To Promote Compliance with the Clean Water Act, the EPA Should Pursue a National Enforcement Initiative to Regulate Concentrated Animal Feeding Operations

Catherine Groves∗

Concentrated Animal Feeding Operations produce a large portion of the United States animal-based food supply at an arguably low price. However, Concentrated Animal Feeding Operations produce incredible amounts of manure that, if mismanaged, can end up in our drinking water, thereby harming humans and animals alike. While the Environmental Protection Agency has authority to regulate Concentrated Animal Feeding Operations’ discharges under the Clean Water Act, it has yet to promulgate regulations that successfully prevent pollution from entering our navigable waters. Instead, the agency has been embroiled in litigation since the late 1980s, culminating in the most recent case in this saga: National Pork Producers v. Environmental Protection Agency. Since 1989, the Environmental Protection Agency has promulgated two sets of Concentrated Animal Feeding Operations regulations, both of which have been struck down by the courts. At the same time, the political climate has become increasingly hostile toward the agency. Additionally, the Environmental Protection Agency does not have complete information on Concentrated Animal Feeding Operations in the United States. As a result, its enforcement of Concentrated Animal Feeding Operations Clean Water Act violations has varied from state to state. In the face of all these challenges, I propose a new approach: the Environmental Protection Agency should first collect information on Concentrated Animal Feeding Operations in the United States, organize this information by watershed area, select the worst

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∗ J.D., University of California, Berkeley, School of Law (Boalt Hall), 2012; B.A., Political Science, University of California, Berkeley, 2008. I would like to thank Robert Infelise and Leah Rindner for their guidance and insight throughout the writing process and Holly Doremus for coteaching a wonderful writing seminar. I also owe many thanks to the editorial board of Ecology Law Quarterly, particularly to my Articles Editor, Jill Jaffe.
offenders, and then pursue enforcement actions against them using the Clinton Administration’s 1999 Clean Air Act New Source Review litigation as a model. This process will help establish a more effective national enforcement strategy to reduce ongoing Concentrated Animal Feeding Operations Clean Water Act violations.

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The Clean Water Act singles out Animal Feeding Operations for regulation and indeed there are regulations that need to be enforced. Some people would say we need more regulation. I think many of us feel we just need to make sure the regulations on the books are justly and adequately implemented and enforced ...

—EPA Administrator Lisa Jackson

INTRODUCTION

Over the last century, the U.S. livestock industry has changed, moving away from the Jeffersonian ideal of bucolic farms and toward Concentrated Animal Feeding Operations (CAFOs). CAFOs, sometimes called factory
farms, are buildings in which thousands of animals are bred and fed to grow rapidly in confined, crowded spaces, and often treated with antibiotics to reduce disease and infections. These CAFOs create numerous environmental hazards; the Environmental Protection Agency (EPA) estimates that food animals produce “more than three times the amount of raw waste” than is produced by humans in the United States. That figure will likely increase if CAFOs continue to grow in number. And while CAFOs arguably produce large quantities of food at cheap prices, they also create vast amounts of manure that harms the environment and human health by entering our waterways.

CAFO owners must devise systems to manage and dispose of this manure. Many CAFOs channel animal excrement into lagoons and then spray the manure onto crops as fertilizer in a process called land application. However, precipitation and mismanagement can cause lagoons to overflow or breach, potentially contaminating local waters. Land applications are also problematic. If a CAFO applies too much manure to a piece of land, the manure can contaminate surface and groundwater—which may be used for drinking water—and harm ecosystems. Additionally, regional clustering of CAFOs

7. The number of CAFOs in the United States has increased from “3,600 in 1982 to almost 12,000 in 2002.” U.S. GOV’T ACCOUNTABILITY OFFICE, CONCENTRATED ANIMAL FEEDING OPERATIONS: EPA NEEDS MORE INFORMATION AND A CLEARLY DEFINED STRATEGY TO PROTECT AIR AND WATER QUALITY 12 (2008) [hereinafter GAO CAFO REPORT]. As discussed infra Part II, the U.S. GAO can only estimate the total number of CAFOs in the United States because no agency, including the EPA, has complete information on the total number of CAFOs in the United States.
9. GAO CAFO REPORT, supra note 7, at 1–2.
11. Id.

It is well established that in many agricultural areas shallow ground water can become contaminated with manure pollutants. This occurs as a result of water traveling through the soil to the ground water and taking with it pollutants such as nitrate from livestock and poultry wastes on the surface. Leaking lagoons are also a potential source of manure pollutants in ground water, based on findings reported in the scientific and technical
makes appropriate land application practices more difficult.\textsuperscript{13} When CAFOs are geographically clustered, as is becoming more common, they produce more manure than can be applied to the surrounding land without runoff entering local ground and surface water.\textsuperscript{14}

As a result, the EPA indicates that CAFOs are a “leading source[] of pollutants” that are contaminating U.S. surface waters.\textsuperscript{15} These pollutants include nutrients such as nitrogen and phosphorus, pathogens like bacteria, organic matter, solids, salts, trace elements, and pharmaceuticals.\textsuperscript{16} Each of these pollutants has the potential to cause a host of environmental and health problems; phosphorus and nitrogen can cause eutrophication (a reduction in the amount of oxygen dissolved in water) and “the resulting adverse impacts—fish kills, reduced biodiversity, objectionable tastes and odors, increased drinking water treatment costs, and growth of toxic organisms.”\textsuperscript{17} Bacteria and other disease-causing microorganisms, known as human pathogens, can cause illness in humans.\textsuperscript{18} In fact, “[m]ore than 150 pathogens found in livestock manure are associated with risks to humans, including the six human pathogens that
account for more than 90% of food and waterborne diseases in humans.”

Additionally, when organic matter biodegrades in water, it consumes the oxygen that aquatic animals use to respire. Indeed, “[e]ven moderate decreases in oxygen levels can adversely affect water bodies . . . [by] decreas[ing] biodiversity,” thereby allowing other species that require less oxygen to dominate ecosystems, thus upsetting ecosystems’ balance. Additionally, solids from animal manure—the manure itself, spilled feed, bedding, litter materials, hair, and feathers—can enter waters, killing plants and animals and creating a “protected environment for pathogens.” Thus, discharges of animal waste can harm human health and ecosystems through “fish kills, algal blooms, and fish advisories, contamination of drinking water sources, and transmission of disease-causing bacteria and parasites associated with food and waterborne diseases.”

Despite the extensive water quality problems associated with CAFOs, current regulation under the Clean Water Act (CWA) is inadequate to prevent their adverse impacts on waters. The EPA defines CAFOs as point sources under the CWA and requires discharging CAFOs to acquire permits containing effluent limitations. The CWA prohibits the discharge of pollutants from a point source to waters of the United States unless a permit authorizes the discharge. However, the EPA lacks essential information regarding CAFOs, including how many there are, where they are located, and if they are currently polluting. Additionally, there are indications that CAFO enforcement may differ from state to state, leading to a “race to the bottom” in compliance. To remedy its inability to regulate CAFOs under the CWA, in 1974 and 1976, the EPA set out to promulgate regulations that established effluent limitations and permitting regulations for CAFOs. Due to legal challenges, the EPA revised its Rules, which it finally promulgated in 2003, recognizing that “[d]espite more than 25 years of regulation of CAFOs, reports of discharge and runoff of manure and manure nutrients from these operations persist. Although these conditions are in part due to inadequate compliance with and enforcement of

19. Id.
20. Id.
21. Id.
22. Id.
25. Id. § 1311(a).
26. Id. § 1342. These permits are generally referred to as National Pollutant Discharge Elimination System (NPDES) permits. Theodore L. Garrett, Overview of the Clean Water Act, in THE CLEAN WATER ACT HANDBOOK 1 n.7 (Mark A. Ryan ed., 3d ed. 2011).
27. GAO CAFO REPORT, supra note 7, at 12.
existing regulations, EPA believes that the regulations themselves also need revision.”30

However, the food animal industry and environmental groups challenged the 2003 regulations, and the Second Circuit in a consolidated opinion, Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency, struck down the regulations and held that the CWA gives the EPA jurisdiction to regulate and control only actual discharges from CAFOs, not potential discharges or the point sources themselves.31 Following the court’s guidance, the EPA promulgated new regulations in 2008,32 which shifted much of the compliance burden onto CAFOs by forcing them to apply for permits to discharge pollutants if they were already discharging or were designed or constructed to discharge into the waters of the United States.33 But industry and environmental groups promptly challenged these regulations.34 The Fifth Circuit in National Pork Producers v. U.S. Environmental Protection Agency overturned portions of the EPA’s 2008 CAFO Rules.35 Thus, the courts have twice rejected the EPA’s attempt to change the CAFO regulations to force compliance with the CWA.

After National Pork Producers, it is unclear how the EPA can force CAFOs to comply with the CWA. Not only have courts narrowly interpreted the CWA to reject the EPA’s regulations, but the current anti-EPA political climate makes legislative change inconceivable.36 The EPA—its regulatory interpretations rejected twice—is unlikely to issue a third set of regulations that would effectively regulate CAFOs in the near future. With this background in mind, I propose that the EPA initiate a large-scale national enforcement

30. Id.
32. Concentrated Animal Feeding Operations (applicable to State NPDES programs; see § 123.25), 40 C.F.R. § 122.23 (2012).
34. Nat’l Pork Producers Council, 635 F.3d at 741.
35. Id. (“In 2008, the EPA, responding to Waterkeeper, revised its regulations (hereinafter the 2008 Rule or the Rule). Subsequently, the Farm Petitioners jointly with the Poultry Petitioners filed petitions for review of the 2008 Rule with this court and the Seventh, Eighth, Ninth, Tenth, and D.C. Circuits. Shortly after the issuance of the 2008 Rule, the EPA sent guidance letters to members of Congress and to a CAFO executive (hereinafter the EPA Letters or guidance letters). The Poultry Petitioners filed a petition for review in this Circuit, challenging the EPA’s procedures for issuing rules that the Poultry Petitioners allege were final. These petitions for review were consolidated by the Judicial Panel on Multi-district Litigation (JPML), pursuant to 28 U.S.C. § 2112(a)(3), and this court was randomly selected to review the parties’ challenges. Subsequently, the Environmental Intervenors filed a motion to intervene in support of the EPA’s position. Also, the EPA filed a motion to dismiss the Poultry Petitioners’ challenges to the guidance letters.”).
36. Editorial, G.O.P. vs. the Environment, N.Y. TIMES, Oct. 14, 2011, at A18 (stating that “as of [October 14, 2011], the Republican-controlled House of Representatives had voted 168 times this year to undercut clean air and water laws while blocking efforts to limit global warming, protect public lands and guard against future oil spills”); see also John C. Becker, Waterkeeper Alliance, Inc. v. EPA: Why It Is Important, [2006] 36 Env’t L. Rep. (Env’t Law Inst.) 10,566, 10,574–75 (concluding that the court’s narrow interpretation of the CWA in Waterkeeper is flawed, but a legislative fix may subject the entire CWA to debate rather than focusing on the particular section at issue).
program to regulate polluting CAFOs, similar to the 1999 Clean Air Act (CAA) New Source Review (NSR) enforcement initiative to regulate coal power plants. Specifically, the EPA should gather information about CAFOs and then bring civil judicial and civil administrative enforcement actions against polluting CAFOs. Bringing federal enforcement actions against CAFOs would solve many of the problems of disparate enforcement and compliance across states, it would raise the political profile of CAFO water pollution, and through media attention and political pressure, could force noncompliant CAFOs to improve their environmental record.

In Part I, I discuss the law relevant to the disposition of the National Pork Producers case, the case itself, how the decision fits into the EPA’s attempt to regulate water pollutants from CAFOs, and the limitations of the EPA’s current regulatory measures. In Part II, I present my suggestions for improving CAFO compliance with the CWA, using the NSR enforcement program as a model of the success of large scale enforcement actions.

I. THE COURT’S RULING IN NATIONAL PORK PRODUCERS V. U.S. ENVIRONMENTAL PROTECTION AGENCY QUASHED THE EPA’S MOST RECENT ATTEMPT TO REGULATE CAFOs

This Part discusses the failings of the CWA and EPA to regulate CAFOs. Specifically, it establishes the basis for regulating CAFOs under the CWA and for pursuing enforcement actions against polluters. Then, it describes the EPA’s 2003 and 2008 CAFO regulations, emphasizing the provisions and shortcomings of each set of regulations, including the subsequent litigation over those regulations. Having revealed a history of flawed CAFO regulation under the CWA, it concludes with an assessment of the next steps the EPA could take to regulate CAFO water pollution.

A. The Clean Water Act

In 1971, Congress passed the CWA to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”37 To achieve these goals, Congress structured the CWA based on two different systems of discharge—point and nonpoint.38 A point source is “any discernible, confined...
and discrete conveyance, including . . . concentrated animal feeding operation . . . from which pollutants are or may be discharged[, but] . . . not . . . agricultural storm water discharges and return flows from irrigated agriculture.”

All discharging point sources are required to obtain National Pollutant Discharge Elimination System (NPDES) permits from the EPA. There are two types of NPDES permits: individual and general. Individual permits are “issued to one facility or source based on site-specific information,” while general permits “cover an entire group or category of similarly situated but separately located facilities.” As a defined point source, every discharging CAFO must obtain an NPDES permit, and comply with the permit’s five general types of provisions: “technology-based effluent limitations, water-quality-based effluent limitations, monitoring and reporting requirements, standard conditions, and special conditions.” Technology-based limitations are “limitations on the discharge of pollutants based on the availability and cost of pollution control technology.” Water-quality-based effluent limitations are “limitations developed to achieve compliance with established water quality standards.” Finally, NPDES permits require point sources to monitor their discharges and report their data to the EPA to ensure compliance. If a point source discharges without a permit or violates the terms of its permit, the EPA can bring an enforcement action; the CAFO is subject to strict liability for failure to comply with the CWA as well as civil and criminal penalties.

CWA enforcement actions fall into four categories: (1) civil judicial enforcement (federal court cases), (2) civil administrative enforcement (penalty actions and compliance orders), (3) criminal enforcement, and (4) citizen suits. The EPA can bring a civil suit under the CWA to challenge

68 Fed. Reg. 60,653–74 (Oct. 23, 2003) (explaining that nonpoint source pollution “is caused by rainfall or snowmelt moving over and through the ground and carrying natural and human-made pollutants into lakes, rivers, streams, wetlands, estuaries, other coastal waters, and ground water. Atmospheric deposition and hydrologic modification are also sources of nonpoint pollution”).

42. Id.
43. McGaffey & Moser, supra note 38, at 33.
44. See generally 33 U.S.C. § 1311(b).
45. McGaffey & Moser, supra note 38, at 33.
47. McGaffey & Moser, supra note 38, at 33.
48. 40 C.F.R. §§ 122.41(j), (l) (2012); 33 U.S.C. § 1342; 40 C.F.R. § 123.25. Under CWA section 402(b) states can administer NPDES permits if the state submits the administrative program. If a state gains primary permitting authority, the EPA retains oversight authority and can veto state-issued NPDES permits. 33 U.S.C. § 1342(b).
50. Id. § 1365. For a general description of the functions of these sections of the CWA, see Beth Ginsberg & Jason Morgan, Enforcement: Sections 309 and 505, in THE CLEAN WATER ACT HANDBOOK (Mark A. Ryan ed., 3d ed. 2011).
unpermitted discharges, discharges in violation of technology or water-
quality-based effluent limitations, violations of new source performance
standards, failures to comply with reporting and record-keeping
requirements, and discharges in violation of NPDES permits. The EPA
shares enforcement jurisdiction with states, but retains authority even in states
where the EPA has approved state-run NPDES permit programs.

To bring a successful enforcement suit against a polluter, the EPA must
prove that a defendant discharged a pollutant into navigable waters from a point
source, and that the CWA does not authorize the discharge. Because the
CWA is a strict liability statute, a defendant’s lack of intent is irrelevant to
establishing civil liability. In civil judicial enforcement actions, the EPA may
seek remedies of injunctive relief and civil penalties up to $37,500 per day for
each violation with no cap on total penalties. For civil administrative
penalties, the EPA may seek $37,500 per day per violation with a $177,500 cap
on total penalties. Since the total allowable damages for civil judicial
enforcement is higher than those allowed for civil administrative enforcement,
civil judicial enforcement is particularly attractive for forcing compliance.

If the EPA chooses not to pursue an enforcement action, citizens can sue
any “person” for violating an “effluent standard or limitation” or an order
issued with respect to an effluent standard or limitation. The CWA defines

52. Id. § 1365(a).
53. Id. § 1316.
54. Id. § 1318.
55. Id. § 1342.
56. Id. §§ 1319(a), 1342(i). In states where the EPA has approved state NPDES permit programs,
however, EPA is required to notify such state of a violation and give the state thirty days to bring a
enforcement action before the EPA may itself commence a civil action. S. Ohio Coal Co. v. Office of
Surface Mining, 20 F. 3d 1418, 1428 (6th Cir. 1994).
57. 33 U.S.C. §§ 1311(a), 1319; Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532 (9th
Cir. 2001).
58. Am. Canoe Ass’n v. Murphy Farms, Inc., 412 F. 3d 536, 540 (4th Cir. 2005) (“CWA creates a
60. 33 U.S.C. §§ 1319(a)(3), (b), (d); 40 C.F.R. § 19.4 (2012) (penalty adjustment and table). If
the EPA chooses to settle an enforcement case, the EPA’s Interim CWA Settlement Penalty Policy will
 dictate the penalties. ENVTL. PROT. AGENCY, INTERIM CWA SETTLEMENT PENALTY POLICY 2 (Mar. 1,
document sets forth the policy of the EPA for establishing appropriate penalties in settlement of civil
judicial and administrative actions. Subject to the circumstances of a particular case, this policy provides
the lowest penalty figure which the Federal Government should accept in a settlement. This Policy is
drafted so that violators whose actions, or inactions, resulted in a significant economic benefit and/or
harmed or threatened public health or the environment will pay the highest penalties. Obviously, where
settlement is not possible, the Government reserves the right to seek penalties up to the statutory
maximum.”).
62. 33 U.S.C. §1362(5) (explaining that the term “person” includes individuals and a wide variety
of entities, including a “corporation, partnership, association, State, municipality, commission, or
political subdivision of a State, or any interstate body”).
63. Id. § 1365(a)(1).
“effluent standard or limitation” broadly to include essentially all standards and limitations the EPA and the states have established under the CWA.64 Before a citizen can bring a lawsuit, the CWA requires that the citizen give sixty days notice to the alleged violator, the state in which the violation is allegedly occurring, and the EPA.65 Additionally, the CWA prohibits citizens from bringing suit when either the federal or state government is “diligently prosecuting” a civil or criminal action regarding the same violations.66

While the EPA does use some of these avenues to pursue enforcement actions against polluting CAFOs, the EPA operates with limited information, making it difficult to ensure compliance.67 Additionally, as described in more detail below, the courts have read the CWA narrowly to allow the EPA to regulate CAFOs only after they have begun polluting.68

**B. Regulating CAFO Water Pollution**

Although the CWA specifically lists “concentrated animal feeding operation” as a point source, the CWA does not define this term.69 However, EPA regulations define CAFOs as “animal feeding operation[s]” that confine more than a specified number of animals70 or facilities that the NPDES permitting authority designates as a “significant contributor of pollutants.”71 Animal feeding operations are “a lot or facility (other than an aquatic animal production facility)” where (1) “[a]nimals (other than aquatic animals) have been, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period,” and (2) where “[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.”72 Essentially, CAFOs are large Animal Feeding Operations and have additional regulations that correspond to the increase in animals and manure.

The EPA’s 1976 regulations required CAFOs to have a permit based on the number of animals in each facility.73 As such, the EPA categorized CAFOs

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64. Id. § 1365(f).
65. Id. § 1365(b)(1)(A).
66. Id. § 1365(b)(1)(B).
70. 40 C.F.R. § 122.23 (2012) (Concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25)). These regulations detail the numbers of animals for small, medium, and large CAFOs. Although the court in National Pork Producers v. U.S. Environmental Protection Agency overruled a portion of these regulations, see discussion of case infra Part I B 2, it affirmed the remainder of the regulations, including presumably the definitions of CAFOs and AFOs, see Nat’l Pork Producers Council v. U.S. Envtl. Prot. Agency, 635 F.3d 738 (5th Cir. 2011).
71. 40 C.F.R. § 122.23 (2012).
72. Id.
as large, medium, or small with corresponding restrictions. If the EPA required a discharging CAFO to have a permit, but did not have one, the CAFO was subject to civil or criminal liability. Table 1 shows the number of animals required to bring an operation within the definition of an animal feeding operation or a concentrated animal feeding operation under the most recent proposed CAFO regulations.

### Table 1: Summary of CAFO size thresholds for all sectors

<table>
<thead>
<tr>
<th>Sector</th>
<th>Large</th>
<th>Medium</th>
<th>Small</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cattle or cow/calf pairs</td>
<td>1000 or more</td>
<td>300–999</td>
<td>Less than 300</td>
</tr>
<tr>
<td>Mature diary cattle</td>
<td>700 or more</td>
<td>200–699</td>
<td>Less than 200</td>
</tr>
<tr>
<td>Veal calves</td>
<td>1000 or more</td>
<td>300–999</td>
<td>Less than 300</td>
</tr>
<tr>
<td>Mature diary cattle</td>
<td>2500 or more</td>
<td>750–2499</td>
<td>Less than 750</td>
</tr>
<tr>
<td>Swine (weighing over 55 pounds)</td>
<td>10,000 or more</td>
<td>3,000–9999</td>
<td>Less than 3000</td>
</tr>
<tr>
<td>Horses</td>
<td>500 or more</td>
<td>150–499</td>
<td>Less than 150</td>
</tr>
<tr>
<td>Sheep or lambs</td>
<td>10,000 or more</td>
<td>3,000–9999</td>
<td>Less than 3000</td>
</tr>
<tr>
<td>Turkeys</td>
<td>55,000 or more</td>
<td>16,500–54,999</td>
<td>Less than 16,500</td>
</tr>
<tr>
<td>Laying hens or broilers (liquid manure handling system)</td>
<td>30,000 or more</td>
<td>9000–29,999</td>
<td>Less than 9000</td>
</tr>
<tr>
<td>Chickens other than laying hens (other than a liquid manure handling system)</td>
<td>125,000 or more</td>
<td>37,500–124,999</td>
<td>Less than 37,500</td>
</tr>
<tr>
<td>Laying hens (other than a liquid manure handling system)</td>
<td>82,000 or more</td>
<td>25,000–81,999</td>
<td>Less than 25,000</td>
</tr>
<tr>
<td>Ducks (other than a liquid manure handling system)</td>
<td>30,000 or more</td>
<td>10,000–29,999</td>
<td>Less than 10,000</td>
</tr>
<tr>
<td>Ducks (liquid manure handling system)</td>
<td>5000 or more</td>
<td>1500–4999</td>
<td>Less than 1500</td>
</tr>
</tbody>
</table>

1. The 2003 Regulations and the Waterkeeper Decision

In response to a lawsuit charging the EPA with failing to revise the CAFO effluent limitations, the EPA revised its regulations in 2003 to address changes in the animal production industry and more than twenty-five years of inadequate compliance. In particular, “the EPA shifted from a regulatory framework that explained what type of CAFO must have a permit to a broader

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74. Id.
77. Id.
78. “May be designated or must meet one of the following two criteria to be defined as a medium CAFO: (A) Discharges pollutants through a man-made device; or (B) directly discharges pollutants into waters of the United States which pass over, across, or through the facility or otherwise come into direct contact with the confined animals. 40 CFR 122.23(b)(6).” Id.
79. “Not a CAFO by regulatory definition, but may be designated as a CAFO on a case-by-case basis. 40 CFR 122.23(b)(9).” Id.
The EPA made this shift because “reports of discharge and runoff of manure and manure nutrients from [CAFOs] persist,” and while the EPA stated that “these conditions [were] in part due to inadequate compliance with and enforcement of existing regulations,” the EPA also thought that the regulations needed revision. As such, the new regulations “reduce[d] discharges that impair water quality by strengthening the permitting requirements and performance standards for CAFOs.”

The 2003 Rule made three major changes to the 1976 regulations to achieve these goals. First, the Rule required all CAFOs to apply for an NPDES permit, even if a facility discharged only in the event of a large storm. The EPA created this provision because it believed that every CAFO has the potential to discharge and, therefore, needed a permit. The Rule allowed an exemption for large CAFOs that could prove they had no potential to discharge. Second, the Rule extended the regulations to cover all large poultry operations “regardless of the type of waste disposal system used or whether the litter [was] managed in wet or dry form.” Third, the regulations required all CAFOs with an NPDES permit to develop and implement nutrient management plans (NMPs) compliant with the regulatory effluent standards. The regulation required each CAFO to identify the site-specific actions it will take in its NMP to ensure appropriate and effective storage and disposal of manure and wastewater. However, the EPA did not review NMP best management practices under the 2003 Rule, nor did the CAFOs include them in the terms of an NPDES permit. Thus, the Rule required all CAFOs, including those that were not yet polluting, to plan to comply or to actually comply with effluent emission standards outlined in NPDES permits, but the EPA did not review CAFOs’ compliance plans as outlined in the NMPs. Moreover, the Rule did not allow third parties to sue to enforce NMP provisions, thereby failing to provide any external oversight.

The 2003 Rule was short lived because in Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency, the Second Circuit held the EPA’s jurisdiction under the CWA only extends to the regulation of actual discharges.

81. Id.
83. Id.
84. Id. at 7176.
85. Id. at 7202.
86. Id. at 7176.
87. Id.
88. Id.
89. Id.
90. See id.
from CAFOs, not potential discharges or the point source itself.91 Thus, the EPA could not require all CAFOs to seek an NPDES permit or to demonstrate no potential to discharge.92 Additionally, the court held that, because the 2003 Rule did not require the EPA to review the NMPs, the EPA could not ensure compliance with applicable effluent or discharge limitations and, therefore, the regulation violated the CWA.93 Thus, the court vacated the 2003 Rule in part and asked the EPA to revise its Rule in accordance with the court’s decision.

2. The 2008 Regulations and the National Pork Producers Decision

Following the court’s decision in Waterkeeper, the EPA promulgated the 2008 Rule, which maintained many of the 2003 Rule provisions with two major changes.94 First, the 2008 Rule mandated all NMPs be subject to review by the EPA and the public and the terms be incorporated in the NPDES permit as enforceable effluent limitations.95 Second, rather than requiring all CAFOs to apply for a NPDES permit, the 2008 Rule required all CAFOs that discharge or propose to discharge to apply for an NPDES permit.96 The 2008 Rule defined a CAFO as “propos[ing] to discharge” if it was “designed, constructed, operated, or maintained such that a discharge will occur.”97

But, under the 2008 Rule, a CAFO operator could apply for voluntary certification by showing that it was designed, constructed, operated, and maintained such that it would not discharge.98 Certification was separate from an application for a NPDES permit and, if the EPA certified a CAFO it would not need a permit.99 If the EPA certified a CAFO and there was a discharge, the CAFO would not be liable for not applying for a NPDES permit, but would still be liable for all unpermitted discharges.100 However, if a CAFO did not voluntarily certify and later discharged, the CAFO would have the burden of proving that it did not propose to discharge; otherwise, it would be liable for failing to apply for a NPDES permit.101 Thus, under the 2008 Rule, a CAFO could be held liable for failing to apply for a permit and for the discharge itself. This additional liability for failing to apply for a permit distinguishes the 2008 Rule from the 2003 Rule.

92. Id.
93. Id. at 499.
95. Id.
96. Id.
97. Id. at 70,423.
98. Id. at 70,426.
99. Id.
100. Id. at 70,427.
101. Id.
Environmental and industry groups in courts across the country promptly challenged the 2008 Rule. However, the food animal industry (“farm petitioners”) challenged the requirement that all CAFOs that discharge or propose to discharge must obtain a NPDES permit in court, arguing that, under Waterkeeper, the EPA exceeded its statutory authority by regulating potential discharges. The court consolidated these claims in National Pork Producers v. U.S. Environmental Protection Agency.

The Fifth Circuit agreed with the industry challengers and held that portions of the 2008 Rule exceeded the EPA’s statutory authority. Relying on Waterkeeper, the Fifth Circuit found that the EPA could not require CAFOs to obtain NPDES permits based on a potential discharge because the CWA only gives the EPA authority to regulate CAFOs that are discharging pollutants into navigable waters. The court also held that the EPA could not hold CAFOs liable for failing to apply for an NPDES permit. The court found that Congress explicitly spoke to the issue of liability in text of the CWA and that the statutory list of when the EPA could impose liability did not include failure to apply for a NPDES permit. Thus, the court vacated portions of the Rule that contradicted its holding. When this Note went to press, the EPA had not appealed the National Pork Producers decision, but had proposed a rule.
requiring CAFOs to submit detailed information about their facilities so that the 
EPA could have more complete knowledge to better enforce the CWA.110

3. Regulating CAFOs after Waterkeeper and National Pork Producers

The 2003 and 2008 CAFO Rules represent the EPA’s attempt to shift 
some of the CWA compliance burden to polluters by providing EPA with a 
record of all CAFOs and by making it clear which CAFOs are not permitted. 
By requiring all CAFOs to apply for a permit (2003 Rule) or all CAFOs to 
apply that would discharge by design (2008 Rule), the EPA would only have to 
prove that a CAFO did not have a permit to show that a CAFO violated the 
CWA, rather than having to prove that a CAFO actually discharged in violation 
of the CWA. Such a regulatory scheme would be easier to enforce.

But, after Waterkeeper and National Pork Producers, the EPA cannot 
regulate CAFOs to prevent pollution and continues to face a number of barriers 
to enforcing CAFO compliance with the CWA. Although the EPA pursues 
enforcement actions against CAFOs, the EPA has neither a count of how many 
CAFOs may be violating the CWA, nor a complete count of the total number of 
CAFOs in the United States.111 In a recent speech, EPA Administrator Lisa 
Jackson admitted that the EPA needs more information about the location of 
CAFOs.112 She noted that many states and local governments have information 
on the location of CAFOs, but that the EPA does not.113 At present, even if the 
EPA had the resources and desire to pursue enforcement actions uniformly 
against CWA violators, it might struggle to identify the worst offenders.

Thus, enforcement largely depends on a self-reporting system where 
CAFOs monitor their own pollutants and determine when to apply for a 
NPDES permit.114 Self-reporting coupled with a low risk of facing an


111. National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding 
source industries, EPA does not have facility-specific information for all CAFOs in the United States.”); 
GAO CAFO REPORT, supra note 7, at 13 (noting that “the number of large farms raising animals has 
increased, but specific data on CAFOs are not available”).

112. Jackson, supra note 1.

113. Id.

114. U.S. GEN. ACCOUNTING OFFICE, LIVESTOCK AGRICULTURE: INCREASED EPA OVERSIGHT 
WILL IMPROVE ENVIRONMENTAL PROGRAM FOR CONCENTRATED ANIMAL FEEDING OPERATIONS 4 
d03285.pdf (“EPA’s limited oversight of the states has contributed to inconsistent and inadequate 
implementation by the authorized states. In particular, our surveys show that 11 authorized states—with 
a total of more than 1,000 large animal feeding operations—do not properly issue discharge permits. 
Although eight of these states issue some type of permit to CAFOs, the permits do not meet all EPA 
requirements, such as including provisions for public participation in issuing permits. The remaining 
three states do not issue any type of permit to CAFOs, thereby leaving facilities and their wastes 
essentially unregulated. EPA officials believe that most large operations either discharge or have a 
potential to discharge animal waste to surface waters and should have discharge permits.”).
enforcement action may incentivize industry to save money by evading regulation. Further, self-reporting has created inconsistent enforcement against polluting CAFOs across the nation; instead, CAFOs’ “compliance with the Clean Water Act seems to be driven by disparate citizen actions and individualized state regulatory efforts.”

Incomplete information and inadequate resources have created a flawed system of self-reporting in which polluting CAFOs can evade compliance. In order to remedy this situation, the EPA must gather more information and, given the ever-present problem of insufficient resources, should consider pursuing a large-scale national program to enforce the CWA and make examples of polluting CAFOs.

II. Proposal: The EPA Should Pursue a National Enforcement Initiative Against the Worst CAFO Polluters

A. A Case Study: The Clean Air Act’s 1999 New Source Review Enforcement Initiative

After Waterkeeper and National Pork Producers, it is not clear how the EPA can effectively regulate polluting CAFOs. The courts have narrowly interpreted the CWA to prevent the EPA from seeking improved compliance through comprehensive regulations. In fact, the courts stated that if the EPA wished to regulate CAFOs more extensively to prevent pollution, Congress would have to amend the CWA. Given that the current political climate is quite hostile toward the EPA, a congressional fix is unlikely, if not potentially risky, for the viability of the CWA as a whole. However, I argue that not all is lost. To revive the CAFO regulations and improve compliance, the EPA should pursue a large-scale enforcement action against facilities violating the CWA, much as it did under the Clinton Administration’s 1999 CAA NSR enforcement initiative in the case of coal power plant violations.


117. Editorial, G.O.P. vs. the Environment, N.Y. TIMES, Oct. 14, 2011, at A18 (stating that “as of [October 14, 2011], the Republican-controlled House of Representatives had voted 168 times this year to undercut clean air and water laws while blocking efforts to limit global warming, protect public lands and guard against future oil spills.”); see also Becker, supra note 36, at 10,574 (concluding that the court’s narrow interpretation of the CWA in Waterkeeper is flawed, but a legislative fix may subject the entire CWA to debate).
In this Part, I introduce the EPA’s 1999 CAA NSR enforcement initiative that increased enforcement of environmental regulation of coal power plants. Despite some differences between power plant regulations under the CAA and CAFO regulations under the CWA, I argue that a similar enforcement program, when applied to CAFOs, could increase compliance with the CWA. I conclude by assessing some of the challenges the EPA may face in implementing such a large-scale enforcement action against CAFOs.

1. A Brief Overview of the Clean Air Act

The 1970 CAA amendments direct the EPA to establish national ambient air quality standards (NAAQS) for air pollutants and provide guidance to states on how to develop state implementation plans to achieve the NAAQS. Since 1970, the EPA has promulgated NAAQS for six criteria air pollutants: sulfur dioxide, particulate matter, nitrogen oxide, carbon monoxide, ozone, and lead. For each of these pollutants, the EPA set standards first at a level designed to protect public health and second at a level to protect public welfare.

NSR is one of the methods states use to implement the NAAQS. The NSR program imposes preconstruction review and permitting requirements on new and modified “major stationary sources” that could have potentially emit significant levels of criteria pollutants. Specifically, NSR analysis is required before a new major stationary source is constructed or before an existing major stationary source undergoes a major modification. The Clinton administration’s 1999 NSR enforcement initiative focused on sources that qualified for NSR due to a major modification.

2. 1999 New Source Review Enforcement Initiative

The CAA’s NSR requirements “were a sleepy backwater of environmental enforcement” until the mid-1990s, when the EPA became suspicious that multiple industries were ignoring NSR permitting requirements when adding to or modifying existing facilities. Under the Clinton Administration, the EPA


120. 42 U.S.C. § 7409.

121. 40 C.F.R. §§ 52.21(b)(1)(i), (b)(23)(i). NSR has different rules for sources in three different situations: (1) prevention of significant deterioration (PSD) for large or major sources of air pollution, 42 U.S.C. §§ 7470–7492; 40 C.F.R. §§ 51.160, 52.21; (2) nonattainment area program for large or major sources of air pollution, 42 U.S.C. §§ 7501–7515; and (3) minor new source review programs for smaller sources of air pollution, 42 U.S.C. §7410.


conducted a multiyear investigation of multiple industries, including the electric utility industry. The EPA ultimately sued seven electric utility companies, charging that seventeen of the companies’ power plants had illegally released air pollutants for years. The EPA also issued Notices of Violations to these companies and filed an administrative order against the Tennessee Valley Authority (TVA), eventually filing enforcement actions for thirty-two coal power plants. Many viewed this large-scale public enforcement initiative as radical and groundbreaking.

The NSR enforcement actions all involved similar allegations; “[i]n each case, EPA allege[d] that the replacement of parts . . . amounted to ‘major modifications’ of those units, triggering new source permitting and regulatory requirements” and each entity’s “failure to obtain preconstruction permits constitute[d] a continuing violation” of the CAA. The EPA sought to remedy these violations by asking the courts to issue orders requiring the power plants to install state-of-the-art emission control technology and award civil penalties on a per-day, per-violation basis. The power plant industry fiercely fought the EPA.

Although it has been over ten years since the EPA first filed the NSR power plant lawsuits, many cases have just recently settled. These settlement agreements are extensive and include detailed emissions reduction requirements. For instance, the EPA announced its settlement with TVA over violations at eleven of TVA’s coal-fired plants. The settlement requires TVA to invest three to five billion dollars in “state-of-the-art pollution controls that will prevent approximately 1,200 to 3,000 premature deaths, 2,000 heart attacks and 21,000 cases of asthma attacks each year, resulting in up to $27 billion in annual health benefits.” Additionally, TVA must invest “$350 million on clean energy projects that will reduce pollution, save energy and protect public health and the environment.” In light of twenty-two favorable

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125. Id.
128. Id.
129. Id. The power plants argued that the EPA interpreted the CAA NSR requirements too stringently and the EPA’s interpretation “could effectively prevent them from continuing to maintain their existing units without going through NSR anew in advance of almost every regularly scheduled maintenance outage.” Id. at 24.
130. EPA Coal-Fired Power Plant Enforcement Initiative, supra note 126.
131. Id.
133. Id.
134. Id.
settlements, the EPA views its coal power plant enforcement initiative as a success.135

B. Enforcement Proposal

The EPA should initiate a large-scale enforcement action against polluting CAFOs as it did under the CAA for coal power plant violations. Specifically, the EPA should gather information about CAFOs and then bring both civil and administrative enforcement actions against polluting CAFOs.

As with the NSR enforcement actions, here the EPA must systematically gather information about CAFO location and pollution. At present, the EPA does not know how many CAFOs are in the United States, let alone how many are discharging pollutants without a NPDES permit.136 Notably, the EPA is already obligated to obtain this information pursuant to the settlement with the environmental petitioners in National Pork Producers.137 The EPA has requested comments on its “co-proposal” to either “obtain certain identifying information from all CAFOs” or “use the authority of CWA section 308 to obtain this information from CAFOs that fall within areas” in locations with water quality problems.138 By gathering this information and more on CAFOs, the EPA will be able to determine not only where CAFOs are located, but also which are polluting.

Bringing NSR-coal-power-plant-scale enforcement actions against CAFOs would solve many of the problems of disparate enforcement and compliance across states. After collecting information on CAFO locations and the water quality surrounding those CAFOs, the EPA can pursue a comprehensive strategy of enforcement actions across the nation. Indeed, by acting in this manner the EPA could “us[e] its enforcement authority to bring substantial cases carrying significant risk for companies, [the EPA] can force consent decrees or settlements requiring application of stringent new limits or controls.”139 These settlements could have resounding effects; when companies agree to stringent pollution control measures in settlements, the public and the EPA pressure the rest of the industry to achieve similar environmental results.140 A large-scale enforcement initiative could raise the political profile of CAFO water pollution and, through media attention and political pressure, could encourage noncompliant CAFOs to improve their environmental record.

135. See EPA Coal-Fired Power Plant Enforcement Initiative, supra note 126.
140. Id.; see also Ronald H. Rosenberg, Doing More or Doing Less for the Environment: Shedding Light on EPA’s Stealth Method of Environmental Enforcement, 35 B.C. ENVTL. AFF. L. REV. 175 (2008) (arguing that the EPA largely pursues administrative enforcement actions instead of judicial enforcement actions to the detriment of transparency and public scrutiny).
Finally, a large-scale federal enforcement initiative would stop the “race to the bottom”\(^{141}\) that is created when states do not bring enforcement actions against CAFOs for fear of driving the CAFOs and associated jobs to other states that do not regulate as rigorously.

### C. Potential Challenges for CAFO Enforcement Initiative

This proposal would likely face opposition and challenges on a number of fronts. First, there would likely be political pressure on agency officials to not bring large-scale publicized enforcement actions against CAFOs. This may be the biggest challenge for an enforcement action and might be a bigger problem from enforcement actions against CAFOs than against coal power plants. Although power plants provide needed electricity, farms readily conjure up idyllic pastoral scenes that may garner more sympathy and support (think “EPA is killing our farms” or some other catchy mantra). However, the EPA has made a number of statements prioritizing both clean water\(^{142}\) and environmental justice,\(^ {143}\) so perhaps the political opposition might not be such an insurmountable hurdle.

Additionally, residents surrounding CAFOs tend to be of a low socio-economic status, may work for the CAFO, and as such might not be in a position to complain about water quality impairment.\(^ {144}\) Residents near coal power plants tend to be of a low socio-economic status as well: “It’s well known that communities of color and low income communities bear the disproportionate share of the deaths and illnesses associated with pollution from coal-fired power plants.”\(^ {145}\)

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141. Centner, supra note 115, at 1238 (citing GAO INCREASED EPA OVERSIGHT, supra note 114, at 4 (recommending that EPA increase its oversight of state CAFO regulations); Rechtschaffen, supra note 115, at 782 (maintaining that study after study show repeated and flagrant violations of the Act); Webster, supra note 115, at 314 (reporting EPA data showing low compliance rates for major discharges)).


144. EPA NEI 2011–2013, supra note 142 (“Several studies have found high concentrations of CAFOs in areas with low income and non-white populations. This is typical in many rural areas of the country where livestock facilities are located. Children in these populations may be particularly susceptible to potential adverse health effects through exposure to contaminated surface waters or drinking water from contaminated ground water sources.”); see also Eileen Gauna, Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice, 22 ECOLOGY L.Q. 1, 2–3 (1995) (discussing environmental justice generally and the common finding that “communities of color are left with greater environmental hazards and less rigorous environmental enforcement than exist in predominantly White communities.”).

polluting CAFOs in low-income communities would alleviate many of the burdens on these communities that have financial and political barriers to pursuing enforcement actions themselves.

A few issues might make pursuing polluting CAFOs more difficult than the challenges associated with the NSR coal power-plant litigation. First, the NSR power plants already had permits and were clearly subject to the CAA, whereas the core problem with many CAFOs is that they do not have permits and are not required to apply for a permit until they have already discharged. Additionally, in terms of sheer numbers, there are more CAFOs in the United States than coal power plants; the EPA estimates that there are close to 12,000 CAFOs\(^\text{146}\) whereas there are approximately 600 coal power plants.\(^\text{147}\) To address some of these challenges, the EPA should target the largest CAFOs that violate NPDES permitting requirements and focus their inspections on CAFOs that are within watershed areas to determine if they are discharging pollutants without a permit. Large CAFOs house more animals that produce more waste, so focusing enforcement actions on larger CAFOs will produce greater positive environmental impacts than cleaning up smaller CAFOs. Additionally, by focusing on watershed areas, the EPA can ensure that it is not acting outside the scope of the CWA and is only regulating those CAFOs that are discharging into the navigable waters of the United States. Finally, by focusing on larger polluters, the EPA can demonstrate to all other CAFOs that it is serious about CWA compliance and can use previous enforcement actions as leverage for further compliance.

There may be a difference in terms of the scope of affected parties as well. The pollution from power plants spreads across entire regions of the United States.\(^\text{148}\) It is not clear if pollution has impaired the waters in the United States on such a large scale because the EPA has incomplete information on the quality of the U.S. waters. Indeed, the EPA itself states that “only 16 percent of the nation’s river and stream miles, 39 percent of its lake and reservoir acres, and 29 percent of its bay and estuarine square miles have been monitored, according to the most recent state-reported assessment findings from 2004.

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\(^{146}\) GAO CAFO REPORT, supra note 7, at 12.


\(^{148}\) National Enforcement Initiatives for Fiscal Years 2008–2010: Clean Air Act: New Source Review/Prevention of Significant Deterioration, ENVTL. PROT. AGENCY, http://www.epa.gov/compliance/data/planning/priorities/caansrpsd.html (last updated Jan. 20, 2011) (“[M]any stationary sources are illegally emitting thousands of tons of pollution into the environment by avoiding these Clean Air Act (CAA) requirements. The pollution can contribute to respiratory illness and heart disease, the formation of acid rain, reduced visibility, and can be transported over long distances before falling on land or water.”).
This means we don’t know the quality of the vast majority of the nation’s waters.”149

CONCLUSION

Manure from CAFOs is a significant problem and will continue to impair water and destroy ecosystems if left unchecked. While the EPA has acknowledged that preventing animal waste from contaminating surface and ground waters is one of its most important priorities, it has yet to effectively regulate CAFO pollution. The Second and Fifth Circuits have rejected the EPA’s attempts to regulate CAFO pollution and have suggested that the EPA seek a legislative fix. However, the current Congress is anti-EPA and is unlikely to revise the CWA to more effectively regulate CAFOs.

Instead, the real challenge that the EPA faces is lack of information and resources. The EPA does not have complete information on the locations of or pollution from CAFOs in the United States. As a result, permits are issued inconsistently, enforcement varies state by state, and the EPA is left to rely largely on third parties and whistleblowers to protect our nation’s waters. While I have argued that the EPA should gather information on CAFOs and then mount a large-scale national enforcement initiative against polluting CAFOs, if political or financial costs are too great for the EPA to overcome, non-profits should use the information garnered from the EPA’s proposed rulemaking to bring citizen suits against polluters.


We welcome responses to this Note. If you are interested in submitting a response for our online companion journal, Ecology Law Currents, please contact ecologylawcurrents@boalt.org.

Responses to articles may be viewed at our website, http://www.boalt.org/elq.