

Agricultural Secrecy

Going Dark Down on the Farm: How Legalized Secrecy Gives Agribusiness a Federally Funded Free Ride

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Executive Summary

Each year, agricultural producers in the United States receive billions of dollars in federal subsidies, crop insurance, conservation payments, and other grants.¹ Defying fundamental principles of good government that apply to other federal programs, the U.S. Department of Agriculture (USDA) is authorized to keep secret much of the basic information farmers provide to qualify for these grants. Congress granted this unprecedented loophole in the nation's sunshine laws by inserting section 1619 as an amendment to the 2008 Food, Conservation, and Energy Act. The amendment provided an exemption to the Freedom of Information Act (FOIA) that covers the information farmers give USDA about their properties.² Unlike other federal grantees, farmers submit their business names and locations, geographic coordinates, types of crop produced and animals raised, and farming practices (e.g., irrigation and fertilizer or pesticide use) without ever worrying about oversight by federal, state, or local governments, much less anyone in the private sector.

Because this basic information is kept secret, watchdog groups cannot determine whether federal aid was warranted or whether farmers are using it correctly. Agencies enforcing health, safety, and environmental laws are denied data that would make their routine oversight of the industry's compliance efficient and effective. The result is that the taxpaying public pays repeatedly to support agricultural production: once when the original grant or subsidy is paid, a second time if the money is misused, a third time to support the efforts of other federal agencies to re-create the data that USDA already has, and a fourth time when these enforcement efforts fail and agricultural pollution contaminates the soil, water, and air.

Occasional government audits, most notably those performed by the Government Accountability Office (GAO), have found that waste and fraud plague USDA subsidies—just as they plague other federal aid programs—demonstrating the need for more transparency, not less.³ Congress's willingness to make an exception for this industry reflects agriculture's significant lobbying presence on Capitol Hill and the fact that USDA is committed to keeping farmers happy through friction-free federal funding.

Among the best examples of the inefficiency and overt harm caused by agriculture secrecy is the Environmental Protection Agency's (EPA) long-delayed efforts to regulate concentrated animal feeding operations (CAFOs), which include hog, chicken, and cattle farms. CAFOs raise more than 40 percent of the livestock in the United States.⁴ These operations typically apply the untreated manure to the land as fertilizer, and the amount and frequency of these applications is specified in a discharge permit. Unfortunately, because EPA and the states have dithered in implementing and enforcing these provisions, only 8,000 of 20,000—or

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40 percent—of CAFOs have the required permits.⁵ Release of the secret USDA data would significantly increase the speed and accuracy of these permitting efforts, allowing EPA to combat a leading source of impaired water quality throughout the nation.

The most commonly offered justification for agriculture’s sweeping exemption from FOIA is the need to protect the privacy rights of individual family farmers. But this idealized image of a nuclear family sharing an old-fashioned farm house at the end of a country lane has little to do with the reality of farm subsidies and crop insurance. Large farms account for the lion’s share of agricultural production in the nation—the largest 12 percent of farms generate 84 percent of total output.⁶ Far from resembling individual citizens who live in suburban and urban areas, the vast majority of the farms that qualify for federal support are incorporated businesses that turn a profit by working the land.

This paper does not address the wisdom of federal farm supports from a public policy perspective. We do contend that whatever the size and scope of such programs, shielding them from independent evaluation is a policy that simply is not justifiable because it costs the taxpayer much more money than it should. In an era when budgets are tight, the economy is troubled, and the environment is in jeopardy, it is tempting to conclude that campaign contributions from the largest beneficiaries of federal grants were the major motivation for such extraordinary special treatment. Congress should repeal this exemption.⁷

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Section 1619 of the 2008 Food, Conservation, and Energy Act prohibits USDA and its contractors from disclosing information provided to it by applicants or participants in USDA grant programs.⁸ Ironically, the legal mechanism for this blanket exemption is the FOIA, intended to embody “the ideal that information is the lifeblood of democracy.”⁹ The Act promotes open access of government records by requiring the publication of extensive information about government programs in the *Federal Register* and by allowing the public to request and be granted access to most government-held information.¹⁰ Broadly conceived, this last requirement allows any person access to virtually any form of information held by the government.¹¹

Although FOIA mandates a “strong presumption in favor of disclosure,”¹² it contains nine exemptions that explicitly prohibit disclosure and public access to information because releasing it would jeopardize national security or invade an individual person’s privacy rights. Section 1619 falls under exemption 3, which prohibits disclosure of information specifically exempted from disclosure by a statute if that statute requires the matters to be withheld from the public in such a manner “as to leave no discretion on the issue.”¹³

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Exempt information includes any item that concerns (1) agricultural operations, farming or conservation practices, or the land itself and (2) geospatial data about agricultural land or operations.¹⁴ Both types of information are routinely provided by agricultural producers and owners of agricultural land in order to participate in USDA subsidy, grant, and loan programs. The agency uses this information to determine the eligibility for participation in these programs, to verify the features of an agricultural operation, and to monitor compliance with regulations that govern benefit payments. The exemption defines “agricultural operations” very broadly to include the production and marketing of agricultural commodities and livestock.¹⁵

Geospatial information is data identified according to a specific location or data that is referenced to a place or a set of geographic coordinates.¹⁶ As a result, geospatial information is one of the most detailed types of information available. USDA maintains a geographic information system (GIS) database, which includes boundary information, land features, crop types, soil type, and Common Land Unit (CLU) data.¹⁷ When geospatial information is fed into a GIS program, it enables an in-depth analysis of variables in isolation or in combination with other factors. If this information were not sequestered by the exemption, it could provide an unprecedented capacity for government agencies and the public to generate maps of floodplains and responses to natural hazards, among other useful applications.

Although section 1619 is broadly drafted, it does provide for limited disclosure. First, it authorizes release of information if necessary to respond to disease or pest threats to agriculture. Second, it permits disclosure of information if the agricultural producer or owner of agricultural land consents. Third, it does not affect the disclosure of information that has been compiled into a statistical or aggregate form that does not identify individual information. Finally, section 1619 does not affect disclosure to other government agencies or persons who are hired to provide technical or financial assistance to agricultural operations in cooperation with USDA programs. However, any additional information generated by these participants is also exempt from disclosure. USDA has also interpreted section 1619 in a manner that further provides that information cannot be shared for “general regulatory or enforcement purposes.”¹⁸

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Table 1: USDA Reliance on Section 1619 to Deny FOIA Requests¹⁹

Fiscal Year	Number of FOIA Denials Based on Section 1619	Number of FOIA Denials Based on Other Exemption 3 Statutes
2008	167	74
2009	432	63
2010	344	62
2011	385	100
Total	1,328	299

It is worth noting that section 1619 is not the only example of unwarranted, broad secrecy protections achieved by agricultural producers in federal and state laws:

- Air releases of hazardous substances from animal waste, including methane and ammonia, are exempt from disclosure under federal environmental laws.²⁰
- The state of Maryland requires farmers to prepare nutrient management plans in order to remediate harmful nutrient loading in the Chesapeake Bay. These plans may be disclosed but any information identifying the individual for whom the nutrient management plan was prepared must be withheld.²¹
- Several states have enacted “ag-gag” laws that criminalize disclosure of media—e.g., photos or video—that record the treatment of animals or other working and environmental conditions at agricultural operations.²²

Improbable Justifications: Terrorism and Privacy

Proponents of agricultural secrecy claim that disclosure would open agricultural operations to agro-terrorism. Disclosure requirements for other similarly situated sectors simply have not led to these worst-case outcomes. Water treatment facilities and the overall water infrastructure in the United States also provide critical services to the United States, on par with agriculture. These facilities are strictly regulated, their locations are often public, and if breached the impact would be widespread. They are nevertheless subject to public reporting requirements, routine regulation, and public enforcement.²³

Section 1619’s general prohibition on information disclosure did not appear until the 2002 Farm Bill, and the prohibition on disclosing geospatial information was added as part of the 2008 Farm Bill.²⁴ The geospatial prohibition was passed in direct response to the 2008 case *Multi Ag Media LLC v. USDA*, in which a federal appeals court ruled that the public interest in USDA activities outweighed individual privacy interests in the information

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requested.²⁵ Because the case predated section 1619, USDA denied the FOIA request on the basis of FOIA Exemption 6, which protects privacy interests in government records.²⁶ The federal court acknowledged valid privacy interests in the information that agricultural operators provide to USDA. For example, information about crops, field productivity, land types, and acreage “shed light on the financial condition of the [agricultural operator]” and reveals financial information traceable to an individual.²⁷

The court determined, however, that this privacy interest was outweighed by the public interest in data that would allow the public to monitor USDA’s administration of its payment programs.²⁸ “[T]here is a special need for public scrutiny of agency action that distributes extensive amounts of public funds in the form of subsidies and other financial benefits.”²⁹ The court noted that with this information, “the public can more easily determine whether USDA is catching cheaters and lawfully administering its subsidy and benefit programs.”³⁰

Oversight Denied

Commodities and crop insurance payments constitute the overwhelming majority of USDA payments: for fiscal years 2008 through 2011, commodities payments totaled nearly \$25 billion and crop insurance payments totaled more than \$23 billion, or 39 and 36 percent respectively.³¹ These payments frequently send market signals to move land into production to increase payments. For example, a USDA study found that increased insurance subsidies in the mid-1990s encouraged the expansion of cultivated cropland, leading to an increase in annual wind and water erosion.³² This same study concluded that policies that increase incentives for crop cultivation and encourage crop production on marginal land “may have disproportionately large unintended environmental consequences.”³³ USDA also administers more than 20 agricultural conservation programs. These programs are intended to reduce soil erosion, enhance water quality and supplies, and improve wildlife habitat. Over the past few decades, millions of acres have been enrolled in these programs, and between 2008 and 2011 USDA distributed an estimated \$10 billion in conservation payments.³⁴

A recent GAO study demonstrates the need for greater transparency in these programs, as well as the need for information regarding how they are being administered. GAO found that USDA has given commodities payments to deceased individuals, paid individuals who are ineligible for payments because they exceed income thresholds, and gave money to people who are not “actively engaged in farming.”³⁵ The report found that some conservation programs work at cross-purposes, undermining their collective effectiveness.³⁶ For example, some payments induce agricultural operators to convert native grasslands to

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cropland, to the detriment of native habitats and local water quality. Finally, GAO said that duplicative program goals and overlapping eligibility requirements have resulted in double-payments for some operators.³⁷

USDA is not a traditional regulatory agency; its mission is to provide assistance and promote agricultural operators and their products. By necessity, USDA field officers maintain a friendly working relationship with agricultural operators, a relationship that tends to downplay strong enforcement actions and rigorous monitoring and verification.³⁸ The GAO report noted, “Almost half of USDA’s field offices did not implement farm-bill conservation compliance provisions [as part of commodity and loan support programs] as required, in part because the officers reported that they were uncomfortable with their enforcement role.”³⁹ The report quoted anonymous officers who found it “difficult to cite farmers for noncompliance in the small communities where the [officers] and farmers live and work.”⁴⁰ Overall, GAO found USDA’s Farm Services Agency (FSA) waived noncompliance decisions issued by field offices of USDA’s Natural Resources Conservation Service (NRCS) 61 percent of the time, and frequently FSA did not adequately justify these waivers.⁴¹

As one further indication of USDA’s preoccupation with pleasing agricultural producers, in the 2002 Farm Bill, Congress required USDA to develop a database containing limited data about government payments to agricultural producers. The information in the database included the names of the recipients, surrogate tax identifications, and the addresses for the parent entity beneficiary and the ultimate beneficiary. The database also tracked payment information, including the amount, transaction date, and the program and fiscal year.⁴² The Environmental Working Group (EWG) used this information to compile its own database, revealing that USDA has given \$277.3 billion in subsidies between 1995 and 2011, with 10 percent of all agricultural operations collecting 75 percent of all subsidies.⁴³

Revealing the amount and recipients of these payments provoked calls for reform and public outrage, and the 2012 Farm Bill contemplates an end to some of these payments.⁴⁴ It appears evident that the agribusiness farm lobby returned to Congress and the 2008 Food, Conservation, and Energy Act turned the database into a discretionary program by changing the wording of the provision from “shall” to “may.”⁴⁵ USDA immediately dropped efforts to update the database on the grounds that Congress did not appropriate the \$7 million to administer the database.⁴⁶ Despite serious concerns regarding the quality of current information, USDA maintains that the information is still available, but only by individual request and on a program-by-program basis.⁴⁷

Obviously, GAO’s availability to conduct rigorous audits helps ensure some accountability for the USDA programs that are shielded by secrecy. But GAO’s resource constraints

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permit it to perform such audits only once in every several years, as requested by Congress. In the meantime, sequestering basic data from the public hobbles other efforts by public interest groups to oversee the utility and effectiveness of such programs. It also hobbles other government agencies that must waste considerable resources duplicating information USDA has at its fingertips. The best example of these negative repercussions on the other missions Congress has assigned to federal agencies is EPA's efforts to enforce the Clean Water Act with respect to large animal farms.

Keeping Agriculture Clean

Farmers rely heavily on irrigation, chemical fertilizers, pesticides, and fungicides. Agriculture consumes approximately 80 percent of the water used in the United States and up to 90 percent in some western states. Heavy agricultural use of groundwater has severely drawn down aquifers around the country, notably the Ogallala Aquifer beneath the Great Plains and Texas. EPA cites agriculture as one of the top sources of impairment for the nation's waters.⁴⁸ Agriculture accounts for 8.6 percent of the total greenhouse gas emissions, including 80 percent of total nitrous oxide emissions and 31 percent of methane emissions.⁴⁹ Both of these gases are long-lived in the atmosphere and trap heat more effectively than carbon dioxide, contributing significantly to climate change.

The federal Clean Water Act (CWA) requires concentrated animal feeding operations, or CAFOs,⁵⁰ to obtain permits limiting their discharges into surface waters such as lakes, rivers, streams, and creeks. CAFOs are agricultural operations that raise a threshold numbers of animals. As noted earlier, they raise more than 40 percent of the livestock in the United States.⁵¹ EPA estimates that CAFOs produce 60 percent of all the manure generated by all farms that confine animals, and in 2003 USDA estimated that confined animals produced more than 500 million tons of manure.⁵² This amount is three times the amount of raw waste that humans generate.⁵³ These operations typically apply the untreated manure generated by the confined animals to the land as fertilizer, and the amount and frequency of these applications is specified in the discharge permit. Unfortunately, because EPA and the states have dithered in enforcing these provisions, only 8,000 of 20,000—or 40 percent—of CAFOs have required permits.⁵⁴

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Table 2: Pollutants in Manure

Pollutant	Examples	Potential Harm
Nutrients	Nitrogen, phosphorus, and potassium	Excess nutrients promote explosive algal growth, which can lead to dead zones and outbreaks of cyanobacteria.
Pathogens	<i>E. coli</i> , <i>salmonella</i> , and other bacteria, viruses, and protozoa	More than 40 diseases found in manure can be transferred to humans, including those that cause Salmonellosis, Tuberculosis, Leptospirosis, gastrointestinal illnesses, trichinosis, and Giardiasis.
Heavy Metals	Arsenic, lead, iron, cadmium, and manganese	Accumulation in the human body can lead to kidney problems, nervous system disorders and negative impacts on IQ, cardiovascular effects, diabetes, reproductive effects, and cancers in multiple tissues.
Pharmaceuticals and Antibiotics	Growth hormones and antibiotics	Presence of growth hormones in the water affects the reproductive systems of aquatic species. ⁵⁵ Non-therapeutic use of antibiotics in animals has been linked to increased antibiotic resistance bacteria that can infect humans. ⁵⁶
Other	Cleaning fluids, heavy metals, synthetic fertilizers, and pesticides	Toxic chemicals can lead to a variety of developmental impacts.

In October 2011, EPA proposed a rule to collect more information about CAFOS under CWA section 308, which allows EPA to collect information that is needed to administer CWA water quality programs. EPA sought five pieces of information:

- (1) the basic contact information for the CAFO owner or authorized representative;
- (2) the location of the CAFO, either by global-positioning system coordinates or by the street address;
- (3) if the CAFO applies manure to land, the total number of acres available for land-application;
- (4) the NPDES permit status; and
- (5) the type of animal that is confined.⁵⁷

Most of this information is already in USDA's possession. If USDA shared information with EPA and the states regarding large animal feeding operations that potentially constitute CAFOs, permitting and enforcement could be done far faster and more efficiently.

A second example of agricultural secrecy interfering with EPA's ability to protect human health and the environment is in the enforcement of section 404 of the CWA. This section regulates the discharge of dredged or fill materials into the waters of the United States,

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including wetlands and other surface waters. A 2009 report by EPA's Office of the Inspector General concluded that EPA should coordinate better with other federal agencies, including the NRCS. The report noted that the 2008 Farm Bill and section 1619 ended cooperation between the two agencies.⁵⁸ Because USDA can no longer release the delineation of wetlands, EPA must now contact individual landowners directly for this information, or the landowner must give consent for the delineations to be released. The report cited an enforcement action that EPA Region 1 developed against a landowner for filling wetlands, only to learn later that the NRCS classified the land as farmland and thus exempt from 404 requirements.⁵⁹ Because NCRS interpreted section 1619 as prohibiting disclosure of wetland delineations, EPA wasted time and resources in developing an enforcement action that was ultimately futile.⁶⁰

Recommendations

Congress should repeal section 1619, allowing other federal agencies, state and tribal governments and agencies, and the public to access information held by USDA. USDA programs that use taxpayer funds should be open, transparent, and accessible. Understanding where this money is going and for what purposes is key to holding USDA accountable for administering public funds and to holding the agricultural sector accountable for the water pollution it causes in rivers, lakes, and coastal waters across the country. This information is also important to recognize the efforts and success of agricultural operations in improving water quality.

Agricultural secrecy has both direct and indirect impacts on a wide range of areas in the public and private sectors. It contravenes the open-government ethic behind the Freedom of Information Act and the tenets of democracy, and it prevents other federal agencies from implementing and enforcing the law. It also results in time-consuming and resource-wasting efforts to replicate the information.

A vibrant democracy thrives on transparency and the ability of the public to scrutinize agency action. The environmental compliance requirements and voluntary conservation programs to control pollution from agricultural operations play a crucial role in mitigating the environmental harms from agriculture. This role only makes the public interest in knowing whether USDA has effectively spent billions of dollars even more compelling. Agricultural secrecy impedes basic efforts to hold governmental agencies and payment recipients accountable for the public funding they administer and receive.

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APPENDIX A: Text of Section 1619 7 U.S.C. § 8791

Information gathering

(a) Geospatial systems. The Secretary shall ensure that all the geospatial data of the agencies of the Department of Agriculture are portable and standardized.

(b) Limitation on disclosures.

(1) Definition of agricultural operation. In this subsection, the term “agricultural operation” includes the production and marketing of agricultural commodities and livestock.

(2) Prohibition. Except as provided in paragraphs (3) and (4), the Secretary, any officer or employee of the Department of Agriculture, or any contractor or cooperator of the Department, shall not disclose--

(A) information provided by an agricultural producer or owner of agricultural land concerning the agricultural operation, farming or conservation practices, or the land itself, in order to participate in programs of the Department; or

(B) geospatial information otherwise maintained by the Secretary about agricultural land or operations for which information described in subparagraph (A) is provided.

(3) Authorized disclosures.

(A) Limited release of information. If the Secretary determines that the information described in paragraph (2) will not be subsequently disclosed except in accordance with paragraph (4), the Secretary may release or disclose the information to a person or Federal, State, local, or tribal agency working in cooperation with the Secretary in any Department program--

(i) when providing technical or financial assistance with respect to the agricultural operation, agricultural land, or farming or conservation practices; or

(ii) when responding to a disease or pest threat to agricultural operations, if the Secretary determines that a threat to agricultural operations exists and the disclosure of information to a person or cooperating government entity is necessary to assist the Secretary in responding to the disease or pest threat as authorized by law.

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(4) Exceptions. Nothing in this subsection affects--

(A) the disclosure of payment information (including payment information and the names and addresses of recipients of payments) under any Department program that is otherwise authorized by law;

(B) the disclosure of information described in paragraph (2) if the information has been transformed into a statistical or aggregate form without naming any--

(i) individual owner, operator, or producer; or

(ii) specific data gathering site; or

(C) the disclosure of information described in paragraph (2) pursuant to the consent of the agricultural producer or owner of agricultural land.

(5) Condition of other programs. The participation of the agricultural producer or owner of agricultural land in, or receipt of any benefit under, any program administered by the Secretary may not be conditioned on the consent of the agricultural producer or owner of agricultural land under paragraph (4)(C).

(6) Waiver of privilege or protection. The disclosure of information under paragraph (2) shall not constitute a waiver of any applicable privilege or protection under Federal law, including trade secret protection.

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Endnotes

- ¹ Between 2008 and 2011, USDA disbursed nearly \$64 billion in payments through the commodity, conservation, crop insurance, and disaster programs. Environmental Working Group, “Farm Subsidies: The United States Summary Information,” <http://farm.ewg.org/region.php?fips=00000> (last visited August 16, 2012) [hereinafter EWG Farm Subsidies].
- ² 7 U.S.C. § 8791, included as Appendix A to this report.
- ³ U.S. Gov’t Accountability Office (GAO), *Farm Bill: Issues for Consideration* 14-18, GAO-12-338SP (April 2012) [hereinafter Farm Bill Issues]. See also U.S. GAO, *Farm Programs: Direct Payments Should be Reconsidered*, GAO-12-640 (July 2012).
- ⁴ Claudia Copeland, *Animal Waste and Water Quality: EPA Regulation of Concentrated Animal Feeding Operations (CAFOs)*, Congressional Research Service (CRS) Report RL31851 (February 16, 2010).
- ⁵ National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule, 76 Fed. Reg. 65,445 (proposed October 21, 2011) [hereinafter CAFO Reporting Rule].
- ⁶ Robert Hoppe & David Banker, *Structure and Finances of U.S. Family Farms Report, 2010 Edition*, USDA Economic Information Bulletin EIB-66 (July 2010) at iv.
- ⁷ The language from section 1619 has been retained in the Senate-passed version of the 2012 Farm Bill, as well as the version passed by the House Agriculture Committee. [Agriculture Reform, Food, and Jobs Act of 2012](#), S. 3240 (112th Congress); [Federal Agriculture Reform and Risk Management Act of 2012](#), H.B. 6380 (112th Congress). The Senate version expands information-sharing to a state agency, political subdivision, or local government agency that “is charged with implementing an agriculture or conservation program under State law.” S. 3240 § 12202 (112th Congress).
- ⁸ 7 U.S.C. § 8791.
- ⁹ David C. Vladeck, *Harnessing the Power of Information for the Next Generation of Environmental Law: III. Access and Dissemination of Information: Information Access—Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 Tex. L. Rev. 1787, 1787 (2008).
- ¹⁰ 5 USC § 552(a)(3).
- ¹¹ Vladeck, *supra* note 9, at 1797.
- ¹² *Multi Ag Media LLC v. USDA*, 515 F.3d 1224 (D.C. Cir. 2008).
- ¹³ 5 U.S.C. § 552(b)(3).
- ¹⁴ 7 U.S.C. § 8791.
- ¹⁵ 7 U.S.C. § 8971(b)(1).
- ¹⁶ U.S. Geological Survey, “What is GIS?” http://egsc.usgs.gov/isb/pubs/gis_poster/#what (last visited August 9, 2012).
- ¹⁷ The CLU is the smallest unit of land with permanent, contiguous boundaries with a common land cover and management, as well as a common owner or producer of agricultural land associated with USDA programs. USDA, Farm Services Agency, “Common Land Unit (CLU),” <http://www.fsa.usda.gov/FSA/apfoapp?area=home&subject=prod&topic=clu> (last visited August 9, 2012).
- ¹⁸ Memorandum from Boyd K. Rutherford, USDA Assistant Secretary for Administration, to Agency FOIA Officers (July 30, 2008).
- ¹⁹ USDA Freedom of Information Act Annual Report FYs 2008 (January 5, 2009), 2009 (January 4, 2010), 2010, and 2011. For example, other statutory bases for denying a FOIA request include but are not limited to: planning and soliciting public contracts in 41 U.S.C. §3303; the confidentiality of information provision in the 2008 Farm Bill, 7 U.S.C. § 2276; the dairy promotion program, 7 U.S.C. § 4501-4514; alternative dispute resolution, 5 U.S.C. §§ 571-578; Agricultural Trade Act of 1978; the Federal Crop Insurance Act, 7 U.S.C. § 1502(c); the Food Stamp Program, 7 U.S.C. §§2011-2036; The National Defense Authorization Act of 1977; the confidentiality of information for archaeological resources, 16 U.S.C. § 470hh; the confidentiality of information for significant caves, 16 U.S.C. § 4304; and the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §136.
- ²⁰ In December 2008, EPA announced a final rule that provides an administrative reporting exemption for air releases of hazardous substances from animal waste at non-CAFO animal agricultural operations. The federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act (EPCRA) contain certain notification requirements when hazardous substances are released. CERCLA/EPCRA Administrative Reporting Exemption for Air Release of Hazardous Substances from Animal Waste at Farms, Final Rule, 73 Fed. Reg. 76,948 (Dec. 18, 2008).
- ²¹ For example, Maryland’s Water Quality Improvement Act requires the Maryland Department of Agriculture to keep nutrient management plans for 3 years “in a manner that protects the identify of the individual for whom the NMP was prepared.” Md. Env’t Code § 8-801.
- ²² Five states—Iowa, Kansas, Montana, North Dakota, and Utah—have these types of laws in effect. Similar legislation was introduced but not passed in Florida, Indiana, Minnesota, Illinois, Nebraska, New York, and Tennessee. Missouri passed a watered-down version of an ag-gag bill in May 2012.
- ²³ See 40 C.F.R. § 122.41.
- ²⁴ USDA Economic Research Service, “The 2002 Farm Bill: Provisions and Economic Implications,” http://www.ers.usda.gov/media/264012/apo22_5_.pdf (last visited August 24, 2012).
- ²⁵ *Multi Ag Media*, 515 F. 3d at 1229.
- ²⁶ *Id.* at 1224.
- ²⁷ *Id.* at 1230.

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- ²⁸ *Id.* at 1233.
- ²⁹ *Multi Media Ag*, 515 F.3d at 1232.
- ³⁰ *Id.* at 1232.
- ³¹ *EWG Farm Subsidies*, *supra* note 1 (last visited August 15, 2012).
- ³² Ruben N. Lubowski et al., *Environmental Effects of Agricultural Land-Use Change: The Role of Economics and Policy* at 51, USDA Economic Research Report No. ERR-25 (August 2006).
- ³³ USDA Economic Research Service Report Summary, “Environmental Effects of Agricultural Land-Use Change” (August 2006), http://www.ers.usda.gov/media/469691/err25_reportsummary_1_.pdf (last visited August 31, 2012).
- ³⁴ *EWG Farm Subsidies*, *supra* note 1 (last visited August 15, 2012).
- ³⁵ *Farm Bill Issues*, *supra* note 3, at 12-13.
- ³⁶ *Id.*
- ³⁷ *Id.* at 16.
- ³⁸ U.S. GAO, *USDA Needs to Better Ensure Protection of Highly Erodible Cropland and Wetlands* at 5, GAO-03-418 (April 2003) [hereinafter Protection of HEC and Wetlands report].
- ³⁹ *Farm Bill Issues*, *supra* note 3, at 17.
- ⁴⁰ *Id.* This sentiment is echoed among interviewees in *Manure in the Bay: A Report on Industrial Animal Agriculture in Maryland and Pennsylvania*, CPR Briefing Paper No. 1206 (May 2012), by Rena I. Steinzor and Yee Huang.
- ⁴¹ *Farm Bill Issues*, *supra* note 3, at 17; *Protection of HEC and Wetlands*, *supra* note 38, at 6.
- ⁴² In the 2008 Farm Bill, Congress changed the language regarding the section 1614 database from “USDA shall release” payment information to “USDA may release” it. 7 U.S.C. § 8785.
- ⁴³ *EWG Farm Subsidies*, *supra* note 1 (last visited August 7, 2012).
- ⁴⁴ See Ron Nixon, *Senate Weighs Bill Overhauling Agriculture Programs*, N.Y. TIMES (June 12, 2012) at A17.
- ⁴⁵ 7 U.S.C. § 8785.
- ⁴⁶ Claritza Jiménez, “USDA Pulls the Plug on Some Subsidy Data”, Center for Public Integrity, <http://www.publicintegrity.org/2010/05/21/2668/usda-pulls-plug-some-farm-subsidy-data> (last visited August 31, 2012).
- ⁴⁷ *Id.*
- ⁴⁸ U.S. EPA, *National Water Quality Inventory: Report to Congress, 2004 Reporting Cycle* at 13, EPA 841-R-08-001 (January 2009).
- ⁴⁹ U.S. Global Climate Research Program, *Global Climate Change Impacts in the United States* at 7 (Thomas R. Karl et. al., eds.) (Cambridge University Press 2009).
- ⁵⁰ Congress specifically defined “point source” to include any concentrated animal feeding operation. 33 U.S.C. § 1362(14).
- ⁵¹ Claudia Copeland, *Animal Waste and Water Quality: EPA Regulation of Concentrated Animal Feeding Operations (CAFOs)*, Congressional Research Service Report RL31851 (February 16, 2010).
- ⁵² National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7,180 (February 12, 2003).
- ⁵³ *Id.*
- ⁵⁴ *CAFO Reporting Rule*, 76 Fed. Reg. 65,445 (proposed October 21, 2011).
- ⁵⁵ Carrier Hribar, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities* at 5, Nat’l Ass’n of Local Boards of Health (2010).
- ⁵⁶ See U.S. GAO, *Antibiotic Resistance: Federal Agencies Need to Better Focus Efforts to Address Risk to Humans from Antibiotic Use in Animals*, GAO-04-490 (April 2004). See also Mary J. Gilchrist et al., *The Potential Role of Concentrated Animal Feeding Operations in Infection Disease Epidemics and Antibiotic Resistance*, 115 *Env’tl Health Perspectives* 313 (February 2007); Lance B. Price et al., *Staphylococcus aureus CC398: Host Adaptation and Emergence of Methicillin Resistance in Livestock*, *mBio* 3(1):e00305-11. Doi:10.1128/mBio.00305-11 (February 2012).
- ⁵⁷ *CAFO Reporting Rule*, 76 Fed. Reg. 65,437 (October 21, 2011).
- ⁵⁸ U.S. Env’tl Protection Agency, Office of the Inspector General, *EPA Needs a Better Strategy to Identify Violations of Section 404 of the Clean Water Act* at 9, Report No. 10-P-0009 (October 26, 2009).
- ⁵⁹ *Id.*
- ⁶⁰ *Id.*

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Selected Chesapeake Bay Work by CPR

Going too Easy? Maryland's Criminal Enforcement of Water Pollution Laws Protecting the Chesapeake Bay, CPR White Paper No. 1212 (September 2012). This paper examines trends in criminal enforcement of water pollution laws in Maryland, concluding that criminal enforcement is an underused but potentially powerful tool for deterrence.

Fairness in the Bay: Environmental Justice and Nutrient Trading, CPR Briefing Paper No. 1208 (August 2012). This paper examines nutrient trading through the lens of environmental justice. It assesses the potential impacts of trading on low-income and minority communities and recommends ways to integrate environmental justice into trading programs in the Bay region.

Manure in the Bay: A Report on Industrial Animal Agriculture in Maryland and Pennsylvania, CPR Briefing Paper No. 1206 (June 2012). This report provides a substantive and detailed look at the CAFO and other AFO programs in Maryland and Pennsylvania, as well as a general overview of the federal CAFO program. The paper also identifies concrete and practical recommendations for improving how the waste generated by animal industrial agriculture is managed and controlled by EPA, the Maryland Department of Environment (MDE), and the Pennsylvania Department of Environmental Protection (DEP).

Accountability: Water Quality Trading in the Chesapeake Bay, CPR Briefing Paper No. 1205 (May 2012). To ensure accountability in water quality trading, this paper makes specific recommendations for designing the program, avoiding environmental inequities, and ensuring strong enforcement.

Back to Basics: An Agenda for the Maryland General Assembly to Protect the Environment, CPR Briefing Paper No. 1110 (October 2011). This paper recommends that MDE should increase permit fees to accurately reflect the cost of administering permits; increase the state penalty maximum to match the federal penalty maximum; explicitly recover the economic benefit of non-compliance in penalty calculations; and establish a mandatory minimum penalty for certain violations.

Ensuring Accountability in Chesapeake Bay Restoration: Metrics for the Phase I Watershed Implementation Plans (August 2010). CPR developed a set of metrics to grade the Bay jurisdictions' Phase I Watershed Implementation Plans. The metrics address (1) the transparency of information in the WIPs in providing key information about their pollution control programs and (2) the strength of the programs in making actual pollution reductions. Using these metrics to grade the WIPs provides a clear and understandable tool for monitoring each state's commitment to restoration.

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Missing the Mark in the Chesapeake Bay: A Report Card for the Phase I Watershed Implementation Plans, CPR White Paper No. 1102 (January 2011). This report card applied the metrics from *Ensuring Accountability* to the Chesapeake Bay states' and the District of Columbia's final Phase I Watershed Implementation Plans. The final grades reflected mediocre commitments and performance because the final plans were light on providing specific commitments for actions needed to achieve the required pollution reductions, and generally did not pledge dedicated funding for the proposed programs.

Failing the Bay: Clean Water Act Enforcement in Maryland Falling Short, CPR White Paper No. 1004 (April 2010). This paper examines trends in CWA enforcement and MDE's enforcement budget and workforce for the period between 2000 and 2009. The report recommends that the Maryland General Assembly provide additional funding to account for the dramatic increase in MDE's workload; that MDE recover any economic benefit achieved by noncompliance from violators and increase on-site monitoring and inspection activities; and that MDE embrace citizen suits as a tool to supplement its own enforcement program.

The Clean Water Act: A Blueprint for Reform, CPR White Paper No. 802 (May 2008). The CWA has accomplished much since its passage in 1972, but much more remains to be done. This Blueprint presents a number of specific and meaningful reforms for the CWA that address existing problems and prepare for the new problems climate change will create.

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