Sources Documenting Scientific Consensus
For Multi-Media Approach to Livestock Emissions

There is a clear scientific consensus that air and water emissions from livestock operations are inextricably linked, that analysis of the farm system's nutrient mass balance is necessary to effectively understand these emissions, and that regulation of one alone can increase adverse emissions of the other.

1. USDA/Economic Research Service: Aillery, Marcel, et al. September 2005. *Managing Manure to Improve Air and Water Quality*, Economic Research Report Number 9. USDA, Economic Research Service. http://www.ers.usda.gov/Publications/ERR9/
2. National Academy of Science:
   a. National Research Council. 2002. *The Scientific Basis for Estimating Air Emissions from Animal Feeding Operations*. National Academies Press, Washington, DC. http://www.nap.edu/catalog.php?record_id=10391
   b. National Research Council. 2003. *Air Emissions from Animal Feeding Operations: Current Knowledge, Future Needs*. National Academies Press, Washington, DC. http://books.nap.edu/catalog.php?record_id=10586
3. Environmental Protection Agency:
   a. EPA-funded mass balance analysis recognizes identity of air and water emission sources: http://www.epa.gov/agstar/pdf/nydairy2003.pdf
   b. EPA overview of biogas digesters identifies air and water benefits: http://www.epa.gov/agstar/pdf/manage.pdf
   c. EPA review of environmental impacts of AFO's identifies manure as source of both air and water emissions: http://www.epa.gov/agriculture/ag101/impacts.html
   d. EPA's proposed rule (72 FR 26585) requested comment on cross-media approaches.
4. National Air Emissions Study: Ongoing study funded with $14.8 million from livestock, and EPA's involvement, plus $1 million for dairy mass balance: http://cobweb.ecn.purdue.edu/~odor/NAEMS/index.htm

June 11, 2007

Water Docket
Environmental Protection Agency
Mail code 2822T
1200 Pennsylvania Ave., NW.
Washington, DC 20460
Attention Docket ID No. OW– 2005–0036.

SUBJECT: Proposed Revised Compliance Dates under the National Pollutant Discharge Elimination System Permit Regulations and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, Docket # EPA–HQ–OW–2005–0036; FRL–8311–4.

The National Council of Farmer Cooperatives ("NCFC"), the National Milk Producers Federation ("NMPF") and member dairy and livestock cooperatives write to comment on the proposed revised compliance dates under the National Pollutant Discharge Elimination System Permit Regulations ("NPDES") and Effluent Limitations Guidelines and Standards ("ELG") for Concentrated Animal Feeding Operations ("CAFO"), 72 Fed. Reg. 90, 26582-26587 (May 10, 2007). The NCFC, NMPF and our members consider the extra time provided under this proposal to be essential if dairy and livestock producers are to proceed with proper and successful compliance to the broader pending CAFO rule provisions. We also continue to encourage EPA to consider the synchronization of the Clean Water and Clean Air rules for CAFOs.

The National Council of Farmer Cooperatives

The National Council of Farmer Cooperatives (NCFC) is the national trade association representing the nearly 3,000 farm cooperatives across the United States whose members include a majority of our nation's more than 2 million farmers. These farmer cooperatives work to meet the food, feed, fuel and fiber needs of consumers at home and abroad. Additionally, their business structure enables farmers to improve their income from the marketplace and capitalize on new market opportunities.

The National Milk Producers Federation

The National Milk Producers Federation, based in Arlington, VA, develops and carries out policies that advance the well being of dairy producers and the cooperatives they own. The members of NMPF's 32 cooperatives produce the majority of the U.S. milk supply, making NMPF the voice of nearly 50,000 dairy producers on Capitol Hill and with government agencies

Background

On May 10, 2007, EPA proposed to extend the date by which operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date, must seek NPDES permit coverage, from July 31, 2007, to February 27, 2009. EPA is also proposing to amend the date by which operations that become defined as CAFOs after

April 14, 2003, due to operational changes that would not have made them a CAFO prior to April 14, 2003, and that are not new sources, must seek NPDES permit coverage, from July 31, 2007, to February 27, 2009. Finally, EPA is proposing to extend the deadline by which permitted CAFOs are required to develop and implement nutrient management plans ("NMPs"), from July 31, 2007, to February 27, 2009. 72 Fed. Reg. 90, 26587 (May 10, 2007).

EPA has proposed the changes in the deadlines to address timing issues associated with the finalization and implementation of the broader CAFO rulemaking that was issued in proposed form on June 29, 2006. These latter changes were made necessary by litigation that invalidated several key provisions of the 2003 CAFO rule. *See Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2d. Cir. 2005). EPA has indicated its intention to finalize this broader CAFO rulemaking sometime in the last half of 2007.

One key element of the *Waterkeeper* decision was the court's ruling that the Clean Water Act (CWA) does not authorize EPA to require a CAFO to obtain NPDES permit coverage simply on the basis of that CAFO having a "potential" to discharge. The Court explicitly ruled that the CWA authorizes the regulation of *actual* discharges of pollutants to navigable waters – not potential discharges and not point sources themselves.

The July 31, 2007 Deadline

In its proposal, EPA indicated more time was needed to finalize the broader CAFO rule and to allow sufficient time for CAFOs to come into compliance. We agree. The July 31, 2007 deadline simply failed to offer CAFOs sufficient time to decide if they needed to apply for a general permit and to decide what they must do to meet the NMP requirements and to prepare an appropriate NMP.

While NCFC and NMPF concur with the proposed extension of the compliance deadlines, we believe that they should be extended further. Specifically, we believe they should be extended for all parties to at least 3 years after the effective final rule is published.

The proposed rule issued June 30, 2006, in response to the *Waterkeeper* decision makes substantive changes, and its request for consideration of cross-media effects bodes further changes in the forthcoming final rule. (71 FR 6978) In fact, NCFC and NMPF continue to advocate synchronization of the Clean Water rule with a Clean Air rule. We believe this cross-media approach would be the most cost-effective means of achieving environmental benefits, as outlined in NMPF's comments to the June 30, 2006, rule.

Barring that, we urge EPA to follow the logic of the 2003 final rule, as outlined in the current proposed rule, and allow at least three full years for compliance from the issuance of the forthcoming final rule. To do otherwise would force states and agriculture into premature and speculative compliance with an unknown rule.

As noted in this proposed rule, the final rule issued in February 2003 allowed for 3 full years and more for full compliance:

> "EPA reasoned in the [February] 2003 CAFO rule, and reiterated in the 2006 date change rule, that allowing newly regulated entities three years to come into compliance was consistent with Congressional intent, as expressed in the 1972 Clean Water Act with respect to newly established point sources. Moreover, the Agency stated that the three year timeframe was necessary for States authorized to administer the NPDES permit program to provide permit coverage for CAFOs that were not previously required to be permitted and to revise State regulatory programs....
>
> "In addition to the requirements to seek permit coverage, the 2003 CAFO rule also required all permitted CAFOs to develop and implement NMPs by December 31, 2006. EPA believed that this date was reasonable given that operations would have had a little over three and a half years from the issuance of the 2003 rule to develop and implement an NMP. This timeframe allowed States to update their NPDES programs and issue permits to reflect the NMP requirements of the 2003 CAFO rule. It also provided flexibility for permitting authorities to establish permit schedules based on specific circumstances, including prioritization of nutrient management plan development and implementation based on site-specific water quality risks and the available infrastructure for development of NMPs." (72 FR 26585)

We support this logic, and strongly recommend that at least three full years should be allowed for compliance from the issuance of the forthcoming final rule. In the context of substantive changes that are unknown to the states and to farmers before the final rule is issued, a compliance deadline of less than 3 years from the date of the final decision does not follow this logic.

The proposed deadlines would require both the states and farmers to act prospectively in response to a rule whose particulars they do not yet know. It would be speculation for the states and industry to take steps to comply with an unknown rule, when such compliance may be rendered obsolete by the final rule.

Even apparently small differences between the proposed and final rules can have very large impacts on individual farmers. Farms could spend large amounts of money to comply in good faith with an anticipated rule, and then be compelled by the final rule to duplicate much of that spending to address a "minor" requirement not reflected in the proposed rule. In many cases, such unnecessary spending can break a farm.

We believe this proposed rule is a useful and necessary first step toward updating compliance deadlines in light of substantial 2006 revisions of the 2003 rule. However, we urge EPA to more fully reconsider these deadlines, just as EPA – potentially, if not actually – is reconsidering the 2003 rule more fully.

In summary, we request EPA to provide at least the originally intended three years from the final rule to comply. We believe that only after the final CAFO rule is completed will dairy and livestock producers be able to make a sound and effective evaluation of all the factors that will come into play to determine whether they need a CAFO permit and what exactly should be included in their NMPs if they are to do so. This proposed

change to the deadline will give CAFOs the necessary additional time to go through this process, and given the complexity and importance of the decisions involved and the resulting business implications for these CAFOs, this added time is more than justified.

Our organizations appreciate the opportunity to provide you with these comments.

Sincerely,

National Council of Farmer Cooperatives
Texas Agricultural Cooperative Council
Land O'Lakes, Inc.
Texas Association of Dairymen
Equity Cooperative Livestock Sales Assn.
Dairylea Cooperative, Inc.
Northwest Dairy Association
National Livestock Producers Association
Kansas Cooperative Council
United Producers, Inc.
St. Albans Cooperative Creamery, Inc.
Agricultural Cooperative Council of Oregon
California Dairies, Inc.
South East Dairy Farmers Association
National Milk Producers Federation
Dairy Farmers of America
Foremost Farms USA
Idaho Dairymen's Association
Nebraska Cooperative Council
Southeast Milk, Inc.
Upstate Niagara Cooperative, Inc.
Northeast Dairy Producers Association
Wisconsin Federation of Cooperatives
Minnesota Association of Cooperatives
Michigan Milk Producers Association
Associated Milk Producers, Inc.
Western United Dairymen
Producers Livestock
Maryland & Virginia Milk Producers Cooperative Association, Inc.
Washington State Council of Farmer Cooperatives

National Milk Producers Federation

National Milk Producers Federation • 2101 Wilson Blvd., Arlington, VA 22201 • 703-243-6111 FAX 703-841-9328

August 29, 2006

Docket ID No. EPA-HQ-OW-2005-0037
Environmental Protection Agency
Water Docket, Mail code: 4203M
1200 Pennsylvania Ave., NW
Washington, DC 20460
Via Email: ow-docket@epa.gov

Re: Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to Waterkeeper Decision (Docket No. EPA-HQ-OW-2005-0037).

To Whom It May Concern:

The National Milk Producers Federation (NMPF) submits the following comments to the Environmental Protection Agency's (EPA's) proposed rule: Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to Waterkeeper Decision published in the *Federal Register* on June 30, 2006[1]. The National Milk Producers Federation, based in Arlington, VA, develops and carries out programs and policies that advance the well-being of U.S. dairy producers and the cooperatives they collectively own. The members of NMPF's 33 cooperatives produce the majority of the U.S. milk supply, making NMPF the voice of nearly 50,000 dairy producers on Capitol Hill and with government agencies.

As stewards of our nation's land, water, and air resources, NMPF's dairy producer members welcome EPA's efforts to protect public health and the environment through the Clean Water Act. Dairy producers around the country devote significant time and resources to environmental stewardship through both voluntary programs and compliance with Federal and State regulations. NMPF has carefully reviewed the proposed revisions to the National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations and offers the following comments.

[1] Docket No. EPA-HQ-OW-2005-0037

GENERAL COMMENTS

Duty to Apply for a Permit

In general, NMPF believes that the EPA proposal has captured the intention of the *Waterkeeper Alliance et al.* v. *EPA*[2] decision (**Waterkeeper Decision**). As the "duty to apply" requirement was rightly ruled invalid as the Clean Water Act subjects only actual discharges to permitting requirements, the change to require only CAFOs that "discharge or propose to discharge" to seek coverage under a NPDES permit is appropriate.

Best Control Technology for Pathogens

NMPF also concurs with EPA that the BCT-based Effluent Limitation Guidelines adopted in the 2003 CAFO rule do in fact represent the best conventional pollutant control technology for removal of pathogens.

Compliance Deadlines

As these proposed revisions will likely not be finalized for several months after the comment deadline, NMPF anticipates that dairy producers who must seek NPDES permit coverage and develop and implement nutrient management plans by July 31, 2007 may be unable to do so due to logistical reasons. NMPF believes that sufficient technical assistance does not exist to complete NPDES permitting applications and development and implementation of nutrient management plans for EPA's estimated 14,100 CAFOs by July 31, 2007. In our understanding of the nutrient management plan process and EPA's intention to have each individual nutrient management plan subject to a public hearing, NMPF has doubts that EPA and State-designated regulatory agencies will have sufficient time to conduct 14,100 such public hearings prior to July 31, 2007. Many dairy producers subject to NPDES permitting will be unable to implement their nutrient management plans prior to July 31, 2007 because of the delay in approval by EPA and State-designated regulatory agencies.

Cross Media Approaches

EPA requested comment on a cross media approach to address a combination of environmental quality issues. NMPF urges EPA to examine the potential for a coordinated Clean Water Act and Clean Air Act regulatory proposal for CAFOs. Such an approach would substantially reduce the costs of compliance and improve overall environmental quality.[3] In a study funded by EPA, the National Academy of Sciences[4] found that "EPA regulations aimed at improving water quality may affect rates and distributions of air emissions from animal feeding operations." Additionally, the National Academy of Sciences[5] proposed "research on how to integrate regulatory and management programs to decrease air emissions with other environmental (i.e.

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[2] 399 F.3d 486 (2nd Cir. 2005)

[3] Finding *in* Aillery, Marcel, et al. September 2005. *Managing Manure to Improve Air and Water Quality*, Economic Research Report Number 9. USDA, Economic Research Service.

[4] Finding 1 *in* National Research Council. 2002. The Scientific Basis for Estimating Air Emissions from Animal Feeding Operations. National Academies Press, Washington, DC.

[5] Page 166 *in* National Research Council. 2003. Air Emissions from Animal Feeding Operations: Current Knowledge, Future Needs. National Academies Press, Washington, DC.

water quality)" programs. To that end, the dairy industry has committed $6 million in research funding for the National Air Emissions Monitoring Study as part of the EPA Consent Agreement. NMPF encourages EPA to pursue a coordinated cross media rulemaking process as elucidated later in these comments.

SPECIFIC COMMENTS

III. The Proposal
A. Duty to Apply for a Permit
3. This Proposal
(a) Requirement That All CAFOs with a Discharge Seek Permit Coverage

In accordance with the Waterkeeper Decision, EPA has proposed to replace the "duty to apply" requirement with the requirement that all CAFOs that "discharge or propose to discharge" seek coverage under a NPDES permit. NMPF supports this proposed revision as it is consistent with the Waterkeeper Decision. This proposed change will more accurately require all dairy CAFOs that discharge or propose to discharge to obtain a permit. By eliminating the "duty to apply" requirement, certain CAFOs that do not discharge or do not plan to discharge will not need to obtain a NPDES permit such as those in very arid regions that may never have any discharge. This could reduce the burden on the dairy industry by reducing the number of dairy operations that will need to seek NPDES permits.

EPA lists four considerations for CAFOs to take into consideration when determining if they should seek a permit. NMPF sees these as logical considerations for an individual CAFO to determine if they may require a NPDES permit; however, NMPF affirms that these are **guidelines** and not requirements by which a CAFO must obtain a permit. Consistent with the Waterkeeper Decision, the only requirement for a CAFO to obtain a NPDES permit are CAFOs that "discharge or propose to discharge" to waters of the U.S. These guidelines must not be used as an affront to the Waterkeeper Decision to circumvent the "duty to apply" provision which the court vacated by requiring CAFOs to apply for a NPDES permit if any of the guidelines apply to their specific operation. EPA must remain steadfast to the Waterkeeper Decision and only require CAFOs which "discharge or propose to discharge" to obtain NPDES permits.

(b) ``No Potential to Discharge'' Determination

NMPF concurs with EPA that this provision can be deleted. Such a designation would be irrelevant because the proposed rule requires only those CAFOs that discharge or propose to discharge to seek coverage under a permit.

(c) Agriculture Stormwater

EPA has proposed to require Large CAFOs, which are not permitted because they do not "discharge or propose to discharge", to comply with the technical standards for land application established by the Director (in addition to meeting the requirements of 40 CFR 122.42(e)(1)(vi-ix)) in order for runoff from their fields to be considered agricultural stormwater. NMPF believes that a Nutrient Management Plan (**NMP**) is a

prudent measure by any dairy operation, regardless of size, to maintain environmental stewardship.

EPA has broad authority, under Section 308 of the Clean Water Act, to seek any information necessary to show compliance with the Clean Water Act for point sources. NMPF can understand EPA's desire to ensure that large CAFOs, which are not permitted because they do not "discharge or propose to discharge," conform to standards to meet the agricultural stormwater runoff exemption. An NMP could be one way to determine such an exemption. However, NMPF strongly recommends that EPA only request and not require Large CAFOs to adhere to the technical standards for land application. Large CAFOs should be offered the flexibility to choose an appropriate measure for their individual operation to demonstrate agricultural stormwater runoff exemption in the case of a discharge resulting from a weather-related incident. Additionally, NMPF proposes that EPA only recommend and not require this same adherence for Medium and Small CAFOs. Requiring CAFOs to prove the agriculture stormwater exemption was not a result from the Waterkeeper Decision and therefore EPA should not include this as a requirement in the final rule.

NMPF questions if EPA has correctly interpreted the Waterkeeper Decision to vacate the "duty to apply" provision. NMPF suggests from the Waterkeeper Decision that those animal feeding operations which do not discharge or propose to discharge are not CAFOs, and therefore the definition of a CAFO needs to be clarified to only apply to animal feeding operations which "discharge or propose to discharge". Under Section 502(14) of the Clean Water Act CAFOs are designated as point sources, however, what defines a CAFO is not codified anywhere in the Clean Water Act. Rather, a CAFO is a regulatory definition proposed by EPA. If the Waterkeeper Decision was not an indication to EPA to reexamine the definition of a CAFO, NMPF wants to be assured that compliance costs for Large CAFOs which are not permitted, but nonetheless must meet EPA's technical guidelines are included in the cost-benefit analysis for the proposed rule. NMPF is unable to discern if these costs have been considered.

B. Nutrient Management Plans
3. This proposal
(a) CAFO Permit Application or Notice of Intent Requirements for Nutrient Management Plans
EPA has proposed to revise 40 CFR 122.21(i)(1)(x) to require the applicant to submit, as part of its permit application or notice of intent (NOI), an NMP developed in accordance with the provisions of 40 CFR 122.42(e)(1) and 40 CFR 412.4(c)(1). NMPF does not object to this proposed change as it addresses the Waterkeeper Decision.

(b) Procedures for Permitting Authority Review
NMPF believes that the procedures outlined by EPA in the proposal for permitting review of NMPs satisfies the Waterkeeper Decision. NMPF is also supportive of the draft template form, but only as a voluntary tool for producers. In the development of

NMPs, we anticipate that producers will use a variety of service providers (i.e. NRCS, Land Grant Universities, State Departments of Agriculture, third-party vendors, etc.) which may have their own templates (developed over years) which may differ from EPA's template.

NMPF seeks guidance and clarity from EPA on the application of Confidential Business Information (**CBI**) within NMPs. Some dairy producers may consider certain information included in their proprietary NMPs to conform to CBI requirements and thus may be excluded from documentation provided for public participation. For example, a dairy farm may develop a manure remediation technology to alter nutrient content of slurry for field application. While this technology may be important as part of the operations proprietary NMP, disclosure as part of the NMP for public participation could release trade secrets – NMPF would envision this to qualify as CBI and not be subject to inclusion in the NMP for public participation. NMPF does not see this as being an isolated issue, but rather common as dairy producers and technology providers seek new methods of manure remediation.

NMPF also has concerns about the items in a proprietary NMP that could pose a security risk if released as part of the documentation provided for public participation. For example, the inclusion of a topographical map for land application, or a schematic of building layout may be appropriate for inclusion a proprietary NMP that could pose a security risk if included in the documentation provided in the public review process. "The potential of terrorist attacks against agricultural targets (agroterrorism) is increasingly recognized as a national security threat."[6] These maps and building schematics would provide an easy opportunity for domestic animal rights terrorists or non-domestic agro-terrorists to obtain information to use in an agro-terrorism activity. The Homeland Security Presidential Directive 9 (HSPD-9), "Defense of United States Agriculture and Food", recognizing a real threat to agricultural production, established a national policy to protect against terrorist attacks on agriculture and food systems.[7] NMPF recommends that EPA clarify, through consultation with the Department of Homeland Security, which elements of a proprietary NMP should be restricted from the documentation provided for public participation because of agro-terrorism threats.

(c) Procedures for Public Participation Prior to Permit Coverage
Permitting Authority discretion for public notification in general permit context
EPA has proposed several methods to allow the permitting authority discretion as to how to best provide information to the public. NMPF supports EPA's suggested proposal to notify the public on the permitting authority's webpage or by other electronic means. This means of communication would likely be the most efficient method of notifying the public allowing the permitting authority to publish new information in a timely manner. Email and postal mail notifications could be subject to non-delivery issues, such as SPAM filters in the case of email and changes of

[6] Page 1 *in* Monke, Jim. February 4, 2005. Agroterrorism: Threats and Preparedness. Congressional Research Service, The Library of Congress, Washington, DC.
[7] HSPD-9: http://www.whitehouse.gov/news/releases/2004/02/20040203-2.html.

address in the case of postal mail, which could result in the delay of permitting information becoming available to the public. Email and postal mail notification also is subject to the limitation of only persons whom opt-in receiving notification whereas posting on the permitting authority's website is a public forum where anyone could view the notification.

In the proposed rule, EPA would require the Director to establish an appropriate time frame for public review of a notice of intent (NOI) or a proposed permit as well as the NMP. NMPF supports EPA's proposal to give the Director the authority to establish such a minimum timeframe; however, NMPF recommends that EPA also require a maximum timeframe for the public to review a notice of intent NOI or a proposed permit and NMP. NMPF suggests a minimum timeframe of 15 days and a maximum of 30 days for public to review the notice of intent and request a public hearing. Implementing both a minimum and maximum timeframe will allow for appropriate public participation and ensure a timely permitting process for dairy producers.

Public participation in the general permitting process:
NMPF is supportive of EPA's effort to streamline the process for producers seeking coverage under a general permit. While the public participation is important in the permitting process, the process should enable producers to gain a permit in a timely manner. EPA must ensure that permitting authorities continue to use the NPDES general permit process for timely issuance of permits to dairy producers, and not allow indefinite delays under the guise of public comment.

(d) Incorporation of Nutrient Management Plans Terms in NPDES Permits
Under a general permit, the manner of incorporation of the NMP into the NPDES permit is paramount to permitting authorities' abilities to process CAFO permits in a timely manner. While NMPF can envision some NMP terms may be applicable to all dairy operations, flexibility in a NMP is vital to the successful integration of numerous on-farm practices to improve water quality. NMPF supports a process which allows for the most flexibility in developing NMPs tailored to individual dairy operations needs.

(e) Changes to Nutrient Management Plans
EPA has proposed a permit revision process to address changes to a NMP. Although NMPF is pleased that EPA recognizes NMPs are dynamic documents, we have reservations over the interpretation of what constitutes a major change to an NMP requiring a revision to a permit. We can envision scenarios where a minor on-farm change, such as changing animal diets (something that can occur monthly, weekly, or even daily based on a variety of factors), could be viewed as a change to an NMP requiring a permit revision. NMPF appreciates that EPA correctly recognizes that such changes should not be viewed as a major change to an NMP and thus would not require a change in the permit. With changes that are not significant, it would not be necessary to notify the public. NMPF hopes that EPA and permitting authorities will remain vigilant in ensuring that minor on-farm changes do not lead advocacy groups, who are opposed to modern dairy farming techniques, to request changes to NPDES

permits where the real goal is to hold public hearings and prevent dairy operations from providing milk to U.S. consumers.

NMPF believes EPA should allow the NMP to include flexibility for predicted changes that might occur on the operation. While this may lead to more initial work and cost for the dairy producer and for the permitting authority (which EPA should include in its Cost-Benefit Analysis), this may avoid problems with making changes to the NMP after the permit has been issued. NMPF hopes that EPA and permitting authorities will remember during the public participation process that this flexibility is necessary for the optimal environmental operation of dairy facilities. NMPF does not want permitting authorities to allow this flexibility in NMPs to be used by advocacy groups, who are opposed to modern dairy farming techniques, during the public participation process as a delay tactic in approving permits.

EPA has proposed a similar review process for already permitted CAFOs when changes have been made to NMPs as for those operations seeking initial permit coverage. While it may be necessary for the public participation to review and comment on the changes to the NMP, NMPF believes EPA must ensure that the public participation process will not act as a barrier to a timely review process.

Permitting Authority Burden

NMPF is concerned about the burden which may be placed upon permitting authorities by requiring changes to NMPs to be reviewed by permitting authorities including a public hearing process. Each additional review will place additional requirements on permitting authority for staff and budgetary resources. As expressed earlier, NMPF already has concerns about permitting authorities ability to conduct 14,100 such public hearings prior to July 31, 2007. This potential additional burden of thousands of public hearings could be problematic for permitting authorities. Such a burden should be considered in the EPA Cost-Benefit Analysis. NMPF believes that this burden could delay the review and approval of changes to NMPs.

EPA has proposed to allow the CAFO facility to proceed with implementing substantial changes to the NMP for up to 180 days before completion of public review process and permitting authority approval, as long as the change would not cause any increased runoff. NMPF supports this proposed provision as it will enable producers to implement changes to their operations in a timely manner that will likely result in improved environmental stewardship. NMPF does, however, have a concern with the procedural process of the permitting authority at the end of the 180 day implementation grace period. There is a fear that if a producer makes a change and that change is ultimately not accepted by the permitting authority at the end of the 180 days, the producer might face regulatory action by the permitting authority. NMPF encourages EPA to allow for a grace period for the producer to remedy those changes. NMPF recommends that language be added to clarify that should a producer implement a substantial change to their NMP that is ultimately denied by the permitting authority, the CAFO would be given adequate time to correct that change and would not be penalized for such a change.

Annual Reporting Requirements
EPA has proposed to provide greater flexibility for CAFO operators in making cropping decisions by modifying the annual report requirements for permitted CAFOs to submit information with the annual report indicating how the CAFO achieved substantive compliance with the terms of the NMP. NMPF supports this proposed approach to allow producers more flexibility with cropping options. Each year many areas of the country face severe weather conditions such as a severe drought or floods and as a result producers have to make alternations to their crop plans. In these circumstances, CAFOs may need to take certain deviations from their NMP. NMPF recommends that EPA include language which lists the types of cropping changes that would be allowed and what necessary records would need to be provided to the permitting authority in the annual report to prove the NMP requirements are met.

C. Remand Concerning Water Quality Based Effluent Limitations
NMPF concurs with EPA that water quality based effluent limitations (WQBEL) do not apply to the land application area because "where a CAFO follows these [NMP land application] practices, any and all precipitation-related discharges of manure, litter, or process wastewater that occur from land application fields would be covered by the agricultural stormwater exclusion and would thus be considered nonpoint source runoff."[8] This reaffirmation by EPA from the 2003 CAFO Rule[9] provides the necessary clarity sought by the Waterkeeper Decision. NMPF also concurs with EPA that the exclusion for agricultural stormwater runoff does apply to discharges from the production area.[10] In practice, NMPF believes that NMPs will incorporate standards for land application of manure which satisfy agricultural stormwater exemptions and that, unless permitted, discharges from the production area will be prevented through containment of runoff and diversion of clean water.

E. Remand Concerning Pathogens for BCT
NMPF concurs with EPA that the BCT-based ELGs adopted in the 2003 CAFO Rule do represent the best conventional pollutant control technology for removal of pathogens, including fecal coliform. Other technologies presented do not meet BCT cost-benefit tests.

V. Cross Media Approaches
EPA requested comment in pursuit of its desire to encourage "approaches that are superior from a cross media perspective." This reflects a welcome recognition that the Clean Water Act and its regulatory manifestations have consequences on other media, especially air, which should be fully accounted for in rulemaking and its cost-benefit analysis. In fact, recent USDA research demonstrates that substantial negative air quality impacts could result from the implementation of this rule with regard only to water quality impacts. NMPF encourages EPA to fully consider impacts on all media,

[8] 71 FR 37758
[9] 68 FR 7198
[10] 40 CFR 122.23(2)

and to implement the final rule in concert with the forthcoming Clean Air rule for livestock operations.

The development of this Clean Water rule has been slow for many reasons beyond the control of EPA. EPA and the livestock sector were new to one another. The drafting of the original proposed rule was very complicated, involving considerable new research and education on both sides. The rule's revision in the first "final" decision was very substantial, well-founded, and beneficial to industry and the public; it was also understandably long in coming. The resolution of the Waterkeeper Decision was similarly time-consuming, and introduced considerable uncertainty to the industry, before finally forcing additional revisions to the rule. For all its nearness to completion, there are still unresolved issues in the current proposed rule. We cannot anticipate a final rule until at least 2007, and producers are justifiably wary of making large infrastructure investments in compliance before they fully and definitively know what compliance entails. For this reason alone, as detailed in the general comments, compliance deadlines should be extended well beyond the publication of the final rule.

A report published recently by the USDA's Economic Research Service has demonstrated quite clearly that considerable inefficiencies will be imposed on livestock producers if separate water and air rules are enforced in sequence, and that considerable savings can be gained from issuing them simultaneously.[11] These researchers summarized their primary findings as follows:

- *Air and water quality regulations would be most cost effective if implemented simultaneously. This would allow farmers to select the most appropriate mix of practices that satisfy environmental quality goals while maximizing net returns. If environmental policies are uncoordinated, farmers may have to make costly changes to practices more than once before both environmental goals can be met.*[12]

The research looked at limited, but important, elements of potential water and air regulation: emissions of water-borne nitrate and air-borne ammonia. Since nitrogen emissions in the form of nitrates can be transformed instead into ammonia, producers minimizing their compliance costs under a water rule will follow the long-standing practice of increasing air-borne emissions of ammonia. When this is determined to be incompatible with air quality goals in a later air rule, their investment in compliance with the water rule may be largely lost. Per the report:

- *CAFO regulations and the hypothetical ammonia reduction regulations provide much different incentives to farmers, and so encourage different management practices. Furthermore, neither set of management practices is the most economical for addressing a joint policy where both water quality and ammonia*

[11] Finding *in* Aillery, Marcel, et al. September 2005. *Managing Manure to Improve Air and Water Quality*, Economic Research Report Number 9. USDA, Economic Research Service.
[12] Page iii *in* Aillery, Marcel, et al. September 2005. *Managing Manure to Improve Air and Water Quality*, Economic Research Report Number 9. USDA, Economic Research Service.

emission goals are set. Farms that adopt a set of practices to meet the CAFO water quality requirements might need to adopt a different set to meet both water and air requirements. The cost of changing practices could be avoided under a coordinated policy. A producer may even be reluctant to comply with new regulations for fear that the rules may change in the future.[13]

The evidence of the report is quite clear that the simultaneous regulation of air and water emissions would be much more efficient than "piecemeal" regulation.[14] It would also be more equitable, on its face. In another study, funded by EPA, the National Academy of Sciences[15] found that "EPA regulations aimed at improving water quality may affect rates and distributions of air emissions from animal feeding operations." Additionally, the National Academy of Sciences[16] proposed "research on how to integrate regulatory and management programs to decrease air emissions with other environmental (i.e. water quality)" programs.

EPA's Office of Air has sought data upon which to base efficacious and cost-effective clean air rules for livestock operations. The livestock industry is coordinating and funding substantial research to provide this data. The dairy industry is contributing $6 million directly to this effort, in addition to collective and individual producer participation in the research process.

This type of research recommended by the National Academy of Sciences will contribute to the development of better practices for managing manure for both air and water quality. It will also provide necessary data to evaluate the impact of the clean water rule on air quality. According to the ERS paper, compliance with a clean water rule can be expected to increase emissions of ammonia, for example. In this case, the negative impact of these air-borne emissions should be counted among the costs of the rule. As such, the cost-benefit studies upon which the rule is based are inadequate, and may be best re-evaluated with data derived through the clean air studies.

Given the interaction between air and water quality issues and given that this rule is already considerably delayed, NMPF urges EPA to coordinate this Clean Water rule for CAFO's with the forthcoming Clean Air rule for livestock operations, deferring the final rule until both media can be addressed simultaneously. This will produce regulation that is more effective, more cost-effective, and simpler to administer overall. USDA's research empirically demonstrates what economic intuition finds obvious: that issuing this Clean Water rule in concert with a Clean Air rule will reduce total compliance costs for the industry, the public, and EPA. Given the substantial delays EPA and livestock farmers have already experienced, it would be most cost-

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[13] Page 39 *in* Aillery, Marcel, et al. September 2005. *Managing Manure to Improve Air and Water Quality*, Economic Research Report Number 9. USDA, Economic Research Service.
[14] Page 21 *in* Aillery, Marcel, et al. September 2005. *Managing Manure to Improve Air and Water Quality*, Economic Research Report Number 9. USDA, Economic Research Service.
[15] Finding 1 *in* National Research Council. 2002. The Scientific Basis for Estimating Air Emissions from Animal Feeding Operations. National Academies Press, Washington, DC.
[16] Page 166 *in* National Research Council. 2003. Air Emissions from Animal Feeding Operations: Current Knowledge, Future Needs. National Academies Press, Washington, DC.

effective to implement this rule simultaneously with an air rule. These rules could be issued in substantive coordination between the Office of Water and the Office of Air. Development of the air rule should benefit from the experience of the Office of Water, and any final water rule could profit from the data generated for the Office of Air. In addition, USDA's Natural Resources Conservation Service (NRCS) has recently adopted air quality as one element of its mission. NMPF urges EPA to work directly with NRCS in the development of these rules, as well.

Most important, though, is the simultaneous issuance of final rules and identical compliance deadlines. This will lead naturally to, at least, minimal mutual compatibility of BCT's and performance standards. Coordination of these rules will significantly reduce the duplication of efforts and expense. For producers, an effective NMP must address all media when considering nitrogen and phosphorus; this work must be duplicated if the rules are not simultaneous. If both rules are known, a single NMP can be produced to address all media and meet the requirements of both rules.

For EPA, simultaneous rules would offer the opportunity to combine permitting processes, in administration if not in name. State and EPA staff could be authorized to deal with both permits through a single process, including when necessary a single hearing. Otherwise, NMP revisions to comply with air rules could require re-permitting under the water rule, with attendant repetitive public hearings; by coordinating the rules, such a producer might be subject to a single hearing, instead of three.

Less expensive compliance with coordinated rules will benefit consumers, mostly by reducing the number of farm bankruptcies associated with compliance costs, and so maintaining the supply of livestock products at a lower price, consistent with our comments on the first proposed rule.

Such coordination, it would seem, represents minimal compliance with the directive in Executive Order 12866 that "When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider the incentive for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity."[17] This Order has defined the guiding principles for Federal regulation in two administrations for more than 12 years.

Every objective in this passage argues for the coordination of these rules. "Innovation" will be spurred by a better prior understanding of the cross media issues, as suggested by EPA in its request for these comments. "Consistency and predictability" can only be met if the requirements for compliance in both media are issued and enforced at the same time. The overall "costs of enforcement and compliance (to the government, regulated entities, and the public)" for both media

[17] 58 FR 51736

have been demonstrated by USDA to be substantially reduced by this coordination. "Flexibility" to achieve the best results at the lowest cost can only be managed through coordination; a stand-alone water rule will lead farmers to make investments that use up their flexibility (especially in the form of financial resources and physical infrastructure) to adapt to an air rule. The "distributive impacts" of imposing unnecessary costs will be to put medium-sized farmers out of business and to make growth more infeasible for small farmers. Finally "equity" is not served by changing the rules with unnecessary frequency; it is only fair to set the rules and stick by them.

VI. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

This is discussed at length in the section on Cross Media Approaches. Given the unavoidable delays in the development and implementation of this rule, and given the enormous overlap in the management of manure for air and water quality, coordinating rules for air- and water-borne emissions from livestock operations is the only way to satisfy the letter and spirit of Executive Order 12866. It is a common-sense, good-government action whose costs and benefits demand accounting in any final rule.

EPA would greatly improve the efficiency and overall effectiveness of its expanded regulation of animal agriculture by deferring the final rule until it can be issued simultaneously with the clean air rule. If appropriate, the cost-benefit analysis for these rules could be combined (or otherwise coordinated) to avoid confounding the overlapping effects of the two rules.

If a stand-alone final rule is issued in this proceeding, its cost-benefit analysis should account for the expected increase in ammonia emissions (per USDA's study, cited above), as well as any other negative environmental impacts of the rule in other media. In this case, these impacts may monetize and add to the costs of the rule, per OMB Guidelines (M-00-08).[18]

Summary

Overall, NMPF is pleased with the proposed rule as the intended changes from the Waterkeeper Decision have been captured. NMPF fully supports the Waterkeeper Decision to vacate the "duty to apply". While the proposed rule does not address the current deadlines of July 31, 2007 for CAFOs to develop and implement an NMP and apply for a permit, NMPF urges EPA to extend the current deadline to allow producers time to comply with the new rule. Finally NMPF asks that EPA consider the benefits of issuing a coordinated water and air rule. As noted above, synchronizing air and water regulations has benefits both to the environment and dairy producers. It is NMPF's hope that EPA strongly considers these comments in order to address the concerns of the dairy industry.

[18] Alternatively, if EPA places equal (negative) value on a kilogram of nitrate and a kilogram of ammonia, the ammonia mass could be subtracted from the nitrates; this alternative approach is, of course, less easily generalizable to all pollutants.

NMPF is interested in working with EPA to ensure that dairy producers continue to be good environmental stewards. NMPF appreciates the opportunity to provide comments to this proposed rule. Please let us know if we can provide additional information or clarification of our comments.

Sincerely,

Robert D. Byrne, Jr.

Robert D. Byrne, Ph.D.
Senior Vice President, Scientific and Regulatory Affairs