

SUSTAINABLE AGRICULTURE COALITION
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EPA Docket Center
EPA West, Room B102
1301 Constitution Ave., NW
Washington D.C.
(submitted via e-mail to ow-docket@epa.gov)

RE: Docket ID No. EPA-HQ-OW-2005-0037

Dear Sir or Madam:

On behalf of the Sustainable Agriculture Coalition (SAC), I am submitting these comments on the EPA proposed revisions to the National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in response to the decision of the U.S. Court of Appeals for the Second Circuit in the case *Waterkeeper Alliance v. EPA*, 399 F.2d 486 (2d Cir. 2005). Federal Register, Vol. 71 at pp. 37744-37787 (June 30, 2006).

SAC represents twenty-six family farm, rural development, and conservation and environmental organizations that share a commitment to federal policy reform to promote sustainable agriculture and rural development. Coalition member organizations include the Agriculture and Land Based Training Association, American Natural Heritage Foundation, C.A.S.A. del Llano (Communities Assuring a Sustainable Agriculture), Center for Rural Affairs, Dakota Rural Action, Delta Land and Community, Inc., Future Harvest/CASA (Chesapeake Alliance for Sustainable Agriculture), Illinois Stewardship Alliance, Innovative Farmers of Ohio, Institute for Agriculture and Trade Policy, Iowa Environmental Council, Iowa Natural Heritage Foundation, Kansas Rural Center, Kerr Center for Sustainable Agriculture, Land Stewardship Project, Michael Fields Agricultural Institute, Michigan Agricultural Stewardship Association, Midwest Organic and Sustainable Education Service (MOSES), The Minnesota Project, National Catholic Rural Life Conference, National Center for Appropriate Technology, Northern Plains Sustainable Agriculture Society, Ohio Ecological Food and Farm Association, Organic Farming Research Foundation, and the Sierra Club Agriculture Committee.

Many of our members live in rural areas with high concentrations of large-scale CAFOs and must cope with an ever-increasing load of inadequately treated CAFO manure, waste spills from CAFO lagoons and other handling and storage facilities, and land application of CAFO manure and other CAFO wastes far in excess of the ability of the soil and vegetation to retain or filter nutrients, sediment, bacteria and other pathogens, salts, CAFO pesticides, and other pollutants. Our members also live in urban and suburban communities whose water supplies continue to be contaminated with CAFO pollutants.

The U.S. EPA has a history of decades of inaction and foot-dragging on fashioning adequate regulations and effective enforcement to deal with this “fecal flood” of CAFO manure and other CAFO wastes. We are concerned that in this regulatory revision EPA continues to propose minimal action and ignore significant threats from CAFO pollution to the public health and environmental quality of the rural

communities where CAFOs are sited and the suburban-urban communities whose water supplies are fouled by CAFO pollutants.

Thank you for your consideration of our comments.

Martha L. Noble

Martha L. Noble,
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Sustainable Agriculture Coalition

COMMENTS OF THE SUSTAINABLE AGRICULTURE COALITION (SAC)

1. Recommendation: EPA should establish a regulatory presumption that all large CAFOs actually discharge pollutants and EPA should retain a legal duty for every Large CAFO to apply for a NPDES permit or rebut the regulatory presumption.

In the *Waterkeeper* case, the U.S. Court of Appeals for the Second Circuit ruled that the EPA's regulatory requirement that all Large CAFOs must apply for a NPDES permit or otherwise demonstrate that they have no potential to discharge was not consistent with the Clean Water Act. The court based this ruling on the determination that the regulation would allow EPA to require CAFOs which only *have a potential to discharge* to obtain a NPDES permit, an outcome not authorized by the Clean Water Act. The court, however, was quite clear in noting that the evidence marshaled by EPA indicated that CAFOs are indeed important contributors to water pollution, stating that both Medium and Large CAFOs are ". . . large-scale industrial operations that raise extraordinary numbers of livestock."¹ The court then went further and virtually invited EPA to establish a regulatory presumption that all Large CAFOs – or some subset of large CAFOs defined by regulation - *actually discharge pollutants* and have a duty to apply for permit.²

In the proposed rule, EPA does not take up the court's invitation to establish this regulatory presumption that all Large CAFOs *actually discharge* and have a duty to apply for a NPDES permit. EPA does provide a cursory list of categories of situations in which Large CAFOs will have a high likelihood of *actually discharging* due to geographic and physiographic conditions, including a category of CAFOs which have had a discharge in the past with no steps taken to avoid another discharge. Instead of establishing a regulatory presumption that even these high-risk CAFOs will actually discharge and have a duty to apply for a NPDES permit or rebut the presumption, EPA merely ". . . suggests that Large CAFOs falling into one or more of these categories should consider seeking permit coverage . . ."³ This feeble suggestion is coupled with the complete absence in the regulation's preamble of any indication from EPA that the agency intends to initiate effective enforcement and compliance actions against CAFOs that discharge without a NPDES permit.

This EPA proposal that Large CAFO operators decide whether or not they need to obtain a NPDES permit is a total shirking of the EPA's duty to ensure that polluters comply with the Clean Water Act.

¹ *Waterkeeper Alliance v. EPA*, 399 F.2d 486, 492 (2d. Cir. 2005). The court's definitions of "Medium CAFO" and "Large CAFO" are the regulatory definitions provided in 40 C.F.R. § 122.23 (2006).

² *Id.* at 506 (ftn 22). See also, Terence J. Centner, *Clarifying NPDES Requirements for Concentrated Animal Feeding Operations*, 14 PENN STATE ENVIRONMENTAL LAW REVIEW 361 (2006).

³ Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to *Waterkeeper* Decision, 71 Fed. Reg. 37744, 37749 (June 30, 1006)(hereinafter Proposed CAFO Regulation Revision).

There is ample evidence from around that country that many CAFO operators discharge pollutants without a permit. EPA estimates that of the roughly 18,800 CAFOs currently in the U.S., only about 8,500 have permits. This may be a significant undercount. In Illinois, a major farm state where nearly 85 percent of the total public lake acreage is contaminated, there are an estimated 500 large CAFOs. Only about 40 have permits, and only about a fifth of them have even been inspected. The Illinois EPA has an inventory of only 30 percent of the CAFOs operating in the state and does not know where the vast majority of them are. In Iowa, the state Department of Natural Resources estimates that about one-quarter of beef feedlots that need permits do not have them, thanks in part to a 5-year EPA and state amnesty from enforcement that has expired.⁴

Under EPA's formula, every Large CAFO in the U.S., including new and expanding facilities, would be allowed to discharge at will until EPA, the state agency administering the Clean Water Act or a private party bringing a Clean Water Act citizen suit action against the CAFO could try to stem the tide of pollution. The federal government's history of action against CAFOs, with a total of eight lawsuits against CAFOs for violating water-pollution standards under the Clean Water Act between 1997 and 2004, indicates the public can expect little protection from EPA if we are left to rely on the current enforcement and compliance process to ensure that CAFOs are designed and operated to comply with the Clean Water Act.

Given the huge amounts of CAFO waste stored and handled in Medium and Large CAFOs, even a single discharge can have catastrophic results. For example, in March 2005, Ritewood Egg, Inc., an egg production CAFO in northern Utah, spilled 2 million gallons of dead chickens, chicken manure and other CAFO waste from a composting holding facility into the Cub River. The company deliberately breached the berm of the holding facility to prevent a blowout when the facility filled with rainwater. Ritewood had no discharge permit and no nutrient management plan.⁵ Apparently, the company believed it was a "no-discharge" facility under its own "self-assessment." In August 2005, the sand walls of a massive liquid manure pit on a Lewis County NY CAFO gave way, spilling 7-8 million gallons of liquid manure into the Black River. State wildlife experts estimate it will take 5-10 years for the River's fish population to rebound. In this case, the CAFO actually had a state-issued permit but state regulators said they had not been informed of the manure pit's existence and it was not included on the permit. This incident illustrates that even for CAFOs with permits, CAFO operators are not adequately apprised of - or are willing to ignore - design, maintenance, and operation requirements sufficient to meet the requirements of the Clean Water Act. In March 2006, the Ryzebol Dairy in Michigan applied excessive amounts of liquid manure and polluted a stream leading to Lake Mona. In addition, the dairy's lagoon overflowed during a rainstorm discharging pollutants which also reached the Lake. The dairy had no NPDES permit, even though it generates about 138 million gallons of liquid manure annually - the equivalent of a town of 94,000 people. Even more astonishing, the dairy had been designated a dairy in "good standing" under Michigan's voluntary Agricultural Environmental Assurance Program. The dairy lost its "good standing" status in January when investigators discovered the farm was over applying manure but no attempt was made by the dairy at that time to obtain NPDES permit.⁶

More insidious is the continual leakage of pollutants from lagoons and other handling and storage areas, as well as the run-off and leaching of phosphorus and nitrogen from lands whose soil and vegetation have reached the limits of their capacity to absorb these nutrients. We note that in its list of high-risk CAFOs,

⁴ Perry Beeman, Many Feedlots Still Lack Manure Controls, Des Moines Register (April 4, 2006).

⁵ State of Utah, Dept. of Water Quality, *Utah Water Quality Board Reaches Settlement with Ritewood Egg* (News Release)(Aug. 25, 2006).

⁶ David LeMieux & Jeff Alexander, *Factory Farm Fined Over Manure Spill*, Muskegon Chronicle (Aug. 24, 2006).

EPA omits CAFOs that are land applying CAFO wastes on soils that are saturated with phosphorus. These soils are likely to be Class 1 and Class 2 soils that have had years of over-application of CAFO manure or other CAFO waste, with phosphorus running off not only bound to sediment but also unbound in biologically available form. The detection of this chronic CAFO pollution can be more difficult but just as damaging over time as catastrophic events.

SAC recommends that EPA establish a regulatory presumption that large CAFOs actually discharge pollutants, rather than rely on CAFO owner-operator “self-assessment” of whether the facility discharges. EPA should make clear to the CAFO sector that the agency will direct significant enforcement and compliance resources to ensure that CAFOs without NPDES permits are not violating the Clean Water Act.

2. Require that all CAFO NPDES permits be individual permits in order to adequately address the Clean Water Act requirement that the terms of site-specific Nutrient Management Plans are effluent guidelines which must be reviewed by the permitting agency and incorporated into a NPDES permit only after opportunity for public review and a public hearing.

The *Waterkeeper* court ruled unequivocally that the terms of CAFO NMPs are site specific effluent limitations that must be incorporated as enforceable measures in the NPDES permit. The court found that both the Clean Water Act and the Administrative Procedures Act require the opportunity for meaningful public participation in the development, revision, and enforcement of these “site-specific” CAFO NMPs.

EPA acknowledges that there are no provisions in the regulations for incorporating site-specific requirements into a NPDES general permit and for providing the public notice and opportunity to comment required by the *Waterkeeper* ruling. In comments on the proposed 2003 CAFO regulations, SAC and hundreds of other organizations pointed out to EPA that the terms of a CAFO’s NMP were required by the Clean Water Act to be incorporated into the NPDES permit, a position upheld in *Waterkeeper*. We further recommended that because of the site-specific nature of NMPs, general permits are not appropriate for CAFOs. CAFOs, most especially Large CAFOs which generate and handle a waste equivalent to that of small and medium-sized cities, should be regulated through individual permits.

In this proposed revision of the CAFO regulations, EPA notes correctly that the process for public notice and opportunity to comment on General NPDES Permits will not satisfy the requirements of the *Waterkeeper* ruling. Rather than simply requiring that all CAFOs obtain individual permits which are subject to existing regulations for public notice and hearing, EPA proposes a “hybrid” truncated process for public review of NMPs for general permits, with variable and unpredictable requirements for public notice and comment subject to the whims of the Directors of permitting authorities around the country. As for the notice period, rather than adopting the notice period for individual permits, EPA suggests a range of notice periods including a period as short as seven days. This proposal indicates a serious disregard by EPA of the statutory requirements for meaningful public participation.

The agency is basically proposing an arbitrary and capricious system for the statutorily required public participation in the development of CAFO effluent limitations and permits. And at the end of it all, under the *Waterkeeper* ruling, a CAFO’s general permit still must be re-opened to adequately incorporate the site-specific, individualized requirements of the CAFO’s NMP. EPA acknowledges that a CAFO NMP must address the adequacy of the storage of manure, litter and process wastewater, the proper management of animal mortalities, the diversion of clean water from the animal production area, and site-specific conservation practices for proper land application of manure, litter, and process wastewater including application rates.⁷ Incorporating these statutorily required NMPs would require significant

⁷ Proposed CAFO Regulation Revision at 37753.

modification and individualization of a CAFO general permit. EPA could save state agencies, the regulated industry, and the public a great deal of uncertainty and confusion by simply requiring that CAFOs must obtain an individual permit with both the NMP and permit subject to the existing requirements for public notice and public comment required for individual NPDES permits.

SAC recommends that that EPA require that all CAFO NPDES permits be individual permits to ensure that permitting authorities give the public legally adequate notice and opportunity for comment on the permit, including the legally enforceable terms of the NMP effluent limitations, and to ensure that permitting authorities give adequate attention to incorporating the site-specific terms and requirements of NMPs into NPDES permits.

SAC also notes that we are generally satisfied with EPA's proposed provision for addressing the requirements for public notice and opportunity to comment on changes to NMPs, except of course for any provision for the use of general, rather than individual permits. We do recommend an additional measure to require that the permitting agency conduct an inspection of the CAFO before allowing any substantial changes to the NMP to ensure that measures that are retained in the NMP will not be undermined by the change and to ensure that the substantial change will not result in the violation of state water quality standards, degrade high value waters, or otherwise result in a violation of other provisions of the Clean Water Act.

We also recommend that a CAFO operator's proposal to increase the number of animals in a NMP not be covered by the 180-day "grace period." While some modifications, such as changes in crop rotations based on weather factors, are outside the control of the CAFO operator, the number of animals is not and any substantial increase in the number of animals in a CAFO should not be granted a "grace period" from public notice and comment requirements.

3. Require that in order to claim that a discharge of pollutants is exempt from Clean Water Act liability as "agricultural stormwater," a CAFO must obtain a NPDES permit that incorporates the requirements of a Nutrient Management Plan.

In the *Waterkeeper* case, the environmental plaintiffs challenged EPA's decision in the 2003 CAFO regulation to exempt from regulatory sanctions those discharges from land application of CAFO waste which could also be classified as "agricultural stormwater." The plaintiffs contended that because CAFOs are explicitly included in the definition of point source, any discharge of pollutants from CAFOs are subject to regulatory sanctions, including those from land applied CAFO waste that might also meet the definition of "agricultural stormwater." The court, however, finding that a statutory ambiguity arises in applying the agricultural stormwater exemption to CAFO pollutant discharges, ruled that EPA's determination to exempt CAFO "agricultural stormwater" discharges from regulatory sanctions was a reasonable, although not necessary, construction of the Clean Water Act under the *Chevron* doctrine.

The industry plaintiffs objected to the 2003 CAFO regulation contending that any pollutant discharge from land application of CAFO waste should be classified as "agricultural stormwater" and therefore not subject to any Clean Water Act regulation. The court disagreed that pollutant discharges from the land application of CAFO waste are exempt from Clean Water Act permit requirements. The court reviewed the EPA's regulatory definition of "agricultural stormwater" which provides that "[w]here 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 [40 C.F.R.] 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of the a CAFO is an agricultural stormwater discharge." The court found this regulation to be a permissible interpretation of the statutory term "agricultural stormwater".

First, SAC points out that this definition for “agricultural stormwater” is embedded in 40 C.F.R. section 122.42(e) which provides that *any NPDES permit issued to a CAFO* must include requirements to develop and implement a nutrient management plan (NMP). The requirement of 40 C.F.R. section 122.42(e)(vi)-(ix) is the land application subset of the requirements for an NMP. SAC also emphasizes that “agricultural stormwater” is a discharge of pollutants that must be distinguished from other land application discharges *in a CAFO permit NMP*. Further, the *Waterkeeper* court ruled that the terms of CAFO NMPs are effluent limitations that must be incorporated into a CAFO permit with public notice and an opportunity for public comment on the terms of the NMP. Therefore, in order for a CAFO to avail itself of the agricultural stormwater exemption, the CAFO must apply for a CAFO permit which incorporates the terms of an NMP that has been reviewed by the regulatory agency and made available for public review and comment.

In the proposed rule revision, however, EPA totally ignores and violates the ruling of the *Waterkeeper* court on the requirements for NMPs in NPDES permits by adopting a process that would allow a CAFO to avoid seeking a NPDES permit by “self-determining” that all the CAFO’s land application discharges are agricultural stormwater. Even more egregious, EPA suggests that the CAFO need not even prepare a NMP, let alone an NMP that meets the procedural requirements mandated by the *Waterkeeper* court. Instead, a CAFO would merely be required to maintain on the CAFO site undefined “documentation” that would indicate CAFO waste was land applied in accordance with 40 C.F.R. section 122.42(e)(1)(vi-ix). Moreover, absolutely no permitting authority or public review of the adequacy of this “nutrient planning” is required in advance.

SAC urges EPA to include in the revision of the CAFO regulation an explicit provision that the “agricultural stormwater” discharge exemption is part of the NMP effluent limitations that must be included within a CAFO NPDES permit and that in order to avail itself of the exemption for “agricultural stormwater” discharges, a CAFO must obtain an NPDES permit.

4. Clarify in the CAFO regulations that the “agricultural stormwater” exemption is limited only to discharge of nutrients from land applied CAFO waste as provided for in the NMP of a CAFO’s NPDES permit.

SAC notes that the EPA’s regulatory definition of “agricultural stormwater” is based on NMPs that address only nutrient discharges. Therefore, we conclude that the discharge from land applied CAFO waste of any other class of pollutants, including, but not limited to, bacteria and other pathogens, antibiotics, hormones, salts and trace elements, heavy metals, arsenic and other hazardous substances is not classified as “agricultural stormwater” discharge and is, therefore, subject to any and all legal restrictions and sanctions on the discharge of these substances to the waters of the United States. EPA, however, in its discussion of Water Quality Based Effluent Limitations (WQBELS) states that a CAFO that follows the requirements of a Nutrient Management Plan (NMP) “. . . eliminates all precipitation-related point source discharges from its land application fields.” This statement is wildly over-inclusive. First, EPA is proposing NMPs that provide only for the minimization of nutrient pollution and do not even address other significant water pollutants. Moreover, many of these pollutants, such as pathogenic bacteria, salts, heavy metals, arsenic and other hazardous substances and pollutants found in CAFO waste have no agronomic value and may even damage vegetation and significantly degrade soil quality. It would be an absurdity for EPA to establish an exemption based on the agronomic value and agricultural utilization of CAFO pollutants which damage agricultural crops and fields. CAFOs should not get a “free pass” to discharge to the waters of the U.S CAFO pollutants that have no agricultural value and have not even been addressed in an NMP.

We recommend that EPA clarify the pollutants included within its regulatory definition of “agricultural stormwater” are limited to nutrients. EPA make clear that hazardous substances and other pollutants commonly found in CAFO waste that EPA has chosen not to assess, monitor, regulate or otherwise control within an CAFO NMP are not included within the agricultural stormwater exemption.

5. Clarify in the CAFO regulations that if CAFO waste is land applied on land covered with snow or ice, the discharge of pollutants as the result of subsequent thaw or precipitation event will not be considered “agricultural stormwater.”

Many CAFO operators apply CAFO manure and waste to frozen land or land covered with snow or ice, often with no vegetation or dormant vegetation and no incorporation of the CAFO waste. The likelihood of this CAFO waste running off the land in a subsequent thaw or precipitation event is very high. Therefore, it is unlikely that this CAFO manure and waste has been applied to meet the agronomic needs of a crop or other vegetation or for any other agricultural utilization and should not be given the benefit of the agricultural stormwater exemption.

SAC recommends that EPA provide explicitly in the CAFO regulations that the discharge of pollutants from CAFO manure and waste that has been applied to frozen land or land covered by snow or ice without adequate incorporation into the soil will not be defined as “agricultural stormwater” exempt from Clean Water Act liability.

6. Require more advanced technology for the removal of pathogens from land applied CAFO wastes.

EPA is required to issue effluent limitation guidelines that reflect a range of technological capabilities. For fecal coliform, EPA must establish guidelines based on “Best Conventional Technology,” (BCT). In 2003, EPA decided that the application of livestock waste according to an NMP, along with some other requirements, effectively controlled fecal coliform and qualified as BCT. But, EPA never formally conducted the required analysis to identify BCT. The *Waterkeeper* court required EPA to conduct this analysis and either confirm that it had identified BCT or select some other technology that more effectively reduces fecal coliform in CAFO discharges.

EPA has in the proposed CAFO regulation revision simply reapplied its established BCT analysis to the technologies that it had previously reviewed and rejected. Not surprisingly, EPA found that applying CAFO waste according to an NMP, without any additional treatment, represents the “best conventional technology” to reduce pathogens such as fecal coliform. EPA failed to review technologies that offer more obvious benefits to reduce pathogens, such as those highlighted by the Environmentally Superior Technology study orchestrated by the North Carolina Attorney General’s office. SAC finds EPA’s cavalier treatment of CAFO pathogens particularly troubling in light of the evidence of the discharge of antibiotic resistant pathogens from CAFOs, pathogen resistance which has developed because of the overuse and sub-therapeutic use of antibiotics as growth promoters and a substitute for good animal husbandry and sound breeding programs for animal health and disease resistance.⁸

SAC recommends that EPA: 1) open its technology review process to include other alternative technologies such as composting and the combinations of processes included in the North Carolina attorney general’s study; and 2) recognize that the application of livestock waste as fertilizer is substantially similar to the application of human sewage sludge (biosolids) as fertilizer and require that CAFO wastes be treated to achieve the same level of pathogen reduction that sewage sludge must attain.

⁸ See, e.g., Chapin et al., *Airborne Multidrug-Resistant Bacteria Isolated from a Concentrated Swine Feeding Operation*, 113 ENVIRONMENTAL HEALTH PERSPECTIVES 137 (2005).

7. Support state authority to require that all CAFO discharges meet water quality standard through the use of WQBELS.

The environmental plaintiffs in *Waterkeeper* took issue with EPA's discussion of Water Quality Based Effluent Standards (WQBELS) in the preamble to the 2003 CAFO regulation, contending that it was a directive to the states prohibiting the use of WQBELS when technology based pollution controls for CAFOs are not sufficient to ensure that CAFO discharges meet water quality standards. The court remanded the issue to EPA with a directive to provide clarification of the EPA position on this issue.

SAC observes that EPA's has clarified the issue by providing that state permit writers may use WQBELS for any CAFO discharges except agricultural stormwater discharges or discharges from new swine, veal or poultry operations. With regard to the application of WQBELS for CAFO agricultural stormwater discharges, SAC recommends that EPA provide additional clarification that while there may be some limitation under the federal Clean Water Act for WQBELS for the nutrient discharges actually allowed in a CAFO's NMP, which meet the regulatory definition of "agricultural stormwater", states may require WQBELS for any other pollutants from CAFO waste that are discharged from CAFO manure and waste land applications sites and impair water quality standards, for example arsenic, hormones, antibiotics, pathogenic bacteria, etc. These substances have no agronomic value and EPA has taken no action or inadequate action to devise technology based pollution controls to adequately address these pollutants. Therefore, states should not be required to ignore the application of WQBELS to these pollutants simply because they are included in stormwater discharges that also contain agricultural nutrients.

Even for agricultural stormwater nutrient discharges, EPA should provide clarification that states have wide latitude in tightening the requirements for nutrient pollution control in NMPs.

With regard to WQBELS for new swine, veal and poultry operations, we note that EPA provides various loopholes in the so-called no-discharge requirements for the production areas of these CAFOs. EPA should clarify that states are free to use WQBELS to close these loopholes in order to address water quality standard impairment.

SAC interprets and approves of the other aspects of EPA's clarification of state use of WQBELS, specifically:

- A permit writer can impose WQBELS to limit any non-precipitation related discharges that occur at land application areas, on a case-by-case basis;
- A permit write can apply WQBELS to further limit discharges from CAFO production areas. These can be imposed because the effluent guidelines do not prohibit all "regulatable" discharges from the production area. Indeed, the effluent guidelines allow occasional overflow discharges (e.g. in a 24 hour, 25 year storm);
- WQBEL limits for agricultural stormwater does not apply to discharges from the CAFO production area;
- States can have additional requirements under their own State regulatory authorities that could go beyond the requirements of the federal NPDES program. For example, where the only discharge from a CAFO's land application area is classified as agricultural stormwater, the runoff though not subject to NPDES regulation, could be subject to additional State requirements that are broader in scope, including additional requirements related to water quality.

SAC urges EPA to notify state permit writers that they may have significant authority to implement requirements to protect local water quality whenever a CAFO proposes to discharge to a water body that is not meeting water quality standards, or when violations of these standards can be attributed to the land application of manure at a CAFO, even when the source claims that its only discharge is "agricultural

stormwater.” Specifically, EPA should actively encourage states to impose water quality-based conditions as a matter of state law, and should state explicitly that states should consider water quality standards when establishing state technical standards that will determine what land application practices will qualify for polluted runoff to be “agricultural stormwater.”

8. EPA should clarify and expand upon its concept of allowing greater flexibility in Clean Air Act, Clean Water Act, and other programmatic requirements to allow cross media approaches to dealing with CAFO pollution. The concept should include greater attention to intensively managed rotational grazing and other methods of livestock and poultry production that reduce pollution loading and dumping and provide for a balance of nutrients used for forage/crop production and animal production within a watershed, state or region.

In Section V of the preamble to the proposed CAFO regulation revision, EPA requests comment on the feasibility of allowing flexibility in how facilities can meet various programmatic requirements, including those of the Clean Air Act and the Clean Water Act, to achieve greater cross-media pollutant reductions. The request refers to Environmental Management Systems, ISO 140001 certification and state-approved trade offs to reduce water pollution discharges and air emissions. In general, SAC is supportive of any process of environmental auditing which has integrity and independent evaluation as part of the process. But its not clear from the EPA request for comments how the agency would use the application of these systems to achieve “greater flexibility” in the requirements of the Clean Air Act, Clean Water Act or other environmental laws as applied to CAFOs. Indeed, EPA does not provide a definition or examples of what this “greater flexibility” entails. We recommend that EPA clarify this request.

In addition, we also recommend that EPA request not just about dealing with CAFO pollution but also about non-confinement livestock and poultry systems that do not generate the vast amounts of waste generated by CAFOs. Many industrialized CAFO systems have as their key feature the decoupling of animal food (forages and crops) production from the production of the animals. In many regions, such as the eastern plains of North Carolina, the Central Valley of California, much of the Delmarva Peninsula, and increasingly areas of high CAFO concentration in the Midwest, the result is the importation of large amounts of nutrients in processed feed, pharmaceuticals, and other pollutants. The so-called “economies of scale” for large-scale CAFO production and specialization are offset by the externalized cost of the damage done to the environment and public health. In addition, a vicious circle is created with increased animal production decreasing farmgate prices for livestock and poultry, with EPA then weakening the regulatory standards to ensure that no CAFO, no matter how poorly designed, goes out of business.

Moreover, there seems to be no end to the geographic concentration of CAFOs and increase in the size of individual operations. Vast amounts of public money have been spent to burn, transport, transform, and otherwise get rid of CAFO manure and other CAFO waste but these efforts are almost always accompanied by the proliferation of new and expanding CAFOs in the same region. The overall result is increasing environmental degradation and public health threats, with the public underwriting the cost for CAFO infrastructure with \$\$ billions of funding from programs such as the Environmental Quality Incentives Program. We note that for EQIP the USDA has yet to evaluate the actual amount of money spend on CAFOs or the environmental performance (whether net benefit or degradation) that has occurred as a result of EQIP CAFO funding.

SAC urges that if EPA does want to address “cross media” and other approaches to environmental issues related to livestock and poultry production, the agency should focus on non-CAFO production systems which are designed to balance animal manure nutrient generation with plant nutrient use in closed loop systems that minimize the generation of “waste” in the first instance.
