UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

OFFICE OF WATER

August 15, 2023

To Petitioners:

This letter responds to your 2017 petition to EPA requesting that the Agency revise Clean Water Act (CWA) regulations for concentrated animal feeding operations (CAFOs). You specifically asked EPA to promulgate the following:

1. An evidentiary presumption that certain CAFOs discharge and are either subject to NPDES permitting or must rebut the presumption by demonstrating they do not discharge;
2. A revision of EPA's interpretation of the agricultural stormwater exemption such that no discharges resulting from CAFO activities are exempt as non-point source pollution;
3. A requirement that integrators who meet the CWA definition of owner or operator are co-permitted with contract producers;
4. Revisions to certain definitions in the CAFO regulations;
5. Revisions to certain requirements applicable to all CAFOs, including requiring water quality monitoring in CAFO National Pollutant Discharge Elimination System (NPDES) permits to ensure compliance with the CWA and permit terms; and
6. A revision of the CAFO Effluent Limitations and Guidelines (ELGs) to address additional CAFO pollutants of concern, prohibit practices known to harm water quality, and otherwise strengthen existing requirements.

EPA shares your commitment to fulfilling the goal of the CWA, to restore and maintain the integrity of the nation's waters, in this case by addressing discharges from CAFOs. EPA also shares your concern that CAFOs can be a significant source of pollutants into waters of the United States.[1] The Agency recognizes that there may be opportunities to do more to address these pollutants. Indeed, many CAFO owners and operators, as well as federal and state agency staff, have experienced challenges effectively implementing and assuring compliance with the current CWA CAFO regulatory requirements.
To address these challenges and concerns, EPA is launching a comprehensive evaluation of potential areas for improvement of the CWA NPDES regulatory program requirements for CAFOs. This evaluation will include a detailed study of the CAFO ELGs.[2] In addition, EPA will convene an Animal Agriculture and Water Quality (AAWQ) subcommittee under the existing Farm, Ranch, and Rural Communities Federal Advisory Committee to hear from farmers, community groups, researchers, state agencies, and others about the most effective and efficient ways to reduce pollutants generated from CAFOs. Together, the ELG detailed study and AAWQ subcommittee will comprise a multi-pronged strategy to evaluate data and input from stakeholders to best address the water quality problems from CAFO discharges. 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 concerns raised in the petition.

[1] *See, e.g.,* CAFOs: EPA Needs More Information and a Clearly Defined Strategy to Protect Air and Water Quality from Pollutants of Concern, *available at* https://www.gao.gov/assets/gao-08-944.pdf.
[2] 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.

In the ELG detailed study, EPA will evaluate the extent to which CAFOs discharge into waters of the United States, and whether such discharges are concentrated in particular regions or states, or widespread nationally. It will also gather information about new technologies and practices for reducing discharges from the production areas and land application areas associated with CAFOs and consider whether these technologies may be technologically available and economically achievable for CAFOs. As part of that analysis, EPA will study the financial health of the agricultural industry as a whole and by sector, to the extent possible. The study will address other issues, as well, during the course of the study, and its focus will evolve as EPA gathers information.

The AAWQ subcommittee will provide an opportunity for EPA to receive input on many of these same issues through the lens of individuals' experiences in implementing the CAFO regulations or their research or expertise addressing the impact of CAFOs on water quality. 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 (NMPs). 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.

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 are appropriate. Particularly given that revising its regulations requires a significant investment of time and resources both for EPA and for implementing state agencies and stakeholders and raises complex legal issues, EPA would like to have a strong indication that such revisions are the most effective and appropriate way to reduce discharges from CAFOs before undertaking such an effort.

Furthermore, even if particular requests in the petition, standing alone, seem obviously beneficial or relatively discrete, EPA thinks that a holistic evaluation of the best way to improve the CAFO regulations, either through implementation or regulatory revision efforts, would be more efficient and effective than considering and pursuing changes piecemeal. EPA's determination to deny the petition and instead pursue this rigorous evaluation is well within EPA's discretion to determine how best to order its priorities and to improve the effectiveness of its CAFO program.
Below EPA addresses the specific requests in the petition.

A. The petition requests that EPA revise its CAFO regulations to ensure that all discharging CAFOs obtain permits.

The CWA prohibits the "discharge of any pollutant" from a point source unless in compliance with a permit. 33 U.S.C. §1311(a). The CWA defines "point source" to expressly include "CAFOs" and to exclude "agricultural stormwater." *Id.* at § 1362(14). All non-excluded discharges from CAFOs are required to have permits. *Id.* at 1362(14). As noted above, EPA will evaluate whether regulatory revisions are needed to help fulfill this statutory mandate following the conclusion of the ELG detailed study and receiving recommendations from the AAWQ subcommittee. Both of these initiatives will address opportunities to effectively ensure compliance with CWA requirements. EPA notes, however, that this first request raises particular concerns, which it discusses below.

a. The petition requests that EPA establish an evidentiary presumption that CAFOs with certain characteristics actually discharge.

One way that the petition requested EPA ensure all discharging CAFOs obtain permits is by establishing an evidentiary presumption that CAFOs with certain characteristics actually discharge. EPA denies this request for the reasons discussed at the beginning of this petition response, namely that EPA has determined that a more effective and efficient approach is to assess the information provided through the ELG detailed study and the AAWQ subcommittee recommendations before deciding whether to establish such a presumption. Moreover, the petition's proposed approach does not appear to be meaningfully distinguishable from regulatory requirements EPA has promulgated in the past, which have been vacated in court. Before attempting approaches similar to those that have been vacated, EPA would like to explore ways of improving the effectiveness of its existing regulatory requirements or enhancements to its regulations other than establishing a presumption that all CAFOs discharge.

In 2003, EPA promulgated a major revision to its CWA CAFO regulations. National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7176, 7197 (Feb. 12, 2003) ("2003 Rule"). 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." 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. EPA*, 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.

In 2008, EPA revised its regulations to try to address the *Waterkeeper* holding. "Unlike the 2003 rule, which categorically required a permit for any CAFO with a 'potential to discharge,'" the revised rule called 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.* In response to comments urging EPA to act on *Waterkeeper*'s invitation to establish a presumption that CAFOs discharge, and other comments arguing that such a presumption is not supportable, EPA clarified that the requirement that CAFOs obtain a permit if they discharge or propose to discharge was "not…a presumption that all CAFOs discharge." 2008 Rule Response to Comments, *available at* https://www.regulations.gov/document/EPA-HQ-OW-2005-0037-1062at 1166.

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.[3]

It is difficult to distinguish between the petition's request that EPA establish a rebuttable presumption that CAFOs with certain characteristics actually discharge—based on factors such as proximity to jurisdictional waters, climatic conditions, whether precipitation exceeds evaporation, production area drainage, and others—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. As a practical matter, both approaches require a CAFO to assess its operation and obtain a permit if it has certain specified characteristics that indicate it will discharge. Indeed, the vacated 2008 Rule was clear that facilities would only need to obtain a permit if they determined that they "will" discharge, whereas the petition's requested approach imposes a burden on CAFO owners and operators even without that objective determination by facilities. Therefore, EPA is concerned that issuing a rule consistent with the petition's request would be even more vulnerable to claims that EPA is exceeding its statutory authority than the 2008 Rule, which was vacated on these grounds. As described above, EPA intends to first consider ways of strengthening and supporting compliance with existing regulatory requirements, through the ELG detailed study and the AAWQ subcommittee recommendations, and possibly other changes, before considering such revisions. EPA does not foreclose the possibility, however, that at some future point it may determine that establishing a presumption of discharge for certain categories of facilities that demonstrate evidence of discharge, or past discharges, may be useful and legally supportable.

1. The petition requests that EPA establish a presumption that CAFOs with certain production area characteristics actually discharge.

The petition specifically asks EPA to presume that CAFOs with certain production area characteristics actually discharge. Petition at 19. The production area of a CAFO generally includes, but is not limited

[3] The *National Pork Producers' Council* decision was 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.*

to, the animal confinement, raw materials storage, mortalities management, and waste containment areas. Petition at 19, *citing* 40 C.F.R. § 122.23(b)(8). The petition cites a 2010 EPA guidance document which identified features in the production area that it stated support a presumption of discharge. These factors included proximity of the CAFO to jurisdictional waters, and whether the CAFO is upslope from such waters; climatic conditions, including whether precipitation exceeds evaporation; type of waste storage system, and the capacity, quality of construction, and presence and extent of built–in safeguards of the storage system; drainage of the production area; exposure of animal waste and feed to precipitation or other water; and other factors. Petition at 20, *citing* EPA, *Implementation Guidance on CAFO Regulations—CAFOs that Discharge or Are Proposing to Discharge* (May 28, 2010) ("2010 Guidance"), *available at* http://www.epa.gov/npdes/pubs/cafo_implementation_guidance.pdf at 2, 5. The petition notes that EPA has already estimated that 75% of CAFOs actually discharge, based on their operational profiles. Petition at 20, *citing* the 2010 Guidance at 13. The petition asks EPA to use the data it already has, such as the information in this Guidance document, to establish a list of criteria related to the production area for which it will establish a rebuttable presumption of discharge. Petition at 21. EPA agrees that it has a great deal of information about the characteristics of CAFOs that discharge from the production area. However, it denies this request for the reasons discussed above. EPA intends to first explore whether there are opportunities to support implementation of existing nutrient management requirements following evaluation of the ELG detailed study and the AAWQ subcommittee recommendations. In addition, EPA cannot at this time perceive a meaningful difference between this request and the 2008 Rule requirements, which a Court of Appeals has rejected as unlawful.

2. The petition requests that EPA establish a presumption that CAFOs that apply manure to land as fertilizer actually discharge.

The CWA defines "point source" to expressly include "CAFOs" and to exclude "agricultural stormwater." 33 U.S.C. § 1362(14). In the 2003 Rule, EPA stated that in order to interpret these two parts of the definition consistently, it must "identify the conditions under which discharges from the land application area of a CAFO are point source discharges that are subject to NPDES permitting requirements and those under which they are agricultural storm water discharges and therefore are not point source discharges." 68 Fed. Reg. at 7197. EPA based the distinction between exempt agricultural stormwater and regulated point source discharges of manure, litter, and process wastewater[4] from a CAFO on whether they were applied in accordance with nutrient management practices that would ensure appropriate agricultural utilization of the nutrients. *Id.* The 2003 Rule codified the specific types of nutrient management practices EPA believed were needed to ensure appropriate agricultural utilization, and stated:

> [w]here such practices have been used, … it is reasonable to conclude that any remaining discharge is agricultural storm water. Conversely, where such practices have not been used, EPA believes it is reasonable to conclude that land application discharges of manure, litter, or process

[4] The petition expresses concern about discharges of "manure" from CAFOs. EPA's CAFO regulations address discharges of "manure, litter, and process wastewater," to encompass materials that have mixed with manure at the operation, including litter, bedding, and water used in its operation. *See* 40 CFR §§ 122.23(b)(5) (defining "manure" to include "manure, bedding, compost and raw materials or other materials commingled with manure or set aside for disposal"); 122.23(b)(7) (defining "process wastewater" to include "water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.") For the sake of brevity, in this petition response EPA will take the petition's approach and use the term "manure" to refer to manure, litter, and process wastewater.

wastewater are not agricultural storm water but are discharges that Congress meant to subject to NPDES permitting requirements when it explicitly included CAFOs in the definition of a point source." *Id.*

EPA recognized that even when manure is land applied in accordance with practices designed to ensure appropriate agricultural utilization of nutrients, runoff of nutrients may occur as a result of rainfall events. However, EPA determined that it is reasonable to view the remaining runoff as exempt agricultural stormwater, given that applying nutrients to crops fulfills an important agricultural purpose, namely the fertilization of crops, and that nutrient management practices would "minimize[]" runoff. 68 Fed. Reg. at 7197-98. EPA stated that if manure is applied in excess of crops' nutrient needs, any runoff of manure would not be considered an exempt agricultural stormwater discharge. *Id.* at 7198. Moreover, it clarified that any dry weather discharges of manure resulting from its application to land areas under the control of a CAFO would not qualify for the agricultural storm water exemption, because as a matter of common sense, only storm water can be agricultural storm water. *Id*. In *Waterkeeper*, the Second Circuit Court of Appeals held that EPA's interpretation of the agricultural stormwater exemption was a "reasonable construction" of the statute. 399 F.3d at 507; *see id. at* 509 ("discharges from land areas under the control of a CAFO can and should generally be regulated, but where a CAFO has taken steps to ensure appropriate agricultural utilization of the nutrients in manure…it should not be held accountable for any discharge that is primarily the result of 'precipitation.'")

The petition's statement that evidence supports a determination that "all CAFOs that land apply waste discharge and require NPDES permits," petition at 19, disregards EPA's interpretation of the scope of the agricultural stormwater exemption. The petition argues that EPA's current regulations "effectively assume that dry weather land application in accordance with an NMP will result in zero discharge, such that no permit is required." Petition at 18. It also refers to EPA's "assumption" that "land application does not result in discharges, absent a precipitation event," and describes EPA's rule as creating a "legal fiction" that NMPs are "zero discharge plans." *Id.*

In fact, EPA's 2003 Rule does not create a "legal fiction" that NMPs result in no discharges. Rather, where manure has been land-applied in accordance with appropriate nutrient management practices, EPA has interpreted the statutory agricultural stormwater exemption to mean that any runoff of nutrients from the field following a rainfall event is exempt agricultural stormwater, and therefore not a point source discharge regulated by the CWA. The Agency has stated that it expects that the use of appropriate nutrient management practices will minimize such runoff. *See id.* at 7197.

The petition also states that EPA's current rules "inexplicably allow Large CAFOs to land apply *without* NPDES permits," and characterize the absence of NMP requirements for unpermitted Large CAFOs as "inherently contradictory." Petition at 19 (emphasis in original). The petition fails to recognize that the current regulations require any CAFO that discharges to obtain a permit, and that the discharge of manure, litter, or process wastewater from a CAFO is subject to NPDES permit requirements, except where it is an exempt agricultural stormwater discharge. A discharge is only exempt agricultural stormwater, in turn, when manure has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure. 40 CFR 122.23(e). Thus, unpermitted discharges from Large CAFOs that do not apply manure in accordance with site-specific nutrient management practices, and lack documentation to this effect, are violating EPA regulatory requirements and would be subject to enforcement. *Id.* at 122.23(e)(1), (2).

EPA recognizes that many Large CAFOs are unpermitted. To the extent these unpermitted Large CAFOs may have dry weather discharges from their land application areas or discharges that do not otherwise qualify as agricultural storm water, such discharges violate the CWA and EPA's NPDES regulations. Addressing any such discharges is foremost a question of implementation and enforcement

of the current regulatory scheme. EPA intends to explore potential improvements to implementation and enforcement of the agricultural stormwater exemption within the current regulatory framework as part of the ELG detailed study and the AAWQ subcommittee's deliberations, including whether new technologies are available and accessible to support its implementation, and whether certain practices have been shown to be particularly effective and implementable. Given the repeated adverse rulings EPA's CAFO regulations have faced in court, EPA would like to explore all opportunities to support and improve implementation of a principle that has been upheld in court before revising this interpretation, as the petition requests.

b. The petition requested that EPA revise its interpretation of the agricultural stormwater exemption to clarify that it does not include any CAFO–related discharges.

The petition asserts that EPA has adopted an overly broad reading of the agricultural stormwater exemption that has "tied its hands" from regulating CAFO pollution, namely, that precipitation-related discharges of manure are exempt from the requirements of the CWA when they are land-applied in accordance with an NMP. The petition states that EPA's interpretation of the exemption has made it "virtually impossible for EPA and state regulators to ensure that discharges are actually caused by precipitation events, rather than by over-application of CAFO wastes to fields, or otherwise improper manure management." Petition at 23. The petition then notes that EPA has clear authority to revise its interpretation of the agricultural stormwater exemption.

EPA agrees with the view expressed in the petition that it has the authority to revise its interpretation of the agricultural stormwater exemption if warranted, but it is denying this request because it would first like to consider ways of improving implementation of this exemption. As discussed above, the 2003 Rule reconciled the CWA's "inclusion of CAFOs as point sources" and the exclusion of agricultural storm water by identifying "the conditions under which discharges from the land application area of a CAFO are point source discharges subject to NPDES permitting requirements and those under which they are agricultural storm water discharges and therefore not point source discharges." 68 Fed. Reg. at 7197. EPA determined that the distinction would depend on "whether or not the manure and process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure or process wastewater." *Id.* The Second Circuit Court of Appeals upheld EPA's interpretation. *Waterkeeper*, 399 F.3d at 507. EPA agrees that agencies retain the discretion to change their interpretation of statutory language, including the scope of "agricultural stormwater." However, EPA has determined that first conducting a robust effort to explore ways of improving implementation of its interpretation, through the ELG detailed study and the AAWQ subcommittee, before deciding whether to revise the regulatory structure at the core of its CAFO program and risking litigation over that revised interpretation, would be the most efficient use of limited Agency resources.

EPA notes that it disagrees with certain aspects of the argument in this part of the petition. The petition asserts that the rules impose "minimal requirements" before a CAFO operator can claim the benefit of the agricultural stormwater exemption, that site-specific NMPs are never submitted to regulatory authorities unless EPA or state agencies specifically request to review a plan, that there is therefore no oversight to ensure that manure is applied at agronomic rates, and consequently, that there is no oversight to ensure that manure runoff is agricultural stormwater. First, EPA disagrees that nutrient management plan requirements are "minimal" and lack federal oversight. In fact, EPA's regulations require NMPs to be submitted to the permitting authority when a CAFO owner or operator seeks authorization to discharge, and the terms of the nutrient management plan are incorporated into the permit and issued for public notice and comment. 40 CFR 122.23(h). The nutrient management plan must address nine specified elements, including site specific conservation practices, land application

protocols, and recordkeeping. *Id.* at 122.42(e)(1). Moreover, EPA's regulations prescribe in detail what the protocols for land application must address, including the fields available for land application, field-specific rates of application that will ensure appropriate agricultural utilization of nutrients in the applied manure, and timing limitations, and they also describe the two approaches CAFOs may use to determine rates of application. *Id.* at 122.42(e)(5). Unpermitted CAFOs do not need to submit their nutrient management planning records to the permitting authority, but they must maintain documentation sufficient to demonstrate that they have established protocols to test manure and soil and to apply it in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of manure nutrients. *Id.* at 122.23(e)(1), (2). In sum, the CAFO regulations require a significant amount of information in NMPs and documentation, and this information can potentially form the basis for extensive federal oversight for permitted CAFOs.

EPA, however, shares the petition's concern that it is extremely challenging for regulatory agency staff or members of the public to determine whether a CAFO has applied manure in accordance with a nutrient management plan. EPA's primary concerns about NMPs are not their lack of rigor, but the extent to which they are, or can be, fully and consistently implemented and enforced. EPA intends to evaluate the ELG detailed study and engage with the AAWQ subcommittee to assess opportunities to more effectively implement the agricultural stormwater exemption, and particularly nutrient management planning, and to better ensure that these approaches are verifiable and enforceable.

c. The petition asks EPA to ensure that permitting agencies co-permit integrators and other operators with producers.

As the petition notes, EPA has long recognized that integrators often exercise significant control over the location, operations, and waste management protocols of CAFOs. Petition at 27, *citing* Proposed NPDES Regulation and ELGs and Standards for CAFOs, 66 Fed. Reg. 2960, 3023 (Jan. 12, 2001). In the 2003 Rule, EPA did not directly address the circumstances under which integrators are required to obtain NPDES permits because it lacked sufficient information at that time to do so on a national level. See 2003 Rule Response to Comments at 1-246. The ELG detailed study and the AAWQ subcommittee will address effective ways of ensuring that all entities that require NPDES permits have them. Following review of the subcommittee's recommendations and the detailed study, EPA will consider whether to pursue such approaches by strengthening implementation and enforcement of existing regulations, or whether regulatory revisions are appropriate. EPA therefore denies this request at this time.

d. The petition asks EPA to revise the CAFO definition to broaden the definition of "production area," to eliminate or shrink the "Medium CAFO" category, and to revise the criteria for designating certain AFOs as CAFOs.

The petition requests that EPA add language to the existing definition of CAFO "production areas" to ensure that all areas associated with the CAFO facility are subject to the CAFO ELG. According to the petition, this clarification would be consistent with the position that EPA took in *Alt v. EPA*, 979 F. Supp. 2d 701 (N.D. W. Va. 2013), and would correct the decision in that case, which interpreted areas around poultry houses to be outside of the production area. Petition at 29-30. The petition also requests that EPA revise the definitions of "Medium" and "Small" CAFOs to increase the number of facilities subject to permitting.

Generally speaking, the current CAFO regulations define an "animal feeding operation" (AFO) as a facility that confines and maintains animals for an extended period and that does not sustain vegetation. 40 C.F.R. § 122.23(b)(1). AFOs are defined as CAFOs, and therefore subject to EPA's CAFO regulations, if they fall into any of three categories: Large CAFOs, a definition based solely on a size

threshold; Medium CAFOs, which must meet a lower size threshold as well as certain criteria (they must discharge to a "water of the United States" through a man-made device or discharge directly into a "water of the United States" that runs through the facility or comes into direct contact with animals); and Small CAFOs, which are AFOs that are not Medium CAFOs and that have been specifically designated as a CAFO by a permitting authority, based on the consideration of listed factors. *Id.* at § 122.23(b), (c). Petitioners ask EPA to revise the "Medium CAFO" category by either expanding the "Large CAFO" category to encompass facilities that are now "Medium AFOs," or to remove the existing provision that Medium AFOs are only CAFOs if they directly discharge from the production area into a water of the United States. *Id.* at 32. The Petition explains that this revision is necessary to stop the practice of facilities evading CAFO permitting requirements by maintaining a number of animals that falls just under the numeric threshold for Large CAFOs, or by changing their discharge design. *Id.* at 31-32. To strengthen existing designation procedures, the petition asks that EPA limit states' discretion in designating AFOs as CAFOs. *Id.* at 32-33. The petition characterizes the regulations as providing an open-ended list of criteria that permitting authorities may consider in determining whether to designate without an indication as to how permitting authorities should weigh these criteria, and as lacking any mechanism for accountability. *Id.* Therefore, the petition asks EPA to revise the definition of "Small CAFO" to incorporate the discharge criteria currently used in the definition of "Medium CAFO." Specifically, the petition asks EPA to revise its regulations to provide that if a Small AFO discharges into waters of the United States through a man-made device, or if it discharges directly into waters of the United States that pass through the facility, it is a CAFO subject to permitting requirements. The petition also asks EPA to expand its own authority to designate AFOs as CAFOs, including by removing the precondition that EPA can only designate an AFO as a CAFO if it finds that the AFO is contributing to a downstream water quality impairment. *Id.* at 33.

EPA agrees with the petition that it is important to address efforts to evade NPDES requirements, whether those efforts are claims that certain areas that discharge pollutants are not part of the CAFO, by trying to avoid triggering size thresholds for regulation, or by other means. Furthermore, EPA views designation as an important tool that can address discharges of pollutants from some facilities not automatically subject to the CAFO regulations and recognizes that the current regulatory program limits the ability to designate facilities as CAFOs. However, EPA denies the petition's requests to amend its regulations at this time. EPA would like to engage in a holistic assessment of how best to improve the CAFO regulatory program, both through the ELG detailed study and the AAWQ subcommittee, and to determine whether significant improvements can be made through improving implementation and enforcement of the existing regulations, or by other regulatory revisions, before deciding to revise its regulations as requested. While some of the petition's requests for regulatory revisions may be well-founded and appear relatively minor, a comprehensive strategy to strengthen the CAFO regulations—whether through improving implementation and enforcement or regulatory revisions—would be more coherent and effective than engaging in a piecemeal effort. Pursuing a comprehensive and well-informed approach would also be the most efficient use of EPA's limited rulemaking resources.

B. Petitioners ask EPA to strengthen NPDES permits for CAFOs to "adequately protect water quality."

a. Petitioners ask EPA to require water quality monitoring in CAFO permits and strengthen annual reporting requirements.

The petition asks EPA to ensure that CAFO NPDES permits require monitoring for a number of pollutants, including pH, total nitrogen, ammonia nitrogen, nitrate, total phosphorus, specific

conductance, biochemical oxygen demand, fecal coliform, temperature, and total suspended solids, and to require monitoring at points of discharge from the production area and land application area, as identified on a site-specific basis by a certified nutrient management planner. Petition at 35-37. Presumably this could be done either through rulemaking or potentially through EPA's oversight of state-issued CAFO permits, and EPA's issuance of CAFO permits in certain states. The Petition states that EPA must require all permitted CAFOs to conduct periodic, representative water sampling and submit the results regularly via discharge monitoring reports, as other industries must do. *Id.* at 37. The Petition notes that EPA rejected water quality monitoring requirements in the 2003 Rule, citing concerns about the difficulty of designing and implementing an effective program. *Id.* at 35, *citing* 68 Fed. Reg. at 7217. However, the Petition argues that some states have since demonstrated affordable and practicable monitoring schemes.

After the Petition was submitted to EPA, the Ninth Circuit Court of Appeals remanded EPA's general permit for CAFOs in Idaho based on its failure to require monitoring that would ensure compliance with its effluent limitations, in a case brought by some of the parties who submitted the Petition. *Food and Water Watch et al. v. EPA*, 20 F.4th 506 (9th Cir. 2021).[5] On July 18, 2023, EPA issued a draft permit for public comment to address the Ninth Circuit's holding that a CAFO permit must contain monitoring provisions. If, in addressing this remand, EPA determines that effective and practicable monitoring requirements are available, EPA may use them as a model for other federally issued permits, as well as state-issued permits, which comprise the significant majority of CAFO permits in this country. EPA can also use its findings on remand as a basis to review state-issued permits. If EPA determines that a state-issued permit does not comply with the requirements of the CWA or implementing regulations, it has the authority to object and potentially assume authority to issue the permit. *See* 40 CFR § 123.44. Furthermore, EPA intends to consider whether it should take any regulatory or implementation-related actions to advance monitoring in CAFO permits based on the results of the ELG detailed study and engagement with the AAWQ subcommittee. At this time, EPA denies the request to require all CAFOs to conduct a particular type of water sampling, whether via state program oversight and potential objections to state-issued permits or via a regulatory revision, pending the outcome of its considerations following the remand of the Idaho general CAFO permit as well as pending the ELG detailed study and the AAWQ subcommittee recommendations.

b. Petitioners ask EPA to strengthen annual reporting requirements.

Petitioners ask EPA to supplement CAFO annual reporting requirements to require reporting of the results of water quality monitoring discussed above, a summary of discharges from the land application area under the control of the CAFO; and manure transfer documentation that CAFOs are currently required to keep on-site. Petition at 37, *citing* 40 CFR §§ 122.42(e)(3), (4). The Petition states that these additions to existing annual report requirements will provide regulators and the public with more of the information they need to assess a facility's compliance status. EPA denies this request because, as noted above, before making regulatory changes it would first like to conduct a comprehensive evaluation of the best ways to strengthen the CAFO program through the ELG detailed study and the AAWQ subcommittee. Generally speaking, an annual report summarizes compliance with regulatory requirements. It would not make sense to modify these reporting provisions before EPA has completed its assessment as to whether to change the underlying regulatory requirements.

[5] Citing the 9th Circuit's decision in *Food and Water Watch*, a Colorado Administrative Court recently issued a decision ordering that the Colorado General Permit for CAFOs be modified to require representative monitoring for pollution from animal feedlots. *Center for Biological Diversity et al. v. Colorado Department of Public Health and Environment,* case no. WQ 2022-0001 (OAC May 16, 2023).

c. The petition asks EPA to revise the ELGs for CAFOs

The petition states that EPA must revise its ELGs for large CAFOs in a variety of ways, stating that the frequency of manure spills and widespread water contamination indicate that the existing ELGs are failing to adequately control CAFO pollution. Specifically, the petition asks EPA to revise the ELGs so that they: 1) apply to all CAFOs (not only Large CAFOs), 2) address pollutants of concern other than manure (e.g., metals, pharmaceuticals, hormones), 3) strengthen NMP requirements so that they protect water quality; 4) require impermeable synthetic liners for waste storage lagoons, 4) require CAFOs with ventilation systems to prevent or capture and divert pollutant releases, and if they cannot, clarify that such emissions constitute discharges that require permits; 5) prohibit land application on frozen, snow-covered, or saturated ground, or on steep slopes; 6) prohibit spray irrigation of manure, 7) mandate pads and covers for all manure stockpiles, and 8) require permitting agencies to use up-to-date rainfall data to determine the adequacy of manure storage.

In January 2023, EPA published its Effluent Guidelines Program Plan 15. In that Plan, it determined that it needs to gather additional information to inform a decision as to whether rulemaking to revise the ELG is warranted. See ELG Plan 15 at 6-3 and Appendix A. In Plan 14, EPA had concluded that it was not necessary to revise the CAFO ELGs at that time. This determination was challenged in the U.S. Court of Appeals for the Ninth Circuit. *Food and Water Watch v. EPA* (9th Cir. No. 21-71084). On February 25, 2022, the court granted EPA's motion for remand of that decision. ELG Program Plan 15 responded to that remand. On February 10, 2023, the court granted petitioner's motion for voluntary dismissal of the case.

In Program Plan 15 EPA explained that deciding whether to revise the CAFO ELGs is informed by understanding the extent to which the current ELGs control pollutant discharges from CAFOs, and the extent to which revisions could improve water quality protection. Identifying the potential effectiveness of ELG revisions requires up-to-date information about the extent to which CAFOs are discharging to "waters of the United States," technologies that are available and economically achievable for controlling CAFOs discharges, and implementation issues associated with currently applicable standards. EPA decided to gather additional information and conduct a detailed study on these issues in order to be able to make an informed decision as to whether to undertake rulemaking. See ELG Program Plan 15 at Appendix A. Specifically, EPA committed to 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 expressed an intent to gather information about new technologies and practices for reducing CAFO discharges, and their availability, effectiveness, and economic achievability. EPA noted that the focus of the study would include other issues and that its focus would evolve as EPA gathers information. Finally, EPA acknowledged that it has committed substantial resources to revising ELGs for other industrial sectors and that undertaking rulemaking for CAFOs at this time could divert resources from these efforts. The Agency is undertaking those rulemakings because it had sufficient information to determine that revising those ELGs would advance water quality protections and, in the absence of such information with regard to CAFOs, EPA did not want to divert resources from those efforts. EPA ultimately concluded that a detailed study would enable EPA to make an informed and reasoned decision as to whether to revise the CAFO ELGs. ELG Program Plan 15 at A-3.

C. Conclusion

In sum, for the above-stated reasons, EPA denies your petition for rulemaking. At the same time, we are enthusiastic about the road ahead and look forward 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