

REVISED VERSION

August 3, 2001

The Honorable Diane Regas
Acting Assistant Administrator for Water (MC-4101)
U.S. Environmental Protection Agency
The Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Subject: The U.S. Environmental Protection Agency's Proposal for Additional Regulation of the Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960 (January 12, 2001)

Dear Ms. Regas:

The Office of the Chief Counsel for Advocacy of the U.S. Small Business Administration ("Advocacy") was created in 1976 to represent the views of small business before Federal agencies and Congress. One of the primary functions of the office is to measure the costs of Government regulation on small businesses and make recommendations for eliminating excessive or unnecessary regulation of small businesses.

On January 12, 2001, the U.S. Environmental Protection Agency ("EPA") issued a Notice of Proposed Rulemaking ("NPRM") for additional regulation of concentrated animal feeding operations ("CAFO"). With this proposal, EPA would remove a permit exemption for larger operations that do not pollute except in large storms and lower the threshold and/or change the criteria for permitting small operations. EPA would also establish zero discharge standards for the swine and poultry sectors, regulate pollution from crops and ground water, and co-permit the livestock grower and owner, two separate businesses. EPA estimates that the cost of the rule could exceed \$800 million annually. The rule could affect at least 10,000 small businesses. NPRM at 3086-3087 and 3102-3103.

Advocacy has substantial concerns with this proposal. To address most of our concerns, we recommend that EPA adopt a two-tier approach with a threshold of 1000 animal units ("AU") and retain the existing designation criteria for operations with less than 300 AU, streamline the permit application and certification requirements, delete the groundwater provision, delete zero-discharge standards at least for swine operations, and delete the co-permitting requirements. Further explanation is provided below.

But first, we would like to express a general concern. This is the first rule in the history of SBREFA panels (23 to date) where EPA did not follow all of the consensus recommendations of a panel report at the time of executive order review of the proposal. We could understand if EPA had rejected panel recommendations based on additional information (obtained between OMB review and the panel) that revealed that the recommendations were not practicable, enforceable, environmentally sound, protective of public health, and consistent with the Clean Water Act. However, this was not the case.

In the past, we have been willing to work particularly with EPA's Office of Water to reach consensus on recommendations, because it has often led to better public policy. We value the strong working relationship we have developed, and we had hoped that this relationship would continue. The good will of the parties depends on the good faith implementation of consensus recommendations. In fairness, prior to publication, EPA did make some significant changes to the proposal to make it more consistent with the major panel recommendations, but we were not fully successful in every instance. Therefore, we respectfully request that EPA re-consider any decisions where inconsistent with panel recommendations. If upon re-analysis, EPA finds that one or more of the recommendations are not valid, they should be rejected, but EPA should provide a sufficiently complete explanation for any such rejection in the preamble of the final rule. Otherwise, EPA should adopt the Panel's recommendations.

1. EPA Should Adopt a Two-Tier Approach with a Threshold of 1,000 AU and Retain Existing Designation Criteria for Operations with Less Than 300 AU

EPA co-proposed two approaches that revise the applicability of the National Pollution Discharge Elimination System ("NPDES") permit program to animal feeding operations. The "Three-Tier" approach would retain the program's existing structure: operations with over 1000 AU would be automatically permitted, those with 300-1000 AU would be permitted if they meet certain criteria, and operations with less than 300 could be permitted only if designated by the permitting authority, but the criteria for the intermediate category would change. Under the "Two-Tier" approach, operations with over 500 AUs would be automatically permitted while all others could be designated, but the designation criteria would change. EPA requested comment on different levels of the threshold for a two-tier approach including 300 AU and 750 AU and on retaining existing designation criteria and extending them to 750 AU.

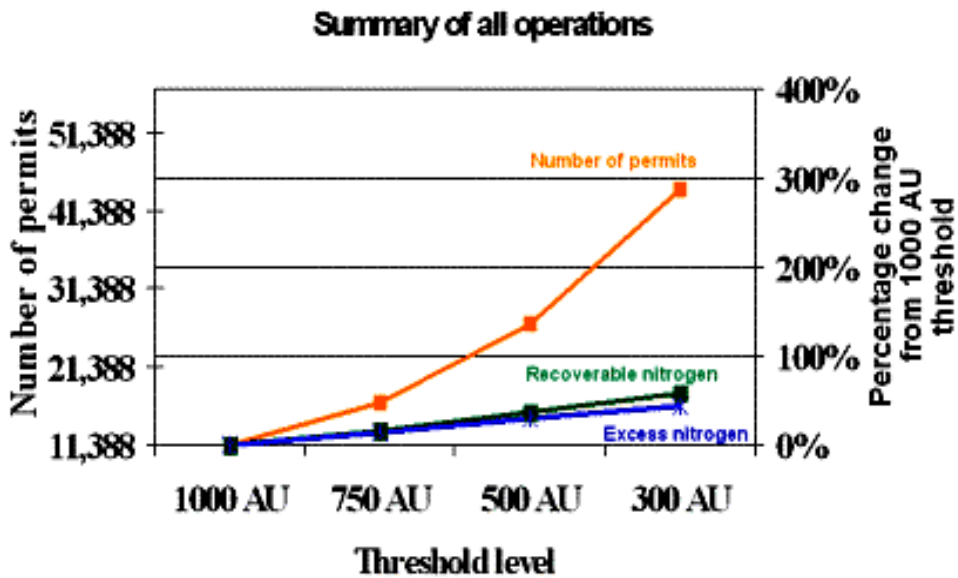
We support a two-tier approach because it would simplify the program and make it easier to determine when the rules apply. We also do not believe that the "risk-based" criteria EPA is considering for the 300-1000 AU category will necessarily improve water quality, but it will increase the number of affected small entities (over the proposed two-tier approach) by thousands. We recommend that EPA adopt a two-tier approach but we cannot support a threshold below 1000 AU because the benefits do not appear to justify the costs. The U.S. Department of Agriculture has shared some preliminary data with us that suggests that as the threshold is lowered, the number of small businesses that would incur costs would dramatically increase while the environmental protection gained would increase only slightly. The preliminary data is presented in Table 1 and Figure 1 below.

Table 1.

Potential CAFOs, Animal Units, and Manure Nutrients, 1997 Census of Agriculture						
Item	Units	Total for Item	AFOs Defined as CAFOs, by Threshold			
			1000AU	750AU	500AU	300AU
			Percent of Total			
Farms / AFOs with feedlot beef, dairy (including confined heifer and veal), swine, and poultry (including layers, broilers, pullets, and turkeys)	number	210,000	5.4	8.0	12.8	21.1
Animal Units	million	36.3	51.8	56.9	64.0	72.9
Recoverable Nutrients						
Nitrogen	1000 tons	1,260	48.6	56.3	66.3	76.6
Phosphorus	1000 tons	689	52.2	59.4	68.8	78.9
Excess Nutrients						
Nitrogen	1000 tons	743	64.4	73.4	84.1	92.8
Phosphorus	1000 tons	467	67.3	75.1	84.5	92.7

NOTE: The estimates presented in this table are based on data from the 1997 Census of Agriculture and methodology developed by the Economic Research Service (ERS), Natural Resources Conservation Service (NRCS), and National Agricultural Statistics Service (NASS). The details of the computation methods may be found in an NRCS report (Kellogg et. al., 2000). These estimates are presently being refined. This material represents a working draft and is not considered final nor a representation of official USDA estimates on numbers of AFOs, animal units, or recoverable and excess manure nutrients.

Figure 1.



According to Figure 1, as EPA lowers the threshold below 1000 AU, the number of permits issued will dramatically increase as will the cost of the program. The benefits, in contrast, do not rise at as great a rate. The amount of nitrogen controlled is relatively less. A threshold of 300 AU, for example, corresponds to a 300% rise in permits issued (over the baseline) but only a 50% rise in the control of nitrogen which exceeds the land available at the farm level. Thus, the costs do not justify the benefits.

The figure also shows that lowering the threshold captures disproportionate numbers of operations – all small – with more land available than manure to apply (i.e., the area between lines for excess and available manure is increasing).¹ If excessive land application of manure is the primary focus of this regulation, EPA should be targeting only operations with less land than manure, which have the higher potential to discharge.

We also cannot support any changes to the designation criteria if it will make it easier to permit operations with less than 300 AUs. EPA is suggesting changing two of the three criteria to make it less difficult to bring enforcement actions against operations. NPRM at 3021. It is not clear how EPA could apply the same set of criteria – which has become less stringent – to two categories of operations, but make it easier to bring actions against operations in one category but not the other. Operations with 300 AU or less may have less of a potential to discharge than operations in the intermediate range but the probability is still non-zero and positive (see paragraph 4 of section 2 below).

EPA agreed at the time of the panel not to consider changing designation criteria for operations with less than 300 AU, a decision the Panel strongly supported. There is no new evidence (obtained since the panel) that the best available technologies would be economically achievable for these operations or improve water quality. There is also no new evidence justifying a shift in scarce resources away from operations with more AUs. We heard from the small entity representatives that family farmers tend to adopt practices that are environmentally friendlier, because they have to live with the consequences (e.g., they have to drink the water they pollute). No new information has surfaced to contradict these statements. If indeed, there are operations in the small category that need permits, a permitting authority will still have the discretion to issue those permits, and they will find a way to issue those permits despite any concerns about enforceability of existing criteria.

We understand that EPA wants a simple program and that applying a different set of designation criteria to one group of operations but not another is inconvenient, but EPA should not apply additional regulatory controls just for control's sake. Unless there is new information of which we are not aware, EPA should keep the focus on larger operations. That way, EPA would address operations of greater concern at a cost of regulation per AU that is lower, which will not affect industry concentration – a major source of concern for the environmental community. If EPA wants one set of criteria for operations with less than 1000 AU, EPA should retain and extend existing criteria to that level. Otherwise, we recommend that EPA adopt a two-tier approach with a threshold at 1000 AU, but keep the designation criteria the same for under 300 AU operations.

¹ It is important to note that farms with excess manure do not necessarily cause environmental problems. For example, these farms might be able to find available land elsewhere in its county.

2. EPA Should Streamline Permit Application and Certification Requirements

The Panel agreed that if EPA proposed to revise applicability requirements for operations with 300-1000 AUs, EPA should provide simple default criteria to separate operations based on their potential to discharge and ultimately require only operations with a reasonable potential to obtain a permit. The default criteria would require minimal information and effort – for example, providing a site-specific ratio of animal units to cropland to demonstrate land application of manure at agronomic rates.²

Instead, EPA proposed to apply a substantially more stringent and burdensome requirement. To avoid a permit, an operation is required to demonstrate no potential to discharge. Moreover, there are no simple default criteria. The permitting authority would have to consider the potential for discharge on a site-specific basis (see proposed 122.23(e)). There is some general guidance in the preamble for demonstrating no potential, but it is clear from that discussion that it will be difficult, if not impossible, to demonstrate. NPRM at 3044.

We worked with EPA for many hours to develop the approach described above because we agreed that diverting scarce resources away from the operations of greatest concern would not serve the public interest. Keeping the focus on operations with at least a reasonable potential, on the other hand, ensures that the permitting authorities will have adequate resources to issue permits where net benefits are greatest while providing small businesses with some flexibility. We have not seen any data, which would prompt EPA to depart from the panel's approach.

But under the proposed approach, EPA has raised the bar so high that few, if any, operations will be able to take advantage of the flexibility a certification approach would provide. Any operation will have some non-negative probability of discharging because it can rain anywhere, even in Death Valley. However, to certify the operation in Death Valley, an authority would have to be willing to ignore even a remote possibility of rain and create a legal fiction to stand for the truth (i.e., that the operation has no probability to discharge). While the Clean Water Act defines a point source as a conveyance from which pollutants are or may be discharged,³ EPA provides no evidence that the Congress ever intended for this definition to be taken to this extreme.

We recommend that the Agency return to the Panel's approach, and instead allow permitting authorities to focus resources where there is greatest need.

3. EPA Should Delete the Ground-water Provision

The proposal would require that existing beef or dairy operations and new poultry or swine operations, subject to effluent guidelines, comply with requirements to prevent discharges to surface waters via groundwater. The requirements include groundwater

² See section 9.2.2 of the SBREFA Panel report for the CAFO rule. A copy of the report is at http://www.sba.gov/advo/laws/is_cafortpt.pdf.

³ See 33 USC §1361(14).

monitoring and installing liners of synthetic material beneath lagoons and ponds, and impervious pads below storage of dry manure stockpiles. These requirements can be avoided, but only by conducting a ground-water assessment that demonstrates, to the satisfaction of the permitting authority, that the ground water beneath the facility is not connected to surface waters through a direct hydrologic connection. To demonstrate no connection, an operator will have to drill monitoring wells and retain a consultant to assess whether there is a hydrologic connection and prepare a report. For the following reasons, EPA should delete the ground-water provision.

It is not clear that EPA has legal authority under the Clean Water Act to regulate ground-water discharges. While some courts have interpreted the Act broadly to include such discharges where there is a connection to surface water, others have disagreed.⁴ One could argue that ground-water discharges are not within the scope of the NPDES permits program. Congress has provided ground-water protection elsewhere in the Act,⁵ and so it would have provided it in the permits program if it had intended to do so. Also, if ground-water discharges were clearly within the scope of the program, Representative Aspin would not have introduced an amendment to include them.⁶ If such discharges are not within the program's scope, EPA cannot regulate any of them, not even where there is a direct connection to surface water. If Congress did not intend to exclude discharges to U.S. waters via groundwater, it could have enacted ground-water protections.

Further, we have questions about the economic achievability of the groundwater provision. Under the Clean Water Act, best available technologies have to be economically achievable for the industry.⁷

The groundwater component of the rule may be achievable if most operators are able to avoid the requirements by conducting an assessment. EPA assumes that 76% of operations can avoid them.⁸ However, as noted above, to demonstrate no link, an operator must still drill monitoring wells. Additionally, the network and depth of the wells may have to be more extensive. It is more difficult to prove a negative. There is also the cost of retaining a consultant to conduct the assessment. EPA estimates that the average cost of an assessment will total \$3000.⁹ But we have heard, both from permit writers and assessors, that the cost just to retain the assessment consultant could exceed \$3,000, and total costs could range from \$6,000 per assessment per facility to far over \$20,000. An assessment could be very expensive indeed! If the operator is confident that an assessment will reveal no link, and it is less expensive to conduct an assessment than to comply with requirements, he or she will opt for the assessment. However, we

⁴ NPRM at 3016-3018.

⁵ See e.g., 33 USC § 1252.

⁶ Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. at 589 (1972).

⁷ See 33 USC § 1311(b)(2)(A).

⁸ See e.g., Section 10.2.6.1 of EPA's Development Document at <http://www.epa.gov/ost/guide/cafo/index.html>.

⁹ *Id.*

doubt that will be the case for many small businesses, which means their likely choice will be between complying with the requirements or exiting the market.

EPA implies that if dairy operations cannot avoid the ground-water requirements, the rule will not be economically achievable for that industry.¹⁰ If smaller beef operators (less than 800 AU) cannot avoid these requirements, the rule may not be economically achievable for this industry either. According to EPA, 99.8% of operations have fewer than 800 AU.¹¹ It can't be achievable for the industry if it is unachievable for a segment that includes virtually 100% of operations in that industry. The following table compares the cost per dollar of sales for EPA model farms for beef operations based on EPA data, first under an assumption that the operator will have to meet the requirements (category 1) and then under one where most will be able to avoid these requirements (category 2). All costs are post-tax dollars and incremental to the cost of the proposal without ground-water requirements.

Table 2. Economic Achievability of Ground-Water Requirements for Beef Farms

		Cost/Sales*	
Head	Region	Category 1	Category 2
777	Midwest	7.2%	1.8%
777	Central	7.7%	1.1%
455	Midwest	9.1%	2.2%
455	Central	9.8%	1.3%

Source: EPA, Economic Analysis, <http://www.epa.gov/ost/guide/cafo/index.html>.

*For the post-tax cost of compliance, on a per-head basis, by ELG option, see Appendix A.3 of the Economic Analysis. Costs in category 1 represent the difference (in cost) between ELG options 2 and 3A; category 2, the difference between options 2 and 3. Revenues, also on a per-head basis, are in Table 8-12 of the Economic Analysis. These farms have sufficient land to apply its manure.

The table shows that, by EPA's criteria, the cost for the intermediate category of beef operations just to meet ground-water requirements is just barely achievable, if at all.¹² These are criteria that industry associations such as the National Cattleman's Beef Association have argued are too stringent. It is important to emphasize that this does not include costs to meet other requirements. For example, these farms are assumed to have adequate land to apply their manure and thus will not incur the cost of transporting the manure off-site, a major cost of the proposal. If this provision is barely achievable without all of the other requirements, the rule will likely not be achievable when those costs are included.

¹⁰ See EPA's Economic Analysis at <http://www.epa.gov/ost/guide/cafo/index.html>. In Section 8.3.1, EPA states "[w]hen option 3 costs are considered without the 3A component . . . , the costs per animal are generally within ranges that have been deemed affordable"

¹¹ *Id.*, Table 8-12.

¹² The rule would not be achievable for an operation by EPA standards if the annual cost of compliance divided by annual revenue (cost/sales) exceeds 10% or if cost/sales is between 3% and 10% and there is an unfavorable cash flow or debt-to-asset ratio. While Table 2 does not show that any of the model farms considered would experience cost/sales exceeding 10%, we were not able to determine if cash flow and debt/assets for these farms were unfavorable.

Further, these costs to small businesses could be disproportionate. We would not expect the compliance costs to vary much across systems but the same cost per AU could be significantly higher for an operation with a few hundred animal units than for one with thousands. Theoretically, an assessment that costs \$20,000 will cost a 100 AU operation \$200 per AU, whereas it will cost a 1000 AU operation \$20 per AU. The following table, based on EPA’s data, shows this to be true. Cost per pound-equivalent reduced generally increases as the size of the operation (in AU) declines.

Table 3. Cost Effectiveness of Ground Water Requirements for Beef Farms

A	B	C	D
Farm Size	Incremental Cost (\$millions)	Incremental Reduction (millions of pounds)	Cost/Pound (B/C)
1,000 +	\$ 78.4	1.6	\$ 49.0
500 - 1,000	\$ 9.5	0.1	\$ 118.8
Total	\$ 87.9	1.7	\$ 52.3

Source: EPA.

The table also raises concerns that the benefits of the ground-water provision do not justify the benefits. It appears that to arrive at its estimates of pounds reduced, EPA had to assume that 100% of operations will discharge to ground water and every ounce of nutrient in these discharges will reach surface water undiminished.¹³ Even if an operation discharges to ground water, that doesn’t necessarily mean the discharge will ever reach a surface water body. The nearest body could be miles away from the operation and/or the slope of the land or the composition of soil in between could be such that no polluted ground water will ever reach that body. The manure in the production area may not even reach the aquifer beneath it, because of considerable depth to groundwater. As noted above, EPA estimates that 24% of operations will have a direct link to surface water. This means that the other 76% will not be located in areas where a discharge to surface water via ground water is likely, most likely due to slope, soil composition, water table depth, or proximity to surface water.

Additionally, we would not expect that small businesses will discharge to ground water. All else being equal, the operation with fewer animals per acre will pose a lesser threat to groundwater contamination than one with more per acre. Also, we heard from small entity representatives during the panel that operators of small operations have an incentive to be good stewards since they will have to drink from the ground water they pollute. For many reasons, the Panel recommended that EPA consider streamlining requirements for small businesses or exempting them altogether. We recommend that, in light of the forgoing, that EPA return to the recommendation and exempt small entities.

At minimum, EPA should adopt a more reasonable approach. For operations not described above,¹⁴ EPA gives the permitting authority discretion to decide if and when a ground-water provision is necessary. This approach would provide flexibility to small

¹³ See Section 12.3 of the Development Document.

¹⁴ See paragraph 1 of this section.

businesses. Only where there are site-specific circumstances conducive to surface-water discharge via groundwater will an operation have to meet ground-water requirements. It would also give the discretion to the permitting authorities, which are better positioned to determine where groundwater protection is needed and can tailor a provision to site-specific circumstances. Finally, this alternative approach would be more consistent with EPA's interpretation of its obligations under the Act.¹⁵ EPA should delete the ground-water provision. However, if it does not, EPA should provide permitting authorities with maximum discretion to decide if, when and what ground-water protection is necessary.

4. EPA Should Delete Zero Discharge Standards At Least for Swine operations

EPA proposes to prohibit any overflow from the production areas of swine and poultry operations to waters of the U.S. However, the Clean Water Act requires that EPA eliminate discharges of certain pollutants only if such elimination is technologically and economically achievable.¹⁶ Massey et al. (2001) raises questions about the technological feasibility for swine owners/operators of complying with a "zero discharge" standard.¹⁷ Even so, there are technologies that could meet the standard. The question is whether these technologies are economically achievable.

Massey et al. noted that existing systems could meet a zero discharge standard if the animals are confined under a roof and manure is collected and stored under the roof. If the system has an anaerobic lagoon, the owner or operator will have to either cover the lagoon or convert to a slurry storage tank and cover the tank, whichever is less expensive.¹⁸ If the same owner or operator does not have at least a partially enclosed building for the animals, he or she will have to build one. Either way, if the least expensive option is not affordable, the operation will likely have to exit the market.

The following table, based on the Massey analysis, demonstrates that 50% of farms could fall into EPA's Financial Stress 3 category (cost/sales exceeds 10%) and an additional 33% could fall into EPA's Financial Stress 2 category (cost/sales between 3% and 10% and unfavorable cash flow and debt-to-asset ratio). The farms included in the Massey et al. study were selected to be representative of production in three major swine producing states, one to represent arid regions (OK), one for balanced regions (MO), and one for wet regions (NC).¹⁹ Costs are incremental to the baseline, which includes manure land application and nutrient management planning. At least for the farms in the sample, these controls do not appear to be achievable.

¹⁵ EPA believes it has the authority to regulate ground-water discharges "when it is reasonably likely that such discharges will reach surface waters" (NPRM at 3018). It cannot be reasonably likely that every operation will discharge to surface waters via ground water if EPA estimates that just 24% of operations would be in an area where there is likely to be a hydrologic connection.

¹⁶ See 33 USC § 1311(b)(2)(A).

¹⁷ Massey, Raymond, et al. "Economic Viability of U.S. Swine Farms Implementing Water Quality Best Available Technologies," a report to the National Pork Producers' Council (NPPC), July 20, 2001. See <http://agebb.missouri.edu/commag/news/frindex.htm>.

¹⁸ This assumes that covering a lagoon is technologically feasible, although Massey et al. identify several apparently serious challenges associated with applying this technology.

¹⁹ Email communication with Raymond Massey, received July 26, 2001.

Table 4. Economic Feasibility of Cover or Tank

Farm	Least-Cost Alternative	Cost/Sale
MO-4	Convert to Tank	5.0%
MO-6	Convert to Tank	4.2%
NC-1	Cover Lagoon	52.0%
NC-4	Convert to Tank	2.6%
OK-1	Cover Lagoon	18.5%
OK-8	Convert to Tank	70.0%

Source: Massey et al. (2001).

If in addition, the operator has to build a structure for the animals or if the manure application and nutrient management planning were not baseline conditions, results could be even worse. If, however, the owner operator had only to build a structure, there would still be questions about economic achievability. Based on EPA’s information, the least-cost option among enclosures for these operations appears to be a hoop structure. Based on EPA estimates, the fixed cost per swine animal unit would be \$270.²⁰ Results for Massey model farms are presented in the following table.

Table 5. Economic Feasibility of Hoop Structure

Farm	Animal Units	Annual Cost*	Annual Sales	Cost/Sale
MO-4	818	\$35,944	\$ 1,110,689	3.2%
MO-6	3200	\$140,612	\$ 2,786,611	5.0%
NC-1	304	\$13,358	\$ 67,075	19.9%
NC-4	844	\$37,086	\$ 1,019,564	3.6%
OK-1	200	\$8,788	\$ 337,201	2.6%
OK-8	600	\$26,365	\$ 131,745	20.0%

Source: Based on Massey et al. (2001).

*Annual costs associated with a hoop structure are calculated by multiplying the cost per animal unit (\$270) by animal units and amortizing the result using a 10% discount rate over 10 years.

Based on the above assumptions, 33% of farms would fall into Stress Category 3 and an additional 50% could fall in Stress Category 2, depending on cash flow or debt-to-asset ratio. For these operations and the larger universe they represent, hoop structures are not achievable.

²⁰ On p. 93 of EPA’s Cost Methodology for Swine and Poultry Sectors, EPA provides costs associated with hoop structures on a per-animal basis, including construction, feed, equipment, repairs and labor. The document can be found at <http://www.epa.gov/ost/guide/cafo/index.html>. For simplicity, we assume that these are all one-time costs (which is conservative) and convert EPA’s estimate of cost/animal to its animal-unit equivalent (cost/animal x animals/animal unit = cost/animal unit). With fixed costs of approximately \$108 and 2.5 animals per animal unit, cost/animal unit would be \$270.

This raises questions about the economic achievability of a no discharge standard for three major pork-producing states. For this reason, we recommend that EPA delete the zero discharge standards for the swine industry. If EPA is concerned that a 25-year, 24-hour storm design standard does not provide adequate protection, then EPA should consider a different standard that provides greater protection (e.g., a 50-year, 24-hour storm design standard).

We may also have concerns about a zero discharge standard for the poultry sector, but we will have to reserve judgement until information, under development to evaluate feasibility for this sector, becomes available. However, we plan to take a hard look at this question, as the benefits associated with such a standard are questionable (poultry manure tends to be dry and thus not subject to discharge), but the cost per sale could be high (broilers tend to generate less revenue than other affected sectors).

5. EPA Should Delete the Co-Permitting Requirements

In the proposal, EPA requires that the integrators and the growers take joint responsibility for manure disposition on the legal theory that the integrator exercises substantial operational control over the grower. This is based on two cases that indicate that liability under the CWA can be predicated on either performance of the work or responsibility for or control over the work.

However, ownership of the animal or specification of how the animals are raised, fed or medicated is unlikely the type of control contemplated by the statute or the case law cited by EPA. Indeed, in franchise law, the specification of the type of food served, or the provision of foodstuffs by the franchiser, does not mean that the franchiser is exercising control over the franchisee, nor is the franchiser liable for the misdeeds of the franchisee. Similarly, the analogy can be drawn that neither the ownership of the animal nor the specification of animal feed would constitute “responsibility” over the facility.

Additionally, SBA has found that a processor does not have the power to control its contract grower if, under the contract, the grower retains the ability to vary inputs to production and can profit accordingly,²¹ which is common among grower-processor contracts in this industry. The Administration should speak with one voice, but it cannot if one Federal agency finds substantial control while another finds no control, and there is no reason to treat these entities differently.²² At minimum, EPA should be speaking with a single voice but at this writing, it does not.²³

²¹ Kohler, David. Memorandum to W.B. Grace, “Affiliation Issue Relative to Chicken Producers Under Contract: Loan Applicant Wheatley Farms,” April 22, 1993.

²² SBA defines “affiliation” at 13 CFR §121.103, for purposes of determining eligibility for SBA programs. In a sense, EPA is also determining eligibility for an EPA program.

²³ EPA proposed an Effluent Guideline for the Metal Products and Machinery (MP&M) category January 3, 2001. See 66 Fed. Reg. 423. It is common in this industry for metal finishers and job shops to enter into a contractual relationship analogous to the one between grower and processor. One entity, which owns the metal, provides it to another to finish the metal according to certain product specifications. Yet, EPA is not considering co-permitting these entities.

We also question whether there will be any significant benefits to the environment from co-permitting. EPA believes that environmental benefits will result if, in order to avoid liability, processors provide growers with resources to install better environmental controls. However, small entity representatives have pointed out that, in the past, when processors have had an opportunity to provide those resources, processors have assumed no liability for manure disposition and instead shifted all of the costs to the grower.²⁴

Co-permitting will not alter the fundamental market relationship between growers and processors. On average, there are 42 growers for every processor.²⁵ As long as the processor is able to find growers with adequate environmental controls, which is likely, at least according to EPA,²⁶ the processor will continue to shift the costs to the grower. And because co-permitting will not change the market relationship, the distribution of costs is not likely to change.

It is more likely that co-permitting will provide an additional layer of oversight. Whether this will lead to environmental benefits is questionable.²⁷ On the other hand, the processor is more likely to interfere in the grower's production. The cost to the processor of interference is low, since the processor will likely be able to pass on any costs. At the same time, the processor will share the benefit since the permitting authority will be less likely to bring enforcement actions. Thus, there will probably be costs to the grower, while the benefits to the environment will be less certain.

Therefore, Advocacy recommends that EPA delete the co-permitting provision. If not, EPA should adopt the approach developed by the panel, in which responsibilities are allocated between the two parties such that only one entity is responsible for compliance with any given permit requirement. Under this approach, a permit writer would have the flexibility to determine the appropriate locus of responsibility for each permit component.

The small entity representatives did support placing a shared responsibility for the manure on processors, and processors do have some control over the nutrient content of manure. Further, it is conceivable that in some instances, it could be less expensive for the grower to pay the processor to change the content of the feed or medicine it provides (to reduce the manure's nutrient content) than to upgrade the manure disposal system. If EPA insists on co-permitting these entities, it should adopt a more reasonable approach.

* * * * *

²⁴ See Section 8.4.8 of the Panel report.

²⁵ Table 2-8 of the Development Document includes an estimate of the total number of poultry farms with production contracts (23,379). Section 2.4.1.1 of the Economic Analysis includes an estimate of total processors (558). The average is approximately 42 (23379/558).

²⁶ EPA has indicated that a substantial fraction of the growers are already complying with many of the proposal's requirements. For example, 30% already have adequate storage. See Appendix D of EPA's Cost Methodology for Swine and Poultry Sectors.

²⁷ For example, the processor might insist that its growers adopt cost-ineffective controls.

In conclusion, Advocacy has substantial concerns with this proposal. We look forward to substantial and substantive discussions with EPA on these and other important issues.

Thank you for your attention to this important matter. Please do not hesitate to contact my staff person working on this issue, Austin Perez, if you have any questions. He can be reached at 202-205-6936.

Sincerely,

/s/Shawne Carter McGibbon
for Susan Walthall

Susan M. Walthall
Chief Counsel for Advocacy

/s/Austin Perez

Austin R. Perez
Assistant Advocate for Environment

cc: Tom Kelly, EPA
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