

**Student**



**Lewis & Clark Law School**

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To:

Wym Matthews

Oregon Department of Agriculture  
Natural Resources Division  
635 Capitol Street NE  
Salem, OR 97301-2532

October 27, 2008

Re: Draft National Pollution Discharge Elimination System (NPDES)/Confined Animal Feeding Operation (CAFO) General Permit No. 2

Dear Mr. Matthews,

These comments are submitted on behalf of the Lewis & Clark Law School Student Animal Legal Defense Fund concerning the Draft NPDES/CAFO General Permit No. 01 (or "Draft Permit").

The Lewis & Clark Law School Student Animal Legal Defense Fund ("SALDF") is devoted to enhancing the welfare and legal status of all animals, wild and domestic, through legal advocacy. The Lewis & Clark SALDF chapter is the oldest and largest of over 120 chapters at law schools across the nation. Our law school is home to the preeminent animal law program, which draws students from across the country.

SALDF's interest in this revision of Oregon's General CAFO NPDES Permit is two-fold: SALDF is concerned about both the confinement of an increasing number of

animals in industrial feeding operation and the potential for CAFO water pollution to cause harm to wildlife.

Widely respected international entities have recently derided the large CAFO model as entirely unsustainable and contrary to values ranging from human health and socio-economic justice to animal welfare. See Pew Commission on Industrial Farm Animal Production, *Putting Meat on The Table: Industrial Farm Animal Production in America*, 2008 (available at <http://www.ncifap.org/>); Food and Agriculture Organization of the United Nations, *Livestock's Long Shadow*, 2007 (available at <http://www.fao.org/docrep/010/a0701e/a0701e00.htm>). While SALDF recognizes that some (though not all) of these concerns are outside the scope of this permit promulgation, we believe that ODA has a responsibility to exercise its discretion in an informed manner that reflects human health, animal welfare, moral and environmental concerns.

### **I. A moratorium on new federally defined CAFOs or waste application areas in impaired watersheds is necessary to restore water quality**

The ODA should refuse to issue any NPDES permits to large federal CAFO operations located in impaired watersheds. This prohibition would be similar to the State's Three Basin Rule, OAR 340-041-0350. This rule places restrictions on certain activities, including the approval of new CAFOs, which would result in the discharge of waste into certain basins to preserve water quality. OAR 340-041-0350. This existing rule legitimizes our concerns that the history of water pollution associated with CAFOs will continue unless expressly prohibited. Moreover, a similar rule is even more appropriate in water quality-limited basins. Any CAFO discharge of waste and other contaminants, whether by accident (i.e. associated with severe storms) or passive leaching due to over-application, would only exacerbate existing pollution problems.

Alternatively, any permit for an existing CAFO that is located in an impaired watershed should not only be an individual permit, but should also require additional monitoring, large buffers between the facility and any surface waters, and other measures to minimize the prospects of contributing to the increased impairment of these waters. Still, a moratorium on CAFOs in impaired watersheds is the only way to ensure the State Agencies fulfill their legal obligation to "take such action as is necessary for the prevention of new pollution and the abatement of existing pollution by . . . [r]equiring the use of *all available and reasonable methods necessary*," ORS 468B.020 (emphasis added).

### **II. Exempting full AWMP from public notice & permitting CAFO population increases without formal permit revision violates public participation requirements**

Public participation is "a critical means" of advancing the Clean Water Act's goals. *Environmental Defense Center v. U.S. E.P.A.*, 344 F.3d 832, 857 (9th Cir. 2003). The Act established that "public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act *shall be provided for, encouraged, and assisted* by the Administrator and the States. 33 U.S.C. § 1251(e) (emphasis added). As the Second Circuit noted in *Waterkeeper Alliance v. E.P.A.*, Congress clearly intended by

this provision "to guarantee the public a *meaningful* role in the implementation of the Clean Water Act." 399 F.3d 486, 503 (2d Cir. 2003)(emphasis added.)

The Second Circuit makes plain that "the terms of nutrient management plans constitute effluent limitations" to which the public has a right of access. Waterkeeper, 399 F.3d at 502-03. However, the Draft Permit provides the public with only a "summary" of the AWMP as part of the public notice for a General Permit application. *Draft Permit*, S1.H(1). Without enumerating the information ODA will and will not include in the summaries and ensuring that ODA will publicize all relevant terms, S1.H(1) falls short of the Clean Water Act's requirements, 33 U.S.C. § 1251(e). Nor does ODA's provision of applicants' AWMPs at its offices satisfy the Clean Water Act's requirement that public participation should "*encouraged, and assisted*" not just "provided for." The AWMP summary requirement instead encourages all citizens who lack easy access to ODA offices to rely on the summary and forgo the most substantive part of the General Permit, the AWMP.

Even more egregiously, the Draft Permit allows permittees to increase their number of animals *above the maximum number allowed* to them by ODA without providing for public comment. See Draft Permit S2.F(1) The maximum number of animals is an integral term of the AWMP and as such it is an effluent limitation. See Waterkeeper, 399 F.3d at 502-03. Change to an effluent limitation triggers public participation requirements. 33 U.S.C. § 1251(e)(public participation in the revision of *any* effluent limitation shall be provided for). Increasing the number of animals requires public input whether ODA plans to consult on the increase (i.e. increases over 10% of the current livestock) or not because the Clean Water Act specifically requires input for *any* revision and, furthermore, an increase of only one percent of current livestock at a large CAFO can have an enormous impact on the amount of waste the CAFO generates. It is unclear why ODA should use a percent increase as a trigger for public input and why the particular numerical percentages were selected. Do CAFOs typically have 10 or 25 percent extra reserve capacity in all manure storage facilities and land application units? ODA should at least provide some explanation of this exemption from notice and comment requirements, because an increase of a few percent of the number of animals and the amount of waste on large CAFOs is by no means *de minimis*.

SALDF appreciates the increased stringency and transparency embodied in this revision of the CAFO NPDES general permit, and particularly ODA's continued oversight of CAFOs despite relaxation of permit requirements at the Federal level. We thank you for the opportunity to comment and look forward to your response.

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Sincerely,

/s/ Claire Tonry

Claire Tonry,  
Co-Director,

SALDF,  
Lewis & Clark Law School

