

Evidence of Discharge but Big Ag Discharges Responsibility

The powerful corporations that control CAFOs and slaughterhouses, along with meat and dairy trade associations and their attorneys, have consistently fought against more protective environmental regulations.

Congress charged the United States Environmental Protection Agency (EPA) with regulating CAFO operations under the Clean Water Act, but the EPA has delegated this authority to almost all the states. The states are supposed to adopt laws at least as stringent as federal law. Thus, while the EPA has authority to determine if CAFOs are discharging (allowing manure seepage or runoff) into our waters, this designation is left up to the states.

Since a 2011 federal court decision, the EPA cannot compel a CAFO to obtain a permit under the Clean Water Act, also known as an NPDES permit, unless it can prove that the CAFO actually discharges pollution. In practice, this means that the EPA and state agencies often rely on CAFOs to *admit* that they discharge the untreated manure of their animals to waters of the United States. NPDES permits require CAFOs to reduce pollution and increase transparency, and many CAFOs choose to avoid this responsibility by never disclosing that they discharge waste. Increasing the number of CAFOs with NPDES permits would help to address the problem of CAFO water pollution. However, as noted later in this analysis, an NPDES permit is far from a cure-all.

The EPA wrote in a 2022 report (p. 75):

"Many CAFOs are not regulated and continue to discharge without NPDES permits because successive court decisions have severely limited EPA's ability to require CAFOs to obtain an NPDES permit."

<https://www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf>

Becoming aware of the EPA's own fact-finding evidence, protectors of America's natural resources, in addition to responsible livestock producers, noted in a petition to the EPA:

"This [EPA 2022] report is a recent entry in the large, well-established, and growing body of evidence showing that CAFOs cause serious harm to human health, degrade the environment and disproportionately burden communities of color and low-income communities. To combat these long-standing and pervasive problems, EPA proposed 'exploring its authority to improve the effectiveness of CAFO regulations.' This petition does just that, and it identifies a clear first step."

<https://www.dtnpf.com/agriculture/web/ag/news/article/2022/10/26/enviros-epa-require-cwa-permits-wet>

The 2022 EPA report lent support to the legal petition based upon the Clean Water Act to take into account the harms that rural residents, and the environment suffer from CAFO pollution.

“Under the Administrative Procedure Act (APA), federal agencies must give interested persons the right to petition for the issuance, amendment, or repeal of a rule (5 U.S.C. § 553(e))”
<https://www.epa.gov/petitions>

A petition was filed in October, 2022 by environmental organizations, including Sierra Club.

https://earthjustice.org/wp-content/uploads/cafo_presumptionpetition_withexhibits_oct2022.pdf

Including an extensive index of scientific references, the petition strongly disputes the notion that wet-manure dairy and hog factory farms do not discharge. Not surprisingly, Big Ag disputes this clear evidence that nearly all factory farms discharge pollution in our nation's waterways.

Because of the CAFO pork, poultry and beef producers' stance, which discharges their responsibility, there now exist “21,237 Large CAFOs across the country, [and] only about 6,200 CAFOs hold CWA permits.” 71% of CAFOs are unregulated under the CWA.

<https://www.epa.gov/system/files/documents/2022-07/CAFO%20Status%20Report%202021.pdf>.

The standing Fifth Circuit Court of Appeals decision ruled: “we uphold the provisions of the 2008 Rule that impose a duty to apply [for CWA/NPDES permits] on CAFOs that are discharging.” <https://cite.case.law/f3d/635/738/>.

However, many CAFOs claim their facility does not discharge pollutants. Thus, it is now time for Americans to support what our petitioning organizations are asking for in the PETITION TO ADOPT A REBUTTABLE PRESUMPTION THAT LARGE CAFOs USING WET MANURE MANAGEMENT SYSTEMS ACTUALLY DISCHARGE POLLUTANTS UNDER THE CLEAN WATER ACT:

Petitioners—a nationwide coalition of citizens' groups and community advocacy, environmental justice, and environmental advocacy organizations—are pleased to submit this petition asking EPA to establish a rebuttable presumption that Large CAFOs using wet manure management systems actually discharge water pollution and, thus, must apply for CWA permits.

(“*Rebuttable presumption*” = A conclusion as to the existence or nonexistence of a fact that must be drawn when certain evidence has been introduced but that can be contradicted by evidence to the contrary.)

A Big Loophole Remains.

Establishing through the Petition that “discharges” are occurring is important. However even requiring an NPDES permit for all CAFOs does not solve the problem of CAFO pollution of surface water because USEPA rules also contain the **Agricultural Storm Water Exemption**. Under the agricultural stormwater exemption, a release of pollutants from land application is exempt from regulation under the Clean Water Act if the release is the result of precipitation and the land application was carried out in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of nutrients. That runoff is defined as agricultural storm water and is the same as unregulated runoff from crop fields not associated with CAFOs.

Some states require that all or most CAFOs in their jurisdiction obtain federal NPDES permits including an approved NMP. An NMP may reduce or minimize runoff to surface water, but does not prevent it. Massive quantities of manure and wastewater are regularly applied to crops fields all over the country without any independent supervision. This Agricultural Storm Water Exemption loophole will continue to stand in the way of adequately regulating CAFOs.

The rising chorus of concern from environmental advocates about water pollution from CAFOs is having some effect. In January of 2023 the EPA announced it was considering tougher regulations on livestock farm pollution.

<https://www.pbs.org/newshour/economy/epa-considers-tougher-regulations-on-livestock-farm-pollution>

References

“EPA Legal Tools to Advance Environmental Justice,” EPA, pg. 75

<https://www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf>

“Enviros Petition EPA on CAFO Regulation”, DTN (Data Transmission Network) by Todd Neeley, 10/26/2022

<https://www.dtnpf.com/agriculture/web/ag/news/article/2022/10/26/enviros-epa-require-cwa-permits-wet>

“Administrative petitions for rulemaking”, EPA

<https://www.epa.gov/petitions>

“PETITION TO ADOPT A REBUTTABLE PRESUMPTION THAT LARGE CAFOs USING WET MANURE MANAGEMENT SYSTEMS ACTUALLY DISCHARGE POLLUTANTS UNDER THE CLEAN WATER ACT”

https://earthjustice.org/wp-content/uploads/cafo_presumptionpetition_withexhibits_oct2022.pdf

“NPDES CAFO Permitting Status Report: National Summary,” End-year 2021, completed 07/20/22 [Type-in the above language if link fails]

<https://www.epa.gov/system/files/documents/2022-07/CAFO%20Status%20Report%202021.pdf>

March 15, 2011 · United States Court of Appeals for the Fifth Circuit · No. 08-61093
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<https://cite.case.law/f3d/635/738/>

“EPA considers tougher regulations on livestock farm pollution,” PBS Newshour, Traverse City, MI

<https://www.pbs.org/newshour/economy/epa-considers-tougher-regulations-on-livestock-farm-pollution>