



Indiana State Department of Agriculture
Governor Mitchell E. Daniels, Jr.
Lt. Governor Rebecca S. Skillman, Secretary of Agriculture and Rural Development
Joseph M. Kelsay, Indiana Agriculture Director

January 19, 2012

Water Docket
Environmental Protection Agency
Mailcode: 28221T
Attn: Docket ID NO. EPA-HQ-OW-2011-0188
1200 Pennsylvania Ave., NW
Washington, DC 20460

The Indiana State Department of Agriculture (ISDA) appreciates this opportunity to comment upon the proposed National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule that would require mandatory reporting for all CAFOs, regardless of discharge status.

The Environmental Protection Agency (EPA) broadly interprets Section 308 of the Clean Water Act (Section 308) to require all CAFOs to report requested information in order to meet agency's objectives of improving and restoring water quality. 76 Fed. Reg. 240, 65436 (proposed Oct. 21, 2011). Section 308 states that "the Administrator shall require the owner or operator of any point source to..." comply with the reporting requirements. 33 U.S.C. §1318(a)(4)(A). The definition of point source specifically includes CAFOs, but only those CAFOs from which pollutants "are or may be discharged." 33 U.S.C. §1362(14). A CAFO does not discharge if it is designed, constructed, operated and maintained so as not to discharge. 40 C.F.R. §122.23(i)(2)(i). Section 308 does not give the EPA the authority to create reporting requirements for point sources unless necessary to regulate the discharge of pollutants. The information being sought by EPA under this proposed rule only assists the agency in meeting its stated goals if the agency assumes that all CAFOs are discharging. To meet its objective, EPA should utilize data from CAFOs that discharge or propose to discharge.

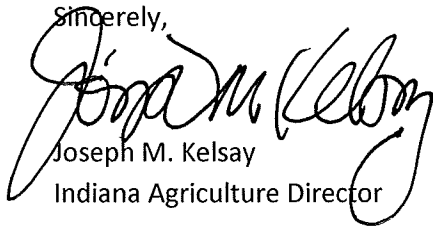
Furthermore, the federal courts have repeatedly ruled that the EPA does not have regulatory authority over CAFOs that do not actually discharge to waters of the United States. In March 2011, the United States Court of Appeals for the Fifth Circuit stated that "there must be an actual discharge into navigable waters to trigger the CWA's requirements and the EPA's authority." *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011). The court noted that "in the absence of an actual addition of any pollutant to navigable waters . . . there is no point source discharge." *Nat'l Pork Producers Council*, 635 F.3d at 750 (quoting *Waterkeeper Alliance, Inc. v. EPA*, 399F3d 486, 504 (2d Cir. 2005)). The court also stated that "[b]efore any discharge, there is no point source." *Nat'l Pork Producers Council*, 635 F.3d at

751 (citing *Service Oil, Inc. v. EPA*, 590 F. 3d 545, 550 (8th Cir. 2009)). The Fifth Circuit clearly limited EPA's authority over CAFOs to only those that actually discharge. Mandatory reporting, without a showing of any discharge, is beyond the scope of EPA's regulatory authority.

The CAFO reporting rule is proposed as a condition of a settlement agreement between the EPA and environmental groups that filed petitions for review of the 2008 CAFO NPDES rule. Although the regulated community also filed petitions for review, the EPA entered into an agreement with the environmental groups without including the livestock and poultry industry in the discussion. Settlement agreements are not an appropriate vehicle for rule promulgation, especially when the negotiations exclude the very community that will be regulated.

In conclusion, ISDA respectfully requests that EPA reconsider its authority under Section 308 to require all CAFOs to submit information. We also request that EPA limit its reporting requirements to those CAFOs with NPDES permits and specific state regulated CAFOs that have had a discharge. Such data is already readily available through the permitting authority in each state by virtue of the NPDES permit needed in order for the facility to discharge.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph M. Kelsay". The signature is fluid and cursive, with a large loop at the end of the last name.

Joseph M. Kelsay
Indiana Agriculture Director