



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OFFICE OF WATER

August 15, 2023

To Petitioners:

On October 27, 2022, you sent a petition to EPA requesting that the Agency adopt a rebuttable presumption that Large Concentrated Animal Feeding Operations (CAFOs) using wet manure management systems actually discharge pollutants under the Clean Water Act (CWA), and therefore must apply for CWA permits. By this letter, EPA denies this petition, and instead commits to pursuing a multi-pronged strategy to evaluate the most effective means of improving EPA's CAFO program.

I would like to emphasize that EPA shares your deep concern for addressing sources of pollution to the nation's waters, and, more broadly, sources of harm to human health and the environment. EPA also shares your conviction that such harms must not fall disproportionately on communities of color, low-income communities, and under-resourced rural communities. Finally, EPA shares your commitment to carrying out the requirements of the CWA and ensuring the effectiveness of its regulatory programs, including the CWA CAFO program. As you may know, today EPA has responded to a separate petition, received in March 2017, asking EPA to revise the CWA regulations for CAFOs. In responding to the 2017 petition, EPA committed to launching a comprehensive evaluation of potential areas for improvement of the CWA regulatory program requirements for CAFOs, including conducting a detailed study of the CAFO effluent limitations guidelines (ELGs) and convening an Animal Agriculture and Water Quality (AAWQ) subcommittee under the existing Farm, Ranch, and Rural Communities Federal Advisory Committee. EPA explained that this approach would evaluate data and input from stakeholders to best address water quality problems caused by CAFO discharges. EPA also views this strategy as an appropriate and necessary first step to addressing the issues raised in your October 2022 petition, and to determining whether to establish a presumption like the one you request. EPA therefore denies your petition at this time and instead commits to evaluating the information it gathers through this comprehensive evaluation to determine how best to strengthen the CWA permitting program for CAFOs, including as it applies to Large CAFOs using wet manure management systems.

**A. Background: Your October 2022 Petition**

EPA greatly appreciates the data that the petition has compiled and presented regarding the threat that CAFOs can potentially pose to surface water, ground water, and drinking water, as well as the damage they can cause to air quality, human health, wildlife—including endangered and threatened species—and drinking water sources. The petition cites these harms as having prompted Congress in 1972 to specifically identify CAFOs as point sources subject to CWA requirements. It also discusses the particular effects of CAFOs on environmental justice communities, which, the petition argues, trigger obligations on the part of EPA to take certain actions to protect underserved communities under Executive Orders 12,898 and 14,008. EPA has carefully reviewed this information and will incorporate it into its comprehensive evaluation of ways it can strengthen the CAFO program.

The petition then asserts that EPA is violating the CWA in failing to ensure that discharging Large CAFOs that use wet manure management systems obtain permits.<sup>1</sup> First, the petition notes that EPA's own information indicates that the majority of discharging Large CAFOs do not have CWA permits. In addition, the petition emphasizes that documented evidence of unpermitted discharges, such as National Pollutant Discharge Elimination System (NPDES) data and state inspection findings, show that many CAFOs almost certainly discharge without NPDES permits. The petition further states that these unpermitted discharges are not adequately detected or penalized, because both EPA and state environmental agencies fail to regularly inspect CAFOs or enforce violations. Moreover, the petition contends that state laws and permit requirements cannot substitute for federal regulations, because they are more permissive in authorizing practices that can harm water quality, including manure application near the edges of waterways. The petition then presents information demonstrating the particularly harmful effects of CAFOs on environmental justice communities and alleges that EPA is failing to comply with the requirements of Executive Orders 12,898 and 14,008 that address environmental justice.

The petition then asks EPA to remedy its alleged failure to comply with the CWA and Executive Orders 12,898 and 14,008 by adopting a rebuttable presumption that Large CAFOs using wet manure management systems actually discharge and, thus, must apply for NPDES permits. It states that administrative agencies may establish presumptions, which may be "sensible and timesaving devices ... where the inferred fact is difficult to prove." Petition at 65, *citing USX Corp. v. Barnhart*, 395 F. 3d 161, 172 (3d Cir. 2004). The petition also notes that presumptions have been upheld when they furthered the objective of the governing statute. *Id.* at 66, *citing National Labor Relations Board v. Tahoe Nugget, Inc.*, 584 F.2d 293, 303 (9th Cir. 1978).

The petition argues that there is a sound and rational connection between Large CAFOs using wet manure management systems and actual discharges. First, it provides evidence of wet manure waste tanks and storage pits breaching, leaching, or otherwise releasing water, as well as spills from waste transport pipes. The petition also documents discharges from land application resulting from what it describes as lenient state manure application rates, application during the winter or before or during wet weather, and application to fields with tile drain systems. The petition argues that if these activities release pollutants to waters of the United States, they are discharges that require NPDES permits. According to the petition, extensive evidence of CAFO pollutants, such as nutrients and bacteria, in waterbodies near CAFO land application sites indicates that land application leads to discharges. Moreover, the petition notes, increasingly severe storms due to climate change will exacerbate discharges from waste storage structures and land application. Finally, the petition explains that the majority of Large CAFOs generate more manure than they can apply at recommended rates and are therefore "almost certain to cause discharges." Petition at 84. It states that the cost, inconvenience, and risks associated with transporting manure off site, as well as the lack of off-farm alternatives, means that Large CAFOs are likely often instead over-applying excess manure on their own land application sites.

The petition then asserts that a presumption that Large CAFOs using wet manure management systems actually discharge would address these issues. It contends that such a presumption would be a "sensible and timesaving device," because EPA and state agencies encounter significant challenges in proving

---

<sup>1</sup> Large CAFOs are CAFOs that meet specified size thresholds and that are therefore automatically subject to EPA's permitting regulations if they discharge. In contrast, Medium and Small CAFOs are only regulated if they meet certain other criteria in addition to size. *See* 40 C.F.R. § 122.23(b)(1).

discharges on a CAFO-by-CAFO basis, whereas Large CAFO operators are well-positioned to rebut the presumption in the rare instance in which, it says, no discharges occur. The petition states that such a presumption would carry out the objectives of the CWA, as well as Executive Orders 12,898 and 14,008, by shifting Large CAFOs with wet manure management systems to more protective NPDES permits.

Finally, the petition contends that such a presumption is consistent with relevant case law, including the decisions in *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2nd Cir. 2005), and *National Pork Producers' Council et al. v. EPA*, 635 F.3d 738 (5th Cir. 2011). Recognizing that these decisions limit EPA's regulatory authority to CAFOs that "actually discharge," as opposed to CAFOs that have the "potential" to discharge or "propose" to discharge," the petition states that a presumption that Large CAFOs using wet manure management systems would "operate[] as a stand-in for the inferred fact: actual discharge." Petition at 100. The petition explains, "[e]ach CAFO subject to the presumption is deemed to discharge and, as a result, the presumption imposes the obligation to apply for a NPDES permit or present evidence to rebut the presumption only on CAFOs that actually discharge." *Id.* Therefore, the petition concludes, this presumption would be consistent with the CWA, *Waterkeeper*, and *National Pork Producers Council*.

## **B. EPA's Response to the petition and Supporting Rationale**

EPA is denying the petition for two reasons. First, EPA has concerns that the petition's request that EPA establish a presumption that Large CAFOs using wet manure management systems discharge is not meaningfully distinguishable from the regulatory requirements EPA promulgated in the past, which were vacated in *Waterkeeper* and *National Pork Producers Council*. Second, however, because EPA shares the concerns expressed in the petition, as well as in the 2017 petition to revise the CAFO regulations, about the importance of ensuring a protective CAFO program, EPA is committing to a comprehensive evaluation of its CAFO program to determine how best to address the concerns raised in both petitions. Before attempting approaches similar to those that have been vacated, EPA would like to explore ways of improving the effectiveness and practicability of its existing regulatory requirements, including through facilitating implementation and enforcement. If EPA ultimately determines that regulatory revisions are appropriate, the Agency will broadly consider the most meaningful potential amendments to any aspects of the provisions, not limited to establishing a presumption that all Large CAFOs discharge. The petition makes an extremely compelling case for the need to holistically evaluate and improve EPA's CAFO program, which the Agency now commits to doing, but it does not demonstrate that establishing such a presumption is the only or the best way to do so.

### **1. The Presumption the Petition Proposes is Similar to Approaches that have been Vacated.**

EPA recently spent over a decade trying to require a broader segment of the Large CAFO universe to obtain permits, without the need for CAFO-by-CAFO demonstrations of actual discharge, but the courts made clear that these requirements exceeded the Agency's authority. In 2003, EPA finalized a major revision to its CWA CAFO regulations, the culmination of at least five years of outreach and analysis. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7176 (Feb. 12, 2003). Among other provisions, the rule required "all CAFO owners or operators to seek coverage under an NPDES permit," unless they affirmatively demonstrate that they have "no potential to discharge." *Id.* at 7197.

The Second Circuit Court of Appeals vacated this aspect of the 2003 Rule, holding that it unlawfully “imposes obligations on all CAFOs regardless of whether or not they have, in fact, added any pollutants to the navigable waters, *i.e.* discharged any pollutants.” *Waterkeeper Alliance, Inc. v. U.S. E.P.A.*, 399 F.3d 486, 505 (2nd Cir. 2005). The Second Circuit emphasized that the requirement to apply for a permit or demonstrate why a permit is not necessary “contravenes the regulatory scheme enacted by Congress; the Clean Water Act gives the EPA jurisdiction to regulate and control only actual discharges - not potential discharges...” *Id.* The court noted, however, that it did not consider the question as to whether EPA might create a regulatory presumption that Large CAFOs, or some subset thereof, actually discharge. *Id.* at 506, n. 22.

Following *Waterkeeper*, EPA tried a different tack to requiring CAFOs to obtain permits. Whereas the 2003 rule categorically required a permit for any CAFO with a “potential to discharge,” in 2008 EPA issued a revised rule calling for a “case-by-case evaluation by the CAFO owner or operator as to whether the CAFO discharges or proposes to discharge from its production area or land application area.” Revised NPDES Regulation and ELGs for CAFOs in Response to the *Waterkeeper* Decision, 73 Fed. Reg. 70418, 70423 (Nov. 20, 2008) (“2008 Rule”). EPA stated that a CAFO “proposes” to discharge if it is “designed, constructed, operated, or maintained such that a discharge will occur,” based on an “objective assessment” of the facility. *Id.* EPA emphasized that if a discharge simply *might* occur, a permit is not required. *Id.*

EPA’s requirement that CAFOs that discharge or propose to discharge obtain a CAFO permit was vacated in a challenge to the 2008 Rule. *National Pork Producers’ Council et al. v. EPA*, 635 F.3d 738, 750-51 (5th Cir. 2011). The Fifth Circuit Court of Appeals held that requiring CAFOs that “propose to discharge” to obtain a permit in effect “requires CAFO operators whose facilities are not discharging to apply for a permit...” *Id.* The court held that any attempt to require a permit of a facility without an “actual discharge...exceeds the EPA’s statutory authority.” *Id.* at 751.<sup>2</sup>

It is difficult to distinguish between the petition’s request that EPA establish a rebuttable presumption that Large CAFOs with wet manure management systems discharge and the approach EPA used in the 2008 Rule, requiring facilities to obtain permits if they are designed, constructed, operated, and maintained such that a discharge will occur, which the Fifth Circuit Court of Appeals vacated. The petition states that the requested presumption does not suffer from the same flaws as the 2003 and 2008 rules because it applies to CAFOs that *actually* discharge. Yet it then acknowledges that some of the CAFOs to which the presumption would apply may be able to rebut it and provide evidence that they do *not* actually discharge. For example, the petition recognizes that Large CAFOs with wet manure management systems that have certain characteristics may not actually discharge, including:

- CAFOs with synthetically lined waste pits, which are designed, constructed, operated and maintained to contain all wastewater and runoff from a 100-year, 24-hour rain event;
- CAFOs with access (on their own farms or on others’ farms) to sufficient land application areas to allow for manure application at rates that ensure no more nutrients are applied than are necessary for the crops to achieve reasonable yield goals;

---

<sup>2</sup> The *National Pork Producers’ Council* decision is consistent with the decision of the Eighth Circuit Court of Appeals in *Service Oil, Inc. v. EPA*, which cited *Waterkeeper* in its rationale for vacating EPA’s requirement that permittees submit a permit application before the date on which the discharge commences. *Service Oil*, 590 F.3d 545, 551 (8th Cir. 2009). The Eighth Circuit held that EPA lacks authority to regulate discharges before they occur. *Id.*

- CAFOs that implement all necessary best management practices;
- CAFOs that conduct comprehensive water monitoring; and
- CAFOs from which water pollution will not reach waters of the United States, either as a direct discharge or as the functional equivalent to a direct discharge.

Petition at 97-98. Given that, as the petition notes, not all Large CAFOs with wet manure management systems discharge (such as those with the characteristics listed above), EPA is concerned that imposing a requirement that all Large CAFOs using wet manure management systems either obtain permits or present evidence to EPA or a state agency that they not discharge could be viewed as running afoul of *National Pork Producers' Council*. Indeed, the vacated 2008 Rule was clear that facilities would only need to obtain a permit if they affirmatively determined that they “will” discharge. The petition’s requested approach goes further, imposing a burden on all Large CAFOs with wet manure management systems even without that objective determination by facilities. Issuing a rule consistent with the petition’s request could therefore be even more vulnerable to claims that EPA is exceeding its statutory authority than the 2008 Rule, which was vacated on these grounds.

Moreover, while EPA recognizes its obligation to comply with Executive Orders, the Orders themselves acknowledge that they do not, and cannot, require agencies to take actions inconsistent with their existing legal authorities. Executive Order 12,898, Sec. 6-608; Executive Order 14,008, Sec. 301. The Executive Orders, therefore, do not obviate EPA’s concerns that granting the petition could be interpreted as pushing against the edges of its CWA authority.

EPA does not disagree with the substantial evidence the petition has compiled regarding practices at Large CAFOs that lead to discharges, nor with the data it presents demonstrating discharges from this sector. Nor does EPA dispute the petition’s contention that requiring all Large CAFOs with wet weather manure management systems to obtain permits would save federal and state agencies time and resources, as well as better protecting the nation’s waters and environmental justice communities. Finally, EPA does not foreclose the possibility that at some future point it may determine that establishing a presumption of discharge for certain categories of CAFOs that demonstrate evidence of discharge, or past discharges, may be legally supportable. Yet before attempting an approach similar to one that has been vacated, EPA would first like to explore ways of improving the effectiveness of its existing regulatory requirements or other approaches to enhancing its regulations, as discussed below, aside from establishing a presumption that all Large CAFOs with wet manure management systems discharge.

## **2. EPA is Instead Initiating a Comprehensive Review of the CWA CAFO Program to Determine How Best to Address Discharges from CAFOs.**

When EPA received this petition, it was also reviewing the 2017 petition, cited above, which asked EPA to revise many aspects of the CAFO regulations. In response to this petition and the 2017 petition, EPA has decided to fully evaluate the existing CAFO program and actions the Agency could take to improve it, through both a detailed study of the CAFO ELGs and through the convening of the AAWQ Federal Advisory Committee subcommittee. As noted above, establishing the proposed presumption raises complex legal issues. Yet even if it did not have these concerns, the Agency would prefer to wait for the outcome of its holistic evaluation of the CAFO program before committing to one specific regulatory revision. Based on its experience in developing, promulgating, and defending its 2003 and 2008 CAFO rules, EPA is keenly aware of the substantial investment of time and resources that revising the CWA

CAFO regulations would require on the part of EPA as well as implementing state agencies and stakeholders. EPA would therefore like to have a strong indication that a regulatory revision is the most effective and appropriate way to reduce discharges from CAFOs before undertaking such an effort. Even if the Agency were to conclude that regulatory revisions are appropriate, EPA would want a thorough understanding of all potential regulatory revisions before embarking on a single change, such as establishing a presumption that one particular category of CAFOs discharges. A comprehensive evaluation of the best way to improve the CAFO regulations would be more efficient than considering and pursuing changes piecemeal.

EPA's evaluation of its current CAFO program and opportunities to improvement will center around two efforts: the ELG detailed study<sup>3</sup> and the AAWQ subcommittee. The ELG detailed study will evaluate the extent to which CAFOs in all sectors discharge into waters of the United States, and whether such discharges are concentrated in particular regions or states, or widespread nationally. Specifically, the ELG will identify the nature and frequency of CAFO discharges into waters of the United States, from both the production area and the land application area. EPA also intends to gather information about new technologies and practices for reducing CAFO discharges, and their availability, effectiveness, and economic achievability. The focus of the study would include other issues and its focus would evolve as EPA gathers information. EPA has concluded that a detailed study is necessary to enable EPA to make an informed and reasoned decision as to whether to revise the CAFO ELGs. EPA expects that, among other things, this analysis will shed light on practices and technologies available to best to address discharges from Large CAFOs with wet manure management systems, including potential regulatory or non-regulatory approaches.

The AAWQ subcommittee will provide an opportunity for EPA to receive input on many of these same issues that the ELG detailed study addresses, but through the lens of individuals' experiences in implementing the CAFO regulations or their research or expertise addressing the impact of CAFOs on water quality. The Agency will seek input from farmers, community groups, researchers, state agencies, and others about the most effective and efficient ways to reduce pollutants generated from CAFOs. EPA will ask the subcommittee to explore issues related to land application practices, production area practices, and, more generally, limiting impacts on water quality from animal feeding operations. With respect to land application practices, the subcommittee will consider, among other things, implementable practices and technologies that are effective in minimizing the runoff of manure and other pollutants, ways of supporting their use, and how best to address challenges in implementing nutrient management plans. As to production area practices, the subcommittee will evaluate practices and technologies for manure storage, including treat and discharge systems, digesters, and nutrient treatment technologies. It will consider how to ensure that manure from CAFOs is applied in areas where it is needed most and in accordance with appropriate nutrient management planning. Finally, the subcommittee will consider certain over-arching issues, including the best means for assessing and eliminating water quality impacts from CAFOs, including through facilitating compliance and incentive-based approaches. The subcommittee will also assess whether there are ways of improving manure management that could reduce disproportionate impacts of these pollutants on disadvantaged communities and communities of color, consistent with relevant Executive Orders. This effort, like the

---

<sup>3</sup> EPA Effluent Guidelines Program Plan 15 (Program Plan 15), January 2023, at Appendix A, *available at* [https://www.epa.gov/system/files/documents/2023-01/11143\\_ELG%20Plan%2015\\_508.pdf](https://www.epa.gov/system/files/documents/2023-01/11143_ELG%20Plan%2015_508.pdf).

ELG detailed study, will involve seeking input about individuals' experiences with and knowledge about Large CAFOs with wet manure management systems.

Forming and convening the AAWQ subcommittee will involve a significant Agency commitment and expenditure of Agency resources. The subcommittee formation process is now underway. EPA expects to issue a Federal Register request for subcommittee nominations in fall 2023. After carefully reviewing and selecting nominees, the EPA Administrator will appoint approximately 10-20 subcommittee members. The membership of the Subcommittee will include a balanced and diverse representation from research institutions, local government, States and Tribes, environmental and environmental justice groups, and agricultural industry across the geographic regions of the United States. EPA anticipates that it will host six to nine public subcommittee meetings over the course of 12-18 months and expects that work groups will meet between public meetings. The public subcommittee meetings would alternate between in-person gatherings in Washington, D.C., and virtual meetings. EPA intends to retain an experienced outside moderator to facilitate the public meetings and to shepherd the process to completion.

After conducting the ELG detailed study and engaging with the AAWQ subcommittee, and reviewing their conclusions and recommendations, EPA will consider whether to revise its regulations. Specifically, EPA will assess whether it can address water quality concerns related to CAFOs through improvements to implementation, enforcement, and other non-regulatory initiatives, or whether regulatory revisions, including the possibility of establishing presumptions of discharge for certain sectors, are appropriate.

### **C. Conclusion**

In sum, in light of EPA's legal concerns about establishing a presumption that Large CAFOs with wet manure management systems discharge, as well as its planned comprehensive evaluation of the CAFO program, EPA denies this petition for rulemaking at this time, and instead commits to pursuing the ELG detailed study and engaging with the AAWQ subcommittee to enable the Agency to make an informed, reasoned decision as to how best to address the valid concerns raised in the petition. EPA looks forward to the road ahead and to working hard to address these issues through the ELG detailed study and through the AAWQ subcommittee. We want to hear from all voices and benefit from the findings of the most current research, and EPA is confident that these efforts will result in real progress and durable solutions to protecting the nation's waters.

Sincerely,



Radhika Fox  
Assistant Administrator