Class Actions and CAFOs:
A Match Made in (Hog) Heaven

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The class action lawsuit has become an increasingly powerful tool for the plaintiffs' bar seeking to address damages caused by environmental problems. At the same time, concentrated animal feeding operations (CAFOs) have received considerable attention from courts, legislators and regulatory agencies, as they all struggle with the balance between farming needs and the air and water quality issues presented by such farms. It is for these reasons that we chose to present a mock class certification hearing involving the neighbors of a CAFO.[1]

The materials set forth below are intended to provide background information about both class certification issues in environmental cases and recent legal and regulatory developments applicable to CAFOs. They are not intended to be exhaustive, but should give the reader with enough background to appreciate the issues raised in the hypothetical and provide a point of departure for research into relevant issues.

I. Class Action Lawsuits

Rule 23 of the Federal Rules of Civil Procedure governs class actions. Prospective class actions must satisfy all four requirements of Rule 23(a) and one of the prerequisites of

[1] A group of lakeshore property owners in Oklahoma recently filed a class action lawsuit against Tyson Foods alleging that poultry waste from Tyson's operations (a chicken farm and chicken processing plant) polluted the lake. See Thompson v. Tyson Foods, Inc., No. CJ-01452, (Okla. Dist. Ct. October 23, 2001).

Rule 23(b). These requirements are discussed separately below.

A. Numerosity – Rule 23(a)(1)

A person seeking to represent a class must first show that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). There is no magic number at or above which joinder becomes impracticable. However, a number of courts have commented that, generally, numbers under twenty-one have been held to be too few, and numbers over forty have sustained the requirement. Martin v. Shell Oil Company, 198 F.R.D. 580, 590 (D. Conn. 2000); Josephat v. St. Croix Alumina, LLC, 2000 U.S. Dist. LEXIS 13102, at *9-10 (D.V.I. 2000); Slaven v. BP America, Inc., 190 F.R.D. 649, 654 (C.D. Cal. 2000).

In Martin, the plaintiffs filed suit on behalf of themselves and those similarly situated as a result of ground water contamination allegedly emanating from the defendant's gasoline station. The plaintiffs did not provide evidence to support their contention that the class was sufficiently numerous, instead relying solely on the number of properties being monitored by the defendant pursuant to an order by the Connecticut Department of Environmental Protection (CTDEP). The court found that the order did not have preclusive effect because it did not expressly state that the defendant caused the contamination at any properties being monitored other than the gasoline station and adjacent shopping center. The court further noted that the defendant provided evidence that it could only be

held responsible for a limited number of properties, based on its hydrogeologic investigation. Thus, the plaintiffs did not meet their burden of showing that joinder was impracticable.

In Olden v. LaFarge Corporation, 203 F.R.D. 254 (E.D. Mich. 2001) the court stated that the plaintiffs had satisfied the numerosity requirement, rejecting the defendant's claim that certification was not appropriate because the number of class members was not known. The plaintiffs, residents of the City of Alpena and neighbors of the largest cement plant in North America, alleged that their property had been damaged by toxic pollutants and air contaminants emitted by the defendant's cement plant. The court held that the plaintiffs had demonstrated that all residents of the City of Alpena were potential class members, satisfying the numerosity requirement. See also Leclercq v. The Lockformer Company, 2001 WL 199840 (N.D. Ill. 2001) (potential class of more than two hundred people who live in approximately 100 homes potentially affected by releases of hazardous substances from defendants' manufacturing facility satisfies numerosity requirement.)

B. Commonality – Rule 23(a)(2)

Class certification is only appropriate if "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). For example, in Leclercq, the plaintiffs sought injunctive relief and damages on behalf of themselves and others similarly situated in homes potentially affected by releases of hazardous substances from defendants' manufacturing facility. Defendants argued that the issues of injunctive or

declaratory relief varied among potential class members, depending on the levels of contaminants in ground water, which varied significantly. Id. at 4-5. The court held that this argument strayed too far into the merits of the plaintiffs' claims, and that it was "the same conduct that allegedly caused the injury to all of the Plaintiffs, and there are common questions of law and fact. Where the defendant engages in a single course of conduct that results in injury to the class as a whole, a common core of operative facts is usually present." Id. (quotations and citations omitted.)

C. Typicality – Rule 23(a)(3)

A class should also only be certified if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Courts recognize that the commonality and typicality requirements often merge. While commonality refers to the common nature of the claims among class members, typicality requires that the claims of the class representatives be typical of the claims of the class, in order to protect absentee members. The focus is on the defendants' conduct. "If Defendants' course of conduct gives rise to all of the class members' claims, and if Defendants have not taken any action unique to the named Plaintiff, then the representative's claim is typical." Josephat, 2000 U.S. Dist. LEXIS 13102 at *17.

The court in Olden rejected the defendant's argument that the plaintiffs could not satisfy the "typicality" requirement "because of the great variance in damages sought by the named class

members." 203 F.R.D. at 269. Common questions of fact existed about the defendant's cement plant emissions, the foreseeability of damages and the similarity of damages. The same legal theories applied to all the claims of putative class members. The court held that "class members' claims may differ in the amount of damages due to each individual, but that feature alone is not fatal to a finding of typicality." Id.

D. Adequate Representation – Rule 23(a)(4)

A class will only be certified if "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The "interests of the named plaintiffs must be sufficiently aligned with those of the absentees, . . . [and] class counsel must be qualified and must serve the interests of the entire class." Josephat, 2000 U.S. Dist. LEXIS 13102 at *18.

In Josephat, the plaintiffs claimed property damage and personal injury caused by the spread of red bauxite dust and red mud as a result of negligent storage and handling practices by the defendants. The defendants argued that the named plaintiffs were not adequate representatives because each of them had claims subject to unique defenses. The court said the determination depended on whether the defense, such as credibility of the representative, would be a major focus of the litigation. "If the credibility of the class representatives is not subject to serious question or does not threaten to become the central issue in the litigation, then a credibility problem will not create a unique defense defeating

certification." Id. at *22. The named plaintiffs in Josephat were held to be adequate representatives.

E. Rule 23(b) Prerequisites

In addition to meeting the requirements set forth in Rule 23(a), an action can only be maintained as a class action if it satisfies one of the three prerequisites set forth in Rule 23(b), designed to ensure that a class is the appropriate vehicle to resolve the dispute.

1. If separate actions by or against individual class members could lead to inconsistent adjudications or result in adjudications that would be dispositive of the interests of other potential class members (or substantially impair those interests), class certification would be appropriate. Fed. R. Civ. P. 23(b)(1).

In Ruland v. General Electric Company, 94 F.R.D. 164 (D. Conn. 1982), the plaintiffs sought certification of a class of property owners along the shoreline of the Housatonic River seeking damages for diminution of property values caused by GE's discharge of PCBs into the river. The court overruled the plaintiffs' objection to a magistrate's proposed ruling denying class certification. The magistrate ruled that the "plaintiffs have not persuasively demonstrated that class certification as requested under Rule 23(b)(1) . . . is appropriate." Id. at 170. The plaintiffs failed to show a genuine risk that individual adjudications would result in putting the

defendant in the position of having to comply with conflicting judgments.

2. If the party opposing the class acts or refuses to act on grounds generally applicable to the class, class certification would be appropriate. Fed. R. Civ. P. 23(b)(2). In Olden, the court held that the plaintiffs satisfied this requirement because they requested injunctive relief (to stop the emissions of cement dust) and the emissions continued. The court found that this was evidence that the defendants had refused to act. 203 F.R.D. at 270.

3. If "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy", class certification would be appropriate. Fed. R. Civ. P. 23(b)(3).

   In Martin v. Shell Oil Co., the DEP required the defendant to, among other things, supply potable water supplies to certain properties and monitor other properties. However, the DEP orders did not expressly state that the defendant caused the contamination at any properties other than the gasoline station and adjacent shopping center. As a result, the DEP orders did not have preclusive effect as to the issue of whether or not the defendants caused contamination of the plaintiffs' properties. This was a factor in the courts'

denial of the plaintiffs' class certification motion. The court held that the claims common to the prospective class did not predominate over questions affecting only individual members. ("[T]he plaintiffs cannot satisfy the requirement . . . that such common issues 'predominate' because the claims require individualized proof of causation." 198 F.R.D. at 590.)

Class certification was also denied in Church v. General Electric Company, 138 F. Supp. 2d 169 (D. Mass. 2001) because the plaintiffs failed to satisfy the predominance requirement of Rule 23(b)(3). The proposed class members were the owners of properties that lie within the floodplain of the Housatonic River in Pittsfield and Lenox, Massachusetts. They alleged that their properties had been damaged as a result of continued deposits of PCBs caused by GE's discharge of PCBs at and in the area of GE's Pittsfield manufacturing facility. After the court granted, in part, GE's motion for summary judgment, only claims for continuing trespass and nuisance remained. The court held that "the individual issues are prevalent enough that the class vehicle cannot be considered the superior one for this case." Id. at 181. While the plaintiffs agreed that the extent of contamination of individual properties and the associated property devaluation would differ, they argued that these differences pertained only to damages, not liability. The court rejected this argument.

> These differences pertain not just to damages, as plaintiffs argue, but to the threshold question of whether the contamination constitutes a nuisance or trespass. On the facts of record as assembled, the court has no guarantee that every recorded level of PCB contamination suffered by the members of the proposed class, no matter what the land's characteristics or what it is typically used for, is necessarily of sufficient gravity to constitute a nuisance or trespass. A class under Rule 23(b) is therefore not appropriate in this case.

Id. at 182. See also Thomas v. FAG Bearings Corporation, Inc., 846 F. Supp. 1400, 1404 (W.D. Mo. 1994) ("while there are undoubtedly common issues of law and fact, such as whether FAG Bearings released TCE into the groundwater, the individual issues of causation and damage so overshadow those in numerosity and complexity to render a class action unhelpful.")

In Sterling v. Velsicol Chemical Corporation, 855 F.2d 1188 (6th Cir. 1988), the court affirmed the district court's certification of a class, stating that

> the problem of individualization of issues often is cited as a justification for denying class action treatment in mass tort accidents. While some

> courts have adopted this justification in refusing to certify such accidents as class actions, numerous other courts have recognized the increasingly insistent need for a more efficient method of disposing of a large number of lawsuits arising out of a single disaster or course of conduct … Where the defendant's liability can be determined on a class-wide basis because the cause of the disaster is a single course of conduct which is identical for each of the plaintiffs, a class action may be the best suited vehicle to resolve such a controversy.

Id. at 1196-97 (footnotes omitted). See also Leclercq, 2001 WL 199840 at *7 (finding that common issues predominate, because the evidence "regarding the history of operations, the spillage, the impact on the land, soil, and water, possible remedies, etc. would be identical."); Bates v. Tenco Svcs., Inc., 132 F.R.D. 160, 164 (D.S.C. 1990) (common questions related to the cause of ground water contamination, the defendants' liability, and the effects of jet fuel contamination on the neighborhood predominate.)

Similarly, in Josephat, the defendants argued that class certification was inappropriate in mass tort actions, citing to some of the asbestos actions. The court distinguished the asbestos actions, in which "the class

members were exposed to different asbestos-containing products for different amounts of time, in different ways, and over different periods of time." 2000 U.S. Dist. LEXIS 13102 at *29. In Josephat, the predominant issue was the liability of the defendants for failure to secure the red bauxite dust, which was applicable to all class members.

F. Other Issues

1. Definiteness

Courts have also required that there be an identifiable class, often referred to as "definiteness." Leclercq , 2001 WL 199840. In Leclercq, the plaintiffs sought to certify a class of people who own or reside at property near the defendants' manufacturing properties who have been or may be impacted by hazardous substances released by the defendants. The defendants argued that the plaintiffs had "not defined an ascertainable class and [had] not provided any objective criteria for membership in the class." Id. at *2. The court rejected this argument. The court reviewed the declaration of the plaintiffs' expert in which he identified the boundaries of a neighborhood of homes that "have an actual or potential risk of chlorinated solvent exposure emanating from the Lockformer site." Id. at *3. The court also reviewed an area identified within a protective order in a case filed by the government, which area

was entirely within the area identified by the plaintiffs' expert. Finally, the court evaluated testing data from wells within the area identified in the order. The court exercised its discretion and defined the proposed class as those people owning or residing at property within the area identified in the order.

2. Amount in controversy requirement

In Olden (involving the neighbors of the cement plant) the court first addressed the defendant's motion to dismiss claiming that the court did not have subject matter jurisdiction over certain putative class members who cannot allege damages in excess of $75,000. The court recognized a split in authority on the question of whether the supplemental jurisdiction statute (28 U.S.C. § 1367) permits a class action when some members of the class do not meet the amount in controversy requirement. Prior to enactment of the supplemental jurisdiction statute, the United States Supreme Court, in Zahn v. Int'l Paper Co., 414 U.S. 291 (1973), held that each class member in a diversity action must meet the amount in controversy requirement. Some courts have held that the language of the supplemental jurisdiction statute is clear, unambiguous, and provides supplemental jurisdiction for all claims arising out of the same case and controversy. In so holding, those courts would permit the class action as long as the original plaintiffs satisfied the amount in

controversy requirement. Other courts have found the statute ambiguous, and looked to the legislative history, which states that the statute was not intended to overrule Zahn. The court in Olden held that the supplemental jurisdiction statute "confers on the Court subject matter jurisdiction over claims by putative class members which do not entail $75,000 in controversy but which form part of the same case and controversy as the claims by other class members which exceed the jurisdictional amount." 203 F.R.D. at 264-265.

II. Right-to-Farm Laws

Every state in the country has a law, in one form or another, intended to afford certain defenses to farmers involved in nuisance actions.[2] A number of issues are often cited as the genesis of these laws, such as the need to conserve and protect agricultural land, the encouragement, development and improvement of agricultural land for food production, an increase in nuisance suits, the extension of non-agricultural land uses into agricultural areas, and hesitancy in making investments for farm improvements. Set forth below is a brief discussion of some of the more common issues that arise in cases involving these right-to-farm laws.

A. Changing conditions

Many of the right-to-farm laws are intended to protect farms from nuisance suits that could arise as a result of the changing nature of surrounding land. (This is essentially a codification of the "coming to

[2] See Attachment 1 for a list of citations to relevant state statutes.

the nuisance doctrine," to protect farmers from urban sprawl.) Thus, protection is often afforded when the farm is originally not a nuisance, but could become one solely because neighboring properties become residential. However, in some cases, the change takes place not on the neighboring property, but rather on the farm. For example, the farm may change the hours of operation, the type of animals raised, or the number of animals. Often, if these types of changed conditions create the nuisance, they are not afforded the same protections.

1. Changes to neighboring properties

The right-to-farm laws typically contain language stating that the farming operation cannot be deemed a nuisance as a result of "changed conditions in or about the surrounding nonagricultural activities after the same has been in operation for more than one (1) year, when the operation was not a nuisance at the time the operation began" or similar language. See e.g. Idaho Code § 22-4503.

For example, in Shatto v. McNulty, 509 N.E. 2d 897 (Ind. Ct. App. 1987), the plaintiffs built their home directly across from a hog farming operation that had been in existence for nearly 15 years. The appellate court affirmed the trial court's denial of injunctive relief and damages on several grounds, including the defenses provided by the right-to-farm act. The court held that "[p]eople may not move to an

established agricultural area and then maintain an action for nuisance against farmers because their senses are offended by the ordinary smells and activities which accompany agricultural pursuits." Id. at 900.

In Payne v. Skaar, 900 P.2d 1352 (Idaho 1995), the evidence was that "the neighborhood surrounding the feedlot has remained substantially unchanged during the Skaar feedlot's existence." Id. at 1355. Thus, the Idaho Supreme Court held that "[t]he district court correctly concluded the [right-to-farm act] does not wholly prevent a finding of a nuisance in circumstances of an expanding agricultural operation surrounded by an area that has remained substantially unchanged." Id. See also Mayes v. Tabor, 334 S.E. 2d 489, 491 (1985) (this "action is not based on 'changed circumstances in or about the locality' . . . and is not a case in which the non-agricultural use extended into an agricultural area.")

In Swedenberg v. Phillips, 562 So. 2d 170 (Ala. 1990), the plaintiffs owned and occupied their property before the defendant established his chicken farm. At trial, the jury returned a verdict for the defendant, and the plaintiffs appealed, claiming that the judge erred in the jury charge related to the right-to-farm act. The court charged the jury that the protection under the right-to-farm act applied unless the plaintiffs could prove that the defendant was negligent (an

exception to the statutory protection).[3] The Alabama Supreme Court held that because the plaintiffs were there first (and thus there was no change in the condition of the surrounding area), the court should not have applied the right-to-farm protection. Therefore, because the trial court charged that the plaintiffs must prove negligence (which is not an essential element of a nuisance claim), the court held that the charge was erroneous.

In Herrin v. Opatut, 281 S.E. 2d 575 (Ga. 1981), the plaintiffs were making nonagricultural use of property before defendants' farm was established. The court held that "if defendants' facility is a nuisance, it is not so 'as a result of changed conditions in the locality' within the meaning of [the right-to-farm law.]" Id. at 578-579. The court noted that "[t]his is not a case where plaintiffs' nonagricultural uses of their land have encroached upon defendants' existing egg farm." Id.

2. Changes to the farming operation

[3] In the charge, the court, referring to the right-to-farm statute, stated that "under the law of Alabama, no agricultural or any farming operation facility or the operation thereof shall be or become a nuisance, private or public, by any change in conditions in and about the locality thereof after the same has been in operation for more than one year when such plant, facility, or establishment or the operation thereof was not a nuisance at the time the operation began provided that the provisions of this section shall not apply whenever a nuisance results from the negligent or improper operation of such plant or establishment or any farming operation or facility." Swedenberg, 562 So. 2d at 172.

In many cases, the changes that allegedly give rise to the nuisance claim are changes to the agricultural operation itself, and not the surrounding neighborhood. In these cases, courts frequently hold that the right-to-farm protections do not apply. For example, in Pasco County v. Tampa Farm Service, Inc., 573 So. 2d 909 (Fla. Dist. Ct. App. 1990), the county cited the chicken farming operation for violations of waste and garbage disposal ordinances. The county had received numerous complaints of increased odor and flies after the farm changed its chicken housing and switched from a dry manure to wet manure distribution system. The farm sought to enjoin the county from enforcing its ordinances, seeking protection under the right-to-farm statute. Id. at 910-11. The trial court granted the injunction, but the appellate court remanded the case for a new trial.

The statute in question in Pasco County stated that a "'change to a more excessive farm operation with regard to noise, odor, dust, or fumes' is not afforded the statutory protection." Id. at 911. The appellate court held that "the evidence strongly supports a finding of a substantial change in the odor of the locale." Id. at 912. In reaching this conclusion, the court commented that "[t]he Act seems to afford farmers protection for . . . minor changes but does not afford protection for more 'excessive' changes." Id.; See also Durham v. Britt, 451 S.E. 2d 1,

3 (N.C. 1994) (appellate court reversed trial court's grant of summary judgment, holding that act was not intended to cover fundamental changes to farm, such as changing from turkey farming to a hog production facility.)

In Shatto v. McNulty, 509 N.E. 2d 897 (Ind. Ct. App. 1987), the plaintiffs built a home directly across from a hog barn that had been in operation for nearly 15 years. The trial court found that the hog operation was not a nuisance, was not operated negligently, and was entitled to the right to farm defense. The court rejected the plaintiffs' arguments that the defendant made significant changes to the farm, holding that it was not appropriate to retry "factual considerations which were determined adversely to [the plaintiffs] on conflicting evidence." Id.

B. Generally accepted agricultural practices

Many of the right-to-farm acts only afford the protection from nuisance actions when the farmer follows "generally accepted agricultural practices." In Steffens v. Keeler, 503 N.W. 2d 675 (Mich. Ct. App. 1993), the plaintiffs moved into a home across the street from a vacant dairy barn. A couple of years later, the defendants moved in across the street and began purchasing pigs. The trial court ruled in the plaintiffs' favor, finding that the right-to-farm act did not apply, the surrounding land had already become predominantly residential, and that the farm operation constituted a nuisance. Id. at 677.

The appellate court reversed, focusing on whether the farm operation conformed to generally accepted agricultural and management practices. The court found that "the trial court clearly erred in determining that [a state official] opined that defendants' operation did not comply with accepted practice." Id. The appellate court reviewed the evidence, and found that after the state officials notified the defendants that the farm was not in compliance, the defendants developed a waste utilization plan. The official later stated that they "found the plan to be acceptable to the Department of Agriculture, and indicated that defendants' use of the plan's manure management method, rendered defendants' farm operation in compliance with the voluntary right to farm guidelines." Id.

C. Negligent operation

Most of the statutes offering farms protection from nuisance actions do not provide the protection in those circumstances when the nuisance is caused by negligence. See Yeager v. Sullivan, Inc., 324 N.E.2d 846 (Ind. App. 1975) (for evidence of negligent operation of the farm.)

D. Takings claims

Recently, the Iowa Supreme Court struck down as unconstitutional the part of the Iowa right-to-farm law that provided immunity against nuisances. Bormann v. Board of Supervisors of Kossuth County, 584 N.W.2d 309 (Iowa 1998) cert. denied Girres v. Bormann, 525 U.S. 1172, 143 L.Ed. 2d 96, 119 S.Ct. 1096 (1999). The law stated that farms located in designated agricultural areas were immune from nuisance suits, "regardless of the

established date of operation or expansion of the agricultural activities of the arm or farm operation." Iowa Code § 352.11(1)(a). Certain farmers secured an approval of an agricultural area designation, and the neighbors challenged it. The court held as follows:

> The approval gave the applicants immunity from nuisance suits. . . . This immunity resulted in the Board's taking of easements in the neighbors' properties for the benefit of the applicants. The easements entitle the applicants to do acts on their property, which, were it not for the easement, would constitute a nuisance. This amounts to a taking of private property for public use without the payment of just compensation in violation of the [federal and state constitutions.] Id. at 321.

III. Recent Farming Cases

A. On September 9, 2001, a jury in Ohio awarded 21 neighbors of the Buckeye Egg Farm $19.7 million, including $4 million in compensatory damages and $15.7 million in punitive damages, for diminished use and value of their homes caused by migration of agricultural pollution and animal waste. Seelke v. Buckeye Egg Farm, Ohio Ct. Cmm. Pls., No. 99CV365, verdict 9/9/01 (as reported in the 16 *Toxics Law* Reporter (BNA) 996 (October 18, 2001.) The neighbors complained of pollution of local streams with chicken manure, ammonia fertilizer, and wastewater, and fly infestations and noxious odors. The state also had filed seven contempt-of-court charges for environmental

violations. The company has reported facing hard times, but also reportedly has committed $50 million to environmental improvements.

B. In September 2001, the United States Court for the Eastern District of North Carolina denied the defendant pork producers' motions to dismiss, holding that a permit was required for the spraying of liquefied wastes on fields. See Water Keeper Alliance v. Smithfield Foods, Inc., E.D.N.C., No. 4:01-CV-27-H(3), filed 9/20/01; Water Keeper Alliance v. Brown's of Carolina, Inc., E.D.N.C., No. 4:01-CV-30-H(3), filed 9/20/01 (as reported in the 16 *Toxics Law Reporter* (BNA) 959 (October 4, 2001.) The lawsuits, filed by a coalition of farmers, ranchers, environmental interests, and animal welfare activists, allege numerous violations of environmental laws, including discharge of pollutants to waters without obtaining National Pollution Discharge Elimination System (NPDES) permits. The plaintiffs contend that the defendants' facilities are concentrated animal feeding operations subject to the requirements of the Clean Water Act.

C. A group of lakeshore property owners in Oklahoma recently filed a class action lawsuit against Tyson Foods alleging that poultry waste from Tyson's operations (a chicken farm and chicken processing plant) polluted the lake. See Thompson v. Tyson Foods, Inc., Okla. Dist. Ct., No. CJ-01452, October 23, 2001 (as reported in the 16 *Toxics Law Reporter* (BNA)1082 (November 15, 2001). The plaintiffs contend that the defendant has polluted the lake by discharging chicken wastes, parts, blood, fat, and other waste. They allege damages including devaluation of property, damage to littoral rights,

inconvenience, annoyance, discomfort, and the costs of restoration and rehabilitation of their property.

IV. Regulation of Concentrated Animal Feeding Operations and Related Resources

A. In March 1999, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of Agriculture (USDA) issued the *Unified National Strategy for Animal Feeding Operations* as part of the Clean Water Action Plan. "This Strategy is based on a national performance expectation that all AFOs should develop and implement technically sound, economically feasible, and site-specific Comprehensive Nutrient Management Plans (CNMPs) to minimize impacts on water quality and public health." The unified strategy identified seven strategic issues to better address water quality and public health impacts from animal feeding operations.

1. Building Capacity for Comprehensive Nutrient Management Plan Development and Implementation

2. Accelerating Voluntary, Incentive-Based Programs

3. Implementing and Improving the Existing Regulatory Program

4. Coordinated Research, Technical Innovation, Compliance Assistance, and Technology Transfer

5. Encouraging Industry Leadership

6. Data Coordination

7. Performance Measures and Accountability

B. Regulation under the Clean Water Act (CWA) – CAFOs are subject to two regulatory programs under the Clean Water Act: the NPDES permitting program and effluent guidelines. However, neither of these programs has been updated in over 20 years. As part of the Unified National Strategy, EPA has proposed changes to these regulatory programs. See 66 Fed. Reg. 9, 2959 (2001) (revisions to portion of CWA "Public concern, changes in the livestock industry, persistent water quality problems, and public health risks have demonstrated the need for simpler, nationally consistent regulations that are more easily implemented and enforced to protect public health and water resources."

1. CWA Section 501 defines the term "point source" (subject to regulation under sections 301 and 402) to include confined animal feeding operations. 33 U.S.C. § 1362(14).

2. CAFO regulations at 40 CFR 122.

3. Effluent guidelines for feedlots can be found at 40 CFR 412, *which contain technology-based limitations.* These were originally published on February 14, 1974.

ATTACHMENT 1

CITATIONS OF FARM PROTECTION ACTS FOR ALL 50 STATES

Ala. Code § 6-5-125 (WESTLAW through end of 2001 Reg. Sess.); Alaska Stat. §§ 9.45.230-.255 (Michie, WESTLAW through 2001 1st Spec. Sess. of the Twenty-Second Leg.); Ariz. Rev. Stat. Ann. §§ 3-111 to 112 (West, WESTLAW through End of the Forty-Fifth Leg., First Reg. Sess. and First Spec. Sess., 2001); Ark. Code. Ann. §§ 2-4-101 to -107 (Michie, WESTLAW through End of 1999 Reg. Sess.1981); Cal. Civ. Code §§ 3482.5 to 3484 (West, WESTLAW through end of 1999-2000 Reg. Sess. and 1st Exec. Sess. and urgency legislation through ch. 109 of the 2001 Reg. Sess. and ch. 13 of the 2001 1st Exec.Sess. and Nov. 7, 2000 election); Colo. Rev. Stat. Ann. §§ 35-3.5-101 to -103 (WESTLAW through end of 2001 1st Reg. Sess.); Conn. Gen. Stat. Ann. § 19a-341 (West, WESTLAW through Gen.St., Rev. to 1-1-01); De. Code Ann. tit. 3, § 1401 (WESTLAW through 2000 Reg. Sess.); Fla. Stat. Ann. § 823.14 (West, WESTLAW through end of 2001 1st Reg. Sess.); Ga. Code Ann. § 41-1-7 (WESTLAW through 2001 Gen Assemb.); Haw. Rev. Stat. Ann. §§ 165-1, 165-3, 165-5, 165-6 (Michie, WESTLAW through the 2000 Spec. Sess.); Haw. Rev. Stat. Ann. §§ 165-2,165-4 (Michie, WESTLAW through 2001 Reg. Sess. of the 21st Leg.); Idaho Code § 22-4501 to 22-4504 (Michie, WESTLAW through the 2000 Cumulative Supplement, 2nd Reg. Sess. of the 55th Leg.); 740 Ill. Comp. Stat. Ann. 70/1 to 70/5 (WESTLAW through P.A. 92-85, apv. 7/12/2001); Ind. Code Ann. §§ 34-6-2-7, 34-6-2-74, 34-19-1-1 to 1-4 (West, WESTLAW through end of 2001 1st Reg. Sess.); Iowa Code Ann. §§ 352.1 - .12 (West, WESTLAW through end of 2000 Reg. Sess.); Kan. Stat. Ann. §§ 2-3201 to –3204 (WESTLAW through end of 2000 Reg. Sess.); Ky. Rev. Stat. Ann. § 413.072 (Matthew Bender, WESTLAW through 2001 Reg. Sess.); La. Rev. Stat. Ann. §§ 3601-3611 (West,

WESTLAW through all 2000 Reg. and Extraordinary Sess. Acts); Me. Rev. Stat. Ann. tit. 17 § 2805 (West, WESTLAW through 2001 1st Reg. Sess. Of 120th Leg.); Md. Code Ann., Cts & Jud. Proc.§ 5-403 (WESTLAW through Reg. Sess. Of 2000 Gen Assemb.); Mass. Gen. Laws Ann. ch. 243 § 6 (West, WESTLAW through c.21 of the 2001 First Annual Session of the Gen. Court); Mich. Comp. Laws Ann. §§ 286.471-.474 (West, WESTLAW through P.A. 2001, no. 120 of 2001 Reg. Sess., 91st Leg.); Minn. Stat. Ann. § 561.19 (West, WESTLAW through end of 2000 Reg. Sess. Amended by 2001 Minn. Law Serv. 128); Miss. Code Ann. § 95-3-29 (West, WESTLAW through end of 2001 1st Ex. Sess.); Mo. Ann. Stat § 537.295 (West, WESTLAW through end of 2000 2nd Reg. Sess. 90th Gen. Assemb.); Mont. Code Ann. §§ 76-2-901 to 903, 27-30-101 to 105, 27-30-201 to 204, 27-30-301, 302 (WESTLAW through 2001 Reg. Sess. Of 57th Leg.); Neb. Rev. Stat. Ann. §§ 2-4401 to 4404 (Michie, WESTLAW through end of 2000 Reg. Sess.); Nev. Rev. Stat. Ann. 40.140, 202.450, 244.363, 266.335, 268.412 (WESTLAW through 1999 Reg. Sess. 70th Leg.); N.H. Rev. Stat. Ann. §§ 432:32 to :35 (WESTLAW through Chapter 297 of the 2001 Reg. Sess.); N.J. Stat. Ann. §§ 4:1C-1 to -10.2 (West, WESTLAW through L.2001, c. 100); N.M. Stat. Ann. §§ 47-9-1 to 9-7 (Michie, WESTLAW through 2001 Supp. and First Sess. of 45th Leg.); N.Y. Agric. & Mkts. Law §§ 1300-c, 300 to 310 (McKinney, WESTLAW through L.2001, chs. 4 to 221); N.C. Gen. Stat. §§ 106-700 to 701, 7A-38.3 (WESTLAW through S.L. 2001-450 of the 2001 Reg. Sess.); N.D. Cent. Code §§ 42-04-01 to -05 (WESTLAW through 2001 Reg. Sess.); Ohio Rev. Code Ann. §§ 929.01 to .05, 3767.13, 1511.021, 1511.02 (West, WESTLAW through 124th Gen. Assemb.); Okla. Stat. Ann. tit. 50 §§ 1, 1.1 (WESTLAW through 2001 1st Reg. Sess.); Or. Rev. Stat. §§ 30.930 to .943, 30.947 (WESTLAW through end of 1999 Reg. Sess.); Pa. Stat. Ann. tit. 3 §§ 901–913, 914.1-914.5, 915, 951–957 (West, WESTLAW through Act 2001-77); R.I. Gen. Laws §§ 2-23-1 to -7 (WESTLAW through end of 2000 Reg. Sess.); S.C. Code Ann. §§ 46-45-10 to –60 (Law. Co-op.,

WESTLAW through end of 2001 Reg. Sess.); S.D. Codified Laws §§ 21-10-1, 21-10-25, 21-25.1 to –25.6 (Michie, WESTLAW through 76th Leg. Assmeb.); Tenn. Code. Ann. §§ 43-26-101 to -104 (WESTLAW through end of 2000 Reg. Sess.); Tex. Agric. Code Ann. §§ 251.001 to .006 (Vernon, WESTLAW through end of 2001 Reg. Sess.); Utah Code Ann. §§ 17-41-401 to -406, 78-38-7 to -8 (WESTLAW through the 2001 Supp.); Vt. Stat. Ann. tit. 12 §§ 5751-5753 (WESTLAW through end of 1999 Adjourned Session, 2000 Reg. Sess.); Va. Code Ann. §§ 3.1-22.28 to - 22.29 (West, WESTLAW through end of 2001 Spec. Sess.); Wash. Rev. Code. Ann. §§ 7.48.300, .305, .310, 7.48.905 (West, WESTLAW through end of 2001 Third Spec. Sess.); W. Va. Code Ann. § 8-24-50 (Matthew Bender, WESTLAW through end of 2000 1st Exec. Sess.); Wis. Stat. Ann. § 823.08 (West, WESTLAW through 2001 Act 15, pub. 8/31/01); Wyo. Stat. Ann. §§ 11-44-101 to -103 (Michie, WESTLAW through end of 2001 Reg. Sess.).