

EPA’S AUTHORITY GONE AWRY: THE FLAWED CAFO REPORTING RULE

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INTRODUCTION

The United Nations has projected that the world population will reach 9.3 billion in 2050 and 10.1 billion in 2100.¹ This growth in population requires an increase in food production of 56%.² Large-scale agriculture is one of the answers to this problem. Some livestock producers have shifted the model of their farms away from the small family farm approach and now use large-scale production practices, which lower product prices as well as increase production.³ The federal government designates these livestock production systems as Animal Feeding Operations (AFOs).⁴ AFOs have been under intense scrutiny—due to their size, number of animals, and management practices—from animal rights activism groups, environmental interest groups, and the federal and state governments.⁵

In the Clean Water Act (“CWA”), Congress expressly required the Environmental Protection Agency (“EPA”) to regulate Concentrated Animal Feeding Operations (“CAFOs”) by designating them as point sources.⁶ Congress clearly perceived that, due to their size, CAFOs posed a potential threat to the biological integrity of the Nation’s waters.⁷ EPA’s regulation of CAFOs has been notably problematic.⁸ EPA’s rules,

1. U.N. Department of Economics & Social Affairs Population Division, *World Population Prospects, the 2010 Revision* 1, U.N. Doc. ESA/P/WP.220 2011 available at http://esa.un.org/unpd/wpp/Analytical-Figures/htm/fig_1.htm.

2. U.N. Environment Programme, *The Environmental Food Crisis: The Environment’s Role in Averting Future Food Crises*, GRID ARENDAL, <http://www.grida.no/publications/rr/food-crisis/> (last visited January 31, 2014).

3. See Jean-Paul Chavas, *Structural Change in Agriculture Production: Economics, Technology and Policy*, in HANDBOOK OF AGRICULTURAL ECONOMICS: VOLUME IA AGRICULTURE PRODUCTION 264–85 (Bruce L. Gardner & Gordon C. Rausser eds., 2001) (discussing economies of scale and the trend toward agricultural intensification); FRANK R. SPELLMAN & NANCY E. WHITING, ENVIRONMENTAL MANAGEMENT OF CONCENTRATED ANIMAL FEEDING OPERATIONS 1 (2007) (noting the change from small farms to large farms).

4. 40 C.F.R. § 122.23(b)(1) (2013).

5. See *Cruel Confinement*, HUMANE SOC’Y OF THE UNITED STATES, http://www.humanesociety.org/issues/confinement_farm/ (last visited Jan. 31, 2014) (discussing animal welfare and management activism of group); *About Factory Farms*, CENTER FOR FOOD SAFETY, <http://www.centerforfoodsafety.org/issues/307/factory-farms/about-factory-farms> (last visited Jan. 31, 2014) (describing environmental and raising practices of large livestock operations); Rod Smith, *EPA Takes Enforcement Actions against Six Feedlots: CAFOs under scrutiny by EPA*, BEEF (May 26, 2010), <http://beefmagazine.com/government/0527-epa-takes-action-against-feedlots> (summarizing Federal EPA enforcement action against CAFOs in Iowa, Kansas, and Nebraska); *DNR to Inspect medium, large CAFOs*, IOWA FARMER TODAY (Feb. 7, 2013), http://www.iowafarmertoday.com/news/livestock/dnr-to-inspect-medium-large-cafos/article_7639e6d6-70a7-11e2-8f80-001a4bcf887a.html (explaining Iowa Department of Natural Resources CAFO inspections).

6. Federal Water Pollution Control Act, 33 U.S.C. § 1362(14) (2006).

7. See *id.* § 1251(a) (“The objective of this chapter is to restore and maintain the chemical, physical and biological integrity of the Nation’s waters.”).

8. See generally Shauna R. Collins, *Striking the Proper Balance between the Carrot and the Stick Approaches to Animal Feeding Operation Regulation*, U. ILL. L. REV. 923 (2012) (positing

especially those requiring National Pollutant Discharge Elimination System (“NPDES”) permits⁹ for CAFOs, have encountered challenges from both environmental interest groups and the agricultural community.¹⁰ These groups argue, respectively, that EPA’s regulations are either too lax or go beyond EPA’s statutory authority.¹¹

EPA claims that part of the problem with regulating CAFOs is due to its lack of complete information regarding CAFOs.¹² EPA asserts that it lacks facility-specific information for all AFOs in the United States and that obtaining such information is necessary to carry out the NPDES program.¹³ In order to obtain this information, in 2011 EPA proposed a CAFO Reporting Rule.¹⁴ This rule would require all AFOs, regardless of size and regulatory status, to report specific information to EPA in order to ensure that CAFOs are complying with the requirements of the CWA.¹⁵ Even though EPA recognized the necessity and importance of obtaining this information, it withdrew the CAFO Reporting Rule in July 2012.¹⁶ EPA

EPA’s current method of CAFO regulation is ineffectual); Hannah Connor, *Comprehensive Regulatory Review: Concentrated Animal Feeding Operations under the Clean Water Act from 1972 to the Present*, 12 VT. J. ENVTL. L. 275 (2011) (evaluating EPA’s regulation of CAFOs throughout history); John C. Becker & John H. Howard, *A Historical View of the Solutions Offered to Regulate Concentrated Animal Feeding Operations Under the Clean Water Act: What Has Been Learned?*, 3 KY. J. EQUINE, AGRIC. & NAT. RES. L. 71 (2011) (analyzing the history of CAFO regulation and proffering solutions to its problems); Terence J. Centner, *Enforcing Environmental Regulations: Concentrated Animal Feeding Operations*, 69 MO. L. REV. 697 (2004) (arguing that EPA’s changing regulation of CAFOs does not advance administrative and enforcement efforts and that EPA should direct its attention to helping states administer and enforce existing regulations); Scott Jerger, *EPA’s New CAFO Land Application Requirements: An Exercise in Unsupervised Self-Monitoring*, 23 STAN. ENVTL. L.J. 91 (2004) (examining the problems with the land application requirements for CAFOs); Gail S. Shane, *Concentrated Animal Feeding Operations: Will Increased Enforcement and More Stringent Regulations Under the Clean Water Act Adequately Protect Public Health and the Environment?*, NAT’L ENVTL. ENFORCEMENT J., April 1998, at 3 (describing CAFO regulation and roles of different entities in that process).

9. The CWA authorizes the NPDES permit program to regulate point sources that discharge pollutants into the waters of the United States. 33 U.S.C. § 1311(a) (2006). Point sources are required to obtain permits from EPA or an authorized state agency, before they are allowed to discharge pollutants into surface waters. *Id.* §§ 1311, 1342(a).

10. See Nat’l Pork Producers Council v. Env’tl. Prot. Agency, 635 F.3d 738, 741–42 (5th Cir. 2011) (challenging the EPA’s 2008 CAFO regulations); Waterkeeper Alliance, Inc. v. Env’tl. Prot. Agency, 399 F.3d 486, 490–92 (2nd Cir. 2005) (challenging the 2003 EPA CAFO regulations).

11. Nat’l Pork Producers, 635 F.3d at 749; Waterkeeper Alliance, 399 F. 3d at 498.

12. National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 76 Fed. Reg. 65,431, 65,431 (proposed Oct. 21, 2011) (to be codified 40 C.F.R. pts. 9,122) [hereinafter *Proposed CAFO Reporting Rule*].

13. *Id.*

14. *Id.*

15. *Id.*

16. National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 77 Fed. Reg. 42,679, 42,679 (withdrawn July 20, 2012) [hereinafter *Withdrawal CAFO Reporting Rule*].

may have claimed good intentions in proposing this rule;¹⁷ however, events leading up to EPA's proposal of the rule show ignoble intentions.¹⁸ It was in EPA's best interest to withdraw the CAFO Reporting Rule due to numerous problems with the rule that this article will address.

Part I describes CAFOs and the history of EPA's CAFO regulation in the United States. This Part also discusses the events that led up to EPA promulgation of the CAFO Reporting Rule. Part I concludes with a description of the contents of the proposed CAFO Reporting Rule, which the following sections of the note evaluate. Part II analyzes the CAFO Reporting Rule EPA proposed and explains how it is not in accord with the CWA. Part II begins by evaluating the plain language of section 308 of the CWA. It then explains how EPA attempted to exercise authority outside of that delegated under the statute. Finally, Part II discusses how the information EPA sought was not relevant to setting effluent limitations and how EPA could not obtain this information from CAFO operators under section 308.

Part III evaluates the due process considerations of the CAFO Reporting Rule. Part III argues that EPA did not fully consider the notice requirement of due process. Part IV describes how the CAFO Reporting Rule violated the concept of cooperative federalism and authority delegated between the EPA and state environmental agencies. Part IV explains EPA's already strained relationship with state agencies and how this rule added to this strain. Part V discusses the settlement agreement with environmental non-government organizations ("NGOs") that led to the rule promulgation. Part V will describe the manner in which EPA proposed the CAFO Reporting Rule and problems with settlements forcing rule promulgation. Finally, Part VI posits how EPA could obtain the information it seeks in the CAFO Reporting Rule using means other than EPA's section 308 authority.

I. BACKGROUND

CAFO regulations are very complex and have a long history. This section will highlight the differences between AFOs and CAFOs, which

17. See Christopher R. Brown, *The EPA's Proposed CAFO Information Disclosure Rules & Their Potential to Improve Water Quality*, 3 ARIZ. J. ENVTL. L. & POL'Y 47, 49 (2013) (arguing that water quality improvements could flow from an "effective information disclosure rule").

18. See Settlement Agreement, *Natural Res. Def. Council v. EPA*, No. 09-60510 (5th Cir. May 25, 2010) [hereinafter *Settlement Agreement*], available at <http://pub.bna.com/ptcj/475036.pdf> (forcing EPA to propose CAFO Reporting Rule via settlement with environmental groups only); ENVTL. PROT. AGENCY, IMPLEMENTATION GUIDANCE ON CAFO REGULATIONS—CAFOs THAT DISCHARGE OR ARE PROPOSING TO DISCHARGE (MAY 28, 2010) [hereinafter IMPLEMENTATION GUIDANCE], available at http://www.epa.gov/npdes/pubs/cafo_implementation_guidance.pdf (discussing EPA's implementation of the 2008 CAFO rule and forced through the settlement agreement).

will help set the backdrop to EPA's statutory power under the CWA. It will also describe the evolution of CAFO regulations and the cases that caused EPA to promulgate the CAFO Reporting Rule. Then, the section will conclude with a summary of the CAFO Reporting Rule, which the EPA proposed on October 21, 2011, and describe a pending lawsuit challenging EPA's withdrawal of the rule.

A. Overview of AFOs and CAFOs

It is important to note the distinction between an AFO and a CAFO. EPA defines an AFO as "a lot or facility . . . where the following conditions are met: (i) Animals . . . have been, are, or will be stabled, or confined and fed or maintained for a total of 45 days or more in any 12-month period, and (ii) [c]rops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility."¹⁹ A CAFO "means an AFO that is defined as a Large CAFO or Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section."²⁰ Not all AFOs are subject to regulation, while certain sizes of CAFOs are.²¹

EPA designates large and medium CAFOs based upon the number and type of animals present on the farm.²² Medium CAFOs are any AFOs that fall within specific ranges, which the EPA defines or designates as a CAFO.²³ CAFOs are defined as medium when the farm meets one of the following conditions:

- (A) [p]ollutants are discharged through . . . a man-made ditch, flushing system, or other similar man-made device; or
- (B) [p]ollutants are discharged directly into waters of the United States that originate outside of and pass over, across,

19. 40 C.F.R. § 122.23(b)(1) (2013).

20. *Id.* § 122.23(b)(2).

21. *See* 33 U.S.C. § 1362(14) (2006) (stating CAFOs are point sources under the CWA); 40 C.F.R. § 122.23(a) (2013) (declaring only specifically defined CAFOs are point sources that require NPDES permits).

22. *See* 40 C.F.R. § 122.23(b)(4), (6) (describing what defines a CAFO regulated under the CWA). The following describes some of the types of animals and number of animals for each of the size designations: mature dairy cows 700 and above for large CAFOs, 200 to 699 for medium CAFOs; cattle other than mature dairy cows or veal 1,000 and above for large CAFOs, 300 to 999 for medium CAFOs; swine weighing 55 pounds or more 2,500 and above for large CAFOs, 300 to 999 for medium CAFOs; swine weighing less than 55 pounds 10,000 for large CAFOs, 3,000 to 9,999 for medium CAFOs; laying hens using a non-liquid manure handling system 82,000 for large CAFOs, 37,000 to 124,999 for medium CAFOs; and chickens other than laying hens using a non-liquid manure handling system 125,000 birds for large CAFOs, and 9,000 to 29,999 for medium CAFOs. *Id.* § 122.23(b)(6)(i).

23. *Id.* § 122.23 (b)(6)(ii).

or through the facility or otherwise come into direct contact with the animals confined in the operation.²⁴

Small CAFOs are any AFOs that do not fit the definition of a medium or large CAFO.²⁵ Nonetheless, EPA will designate a small AFO as a CAFO if it significantly contributes pollutants to surface waters.²⁶

B. CAFO Regulation History

Under the CWA, Congress specified point sources that are subject to regulation.²⁷ The definition of point sources includes any “concentrated animal feeding operation . . . from which pollutants are or may be discharged.”²⁸ Despite this inclusion of CAFOs, EPA did not issue national effluent limitation guidelines (“ELGs”)²⁹ and standards for feedlots until 1974.³⁰ The guidelines allow CAFOs to discharge only if “a chronic or catastrophic storm causes an overflow from a facility . . . from a 25 year, and 24 hour storm occurrence. . . .”³¹ In 1976, EPA further defined ELGs through a NPDES regulation, which allowed smaller CAFOs to have an ELG based on the permitting authority’s best professional judgment.³² The 1976 regulations did not require then-designated large CAFOs³³ to apply for or obtain a NPDES permit if there was not a discharge of pollutants from the facility into navigable waters.³⁴

In 1999, EPA and the United States Department of Agriculture (“USDA”) published the Unified National Strategy for Animal Feeding Operations.³⁵ EPA and USDA published the document in response to

24. *Id.*

25. *Id.* § 122.23(b)(9).

26. ENVT. PROT. AGENCY, PRODUCERS’ COMPLIANCE GUIDE FOR CAFOs 9 (Nov. 2003), available at <http://www.epa.gov/rfa/documents/Compliance-CAFOs.pdf>.

27. 33 U.S.C. § 1362(14) (2006).

28. *Id.*

29. ELGs are national technology-based regulations to control industrial wastewater discharges. *Basic Information*, ENVT. PROT. AGENCY, <http://water.epa.gov/scitech/wastetech/guide/basic.cfm> (last visited Dec. 30, 2013). EPA issues ELGs for categories of dischargers and attempts to work in tandem with other water quality programs to protect the nation’s waters. *Id.*

30. Effluent Limitations Guidelines, 39 Fed. Reg. 5704, 5704 (Feb. 14, 1974).

31. *Id.* at 5707 (discussing an exception to the “no discharge” of pollutants rule as a result of unusual rainfall events).

32. State Program Elements Necessary for Participation in the National Pollutant Discharge Elimination System, 41 Fed. Reg. 11,458, 11,460 (Mar. 18, 1976).

33. *Id.* at 11,461.

34. Connor, *supra* note 8, at 291. CWA defines “navigable waters” as “waters of the United States, including territorial seas.” 33 U.S.C. § 1362(7).

35. U.S. DEP’T OF AGRIC. & ENVT. PROT. AGENCY, UNIFIED NATIONAL STRATEGY FOR ANIMAL FEEDING OPERATIONS (1999), available at <http://www.epa.gov/npdes/pubs/finafost.pdf>.

President Clinton's release of the Clean Water Action Plan, which provided a plan for restoring and protecting water quality across the United States.³⁶ The Unified Strategy represented USDA and EPA's joint efforts to implement improved measures to protect the nation's waters.³⁷ The document describes the expectation that all AFO owners and operators develop and implement a technically sound and economically comprehensive nutrient management plan to deal with manure produced on the farm.³⁸

In 2001, EPA issued a new CAFO regulation due to a timeline established in a lawsuit between EPA, Natural Resources Defense Council, and Public Citizen.³⁹ In 2003, EPA promulgated, in final form, a large portion of the 2001 proposed rule.⁴⁰ The 2003 Rule had extensive revisions and included a new definition for CAFOs, a "duty to apply" for a NPDES permit for all CAFOs, a compliance schedule, a requirement for the CAFO to utilize best management practices for manure handling and to use a nutrient management plan, and a new design standard for certain facilities.⁴¹ In 2003, environmental NGOs and agriculture industry representatives challenged the 2003 CAFO Rule in the Second Circuit Court of Appeals.⁴² The court vacated the provisions that allow permitting authorities to issue permits without reviewing the nutrient management plan, that allow permitting authorities to issue permits that do not include the nutrient management plan guidelines, that do not provide adequate public participation, and that require all CAFOs to apply for a NPDES permit.⁴³

In response to the 2003 challenge and vacation, EPA issued a Revised NPDES Permit Regulation for CAFOs in 2008.⁴⁴ The 2008 Rule revised six

36. *Id.*

37. *Id.*

38. *Id.*

39. *See also* Natural Res. Def. Council v. Reilly, Civ. No. 89-2980, 1991 U.S. Dist. LEXIS 5334, at *12, *30 (D.C. Cir. Apr. 21, 1991) (establishing timelines for EPA to set standards for discharge of pollutants, including manure, from CAFOs).

40. National Pollutant Discharge Elimination System Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7187 (Feb. 12, 2003) (to be codified at 40 C.F.R. pts. 9, 122, 123, 412); *see also* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 3024 (proposed Jan. 12, 2001) (to be codified at 40 C.F.R. pts. 122, 412).

41. National Pollutant Discharge Elimination System Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. at 7181-82.

42. *Waterkeeper Alliance, Inc. v. Env'tl. Prot. Agency*, 399 F.3d 486, 486 (2d Cir. 2005).

43. *Id.* at 524.

44. Revised National Pollution Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations in Response to the *Waterkeeper* Decision: Final Rule, 73 Fed. Reg. 70,417, 70,422-23 (Nov. 20, 2008) (to be codified at 40 C.F.R. pts 9, 122, 412) [hereinafter *2008 CAFO Rule*].

CAFO regulatory provisions: the “duty to apply” for NPDES permit coverage for all CAFOs that “propose to discharge;” an optional certification program for CAFOs that do not discharge; clarification of the agriculture stormwater exemption⁴⁵ for unpermitted CAFOs; the nutrient management plan submission and required public participation; New Source Performance Standards for specific facilities; water quality-based effluent limitations applicability; best available technology effluent limitations for pathogens; and compliance dates.⁴⁶

Environmental NGOs and agriculture industry representatives challenged this rule following its promulgation.⁴⁷ In this case, the Fifth Circuit Court of Appeals vacated provisions in the 2008 Rule that required CAFOs that “propose to discharge” to apply for a NPDES permit and that created liability for failing to apply for a NPDES permit.⁴⁸ However, the court upheld the provisions that imposed a “duty to apply” on CAFOs that are discharging.⁴⁹ This allowed permitting authorities to regulate a permitted CAFO’s manure land application and include those requirements in the NPDES permit.⁵⁰

On July 30, 2012, EPA promulgated the current form of the CAFO rule.⁵¹ This direct-to-final rule⁵² eliminated the requirement that an owner or operator of a CAFO that “proposes to discharge” must apply for a NPDES permit and removed the voluntary certification option for unpermitted CAFOs.⁵³ The action also removed the timing requirements specifying when CAFO owners and operators must apply for a NPDES permit because those dates in the 2008 Rule had passed.⁵⁴ On October 31,

45. Agricultural stormwater discharges are “precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO . . .” 40 C.F.R. § 122.23(e) (2013). These discharges are exempt when the manure, litter, or process wastewater is applied to land areas under control of a CAFO according to the CAFO’s site-specific nutrient management plan. *Id.* § 122.23(e).

46. 2008 CAFO Rule, *supra* note 44, at 70,421–68.

47. Nat’l Pork Producers Council v. Env’tl. Prot. Agency, 635 F.3d 738, 745 (5th Cir. 2011).

48. *Id.* at 756.

49. *Id.*

50. *Id.*

51. National Pollutant Discharge Elimination System Permit Regulation for Concentrated Animal Feeding Operations: Removal of Vacated Elements in Response to 2011 Court Decision, 77 Fed. Reg. 44,494, 44,494 (July 30, 2012) (codified at 40 C.F.R. pt. 122) [hereinafter *2012 CAFO Rule Vacature*].

52. A direct-to-final rule does not require an opportunity for public comment; EPA found good cause that notice and comment procedure was impracticable, unnecessary, or contrary to public interest because the action was “ministerial in nature.” *Id.* at 44,496; Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(B) (2006).

53. 2012 CAFO Rule Vacature, *supra* note 51, at 44,494.

54. *Id.* at 44,495.

2012, EPA published a review of the CAFO rule in the Federal Register pursuant to section 610 of the Regulatory Flexibility Act.⁵⁵ EPA solicited comments on “the continued need for the CAFO rule;” “the nature of complaints or comments received concerning” the CAFO rule; “the complexity of the rule;” “the extent to which the rule overlaps, duplicates or conflicts with other Federal, State or local government rules;” “and the degree to which technology, economic conditions or other factors have changed” regulated CAFOs.⁵⁶ Individuals seeking to comment on the CAFO rule had until March 1, 2013 to do so.⁵⁷ EPA is currently reviewing these comments, but the review has left the future of CAFO regulation unsettled.

C. Sweetheart Deal that Led to the CAFO Reporting Rule Promulgation

On May 25, 2010, EPA and the environmental NGOs involved in the 2008 CAFO rule challenge reached a settlement prior to the final disposition of the case by the Fifth Circuit.⁵⁸ The settlement agreement required EPA to produce a guidance document to assist permitting authorities in implementing the NPDES permit program for CAFOs.⁵⁹ This document would specify the types of operations and circumstances requiring a CAFO to apply for permit coverage.⁶⁰ The document would also contain guidelines for determining when a CAFO was “proposing to discharge.”⁶¹ In a surprising three-day turnaround, EPA published this guidance document on May 28, 2010.⁶² This settlement also required EPA to propose a rulemaking process, under its CWA section 308 authority to force all AFOs—regardless of size and regulatory status—to submit certain information regarding their operations and practices.⁶³ Then, EPA was

55. Section 610 Reviews of Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements; NESHAP: Reinforced Plastic Composites Production; and NPDES Permit Regulation and Effluent Limitations Guidelines Standards for Concentrated Animal Feeding Operations (CAFOs), 77 Fed. Reg. 65,840, 65,842 (Oct. 31, 2012) (reviewing 40 C.F.R. pts. 9, 122, 412).

56. *Id.*

57. Section 610 Review of NPDES Permit Regulation and Effluent Limitation Guidelines Standards for Concentrated Animal Feeding Operations (CAFOs); Extension of Comment Period, 78 Fed. Reg. 277, 277 (Jan. 3, 2013) (extending the comment period of section 610 review of CAFO program).

58. *Settlement Agreement, supra* note 18, at 1.

59. *Id.* at 2.

60. *Id.*

61. *Id.*

62. *See generally* IMPLEMENTATION GUIDANCE, *supra* note 18 (discussing EPA's implementation of the 2008 CAFO rule).

63. *Settlement Agreement, supra* note 18, at 2.

obligated to release this information to the public unless it was confidential business information.⁶⁴

D. 2011 CAFO Reporting Rule

On October 21, 2011, EPA published the NPDES CAFO Reporting Rule in the Federal Register.⁶⁵ The rule was a co-proposition that allowed for two mechanisms under which EPA could “obtain basic information from CAFOs to support EPA in meeting its water quality protection responsibilities under the Clean Water Act.”⁶⁶ EPA claimed this information would “improve EPA’s ability to effectively implement the NPDES program and ensure that CAFOs are complying with the requirements of the CWA.”⁶⁷ EPA claimed section 308 of the CWA gave it the authority to obtain certain information from all AFOs regardless of the facilities’ regulatory status.⁶⁸

EPA fully admits that the rule proposal was due to a settlement agreement with environmental NGOs, which arose from challenges to the 2008 CAFO rule.⁶⁹ The settlement agreement mandated that EPA use section 308 of the CWA as authority for the rule, provided a timeline for the proposed rulemaking, and set forth the specific information EPA was to seek from all CAFO operators.⁷⁰ The settlement agreement required EPA to propose the rule by October 14, 2011, and take final action on the rule by July 13, 2012.⁷¹ The settlement agreement required EPA to seek the following information:

Name and address of the owner and operator; [i]f contract operation, name and address of the integrator; [l]ocation (longitude and latitude) of the operation; [t]ype of facility; [n]umber and type(s) of animals; [t]ype and capacity of manure storage; [q]uantity of manure, process wastewater and litter generated annually by the CAFO; [w]hether the CAFO land-applies; [a]vailable acreage for land application; [i]f the CAFO land-applies, whether it implements a nutrient

64. *Id.* at 4.

65. *Proposed CAFO Rule*, 76 Fed. Reg. 65,431, 65,431 (proposed Oct. 21, 2011) (to be codified at 40 C.F.R. pts. 9, 122).

66. *Id.*

67. *Id.*

68. *Id.* at 65,433.

69. *Id.* at 65,435.

70. *Id.*

71. *Id.*

plan for land application; [i]f the CAFO land-applies, whether it employs nutrient management practices and keeps records on site consistent with 40 C.F.R. § 122.23(e); [i]f the CAFO does not land apply, alternative use of manure, litter, and/or wastewater; [w]hether the CAFO transfers manure off-site, and if so, quantity transferred to recipient(s) of transferred manure; [and w]hether the CAFO has applied for NPDES permit.⁷²

If EPA chose not to request any of this information, it was required to identify the item and explain why it did not seek the information.⁷³ Notably, the settlement agreement did not “commit EPA to the substance of any final action . . . limit or modify the discretion accorded EPA by the CWA . . . [or] require EPA to collect the information proposed in [the] notice.”⁷⁴

As previously stated, EPA proposed two mechanisms through which to obtain the information required under the settlement agreement.⁷⁵ Option 1 of the two mechanisms would apply to all CAFOs.⁷⁶ In this option, EPA would require CAFO operators to fill out a survey asking specific questions relating to the facility and its management.⁷⁷ EPA would require the following information to be submitted: the legal name of the owner of the CAFO or an authorized representative, including their mailing address, email address, and primary telephone number; location of the CAFO's production area identified by either the latitude and longitude or the street address; if the owner or operator has NPDES permit coverage, the date the permit was issued, and the permit number; identification of each animal type confined for the previous 12-month period; and where the owner or operator land applies manure, litter and process wastewater, and the number of acres under the control of the owner that is available for land application.⁷⁸ This option would require all CAFO owners or operators to submit the above information; however, an exception would exist to allow for states with authorized NPDES programs to provide the information EPA sought.⁷⁹

72. *Id.* at 65,435–36.

73. *Id.* at 65,435.

74. *Id.*

75. *Id.* at 65,431.

76. *Id.* at 65,437–38.

77. *Id.* at 65,437.

78. *Id.*

79. *Id.* at 65,439.

States choosing to submit information would be required to submit the information within ninety-days of the rule's effective date.⁸⁰ Within sixty days of states submitting the information, EPA would make a list available with the names, permit number, and state of reporting CAFOs.⁸¹ If a CAFO did not appear on the list, then the rule required the CAFO to submit the survey within ninety days of the list publication.⁸² The Reporting Rule required CAFOs to submit the information on the official survey form provided by EPA, either electronically or by certified mail.⁸³ EPA would not mail the surveys to individual CAFOs because EPA claimed that the locations and addresses of many operations are unknown.⁸⁴ The survey would be available either on the EPA website or via request from EPA headquarters.⁸⁵ EPA would also print the survey in the Federal Register, but in order to notify CAFOs, EPA would "conduct extensive outreach with the regulated community, industry groups, environmental groups and states in [EPA's] efforts to notify all stakeholders about the [rule] requirements."⁸⁶

Option 2 would only apply to CAFOs in focus watersheds.⁸⁷ Under this option, EPA would first attempt to identify focus watersheds with "water quality problems likely attribute[d] to CAFOs."⁸⁸ EPA would then identify CAFOs in those focus watersheds through existing data from the Federal, state, and local level.⁸⁹ After EPA identified focus watersheds and CAFOs in the area, EPA would request CAFOs to submit the same information as in Option 1.⁹⁰ In order to notify CAFOs in the focus watersheds of the reporting requirement, EPA would "conduct a variety of information outreach efforts" including: publication of notice in the Federal Register describing the boundaries of the targeted areas; extensive outreach with the regulated community and interested stakeholders; and working with the state and local authorities.⁹¹ If a CAFO failed to report the required information to EPA, the CAFO would be in violation of CWA section 308 and subject to penalties under section 309.⁹² Section 309 allows "for

80. *Id.* at 65,440.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 65,442.

88. *Id.*

89. *Id.*

90. *Id.* at 65,444.

91. *Id.*

92. *Id.* at 65,444.

administrative, civil and criminal penalties," which EPA assesses using a national approach as outlined in its general penalty policy.⁹³

EPA ended the proposed rulemaking by discussing other mechanisms it could use to obtain the information.⁹⁴ These methods include the use of existing data from the USDA, state permitting programs, state registration or licensing programs, satellite imagery and aerial photography, reporting requirements under other programs, and other sources of data. The EPA also discussed alternative methods of promoting environmental stewardship and compliance, in addition to requiring states to submit CAFO information from their CAFO regulatory programs and only collecting information from CAFOs if a state does not report.⁹⁵

Following the notice and comment period, EPA withdrew the CAFO Reporting Rule on July 20, 2012.⁹⁶ EPA partially decided to withdraw the CAFO Reporting Rule following a search on the internet of state NPDES permitting websites that contained CAFO information accessible online.⁹⁷ EPA found that thirty-seven state permitting websites have information on 7,473 AFOs; this information includes operations that are not defined or designated as CAFOs and those that the CWA does not regulate.⁹⁸ Further, EPA executed a Memorandum of Understanding with the Association of the Clean Water Administrators, which will assist in gathering information about CAFOs.⁹⁹ EPA believes cooperating with the states will allow EPA to obtain the information it seeks about CAFOs.¹⁰⁰ This approach is more appropriate because states have expressed interest in working with EPA to exchange the information the states already possess.¹⁰¹ EPA also believes its partnerships with the USDA, United States Geological Survey, and other federal agencies will yield timely and useful information about CAFOs.¹⁰² EPA noted that CAFOs have provided information to governmental entities, even though not directly to EPA.¹⁰³ Therefore, EPA can obtain the information it seeks from other government entities.¹⁰⁴

93. *Id.*

94. *Id.*

95. *Id.* at 65,445-47.

96. *Withdrawal CAFO Reporting Rule*, 77 Fed. Reg. 42,679, 42,679 (withdrawn July 20, 2012).

97. *Id.* at 42,681.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

Environmental and animal welfare groups sued EPA one year after EPA's withdrawal of the CAFO Reporting Rule.¹⁰⁵ These groups alleged that EPA unlawfully retracted the CAFO Reporting Rule when the agency failed to provide a reasonable basis for the withdrawal decision as required by the Administrative Procedure Act.¹⁰⁶ These groups fail to realize the fatal flaws present in the CAFO Reporting Rule as proposed, which would have prevented EPA from promulgating the rule.

II. EPA'S AUTHORITY UNDER SECTION 308 AND EPA'S FLAWED APPLICATION OF SECTION 308 TO THE CAFO REPORTING RULE

To comprehend how EPA acted in an *ultra vires*¹⁰⁷ manner, it is essential to understand section 308 of the CWA and how the courts have interpreted EPA's authority under that section. It is also instructive to observe how EPA has previously used section 308 to obtain information from point sources. Finally, this Part reviews how EPA improperly applied its 308 authority to the CAFO Reporting Rule.

A. EPA's Section 308 Authority

Section 308 is a CWA enforcement provision.¹⁰⁸ This section states, in pertinent part:

the Administrator [of EPA] shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods . . . (iv) sample such effluents . . . and (v) provide such information as he may reasonably require.¹⁰⁹

The section then states that EPA or an authorized representative,¹¹⁰ upon presentation of proper credentials, may conduct an inspection of the facility

105. Complaint at 2, *Env'tl. Integrity Project v. EPA*, No. 1:13-CV-1306 (D.D.C. Aug. 28, 2013).

106. *Id.* at 3–4.

107. Black's Law Dictionary defines *ultra vires* as "unauthorized; beyond the scope of power allowed or granted by . . . law." BLACK'S LAW DICTIONARY 1662 (9th ed. 2009).

108. Point sources subject to section 308 that do not comply are subject to enforcement proceedings. 33 U.S.C. § 1319 (2006).

109. *Id.* § 1318(a)(A) (emphasis added).

110. This includes an authorized contractor acting as a representative of EPA. *See In Re Alameda Cnty. Assessor's Parcel Nos. 537-801-2-4 & 537-850-9*, 672 F. Supp. 1278, 1287–88 (N.D.

and have access to and copy the records required above.¹¹¹ EPA uses this information to develop—or assist in the development—of effluent limitations, other limitations, prohibitions, or effluent standards, pretreatment standards, or performance standards.¹¹² EPA also uses the information to determine if there are violations and to help carry out various programs under the CWA.¹¹³ The information obtained under this section is available to the public¹¹⁴ except “upon a showing . . . that records, reports, or information, or particular part . . . would divulge methods or processes entitled to protection as trade secrets.”¹¹⁵ This section of the CWA requires point sources to self-monitor which allows for easier monitoring and inspection by EPA or the state agency regulating the point source.¹¹⁶ If permitted point sources do not maintain the records required in section 308, point sources can face enforcement action under CWA section 309.¹¹⁷

Relatively few cases challenge EPA's authority under section 308 of the CWA. In general, the courts recognize EPA's authority to collect information to carry out the objectives of the CWA.¹¹⁸ The Fifth Circuit noted this in *Texas Oil and Gas Association v. EPA*.¹¹⁹ This suit involved eighteen petitions seeking review and reversal of final best available technology effluent limitation guidelines for the costal oil and gas production industry.¹²⁰ In the initial stages of setting these limitations, EPA distributed a 99-page questionnaire to known costal operators under its section 308 authority.¹²¹ The court found this action within EPA's power to collect information necessary to carry out the CWA's objectives.¹²² In this

Cal. 1987) (discussing the Ninth Circuit case *Bunker Hill Co. Lead & Zinc Smelter v. Env'tl. Prot. Agency*, which stated that private contractors hired by the EPA could enforce EPA regulations).

111. 33 U.S.C. § 1318(a)(B).

112. *Id.* at § 1318(a).

113. *Id.*

114. *See* *Gersh & Danielson v. Env'tl. Prot. Agency*, 871 F. Supp. 407, 410–11 (D. Colo.

1994) (stating information obtained by section 308 is available to public—except for information designated as trade secrets—under the Freedom of Information Act, 5 U.S.C. § 552(a), to confirm otherwise would circumvent Congress's goal for public participation in CWA proceedings).

115. 33 U.S.C. § 1318(b).

116. *Id.*

117. *Id.* at § 1319.

118. *See* *Tex. Oil & Gas Ass'n v. Env'tl. Prot. Agency*, 161 F.3d 923, 930 (5th Cir. 1998) (recognizing EPA's authority to collect information through section 308 of the CWA); *United States v. Tivian Laboratories, Inc.*, 589 F.2d 49, 53 (1st Cir. 1978) (seeking information under the CWA and Clean Air Act 42 U.S.C. § 7414).

119. *Tex. Oil & Gas Ass'n*, 161 F. 3d at 930.

120. *Id.* at 927.

121. *Id.* at 930.

122. *Id.* at 927–30.

case, EPA Region 6 issued NPDES permits that banned the discharge of produced water from costal oil and gas facilities.¹²³

Similarly, the First Circuit Court of Appeals stated that EPA can request data and information from an individual or company.¹²⁴ However, “the agency’s request for information is not enforceable under the Acts, nor may fines be imposed, until a court order is obtained.”¹²⁵ This means that the Act does not permit EPA, without first obtaining judicial leave, to force an individual to produce records.¹²⁶ Tivian Laboratories—the entity EPA sought information from—challenged the constitutionality of the CWA and the Clean Air Act provisions that require owners of any point source to provide information that EPA reasonably requires to carry out its responsibilities under the Acts.¹²⁷ In October 1975, EPA sent Tivian Laboratories a letter requesting information about the company’s use and disposal of polychlorinated biphenyls and other chemical substances.¹²⁸ The letter cited section 308 of the CWA as the source of its authority to request the information.¹²⁹ Tivian Laboratories refused to comply with EPA’s request, thus EPA filed suit in federal district court to obtain judicial enforcement of its request and impose a civil fine on Tivian Laboratories for not supplying the data voluntarily.¹³⁰

Tivian Laboratories claimed that EPA violated its Fourth Amendment rights by threatening it with fines if it did not turn over the requested information.¹³¹ The court found that there was no threat of fines in EPA’s letter and the agency can request the information, but similar to a *subpoena duces tecum*,¹³² a court order is necessary in order to obtain the information if it is not voluntarily given.¹³³ Additionally, the court did not perceive that the questionnaires EPA sent violated the Fourth,¹³⁴ Fifth,¹³⁵ or Thirteenth

123. *Id.*

124. *United States v. Tivian Laboratories, Inc.*, 589 F.2d 49, 53 (1st Cir. 1978).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 51.

129. *Id.*

130. *Id.* at 51–53.

131. *Id.* at 53.

132. Agencies commonly use *subpoenas duces tecum* to obtain records as evidence that is relevant to not only pending charges, but also to assist the agency in determining if it is necessary to bring an enforcement action. *Id.* at 53–54.

133. *Id.*

134. “The right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” U.S. CONST. amend. IV.

135. “No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .” U.S. CONST. amend. V.

Amendments.¹³⁶ The Ninth Circuit Court of Appeals and three district courts have reaffirmed these fundamental principles behind EPA's section 308 authority.¹³⁷

When employing the section 308 authority, EPA typically uses Administrative Investigative Commands ("AICs").¹³⁸ Agencies use AICs to obtain documents, records, and other tangible items—in this case maintenance records, effluent sample levels, and other site-specific information.¹³⁹ EPA uses its section 308 authority to command owners and operators of point sources "to give written answers to written questions, to provide originals or true copies of records and documents, and to provide narrative descriptions and explanations of previous events."¹⁴⁰ When EPA determines it needs information from an industry, it prints a notice in the Federal Register.¹⁴¹ Under normal circumstances, EPA sends the questionnaire or survey seeking specific information to the owner or operators of the point sources.¹⁴² EPA exerts this authority over sources of

136. "Neither slavery nor involuntary servitude . . . shall exist within the United States. . . ." U.S. CONST. amend. XIII § 1.

137. *See generally* Trustees for Alaska v. Env'tl. Prot. Agency, 749 F.2d 549, 560 (9th Cir. 1984) (arguing the Fourth Amendment is not violated when EPA uses section 308 authority); United States v. Xcel Energy Inc., 759 F. Supp. 2d 1106, 1117 (D. Minn. 2010) (using similar Clean Air Act authority 42 U.S.C. § 7414(a)(ii) holding that EPA must seek court intervention to compel document production); United States v. Hartz Constr. Co., Inc., 2000 WL 1220919, *3 (N.D. Ill. 2000) (stating EPA must seek compliance through court to obtain information through section 308 of CWA); United States v. Liviola, 605 F. Supp. 96, 99 (N.D. Ohio 1985) (utilizing similar authority under Resource Conservation and Recovery Act, 42 U.S.C. § 6927 and Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9604(e)(1), EPA must obtain a court subpoena and enforcement to compel disclosure under the acts).

138. John A. Hamill, Sr., *EPA Administrative Investigative Tools: An Inside Perspective*, 4 J. ENVTL. L. & LITIG. 85, 100 (1989).

139. *Id.*

140. *Id.* at 100–01.

141. *E.g.*, Agency Information Collection Activities: Proposed Collection; Comment Request; Industry Detailed Questionnaire: Phase III Cooling Water Intake Structures, 67 Fed. Reg. 76,400, 76,402 (Dec. 12, 2002) ("EPA does not have current economic and financial data on these facilities and intends to send . . . the detailed questionnaire . . . to [the related industry].").

142. *See id.* ("EPA intends to send the Industry Short Technical Questionnaire to all the known processing facilities [of the related industry]."); *see also* Notice of Information Collection Activities; Detailed Industry Questionnaire: Phase II Cooling Water Intake Structures, 63 Fed. Reg. 3738, 3740 (Jan. 26, 1998) ("The detailed questionnaire will be administered under authority of section 308 of the Clean Water Act, 33 U.S.C. 1318; therefore, all recipients of the detailed questionnaire are required to complete and return the questionnaire to EPA."); Agency Information Collection Activities: Proposed Collection; Comment Request; Information Collection Request for Petroleum Refinery Sector New Source Performance (NSPS) and National Emission Standards for Hazardous Air Pollutants (NEHSAP) Residual Risk Technology Review; EPA ICR No. 2411.01, OMB Control No. 2060—NEW, 75 Fed. Reg. 60,107, 60,109 (Sept. 29, 2010) ("The survey will be sent to all facilities identified as petroleum refineries through information available to the Agency.") (utilizing EPA's analogous authority under the Clean Air Act 72 U.S.C. § 7414).

pollution that are clearly point sources, such as chemical production plants, power plants, landfills, mines, and construction sites.¹⁴³

The information EPA seeks under section 308 must reasonably relate to the purpose of the CWA.¹⁴⁴ The point source that EPA seeks information from has the burden to prove there is no reasonable relation between the information and the CWA's purpose.¹⁴⁵ Generally, courts enforce an administrative agency's request for information when the investigation is within the agency's authority, the request is not too indefinite, and the information requested is reasonably relevant.¹⁴⁶ This requirement applies to EPA's request for other information as well.¹⁴⁷ To avoid submitting the information, the responder to the request must establish the agency's action is improper by making a well-supported allegation of specific facts.¹⁴⁸

B. EPA's Flawed Attempt to Use Section 308 in the CAFO Reporting Rule

There are several problems with EPA's assertion of authority under section 308 of the CWA to collect information from all AFOs. It is possible that EPA does not have the power to issue questionnaires in order to collect information under its section 308 powers. In order to determine if EPA has the authority to collect information from all AFOs, one must look at the plain language of the statute. This means to determine EPA's authority¹⁴⁹ one must look at the "language itself [and] the specific context in which

143. See generally *Trustees for Alaska v. Envtl. Prot. Agency*, 749 F.2d 549, 551–52 (9th Cir. 1984) (attempting to obtain information from gold placer miners); *United States v. Tivian Labs., Inc.*, 589 F.2d 49, 51 (1st Cir. 1978) (seeking information from a chemical production plant). AFOs are not point sources in and of themselves; EPA only regulates AFOs as CAFOs if the specific AFO fits the regulatory definition EPA established. See *supra* Part IA; *United States v. Xcel Energy Inc.*, 759 F. Supp. 2d 1106, 1109 (D. Minn. 2010) (attempting to obtain information from power plants); *United States v. Hartz Constr. Co., Inc.*, 2000 WL 1220919, *1 (N.D. Ill. 2000) (attempting to obtain documents from construction site); *United States v. Liviola*, 605 F. Supp. 96, 97 (N.D. Ohio 1985) (looking to obtain information from a landfill).

144. 33 U.S.C. § 1318(a)(A)(2006) ("the Administrator shall require the owner or operator of any point source to . . . (v) provide such other information as he may *reasonably require*") (emphasis added).

145. See *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943) (stating subpoenaed information must be "plainly incompetent or irrelevant" and not producible).

146. See *United States v. Powell*, 379 U.S. 48, 57–58 (1964); *United States v. Morton Salt Co.*, 338 U.S. 632, 652–53 (1950); *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 208–09 (1946).

147. See *United States v. Charles George Trucking Co.*, 823 F.2d 685, 689 (1st Cir. 1987) (discussing EPA's information-gathering authority under the Resource Conservation and Recovery Act); *United States v. Liviola*, 605 F. Supp. 96, 99 (N.D. Ohio 1985) (reviewing request under 42 U.S.C. § 9604).

148. Hamill, *supra* note 138, at 117–18.

149. See *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 126 (1977) (using a plain-language interpretation to determine the EPA's authority to set performance standards for new point sources of water pollution).

that language is used”¹⁵⁰ because it is “presume[d] that [the] legislature says in a statute what it means and means in a statute what it says”¹⁵¹ when delegating authority to agencies.

The plain language of the statute allows EPA to enter the premises of a point source and review the reports and records kept by the point source. There is nothing in the CWA that compels a point source of pollution to fill out a questionnaire and return it to EPA for review. No courts have held that EPA has the power to send these questionnaires, nor does it appear that it has been litigated. The case law shows that EPA has sent questionnaires directly to regulated point sources for information, but there is no evidence that EPA has the authority to obtain information from an entire industry—in this case every single AFO in the United States.¹⁵²

The most significant problem with the rule is EPA's attempt to assert power over farms beyond its section 308 authority. As shown above, EPA strictly defines what size a livestock farm must be in order for EPA to be considered a CAFO. Further, EPA has only stated that large CAFOs and certain medium sized CAFOs are considered point sources of water pollution.¹⁵³ However, as proposed, EPA planned to demand information from all AFOs. EPA was clearly participating in *ultra vires* agency action through the CAFO Reporting Rule.

C. Relevance of Information

There were problems with the relevance of the questions EPA was seeking from all AFOs. Whether or not a CAFO has a NPDES permit does not help EPA set effluent limitations for a particular watershed. Because CAFOs are required to be zero-discharge facilities, they do not allow effluents enter waters of the United States and thus should have little impact on effluent levels in a watershed. EPA, as allowed under the CWA,¹⁵⁴ has

150. McNeil v. United States, 131 S. Ct. 2218, 2221 (2011) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

151. *BedRoc Ltd., v. United States*, 541 U.S. 176, 183 (2004) (quoting *Conn. Nat'l Bank v. Fermain*, 503 U.S. 249, 253–54 (1992)).

152. See generally *Trustees for Alaska v. Evtl. Prot. Agency*, 749 F.2d 549, 551–52 (9th Cir. 1984) (attempting to obtain information from gold placer miners); *United States v. Tivian Labs., Inc.*, 589 F.2d 49, 51 (1st Cir. 1978) (seeking information from a chemical production plant); *United States v. Xcel Energy Inc.*, 759 F. Supp. 2d 1106, 1109 (D. Minn. 2010) (attempting to obtain information from power plants); *United States v. Hartz Constr. Co., Inc.*, 2000 WL 1220919, *1 (N.D. Ill. 2000) (attempting to obtain documents from construction site); *United States v. Liviola*, 605 F. Supp. 96, 98 (N.D. Ohio 1985) (looking to obtain information from a landfill).

153. EPA's ability to designate certain livestock farms as point sources is completely self-serving. Therefore, on a whim, EPA could simply change the definition of point source to include all AFOs no matter what size in order to extend its authority over the farms.

154. 33 U.S.C. § 1362(14) (2006).

exempted any agricultural stormwater discharges that are precipitation-related from land areas under CAFOs control.¹⁵⁵ Therefore, there is no connection to setting effluent limitations and whether a CAFO land-applies manure, litter, or process wastewater. As long as a CAFO is following its site-specific nutrient management plans, it is a zero-discharge facility, which should not affect effluent levels in nearby watersheds. Any discharges that result would most likely be due to precipitation, which Congress exempted under the agriculture stormwater exemption.¹⁵⁶ Additionally, the type and number of animals on a particular livestock operation is not related to setting and/or establishing effluent limitations. The EPA's only concern should be if CAFOs are discharge without a permit and not focus on how many and what species of animals are present in a particular location.

Finally, knowledge of the address or latitude and longitudinal location of a CAFO is not reasonably related to setting effluent limitations. The ability to locate and contact CAFOs does not fall within the purview of setting and developing effluent limitations. EPA's duty under the CWA is to set effluent limitations for waters of the United States. Potential sources of pollution do not affect the setting of effluent limitations in a given area. EPA is required to set effluent limitations based upon the amount of remediation needed for a particular watershed, not to set them in a specific manner depending on what types of pollution sources are in a given area.¹⁵⁷ Furthermore, information collected under section 308 is available to the public. A producer's overriding interest in keeping the location of their production facilities—and many times their home—private is more important¹⁵⁸ than EPA's need for this information.¹⁵⁹

155. 40 C.F.R. § 122.23(e) (2013).

156. *Id.* at § 122.23(e).

157. *Water: Industry Effluent Guidelines: Frequent Questions*, ENVTL. PROT. AGENCY, http://water.epa.gov/scitech/wastetech/guide/questions_index.cfm, (last updated Mar. 6, 2012).

158. *Press Releases*, NORTH AMERICAN ANIMAL LIBERATION PRESS OFFICE, <http://animalliberationpressoffice.org/NAALPO/category/press-releases/> (last visited Feb. 18, 2014). The Animal Liberation Press Office lists numerous animal rights activities and liberations on farms around the United States. This provides information about why farmers may want to keep the location of their farming operations confidential when this information is available by way of a FOIA request. Some of these activities include: release of pheasants from Primrose Pheasant Farm in Canby, OR on September 24, 2012; cattle trailers being burned on a Harris Ranch in Coalinga, CA on January 9, 2012; a turkey and geese "liberation" from a farm in Vermont on November 22, 2012; the invasion of an elk farm in Oregon on September 1, 2011; the fire-bombing of a poultry farm in Mexico on October 16, 2010; the raid of a deer farm in Oregon on October 11, 2010; a "liberation" of 72 hens from a Utah poultry farm on April 2, 2010; and the January 17, 2008 "liberation" of two turkeys from a farm in South Carolina. *Id.*

159. Livestock farmers' fears were not unfounded as evidenced by EPA's recent release of this information to environmental groups in February 2013. Alan Newport, *EPA Releases Producer Information to Animal Rights Groups*, FARM FUTURES (Feb. 20, 2013), <http://farmfutures.com/story->

III. THE CAFO REPORTING RULE AND ITS FAILURE TO FULLY CONSIDER DUE PROCESS

Notice is essential to due process in order to give all interested parties the knowledge of the action and allow them the opportunity to present their objections.¹⁶⁰ Notice by publication is a feasible and customary substitute for unknown parties.¹⁶¹ Publication in the Federal Register is generally sufficient to give notice to a person affected by what the notice contains.¹⁶² The Supreme Court has held, “[j]ust as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents.”¹⁶³ Courts recognize publication in the Federal Register as adequate notice for detailing the operations of numerous agencies.¹⁶⁴

In *Federal Crop Insurance Corporation v. Merrill*, a wheat farmer applied for crop insurance with the Federal Crop Insurance Corporation (“FCIC”), an agency of the federal government created under the Federal Crop Insurance Act.¹⁶⁵ An agent of the FCIC informed the farmer that his entire crop qualified and a Federal Crop Insurance Policy would provide

epa-releases-producer-information-animal-rights-groups-17-95162; Amanda Peterka, *Beef Industry slams EPA for Giving Enviros Access to CAFO Data*, GREENWIRE (Feb. 21, 2013), <http://www.eenews.net/Greenwire/2013/02/21/7>; Amanda Peterka, *EPA Probes Release of CAFO Data to Enviro Groups*, GREENWIRE (Mar. 6, 2013), <http://www.eenews.net/Greenwire/2013/03/06/archive/2?terms=small+CAFO>. Admittedly, EPA should have checked to ensure that release of this information was warranted under FOIA prior to its release. In July 2013, the American Farm Bureau Federation and the National Pork Producers Council sued EPA to prevent another release of farmer information to environmental groups. Julie Harker, *AFBF/NPPC Sue to Stop EPA Info Release*, BROWNFIELD AG NEWS (July 8, 2012), available at <http://brownfieldagnews.com/2013/07/08/afbfnpcc-sue-to-stop-epa-info-release/>; Amanda Peterka, *Grassley Measure Targets EPA for Releasing Livestock Data*, GREENWIRE (May 22, 2013), <http://www.eenews.net/greenwire/stories/1059981630/search?keyword=grassley+measure+targets>.

160. *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 314 (1950).

161. *Id.* at 317 (stating notice by publication to unknown parties is sufficient to fulfill fiduciary duty).

162. *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384–85 (1947).

163. *Id.*

164. *Higashi v. United States*, 225 F.3d 1343, 1349 (Fed. Cir. 2000) (finding that publication of repeal of executive orders excluding Japanese Americans from the West Coast satisfies due process); *Guangzhou Maria Yee Furnishings v. United States*, 412 F.Supp.2d 1301, 1309 (Ct. Int'l Trade 2005) (finding the Department of Commerce's practice of sending questionnaires to the Chinese Ministry of Commerce and seeking forwarding was not reasonable based on the alternative of publishing in the Federal Register); *Transcom v. United States*, 121 F. Supp. 2d 690, 708 (Ct. Int'l Trade 2000) (holding that publication by the Department of Commerce of notice of initiation in the Federal Register is adequate notice to Hong Kong exporters, even though the exporters were not individually named).

165. *Merrill*, 332 U.S. at 382.

coverage for his crop.¹⁶⁶ Following this advice, the farmer obtained the insurance policy.¹⁶⁷ Unfortunately, the crop was lost to a severe drought.¹⁶⁸ After being notified, FCIC denied benefits because the regulations did not cover reseeding of winter wheat, even though the FCIC agent had mistakenly represented to the farmer that he was covered.¹⁶⁹ The farmer brought an estoppel claim, seeking payment under the insurance policy for his lost crops.¹⁷⁰ The Supreme Court noted that the requirements for private estoppel were present.¹⁷¹ Nonetheless, the court held that the farmer was presumed to know FCIC regulations, regardless of the “hardship resulting from innocent ignorance.”¹⁷² Therefore, individuals are charged to know how the regulations printed in the Federal Register affect them.

However, in *Mullane v. Central Hanover Bank and Trust Company*, a bank established a common fund pursuant to a New York Statute that allowed the creation of common funds for distortion of judicial settlement trusts.¹⁷³ Central Hanover Bank and Trust petitioned the court for settlement of its first account as the common trustee for the funds. Central Hanover Bank and Trust published the notice of the settlement for four weeks in a local New York newspaper, even though not all of the beneficiaries under the trust were New York residents.¹⁷⁴ Additionally, Central Hanover Bank and Trust notified individuals by mail that were of full age and sound mind whose names and addresses were known to the bank and were entitled to income from the trust.¹⁷⁵ Mullane was appointed as a special guardian and attorney for all persons known or unknown that had or might have an interest in the trust.¹⁷⁶ Mullane argued that the notice by publication under the statute was inadequate to afford the trust beneficiaries due process under the Fourteenth Amendment.¹⁷⁷ The Supreme Court held that the notice requirements of the New York statute were inadequate to fulfill the notice and right to be heard requirements of due process.¹⁷⁸ The court noted “[a]n elementary and fundamental requirement of due process in any proceeding[,] which is to be accorded finality is notice reasonably

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 385.

172. *Id.*

173. *Mullane v. Cent. Hanover Bank & Trust*, 339 U.S. 306, 307 (1950).

174. *Id.* at 309.

175. *Id.* at 310.

176. *Id.*

177. *Id.*

178. *Id.* at 319.

calculated, under the circumstances, [is] to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”¹⁷⁹ In this instance the court stated, “[i]t would be idle to pretend that publication alone . . . is a reliable means of acquainting interested parties of the fact that their rights are before the courts.”¹⁸⁰

CAFO owners and operators, generally, do not read the Federal Register;¹⁸¹ however, publication in the Federal Register could be adequate notice for the majority of CAFOs. In the past, EPA and other agencies sent questionnaires directly to facilities to request specific information to set and enforce effluent limitations.¹⁸² There is no evidence that EPA has ever published a questionnaire to an entire industry in the Federal Register seeking general information without directly contacting the group of individuals from which EPA is seeking information. Following the notice requirement in *Mullane*, EPA may be required to send the questionnaire to all known CAFOs. The publication of the CAFO Reporting Rule in the Federal Register would notify the CAFOs not given actual notice. Then, EPA would use the outreach option suggested under the rule to notify the remaining CAFOs of the obligation to report information to EPA under the rule. Therefore, EPA may not have satisfied the principles of due process and would have been vulnerable to suit.

IV. COOPERATIVE FEDERALISM

The CWA authorizes EPA to protect the “chemical, physical, and biological integrity of the Nation’s waters.”¹⁸³ In order to do this, Congress established the NPDES program, which authorizes EPA to issue permits to point sources to regulate discharges of pollutants.¹⁸⁴ Under this program,

179. *Id.* at 314.

180. *Id.* at 315.

181. This is an assumption based on the author’s personal and professional experience living and working with farmers. Some farmers may read the Federal Register; however, there is no statistical data related to the readership of the Federal Register on a daily basis.

182. See *Trustees for Alaska v. Env’tl. Prot. Agency*, 749 F.2d 549, 560 (9th Cir. 1984) (describing EPA’s use of section 308 against gold place miners); *United States v. Tivian Labs., Inc.*, 589 F.2d 49, 53 (1st Cir. 1978) (discussing EPA’s attempt to utilize section 308 CWA authority); *United States v. Xcel Energy Inc.*, 759 F. Supp. 2d 1106, 1117 (D. Minn. 2010) (attempting to obtain information from power plants using similar Clean Air Act power); *United States v. Hartz Constr. Co., Inc.*, 2000 WL 1220919, *3 (N.D. Ill. 2000) (explaining use of section 308 against a construction company seeking information about NPDES permit violations); *United States v. Liviola*, 605 F. Supp. 96, 98 (N.D. Ohio 1985) (seeking information from landfills using various environmental statutes).

183. 33 U.S.C. § 1251(a) (2006).

184. *Id.* at § 1342(b).

EPA attempts to advance the CWA's objectives—including not only reducing water pollution, but eliminating it.¹⁸⁵

EPA, or states with a federally-approved permitting system, issues NPDES permits.¹⁸⁶ Thus, Congress created a system of concurrent state and federal jurisdiction, where it granted EPA primary authority.¹⁸⁷ With this authority, EPA must establish the parameters of the states' authority, determine minimum standards of regulation, closely oversee the states' implementation of the program, and step in when necessary.¹⁸⁸ Additionally, EPA should use the extensive authority sparingly and only when necessary to promote the efforts to protect and improve the nation's waters.¹⁸⁹ Thus, the CWA sets up a "cooperative federalism" system in "which states may choose to be primarily responsible for running federally-approved programs."¹⁹⁰

In accordance with the statute, EPA has regulated CAFOs in this manner.¹⁹¹ States that have an approved NPDES permit program are allowed to regulate CAFOs. However, over the last few years, a strain has developed in the relationship between EPA and its state counterparts.¹⁹² Recently, regional EPA offices have investigated two states NPDES CAFO programs and found the states' CAFO regulations inadequate.¹⁹³ Concurrent

185. *Id.* at § 1251(a)(1)–(7).

186. *Id.* at § 1342(b).

187. *United States v. Cargill*, 508 F. Supp. 734, 742 (D. Del. 1981); *see also Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981) (explaining the dual authority of the states and the federal government to develop regulatory programs under the Surface Mining Act and other federal statutes); *Chesapeake Bay Found. v. Va. State Water Control Bd.*, 453 F. Supp. 122, 127 (E.D. Va. 1978) (declaring EPA has ultimate authority to reject a state NPDES permit).

188. *See Cargill*, 508 F. Supp. at 742 (explaining EPA's role in water quality regulation through the CWA).

189. *Id.*

190. *S. Ohio Coal Co. v. Office of Surface Mining, Reclamation & Enforcement*, 20 F.3d 1418, 1427 (6th Cir. 1994); *see also* 33 U.S.C. § 1342(b) (2006).

191. *See supra* Part I; 33 U.S.C. §§ 1311(a), 1314(a), 1342.

192. *See Amanda Peterka, EPA faults Iowa regulators for slack CAFO enforcement*, GREENWIRE (July 13, 2012), <http://www.eenews.net/Greenwire/2012/07/13/archive/3?terms=EPA+CAFO+Iowa+DNR> (discussing an EPA report that blamed the Iowa Department of Natural Resources for lack of CWA enforcement against CAFOs).

193. REGION 7 ENVTL. PROT. AGENCY, PRELIMINARY RESULTS OF AN INFORMAL INVESTIGATION OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM FOR CONCENTRATED ANIMAL FEEDING OPERATIONS IN THE STATE OF IOWA (July 2012), *available at* http://www.epa.gov/region7/water/pdf/ia_cafos_preliminary_report.pdf; REGION 5 ENVTL. PROT. AGENCY, REPORT ON THE INITIAL RESULTS OF AN INFORMAL INVESTIGATION OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM FOR CONCENTRATED ANIMAL FEEDING OPERATIONS IN THE STATE OF ILLINOIS (September 2010), *available at* http://www.epa.gov/region5/illinoisworkplan/pdfs/iepa_cafos-report.pdf.

with these findings, the regional EPA offices reviewed the two states' NPDES permit programs and found them severely lacking.¹⁹⁴

Both of the states—Iowa and Illinois—responded in detail to EPA's request to overhaul their NPDES permit programs.¹⁹⁵ Illinois EPA entered into a memorandum of agreement with federal EPA that requires the two agencies to work together to assure compliance with the federal requirements for CAFOs; cooperate on inspections, information gathering, permitting, and enforcement; share information gathered through state programs; and ensure follow up actions will be taken in a timely and effective manner to implement federal CAFO regulations.¹⁹⁶

Clearly, there is a fragile relationship between EPA and its state cohorts. In the above situations, EPA was forced to step in and review a state's NPDES permitting program that it found ineffective. In these cases, EPA only entered into an agreement with the state, which required the state to reevaluate its current program and implement it properly. In the case of Illinois, EPA requested the state gather more information from the CAFOs within its jurisdiction and share the information with EPA.¹⁹⁷ There have been numerous critiques that EPA needs to step into the role of forcing

194. See Letter from Karl Brooks, Adm'r, EPA Region 7 to Chuck Gipp, Dir., Iowa Dep't of Natural Res. (July 12, 2012), *available at* http://www.epa.gov/region7/water/pdf/ia_cafos_transmittal_letter_idnr.pdf (asking the Iowa Department of Natural Resources to submit a work plan to improve their NPDES program for CAFOs); Letter from Susan Hedman, Adm'r, Regional, to Doug Scott, Dir., Ill. Env'tl. Prot. Agency, Re: Petition to Withdraw the Illinois NPDES program (Sept. 28, 2010), *available at* http://www.epa.gov/region5/illinoisworkplan/pdfs/iepa_cafos_letter.pdf (establishing a plan to improve Illinois' NPDES program).

195. See IOWA DEP'T OF NATURAL RES., RESPONSE TO IOWA CAFOS PRELIMINARY REPORT 1 (Sept. 11, 2012), *available at* http://www.epa.gov/region7/water/pdf/water_dnr_response_091112.pdf (addressing questions Region 7 of EPA posed when it reviewed Iowa's CAFO regulatory program); ILLINOIS EPA RESPONSE TO US EPA REGION 5'S SEPTEMBER 2010 "INITIAL RESULTS OF AN INFORMAL INVESTIGATION OF THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PROGRAM FOR CONCENTRATED ANIMAL FEEDING OPERATIONS IN THE STATE OF ILLINOIS" 1 (Nov. 1, 2010), *available at* http://www.epa.gov/region5/illinoisworkplan/pdfs/iepa_response_201010.pdf (explaining Illinois's CAFO regulatory program in response to Region 5 of EPA's investigation).

196. Memorandum of Agreement Between the U.S. Env'tl Prot. Agency and the Ill. Env'tl Prot. Agency Concerning Oversight and Improvement of Performance in Administering Federally Authorized, Delegated and/or Approved Illinois Environmental Programs and Work Sharing for Those Programs (Nov. 1, 2010), *available at* http://www.epa.gov/region5/illinoisworkplan/pdfs/memorandum_of_agreement_20101101.pdf.

197. The agreement has resulted in the Illinois Pollution Control Board proposing changes to its agricultural management regulations. See 37 Ill. Reg. 18,974–19,081 (proposed Dec. 2, 2013), *available at* http://www.cyberdriveillinois.com/departments/index/register/register_volume37_issue48.pdf. The proposed changes include a reporting requirement, similar to federal EPA's Proposed CAFO Reporting Rule, for certain CAFOs located in Illinois. See *id.* at 19,002–04.

states to implement properly their CAFO programs.¹⁹⁸ However, as courts have stated, EPA should only do so sparingly.¹⁹⁹

Under most state-approved NPDES programs, CAFOs seeking permit coverage must submit the information that EPA is seeking. Option 1 of the CAFO Reporting Rule would have completely bypassed the states as a source of information by demanding that all CAFOs report the required information directly to EPA. Under this option, there was an exception that allowed for states to report the information as well; however, states possibly would not have felt the need to submit this information to EPA. This is because EPA could have theoretically obtained the information from CAFOs, and the state may assert it has more important regulatory functions than information gathering on behalf of the federal government. Thus, many states already have the information EPA was seeking to obtain under the CAFO Reporting Rule and are required to submit it to EPA under the doctrine of cooperative federalism.

V. SETTLEMENT AGREEMENT FORCING PROMULGATION OF THE CAFO REPORTING RULE

The essential tenets of administrative law are transparency, public participation, and equal access to judicial review.²⁰⁰ These values legitimize the administrative process that Congress established when it delegated authority to administrative agencies.²⁰¹ In recent years, there has been a move in administrative law that favors private ordering over state-imposed solutions to regulatory problems.²⁰² When using settlements, agencies normally limit the scope of their regulatory discretion.²⁰³ An example of EPA limiting its regulatory discretion is during Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”)

198. Christopher R. Brown, *Uncooperative Federalism, Misguided Textualism: The Federal Courts' Mistaken Hostility Toward Pre-Discharge Regulation of Confined Animal Feeding Operations Under the Clean Water Act*, 30 TEMP. J. SCI. TECH. & ENVTL. L. 175, 179–80 (2011); Karly Zande, *Raising a Stink: Why Michigan CAFO Regulations Fail to Protect the State's Air and Great Lakes and are in Need of Revision*, 16 BUFF. ENVTL. L.J. 1, 16 (2009).

199. *United States v. Cargill*, 508 F. Supp 734, 742 (D. Del. 1981).

200. Thomas D. Wuertenberger & Maximilian C. Karacz, *Using an Evaluative Comparative Law Analysis to Develop Global Administrative Law Principles*, 17 MICH. ST. J. INT'L L. 567, 581 (2009).

201. *Id.*

202. Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1015 (2001).

203. *Id.* at 1018.

settlements.²⁰⁴ EPA will agree to settle for a particular amount of environmental remediation and cleanup that is much less than the actual cost while stating that EPA will not seek more money from that company if cleanup costs exceed the settled for amount.²⁰⁵

There are numerous problems when agencies enter into settlements. First, settlements only occur when traditional rulemaking falls short of establishing an acceptable regulation.²⁰⁶ Additionally, settlements generally involve only a limited number of participants.²⁰⁷ When using a settlement, the stakeholders participating in judicial review of a regulation do not necessarily include all of the parties interested in the regulation.²⁰⁸ Additionally, an agency is not required to settle with every party objecting to the regulation in court.²⁰⁹ Another problem with settlements is the secretive nature of the process.²¹⁰ Unlike rulemaking, settlement proceedings are closed to the public because they result from confidential mediation, which is shielded from public scrutiny.²¹¹ Settlements “offer[] interest groups and the agency an opportunity to do something they were not permitted to do in the notice-and-comment period: negotiate in secret.”²¹² This can allow agencies to adopt policies that they would not have contemplated following notice-and-comment rulemaking and can raise opposition from other affected stakeholders.²¹³ Because of the problems with administrative settlements, the House of Representatives has also taken an interest in this “sue and settle” policy that environmental NGOs and EPA employ.²¹⁴

204. See generally J. Whitney Pesnell, *The Contribution Bar in CERCLA Settlements and Its Effect on the Liability of Nonsettlers*, 58 LA. L. REV. 167, 168 (1997) (discussing EPA's use of settlements for CERCLA cleanup suits).

205. See *id.* at 166–77 (discussing joint and several liability under CERCLA).

206. Rossi, *supra* note 202, at 1026.

207. *Id.* at 1027.

208. *Id.*

209. This was the case with the CAFO Reporting Rule. EPA only entered into a settlement with the environmental NGOs, even though this reporting rule greatly affected the agricultural industry. See *Settlement Agreement*, *supra* note 18, at 1 (stating settlement only between EPA and “Environmental Petitioners” and not all parties involved in the suit).

210. Rossi, *supra* note 202, at 1029.

211. *Id.*

212. *Id.* (quoting Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbances in the Regulatory Process*, 30 LAW & SOC'Y REV. 735, 757 (1996)).

213. *Id.*

214. See *Federal Consent Decree Fairness Act and the Sunshine of Regulatory Decrees and Settlements Act of 2012: Hearing on H.R. 3041 and H.R. 3862 Before the Subcomm. on Courts Commercial and Admin. Law of the H. Comm. on the Judiciary*, 112th Cong. 10 (2012) (discussing H.R. 3682, which proposed to address the issue with sue and settle); *Mandate the Madness: When Sue and Settle Just Isn't Enough Before Subcomm. Tech., Info., Policy, Intergovernmental Relations and Procurement Reform of the H. Comm. on Oversight and Gov't Reform*, 112th Cong. 1–2 (2012).

However, when entering into consent decrees or settlement agreements, administrative agencies are required to follow these guiding principles by not:

- (1) commit[ting] the executive branch to expend inappropriate funds or seek appropriations from Congress;
- (2) commit[ting] the executive branch to promulgate, amend, or revise regulations; or (3) divest[ing] discretionary power granted by Congress or the Constitution to respond to changing circumstances, to make policy or managerial choices or protect the rights of third parties.²¹⁵

Therefore, an administrative agency cannot enter into any settlement it desires.

Admittedly, settlements are an important tool for EPA, and other agencies, in the administrative process. Settlements allow EPA to focus its limited resources on enforcement proceedings that are more important to upholding the environmental laws Congress established. Settlements are also valuable tools that assist in upholding the values of judicial economy in an already backlogged federal court system. Additionally, because of the atmosphere and confidential nature of settlements, parties are able to air their concerns openly and honestly, allowing for a more interactive administrative process.²¹⁶

In this case, the settlement agreement between the environmental NGOs and EPA violates the tenets of administrative law. When EPA enters into closed-door settlements, it is not being transparent in its dealings. These types of settlements place the legitimacy of EPA's proposed rules into question. Settlements forcing rule promulgations allow one set of interested parties to push its agenda by binding an agency to take an action. Administrative agencies are supposed to act within their statutory power, carry out the duties delegated to them by Congress, and not be influenced by one viewpoint on an issue. Additionally, the settlement with the environmental NGOs forced EPA to propose a rule that attempted to expand impermissibly its statutory power. As important as EPA and the

215. Memorandum from Randolph D. Moss, Att'y Gen. on Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion (quoting Memorandum from Edwin Meese III, Att'y Gen. to All Assistant Attorneys General and All United States Attorneys on Policy Regarding Consent Decrees (Mar. 13, 1986)), *reprinted in* U.S. DEP'T OF JUSTICE, OFFICE OF LEGAL POL'Y, GUIDELINES ON CONSTITUTIONAL LITIGATION 150, 152-53 (1988), available at http://www.justice.gov/olc/consent_decree2.htm#N_1_.

216. Rossi, *supra* note 202, at 1029.

environmental NGOs claim this information to be,²¹⁷ EPA did not enter into the settlement in a proper manner.

VI. SOLUTIONS ON HOW EPA COULD OBTAIN CAFO INFORMATION

EPA could obtain information about CAFOs in order to regulate properly CAFOs in many different ways.²¹⁸ First, EPA could adjust the defects in the Reporting Rule pointed out above. This would be the simplest method to obtain information about only the large and medium CAFOs the CWA regulates. However, this would not allow EPA to gather all the information it seeks. EPA would like to know the location of all livestock operations in the United States no matter what size, even though it currently does not have authority to regulate them.

EPA could also obtain the information from the state environmental agencies. This option is the best option not to upset the delicate dual enforcement system Congress established. Here, EPA could request information about CAFOs from the state agencies where an approved NPDES program exists. In the states that do not have an approved NPDES program, EPA acts as the regulatory body and should already have access to the needed information. This option would require EPA to ensure that states are fulfilling their regulatory duties when it comes to CAFOs. This would mean a review of states' CAFO programs, as was done in Illinois and Iowa, to ensure that the state CAFO programs align with requirements under the CWA and that the states are gathering the information needed to fulfill those requirements. EPA has already established it can gain information in this manner.²¹⁹

Additionally, EPA could attempt to obtain the information USDA and other federal agencies have on CAFOs. This work would be similar to the Unified Regulatory Agenda that existed between EPA and USDA during the Clinton Administration. USDA also has information about the locations and composition of farms based on the agriculture census that comes out

217. Tammy Webber, *EPA Can't Regulate Livestock Farms It Can't Find*, HUFFINGTON POST (Aug. 2, 2012), http://www.huffingtonpost.com/2012/08/02/epa-cant-regulate-livesto_n_1732414.html; Amanda Peterka, *EPA drops proposed CAFO reporting rule*, GREENWIRE (July 16, 2012), <http://www.eenews.net/Greenwire/2012/07/16/archive/3?terms=CAFO+Reporting+Rule>.

218. This section simply highlights some of the ways EPA could gather information about CAFOs if this information is as necessary as EPA claims it to be in order to regulate CAFOs. All of these possibilities require more refinements and they are not intended to be exhaustive.

219. Newport, *supra* note 159; *Beef Industry slams EPA for Giving Enviros Access to CAFO Data*, *supra* note 159.

every five years.²²⁰ EPA could request this information from USDA; however, there is notable difficulty when agencies attempt to share information.²²¹

Finally, EPA could attempt to propose a similar CAFO Reporting Rule, but may consider beginning the process through negotiated rulemaking. Negotiated rulemaking is a process in which a governmental agency and affected interested groups negotiate the terms of a proposed administrative rule.²²² Then EPA publishes the negotiated rule in the Federal Register to solicit public comments, which the agency then evaluates prior to finalizing the rule.²²³ This type of rulemaking would allow both environmental interest groups and members of the agricultural community to participate. This will allow EPA to operate in an open and transparent manner and make sure all interested and affected parties are present to express their concerns with the rule. This option would take more time because the rule would be subject to a notice and comment period, but could result in EPA being able to obtain more of the information it seeks.

CONCLUSION

EPA's quest to collect information on CAFOs in order to protect the United States' water quality was a noble one. However, there were significant problems with the 2011 CAFO Reporting Rule. First, the rule was an unacceptable attempt to extend EPA's statutory authority over all livestock farms in the nation. Second, EPA did not fully consider the notice requirement of due process to all known CAFOs. In addition, if EPA had finalized this rule, it would have unnecessarily strained EPA's already tenuous relationship with state environmental protection agencies. Finally, the sweetheart deal with environmental NGOs that forced EPA to promulgate the CAFO Reporting Rule would have opened up the rule to numerous challenges. Overall, EPA's withdrawal of the CAFO Reporting Rule was in EPA's best interest, especially when EPA can work with its state counterparts and other federal agencies to gain the information it seeks.

220. See 7 U.S.C. §§ 2204(g), 2276 (describing the federal government's general authority to collect census data); 13 U.S.C. § 221 (discussing the obligation of farmers to respond to the census).

221. See Peng Liu & Amit Chetal, *Trust-Based Secure Information Sharing Between Federal Government Agencies*, 53 J. AM. SOC'Y INFO. SCI. & TECH. 283, 283 (2005) (discussing information sharing problems between government agencies).

222. Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 136-37 (1985) (describing problems encountered when EPA and USDA attempted to share information during pesticide exemptions).

223. *Id.* at 137.