

## **SETTLEMENT AGREEMENT**

WHEREAS, on December 10, 2008, the Natural Resources Defense Council, Inc. (“NRDC”), Sierra Club and Waterkeeper Alliance (collectively, the “Environmental Petitioners”), timely filed a petition in the Ninth Circuit Court of Appeals for judicial review of the United States Environmental Protection Agency’s (“EPA’s”) final rule under the Clean Water Act entitled “Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision: Final Rule” (“Final Rule”), 73 Fed. Reg. 70,418 (Nov. 20, 2008);

WHEREAS, the petition for review was subsequently transferred to the Fifth Circuit Court of Appeals and consolidated with seven other petitions challenging the Final Rule, under the case caption National Pork Producers Council v. EPA, No. 08-61093;

WHEREAS, on December 2, 2009, Environmental Petitioners and EPA moved to sever the Environmental Petitioners’ petition from the others challenging the Final Rule and hold it in abeyance pending the finalization and implementation of a then-proposed settlement agreement;

WHEREAS, on December 8, 2009, the Court responded to this motion by issuing an order severing the Environmental Petitioners’ petition (case caption NRDC v. EPA, No. 09-60510), and dismissing it without prejudice pursuant to 5<sup>th</sup> Cir. R. 42.4 (the “December 8, 2009 Order”);

WHEREAS, the December 8, 2009 Order provided that Environmental Petitioners could reinstate the petition within 180 days (i.e., by Monday, June 7, 2010);

WHEREAS, the Environmental Petitioners and EPA (the “Settling Parties”) have now concluded their settlement negotiations;

WHEREAS, EPA intends to release a guidance document as described in Paragraph 1 below and to take the further actions described in Paragraphs 2 and 3; and

WHEREAS, in light of EPA's intentions, the Settling Parties wish to resolve this matter without any further litigation;

NOW, THEREFORE, the Environmental Petitioners and EPA, each intending to be bound by this Agreement, hereby agree as follows:

1. As soon as practicable after the Effective Date of this Agreement, but no later than May 28, 2010, EPA shall make publicly available a guidance document designed to assist permitting authorities in implementing the National Pollutant Discharge Elimination System ("NPDES") permit regulations and Effluent Limitations Guidelines and Standards for concentrated animal feeding operations ("CAFOs") by specifying the kinds of operations and factual circumstances that EPA anticipates may trigger the duty to apply for permits as discharging or proposing to discharge.

2. No later than twelve months after the Effective Date of this Agreement, EPA will propose a rule under section 308 of the Clean Water Act, 33 U.S.C. § 1318, to require all owners or operators of CAFOs, as point sources under the Act, regardless of whether they discharge or propose to discharge, to submit information to EPA. The rule will propose requiring submittal of the information listed below, or, if EPA does not propose requiring information about one or more of the items listed below, EPA's proposed rule preamble will discuss the item(s), explain why EPA chose not to propose requiring that information, and request comment on those items.

- Name and address of the owner and operator
- If contract operation, name and address of the integrator

- Location (longitude and latitude) of the operation
- Type of facility
- Number and type(s) of animals
- Type and capacity of manure storage
- Quantity of manure, process wastewater and litter generated annually by the CAFO
- Whether the CAFO land-applies
- Available acreage for land application
- If the CAFO land-applies, whether it implements a nutrient management plan for land application
- If the CAFO land-applies, whether it employs nutrient management practices and keeps records on site consistent with 40 C.F.R. § 122.23(e)
- If the CAFO does not land apply, alternative uses of manure, litter, and/or wastewater
- Whether the CAFO transfers manure off-site, and if so, quantity transferred to recipient(s) of transferred manure
- Whether the CAFO has applied for an NPDES permit

EPA also will propose requiring information to be submitted every five years, or, if EPA does not propose requiring information submittals every five years, EPA will explain in the proposed rule preamble why the agency chose not to propose requiring such re-submittals. EPA will take final action on the proposed rule within twenty-four months after the Effective Date of this Agreement.

3. EPA will release to the public information initially collected pursuant to rulemaking as described in Paragraph 2, except for information that constitutes methods, processes, or trade secrets entitled to protection as confidential information pursuant to 33 U.S.C. § 1318(b). For any such information that EPA withholds as confidential, EPA will identify the records being withheld (individually, or if a large number of similar records are being withheld, by described category); provide the reason that the records were withheld; and provide an estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation. If, based on the information received, Environmental Petitioners believe that there are categories of operations that presumptively discharge, and they submit a petition for rulemaking requesting EPA to develop a rule to require those categories to have NPDES permits, EPA agrees to grant or deny the petition within a reasonable time, after consideration of the petition and any other relevant information that is available and in the possession of EPA, including information collected pursuant to Paragraph 2 that EPA withheld as confidential.

4. Environmental Petitioners agree that they shall not seek reinstatement of their petition for judicial review of the Final Rule except as noted in Paragraph 10 below.

5. The United States agrees to pay Environmental Petitioners \$95,000 in full satisfaction of their claim for attorney fees and costs in their challenge to the Final Rule through the Effective Date of this Agreement.

6. The Effective Date of this Agreement shall be the date on which representatives of all of the Settling Parties have signed the Agreement.

7. Nothing in this Agreement shall be construed to limit or modify the discretion accorded EPA by the Clean Water Act or by general principles of administrative law.

8. Except as set forth in this Agreement, Environmental Petitioners and EPA retain all rights, claims, defenses, and discretion they may otherwise have. This Agreement shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the United States, its officers, or any person affiliated with it. Nor shall this Agreement constitute an admission by Environmental Petitioners that the Final Rule complies with the Clean Water Act or with the Administrative Procedure Act.

9. The commitments of EPA in this Settlement Agreement are subject to the availability of appropriated funds applicable for those purposes. No provision of this Agreement shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341-44 and 1511-19, or any other applicable provision of law.

10. In the event that EPA does not take any of the actions referenced in this Agreement, Environmental Petitioners' only remedy pursuant to this Agreement shall be to seek leave from the Court to reinstate its petition for review of the Final Rule, to the extent permitted by the December 8, 2009 Order. Under no circumstances shall any provision of this Agreement be the basis for any action for specific performance, mandamus, or any other remedy seeking to compel EPA to take any of the actions referenced in this Agreement.

11. Any term set forth in this Agreement may be modified by written agreement of Environmental Petitioners and EPA.

12. Nothing in this Agreement shall bind, obligate, or otherwise create any rights or duties applicable to or enforceable by, or impose any conditions or limitations upon, any person or entity that has not signed the Agreement, nor shall the Agreement be construed to make any such person or entity a third-party beneficiary of the Agreement.

13. Any notices required or provided for by this Agreement shall be made in writing, via facsimile, electronic mail, or other means, and sent to the following:

For NRDC:

For Sierra Club:

For Waterkeeper Alliance:

For EPA:

BRIAN H. LYNK  
Environmental Defense Section  
United States Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986  
Telephone: (202) 514-6187  
Facsimile: (202) 514-8865  
E-mail: [brian.lynk@usdoj.gov](mailto:brian.lynk@usdoj.gov)

Alternate address for non-U.S. Postal Service deliveries:  
601 D Street, NW  
Washington, DC 20004

SYLVIA HORWITZ  
U.S. Environmental Protection Agency  
Office of General Counsel  
1200 Pennsylvania Ave., N.W.  
Washington, DC 20460  
Telephone: (202) 564-5511  
Fax: (202) 564-5477  
E-mail: [horwitz.sylvia@epamail.epa.gov](mailto:horwitz.sylvia@epamail.epa.gov)

14. This Agreement may be executed in any number of original counterparts, each of which shall be deemed to constitute one agreement. The execution of one counterpart by any Settling Party shall have the same force and effect as if that Settling Party had signed all other counterparts.

15. This Agreement constitutes the entire Agreement between Environmental Petitioners and EPA with respect to the subject matter addressed herein. There are no warranties or representations, oral or written, relating to the subject matter hereof that are not fully expressed or provided for herein.

16. The undersigned representatives of each Settling Party certify that they are fully authorized by the Settling Party that they represent to bind that Settling Party to the terms of this Agreement.

For NRDC:

For SIERRA CLUB:

For WATERKEEPER ALLIANCE:

For EPA:

IGNACIA MORENO  
Assistant Attorney General  
Environment and Natural Resources  
Division

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BRIAN H. LYNK, Trial Attorney  
Environmental Defense Section  
United States Department of Justice  
P.O. Box 23986  
Washington, D.C. 20026-3986  
Telephone: (202) 514-6187  
Facsimile: (202) 514-8865  
E-mail: brian.lynk@usdoj.gov

Dated:

