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Water Docket
Environmental Protection Agency
Mail Code 2822T
1200 Pennsylvania Ave., NW.,
Washington, DC 20460

Docket No. EPA-HQ-OW-2005-0037

To Whom It May Concern:

The Center for Food Safety (CFS) and its Cool Foods Campaign submits the following comments on the proposed rule, “Revised National Pollutant Discharge Elimination System Permit Regulations for Concentrated Animal Feeding Operations; Supplemental Notice of Proposed Rulemaking” under the Environmental Protection Agency. 73 Fed. Reg. 12321 (March 7, 2008).

CFS is a non-profit public interest and environmental advocacy membership organization established in 1997, working to protect human health and the environment from potentially harmful food production technologies and promoting sustainable alternatives. CFS combines multiple tools and strategies in pursuing its goals, including litigation and legal petitions for rulemaking, policy and research, as well as public education.

The Cool Foods Campaign of the Center for Food Safety is a public advocacy campaign that educates people about the connections between agriculture and food and their contribution to global warming. The Campaign has conducted extensive scientific data analyses of greenhouse gas emissions from all aspects of the U.S. food system including animal waste and animal production. The aim of the Campaign is to inform people about the impact of their food choices across the entire food system and create lifestyle changes to reduce global warming. Our campaign seeks solutions to the problem of global warming, and focuses on

agricultural practices, including animal waste, that can reduce and reverse this trend.

We have a number of serious environmental and public participation concerns about the voluntary certification proposed by the EPA, as discussed in detail below.

BACKGROUND

In the March 7, 2008 Federal Register, EPA announced the public comment period on a supplemental notice of proposed rulemaking to the EPA's June 30, 2006 notice of proposed rulemaking to revise the National Pollutant Discharge Elimination System with regards to concentrated animal feeding operations (CAFOs) in response to the order issued by the U.S. Court of Appeals for the Second Circuit in *Waterkeeper Alliance et al. v. EPA*. In 1972, Congress enacted the Federal Water Pollution Control Act (also known as the Clean Water Act (CWA) to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters.”¹ Under the CWA, National Pollutant Discharge Elimination System (NPDES) permits would be required for any “point source”² to discharge pollutants into waters of the U.S.

In February 2003, EPA revised the effluent limitations and permitting regulations for CAFOs. The 2003 rule added poultry operations with dry manure handling systems to the definition of CAFO, eliminated the exemption for operations that discharge only in a large 25-year, 24-hour storm event, and added requirements for land application areas under the control of the CAFO.³ The 2003 CAFO rule required any Large CAFO with a potential to discharge manure, litter, or process wastewater to waters of the U.S. to apply for an NPDES permit.

On February 28, 2005, the Second Circuit issued a decision in *Waterkeeper Alliance et al. v. EPA* regarding challenges to the 2003 rule. Among its holdings, the Court deemed the 2003 CAFO rule illegal because it did not allow “any meaningful review” of the nutrient management plans (NMP) submitted by CAFOs and did not require that they be included in the NPDES permit. As well, the court deemed that the “permitting scheme established by the CAFO Rule violates the Clean Water Act’s public participation requirements and is otherwise arbitrary and capricious.” The court vacated the 2003 rule requirement that all CAFOs must apply for permits or demonstrate that they do not have the potential to discharge.⁴

In response to the *Waterkeeper* decision, EPA published a proposed rule in the Federal Register June 30, 2006. EPA proposed to require only owners or operators of those CAFOs that actually discharge or propose to discharge to seek authorization under an NPDES permit. Second, EPA proposed to require CAFOs seeking authorization to discharge under

¹ Clean Water Act, 33 U.S.C., §1251(a).

² Under CWA section 502(14) [33 U.S.C. §1362(14)] a “point source” is defined as: “The term ‘point source’ means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.”

³ 68 Fed. Reg. 7176 (Feb. 12, 2003) (codified at 40 C.F.R. pts. 9, 122, 123 and 412).

⁴ See *Waterkeeper Alliance et al. v. EPA* 399 F.3d 486 (2nd Cir. 2004).

individual permits to submit their NMPs with their permit applications. Permitting authorities would be required to review the NMP and provide the public with an opportunity for meaningful public review and comment. Permitting authorities would also be required to incorporate terms of the NMP as NPDES permit conditions. The proposed rule also addressed the remand of issues for further clarification and analysis. These issues concern clarifications regarding the applicability of water quality-based effluent limitations (WQBELs); new source performance standards for swine, poultry and veal CAFOs; and “best conventional technology” effluent limitations guidelines for fecal coliform. This supplemental notice is proposing additional options being considered by EPA for inclusion in the rulemaking to respond to the Second Circuit’s decision in the *Waterkeeper* case. No provisions promulgated in the 2003 final rule are affected or reopened by this supplemental proposal, nor is EPA reopening the comment period on the 2006 proposed rule.

Under the proposed rule, EPA is proposing a voluntary option for CAFOs to certify that the CAFO does not discharge or propose to discharge based on “an objective assessment of the CAFO’s design, construction, operation and maintenance.” These certificates are issued when the CAFO meets two (proposed) eligibility criteria: “1) an objection evaluation of the production area design, construction, operation, and maintenance, which shows that the production area will not discharge, and 2) development, implementation and maintenance on-site of a nutrient management plan.” 73 Fed. Reg. 12321, 12325 (Mar 7, 2008) (to be codified at 40 CFR pt 122). This certificate is not subject for approval by the permitting authority or Director and there would be no opportunity for the public to comment on the certification.

The Center for Food Safety and the Cool Foods Campaign have several significant environmental and public participation concerns related to the proposed EPA rule, as detailed below.

CENTER FOR FOOD SAFETY COMMENTS

Summary

Animal manure is a byproduct of CAFOs and animal production that warrants considerable attention. “CAFOs represent 4.5% of U.S. feeding operations, but the quantity of manure generated by these facilities exceeds 200 million tons- more than 47% of the U.S. total.”⁵ Animal manure contributes to global warming by releasing a variety of greenhouse gases including methane, nitrous oxide and ammonia to the air. In water, animal manure can contribute heavily to nitrogen and phosphorus loads and lead to eutrophication, hypoxia and dead zones. Unproductive waterways can no longer sequester carbon with the efficiency of healthier systems and rotting plants emit methane as they die. Releases of animal manure to waterways are a serious concern for the environment and for the well-being and health of those living nearby CAFOs and downstream of their effluents.

The proposed EPA rule would create regulatory loopholes that will permit a CAFO to potentially discharge and even be re-certified after a discharge. Such releases to the water

⁵ Aillery M., et al. Managing Manure to Improve Air and Water Quality. *United States Department of Agriculture, Economic Research Service* Report 9 September 2005.

will be devastating to the environment and will continue to exacerbate global warming. Once a CAFO has demonstrated their ability to discharge, there should be no process for re-certification, since under the Clean Water Act, they can be considered a “polluter”. CAFOs that discharge should be required to apply for an NPDES permit and to be held to the same accord as any CAFO that applies for a permit with the intent to discharge.

Lastly, under the new proposed rule, the EPA does not heed the decision of the *Waterkeeper* case or adhere to the Clean Water Act since it will continue to foreclose appropriate oversight and public participation. The proposed rule can be determined a plan or program according to the Clean Water Act’s description and thus public participation should be integral to the development and maintenance of such a program. Instead, the proposed rule will allow the public no chance for hearings, public comments or regulatory oversight that is so important. This is violative of the Clean Water Act and should be revised to allow for greater public involvement and participation throughout the entire certification process.

I. *The Proposed EPA CAFO Rule Will Contribute to Environmental Degradation and Global Warming*

Animal manure is a significant source of nitrogen, phosphorus and a variety of other pollutants to both the air and the water. Environmental impairment from agricultural runoff, including the spreading of animal manure on croplands, is significant. “It is estimated that animal feeding operations account for 16% of agricultural pollution.”⁶ The proposed EPA rule would create regulatory loopholes that will permit a CAFO to potentially discharge and even be re-certified after a discharge. Such releases to the water will be devastating to the environment and will continue to exacerbate global warming.

Phosphorus and nitrogen releases into waterways cause a variety of environmental impacts. “The effects of increased nutrients on freshwater and marine ecosystems are well documented and include eutrophication, hypoxia, and decreased biodiversity.”⁷ Eutrophication is the excess of phosphorus and nitrogen in water⁸ that eventually leads to hypoxia. An excess of nutrients in water can produce algal blooms that absorb available oxygen quickly. As algae grow and then decompose, they choke waterways of available nutrients and oxygen and advance a waterway into a hypoxic stage. “Hypoxia results when oxygen consumption, primarily through decomposing organic material, exceeds oxygen production through photosynthesis and replenishment from the atmosphere.”⁹

The build-up of such nutrients and the resulting environmental damage is directly contributing to global warming through the increased production of greenhouse gases. As

⁶Center, T. and Feitshans T., Regulating Manure Application Discharges from Concentrated Animal Feeding Operation in the United States. *Environmental Pollution* 141 (2006) 571-573.

⁷Bernot, M., et al. Nutrient Uptake in Streams Draining Agricultural Catchments of the Midwestern United States. *Freshwater Biology* 51 (2006) 499-509.

⁸*Id.* at 5 (USDA)

⁹Committee on Environment and Natural Resources. An Integral assessment – Hypoxia in the Northern Gulf of Mexico. *National Science and Technology Council*. May 2000.

rotting plants and algae die they emit methane¹⁰ - a potent greenhouse gas. All types of waterways, especially oceans and wetlands, have huge potential for carbon sequestration through aquatic plant life among other things.¹¹ As these plants die off, they are no longer able to sequester carbon, and in many cases begin to emit greenhouse gases that contribute to global warming. In wetlands especially, changes in the nutrients' (i.e., phosphorus and nitrogen) loadings can affect carbon and nutrient transformations and the ability of wetlands to absorb nitrogen.¹²

II. *Violators of the Voluntary Certification Should be Considered Polluters and Be Required to Apply for a NPDES Permit*

Under the proposed EPA rule, “a discharge by the CAFO or failure of a certified CAFO to continue to be designed, constructed, operated, and maintained in accordance with the eligibility criteria and certification statement would render the certification invalid and put the CAFO in the same position as any other unpermitted and uncertified CAFO.”¹³ We believe that this is an appropriate action since the certification would thus be null and void. However, under the proposed rule, EPA would allow for such violators to be able to re-certify as a CAFO that will not discharge or propose to discharge. According to the rule, re-certification would require a CAFO to submit to the Director information about why the discharge occurred and what steps the CAFO has taken to ensure that it will not happen again (as well as all of the original information required for a certificate). This is a clear violation of the Clean Water Act.

In *Waterkeeper Alliance et al. v. EPA*, the Court very clearly defined the scope and intended purpose of the Act. “The Act formally prohibits the ‘discharge of a pollutant’ by ‘any person’ from any ‘point source’ to navigable waters except when authorized by a permit issued under the National Pollutant Discharge Elimination System (“NPDES”).”¹⁴ It is under this same premise that the court decided that not every CAFO should be required to apply for a permit, since the CWA regulates actual discharges, and has no control over those CAFOs that simply have the potential to discharge and have not, as yet, actually discharged. Yet, under the proposed certification, a CAFO that has a discharge would be able to re-apply for a certification that states that they do not discharge or propose to discharge, and protects them from the duty to apply for a permit, like any other CAFO that discharges. This is erroneous interpretation and application of the Act since the CAFO has already demonstrated their ability to discharge and can therefore no longer state that they will not discharge or propose to discharge. Therefore, under the Clean Water Act, the CAFO should be required to apply for a NPDES permit and be held accountable for these discharges.

¹⁰ Giani, Luise; Ahrensfield, Elke. (2002). Pedobiochemical indicators for eutrophication and the development of “black spots” in tidal flat soils on the North Sea coast. *Journal of Plant Nutrition and Soil Science*, 165: 537-543.

¹¹ IPCC. (2000). IPCC Special Report on Land-Use Change and Forestry. A Special Report of the Intergovernmental Panel on Climate Change. Online at <http://www.ipcc.ch/>

¹² Science article

¹³ 73 Fed Reg.12321., at 12327.

¹⁴ *Waterkeeper*, 399 F.3d at 491.

The overbroad and ill-conceived permissive language of the proposed rule, which states that while technical review and approval of certifications are not normally required, they may be “appropriate in situations where a certified CAFO has in fact discharged...” will perpetuate a system where certified CAFOs will be free to pollute, re-apply for a new certificate, and pollute again, never once being required to apply for a permit, as is mandated by the clear language in the Clean Water Act and the Waterkeepers case. Because EPA does not explicitly state that a technical review of a certificate renewal would be *required*, it allows for situations in which a violating CAFO would not endure any further scrutiny after a pollutant discharge. Furthermore, the proposed rules state, “EPA would generally consider a recurring discharge as evidence that a CAFO is not eligible for certification or re-certification and would need to seek permit coverage.”¹⁵ The use of the term “generally” does not command that repeat polluters apply for a permit despite their obvious violations of the Clean Water Act. This section of the proposed rule is unacceptable, unlawful, and will lead to further environmental degradation by creating loopholes in the regulatory system that will allow repeat offenders to continue to pollute without consequences. EPA’s failure to bring the proper scope of the Clean Water Act to encompass CAFOs that have clearly violated the Act not only undermines the Act itself, but Congress’ intent to preserve our nation’s waters.

III. The Lack of Oversight and Public Participation Within the Certification Process is Illegal and Will Perpetuate a System That Has Little Enforceability

In *Waterkeepers Alliance et al. v. EPA*, the court ruled that several sections of the proposed CAFO rule were illegal because of their explicit exclusion of adequate regulatory oversight and public participation of permits. The Court stated that, “By failing to provide for permitting authority review of the nutrient management plans, the CAFO Rule plainly violates these statutory commandments...The CAFO Rule deprives the public of the opportunity for the sort of regulatory participation that the ACT guarantees because the Rule effectively shields the nutrient management plans from public scrutiny and comment.”¹⁶ The new proposed rule does not heed the decision of the *Waterkeeper* case or adhere to the Clean Water Act as it will continue to bar appropriate oversight and public participation.

According to the Clean Water Act, “Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.”¹⁷ Clearly, since the proposed rule is a certification process that involves statements, documents and submission to the Director, this can undoubtedly be defined as either a plan or program within the definition of the Clean Water Act. Accordingly, public participation should be “provided for, encouraged and assisted” throughout the process of this plan and program. Yet, under the proposed rule, “A CAFO’s no discharge certification

¹⁵ 73 Fed. Reg. at 12327.

¹⁶ *Waterkeeper* 399 F.3d at 499 – 503.

¹⁷ 33 U.S.C. §1251(e).

would not be subject to approval by the permitting authority and there would not be an opportunity for the public to comment and request a hearing regarding the certification.”¹⁸

This is a violation of the express language and clear intent of the Clean Water Act. Nowhere within the proposed rule will the public be able to rightfully participate in the “development, revision, and enforcement of” any part of the voluntary permits. Without the ability to have access to records regarding a certification, the public “would be without means to enforce the terms of the nutrient management plans because they lack access to those terms.”¹⁹ It is at best negligent and at worst agency malfeasance that the Court’s ruling on this type of participation in the *Waterkeeper* case has been so blatantly overlooking in the provisioning of a new rule. The Court deemed this lack of public participation, “unacceptable” and we wholly agree. The public have a right to be fully involved in the process of voluntary certifications because they clearly fall under the description of a Clean Water Act plan or program. Preventing this inherent right and failing to assist the public in participation is unlawful and detrimental to the public and the environment.

Without public access to records and documents the public can not effectively participate in the oversight of certifications. Unfortunately under the proposed rule, such oversight will not be apparent. “Under the proposal, the certification would become effective upon submission to the Director.” See 73 Fed. Reg. at 12326. There would be no scrutiny of documentation, records or technical reviews. Yet again, the EPA seems to be clearly defying the ruling of the court in the *Waterkeeper Alliance et al. v. EPA*, in which they stated that the “absence of any meaningful review” was illegal and violated the Clean Water Act.²⁰ The EPA is attempting to continue this illegal system with their voluntary certification program, whereby a CAFO can certify that they won’t discharge and not be held to any level of oversight or scrutiny. Regulatory approaches of this kind are negligent and allow for the potential for continued and unabated pollution, in contravention of the Act. While voluntary, these certifications need to be adequately reviewed and analyzed to ensure that CAFOs are sufficiently qualified for such status in order to ensure the continued protection of our nation’s waterways and prevent further global warming impacts.

IV. Conclusions

The EPAs Proposed Rule Will Contribute to Waterway Pollution and Increase Global Warming

As previously explained, manure discharges to waterways are devastating for environmental health and will contribute significantly to global warming. Excessive nitrogen and phosphorus in waterways will increase available nutrients and cause eutrophication. Algae growth will create hypoxic conditions that will eventually choke waterways of much needed oxygen and cause plants to begin to rot. As plants die they will emit methane, a greenhouse gas, and heavily affected waterways could become “dead zones” and will no longer be able to sequester carbon efficiently.

¹⁸ 73 Fed Reg.at 12324.

¹⁹ *Waterkeeper*, 399 F.3d at 503 – 504.

²⁰ *Id.* at 498 – 504.

Voluntarily Certified CAFOs That Discharge Should Not Be Allowed to Re-certify and Should Be Required to Apply for an NPDES Permit

The EPA's proposed rule would allow for CAFOs that discharged under the certification program to be able to re-certify again that they propose to not discharge. Given that these CAFOs have already shown their ability to pollute, they should be treated as CAFOs that intend to discharge and be required to apply for a NPDES permit. Re-certifying polluting CAFOs will contribute greatly to manure discharges and will offer no incentive for a CAFO to legitimately apply for a NPDES permit. Instead, they would be able to pollute without the potential for any enforcement. This is irresponsible and violative of EPA's statutory responsibility to protect the public health and environment.

EPA Should Allow and Welcome Significant Public Participation and Oversight Throughout the Certification Process

Pursuant to the Clean Water Act, any program or plan implemented must have meaningful public participation.²¹ The current proposed EPA rule would not allow for the public to hold any public hearings about certifications or NMPs and would not allow for public scrutiny or review of any documents submitted with the certification process. This newly created exception is illegal pursuant to the Clean Water Act, and disregards the *Waterkeeper* Court's decision, which actively advocated for increase public participation in the original EPA proposed rule. EPA should create a system that would allow for the public review of documents submitted for CAFO certifications to ensure public involvement and some type of oversight. Furthermore EPA should implement a more stringent review process of submitted certifications by the Director or a Board.

Respectfully Submitted,

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²¹33 U.S.C. §1251(e).