



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

JUN 11 2012

The Honorable Ben Nelson
United States Senate
720 Russell Senate Office Building
Washington, D.C. 20510

OFFICE OF
THE REGIONAL ADMINISTRATOR

Dear Senator Nelson:

Administrator Jackson asked that I respond to your May 29, 2012 letter about how the Environmental Protection Agency uses piloted aircraft to reduce Nebraska water-quality impacts caused by discharges of untreated manure, litter or process wastewater from concentrated animal feeding operations. Your interest in Region 7's water-protection efforts provides a welcome opportunity to share information that will improve public understanding of how this common practice helps all parties protect Nebraska's vital waters.

For four decades the EPA has successfully been reducing point-source pollution discharges into America's – and Nebraska's – rivers and streams. EPA's efforts have cut pollution discharges from livestock and poultry operations that meet the definition of a CAFO, along with pollution from combined sewer overflows, sanitary sewer overflows, and municipal separate storm sewer systems. EPA uses piloted aircraft to evaluate compliance with the Clean Water Act's requirements for CAFO discharges. This important, cost effective tool helps protect local communities and water quality from harm that can result from discharges from these facilities.

Recent news reports have said that Congressional representatives are criticizing the EPA's use of "drones." For the record, the only aircraft the EPA has used to verify compliance with environmental laws are manned aircraft – i.e. planes with pilots.

I have enclosed more detailed responses to questions in the Nebraska delegation's May 29 letter.

Thank you for your inquiry. If you have any additional questions, please contact me at 913-551-7006 or your staff may contact Sarah Hatch, Congressional and State Liaison, at 913-551-7199.

Sincerely,


Karl Brooks

Enclosure

cc:

US Senator Mike Johanns
US Representative Jeff Fortenberry
US Representative Adrian Smith
US Representative Lee Terry



Q1. On what statutory authority is the EPA relying to conduct aerial surveillance inspections?

The EPA's governing statutes provide general and specific authority for the agency to conduct investigations, collect information, require reporting, perform monitoring, conduct inspections, and take other actions necessary to ensure our nation's environment is protected from unlawful pollution. The Supreme Court considered the matter of EPA's authority to conduct aerial assessments in *Dow Chemical v. U.S.*, 476 US 227 (1986), stating:

Congress has vested in EPA certain investigatory and enforcement authority, without spelling out precisely how this authority was to be exercised in all the myriad circumstances that might arise in monitoring matters related to clean air and water standards. When Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission. Regulatory and enforcement authority generally carries with it all modes of inquiry and investigation traditionally employed or useful to execute the authority granted.

Dow Chemical at 233.

The Court reasoned that the specific statutory provisions for information collection and inspection authority appear to expand, not restrict, EPA's general powers to investigate. The Court concluded that EPA, as a regulatory and enforcement agency, needs no explicit statutory provision to employ methods of observation commonly available to the public at large and held that the use of aerial observation and photography is within EPA's statutory authority. *See Dow Chemical* at 234.

Q2. It is our understanding that EPA Region 7 staff have informed the regulated community in Nebraska that the aerial surveillance is being conducted pursuant to federal standards under the Clean Water Act. Is this understanding correct?

EPA Region 7 has informed the Nebraska regulated community (e.g., livestock and poultry producers) that Supreme Court precedent supports EPA's authority to perform these flights to investigate CWA issues. To further share information with cattle producers in northeast Nebraska about Region 7's flights, the agency also worked with USDA the University of Nebraska Lincoln Ag Extension to convene a well attended information meeting in West Point, Nebraska on March 13, 2012. Staff from Senator Johanns and Representatives Fortenberry and Smith attended Region 7's West Point presentations and question and answer session. Several Nebraska press and cattle trade representatives attended and reported extensively.

Q3. If so, is enforcement with respect to Clean Water Act the exclusive purpose of the flights?

In Region 7, the primary purpose of these flights is to provide an efficient and cost effective manner for screening large numbers of animal feeding operations to determine if a more comprehensive evaluation is required to assess CWA compliance.

The flights provide real time information not available from other sources that routinely generate satellite and aerial imagery of animal feeding operations in Nebraska and Iowa watersheds, such as U.S. Department of Agriculture's (USDA) National Agriculture Imagery Program (NAIP), U.S. Geological Survey (USGS), Google and Microsoft. This information allows Region 7 to avoid inspections at facilities that do not appear to be polluting surface water, which are, by far, the majority. The timely information allows Region 7 to focus its limited resources on those operations most likely to be polluting surface waters and threatening public health or the environment.

Q4. Have photographs from these flights been used by the agency as the sole evidence against a livestock operation, or have photographs been used, without corroborating evidence from an on-the-ground inspection, to encourage a livestock owner/operator into taking action in response to issues or concerns raised by EPA?

Not a single Region 7 enforcement action has been pursued which relied solely on photographs obtained during these flights. The flights have been used as a screening tool to focus on-the-ground inspections on those operations likely to be polluting surface waters and threatening public health or the environment.

Q5. Approximately, how many aerial surveillance inspection flights have been conducted in Region 7?

In Iowa, the completed flights include three in 2010; five in 2011 and one in 2012. In Nebraska, the completed flights include six in 2011 and three in 2012. To date EPA Region 7 has performed sixteen individual flights since the Region began performing them in 2010.

Q6. Of these flights, how many have targeted operations in Nebraska?

Starting in March 2011, EPA Region 7 has performed nine flights that evaluated operations in Nebraska. The flights did not target individual operations but instead, as described below, target areas with large numbers of animal feeding operations and/or watersheds where the state has identified streams as impaired by contaminants often associated with animal feeding operations.

Q7. How many more are planned?

For the remainder of federal fiscal year (FFY) 2012, Region 7 intends to perform two additional flights in Nebraska and two in Iowa. EPA Region 7 plans on continuing to use the flights beyond FFY 2012. However, those flights have not yet been scheduled.

Q8. What criteria are used to identify operations for aerial surveillance?

EPA Region 7's process for identifying where it will fly involves looking at areas that contain high concentrations of large and medium sized animal feeding operations and/or watersheds where the state has identified impaired rivers and streams. When looking at impaired waters, EPA Region 7 focuses on waters where the causes of the impairment could be attributed to animal feeding operations (i.e., ammonia, bacteria, fish kills, low dissolved oxygen, etc.). Once an area is identified, we then plan a flight path that will allow for us to cover as many large and medium sized facilities as possible.

Q9. How many enforcement actions have resulted from the flights in Region 7?

As stated above, EPA Region 7 has not taken any enforcement actions based solely on evidence contained in an aerial photograph. EPA Region 7 has however taken enforcement actions at animal feeding operations where aerial photographs were obtained and follow-up inspections were conducted. A summary of these actions is in the table below:

| EPA Enforcement Actions at CAFOs Where Aerial Images Were Collected* | | | |
|---|---|--------------------------------------|---------------------------|
| | Administrative Compliance Orders | Administrative Penalty Orders | Letters of Warning |
| Iowa | 25 | 8 | 6 |
| Nebraska | 4 | 2 | 8 |
| * As of 6/1/2012 | | | |

Q10. Did EPA conduct aerial surveillance inspections prior to 2010? If so, for how long has this practice been utilized?

Flights to assess animal feeding operations in Region 7 did not begin until March 2010. Initial flights were conducted in Iowa. The flights were continued because of their success in gathering timely information that allowed Region 7 to focus on those operations likely to be polluting surface waters and threatening public health or the environment. Flights began in Nebraska in March 2011.

Q11. Have similar aerial surveillance inspections been carried out in regions other than Region 7? If so, in what regions have these occurred and, specifically, in what states within those regions have they occurred?

Nationally, the EPA uses aircraft in a variety of ways to identify potential air, water and land pollution. For example, aircraft may be used to locate regulated facilities, identify discharges, learn about water connections and pathways, and gather evidence, such as photographs and exact locations. The EPA and other agencies also use aircraft for emergency response.

Q12. Does EPA inform local and state authorities when flights are scheduled to occur?

In Region 7, it is standard practice to notify the state environmental agency prior to EPA performing a flight. During the initial flights in 2010, EPA Region 7 also notified appropriate county sheriff departments. However, law enforcement notification was discontinued in 2011 because the altitude at which they are conducted (greater than 1,200 feet) and the limited time spent over any single operation did not result in any citizen concerns raised to EPA Region 7. Also, a single day's flight may cover hundreds of square miles and many separate jurisdictional areas. Due to the lack of complaints in 2010, Region 7 concluded the time intensive process of notifying every local authority along the flight path was not necessary.

Q13. To what extent are entities targeted for aerial surveillance flights currently subject to on-site inspections by the Nebraska Department of Environmental Quality (NDEQ)?

Region 7 believes that all animal feeding operations assessed as part of an EPA Region 7 flight could be subject to inspection by NDEQ. As the agency authorized to implement the National Pollutant Discharge Elimination System (NPDES) program, NDEQ has comparable inspection authority to inspect effluent sources, such as animal feeding operations. The EPA maintains concurrent inspection and enforcement authority with authorized state NPDES programs and has been performing on-the-ground inspections in all Region 7 states for decades. As discussed above, information gathered during the flights is shared with the state environmental agency.

Q14. At what elevation are flights typically operating when images are recorded?

With the exception of take off and landings, the typical altitude for EPA Region 7 flights is between 1,200 and 1,500 feet above the surface.

Q15. Do these aerial surveillance flights ever disrupt livestock? Have any of the operations that have been subject to aerial inspections raised concerns with increased animal stress or noise?

Given the altitudes at which flights occur, EPA Region 7 does not believe they cause any disruptions to the livestock operations. When flights were initiated in 2010, EPA Region 7 was mindful that this could be a concern for producers. As a result, the EPA Region 7 personnel conducting the flights have been

vigilant in their observations of the animals' behavior as they fly over an operation and have observed no significant change during the brief period they are near an operation. Moreover, to date EPA Region 7 has not received any complaints or concerns from livestock owners related to animal stress or noise.

Q16. Do images ever record land or buildings not currently subject to regulation under the Clean Water Act or other applicable federal law?

The elevation (above 1,200 feet) at which EPA Region 7 flights occur make it impossible to eliminate all areas outside the animal feeding operation from being photographed. Moreover, the angle sometimes necessary to assess an operation (the plane rarely flies directly over the facility because the operation is viewed through a cockpit window) is such that the images are taken from an angle that may capture some land and buildings beyond the facility. Images taken from the ground would have a similar tendency to capture land and buildings on the horizon. However, like images taken on the ground and since the EPA is seeking the greatest clarity and detail possible in every image, every effort is made to ensure that the sole subject of every photo is the production or land application areas of an animal feeding operation. Also like photos taken from the ground, the images may unintentionally capture areas that are not subject to CWA regulation.

Q17. Do the images collected ever include residential buildings?

Yes, EPA Region 7 has collected images that include residential buildings. In some instances residential buildings are located within, or immediately adjacent to, animal feeding operations. Consequently, there are instances where residential buildings are captured in the images. Similar to the discussion immediately above, there are also instances where the photographer may take a photo at a fairly long distance or at angles that may include entire sections of land that may have multiple structures and/or facilities not associated with the subject of the photograph.

Q18. If so, are those residences occupied by the responsible parties associated with the regulated facility?

As mentioned above, the purpose of the Region 7 flights is to screen animal feeding operations and identify which ones require an on-the-ground inspection that will determine compliance with the CWA. Who resides within a specific residence is not a part of this screening process. Instead, EPA Region 7 attempts to identify who owns and/or operates the animal feeding operation - those responsible for the operation's compliance with the CWA. In a majority of the instances where there were residential buildings adjacent to, or within the boundaries of an animal feeding operation, EPA Region 7 ultimately found that these structures were occupied by either the owners or operators of the animal feeding operation.

Q19. Are aerial surveillance inspections recorded exclusively using still photography? Has video equipment ever been used?

EPA Region 7 only takes photographs during the flights. EPA Region 7 has not used video equipment.

Q20. For how long are images kept?

EPA Region 7 maintains these images pursuant to the EPA Record Schedules 207 and 211. Schedule 207 applies to enforcement action files and includes all administrative, judicial and landmark cases. Retention timeframes for schedule 207 are summarized below:

| Enforcement Type | Retention Time |
|------------------|----------------|
|------------------|----------------|

| | |
|----------------------|--|
| Administrative Cases | 10 years after settlement or closure of case. |
| Judicial Cases | 20 years after settlement or closure of case. |
| Landmark Cases | Permanent record. Transferred to national archives after 20 years. |

Schedule 211 applies to compliance and enforcement files not associated with the enforcement action types discussed above and are to be kept for five years after file closure by EPA.

Q21. Where photographic images are not used in an enforcement action, for how long do the images remain on file?

Aerial photographs associated with facilities that EPA Region 7 has determined do not warrant any of the enforcement action types discussed above are maintained pursuant to EPA Record Schedule 211 and are to be kept for five years after file closure by EPA.

Q22. Who maintains these photographic records?

In Region 7, the images are maintained by the Water Enforcement Branch of the Water Wetlands and Pesticides Division in conjunction with the Region 7 Records Center.

Q23. Has EPA shared or otherwise distributed any aerial images of Nebraska entities with other federal or state agencies other than the State of Nebraska?

As part of EPA Region 7's March 2012 outreach meeting in West Point, Nebraska Region 7 staff used a Power Point presentation that contained portions of images that were associated with animal feeding operations in Nebraska. This presentation was made available to the public and therefore it is possible that other federal or state agencies obtained a copy.

EPA Region 7 has also included portions of images from Nebraska as part of presentation presented at a EPA Region 7 nonpoint source and source water protection program meeting in June 2011. This presentation was also made available to the public.

It is important to note that when EPA Region 7 uses images for educational purposes it modifies the image to only include the specific issue or practice it seeks to highlight. EPA Region 7 never reveals the facility name or includes other identifying information in its presentations.

Q24. Does EPA plan to share the images?

In some instances EPA Region 7 will provide copies of images to a state environmental agency. EPA Region 7 also includes photographs in subsequent inspection reports if it is determined an on-the-ground inspection is warranted.

Q25. Are the images subject to release under the Freedom of Information Act?

As Agency records, these images are subject to the Freedom of Information Act. Whether the images would be released under FOIA or determined to be exempt from mandatory disclosure will be determined on a case specific basis. For example, EPA would consider whether portions of the images that inadvertently contain personal residences or pictures of individuals qualify for withholding under Exemption 6 of FOIA (personal privacy). Applicability of this and other exemptions, or of other statutes, will be determined on a case by case basis.