



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 20 2006

OFFICE OF
WATER

The Honorable Saxby Chambliss
Chairman
Committee on Agriculture, Nutrition and Forestry
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Thank you for your letter dated March 3, 2006, to Environmental Protection Agency (EPA) Administrator Stephen L. Johnson concerning regulation of concentrated animal feeding operations (CAFOs). In your letter, you requested that EPA clarify whether or not a CAFO is required to obtain a National Pollutant Discharge Elimination System (NPDES) permit if the CAFO does not discharge.

I appreciate your continued interest in EPA's progress in responding to the Court of Appeals' decision in *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005). EPA is continuing to move forward with its rulemaking, as expeditiously as possible, to comply with the Court's decision. EPA hopes to propose rule revisions in which we intend to clarify that only CAFOs that discharge or propose to discharge must be covered by an NPDES permit.

It is true that, in light of the Second Circuit decision, the Clean Water Act does not require a CAFO to obtain an NPDES permit if the CAFO does not discharge or propose to discharge. The Agency has consistently communicated to States that, under section 510 of the Clean Water Act and 40 C.F.R. 123.1(i)(2), while they may operate a program with greater scope of coverage than required by the Clean Water Act, the additional coverage is not part of the federally approved program, and requirements imposed pursuant to that greater scope of coverage are not federally enforceable and are only imposed under State law.

EPA will continue to work with States as the Agency finalizes proposed changes to the CAFO rule. Thank you for your interest in this important issue. If you have any questions, please feel free to contact me or your staff may call Tom Dickerson in EPA's Office of Congressional and Intergovernmental Relations, at (202) 564-3638.

Sincerely,

A handwritten signature in black ink, appearing to read "B. H. Grumbles".

Benjamin H. Grumbles
Assistant Administrator



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

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OFFICE OF
WATER

The Honorable James Inhofe
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

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Thank you

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Benjamin H. Grumbles
Assistant Administrator

United States Senate
WASHINGTON, DC 20510

March 3, 2006

The Honorable Stephen L. Johnson
Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Administrator Johnson:

We have some concerns with how the U.S. Environmental Protection Agency (EPA) is handling its response to the 2005 ruling by the Second Court of Appeals in *Waterkeeper Alliance et al. v. EPA*. We were pleased with the February 10, 2006, final rule published revising the compliance dates for Concentrated Animal Feeding Operations (CAFOs), especially with the agency's statement that it could allow further extension in the final rule if necessary. We continue to be concerned about communications between EPA headquarters, EPA Regional Offices and the states regarding the application of the National Pollutant Discharge Elimination System (NPDES) permit program to CAFOs.

In *Waterkeeper Alliance v. EPA*, the court vacated some of the core provisions of EPA's 2003 CAFO rule, including EPA's requirement that CAFOs that do not discharge pollutants must get an NPDES permit. As a result, several state NPDES programs for CAFOs will need to be fundamentally changed. This should occur as quickly as possible because many CAFOs are being told by state regulatory agencies that they must get a state's federally enforceable NPDES permit now, even though these CAFOs are not discharging. It does not appear EPA and the Regional Offices are effectively working with the states to ensure they understand that unless a CAFO is discharging they cannot be required to get a federally enforceable NPDES permit.

In fact, several states, with EPA's apparent blessing, are continuing to move forward with requiring CAFOs to get federally enforceable NPDES permits. For example, on December 7, 2005, Region 5 sent a report to the six states in the region detailing how the states are applying their NPDES permit program to CAFOs. Five of these six states are requiring CAFOs to get NPDES permits even if they do not discharge. The Region 5 report failed to mention that the Second Circuit ruling will substantially reduce the number of CAFOs that need to be covered by the program. This Region 5 communication, which is enclosed, is being cited by state NPDES authorities as evidence

EPA intends to continue to require NPDES permits for all CAFOs regardless of whether they discharge pollutants.

It appears the cause of this problem is EPA's position on the issue. Greater clarity must be brought on the important differences between federal law and state law in the application of section 510 of the Clean Water Act. For example, EPA stated in the February 10, 2006, final rule that "states may choose to require CAFOs to obtain NPDES permits in advance of the dates set in the federal NPDES regulations, pursuant to the authority reserved to States under Section 510 of the Clean Water Act to adopt requirements more stringent than those that apply under federal law."

Section 510 does not allow states to require CAFOs to be subject to federally enforceable NPDES permit requirements when the federal government itself cannot require this. States can require under state law CAFOs to get state permits that are enforceable in state courts, but they cannot require CAFOs to get federally enforceable NPDES permits if the CAFO is not discharging.

We want states to be able to continue operating successful water quality protection programs that work for them. However, section 510 does not extend to the states the ability to impose a federal requirement that carries federal penalties and liabilities when the federal government itself cannot lawfully do so.

We strongly encourage you to immediately reconsider EPA's position on this matter and make a clear statement to the regions and states that federally enforceable NPDES permits are required only for CAFOs that actually discharge pollutants to water, and that they are not required for those CAFOs that do not discharge.

We appreciate your attention to this matter and look forward to hearing from you.

Sincerely,


Saxby Chambliss, Chairman
Senate Committee on Agriculture,
Nutrition and Forestry


James M. Inhofe, Chairman
Senate Committee on Environment
and Public Works

Enclosure