OBAMA-BIDEN TRANSITION PROJECT

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WATERKEEPER® ALLIANCE

CENTER ON RACE, POVERTY & THE ENVIRONMENT
Providing legal and technical assistance to the grassroots movement for environmental justice

December 16, 2008

Mr. J. Charles. Fox
1025 F Street NW, 9th Floor
Washington, DC 20004-1409

Via email: cfox@pewtrusts.org

Dear Mr. Fox,

We write to you today in your capacity with the transition team for the incoming administration of President-elect Barack Obama. As you know, the rise in the number of factory farms (CAFOs) and concentration of the livestock industry has given rise to significant environmental, environmental justice and community health problems in rural America. The Obama campaign's rural policy agenda recognized the importance of controlling these largely unregulated sources of air and water pollution through improved regulation and enforcement. Unfortunately, an Obama Administration will inherit an agriculture and environment policy foundation that favors industrial agriculture over sustainable production of livestock and dairy, sacrifices rural communities' health, and self-policing over effective regulatory control.

Industrial Agriculture and Water

- *A worsening problem*

Modern, industrialized agriculture is one of the leading causes of water quality impairment in the United States. Factory farms or Concentrated Animal Feeding Operations (CAFOs) are a big part of this problem. According to EPA, agricultural operations that confine livestock and poultry animals generate about 500 million tons of animal waste annually or three times more waste than humans generate each year. Unlike human waste, most animal waste receives no treatment and is instead stored in unlined manure pits and then spread onto land. CAFO waste contains nutrients and bacteria that affect human health and destroy waterbodies.

EPA's 2003 revised CAFO regulations were challenged by both environmental organizations and industry groups. In *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2d Cir. 2005), the court affirmed the Rule in part and reversed in part and remanded it to the agency. Importantly for recent developments, industry prevailed in its argument that EPA cannot require all large CAFOs to apply for a permit based on their potential to discharge, because the CWA only requires facilities that "actually" discharge to obtain a permit. On November 20th, EPA issued a revised final rule that essentially exempts thousands of CAFOs from the Clean Water Act's requirement that they obtain permits that limit water pollution. The rule also creates a loophole allowing facility operators to "self certify" they will not have a discharge and thereby avoid enforcement for some violations even if they do discharge. The rule also rejects performance standards based on technologies that would reduce harmful bacteria and other pathogens contained in animal waste, missing an opportunity to prevent water pollution and threats to public health. Waterkeeper Alliance, NRDC, and Sierra Club have again challenged this rule.

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- *Real solutions for the future*

Legislative Amendment: The new administration should support a targeted CWA amendment to require NPDES permits of every point source that has the potential to discharge to waters. In *Waterkeeper v. EPA*, the Second Circuit held that only point sources that actually discharge pollutants into Waters of the United States are required to obtain permits. EPA has responded to the decision and mounting pressure from the CAFO industry by failing to even articulate which types of facilities must be regulated. The CWA amendment would plainly provide EPA with the authority to use the NPDES permitting program to prevent pollution by requiring point sources with the potential to discharge to obtain a permit. This would not only ensure that all CAFOs would be regulated, but could also be important for regulating other industries that have periodic discharges.

Permitting: Even without a legislative change, EPA has significant untapped authority to require permits from CAFOs and other periodic dischargers, and should do so. EPA must reopen its recent Final CAFO Rule and gather sufficient evidence to make the "regulatory presumption" that large CAFOs, or certain designated subsets of large CAFOs, "actually discharge" and thus require Clean Water Act permits. In general, EPA should strengthen its regulations to create a stronger and more consistent set of requirements across states. Specifically, the agency must require integrators to be co-permitted, ensure that facilities' nutrient management plans are fully reflected in their permits, and that available technologies to reduce pathogen pollution are employed. EPA should also re-examine its definition of "agricultural stormwater," and clarify that discharges from CAFO land application areas do not qualify for this statutory exemption.

Effluent Limitation Guideline (ELG) Development: EPA must conduct extensive research on alternative waste management technologies, with a focus on building a record for long-term review of the ELGs in a 10-year timeframe. North Carolina has adopted legislation that prohibits new and expanding CAFOs from implementing current lagoon and sprayfield technology, and is in the process of developing regulations to apply this statute. In the coming years, the industry will begin to respond to these technology-forcing mandates at the state level. EPA needs to re-issue ELGs that reflect the most protective waste management technologies.

Enforcement, enforcement, enforcement: Although EPA has listed CAFOs as a priority enforcement area for the past few years, there has been little action to back this up. Aggressive pursuit of those who discharge without permits, or in violation of permits, would do much to signal a change in agency practice. To ensure adequate funding, EPA should require states to set permit fees at levels sufficient to cover the costs of inspections and enforcement. EPA should also take action against states for not issuing permits that comply with NPDES requirements.

At this juncture, the legal uncertainties facing EPA and state permitting agencies have dramatically undercut their abilities to prevent air and water pollution from CAFOs. New perspectives and approaches are needed to alter this dynamic, and restore meaningful environmental and public health protections.

Air Emissions and Global Warming

- *A real and growing source of air pollution*

On a daily basis, CAFOs emit a host of pollutants that include toxic compounds, form low-level ozone ("smog"), form fine particle pollution (PM2.5), and significantly contribute to global warming. Toxic compounds in CAFO air emissions include hydrogen sulfide and methanol, a potent reproductive toxin which is released in such massive quantities that dairies should be subject to permitting under section 112 of the Clean Air Act. CAFOs are also a significant source of ammonia gas; a recent CERCLA/EPRCA disclosure from a dairy in Oregon revealed the dairy to be the *third largest* ammonia emitter in the United States.

CAFOs also emit volatile organic compounds ("VOC"), which react with other compounds to form PM2.5. Ozone and PM2.5 pollution are subject to EPA's national ambient air quality standards, and even rural residents now find themselves in areas that fail to meet these health-based standards. The rural San Joaquin Valley's failure to meet ozone and PM2.5 health-based standards costs the public $5.7 *billion* dollars *each year*.[1] That air basin's largest sources of VOC and ammonia are dairies and other CAFOs. Finally, methane and nitrous oxide emissions from CAFOs are 23 and 296 times as powerful as CO_2 as global warming pollutants, respectively. According to the California Energy Commission, dairy CAFOs in California emit 19 million metric tons of CO_2 equivalent air pollution, or about 5% of all of California's greenhouse gas emissions.

Over the past eight years, EPA has made these problems worse by failing to take meaningful steps to protect the public. Instead, the Bush Administration elected to give CAFO operators the "Air Compliance Agreement" an industry-wide get-out-of-jail-free-card whereby EPA agreed to not prosecute CAFOs for violations of air pollution and allowed the industry to study its own air emissions. *See Association of Irritated Residents v. U.S. EPA*, 494 F.3d 1027 (D.C. Cir. 2007). EPA has refused to regulate methanol or hydrogen sulfide emissions as Hazardous Air Pollutants. Finally, the Bush Administration has proposed to amend California's State Implementation Plan to exempt CAFOs from air pollution controls, despite a recent federal court ruling. *See Association of Irritated Residents v. C&R Vanderham Dairy*, 2007 U.S. Dist. LEXIS 70890 (E.D. Cal. Sept. 25, 2007); 73 Fed. Reg. 9260 (Feb. 20, 2008).

- *Real progress is possible to protect rural communities.*

Enforcement of Existing Laws and Regulations: EPA must treat CAFOs just like other major sources of air pollution. EPA should enforce the requirements of the Clean Air Act and other applicable laws. The Agency should also define hydrogen sulfide as a Hazardous Air Pollutant, and adopt National Emissions Standards for Hazardous Air Pollutants to regulate CAFOs' hydrogen sulfide and methanol emissions. In the coming months, EPA must accelerate the air quality monitoring and modeling pursued under the Air Compliance Agreement and create an independent panel of scientists to oversee the scientific aspects of the Agreement. EPA should also expand its research to aggressively identify the full suite of impacts associated with CAFO

[1] See a recent study by Dr. Jane Hall and Dr. Victor Brajer of California State University Fullerton, available at http://business.fullerton.edu/centers/iees/reports/Benefits_of_Meeting_Clean_Air_Standards_11-13-08.pdf.

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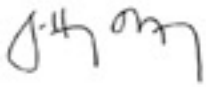
air emissions and follow up with rulemaking, guidance and/or enforcement actions designed to force CAFOs to comply with Clean Air Act, CERCLA, and EPCRA requirements.

Rejecting Flawed Regulations: EPA should reject the Bush EPA's proposed rules to exempt CAFOs from the Clean Air Act in California, as well as CERCLA and EPCRA reporting requirements. *See* 73 Fed. Reg. 9260 (Feb. 20, 2008) 72 Fed. Reg. 73700 (Dec. 27, 2007). On Friday, December 12, 2008, EPA signed the final rule to exempt CAFOs from CERCLA/EPCRA. There is no basis in law or public policy that should allow CAFOs to escape pollution controls or report their toxic releases to the public.

Ensure that Federal Advisory Committees are Sufficiently Balanced: EPA often hides behind the recommendations of the U.S. Department of Agriculture's Agricultural Air Quality Task Force ("AAQTF") to justify its unwillingness to regulate CAFO air emissions. The AAQTF is charged with "determining the extent to which agricultural activities contribute to air pollution and ways in which the agricultural industry can improve air quality." However, it has historically lacked a sufficiently diverse group to ensure the representational balance mandated by the Federal Advisory Committee Act ("FACA"). *See* 5 U.S.C. app. 2 § 2(a) (2002); *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 445-46 (1989). Rather, the AAQTF has been dominated by representatives of industry and other special interests that seek to advance their own agendas and prevent the formation of credible public policy. Recently, EPA established a second advisory committee to provide advice and recommendations to the Administrator on environmental issues and programs that impact farms, ranches, and rural communities. The new Administration should review the composition of the two agricultural advisory committees to ensure the representational balance required by FACA and to prevent improper influence by special interests.

Of the many issues facing the Obama Administration as it assumes office next month, agriculture, rural, and environmental policies are of special importance. The outgoing administration has, in many ways, set back efforts to preserve our communities and environment and shape a more sustainable future. We appreciate the opportunity to bring to your attention these concerns and suggested pathways for progress. Moreover, we believe that a meeting with members of the transition team or incoming EPA appointees or staff would be a fruitful opportunity to provide additional information and discuss these issues in greater detail.

Sincerely,



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