



May 15, 2017

Office of Regulatory Policy and Management
United States Environmental Protection Agency
Mail Code 1803A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Re: Evaluation of Existing Regulations; Proposed Rule (Docket ID No. EPA-HQ-OA-2017-0190)

To whom it may concern,

The National Cattlemen's Beef Association (NCBA) is the largest and oldest national trade association representing U.S. cattle producers, with more than 30,000 direct members and over 175,000 cattle producers and feeders through state affiliations. NCBA works to advance the economic, political, and social interests of U.S. cattle producers and advocate for the cattle industry's policy positions.

The Public Lands Council (PLC) represents ranchers who use public lands to preserve the natural resources and unique heritage of the West. PLC membership consists of state and national cattle, sheep, and grasslands associations. PLC works to maintain a stable business environment for ranchers in the West, where roughly half the grazing land is federally owned and many operations have, for generations, depended on public lands for forage.

NCBA and PLC represent people who raise cattle, some of whom operate feedlots, some of which meet the U.S. Environmental Protection Agency's (herein, EPA or Agency) definition of concentrated animal feeding operations (CAFOs). Many of these members have obtained National Pollutant Discharge Elimination System (NPDES) CAFO permits. NCBA members with NPDES permits take great care to ensure their compliance with permit requirements. Cattle producers take seriously their responsibility to maintain our country's natural resources and to promote healthy and vibrant ecosystems. NCBA and PLC are submitting comments regarding EPA regulations that should be repealed, replaced, or modified to relieve regulatory burden from cattle producers.

The EPA regulations outlined below inhibit job creation, are ineffective, are unnecessary, or impose costs that exceed the environmental benefits. Often, these regulations impose federal requirements on cattle producers that discourage innovation and impose rigid requirements that do not work on cattle operations and, moreover, defy common sense.

Regulations that should be replaced to provide regulatory relief to cattle producers

- I. NCBA and PLC recommend EPA rescind the 2015 waters of the U.S. (WOTUS) Rule and replace it with a rule that clarifies the extent of federal jurisdiction without overreaching.**

On February 28, 2017, President Trump signed Executive Order 13778 directing EPA to review the WOTUS rule and to publish a proposal rescinding or revising it. We strongly support the President's EO and urge EPA to pursue this effort aggressively.

The replacement rule must clarify the extent of federal jurisdiction while comports with the interstate commerce clause. The replacement must work for cattle producers, follow the rule of law, and replace each instance of WOTUS in the Code of Federal Regulations so that there is one single definition across the federal government.

Recommendation: We recommend that the agency:

- (a) repeal the existing rule (80 Fed. Reg. 37054);
- (b) in a separate rulemaking, propose a revised rule that more closely adheres to the language of the Clean Water Act and Supreme Court decisions in *Riverside Bayview*, *SWANCC* and *Rapanos*.

Regulations that should be repealed to provide regulatory relief to cattle producers

- II. NCBA and PLC urge the EPA to repeal the Mandatory Reporting of Greenhouse Gases (GHGs) rule for manure management systems (40 CFR 98, subpart JJ).**

According to the EPA, beef cattle production was responsible for 1.9% of total U.S. GHG emissions in 2014. By comparison, GHG emissions from transportation and electricity accounted for 25.8% and 30.6% of total U.S. GHG emissions in the same year. The GHG Mandatory Reporting Rule places an undue burden on animal agricultural producers, significantly increasing production costs with negligible environmental benefit.

Recommendation: EPA should repeal the Mandatory Reporting of Greenhouse Gases rule for manure management systems (40 CFR 98, subpart JJ).

Regulations that should be modified to provide regulatory relief to cattle producers

- III. NCBA and PLC urge the EPA to modify the CERCLA and EPCRA reporting requirements to regulate no animal feeding operations because the requirements unduly burden cattle producers and create no environmental benefit to the public.**

On April 11, 2017, the U.S. Court of Appeals for the DC Circuit issued a ruling in long-running litigation to vacate a 2008 EPA rule which exempted livestock producers from CERCLA and EPCRA reporting requirements. In light of this decision, livestock farmers will be responsible for calculating and reporting the rate of emissions associated with the storage of manure for use as a fertilizer as “emergency releases” to state and local authorities under 42 U.S.C. § 11004 (EPCRA § 304) and to the Coast Guard’s National Response Center under 42 U.S.C. § 9603 (CERCLA § 103) beginning as early as May 2017. These reports will not provide an emergency planning/response benefit to regulators or the public, but will rather have a detrimental impact on emergency response programs (and the public’s reliance on them). As emergency response centers receive a flood of continuous release notifications, systems designed to handle true emergencies will become overwhelmed and bogged down with useless information. Failure to file these reports will subject livestock farmers to expensive citizen suit litigation filed by eco and animal rights activists.

Diffused emissions from cattle operations present little public health impact due to the low concentration of regulated substances. Cow/calf farms are spread over many acres of land, and cattle feedlots are open-air systems that do not concentrate emissions. These disperse emissions do not impact public health or the environment in any significant manner.

Recommendation: EPA should develop a regulation that relieves farms of the obligation to file these reports by (1) clarifying that the presence, storage, and handling of manure is a “routine agricultural operation” and therefore exempt under EPCRA from the definition of a hazardous chemical and (2) changing the regulatory threshold for reporting emissions from agricultural operations under CERCLA.

- IV. NCBA and PLC urge EPA to modify the Spill Prevention Control & Countermeasures (SPCC) Rule for Farms (40 CFR part 112) so that it is easier for farmers to implement.**

While EPA attempted to address the farming community’s concerns related to the SPCC rule, the program presents many unnecessary challenges for agricultural producers. That assessment is borne out by the agency’s own Regulatory Impact Analysis (RIA). EPA examined the Clean Water Act violation data from 2001 to 2006. In over 10,000 violations in that time period, only 292 involved oil spills of any type, and only **one** of those involved a farm. Many other estimates in the RIA were incorrect as well. EPA estimated an approximate figure of 152,000 affected farms based on USDA numbers. Nowhere did EPA mention the USDA numbers presented in the 2005 round of proposals that numbered

potentially affected farms closer to 400,000. Yet despite these facts, EPA moved to place a costly and burdensome rule on the agricultural industry with no data to show a risk justifying the cost. EPA included other incorrect assumptions to bolster their cost-savings analysis, estimating \$3.6 million savings due to a pesticide application equipment exemption. However, this cost savings was only based on a report from one state. EPA included savings from preexisting exemptions like home heating oil tanks (which have been exempted since 1973 with no SPCC application). While Congress granted the agency flexibility to address any concerns on farms, EPA rejected this approach and finalized a study that recommends the strictest limit possible.

The strictest limit (2,500g) has not yet been codified by the EPA, presenting an opportunity for the agency to propose a rule to modify the overly burdensome requirements of the SPCC Rule for Farms. A rule that accommodates assets such as mobile tanks would ensure a common-sense approach to environmental regulation.

Recommendation: The SPCC for farms should be modified so it is easier for farms to implement.

V. NCBA and PLC recommend the EPA modify the CERCLA and RCRA implementing regulations to bolster the exemption for agricultural byproducts, including manures and crop residues, returned to the soil as fertilizers or soil conditioners.

In 1979, EPA promulgated regulations that reflect Congress' intent that the agency not regulate manure or crop residue under the Solid Waste Disposal Act (42 U.S.C. § 6903(27)). Certain court decisions, however, have injected uncertainty in this area of the law. The EPA has an opportunity to rectify this ambiguity. By bolstering language in the implementing regulations of RCRA and CERCLA, EPA can further clarify that these laws do not apply to agriculture insofar that the manure is being used as a fertilizer or soil conditioner.

Recommendation: EPA should modify the CERCLA and RCRA implementing regulations to further clarify and bolster the exemption for agriculture.

VI. NCBA and PLC recommend the EPA omit from finalization the proposed revision regarding objection to administratively continued permits (40 CFR 123.44) (Docket ID No. EPA-HQ-OW-2016-0145c).

EPA proposed granting itself the power to object to administratively continued permits by providing Regional Administrators the discretion to change the status of an administratively continued permit to "proposed permit" - an outcome that would trigger the robust federal review process outlined in 81 Fed. Reg. 31344, 31372 (May 18, 2016).

This proposed revision marginalizes a valuable tool afforded to states with authorized NPDES permit programs – the ability to administratively continue an existing NPDES permit in lieu of permit reissuance. This tool is important because it allows states to prioritize limited resources and limited personnel to ensure the most efficient management

of their state NPDES program. This revision, if finalized, further erodes State authority to manage their own programs and will discourage unauthorized states from assuming authority.

Denial of an administratively continued permit, which this rule revision entails, would leave agricultural producers who hold NPDES permits without permit coverage and vulnerable to citizen lawsuits. The proposal also raises a constitutional concern, as the EPA provides no procedure to challenge a permit status change. The revision raises additional concern because it exceeds EPA's statutory authority. Clean Water Act § 402(d) grants EPA the authority to review proposed permits and to object to them, which if objected to prohibits the permit from issuing. The revision here would replicate this administrative power and apply it to administratively continued permits, a step that goes beyond the power Congress granted to EPA in the Clean Water Act.

Finally, this effort by EPA is unnecessary because EPA already manages a largely successful effort that resolves the underlying issue. The Priority Permit Measure provides an avenue for EPA to target state-issued NPDES permits to undergo the reissuance process by designating them as "priority permits".

Recommendation: EPA should withdraw its proposed revision regarding objection to administratively continued permits (40 CFR § 123.44) (Docket ID No. EPA-HQ-OW-2016-0145c).

Regulations that merit clarification through agency guidance

VII. NCBA and PLC recommend the EPA clarify the scope of the NPDES CAFO permit by stating that winter feeding areas and satellite animal pens are not within the scope of the definition of "animal feeding operation" as defined in 40 CFR 122.23.

EPA should issue a guidance document stating that winter feeding areas and satellite animal pens are not regulated within the scope of the NPDES CAFO permit. These issues have become a recurring problem, with EPA regional offices erroneously interpreting these areas to be within the scope of the permit. To the contrary, the implementing regulations at 40 CFR 122.23 clearly state these areas are outside the regulatory regime.

EPA's definition of animal feeding operation requires that no vegetation, forage growth, or post-harvest residues are sustained during the normal growing season. Winter feeding areas fall outside this metric because the land used for this purpose necessarily sustains vegetation or forage growth during the normal growing season.

EPA's CAFO definition states that two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes. In recent years, EPA regional offices have taken enforcement actions against

animal feeding operations that fall below the regulatory threshold of 1000 head by using a creative, and by NCBA's estimation - illegal, interpretation of the CAFO definition that is not supported by the EPA's own regulations.

Recommendation: EPA should issue clarifying guidance that winter feeding areas and satellite pens are outside the scope of the definition of animal feeding operation and concentrated animal feeding operation. EPA should further direct regional offices to cease enforcement actions against farms that do not meet the regulatory definitions found in 40 CFR 122.23.

Additional recommendation to provide regulatory relief to cattle producers

VIII. NCBA and PLC oppose any additional burdens that will slow the EPA permitting process.

NCBA opposes the augmentation of Endangered Species Act (ESA) consultation on EPA permits beyond what is currently required by law. Any consultation that goes beyond the current requirements of the law will cause a disruption in the permitting process and will only serve to further complicate a permitting process which is already very time-consuming. NCBA contends that EPA is already meeting their statutory obligation in conducting ESA consultation. Because this would impact NPDES-permitted NCBA members, we oppose any expansion of the ESA consultation process on EPA permits beyond what is currently required by law.

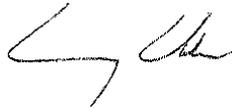
IX. NCBA and PLC urge the EPA to apply privacy protections to any data collected by the Agency that implicates a privacy interest.

EPA must protect the privacy of farmers and ranchers in implementing the agency's regulations. Many farmers and ranchers maintain a personal residence on their operations and this information may be protected under privacy protections of the law. For example, the Freedom of Information Act (FOIA) Exemption 6 protects "personnel and medical and similar files" from disclosure if such information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. 552(b)(6). Prior to any public release of this information, NCBA contends that EPA must conduct a balancing test to determine whether this information is protected under the FOIA and therefore must not be released. *See Multi Ag Media LLC v. USDA*, 515 F.3d 1224, 1228 (D.C. Cir. 2008); *News-Press v. DHS*, 489 F.3d 1173, 1196-97 (11th Cir. 2007). This test requires EPA to weigh the public's interest in receiving the information against the individual's right to privacy. NCBA strongly urges EPA to consider the FOIA exemption, and other relevant privacy protections, before releasing any information that could risk the residences of farmers and ranchers.

X. Conclusion

The U.S. cattle industry is proud of its history as stewards of our nation's natural resources. The industry takes very seriously its obligation to protect the environment while providing the nation with a safe and affordable food supply. NCBA and PLC urge EPA to carefully consider the comments provided above, and make the recommended changes before finalizing the proposed rule.

Respectfully Submitted,



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