

BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

IN THE MATTER OF:)	
)	
CONCENTRATED ANIMAL FEEDING)	R2012-023(A)
OPERATIONS (CAFOS): PROPOSED)	
AMENDMENTS TO 35 ILL. ADM. CODE)	
501, 502 AND 504)	

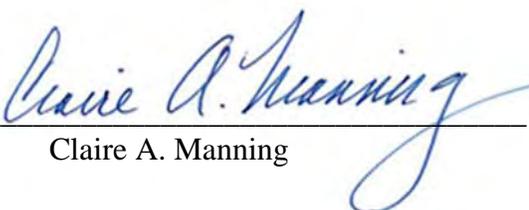
NOTICE OF ELECTRONIC FILING

TO: *SEE ATTACHED SERVICE LIST*

PLEASE TAKE NOTICE that on November 26, 2014, on behalf of ILLINOIS PORK PRODUCERS ASSOCIATION, ILLINOIS FARM BUREAU, ILLINOIS BEEF ASSOCIATION and ILLINOIS MILK PRODUCERS ASSOCIATION (collectively, the ILLINOIS AGRICULTURAL COALITION), I have filed the APPLICATION FOR NON-DISCLOSURE.

Dated: November 26, 2014

Respectfully submitted,

By: 
 Claire A. Manning

BROWN, HAY & STEPHENS, LLP

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PROOF OF SERVICE

I, Claire A. Manning, certify that I have served the AGRICULTURAL COALITION'S APPLICATION FOR NON-DISCLOSURE, by US Mail, first class postage prepaid, on November 26, 2014 to the following:

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**AGRICULTURAL COALITION'S
APPLICATION FOR NON-DISCLOSURE**

Now comes the Illinois Agricultural Coalition (“Coalition”), comprised of THE ILLINOIS PORK PRODUCERS ASSOCIATION, THE ILLINOIS FARM BUREAU, THE ILLINOIS BEEF ASSOCIATION, AND THE ILLINOIS MILK PRODUCERS ASSOCIATION, by and through its counsel, BROWN, HAY & STEPHENS, LLP, and respectfully presents to the Illinois Pollution Control Board (“Board”) the following Application for Non-Disclosure (“Application”) pursuant to 35 Ill. Adm. Code 130.406, requesting that certain information sought by the Board from the Illinois Environmental Protection Agency (“IEPA” or “Agency”) be entitled to protection from public disclosure as “non-disclosable” information in the context of this proceeding. In support of its Application, the Coalition states as follows:

I. BACKGROUND

A. State of Illinois’ CAFO Rulemaking Proceeding – Reporting Requirements for Unpermitted CAFOs.

On July 15, 2014, a Certificate of No Objection was issued by the Illinois Joint Committee on Administrative Rules (“JCAR”) for the proposed amendments to 35 Ill. Adm. Code 501, 502 and 504 of the Board’s agriculture related pollution regulations, after the proposed amendments were modified by the Board pursuant to the recommendations of JCAR.

In The Matter Of: Concentrated Animal Feeding Operations (CAFOs): Proposed Amendments to 35 Ill. Adm. Code Parts 501, 502, and 504, PCB R12-23(A), p. 1 (Aug. 7, 2014) (hereinafter filings in docket R 12-23(A) will be cited to as the document in the “R12-23(A)” docket). Board Docket R2012-023(A) was opened on August 7, 2014, and contains proposed amendments to 35 Ill. Adm. Code Parts 501, 502, and 504 which were not adopted as part of the final rule promulgated in docket R2012-023. *Id.*

Specifically, JCAR raised concerns related to the Board’s proposed Section 501.505, which would require unpermitted CAFOs to report certain specified information to the IEPA. Accordingly, the Board declined to move forward with that section in R12-23 but has opened this sub-docket, R12-023(A), primarily to further consider whether to promulgate Section 501.505. On October 10, 2014, the Board directed the Agency to submit written comments and, in those comments, to provide the following specific information:

6. Please provide a copy of any inventory, database or similar compilation of CAFOs that are not required to be covered by an NPDES permit that is maintained by the Agency. Please comment on whether this information is available to the public through the Agency’s website or other medium. Also, please provide language requiring public availability of this information that the Board can consider if it proceeds to first notice.

Board Order, R12-23A, p. 14 (Oct. 10, 2014).

Apparently, the Board has interpreted JCAR’s admonition related to proceeding forward with Section 501.505 as suggesting that the Board, for purposes of the state’s regulation of CAFOs pursuant to the Clean Water Act (“CWA”), ascertain and retrieve, in the context of this proceeding, the information IEPA *does* have in its database related to CAFOs. Respectfully, the Coalition disagrees with that interpretation.

The Coalition provided substantial public comments regarding all of the issues of concern in Board Docket R12-23, but most importantly proposed Section 501.505. *See* R12-23 PC#3030; Pre-filed Testimony of Jim Kaitschuk for the Coalition (June 19, 2012); Coalition's Questions for IEPA (July 17, 2012); Coalition's Motion Proposing Changes to IEPA Proposed Rules (Sept. 25, 2012); PC# 19, 28, and 3040. The Coalition reiterates those comments here and requests that they be made a part of the Board's record in this sub-docket. While the Coalition recognizes that it will have an opportunity to file a Public Comment subsequent to the IEPA's response to the Board's Order, this filing is believed necessary to ensure that certain information provided by IEPA in response to the Board's Order be protected in the context of this public proceeding.

B. The Federal CAFO Rulemaking Proceeding – Reporting Requirements for Unpermitted CAFOs.

The Illinois Environmental Protection Act (“Act”) adopts the federal CWA and, in doing so, the legislature stated that no permit derived from the CWA would be required in Illinois if it was not required federally. *See* 415 ILCS 5/12(f). More broadly, the Coalition asserts that since reporting requirements for unpermitted CAFOs have not been required federally, Illinois should not require them either. For the Board's information, we provide the following discussion of the background and recent case law concerning the United States Environmental Protection Agency's (“USEPA”) decision not to move forward with a CAFO reporting rule.

On October 21, 2011, the USEPA published a proposed CAFO Reporting rule, pursuant to Section 308 of the Clean Water Act (“CWA”), which is similar to that urged here by the Environmental Groups and proposed by the Board in Section 501.505. *See* NPDES CAFO Reporting Rule, 76 Fed. Reg. 65,431, 65,436 (Oct. 21, 2011). The Board's proposed Section 501.505 would have required livestock operations that were not otherwise required to obtain a

permit to nonetheless submit certain information, including contact information, the CAFO's location, its permitting status under the CWA, the amount and type of animals, and the number of acres it has, etc. On July 20, 2012, the USEPA published a notification stating that it was withdrawing the proposed rule in its entirety. Following this decision, several environmental organizations filed suit alleging that the USEPA's decision was arbitrary, capricious, and an abuse of discretion. *Environmental Integrity Project v. EPA* ("Environmental Integrity"), Complaint for Injunctive and Declaratory Relief, Case No.: 1:13-cv-01306, 3 (Aug. 28, 2013).

The USEPA moved for summary judgment, stating that it withdrew the proposed rule in order "to pursue a more efficient and effective approach." *Environmental Integrity Project v. EPA*, Defendants' Cross-Motion for Summary Judgment ("MSJ"), Case No.: 1:13-cv-01306, 11 (Aug. 1, 2014). The USEPA's decision was based upon the fact that many entities, including state agencies, the U.S. Department of Agriculture, and other arms of the USEPA collect information on CAFOs, and therefore, it would be more efficient to use these sources before requiring CAFOs to provide the proposed information. *Id.* at 12. The USEPA also recognized that any gaps in the information already provided to states pursuant to the NPDES permitting process could be filled through information requests, surveys, or site visits. *Id.* at 23. Importantly in this case, the USEPA did not include, in its MSJ, the information actually collected by the federal and various state governments (i.e., the data itself). Rather, the court granted the MSJ simply on the basis of USEPA's general references as to what information it has at its disposal for purposes of its regulatory obligations. Simply, it was sufficient that such information was available through other programs and, therefore, the USEPA's decision to not make it specifically available in the context of the CAFO rules was appropriate. The Coalition

believes that JCAR was making a similar point in its objection to the Board moving forward with its reporting rule.

II. THE BOARD'S PART 130 PROCEDURAL RULES PROVIDES AUTHORITY FOR NON-DISCLOSURE IN THE CONTEXT OF THE BOARD'S REQUEST FOR INFORMATION IN THIS PROCEEDING.

The Board's October 10, 2014 and November 6, 2014 Orders require the submission of "a copy of any inventory, database or similar compilation of CAFOs that are not required to be covered by an NPDES permit that is maintained by the Agency" (hereinafter "Database"). A portion of that information is entitled to protection as non-disclosable information pursuant to 415 ILCS 5/7(a)(iv), 5/7.1 and 35 Ill. Adm. Code 101.202.

As stated above, IEPA has compiled data to create a Database of livestock facilities that may or may not be required to be covered by an NPDES permit. The Database includes information from the Illinois Department of Public Health ("IDPH") and from the Illinois Department of Agriculture ("IDOA"), primarily from Notices of Intent to Construct forms that are required pursuant to the Livestock Management Facilities Act ("LMFA"). Board Order, R12-23, pp. 183; 247 (Nov. 7, 2013). The Database also contains information otherwise obtained by the IEPA, through inspections and via information obtained by staff. *Id.* Accordingly, the Database could contain information from sources unknown to the Coalition and to the Board. The information that the Coalition believes should be subject to non-disclosable protection in the context of this proceeding includes the following information that could be contained in the Database:

- a. Livestock facility location information: facility street address, latitude and longitude;
- b. Livestock facility owner information: address and phone; and
- c. Waste and wastewater storage information: containment type, wastewater storage type and total storage volume.

A. Statutory and Regulatory Background

Section 7(a) of the Illinois Environmental Protection Act (“Act”) provides the general policy of disclosure and public inspection of data held by the Board and the Agency, as provided by the General Assembly. The statute also provides exemptions for information the General Assembly has deemed to be protected from such disclosure. The statute provides:

(a) All files, records, and data of the Agency, the Board, and the Department shall be open to reasonable public inspection and may be copied upon payment of reasonable fees to be established where appropriate by the Agency, the Board, or the Department, except for the following:

- (i) information which constitutes a trade secret;
- (ii) information privileged against introduction in judicial proceedings;
- (iii) internal communications of the several agencies;
- (iv) information concerning secret manufacturing processes or confidential data submitted by any person under this Act.

415 ILCS 5/7(a).

Part 130 of the Board procedural rules provides a process to identify and protect trade secrets and other non-disclosable information. 35 Ill. Adm. Code 130.100. “Non-disclosable” information is defined in the regulations as “*information which constitutes a trade secret; information privileged against introduction in judicial proceedings; internal communications of the several agencies; information concerning secret manufacturing processes or confidential data submitted by any person under the Act* [415 ILCS 5/7(a)].” 35 Ill. Adm. Code 101.202 (emphasis in original). “[T]he term ‘non-disclosable information’ encompasses a broader subject matter” which can protect a wide variety of information from disclosure to the public. *See In the Matter Of: Revision of the Board’s Procedural Rules: 35 Ill. Adm. Code 101-130*, First Notice Proposed Rule, R00-20, p. 8 (March 16, 2000). Any information that is “claimed or determined” to be non-disclosable information “must be kept segregated from articles that are open to public inspection, and must be kept secure from unauthorized access.” 35 Ill. Adm. Code 130.106.

An Application for Non-Disclosure pursuant to Part 130, Subpart D requires a discussion of the following:

- 1) Identification of the particular non-disclosure category into which the material that is sought to be protected from disclosure falls (see 35 Ill. Adm. Code 101.202 for the definition of “non-disclosable information”);
- 2) A concise statement of the reasons for requesting non-disclosure;
- 3) Data and information on the nature of the material that is sought to be protected from disclosure, identification of the number and title of all persons familiar with the data and information, and a statement of how long the material has been protected from disclosure;
- 4) An affidavit verifying the facts set forth in the application for non-disclosure that are not of record in the proceeding; and
- 5) A waiver of any decision deadline in accordance with Section 130.204 of this Part.

35 Ill. Adm. Code 130.404(e).

B. Identification of the particular non-disclosure category into which the material that is sought to be protected from disclosure – 35 Ill. Adm. Code 130.404(e)(1)

As a general proposition, the Coalition does not take issue with information that is already publicly disclosed, pursuant to the LMFA, or otherwise. It is already available to the public as part of the public domain. When presented by the applicant for a given state program, the applicant was aware that some of the data would become publicly available and, as such, now has little claim to confidentiality of the data publicly disclosed. However, much of the information requested by the Board, as believed contained in the Database, is not required to be publicly disclosed and, as the Coalition understands the Database, it is not possible to tell where certain information comes from (much less verify its accuracy). Moreover, the Coalition presumes that much of the information at the IEPA’s disposal is sensitive, private information, which IEPA does not routinely disclose. Once that bell is rung, it cannot be unring.

From the perspective of the livestock farmers, the data requested by the Board represents their personal information. Many of these facilities are run by family farmers, and their homes are on or near the farms where they raise their livestock. Information in state databases may contain their private cell phone numbers, addresses, and other private or personal information. Other information requested by the Board contains business confidential information that may cause competitive harm to the farmer or his business. Accordingly, the Coalition asserts that Board protection from disclosure of certain of the requested information is proper pursuant to Part 130 of its procedural rules. 35 Ill. Adm. Code Part 130.¹

The data for which the Coalition seeks to be subject to non-disclosure falls into three categories: the addresses and coordinate locations of all Illinois livestock facilities known to the IEPA; the addresses and phone numbers of owners of those livestock facilities; and the particular waste and wastewater containment structures at those facilities.

C. Statement of Reasons Supporting Application for Non-Disclosure - 35 Ill. Adm. Code 130.404(e)(2)

1. Confidential Data: Personal and Privacy Considerations.

The Coalition asserts that all of the above information constitutes confidential data, as described in Section 101.202 (“confidential submitted by any person under the Act”). “Confidential data” is an undefined term in the Act and the Board’s regulations. *See In the Matter Of: Petition of Horsehead Resource and Development Company, Inc. for an Adjusted*

¹ The Coalition also believes that some of the information requested by the Board may also be entitled to protection pursuant to the Illinois Freedom of Information Act (“FOIA”). See 5 ILCS 140/7(1)(a), (b) and (g). The Coalition recognizes that the Board is not here called upon to make a determination regarding the applicability or non-applicability of FOIA. Rather, as the “keeper” of this information, the IEPA is the state agency that is required to make that determination. In this proceeding, however, the IEPA has continuously asserted that the Board’s proposed Section 501.505 is not necessary for the proper administration of its CAFO program. Accordingly, the information is now subject to public disclosure *only* as a result of Board order to the IEPA. The Coalition recognizes that the Board’s Part 130 rules generally apply in situations where the provider of the information files the Application for Non-Disclosure. However, given the unique context here, the Coalition believes that Part 130 protection for some of the requested information is both warranted and appropriate.

Standard Under 35 Ill. Adm. Code 720.131(c), AS 00-2, p. 3 (Sept. 9, 1999). Black's Law Dictionary generally defines confidential, in reference to information, as that data "meant to be kept secret." CONFIDENTIAL, Black's Law Dictionary (9th ed. 2009). The Coalition does not believe that the release of this information is necessary to fulfill the purposes of the CWA, nor the Act.² Moreover, the Board's actual inquiry (i.e., what does the Agency have?) does not require the *actual release* of information the Coalition believes objectionable. In short, the IEPA Database was never compiled for the purpose of publicly disclosing the varied information, from various sources, contained therein. Accordingly, the entities that are not required to be permitted (or otherwise regulated pursuant to State law, such as pursuant to the Notice of Intent to Construct provisions of the LMFA) have an expectation of privacy and confidentiality as to their addresses and phone numbers – as well as the scope and type of their business operations.

The Database is believed to include personal information such as private cell phone numbers, addresses, and names of unregulated persons and entities, etc. Many of these livestock operations are run by family farmers, and their homes are on or near the farms where they raise their livestock. These farmers engage in honest work in producing these livestock. Making the totality of information contained in the Database publicly available will expose farm families to potential harassment or physical danger, since the names and phone numbers of these families would be available to those who oppose what have become standard methods of livestock production. Requiring this personal information to be submitted by the IEPA would represent a troubling intrusion into the lives of private citizens and small businesses. This very real concern was recently voiced by U.S. Senators in response to the USEPA's release of certain information

² While the Coalition recognizes that 40 CFR 123.26(b)(1) directs the IEPA to maintain a database such as this, and provide it to USEPA upon request, maintenance of the database is simply not the same as providing the personal and confidential information it collects in a public proceeding such as this. Further, as the Coalition has argued in the underlying docket, it knows of no other state program where unregulated entities are required to report this information.

related to livestock operations in April 2013. Letter from Sen. Deb Fischer, *et. al.* to Administrator Bob Perciasepe, USEPA (Apr. 4, 2013) (Attachment A). As explained by these Senators, there have already been circumstances in which farmers and ranchers feel their privacy has been invaded and their security has been threatened due to these types of disclosures. *Id.*

2. Confidential Data: Business, Competition and Financial Considerations

The Database also likely contains confidential business information, in particular, information related to the scope and type of operations at a given facility (containment type, wastewater storage type, and total storage volume). Much of this information is not shared with the public at-large, nor is it even shared with other farms and/or livestock farmers. Livestock production is a competitive business, with most owners being unaware of the type of containment structures and waste storage in place at their competitor's facility. See also 5 ILCS 140/7(1)(g), as discussed herein at Footnote 1. Accordingly, the Coalition asserts that the requested information is entitled to business confidential protection.

3. National Security and Agro-terrorism Concerns

In addition to the above, a far more ominous threat is the potential for agro-terrorist attacks carried out by animal welfare organizations. See Jillian Kay Melchior, *The EPA's Privacy Problem*, NATIONAL REVIEW ONLINE (Jan. 14, 2014 6:30 PM), <http://www.nationalreview.com/article/368478/epas-privacy-problem-jillian-kay-melchior>.

A coordinated attack carried out by Animal Liberation Front on a farm in California in 2012 caused more than \$2 million in damage. *Id.* Greater accessibility of the location of livestock facilities leaves them more vulnerable to future attacks. The Board is a public entity and quite visible given its online presence; thus, providing this information in the context of this proceeding opens it up to the public domain.

Further, public availability of information in the Database can have dire consequences. Revealing the location of CAFOs provides terrorist groups with a listing of facilities that could be attacked without warning. Terrorist threats to America's food supply chain were the subject of Homeland Security Presidential Directive # 9. Homeland Security Presidential Directive/HSPD-9, Defense of United States Agriculture and Food (Jan. 30, 2004) available at: <http://www.gpo.gov/fdsys/pkg/PPP-2004-book1/pdf/PPP-2004-book1-doc-pg173.pdf> (hereinafter "HSPD-9").

The goal of HSPD-9 is to "provide the best protection possible against a successful attack on the United States agriculture and food system, which could have catastrophic health and economic effects." *Id.* at 173. HSPD-9 expressly directs multiple federal agencies to enact plans to "protect vulnerable critical nodes of production or processing" from threats. *Id.* at 175. Agriculture and food systems are also considered critical infrastructure and key resources under HSPD-7, and pursuant to the definition of "critical infrastructure" provided in the USA PATRIOT Act of 2001. Homeland Security Presidential Directive/HSPD-7, Critical Infrastructure Identification, Prioritization, and Protection (Dec. 17, 2003) available at: <http://www.dhs.gov/homeland-security-presidential-directive-7#1>; 42 U.S.C. § 5195c(e).

In furtherance of its responsibilities under these Presidential Directives, the Department of Agriculture (USDA) prepared and submitted to the Department of Homeland Security a sector-specific plan to secure our food supply. USDA, Agriculture and Food Critical Infrastructure and Key Resources Sector-Specific Plan as input to the National Infrastructure Protection Plan (May 2007) available at <http://www.usda.gov/documents/nipp-ssp-ag-food.pdf> (hereinafter "Sector-Specific Plan").

The Sector-Specific Plan specifically provides that:

Securing the sector presents unique challenges because U.S. agriculture and food systems are extensive, open, interconnected, diverse, and complex structures providing attractive potential targets for terrorist attacks. Attacks on the sector, such as introducing animal or plant disease or food contamination, could result in severe animal, plant, or public health and economic consequences because food products rapidly move in commerce to consumers without leaving enough time to detect and identify a causative agent.

Id. at 2.

Providing a publicly available listing of facilities that may or may not be subject to the CWA is contrary to the policies and objectives set in place to protect the American food supply and distribution chain. The Database could serve as a terrorist target list. Those intending on causing catastrophic harm could simply review the database for the facilities with the largest number of animals, and therefore the largest potential impact. A coordinated attack on multiple facilities within defined geographic areas could also be planned that would overwhelm first responders, and create a threat to health and safety of the population beyond the threat to the food supply.

4. *Ongoing Federal Litigation*

Disclosure of farm-related personal information pursuant to the federal Freedom of Information Act (as well as similar acts in seven states) is currently the subject of litigation in the United States District Court for the District of Minnesota. See *American Farm Bureau Federation, et.al., v. U.S. Environmental Protection Agency*. Case No. 13-cv-01751. See Attachment B (Plaintiff's Memorandum of Support of Restraining Order); and Attachment C (USEPA Letter Agreeing Not to Release Certain Information Pursuant to FOIA Pending Litigation).

Here, as in that lawsuit, IEPA should not be required to provide sensitive information in this proceeding – especially in light of the Coalition's pending objections.

D. The nature of the material that is sought to be protected from disclosure, identification of the number and title of all persons familiar with the data and information, and a statement of how long the material has been protected from disclosure – 35 Ill. Adm. Code 130.404(e)(3)

As explained in Footnote 1 of this Application, the Coalition recognizes that it is not the “keeper” of the information subject to disclosure objection. The IEPA is. Accordingly, the Coalition is not in a position to discuss how the data is compiled – beyond what the IEPA has already disclosed in this proceeding which, from the Coalition’s perspective, is sufficient justification for this filing. The extent of the Coalition’s knowledge of the IEPA’s Database is set forth in other sections of this filing.

E. Waiver of Any Relevant Decision Deadline – Ill. Adm. Code 130.404(e)(5)

Section 130.204 of the Board’s rules requires that the applicant for non-disclosure submit a waiver of any relevant decision deadline relevant in the underlying proceeding, for the time it takes for a Board decision to be rendered on the application, plus 45 days thereafter. 35 Ill. Adm. Code 130.204. The Coalition recognizes that there is no statutory decision deadline in this rulemaking. However, the Coalition asserts that the spirit of the Board’s rule would justify non-release of the objectionable information by the IEPA pending any decision by the Board as to the propriety of, or continued need for, such information.

III. REQUEST FOR RELIEF

In accordance with this Application for Non-Disclosure, the Coalition requests that the Board order or otherwise direct the IEPA to provide its Database without the inclusion of the following objectionable information: any references to the addresses and locations of the farms that may be listed therein; the phone numbers and any other personal information related to presumed owners of these farms; and information related to waste and wastewater storage, such as containment type, wastewater storage type and total storage volume. Further, until the Board

otherwise directs the IEPA related to its request, the Coalition asks that any such information contained in the Database not be made public in this proceeding. Specifically, the Coalition asks that the information not be included in any electronic or otherwise public filing and not included as an attachment to any filings given to those persons on the Board's Service List.

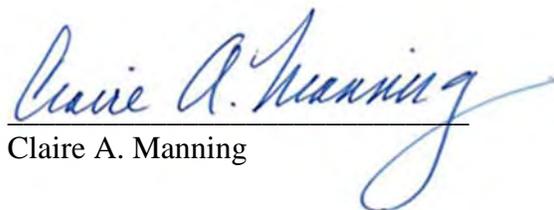
IV. ALTERNATE REQUEST FOR RELIEF DUE TO UNIQUE CIRCUMSTANCES

Because the Coalition does not actually possess the Database, and has not created it, the Coalition is in a unique position as applicant for non-disclosure. As such, the Coalition alternately requests that if the Board denies its Application for Non-Disclosure pursuant to Part 130, that the Board nonetheless accepts as adequate for the purposes of its inquiry in this sub-docket, an IEPA filing that is consistent with the Coalition's Application for Non-Disclosure.

V. CONCLUSION

WHEREFORE, for the reasons stated hereinabove, the Coalition has demonstrated that the confidential information requested by the Board constitutes non-disclosable information entitled to protection pursuant to 35 Ill. Adm. Code 130.406(c) or, alternatively, that the Board accept as adequate a filing from the IEPA consistent with this Application.

Respectfully Submitted,



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ATTACHMENT A

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WASHINGTON, DC 20510-6175

SETTINA PURRIER, MAJORITY STAFF DIRECTOR
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April 4, 2013

The Honorable Bob Perciasepe
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Ave NW
Washington, D.C. 20460

Dear Acting Administrator Perciasepe:

We write to express concern and seek further information regarding the Environmental Protection Agency's (EPA) recent release of personal and confidential business information relating to concentrated animal feeding operations (CAFOs) to environmental groups in response to a Freedom of Information Act (FOIA) request.¹ This action demonstrates a troubling disregard for the interests of both private citizens and competitive businesses. We understand that you are currently investigating the propriety of the FOIA releases and whether the releases contain sensitive information not already publicly available.² EPA claims that the recipients of the information have agreed not to disseminate the data EPA provided to them.³ Since the information has already been released, EPA's assertion that the groups will not distribute the information is hardly reassuring. As such, the lack of appropriate safeguards within EPA's FOIA office requires your immediate attention.

As you are aware, FOIA's purpose is to provide the public with a means to access government information.⁴ The statute essentially enables people to learn "what their government is up to."⁵ FOIA is not, however, a mechanism by which private citizens or organizations may obtain personal information of other private citizens, or confidential business information.⁶

EPA's recent and overbroad application of FOIA exemptions with respect to agency information undermines FOIA's purpose by preventing the public from learning what the agency is up to.⁷ Conversely, in releasing the personal and confidential information of CAFO owners,

¹ Amanda Peterka, *EPA probes release of CAFO data to enviro groups*, Mar. 6, 2013, <http://www.eenews.net/Greenwire/2013/03/06/archive/2?terms=EPA+probes+release+of+CAFO+data+to+enviro+groups>.

² Letter from Nancy Stoner, EPA Office of Water Acting Assistant Administrator, to Agricultural Groups (Feb. 28, 2013).

³ Peterka *supra* note 1.

⁴ 5 U.S.C. § 552 (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

⁵ *NARA v. Favish*, 541 U.S. 157, 171-72 (2004) (quoting *DOJ v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989)).

⁶ *Id.*

⁷ See David Vitter, *Clearing the Air on an Opaque EPA: EPA nominee Gina McCarthy has an awful lot to answer for*, Mar. 13, 2013, <http://www.usnews.com/opinion/articles/2013/03/13/obama-epa-nominee-gina-mccarthy-has-a-lot-to-answer-for>. See also Letter from Hon. David Vitter et al., to Hon. Arthur Elkins, Inspector Gen., Env'tl. Prot. Agency (Feb. 7, 2013).

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EPA has shown no regard for the privacy and safety of private citizens, and businesses. EPA's current application of FOIA thus represents the antithesis of a transparent government and an offensive abuse of agency discretion.

Pursuant to its long term effort to regulate CAFOs, EPA proposed a rule (CAFO Reporting Rule) in October 2011 that would have required CAFO owners to submit information on their operations, including location and contact information.⁸ EPA withdrew this rule in July 2012⁹ and instead began working with states to gather the data.¹⁰ In October 2012, three environmental groups submitted FOIA requests to EPA requesting information relating to CAFOs.¹¹ In response, the EPA released to these three groups the information EPA had gathered from more than 30 state permitting authorities.¹² However, not all of the information provided to EPA should have been released in such a careless fashion. The comprehensive data released provides the precise locations of CAFOs, the animal type and number of head, as well as the personal contact information, including the names, addresses, phone numbers, and email addresses of CAFO owners.¹³ The Department of Homeland Security had previously informed EPA that the release of such information could constitute a domestic security risk.¹⁴ EPA's disregard for the implications of the release of this information is alarming.

FOIA provides nine exemptions designed to protect the disclosure of certain information.¹⁵ Exemption 4 shields the disclosure of information related to the proprietary interests of business,¹⁶ and exemption 6 safeguards the privacy interests of individuals.¹⁷ In this instance, EPA's release of the geographical location and the animal specifications of CAFOs falls within the broad definition of business information and should have been withheld.¹⁸ Moreover, EPA's release of the CAFO owners' personal contact information could result in serious and unacceptable risks for farmers, ranchers, and their families – a risk exemption 6 was designed to avoid.¹⁹

In an attempt to calm the fears of the individuals affected, EPA has reported that the three environmental groups who currently have possession of this information have agreed not to

⁸ National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 76 Fed. Reg. 204 (proposed Oct. 21, 2011) (to be codified at 40 C.F.R. pt. 9 and 122).

⁹ National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 77 Fed. Reg. 140 (Jul. 20, 2012).

¹⁰ Amanda Peterka, *Beef industry slams EPA for giving enviros access to CAFO data*, Feb. 21, 2013, <http://www.eenews.net/Greenwire/2013/02/21/archive/7>.

¹¹ Peterka *supra* note 1.

¹² *Id.*

¹³ KDHE refuses to provide EPA with Kansas CAFO information, <http://www.thestockexchangeneews.com/2013/03/08/kdhe-refuses-to-provide-epa-with-kansas-cafo-information/> (Mar. 8, 2013).

¹⁴ Peterka *supra* note 9.

¹⁵ 5 U.S.C. § 552 (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524.

¹⁶ 5 U.S.C. § 552(b)(4).

¹⁷ 5 U.S.C. § 552(b)(6).

¹⁸ 5 U.S.C. § 552(b)(4). *See also* Department of Justice Guide to the Freedom of Information Act: Exemption 4 (2009), http://www.justice.gov/oip/foia_guide09/exemption4.pdf.

¹⁹ 5 U.S.C. § 552(b)(6). *See also* Department of Justice Guide to the Freedom of Information Act: Exemption 6 (2009), http://www.justice.gov/oip/foia_guide09/exemption6.pdf.

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disseminate the data.²⁰ This assurance is hollow. As the Supreme Court of the United States confirmed in *Favish*, and as EPA is aware, “release to one is release to all.”²¹ Accordingly, EPA has no ability to ensure that this information will be kept private, and, moreover, private requestors cannot legally withhold the information.²² Since the very purpose of FOIA is to provide information about the government for public dissemination, an agency cannot control what an individual or organization does with information procured through a FOIA request. As such, the Senate Committee on Environment and Public Works is disappointed that EPA sought to downplay the seriousness of their mistake by inaccurately claiming that the information released will remain private.

EPA has stated that the agency plans to do an investigation to ensure that any legitimate privacy concerns are addressed.²³ While we support this initiative, we request that you brief the Committee staff on the status of your investigation by no later than April 18, 2013.

Additionally, we request that you respond to the following questions and requests no later than April 18, 2013:

1. Please detail the steps EPA is taking to investigate this privacy breach.
2. Who at EPA is in charge of the investigation?
3. Is the agency examining possible conflicts of interest or inappropriate relationships between EPA employees and groups requesting the information, in particular regarding Nancy Stoner and/or her staff?
4. Who was responsible for processing and executing the above mentioned FOIA requests?
5. What was the purpose of compiling the information released? How does the agency plan to use it? Does EPA intend to develop a national database of CAFOs? If so, will the database include information about producers and facilities not subject to regulation under the Clean Water Act?
6. How much time, money, and staff did EPA dedicate to bundling the information distributed pursuant to the above mentioned FOIA requests?
7. Please provide all documents referring or relating to the CAFO FOIA requests from Earthjustice, Natural Resources Defense Council, and Pew Charitable Trusts, including any emails sent or received on personal or private accounts.
8. For each state from which EPA sought to obtain information on livestock agriculture, please provide copies of all written, electronic, or other communications between EPA,

²⁰ Peterka *supra* note 1.

²¹ Supreme Court Rules for “Survivor Privacy” in *Favish*, <http://www.justice.gov/oip/foiapost/2004foiapost12.htm> (Apr. 9, 2004). See also *National Archives & Records Administration v. Favish*, 124 S. Ct. 1570, 1580 (2004).

²² *Id.*

²³ Peterka *supra* note 1.

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its agents and partners, and the individual states from which EPA collected information on livestock facilities. In particular, this includes but is not limited to copies of all emails or other written communication with the individual states describing the types of information and the public nature of that information, which EPA sought. In addition, please provide copies of any written correspondence received from the states, including cover letters or other electronic or written communications transmitting the information. If no written records exist to memorialize the request or the response received from the states, please indicate why, and provide specific details on the state officials with whom communications were made, their authority to release records, and the general custodial chain of records that describes how EPA obtained each state's data.

9. If a party other than EPA's Office of Water obtained the information, please include that information and all correspondence between the states and that third party, including but not limited to EPA Regional Offices, the Association of Clean Water Administrators, or third-party contractors, such as Tetra Tech. Please also include copies of all communications between these third parties and EPA.

Thank you for your prompt attention to this matter. If you have questions regarding this request, please contact Laura Acheson with the Senate Committee on Environment and Public Works at (202) 224-6176.

Sincerely,



Deb Fischer
U.S. Senator



David Vitter
U.S. Senator



James Inhofe
U.S. Senator



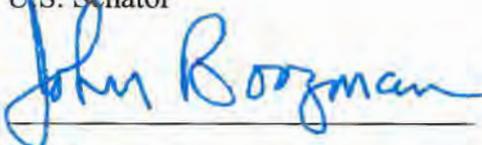
John Barrasso
U.S. Senator



Mike Crapo
U.S. Senator



Roger Wicker
U.S. Senator



John Boozman
U.S. Senator



Jeff Sessions
U.S. Senator

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cc: The Honorable Nancy Stoner
Acting Assistant Administrator for Water

ATTACHMENT B

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA**

**AMERICAN FARM BUREAU
FEDERATION, et al.,**

Plaintiffs,

v.

**U.S. ENVIRONMENTAL PROTECTION
AGENCY, et al.,**

Defendants

Civil Action No. _____

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR A
TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION**

Pursuant to the Federal Rules of Civil Procedure and the Local Rules of this Court, Plaintiffs American Farm Bureau Federation (“AFBF”) and the National Pork Producers Council (“NPPC”) file this memorandum of law in support of their motion seeking a temporary restraining order (“TRO”) and/or a preliminary injunction prohibiting Defendant Environmental Protection Agency (“EPA” or the “Agency”) from releasing to the public the personal information of farmers in Minnesota and numerous other states under the Freedom of Information Act (“FOIA”).

INTRODUCTION

Earlier this year, in response to FOIA requests, EPA released to the public a massive collection of data concerning livestock and poultry farms and farmers in 29 states. This clearinghouse of information—which included detailed spreadsheets that can be easily searched, sorted, and shared—revealed the names, home addresses, home and mobile

telephone numbers, global positioning coordinates, and other personal information of farmers around the country. The data included many farm mailing addresses that were also the home addresses of the farmers and their families. Contrary to clear U.S. Supreme Court precedent, EPA has asserted that the farmers' interest in controlling the disclosure of their personal information completely dissipated when that information appeared in some form, somewhere on a state or federal website, or was otherwise available to the public as a result of state or federal disclosure requirements. EPA has also asserted that any person who forms a business entity in order to run a closely held business has a diminished expectation of privacy if the business is run out of his or her home.

Based on this flawed rationale, EPA is on the cusp of disclosing *more* personal information about thousands *more* farmers and farm families in six additional states, in addition to re-releasing to a larger audience the personal information that was unlawfully included in its prior FOIA responses. Plaintiffs are asking the Court to stop this massive invasion of farmers' privacy. As the U.S. Supreme Court has explained, "the privacy of the home" rightly receives "special consideration in our Constitution, laws and traditions." EPA's impending FOIA release of farmers' personal information will cause immediate, irreparable harm to the specially protected privacy interests of numerous farmers and farm families. To make matters worse, the legal theories on which EPA has relied to justify its decision to release this personal information fly in the face of U.S. Supreme Court and Eighth Circuit Court of Appeals precedent. Plaintiffs—organizations that represent the interests of Minnesota's, and America's, farmers and farm families—are therefore seeking emergency relief from this Court to prevent the immediate and unjustifiable invasion of farmers' privacy that will result if EPA releases their personal information.

BACKGROUND

A. EPA's Proposed Reporting Rule

In 2008, EPA proposed a substantial revision to its regulations governing National Pollutant Discharge Elimination System ("NPDES") permits for livestock and poultry farms classified as "concentrated animal feeding operations" or "CAFOs" under the Clean Water Act ("CAFO Rule").¹ Numerous groups petitioned for judicial review of the Agency's revised regulations. During the course of litigation, EPA entered into a settlement agreement with some of those groups, including Natural Resources Defense Council ("NRDC"), Sierra Club and Waterkeeper Alliance (the "Settlement Agreement").²

As part of the Settlement Agreement, EPA agreed (1) to propose a rule that would require CAFO operators to report certain information to the Agency, and (2) to release that information to the public ("CAFO Reporting Rule").³ Accordingly, EPA proposed a rule in October 2011 that would have required all large- and medium-sized CAFO operators to provide the Agency with location and contact information, as well as information about the type and number of animals and the size of the property.⁴ Plaintiffs, along with numerous other agricultural organizations, objected to the proposed rule, which would have exceeded

¹ See National Pollution Discharge Elimination Systems ("NPDES") Concentrated Animal Feeding ("CAFO") Reporting Rule, EPA-HQ-OW-2005-0037, 73 Fed. Reg. 70,418 (Nov. 20, 2008). See also EPA, What is a CAFO?, available at <http://www.epa.gov/region7/water/cafo/> (last visited July 5, 2013) ("Animal Feeding Operations (AFOs) are agricultural operations where animals are kept and raised in confined situations" and CAFOs are operations that keep a large number of animals); Regulatory Definitions of Large CAFOs, Medium CAFO, and Small CAFOs, available at http://www.epa.gov/npdes/pubs/sector_table.pdf (last visited July 5, 2013).

² See Settlement Agreement amongst EPA and NRDC, Sierra Club, & Waterkeeper Alliance (December 10, 2008), available at <http://www.caes.uga.edu/extension/water/documents/settlementagreement.pdf> (last visited July 2, 2013).

³ See *id.* at ¶¶ 2-3.

⁴ See NPDES CAFO Reporting Rule, EPA-HQ-OW-2011-0188, 76 Fed. Reg. 65,431 (Oct. 21, 2011).

EPA's authority under Clean Water Act.⁵ On July 20, 2012, EPA withdrew its proposed CAFO Reporting Rule.⁶

Shortly before withdrawing the proposed CAFO Reporting Rule, EPA entered into a Memorandum of Understanding ("MOU") with the Association of Clean Water Administrators ("ACWA"), a professional organization whose membership includes state and interstate water pollution control administrators.⁷ Pursuant to this MOU, EPA and ACWA agreed to collect and exchange information about livestock and poultry farms on a state-by-state basis. With ACWA's cooperation, EPA now has obtained information concerning thousands of livestock and poultry farms and other farming operations from at least 30 states.⁸

B. EPA's Original FOIA Release

In a letter dated September 11, 2012, Earthjustice—an organization that regularly represents Sierra Club, one of the parties to the Settlement Agreement—submitted a FOIA request to the Agency that sought a host of information about farms, including: "All records relating to and/or identifying existing sources of information about CAFOs, including the AFOs themselves, and EPA's proposed and intended data collection process for gathering that information."⁹ NRDC (another party to the Settlement Agreement) and the Pew Charitable

⁵ Boylan Decl., Ex. 1 (Letter from American Farm Bureau Federation et al to EPA (Jan. 19, 2012)).

⁶ See NPDES CAFO Reporting Rule, EPA-HQ-OW-2011-0188, 77 Fed. Reg. 42,679 (July 20, 2012).

⁷ See EPA, Final Action on the Proposed NPDES CAFO Reporting Rule: Questions and Answers (July 2012) ("EPA Q&A"), available at http://www.epa.gov/npdes/pubs/cafo_308_final_action_qa.pdf (last visited July 2, 2013); Boylan Decl., Ex. 2 (Memorandum of Understanding between EPA and Association of Clean Water Administrators (July 12, 2012)).

⁸ See Boylan Decl., Ex. 3 (Letter from Nancy K. Stoner, Acting Assistant EPA Administrator, to Don Parrish, American Farm Bureau Federation (Feb. 28, 2013), at 1).

⁹ See Boylan Decl., Ex. 4 (FOIA Request Letter from Eve C. Gartner, on behalf of Earthjustice, to EPA (Sept. 11, 2012), at 2).

Trusts jointly submitted a similar FOIA request dated October 24, 2012, also seeking detailed information about CAFOs, including: “[t]he legal name of the owner of the CAFO . . . their mailing address, email address, and primary telephone number” and “[t]he location of the CAFO’s production area, identified by latitude and longitude and street address.”¹⁰ Much of the information sought in the FOIA requests from Earthjustice and NRDC was the same as the information that would have been provided and made public under the Settlement Agreement and EPA’s withdrawn CAFO Reporting Rule.

In response to these FOIA requests, in early February 2013, EPA released data concerning CAFOs and other farms that EPA had collected from 29 states.¹¹ The information was released in exactly the same form that it was received from the states.¹² EPA concluded that it had no legal obligation to determine whether the release contained personal information protected by FOIA Exemption 6 before providing it to the requesters. Furthermore, EPA made no effort to contact Plaintiffs, or any other group representing the interests of farmers—much less the farmers themselves—before it issued a FOIA release that contained vast amounts of personal information.¹³

Plaintiffs, upon learning that EPA had released the farmers’ personal information, objected in writing to the legality of the Agency’s decision.¹⁴ In response, EPA explained that “it was the EPA’s understanding, based on our communication with states, that the information received, and subsequently released, was all publicly available, either through a publicly

¹⁰ See Boylan Decl., Ex. 5 (FOIA Request Letter from Claire Althouse, on behalf of National Resources Defense Council and PEW Charitable Trusts, to EPA (Oct. 24, 2012), at 2).

¹¹ See Parrish Decl. ¶ 9.

¹² See *id.*

¹³ See *id.*; See Formica Decl. ¶6.

¹⁴ See Boylan Decl., Ex. 6 (Letter from American Farm Bureau Federation et al to EPA (Feb. 25, 2013)).

accessible database or through a public records request to each state.”¹⁵ Nevertheless, in light of Plaintiffs’ objections, EPA promised to conduct review of the already-released information to “address any legitimate privacy concerns.”¹⁶

C. EPA’s April 4 FOIA Release

In a letter dated April 4, 2013, EPA responded to the substance of Plaintiffs’ objections.¹⁷ In that letter, the Agency admitted that some of the information in its original FOIA release was protected by Exemption 6, and accordingly should have been redacted. The Agency also explained the policy it would apply regarding the disclosure of farmers’ personal information, including how it would address the information from 29 states that it had already released.¹⁸ The Agency’s April 4 letter was accompanied by a second data release, which redacted farmers’ personal information in accordance with EPA’s newly stated policy.¹⁹

According to EPA, “Exemption 6 does not extend privacy protection to information that is well known or widely available within the public domain.”²⁰ On that basis, EPA refused to redact farmers’ personal information if the information was: “identical” or “almost identical” in “content and format” to information that can be found on states’ websites; obtained “directly from the Agency’s publicly available ECHO [Enforcement and Compliance History Online] databases”; or “available through mandatory disclosure requirements of NPDES regulations or similar state permit disclosure laws.”²¹ EPA did not provide links to

¹⁵ See Boylan Decl., Ex. 3 (2.28.13 Stoner letter, at 1).

¹⁶ *Id.* at 1-2.

¹⁷ See Boylan Decl., Ex. 7 (Letter from Nancy K. Stoner to Don Parrish, American Farm Bureau Federation (April 4, 2013) (“April 4 Letter”)).

¹⁸ See *id.* at 1-4.

¹⁹ See *id.* at 4.

²⁰ *Id.* at 2.

²¹ *Id.* at 1-3.

where the information could be located on the states' websites or its ECHO database, nor did it explain how the information could be obtained using mandatory disclosure requirements.

EPA's April 4 FOIA release also did not redact any personal information if the listed owner or operator of a farm was a corporation, even if the corporation was closely held and the entity's name included the name of the family, and even if the family *resides at the farm*. Apparently relying on an outdated and overruled 1975 Office of Management and Budget memorandum, EPA claimed: "The privacy interested in Exemption 6 does not extend to information about corporations and businesses, and courts view an individual's expectation of privacy as diminished with regard to matters in which he or she is acting in a business capacity."²²

Even under its narrow interpretation of Exemption 6, EPA's April 4 letter conceded that some of the data it had released in February contained personal information that was neither publicly available nor about a corporation or business.²³ After admitting its error, the Agency asked the FOIA requesters to return their copies of the data that had been released, and provided them with a new batch of information. This second release included redactions of some personal information gathered from farmers in ten of the 29 states. The information from the other 19 states remained completely unredacted.²⁴

In correspondence dated April 30, 2013, EPA again amended its response to the FOIA requests after realizing that it should have made additional redactions to safeguard information

²² *Id.* at 2-3, n.18.

²³ *See id.* at 24.

²⁴ *See id.*

protected by Exemption 6.²⁵ EPA's April 30 letter again requested the return of previously released disks containing prior responses.²⁶ EPA did not, however, revise or reconsider the policies set forth in its April 4 letter governing the release farmers' personal information.

D. EPA's Imminent FOIA Release

Under the MOU between EPA and ACWA, which remains effective through June 12, 2014, EPA's objective is to collect information regarding livestock and poultry farms from all 50 states.²⁷ EPA accordingly has continued its efforts to collect information from the states concerning CAFOs and other farms, including from the 21 states whose information was not part of EPA's prior FOIA releases.

Plaintiffs understand that EPA has now collected, and imminently plans to distribute, the personal information of farmers from Minnesota, California, Idaho, Nevada, Oklahoma and Washington.²⁸ Moreover, the government website that tracks FOIA requests indicates that there are multiple pending requests for information that are similar to the requests that prompted EPA's prior release of farmer information gathered from 29 states. Several of those requests have an estimated completion date of July 11, 2013.²⁹ EPA intends to respond to these pending FOIA requests by re-releasing the personal information of farmers in the 29 states that were the subject of the prior releases, and by releasing for the first time the personal

²⁵ See Boylan Decl., Ex. 8 (Letter from Allison P. Wiedeman, Chief, Rural Branch, EPA Office of Wastewater Management to Don Parrish, American Farm Bureau Federation (April 30, 2013)).

²⁶ See *id.*

²⁷ See EPA Q&A, *supra* n.8.

²⁸ See Formica Decl. ¶7.

²⁹ See Boylan Decl., Ex. 9 (July 2, 2013 screenshot taken of the EPA's pending FOIA request page).

information of farmers in the six additional states that have not yet been the subject of a FOIA release.³⁰

The imminent release of personal information belonging to the farmers in Minnesota, California, Idaho, Nevada, Oklahoma and Washington threatens a new and significant harm to the privacy interests of those farmers and their families. Further, the disclosure of information belonging to the farmers living in the 29 states that were the subject of the prior release (information that was clawed back due to Agency error, and then re-released, and then clawed back again due to Agency error, and then re-released again) also represents a significant harm. Through this emergency motion, Plaintiffs are asking this Court to prevent those harms.

ARGUMENT

Temporary restraining orders and preliminary injunctions are extraordinary forms of relief, to be employed in extraordinary circumstances. *Watkins, Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003). The imminent public release of the names, addresses, telephone numbers and other personal information of thousands of farmers living in 35 states—including Minnesota—readily qualifies as extraordinary.

To justify an temporary restraining order prohibiting EPA's release of this information, Plaintiffs must demonstrate: (1) "the threat of irreparable harm . . . in the absence of such relief," (2) that "the balance between that harm and the harm that the relief may cause the non-moving party" weighs in favor of the movant, (3) "the likelihood of the movant's ultimate success on the merits," and (4) that a restraining order or injunction would be in "the public

³⁰ See Formica Decl. ¶¶ 7-8.

interest.”³¹ *Life Time Fitness, Inc. v. DeCelles*, 854 F. Supp. 2d 690, 694-95 (D. Minn. 2012).

As discussed below, each of these factors weighs in favor of Plaintiffs’ requested relief.

I. The release of personal information irreparably harms farmers’ privacy interests.

In its seminal case interpreting the scope of FOIA Exemption 6, the U.S. Supreme Court warned against “disparag[ing] the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions.” *United States Dep’t of Def. v. Federal Labor Rel. Auth.*, 510 U.S. 487, 501 (1994) (“*FLRA*”). EPA’s pending FOIA release will unquestionably infringe on the “privacy of the home” for thousands of farmers and farm families who live on or near the CAFOs they operate. *See* Lunemann Declaration. The EPA will release to FOIA requesters, as it has in the past, the names, home addresses, home telephone numbers, global positioning coordinates, and other personal information of American farmers. As with its prior releases, EPA is likely to disseminate this personal data through “user friendly” spreadsheets that will allow the requesters to search, sort, and share the information with other organizations and individuals, potentially including those who aim to harass or otherwise harm farmers and put them and their families at risk.

Releasing personal information in this manner qualifies as irreparable harm in and of itself. “When a legitimate expectation of privacy exists, violation of privacy is harmful without any concrete consequential damages.” *Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978). And because that information, once revealed, cannot be unseen, the harm to farmers’ privacy interests would be irreparable. *See e.g., UBS Fin. Serv., Inc. v. Christenson*, 2013 WL 2145703, at *6 (D. Minn. May 15, 2013) (“[T]he release of confidential client information will cause irreparable harm because, once shared, that private information cannot

³¹ The same standard also governs issuance of a preliminary injunction. *Calleros v. FSI Int’l, Inc.*, 892 F. Supp. 2d 1163, 1167 n.5 (D. Minn. 2012).

be ‘un-shared.’”); *Hirschfeld v. Stone*, 193 F.R.D. 175, 187 (S.D.N.Y. 2000) (“The harm at issue here—disclosure of confidential information—is the quintessential type of irreparable harm that cannot be compensated or undone by money damages.”); *Oil, Chem. & Atomic Workers Int’l Union v. Amoco Oil Co.*, 885 F.2d 697, 707 (10th Cir. 1989) (finding that a threatened “invasion of privacy” constituted irreparable injury).

The fact that some farmers’ personal information may already be available, either online (though perhaps buried deep within a state website), or through some sort of data request to the state or federal government, does not lessen the harm from EPA’s decision to compile the personal information of individuals and serve as a clearinghouse for that information using FOIA. The fundamental purpose of FOIA Exemption 6 is protection of “the individual’s *control* of information concerning his or her person.” *FLRA*, 510 U.S. at 500 (emphasis added). EPA’s planned FOIA release harms farmers by wresting that control away from them, and placing their personal information in the hands of entities that could use it to harm farmers and their families or distribute it without the farmers’ consent, as the original FOIA requesters have stated they intend to do.

II. EPA will not suffer any harm if the release of farmers’ personal information is delayed.

On the opposite side of the ledger, it is difficult to conceive of any way in which EPA would be harmed by a delay in the timing of its planned FOIA release. The Agency took approximately five months to respond to the initial requests filed by EarthJustice and NRDC. Its current schedule for the pending requests would result in a response in approximately two months. Postponing those releases for the time it takes to ensure that the farmers whose information will be disclosed are appropriately protected—particularly in light of the EPA’s

multiple “oversights” when it first released the information it had collected from 29 states—threatens no harm whatsoever to EPA.

III. Plaintiffs are likely to succeed on the merits of their claims.

Plaintiffs’ claim in this case is brought under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706. To prevail, Plaintiffs must demonstrate that EPA acted arbitrarily and capriciously, or contrary to law, in deciding that the personal information of farmers is not protected from disclosure under FOIA Exemption 6, which safeguards “personal, medical, or similar file[s], the release of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(6). For the reasons discussed below, Plaintiffs are likely to succeed in making this showing.

A. Exemption 6 protects personal information even when it is already publicly available.

Although FOIA “reflects a general philosophy of full agency disclosure,” the statute also contains “a number of exemptions.” *FLRA*, 510 U.S. at 494. The exemption at issue in this case, Exemption 6, “bars disclosure when it would amount to an invasion of privacy that is to some degree ‘unwarranted.’” *Id.* at 495. To determine whether an invasion of privacy is unwarranted, “a court must balance the public interest in disclosure against the interest Congress intended the exemption to protect.” *Id.* (quoting *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 776 (1989) (brackets omitted)). Crucially, “the only relevant ‘public interest in disclosure’ to be weighed in this balance is the extent to which disclosure would serve the ‘core purpose of the FOIA,’ which is ‘contributing significantly to public understanding of the operations or activities of the government.’” *Id.* (quoting *Reporters’ Comm.*, 489 U.S. at 775) (brackets omitted) (emphasis in original).

The public interest in this case is nil. Farmers' personal information cannot possibly provide any insight into *the Agency's* operations or activities. As the Supreme Court explained in *FLRA*, the purposes of FOIA are "not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." 510 U.S. at 496. That explanation is equally applicable in this case. A spreadsheet compiling personal information about farmers and their families sheds absolutely no light on EPA's performance of its duties. *See Reporters Comm.*, 489 U.S. at 774-775 (federal compilation of scattered criminal history data sheds no light on the federal government's performance). "FOIA's central purpose is to ensure that the *Government's* activities be opened to the sharp eye of public scrutiny, not that information about *private citizens* that happens to be in the warehouse of the Government be so disclosed." *Id.* at 774 (emphasis in original). The fact that those private citizens' information came to be in the government's possession as a result of their contact with the government—whether through arrests, as in *Reporters Committee*, or permitting, as in this case—is wholly irrelevant. *See id.*

When the public interest in a FOIA release is "virtually nonexistent," as is the case here, then even "a very slight privacy interest would suffice to outweigh the relevant public interest" *FLRA*, 510 U.S. at 500. In an attempt to avoid a weighing of farmers' privacy interests against the nonexistent public interest in disclosure, EPA's April 4 letter takes the erroneous position that no privacy interest exists with respect to "information that is well known or widely available within the public domain." The U.S. Supreme Court has already explicitly rejected this "cramped notion of personal privacy" on multiple occasions (*Reporters Comm.*, 489 U.S. at 763). In its place, the Court has explained that because "[t]he privacy interest protected by Exemption 6 encompass[es] the individual's control of information

concerning his or her person,” it “does not dissolve simply because that information may be available to the public in some form.” *FLRA*, 510 U.S. at 500 (internal quotation marks omitted).

Put another way, Exemption 6 guards individuals’ ability to determine when and how their personal information is made public. And while living “[i]n an organized society” means that individuals may sometimes disclose (voluntarily or pursuant to state or federal law) sensitive personal information in certain contexts, those individuals continue to retain an “interest in controlling the dissemination” of their personal information. *Id.* Thus, under clear U.S. Supreme Court precedent, there can be no doubt that the privacy interests protected by Exemption 6 extend to the names, home addresses, telephone numbers, global positioning coordinates, and other personal information of farmers and farm families, even if that information is already “available to the public in some form” (*FLRA*, 510 U.S. at 500). Moreover, the Supreme Court has been especially “reluctant to disparage the privacy of the home, which is accorded special consideration in our Constitution, laws, and traditions.” *Id.* at 501.

Again, there is a reason why the FOIA requesters have asked for the information from EPA: they would prefer to let EPA do the drudge work of locating, gathering, and compiling scattered information into a single production of data. “[T]he compilation of otherwise hard-to-obtain information” for release under FOIA “in a single clearinghouse of information” has “vast[ly] differen[t]” privacy implications from the collection of public records located in numerous, disparate locations. *Reporters Comm.*, 489 U.S. at 764. The Supreme Court accordingly has squarely held that individuals retain a privacy interest in the control of their personal information even if that information could be found through other sources, such as a

telephone directory or voter registration list. *FLRA*, 510 U.S. at 500. That holding applies equally today, when information may be available online as well as in print. The point of the Court's decisions in *Reporters' Committee* and *FLRA* is that FOIA Exemption 6 restricts *the government's* ability to distribute personal information, regardless of whether that information is otherwise publicly available. *See id.* EPA's assertion that "Exemption 6 does not extend privacy protection to information that is well known or widely available within the public domain" therefore flatly contradicts the Supreme Court's holdings.

Once the Supreme Court's holdings are properly applied, it is clear that the privacy interests here "substantially outweigh[] the negligible FOIA-related public interest in disclosure" (*FLRA*, 510 U.S. at 502), and that the release of farmers' personal information constitutes an "unwarranted invasion of personal privacy" under FOIA Exemption 6. Accordingly, Plaintiffs are likely to prevail on the merits of their claim.

B. Exemption 6 extends privacy protection to farmers who incorporate or form other business entities.

In addition to its claim that Exemption 6 does not extend to information that is publicly available in some form, EPA's April 4 letter asserts that "[t]he privacy interest in Exemption 6 does not extend to information about corporations and businesses, and courts view an individual's expectation of privacy as diminished with regard to matters in which he or she is acting in a business capacity." Again, EPA's over-broad assertion that the many farmers who operate their CAFOs as sole proprietorships or closely held business entities such as Patrick Lunemann and his family, *see* Lunemann Decl. at ¶ 3, are entitled to no privacy protections conflicts with binding precedent.

The Eighth Circuit Court of Appeals has addressed the question of Exemption 6's application to corporations in a very similar context. In *Campaign for Family Farms v.*

Glickman, 200 F.3d 1180 (8th Cir. 2000), a group of pork producers sought to prevent the release under FOIA of the names and addresses that appeared on a petition filed with the U.S. Department of Agriculture. The Department argued, among other things, that the privacy interests protected by Exemption 6 were “diminished” because “many individuals may have signed [the petition] in their business or entrepreneurial capacities” (*id.* at 1188)—almost precisely the argument that EPA made in its April 4 letter. The Eighth Circuit emphatically rejected the Department’s argument.

Observing that the U.S. Supreme Court has “construed the personal privacy exemption broadly,” the Eighth Circuit rejected the Department of Agriculture’s “overly technical distinction between individuals acting in a purely private capacity and those acting in an entrepreneurial capacity.” *Id.* at 1189. Drawing the fine lines proposed by the Department of Agriculture in *Campaign for Family Farms*, and by the EPA in this case, “fails to serve [Exemption 6’s] purpose of protecting the privacy of individuals.” *Id.* The fact that farmers, including Patrick Lunemann, *see* Lunemann Decl. at ¶ 3, sometimes employ the corporate form, the Court of Appeals has explained, “does little to diminish” their interest in controlling the dissemination of their personal information. *Id.* Thus, the Eighth Circuit held that the farmers were protected under Exemption 6 “[w]hether [they] sold pork as an individual, a sole proprietor, or as a majority shareholder in a closed corporation.” *Id.* Because EPA’s assertion that incorporation eviscerates Exemption 6’s protections is irreconcilable with the holding in *Campaign for Family Farms*, Plaintiffs are also likely to prevail on the merits of this claim.

IV. The public interest favors issuance of injunctive relief.

Finally, the public interest also weighs in favor of an order that will allow the merits of Plaintiffs’ claims to be decided before farmers’ personal information is released to the public. The public undoubtedly has an interest in the timely handling of FOIA requests. But as noted

above, the requests here at issue have been pending for approximately two months. It took EPA about five months to process the requests that resulted in their initial disclosure of farmers' personal information, and the Agency had to withdraw those releases twice to correct its admitted errors in those releases. A relatively short delay that ensures accurate processing of the FOIA requests, as well as the protection of farmers' privacy interests, is fully consistent with the public interest. Moreover, the public has a strong interest in ensuring that the privacy interests of America's farmers and their families are protected. *Cf. Arnzen v. Palmer*, 713 F.3d 369, 375 (8th Cir. 2013) (upholding the district court's determination that the public interest in protecting personal privacy outweighed other public interests).

CONCLUSION

For all the reasons stated above, Plaintiffs' motion for a temporary restraining order and/or a preliminary injunction should be granted.

Dated: July 5, 2013

Respectfully submitted,

/s/

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ATTACHMENT C



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 09 2013

OFFICE OF
WATER

Re: Freedom of Information Act Request

Dear

On July 5, 2013, the U.S. Environmental Protection Agency ("EPA" or "Agency") received a complaint and a request for a temporary restraining order regarding the information you requested in the above-referenced Freedom of Information Act ("FOIA") request. In deference to the court who now has before it an Administrative Procedure Act challenge to the release of such information, the Agency is providing you with an interim response to your FOIA request by notifying you that the Agency will defer its response to your request until the merits of the complaint are decided by the court. Throughout the litigation, the EPA will continue to provide you with periodic updates on the status of your request. Once this litigation is resolved, the Agency will promptly respond to your FOIA request and provide you with your final administrative appeal rights.

As stated earlier, this letter is an interim response to your FOIA request and you do not have to appeal at this time. However, if you feel compelled to contest this interim response, you may appeal this response to the National Freedom of Information Officer, U.S. EPA, FOIA and Privacy Branch, 1200 Pennsylvania Avenue, N.W. (2822T), Washington, DC 20460 (U.S. Postal Service Only), FAX: (202) 566-2147, E-mail: hq.foia@epa.gov. Only items mailed through the United States Postal Service may be delivered to 1200 Pennsylvania Avenue, NW. If you are submitting your appeal via hand delivery, courier service, or overnight delivery, you must address your correspondence to 1301 Constitution Avenue, N.W., Room 6416J, Washington, DC 20001. Your appeal must be made in writing, and it must be submitted no later than 30 calendar days from the date of this letter. The Agency will not consider appeals received after the 30 calendar day limit. The appeal letter should include the tracking number listed above. For quickest possible handling, the appeal letter and its envelope should be marked "Freedom of Information Act Appeal."

If you have any questions, please contact Quoc Nguyen at (202) 564-6343.

Sincerely,

Andrew Sawyers
Office Director,
Office of Wastewater Management

AFFIDAVIT OF JIM KAITSCHUK

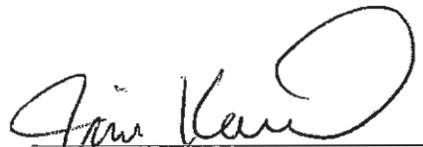
1. My name is Jim Kaitschuk. I am Executive Director of the Illinois Pork Producers' Association. The Illinois Pork Producers' Association is a member of the Illinois Agricultural Coalition, a public participant in the Board's original R12-023 proceeding and in the Board's current sub-docket proceeding, R12-023(a). On behalf of the Illinois Agricultural Coalition, I have given testimony and otherwise participated in R12-023. On behalf of the Illinois Agricultural Coalition, I specifically execute this Affidavit in R12-023(a).

2. I have reviewed the APPLICATION FOR NON-DISCLOSURE filed on November 26, 2014 by the Illinois Agricultural Coalition in R12-023(a), to which this Affidavit is appended.

3. It is my opinion and belief that any facts set forth therein are true and accurate, to the best of my recollection and belief.

FURTHER, Affiant sayeth not.

DATED: November 26, 2014


Jim Kaitschuk

Subscribed and Sworn to before me
this 26th day of November, 2014.


Notary Public

