



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

DEC 17 2008

ASSISTANT ADMINISTRATOR  
FOR ENFORCEMENT AND  
COMPLIANCE ASSURANCE

**Via U.S. Mail**

Mr. L. Edward Jestice, Jr.  
President  
Delaware Farm Bureau  
3457 South DuPont Highway  
Camden, DE 19934

Re: August 29, 2008 Letter Regarding Poultry Farm Inspections

Dear Mr. Jestice:

I am writing on behalf of the U.S. Environmental Protection Agency (“EPA” or “Agency”) to respond to your August 29, 2008 letter to the Farm, Ranch, and Rural Communities Federal Advisory Committee (“FRRCC”) in which you raise concerns regarding EPA’s poultry inspections conducted in Delaware. EPA’s Office of Enforcement and Compliance Assurance appreciates the opportunity to outline why we have identified water discharges from concentrated animal feeding operations (“CAFOs”) as a compliance and enforcement national priority and how we have been engaging with the State of Delaware to improve Delaware poultry operations’ environmental compliance. It is my understanding that Mr. James Moseley, Chair of the FRRCC, intends to respond to your letter as well.

*EPA’s Interest in CAFOs*

EPA has conducted CAFO inspections in Delaware – and other states in EPA Region III – as part of a comprehensive, nationwide effort to address noncompliance and the environmental impacts of CAFOs from several animal sectors. Improperly managed animal feeding operations can present significant risks to the environment and human health. CAFOs also have substantial rates of noncompliance with requirements under the Clean Water Act (“CWA” or “the Act”). For these reasons, EPA identified CAFOs as a CWA compliance and enforcement national priority beginning in 1998, and has renewed the CAFO priority for Fiscal Years 2008-2010.

EPA is concerned with poultry operations’ impacts to waters abutting, or on, the Delmarva Peninsula (Delaware, and the Eastern Shores of Maryland and Virginia). The geographic density of poultry growout facilities in close proximity to processing plants has led to a substantial concentration of animal production activity and waste on the

Delmarva Peninsula. Poultry production on Delmarva annually results in approximately 1.6 billion pounds of litter.

CAFOs in Delaware have significantly impacted waters such as the Chesapeake Bay, Delaware's Inland Bays, and numerous tributaries to these waters, such as the Nanticoke and Pocomoke Rivers. Several of these waters are listed as impaired under the CWA for nutrient pollution. The suspected source of the impairment in many instances is agriculture.

#### EPA's Delaware Poultry Farm Inspections

In the course of its poultry farm inspections in Delaware, EPA has developed an interim process with the Delaware Department of Natural Resources and Environmental Control and the Delaware Department of Agriculture (collectively "the State") for notifying farmers of inspections. Following this process, EPA provides the State with two weeks' notice of the inspections so that the State can accompany EPA on the inspections. The State then provides the farmers with approximately 48 hours' notice of the inspections to ensure that the owners or operators can be present for, and participate in, the inspections. Accordingly, EPA's poultry farm inspections in Delaware have generally been announced inspections.<sup>1</sup>

Your letter referenced proposed inspections for 40-46 unidentified farms in July 2008. It is critical to note that these proposed site visits were not full compliance inspections. Rather, the State and EPA Region III agreed to conduct 20 joint site visits – led by the State – whereby the State and EPA Region III would assess whether a farm required a permit. Following the 20 joint site visits, the State would conduct any additional site visits. The State and EPA Region III conducted the first ten joint site visits from August 25-27, 2008, and the second ten joint site visits from December 3-5, 2008.<sup>2</sup> It is our understanding that the State provided the 20 farm owners or operators with one week's notice of the site visits.

#### EPA's CWA Inspection Authority

In any event, although Delaware poultry farmers have generally received notice of inspections, EPA has the authority to conduct unannounced inspections. EPA often conducts unannounced inspections to monitor regulatory compliance in all sectors, including agriculture. The ability to conduct unannounced inspections allows inspectors to evaluate facilities' normal operating conditions.

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<sup>1</sup> Two poultry farm inspections in Delaware did not follow the notification process. In the first instance, EPA is unaware whether the State initiated contact with the farmer prior to the inspection. In the second instance, EPA sought to notify the farmer that was the subject of the inspection, but the farmer was deceased and the farmer's relative directed EPA inspectors to the living relative operating the farm. All inspections following these two inspections have followed the notification process.

<sup>2</sup> The first ten site visits did not coincide with the Delaware State Fair, which ran from July 17-26, 2008.

The ability to conduct unannounced inspections is integral to the CWA's regulatory scheme. The CWA provides the Agency with broad authority to, among other things, enter and inspect any premises in which an effluent source is located or in which records are required to be maintained under the Act. Announced inspections in all instances would limit EPA's ability to evaluate compliance with the Act.

Nevertheless, EPA inspectors often provide CAFO owners and operators with advance notice of inspections. The National Pollutant Discharge Elimination System Compliance Inspection Manual specifically states with regard to CAFOs: "EPA conducts both announced and unannounced inspections. Depending upon the specific circumstances the permittee may or may not be notified prior to the inspection by writing or by telephone. Each region uses different criteria to determine whether to announce inspections."<sup>3</sup> The manual further states on page 16-30:

CAFO inspectors should be aware that they might have to call the facility prior to the time of inspection to announce their arrival because small farm operators might not be able to stop production and assist the inspectors with the inspection process. In addition, the inspector might need to know the facility's biosecurity procedures before the time of inspection.

EPA inspectors take steps to ensure that relevant biosecurity procedures are followed consistent with the inspection manual and EPA's biosecurity guidance.<sup>4</sup> In addition, EPA appreciates that poultry farms may be co-located on property with owners' and operators' residences. The inspection manual instructs inspectors when they arrive to seek out the person responsible for operation and/or compliance at the facility who is authorized to grant access to the facility.

#### Delaware's Nutrient Management Law

Your August 29 letter suggests that EPA's poultry farm inspections are "unjust and unwarranted" because EPA sampling has not specifically identified the presence of contamination from poultry operations in Delaware. Specifically, your letter states that EPA's soil and water samples from the first set of inspections demonstrated "0 contamination." It is not clear what sampling episode the letter refers to when referencing "0 contamination." EPA's sampling data from 2007 and 2008 poultry farm inspections in Delaware have indicated the presence of pollutants in the soil and water samples taken at several of the inspected poultry farms, including discharges of pollutants to waters of the U.S. These sampling results indicate that Delaware poultry operations have caused the release of pollutants to water.

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<sup>3</sup> U.S. Environmental Protection Agency, *National Pollutant Discharge Elimination System Compliance Inspection Manual*, EPA 305-X-04-0001, 2-6, July 2004.

<sup>4</sup> U.S. Environmental Protection Agency, *Memorandum: Routine Biosecurity Procedures for EPA Personnel Visiting Farms, Ranches, Slaughterhouses and other Facilities with Livestock and Poultry*, EPA 305-B-01-011, December 2001.

Additionally, your letter commends Delaware's nutrient management law (program). EPA acknowledges that Delaware has adopted a nutrient management law. Furthermore, EPA acknowledges that Delaware's nutrient management program is more expansive than the federal National Pollutant Discharge Elimination System ("NPDES") CAFO program because it applies to animal feeding operations down to eight animal units, and also to operations applying nutrients to more than ten acres of land. However, Delaware's nutrient management program is less stringent than the federal CAFO program because it does not meet certain NPDES regulatory requirements, including, for example, definitional issues that trigger the requirement for CAFO NPDES permits. Accordingly, EPA Region III has not approved Delaware's nutrient management law as an authorized CWA NPDES CAFO program.

Delaware has incorrectly maintained that compliance with its nutrient management program obviates the need for an NPDES CAFO permit. Accordingly, the State's position has the potential to create confusion in the agricultural community on CWA requirements. As a threshold matter, the CWA requires that certain sources of pollution have a valid NPDES permit to discharge pollutants into the waters of the United States. Compliance with the Delaware nutrient management program does not eliminate the need to comply with this CWA requirement. For CAFO operations, the NPDES permit identifies under what conditions a discharge may occur and provides other record keeping and reporting requirements. If a farm does not have a valid NPDES CAFO permit, but is required to have a permit under the CWA, the farm is exposing itself to risk of citizen suits or federal/state enforcement actions.

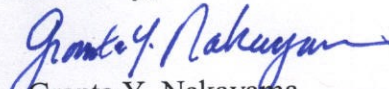
Finally, even if the State had an EPA-approved NPDES CAFO program, EPA retains authority to conduct inspections in the State, and we routinely conduct inspections in other states that have EPA-approved programs. The Agency continues to hold discussions with representatives from the State to address the above issues regarding the Delaware nutrient management program.

### Conclusion

EPA conducts announced and unannounced CAFO inspections across the country as part of its effort to ensure regulatory compliance, and to determine the extent and sources of nutrient discharges from animal agriculture affecting our nation's waters. At the same time, EPA recognizes some of the unique aspects of CAFO inspections, such as biosecurity, production disruption concerns, and the fact that many CAFOs are co-located with farmers' residences. EPA remains concerned about CAFOs' environmental impacts to our nation's waters, and will continue our effort to protect human health and the environment under this Clean Water Act compliance and enforcement national priority. We are assisting the FRRCC's Livestock and Poultry Production Workgroup in developing and considering ways to promote CAFOs' compliance with the CWA.

We trust that you will find this letter useful in explaining EPA's basis for conducting CAFO inspections in Delaware. Please contact Timothy Sullivan of my staff at (202) 564-2723 should you have any questions regarding this matter.

Sincerely,

  
Granta Y. Nakayama

cc: Alicia Kaiser, Designated Federal Officer, FRRCC  
James Moseley, Chairman, FRRCC  
Austin Short, Acting Secretary, Delaware Department of Agriculture  
John A. Hughes, Secretary, Delaware Department of Natural Resources and  
Environmental Control  
David McGuigan, Associate Director, Water Protection Division, EPA Region III  
Hank Zygmunt, Agriculture Counselor, EPA Region III  
Sally Shaver, Agriculture Counselor, EPA