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**Rewarding Bad Behavior:  
EPA's Regime of Industry  
Self-Regulation**

By *Mariel Kusano*\*

## **I. Introduction**

On January 31, 2005, the United States Environmental Protection Agency (EPA) published the Animal Feeding Operation Consent Agreement and Final Order (AFO CAFO)<sup>1</sup> in the Federal Register.<sup>2</sup> The AFO CAFO establishes an agreement between the EPA and Animal Feeding Operations (AFOs). The AFOs that sign the consent agreement are obligated to provide funding for a nationwide emissions monitoring study and to cooperate with the EPA in formulating a new regulatory regime for the livestock industry.<sup>3</sup> In return, EPA enters a covenant not to sue and provides a limited release from liability for certain past and ongoing Clean Air Act (CAA), Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), and Emergency Planning and Community Right-to-Know Act (EPCRA) violations.<sup>4</sup>

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1. In this note, the Animal Feeding Operation Consent Agreement and Final Order will be referred to by the acronym "AFO CAFO." The name of the proposed order has caused some confusion because the acronym "CAFO" is industry terminology for "Concentrated Animal Feeding Operation."

2. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958 (proposed Jan. 31, 2005).

3. *Id.*

4. *Id.* at 4962.

On its face, the AFO CAFO appears to encourage and facilitate cooperation between the EPA and the livestock industry. However, a closer look reveals a “sweetheart deal that turned its back on the scientific and environmental communities.”<sup>5</sup> The “sweetheart deal” removes liability from AFOs in exchange for information and cooperation that the livestock industry is already obligated to provide to the EPA.<sup>6</sup>

This note explains the AFO CAFO and the details of the Consent Agreement between the EPA and the livestock industry. It also discusses the procedural and substantive concerns surrounding the creation of the AFO CAFO regulation scheme. This note concludes with a discussion on how the AFO CAFO’s use of EPA’s enforcement power creates a dangerous precedent that will affect the interaction between agencies, states, and concerned citizens and greatly impede efforts to enforce existing environmental regulations.

## II. The Livestock Industry

### A. Overview of the Livestock Industry and Animal Feeding Operations

The United States’ varied livestock industry ranges from meat production to

animal products, such as dairy goods. Throughout the history of the United States, the livestock industry has been, and continues to be, politically powerful and economically important, accounting for a large portion of the U.S. economy.<sup>7</sup> According to recent United States Department of Agriculture estimates, the livestock industry is expected to yield a gross domestic product greater than eleven trillion dollars in the year 2006.<sup>8</sup>

In contrast to its impressive economic projections, the number of producers in the livestock industry is not expanding. Rather, the industry is moving away from its origins as a conglomerate of many small family-run farms and is rapidly becoming an industry of a few elite and powerful manufacturers.<sup>9</sup> Between 1987 and 1992, the “total number of animal units produced in the U.S. increased by about 4.5 million (approximately 3 percent) . . . however, the number of AFOs decreased, indicating a consolidation within the industry overall and greater production from fewer, larger AFOs.”<sup>10</sup>

Industrialized animal factories are known as animal feeding operations or concentrated animal feeding operations and are defined in 40 C.F.R. section 122.23(b)(1) as:

5. Michael Janofsky, E.P.A. *Offers an Amnesty if Big Farms are Monitored*, N.Y. TIMES, Jan. 22, 2005, at A8 (quoting Joe Rudek, a senior scientist with Environmental Defense).

6. *Id.*

7. U.S. DEPARTMENT OF AGRICULTURE, ECONOMIC RESEARCH SERVICE, LIVESTOCK, DAIRY, AND POULTRY OUTLOOK, ECONOMIC INDICATORS FOR THE LIVESTOCK SECTOR (figures from Philadelphia Federal Reserve Bank, *Survey of Professional Forecasters* (Feb. 2006)), available at <http://www.ers.usda.gov/publications/ldp/LDPTables.htm> (last visited Apr. 2, 2006).

8. *Id.* (Eleven trillion dollar figure is a chain-weighted Gross Domestic Product estimation using the valuation of the year 2000 U.S. dollar.)

9. U.S. ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL ASSESSMENT OF PROPOSED REVISIONS TO THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM REGULATION AND THE EFFLUENT GUIDELINES FOR CONCENTRATED ANIMAL FEEDING OPERATIONS, EPA-821-B-01-001, 1-3 (2001), available at <http://epa.gov/ost/guide/cafo/pdf/EnvAssessPt1of2.pdf> (last visited Apr. 11, 2006) [hereinafter ENVIRONMENTAL ASSESSMENT].

10. *Id.*

a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

- (i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and
- (ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.<sup>11</sup>

The consolidation of a large number of animals in controlled, industrialized environments has created an animal manufacturing business with all the environmental risks and downsides typically associated with traditional manufacturing.<sup>12</sup>

## B. AFO Pollutants and Environmental Concerns

Due to the large numbers of livestock onsite, AFOs are environmental hazards to the communities located around them. The primary concerns are the environmen-

tal impacts associated with the large concentration of untreated animal waste found at AFO sites.<sup>13</sup> In 1997, the United States Department of Agriculture's National Resources Conservation Service "estimated that 291 billion pounds of manure measured on a wet basis was generated . . . from swine, poultry, and beef and dairy cattle."<sup>14</sup> In comparison, in 1997, "the human sanitary waste production . . . was only 49 billion pounds."<sup>15</sup>

While large amounts of untreated animal waste have environmental impacts that affect the quality of water and land around an AFO,<sup>16</sup> the AFO CAFO was written primarily to address the air pollution problems associated with AFOs.<sup>17</sup> As such, this note focuses on the hazards that AFOs pose to air quality and the implications of the air pollution problem on the public health of communities that neighbor AFOs.

### 1. Air Pollutants

AFOs emit many potentially hazardous air pollutants that are byproducts of the high animal concentration on AFOs and their associated manure storage and land application sites.<sup>18</sup> Among the air emissions of concern are "gases[, such as]

11. 40 C.F.R. § 122.23(b)(1) (2006).

12. ENVIRONMENTAL ASSESSMENT, *supra* note 9, at 1-1.

13. *Id.* at 2-1.

14. *Id.*

15. *Id.* at 2-2. In addition to the differences in the amount of waste, animal waste product from AFOs and human waste that goes through sanitary systems are treated in vastly different ways. The management, treatment, and disposal systems associated with human waste are highly regulated. In contrast, the disposal of animal waste is largely unregulated.

16. U.S. Environmental Protection Agency, Managing Manure Nutrients at Concentrated Animal Feeding Operations, EPA-821-B-04-009, at 2-1 (2004), available at [http://www.epa.gov/npdes/pubs/cafo\\_manure\\_guidance.pdf](http://www.epa.gov/npdes/pubs/cafo_manure_guidance.pdf) (last visited Apr. 11, 2006).

17. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. at 4962.

18. IOWA STATE UNIVERSITY & THE UNIVERSITY OF IOWA STUDY GROUP, ENVIRONMENTAL HEALTH SCIENCES RESEARCH CENTER, IOWA CONCENTRATED ANIMAL FEEDING OPERATION AIR QUALITY STUDY 5-6 (2002) [hereinafter IOWA STUDY], available at <http://www.public-health.uiowa.edu/ehsrc/CAFOstudy.htm> (last visited Apr. 11, 2006).

ammonia (NH<sub>3</sub>), nitric oxide (NO), hydrogen sulfide (H<sub>2</sub>S), nitrous oxide (N<sub>2</sub>O), and methane (CH<sub>4</sub>); the general class of materials designated volatile organic compounds (VOCs); odor-causing compounds; and the aerosol classes PM<sub>2.5</sub> and PM<sub>10</sub> (particulate matter).<sup>19</sup>

Ammonia, nitric oxide, hydrogen sulfide, nitrous oxide, and VOCs primarily result from the decomposition of livestock excrement.<sup>20</sup> The severity of each emission varies from AFO to AFO depending on the number of animals present and the type of waste storage and disposal the facility uses.<sup>21</sup> Methane and other odor-causing compounds are byproducts of not only the breakdown of manure, but also of animal digestion.<sup>22</sup> These emissions also vary between facilities, with AFOs that contain ruminant animals contributing to the lion's share of the problem.<sup>23</sup> An "adult cow produces between 80 and 120 kg of [methane] annually," and in 1999, it was estimated that "[n]inety-five percent of [methane] emissions from agricultural activities came from livestock production."<sup>24</sup> Lastly, and of great concern, are the particulate matter emissions from AFOs. Sources of particulate matter from

AFOs vary and can range from very small particulates, such as epithelial cells and other bioaerosols,<sup>25</sup> to larger particulates, such as feathers, hair, and particles from feed or dried manure.<sup>26</sup>

## 2. Public Health Concerns

Due to the hazardous nature of these air pollutants, AFOs have been scrutinized by many scientific and public health organizations, such as the EPA, the National Academy of Sciences, the American Lung Association, and various universities.<sup>27</sup> Many studies have shown that the regulated AFO emissions have health effects that "include respiratory diseases (asthma, hypersensitivity pneumonitis, industrial bronchitis), cardiovascular events (sudden death associated with particulate air pollution), and neuropsychiatric conditions (due to odor as well as delayed effects of toxic inhalations)."<sup>28</sup>

Studies have shown both short-term and long-term exposure to air pollutants result in serious short-term and long-term public health effects.<sup>29</sup> Short-term acute exposure tends to manifest itself in health

19. NATIONAL ACADEMY OF SCIENCES, THE SCIENTIFIC BASIS FOR ESTIMATING AIR EMISSIONS FROM ANIMAL FEEDING OPERATIONS: INTERIM REPORT 14-20 (2002) [hereinafter NAS REPORT], available at <http://www.nap.edu/catalog/10391.html> (last visited Apr. 11, 2006). See also, IOWA STUDY, *supra* note 18, at 42.

20. NAS REPORT, *supra* note 19, at 14-20.

21. ENVIRONMENTAL ASSESSMENT, *supra* note 9, at 2-7 – 2-16.

22. NAS REPORT, *supra* note 19, at 17.

23. *Id.*

24. *Id.*

25. Bioaerosols are "particles of biological origin that are suspended in air. These include bacteria, fungi, fungal and bacterial spores, viruses,

mammalian cell debris, products of microorganisms, pollens, and aeroallergens." IOWA STUDY, *supra* note 18, at 36.

26. ENVIRONMENTAL ASSESSMENT, *supra* note 9, at 2-16.

27. See generally ENVIRONMENTAL ASSESSMENT, *supra* note 9; IOWA STUDY, *supra* note 18, NAS REPORT, *supra* note 19; AMERICAN LUNG ASSOCIATION, *State of the Air 2004* (2004), available at [http://lungaction.org/reports/sota04\\_full.html](http://lungaction.org/reports/sota04_full.html) (last visited Apr. 11, 2006); AMERICAN LUNG ASSOCIATION, *State of the Air 2005* (2005), available at [http://lungaction.org/reports/sota05\\_full.html](http://lungaction.org/reports/sota05_full.html) (last visited Apr. 11, 2006) [hereinafter SOTA 05].

28. IOWA STUDY, *supra* note 18, at 122.

29. SOTA 05, *supra* note 27, at 56.

effects such as coughing, wheezing, cardiac arrhythmias and heart attacks.<sup>30</sup> Long-term exposure, even at low levels, can lead to chronic health effects such as premature births, increased risk of cardiovascular disease, asthma, and other serious respiratory problems.<sup>31</sup>

As the livestock industry moves to fewer, more geographically concentrated facilities housing a greater number of animals, AFOs will pose serious health risks to the public at large, with the greatest concentration of adverse impacts on neighboring communities.<sup>32</sup> Given the hazardous nature of these air pollutants, the government has created several ways to regulate the livestock industry through federal statutes. If released in sufficient quantities, ammonia and hydrogen sulfide are regulated by CERCLA and EPCRA. Hydrogen sulfide, PM, and VOCs are regulated under the CAA. Other pollutants are regulated under specific state rules and environmental statutes.<sup>33</sup> However, despite the federal and state protections in place, rules such as the AFO CAFO threaten to remove government enforcement and increase the threat AFOs pose to public health.

30. *Id.*

31. *Id.*

32. IOWA STUDY, *supra* note 18, at 122.

33. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. at 4959.

34. *Id.* at 4958.

35. *Id.* at 4959.

36. "A tender young chicken suitable for broiling" is less than thirteen weeks old at time of slaughter. OKLAHOMA 4-H PROGRAMS, OKLAHOMA AG IN THE CLASSROOM GLOSSARY (2006), available at <http://www.clover.okstate.edu/fourh/aitc/lessons/glossary/bisfor.html> (last visited Apr. 11, 2006); U.S. DEPARTMENT OF AGRICULTURE, ECONOMIC RESEARCH

### III. Animal Feeding Operation Consent Agreement and Final Order

#### A. Overview of the Air Compliance Agreement

The Animal Feeding Operation Consent Agreement and Final Order is an attempt for the EPA to gain industry cooperation in order to obtain information regarding AFO air emissions and to ensure compliance with existing CAA regulations.<sup>34</sup> In exchange for the cooperation of the livestock industry, EPA offers a "limited release and covenant not to sue for certain past and on-going CAA, CERCLA, and EPCRA violations."<sup>35</sup>

#### B. Applicability of the AFO CAFO

The Air Compliance Agreement ("Agreement") established in the AFO CAFO is offered to "AFOs in the egg, broiler chicken,<sup>36</sup> turkey, dairy and swine industries."<sup>37</sup> The Agreement is also extended to contract growers and integrators,<sup>38</sup> primarily found in the swine, broiler chicken, and turkey industry. Despite the broad application, the Agreement does not apply to all AFOs. The Agreement's focus on emissions from AFO "buildings or structures that house agri-

SERVICE, BACKGROUND STATISTICS ON THE U.S. BROILER INDUSTRY (Oct. 27, 2005), <http://www.ers.usda.gov/News/broilerCoverage.htm> (last visited Apr. 11, 2006).

37. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. at 4959.

38. Contract growers are AFOs that grow the animals, often times on behalf of multiple companies that usually own the animals and provide feed and medical services. After maturing the animals, contract growers deliver the animals to AFOs known as integrators. Integrators process and market the meat products. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. at 4960.

cultural livestock, and from lagoons or similar structures that are used for storage and/or treatment of agricultural livestock waste” require it to exclude AFOs that implement open-air feedlots exclusively, such as cattle feedlots.<sup>39</sup>

### C. Major Terms of the Air Compliance Agreement

#### 1. Civil Penalty with No Admission of Liability

All AFOs that sign the Air Compliance Agreement agree to pay a civil penalty based on the size of the AFO, with the penalty range affected by the animal species and the number of each species housed at the AFO.<sup>40</sup> Although the civil penalty considers the type and quantity of animals, the “total penalty is capped and ranges from \$10,000 for a participant having 10 or fewer farms to \$100,000 for a participant having over 200 farms.”<sup>41</sup>

A civil penalty is typically a “fine assessed for a violation of a statute or regulation.”<sup>42</sup> Despite the common usage definition, the agreement to pay a civil penalty when signing on to the AFO CAFO does not equate to an admission of guilt, nor is it an admission of liability for violating federal statutes.<sup>43</sup> As written, the AFO CAFO requires the payment of a civil penalty as a mere condition to signing the agreement.<sup>44</sup> It does not identify the specific violation, if any, for which the AFO is being penalized.<sup>45</sup>

### 2. Funding and Cooperation - Emissions Monitoring Study

In addition to the payment of a civil penalty, all participating AFOs must contribute a “payment of approximately \$2,500 per farm into a fund to conduct a nationwide emission monitoring study and for making their facilities available for emissions testing.”<sup>46</sup> According to the AFO CAFO, the purpose of the two-year monitoring study is to:

collect data and aggregate it with appropriate existing emissions data; analyze the monitoring results; and create tools (e.g. tables and/or emission models) that AFOs could use to determine whether they emit pollutants at levels that require them to apply for permits under the CAA or submit notifications under CERCLA or EPCRA . . . to generate scientifically credible data to provide for the characterization of emissions from all major types of AFOs in all geographic areas where they are located.<sup>47</sup>

At the conclusion of the monitoring period, EPA will use the data “to develop emissions estimating methodologies [that] . . . will then be used by the AFO industry to estimate their annual emissions.”<sup>48</sup> After the creation of the new emissions estimating methodologies, all AFOs, including non-participating AFOs,

39. *Id.* at 4959.

40. *Id.*

41. *Id.*

42. BLACK’S LAW DICTIONARY 1198 (8th ed. 2004).

43. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. at 4959.

44. *Id.*

45. *Id.* at 4958.

46. *Id.* at 4959.

47. *Id.* at 4960.

48. *Id.* at 4959.

49. *Id.*

will be required to “determine their emissions and to comply with all applicable CAA requirements, including applying for all required permits, and to make any requisite hazardous release notices under CERCLA and EPCRA.”<sup>49</sup>

### 3. EPA's Limited Release and Covenant Not to Sue

In exchange for the payment of civil penalties, contributions to the emissions study, and cooperation with EPA in monitoring emissions, the AFOs receive a release and a limited, conditional covenant not to file civil suits for certain violations.<sup>50</sup> This release and covenant not to sue covers an “AFO's liability for failing to comply with certain provisions of CERCLA, EPCRA, and the CAA up to the time the AFO reports its releases under CERCLA or EPCRA and applies for and receives the requisite CAA permits.”<sup>51</sup>

The EPA can revoke the limited release and consent not to sue given certain conditions.<sup>52</sup> While any failure to comply with the agreement can result in the revocation of immunity, revocation can also occur if the participating AFOs fail to comply with “all final actions and final orders issued by the State or local authority that address a nuisance arising from air emissions at the AFO.”<sup>53</sup> Regardless of the civil penalties paid or contributions given to the emissions monitoring study, any participating AFO that has its limited release and consent

not to sue revoked could be held liable for all past and ongoing violations.<sup>54</sup>

More troubling than the AFOs' immunity from EPA prosecution for past and ongoing violations of the CAA, CERCLA, and EPCRA,<sup>55</sup> is the implied immunity from prosecution from State and citizen suits. After outlining the AFO's immunity from EPA suits, the AFO CAFO states that “the [Air Compliance] Agreement will *not* affect the ability of States or citizens to enforce compliance with *nonfederally* enforceable State laws, existing or future, that are applicable to AFOs.”<sup>56</sup> By differentiating between nonfederal and federal laws, this statement implies that the Agreement *will* affect the ability of States or citizens to enforce compliance with existing and future *federal* laws that are applicable to AFOs, e.g., CERCLA, EPCRA, or CAA.<sup>57</sup> If read in this light, the AFO CAFO impinges on the states' or concerned citizens' ability to bring suit against AFOs for violations of federal law.

### D. EPA's Justification of the Covenant Not to Sue

To justify the Agreement and the covenant not to sue, EPA argues that the AFO CAFO will stimulate cooperation between the EPA, the scientific community, and the livestock industry.<sup>58</sup> Further, EPA claims that the collaboration of government and industry through an emissions monitoring study will result in a better understanding of AFO emissions and a

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 4958.

56. *Id.* at 4959 (emphases added).

57. There is some question whether CAA, CERCLA, and EPCRA allow the EPA to create a regulatory regime that precludes state and citizen suits. See generally 42 U.S.C. § 7413 (2006); 42 U.S.C. § 9603 (2006); 42 U.S.C. § 11045 (2006).

58. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. at 4958.

59. *Id.*

more effective and efficient regulatory regime.<sup>59</sup>

### 1. Efficiency

One of EPA's justifications for the implementation of the AFO CAFO is that the Agreement will be the "quickest and most effective way to address the current uncertainty regarding emissions from AFOs and to bring all participating AFOs into compliance with all applicable regulatory requirements."<sup>60</sup> Although the EPA has the power to monitor AFOs and create individual consent agreements that force compliance with federal law, the EPA argues that the case-by-case "process has [proven] to be difficult and time consuming, partly due to the uncertainty regarding emissions from AFOs."<sup>61</sup> In addition to the time factor, EPA also emphasizes that case-by-case enforcement results in inefficient regulation of the livestock industry—i.e., one AFO at a time, as opposed to the broad enforcement possible through the general application of the AFO CAFO.<sup>62</sup>

### 2. Enforcement power

EPA further justifies its AFO CAFO by denying that the Agreement will negatively affect EPA's role in enforcement and regulation of the livestock industry.<sup>63</sup> In its summary of the Agreement, the EPA specifically states that "[t]he Air Compliance Agreement will not affect in any way EPA's ability to respond to an imminent and substantial endangerment to public health, welfare or the environment."<sup>64</sup> While arguing that the agency's

enforcement power will not be reduced by the Agreement in the AFO CAFO, the EPA de-emphasizes its enforcement role and states that "many of the negative impacts resulting from AFOs . . . are not currently regulated under Federal laws, but are addressed by State and local laws."<sup>65</sup> The AFO CAFO describes EPA as only having a "limited role in dealing with many of the potential impacts from AFOs."<sup>66</sup> While appearing to highlight EPA's commitment to enforcement, the language used to justify the consent not to sue minimizes EPA's congressionally mandated enforcement obligations under statutes such as the CAA.

## IV. A New Use of Enforcement Power – The Flaws in EPA's AFO CAFO

### A. Procedural Concerns - Administrative Procedure Act

The Administrative Procedure Act (APA) sets out general requirements that the EPA must follow for rulemaking.<sup>67</sup> According to 5 U.S.C. section 551, rulemaking is an "agency process for formulating, amending, or repealing a rule,"<sup>68</sup> which is the

whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 4959.

66. *Id.*

67. 5 U.S.C. §§ 551-559 (2006).

68. 5 U.S.C. § 551(5) (2006).

69. 5 U.S.C. § 551(4) (2006).

or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.<sup>69</sup>

The AFO CAFO is an agreement of *general applicability* that is open to all qualifying AFOs.<sup>70</sup> The primary goal of the agreement is to create an emissions monitoring study that would have a “future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency.”<sup>71</sup> A prospective, future-oriented goal that has general application typically falls under rulemaking as defined by the Administrative Procedure Act.<sup>72</sup>

The procedural requirements of the APA apply because “the agency action jeopardizes the rights and interests of parties.”<sup>73</sup> If an agency action jeopardizes the rights and interests of parties, the action “must be subject to public comment prior to taking effect.”<sup>74</sup> The AFO CAFO’s limited release and consent not to sue may preclude state and citizen suits against participating AFOs, therefore greatly impinging citizens’ right to enforce federal statutes, such as the CAA. Further, the AFO CAFO affects the rights and interests of the AFOs. The AFOs that voluntarily sign on to the Agreement not only

agree to pay a fine dependent on the size of its operation, but also consent to participate in the emissions monitoring program outlined in the AFO CAFO.<sup>75</sup> The AFOs that do not qualify or choose not to participate are also affected because they are subject to potential enforcement action and are excluded from an emission monitoring study that has the potential to affect future regulation.<sup>76</sup> Due to the rights and interests affected by the AFO CAFO, the AFO CAFO could be considered an agency action that impinges on the rights and interests of parties thus triggering APA procedural requirements.

### 1. Insincerity of Comment Request

The APA requires that “general notice of proposed rule making shall be published in the Federal Register.”<sup>77</sup> In addition to publication in the Federal Register, the APA requires the EPA to publish or serve a substantive rule no less than 30 days before its effective date.<sup>78</sup> The AFO CAFO was published in the Federal Register ninety days prior to the end of the sign-up period—the period of time when qualifying AFOs could voluntarily sign the Agreement, which would commit the AFO to the payment of a fine and participation in an emissions study in exchange for a limited release and covenant not to sue.<sup>79</sup> Although the AFO CAFO appears to satisfy the time requirements for proper notice and comment, the timing of the public comment period

70. *Id.*

71. *Id.*

72. See 5 U.S.C. § 551(4), (6) (2006).

73. *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802, 815 (D.C. Cir. 1983) (quoting *Batterton v. Marshall*, 648 F.2d 694, 708 (D.C. Cir. 1980)).

74. *Batterton*, 648 F.2d at 708.

75. Animal Feeding Operations Consent

Agreement and Final Order, 70 Fed. Reg. at 4959.

76. *Id.*

77. 5 U.S.C. § 553(b) (2006).

78. 5 U.S.C. § 553(d) (2006).

79. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. at 4959.

80. *Id.* at 4961-62.

and the industry sign-up period raises questions on the adequacy of EPA's publication of the AFO CAFO.

The timing of the comment period and the sign-up period throws into question the sincerity of EPA's request and concern for public comment. The AFO CAFO's comment and sign-up periods ran concurrently.<sup>80</sup> This timing allowed AFOs to sign on to the Agreement as published before EPA had the chance to review any comments. This implies that any comments received would not significantly alter the final agreement. Unsurprisingly, after the comment period closed, EPA announced that after reviewing over 650 comments from industry, states, environmental groups, and local citizen groups, it determined that no change was needed in the AFO CAFO.<sup>81</sup>

## **B. Substantive Concerns – Misuse of EPA's Power**

### **1. Delegation of an EPA Investigation to an Industry Cooperative: Allowing the Fox to Guard the Henhouse**

In addition to the procedural concerns surrounding the AFO CAFO, the organizational structure of the AFO CAFO's emissions monitoring program illustrates EPA's failure to participate actively in the enforcement and regulation of participating AFOs. After the initial agreement between EPA and the participating AFOs, the Agreement states that the "participating AFOs will set up an

umbrella nonprofit entity . . . to handle the funds contributed by the individual participating facilities."<sup>82</sup> The industry-established nonprofit would then, without the collaboration of EPA, "subcontract to a Science Advisor and independent monitoring contractor to run the nationwide monitoring study."<sup>83</sup> The industry-selected Science Advisor and independent monitoring contractor are responsible for creating a plan for the monitoring study and compiling a list of recommended candidate facilities to be monitored.<sup>84</sup> Although the plans and list of candidate facilities must be approved by EPA, the plan and sample group remain wholly industry selected.<sup>85</sup>

Operating pursuant to industry-created plans, the industry-selected AFOs would be studied by the industry-hired independent monitoring contractor who would oversee all monitoring using a fleet of mobile labs purchased by the industry-created nonprofit organization.<sup>86</sup> The EPA would only begin to investigate the situation after data is compiled and delivered to them by the industry entities established for the emissions monitoring study.<sup>87</sup>

Aside from establishing the organizational blueprints of the emissions monitoring study in the AFO CAFO, EPA contributes very little to the creation, operation, and maintenance of the emissions monitoring study.<sup>88</sup> The organizational structure established by the AFO CAFO

81. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Response to Public Comments on the Animal Feeding Operation Air Agreement*, available at <http://www.epa.gov/compliance/resources/agreements/caa/cafo-agr-response-com.html> (last visited Apr. 11, 2006).

82. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. at 4960.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *See generally id.* at 4960.

89. *Id.*

appears to be a delegation of EPA's enforcement power to the very industry that the EPA is attempting to enforce. The livestock industry's control over all areas of the emissions study, which is intended to establish stricter and more reliable emission standards, raises doubts about the likelihood that the AFO CAFO process will result in an accurate scientific study. This is especially true when negative results promote the tester's self-interest.

## 2. Delay in Actual Enforcement Until 2009

Regardless of accusations that the AFO CAFO will lead to ineffective monitoring due to self-regulation, the AFO CAFO should be considered an ineffective enforcement order because actual EPA enforcement will not commence until at least 2009.<sup>89</sup> The AFO CAFO was published in the Federal Register on January 31, 2005, with a sign up period of 90 days post-publication.<sup>90</sup> Due to the large number of comment letters received after the publication in the Federal Register, the sign up period was extended on multiple occasions.<sup>91</sup> Given the initial expectation of a May 1, 2005, sign-up deadline, the EPA predicted that "monitoring [would] begin in 2005 and continue for 2 years," which would be the "minimum time needed because emissions from AFOs can vary greatly over the course of a year and may vary significantly from year to year."<sup>92</sup>

90. *Id.* at 4958.

91. Animal Feeding Operations Consent Agreement and Final Order, Supplemental Notice, 70 Fed. Reg. 40,016-01 (July 12, 2005).

92. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. at 4960.

93. *Id.*

94. *Id.*

Following the two-year study period, the EPA estimated that methodologies for estimating annual emissions from AFOs would be published on its website on a rolling basis "within 18 months after the conclusion of the nationwide emissions monitoring study."<sup>93</sup> The timeline provided in the AFO CAFO projects a completion date to be, at best, in 2009.

Even with a liberal reading, the AFO CAFO establishes a methodology that would create immunity from enforcement suits by the EPA and possibly by states and concerned citizens for a period of four to five years.<sup>94</sup> The limited release and consent not to sue means that the EPA is forgoing the enforcement of various federal environmental statutes for all participating AFOs across the country for nearly half a decade.<sup>95</sup> The AFO CAFO fails to establish any standards for enforcement and allows participating AFOs to violate federal environmental statutes with no recourse into the far distant future.

## V. Conclusion – Future Implications

It is unclear how drastic an effect the AFO CAFO will have on the regulation of the livestock industry. The initial comment period closed on March 2, 2005,<sup>96</sup> reopened on March 28, 2005, and finally closed on May 2, 2005.<sup>97</sup> The sign-up period was extended twice and closed on July 29, 2005.<sup>98</sup> On August 3, 2005, the

95. *Id.* at 4958.

96. *Id.*

97. Animal Feeding Operations Consent Agreement and Final Order, Supplemental Notice, 70 Fed. Reg. 16,266-01 (Mar. 30, 2005).

98. Animal Feeding Operations Consent Agreement and Final Order, Supplemental Notice, 70 Fed. Reg. at 40,016.

sign-up period was reopened and extended until August 12, 2005, “[i]n order to provide more time for operators of animal feeding facilities to make informed decisions about participation.”<sup>99</sup> On August 15, 2005, EPA issued a press release stating that more than 2,000 AFOs signed agreements, spanning 37 states and representing “the pork, egg layers, meat birds, and dairy industries.”<sup>100</sup> The two-year monitoring study involving a select group of participating AFOs is scheduled to begin in early 2006.<sup>101</sup>

The immediate consequence of the AFO CAFO agreement between the EPA and the over 2,000 participating AFOs is the prevention of the EPA, states, and concerned citizens from filing suit against violating AFOs for the duration of the emissions monitoring study. This immunity from suit is potentially an open-ended invitation to violate, especially given an organizational structure in which the regulated industry is responsible for creating the timeline of monitoring and data collection.<sup>102</sup>

Despite the unknown potential effects of the AFO CAFO, the mere fact that EPA proposed such a rule may affect other industries. Whether or not EPA’s AFO CAFO succeeds in creating a more efficient and effective regulatory regime based on industry and government collaboration, the creation of an industry-friendly regulatory regime establishes an incentive for other industries to ignore existing regulations in order to coerce EPA into

implementing a “sweetheart deal.” The AFO CAFO is more than an expedient method in gathering data on AFO emissions—the AFO CAFO is a bold move towards eroding citizen and state enforcement powers and sets a dangerous precedent for industry and the EPA. The EPA should not be allowed to pass of its regulatory functions to the very industries it is meant to police. Every effort should be made to ensure that states and citizens’ right to enforce environmental statutes are not diminished by unchecked “sweetheart deals” between EPA and industries.

99. Animal Feeding Operations Consent Agreement and Final Order, Supplemental Notice, 70 Fed. Reg. 44,631-01 (Aug. 3, 2005).

100. U.S. ENVIRONMENTAL PROTECTION AGENCY, *Thousands Sign Up for Animal Feeding Operations Air Compliance Agreement*, EPA NEWSROOM, Aug. 15, 2005, available at <http://yosemite.epa.gov/opa/adm->

[press.nsf/d9bf8d9315e942578525701c005e573c/518e0d3417e2488d8525705e0052da43!OpenDocument](http://press.nsf/d9bf8d9315e942578525701c005e573c/518e0d3417e2488d8525705e0052da43!OpenDocument) (last visited Apr. 11, 2006).

101. *Id.*

102. Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. at 4960.