October 5, 2009

William Matthews
Oregon Department of Agriculture
635 Capitol Street Northeast
Salem, Oregon 97301

Re: Oregon Confined Animal Feeding Operation (CAFO) National Pollutant Discharge Elimination System (NPDES) General Permit Number 01-2009

Dear Mr. Mathews:

Please accept this comment letter concerning the proposed CAFO NPDES General Permit Number 01-2009 (Permit). These comments are submitted on behalf of the Lewis & Clark Law School chapter of the Student Animal Legal Defense Fund (SALDF).

SALDF would like to thank the Oregon Department of Agriculture (ODA) for this opportunity to comment. As new members of the legal profession, the students of SALDF are actively educating themselves on how to use the legal system to protect the lives and advance the interests of animals. In nearly all instances, laws that protect animals also advance the well-being of humans; the interests of animals and humans often coincide. The proposed Permit addresses such a situation. In this case, the discharge of pollutants into public waterways and groundwater by industrial animal food production facilities directly affects the welfare of the public and the treatment of animals. Although, the comments below only pertain to the topic areas of the Permit, the members of SALDF hope that requiring CAFOs to abide by higher standards of environmental care will benefit animals and humans alike.

SALDF asks ODA to recognize that the proposed Permit is but one way to regulate CAFOs and safeguard the public interest and animal welfare. SALDF would like to note the severe and widespread problems associated with CAFOs, specifically, the cruel and unethical treatment of animals. Common industry standards for CAFOs degrade the natural environment, reduce public health, and diminish the economic vitality of surrounding communities. The permitting process addresses these issues, but does so insufficiently. In contrast the regulations pertaining to animals welfare and the enforcement of existing animal laws are substandard and are insolated from public comment. The comments below pertain only to the proposed Permit,

however these comments are written in hopes of precipitating change affecting these larger unaddressed issues. The comments generally refer to the goals of the Clean Water Act as established in Code of Federal Regulations and further prescribed by *Waterkeeper Alliance, Inc. v. EPA*. 399 F.3d 486 (2nd Cir. 2005).

I. The overbroad Permit limits its public usefulness

The Permit, in attempting to cover CAFOs of all sizes and all types of animals, results in an overbroad document. The generality of the Permit diminishes its worth.

Separating the permitting process from the issuance of the Animal Waste Management Plan (AWMP) reduces the Permit's usefulness. The specific requirements of the regulations imposed on any given facility are found in their AWMP, which is issued independently from the Permit. The permit's utility to the public is undermined by this procedure. For example, if residents in Area III want to use the Permit to determine the regulations imposed on any of the seven "fur bearing mink" CAFOs in their vicinity, they would be unable to find any indication of the limitations applicable to these sites. Mink CAFOs fall under "other animal type" and their classifications are determined independently by the ODA. Therefore, a concerned citizen would only be able to gleam the vague outline of regulations controlling the nearby mink facility by examining the permit allowing it to operate.

The public purpose served by the Permit is significantly reduced because it applies to all facilities. This renders the Permit unhelpful when the public seeks information regarding specific facilities.

II. Permit coverage should include CAFOs conducting short-term or temporary operations

The criteria for coverage under the Permit (pages 5–8) deviate from federal requirements. Specifically, section S1.A.2(c) states that the Permit covers a "small, medium, or large concentrated animal feeding operation defined in 40 CFR § 122.23."

The definition under 40 CFR § 122.23 lists only one exemption: sites boasting "no potential to discharge." Section 122.23 further specifies that an owner or operator must request a determination of "no potential discharge." No other exemptions are listed in the regulation. However, Table 1 on page 5 of the Permit suggests an exemption for any concentrated animal feeding operation that confines, feeds, or maintains animals for less than 45 days in any 12-month period. This exception is at odds with the definition established in the Permit under section S1.A.2(c) citing 40 CFR § 122.23.

This inconsistency creates a serious gap in oversight and regulation. Temporary or short-term operations pose as much risk of water pollution as permanent operations (perhaps more due to the potential for a drastic influx in animal waste and related discharge). By excluding

operations lasting less than 45 days, the Permit fails to include a significant potential source of discharge.

Table 1 also suggests that operations that confine animals for less than 4 months under "small confined" or "medium confined" CAFOs are also exempt from the Permit. Like the 45-day exemption, the four-month exemption for small or medium non-concentrated CAFOs poses a serious absence of oversight.

III. Storm discharge exemption should be eliminated

The Permit makes an exception for contaminated runoff in the event of a 25-year, 24-hour storm event under section S2.B.1(a) (page 9). This exception is a major environmental and public health hazard.

The purpose of the Permit is to regulate discharge, often in the form of runoff. Every aspect of the Permit requires some effort on the part of the permittee to achieve this end. But under the 25-year, 24-hour storm exemption, the permittee is allowed to do nothing. The extra risk of contamination in an extreme storm event should call for additional effort, not less. The permittee has a wide range of tools available to eliminate or mitigate runoff in the event of a 25-year, 24- hour storm, including structural, technological, or operational adjustments.

The blanket exemption should be eliminated.

IV. Rules for "non-substantial changes" to AWMP should be revised

In S3.D.1(b) (on page 14–15), changes to an AWMP are classified as either "substantial" and "non-substantial." Each category contains separate requirements for submitting proposals for changes and providing notice to the public (no public notice is required for "non-substantial changes"). The result of a "non-substantial" classification is that the public is not notified of the changes to the CAFO's AWMP.

The two items listed as "non-substantial changes" can hardly be considered minor. Item 1 allows increases in animal numbers greater than 10% of the registrant's maximum allowed animal numbers, and item 2 allows facility expansions, production increases, or process modifications that will result in new or increased generation of waste, litter, or process waste water beyond the scope of the current AWMP.

The absence of public notice for changes of this magnitude is a violation of *Waterkeeper Alliance et al. v. EPA*. 399 F.3d 486 (2nd Cir. 2005). The United States Court of Appeals for the Second Circuit declared in its judgment:

> Congress clearly intended to guarantee the public a meaningful role in the implementation of the Clean Water Act. The Act unequivocally and broadly declares, for example, that "[p]ublic participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the

Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States." 33 U.S.C. § 1251(e). Consistent with this demand, the Act further provides that there be an "opportunity for public hearing" before any NPDES permit issues….

Any change in an AWMP that extends beyond the scope of the original plan, particularly with regard to generation of waste, requires public participation. A facility expansion that generates waste beyond the existing AWMP is a substantial change. Other changes listed as "non-substantial" might include production increases or process modifications that will generate increased waste, litter, or processed wastewater. These changes necessitate public input and need to result in public notice and comment.

V. The annual report should include more specific animal numbers

The annual report requirement presumably exists to ensure compliance, both with regard to the ODA's oversight role as well as to the public's right to hold violators accountable for any violations that threaten public resources. One key element of the annual report is the listing of the number of animals confined in the facility. However, S4.D.2(a)(ii) (page 18) only requires the operator to report the "actual number of animals by type at the CAFO averaged over the year."

Oversight with regard to animal numbers is undermined because the permittee is only required to report the average number of animals over the course of the year rather than reporting a more telling account of the actual number of animals (e.g., the most animals confined at any one point in the previous year, the total number of animals confined in the previous year, the average number of animals for each month of the previous year, etc.).

The Permit repeatedly references an allowable 10% increase in the number of animals. In keeping with this allowance, the annual report needs to include the maximum number of animals contained at any one time in the facility over the course of the year rather than the average number of animals.

In addition, the federal requirements under 40 CFR § 122.23 identify a maximum number of animals rather than a maximum average.

VI. Conclusion

As explained above, the Permit broadly fails to protect the public's waterways and groundwater. The ODA has been given an opportunity to simultaneously improve CAFO operations and protect one of the state's most valuable natural resources: our water. This is not an unchecked opportunity. ODA is accountable to the public in this endeavor. As a matter of law, the EPA (and, by extension, the ODA) must regulate discharge of CAFOs as required by the Clean Water Act and further prescribed in *Waterkeeper Alliance et al. v. EPA*. 399 F.3d 486 (2nd Cir. 2005). The members of SALDF look forward to ODA achieving this very important task and further revising the Permit.

Thank you again for this opportunity to comment.

Sincerely,
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