO would disclose to EPA and the public how it *plans* to meet the ELG for the coming five years, and then in an annual report, which would be available to the public for review, the CAFO would demonstrate how it *actually* met the ELG over the prior year. The annual report would document any changes to nutrient management practices that differed from the "plan" submitted with the NOI or permit application. This approach would afford the greatest amount of flexibility to CAFOs to effectively manage their farming operations, while at the same time treating CAFOs like other point sources.

The proposed annual reporting approach could also be used in conjunction with the proposed process at § 122.42(e)(5), by narrowing the scope of changes that would be subject to agency approval and public review and comment under proposed § 122.42(e)(5)(ii). EPA could identify a discrete set of NMP changes that would be so substantial (*e.g.* a more than 10 percent

increase in the maximum animal headcount or maximum amount of manure, or the introduction of a new field substantially different in characteristics from fields in the approved NMP) as to require agency review, approval, public notice and comment and allow all other changes to be folded into the annual reporting process. We urge EPA to utilize the annual reporting mechanism to the maximum extent possible to notify the public about changes to a CAFO's NMP.

6. Examples of Different Types and Treatments of NMP Elements, Some as Terms, Some Not, and Our Proposals for Public Review.

Below in Table 3 we identify numerous NMP elements, some of which would be permit terms, some of which would not. While this list is not intended to be exhaustive, it is indicative of the regulatory approach we envision for the treatment of some NMP elements as permit terms, and the associated treatment for agency and public review. For example, some of these NMP and permit "terms" would be subject to public review in the development of the general permit. These would include the formulas used to calculate the agronomic rate, the protocols that CAFOs are to follow when doing manure and soil testing for nutrient content, or how they are to develop their expected yields from year to year for the crops they could grow. Examples of items that could be permit terms, but subject to public review only during the NOI application process are the fields that could be receiving manure or may have received it in the past, and the crops that could be grown on the fields specified. An example of an NMP element that is not a term but subject to review in the NMP process is the set of example calculations that the CAFO would provide in their original NMP to demonstrate the appropriate agronomic use for a likely scenario of fields and crops over the term of the permit. Lastly, some NMP elements are not permit terms and not subject to review during the general permit development process or the NOI process, as they are not available at that time. Still, these elements would be reflected in the

annual report and therefore available to the public for review at that time. These include items like the actual expected yields used, the actual manure and soil test results, and the actual associated agronomic application rates.

Table 3: Examples of NMP elements and their treatment as NMP/ NPDES permit "terms"

Element Description	NMP - Permit Term?	Public Review During General Permit Development?	Public Review During NOI Application Process?	If to be Modified, is Agency and Public Review Required?
Formulas depicting the specific elements that go into the calculations of an agronomic application rate	Yes	Yes	No	Cannot be modified by CAFO
Fields that could be receiving manure or may have received it in the past	Yes	No	Yes	Yes, if substantial change
Crops that could be grown on the fields specified	Yes	No	Yes	Yes, if substantial change
Specification that the "expected" yields for crops to be grown will be determined year by year according to Director's technical standards	Yes	Yes	No	Cannot be modified by CAFO
Protocols to be followed when testing nutrient content of manure	Yes	Yes	No	Cannot be modified by CAFO
Protocols to be followed when testing nutrient content of soils	Yes	Yes	No	Cannot be modified by CAFO
Example, with calculated agronomic application rates, of possible 5-year scenario of fields to receive manure and crops to be grown	No	No	Yes	n.a.
Actual manure and soil test results for nutrient content used to calculate agronomic application rates each year	No – but in annual report	No	No	No – but public can review annual report
Actual "expected" yields used for crops when calculating a particular year's agronomic application rate	No – but in annual report	No	No	No – but public review annual report
Actual cropping and land application practices in each year of the permit term	No – but in annual report	No	No – but public reviews all possible options during NOI process (i.e. fields, crops, etc.)	No – but public can review annual report

F. Water Quality Based Effluent Limitations.

The *Waterkeeper* court remanded two issues to EPA for clarification regarding water quality-based effluent limitations ("WQBELs"). First, the court asked EPA to clarify why it failed to promulgate WQBELs for CAFO discharges (other than agricultural storm water discharges). Second, the court asked EPA to "clarify whether States may develop WQBELs on their own."

We believe that EPA's response in the proposed rule to the Second Circuit's remand is correct. Permit writers have the ability to add WQBELs to a permit, as determined on a case-by-case basis, as needed for non-precipitation-related discharges from land application areas and for discharges from production areas (other than for new sources in swine and poultry, which will be subject to a zero discharge standard from their production areas). EPA is correct in reiterating that federally enforceable WQBELs are not available for agricultural storm water discharges because such discharges are not from a point source. We agree that states can, under state law only, impose water quality-related requirements on such nonpoint source discharges.

We also agree with EPA statements that states can consider water quality protection issues in setting the "technical standards" for land application practices for *permitted* CAFOs. It is imperative, however, (as discussed extensively in Part ___?????? *supra*) that EPA state explicitly in the final rule that such technical standards, whether or not based on water quality protection considerations, cannot be mandatory requirements for precipitation-induced discharges from a *non-permitted* CAFO's land application area to qualify as "agricultural storm water." This is a federal statutory exemption that does not depend on a water-quality analysis. While states can impose different technical standards in their respective delegated NPDES permitting programs on those CAFOs that receive permit coverage, only the federal authorities can define "agricultural storm water," and the Second Circuit clearly held that "agricultural

storm water" cannot be subject to WQBELs. Therefore, a non-permitted CAFO that has only agricultural storm water discharges cannot be subject to any federally enforceable WQBELs or related requirements.

G. New Source Performance Standards for Subpart D.

The Second Circuit Court of Appeals remanded in *Waterkeeper* the 2003 CAFO rule's "New Source Performance Standard" ("NSPS") standard, whereby EPA's record in support of a 100-year, 24-hour storm design standard for new CAFO facilities was not found to be complete or persuasive. ("Specifically, the court directed EPA to clarify the statutory and evidentiary basis for allowing subpart D CAFOs to comply with the NSPS requirements by either the 100-year storm standard or the alternative performance standards." (*See* 71 Fed. Reg. at 37,760). As discussed in Section II. B. 4. above, in response to the court's direction, EPA analyzed the 100-year storm design using models of CAFOs designed to accommodate a 100-year storm and subjected them to actual and constructed daily weather events.

The systems analyzed in EPA's simulation modeling analysis were uniformly able to contain 100-year and greater storm events and were found by EPA to meet a zero-discharge standard. New sources are therefore allowed in this proposal to demonstrate, using the same or functionally similar simulation modeling approach, that their designs achieve a zero-discharge outcome. If they can demonstrate that this is achieved, these new sources may use their modeled design standard in their operation.

We find the methodology and simulation modeling approach to be sound and valid, and in general we strongly support the proposed approach to allowing a new source to demonstrate that their system and design achieve zero discharge. Furthermore, we strongly support the proposal that states be allowed to conduct such simulation modeling and analysis for entire classes of CAFO manure management systems so as to minimize the potential wasted expense of

multiple CAFOs under similar operating circumstances with similar operations having to demonstrate an essentially identical outcome. We encourage EPA to do all that it can to ensure that states do in fact establish such generalizable classes of zero discharge designs for new sources. It is our view, as discussed in Section II. B. 2. and 4. above that even in the case of open impoundments, in many parts of the country a 25-year, 24-hour storm design system can effectively contain a 100-year or 500-year storm and should be treated as a zero discharge facility.

H. BCT for Pathogens.

The Second Circuit Court of Appeals remanded in *Waterkeeper* the 2003 CAFO rule's "best conventional technology" ("BCT") standard for pathogens. (In the case of CAFOs, EPA has determined that the only pathogen that could be a conventional pollutant under the Clean Water Act and subject to the BCT standard is fecal coliform (*See* 71 Fed. Reg. at 37,771). The court found in *Waterkeeper* that EPA did not affirmatively establish that BCT-based ELGs adopted in the CAFO represent the best conventional pollutant control technology for reducing pathogens. EPA had essentially come to this conclusion indirectly, on the basis of the evidence and its analysis. The court noted that EPA may well ultimately determine that these ELGs in fact represent BCT for fecal coliform, but the court directed EPA to come to that or any other appropriate conclusion through an affirmative and direct analysis.

In response, EPA in the proposed rule conducted a rigorous and thorough examination and analysis, some of which repeats what was done in the development of the 2003 CAFO rule but much of it original for the 2006 proposed rule. EPA reviewed the available conventional technologies and examined and analyzed them from the perspective of their technical feasibility and their ability to provide greater control of fecal coliform than the technologies adopted in the 2003 CAFO rule's ELG. Then, in the manner dictated by the Clean Water Act for BCT, EPA

examined and analyzed these conventional technologies with a two-part cost reasonableness test, which it applied to the standard indicator for fecal coliform (total suspended solids) and for fecal coliform itself. If any candidate technologies are feasible and pass these two-part cost reasonableness tests, then the most limiting candidate technology becomes the basis for setting BCT effluent limitations. Alternatively, if no candidate technology passes that is more stringent than the standard dictated by the "best practicable control technology currently available" ("BPT"), then BCT effluent limitations will be set equal to the BPT effluent limitations that were established in the 2003 CAFO rule ELG.

EPA found in the proposed rule that all the candidate technologies ultimately failed these cost reasonableness tests, and accordingly EPA proposed in this rule that the BCT effluent limitations be set equal to the 2003 CAFO rule's BPT limitations. EPA asks for comments on all aspects of the cost-reasonableness analysis used in reaching this conclusion.

We find no fault or shortcoming in the EPA analysis of the technical feasibility of these conventional technologies. We also find this work to be consistent with the law. We agree that for the vast majority of CAFOs, the candidate technologies EPA considered present largely insurmountable challenges that make them inappropriate as BCT. EPA went on to analyze the cost reasonableness of these technologies, and we again find no fault with the cost data or the analytical techniques used by EPA in this work. We are fully supportive of EPA's proposal in this rule that the BCT effluent limitations be set equal to the 2003 CAFO rule's BPT limitations.

We note with interest the recently completed "Phase 3" report on the "Development of Environmentally Superior Technologies" for technology determinations per the agreements between the North Carolina Attorney General and major pork producers in that state. (*See* Development of Environmentally Superior Technologies. 2006. Phase 3 Technology

Determination Report, published by NCSU College of Agriculture and Life Sciences, 62-pages, on file with NCSU Animal and Poultry Waste Management Center (March 8, 2006). Also available at www.cals.ncsu.edu/waste_mgt/.) This was the third report prepared to support a consent agreement between the Attorney General and these pork producers to identify and evaluate potentially "Environmentally Superior Technologies" ("EST") that could be utilized by North Carolina pork producers. In order to be unconditionally EST, a technology has to meet technical, operational and economic feasibility standards. The economic feasibility standard was a consideration of the technology's cost and the impact of its adoption on the competitiveness of the North Carolina pork industry (see page 5). A technology would be considered economically feasible and therefore unconditionally EST if its implementation did not cause the North Carolina swine herd to decrease by more than 12 percent (see page 6).

The study considered multiple technologies, including several that were considered by EPA in its BCT analysis. The EST study considered:

- A covered in-ground anaerobic digester with biological trickling filters and greenhouse vegetable production system;
- A sequencing batch reactor system;
- Two belt manure removal systems;
- Several solids separation systems;
- A constructed wetland system;
- A reciprocating wetland system;
- An upflow biological aerated filter system;
- A gasification system;
- A fluidized bed combustion system;

- An insect biomass conversion system;
- Mesophilic and thermophilic anaerobic digesters;
- A water reuse system;
- Permeable lagoon covers with aerobic blanket system;
- A nitrification and denitrification soluble phosphorus removal system;
- A centralized composting system; and
- A closed loop chemical treatment system.

The Phase 3 report found that none of these technologies were economically feasible for existing swine operations in North Carolina. The report states that "the technologies studied which have been shown to meet the environmental performance standards and would be required for a complete liquid and solids treatment system currently exceed the threshold cost for economic feasibility as defined herein for existing categories of farms." (See page 7 – emphasis added). This finding is consistent with EPA's finding in the proposed rule that none of the candidate technologies considered for the BCT standard met its cost reasonableness tests, at least for existing operations.

In the case of new operations, the report found that one of the technologies (nitrification and denitrification soluble phosphorus removal system), when used in combination with one of the following four other technologies, could be given an unconditional Environmentally Superior Performance Standard designation (they resulted in a less than 12 percent reduction in the North Carolina swine herd). These technologies are:

- High solids anaerobic digestion;
- Centralized composting;

- Gasification for elimination of swine waste solids with recovery of value-added products; and
- Fluidized bed combustion of solids.

These findings, though, do not support the adoption of one of these technology packages as a BCT standard for the following reasons. First, we would dispute any contention that a technology standard that resulted in the loss of 12 percent of the nation's swine herd was a "cost reasonable" standard. Inevitably, it will be the mid-sized commercially oriented family operated facilities that are most stressed by such a regulatory requirement, and it is from the ranks of these producers where the most loss of the swine herd and pork producers could be expected. The inevitable result will be even greater concentration in the swine producing sector, a policy outcome that should be avoided.

Second, the costs of these systems are commonly offset to a certain important extent by the resale value of the solids or composted solids generated through this process. Yet, as EPA notes in the proposed rule with respect to the use of composting systems, if such technology were adopted for a broad range of CAFOs, the economic resale value of the end-product would plummet as the supply of the end-product would greatly exceed demand. ("EPA believes regulatory requirements that resulted in all facilities in a geographical area composting their manure would flood the local market and significantly reduce a CAFO's ability to offset costs through compost sales. For this reason, compost sales cannot reliably be included as cost offsets for this option." *See* 71 Fed. Reg. at 37,767.) While this statement is made with respect to composted manure, the same can be said of manure solids that are dried, bagged and commonly sold as a soil amendment. It is unreasonable to expect that there will be significant resale value of either a composted or dried manure solid end-product if such systems have to be adopted on a

large scale across the country for entire CAFO classes or subcategories. There would be far lower or perhaps even no value to these end-products to offset the capital and operating costs of the technology as a result.

Third, with respect to anaerobic digestion, EPA has found that processed wastewater which must be subsequently stored before land application offers significant opportunities for the re-growth of pathogens and raises doubts about the ultimate effectiveness of this system for pathogen control ("The technology would not necessarily result in decreased discharges of pollutants (including pathogens) beyond the selected BPT option.") (*See* 71 Fed. Reg. at 37,764). Lastly, in the case of the fluidized bed and gasification systems, EPA reviewed these systems and found numerous operational challenges, particularly for smaller CAFOs, and found these challenges, along with the high capitol and operational costs and expertise required to operate and maintain the systems to render such technologies infeasible as BCT (*See* 71 Fed. Reg. at 37,765-66). We see no evidence in the Phase 3 or related reports that would lead EPA to change this conclusion with respect to the adoption of this technology by swine or other CAFOs across the entire country.

With respect to the economic cost analysis EPA performed that led to the proposed BCT decisions, some observers suggest that EPA should offset the capital and operating costs with funds that CAFOs might receive from federal conservation financial assistance programs targeted to farmers. We believe that it is extremely ill-advised for EPA to include in the cost reasonableness analysis highly subjective and unreliable estimates of potential public financial or conservation cost-share assistance that may be made available to livestock producers. There is simply too much uncertainty about the availability of such funds for EPA to make any kind of realistic and accurate estimate of what might be available to a livestock producer. Of the

relatively small amount of funds that may be available, there is little guarantee of the amount that could ever be utilized by livestock operations to comply with the CAFO rule. For example, in the case of the largest and most active USDA conservation financial assistance program, the Environmental Quality Incentives Program ("EQIP"), USDA reports that there was a backlog of applications on hand at the end of Fiscal Year 2005 amounting to requests for $596 million in assistance. This backlog of applications does not include the additional hundreds of millions of dollars in assistance that producers could potentially seek from EQIP but do not, as they are not willing to go through the process of submitting an application because the backlog is so great. This documented backlog of $596 million is now approximately 50 percent of the total funds that are made available through EQIP in any year. Compared to this backlog is EPA's estimate in 2003 that the annual, pre-tax cost for all CAFOs to comply with the 2003 rule was $326 million (in 2001 dollars). (*See* 71 Fed. Reg. 7,243-44.) Over the assumed ten-year implementation period these non-discounted costs would be $3.26 billion. It is unreasonable to presume that EQIP, which dwarfs any other conservation financial assistance program in operation today, could make a substantial dent in the 2003 rule's $3.26 billion in costs to CAFOs, given this backlog, and then also make a significant dent in the costs of new and expensive pathogen control technologies.

No producer of livestock, poultry, or a crop, can ever count on an EQIP contract or other publicly available cost share assistance to make a new technology affordable until they have a signed contract in hand. Supporting the adoption of sound conservation technologies through cost-share and financial assistance is certainly one of the key purposes of EQIP and related programs, but the competition for funds is so great, and the program priorities, ranking criteria, and other key policies so variable from year to year that a producer has simply no guarantee of

getting funds. In the case of swine producers, for example, USDA estimates that they have received over the 2003-2005 program years, only two percent of the total EQIP cost share funds provided over that period, or only $43 million. This is less funding than that received by producers of goats, emus, and ostriches. Based on this record, swine producers can not count on EQIP funds to help them adopt a highly specialized and expensive pathogen control technology.

Furthermore, as we have seen with other farm bill programs, the changing federal fiscal outlook and concerns over deficit control can lead to major and unexpected changes in program funding levels in the conservation arena. Program funding levels can and have been cut unexpectedly over time.

No producer could ever expect a banker or other creditor to loan funds for this technology on the chance that, prospectively, there will be an EQIP contract to help pay for it, or that at some point Congress will create a tax incentive to support it. EPA should not assume that these funds or incentives are going to be there, either. We strongly object to such a presumption for these reasons.

Appendix A

Metadata and comments regarding the data collected, analyzed and reported in Tables 1 and 2 in Section II. B. 1.

Egg Layer Data and Information

State	State Agency	Source of *Layer* Incident, Release or Discharge Data	Egg Layers Only?	Discharges Only?
IA	IA DNR, AFO Staff	Manure release records exist online for the past four years, as prepared and reported by the Iowa DNR Environmental Services Division. See their 2005 Report of Manure Releases, for example, at: http://www.iowadnr.com/epc/05mar/17.pdf#search=%22Iowa%20DNR%20Environmental%20Services%20Division%20Report%20of%20Manure%20Releases%22	No	No, includes releases and other incidents are included
OH	OH EPA, Central Office, Division of Water	Ohio EPA, Ohio Dept of Ag, and the Ohio DNR keep various records related to discharges of manure or wastewater from livestock operations. Information is not kept in one central database. Records go back to about 1990. Requested and obtained from the Ohio EPA a copy of their complaint log, which lists many of the more recent discharge events.	Yes	Unknown
IN	IN DEM	State poultry association leadership reviewed with IDEM staff the stat records on incidents and reported them to us.	Yes	Unknown
GA	PAT FREY??	Professional judgment of the program staff obtained through email inquiry or phone interview. Georgia has a database of EPD Enforcement Orders. The database is not searchable by industry.	Yes	Yes
TX	TX CEQ, Water Quality Division – Wastewater Permitting	Professional judgment of the program staff obtained through email inquiry or phone interview. In 2003, an informal poll was conducted regarding the number of self-reported discharges from all CAFOs from 1998-2003, and there were none from egg-laying facilities. Regions would probably recall a discharge happening as it's pretty rare and no regions could recall any.	Yes	Unknown
AR	AR DEQ, NPDES Enforcement	Professional judgment of the program staff obtained through email inquiry or phone interview.	Yes	Unknown

State	State Agency	Source of *Layer* Incident, Release or Discharge Data	Egg Layers Only?	Discharges Only?
	Section			
NE	NE DEQ Agriculture Section	Professional judgment of the program staff obtained through email inquiry or phone interview. The files go back to 1972 but are not available in an easily accessible database, although that is now being developed.	Yes	No, could include non-discharging incidents
MN	PAT FREY??	Report from professional staff after their review of agency records. Minnesota requires monthly discharge monitoring reports to be filed. They recently started scanning them. They are not available online.	Yes	Yes
FL	FL DEP	Professional judgment of the program staff obtained through email inquiry or phone interview. Discharge records are kept in hard copy but are not available in an easily accessible database.	Yes	Unknown
NC	NC DENR Division of Water Quality (AFO Unit)	North Carolina's compliance and enforcement database tracks discharge violations in general, regardless of the source of the discharge violation. The records go back to the late 1980s and are open to the public and can be found at…?.	Yes	Yes
AL	AL DEM, Field Operations Division	Professional judgment of the program staff, obtained through email inquiry or phone interview, is that in recent years there have been "very few" incidents involving egg-laying operations. Records are kept if a discharge is observed during an inspection, if they are reported by a complainant, or if they are self reported by the operator. The records go back a number of years. They are not collated separately so to get an accurate number of egg-layer manure discharges, one would have to review the files in person in Alabama.	Yes	Yes

Swine Data and Information

State	State Agency	Source of *Swine* Incident, Release or Discharge Data	Discharges Only?
IA	Iowa DNR, AFO Staff	Manure release records exist online for the past four years, as prepared and reported by the Iowa DNR Environmental Services Division. See their 2005 Report of Manure Releases, for example, at: http://www.iowadnr.com/epc/05mar/17.pdf#search=%22Iowa%20DNR%20Environmental%20Services%20Division%20Report%20of%20Manure%20Releases%22	No, includes releases and other incidents are included
NC	NC DENR Division of Water Quality (AFO Unit)	North Carolina's compliance and enforcement database tracks discharge violations in general, regardless of what was the source of the discharge violation. The records go back to the late 1980s and are open to the public and can be found at...?.	Yes
MN	PAT FREY??	Report from professional staff after their rview of agency records. Minnesota requires monthly discharge monitoring reports to be filed. They recently started scanning them. They are not available online.	Yes
IL	IL EPA Bureau of Water Watershed Management Section	Illinois keeps an online record of enforcement orders beginning in 2002, and these can be found at www.???.....	Yes
NE	NE DEQ Agriculture Section	Professional judgment of the program staff obtained through email inquiry or phone interview. The files go back to 1972 but are not available in an easily accessible database, although that is now being developed.	No, could include non-discharging incidents
MO	MO DNR	DNR keeps electronic records of complaints and emergency responses, and these are available online at www.???, or available on request.	Yes
OK	OK Dept of Ag	Mandatory spill reports database is maintained by OK Dept of Ag and reports are available upon request. The basic information found there is of all incidents and releases, regardless of whether any manure reached a surface water. OK Dept of Ag was asked and complied with a request to review these files and identify those incidents that actually resulted in a discharge.	Yes

State	State Agency	Source of *Swine* Incident, Release or Discharge Data	Discharges Only?
OH	Ohio EPA, Central Office, Division of Water	Ohio EPA, Ohio Dept of Ag, and the Ohio DNR keep various records related to discharges of manure or wastewater from livestock operations. Information is not kept in one central database. Records go back to about 1990. Requested and obtained from the Ohio EPA a copy of the complaint log, which lists many of the more recent discharge events.	Yes