

Disclaimer

The Administrator signed the following final action on the National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule on July 13, 2012. The EPA is submitting this final action for publication in the Federal Register.

While we've taken steps to ensure the accuracy of this Internet version of the final action, it's not the official version of the final action. Please refer to the official version in a forthcoming Federal Register publication or on GPO's Web site.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9 and 122

[EPA-HQ-OW-2011-0188; FRL-9693-5]

RIN 2040-AF22

National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed Rule; Withdrawal.

SUMMARY: On October 21, 2011, the EPA proposed a rulemaking to improve and restore water quality by collecting certain information about concentrated animal feeding operations (CAFOs). The EPA also solicited comments on improving water quality by promoting environmental stewardship and compliance rather than collecting facility-specific information. The EPA is withdrawing the proposal to collect CAFO information by rule. Instead, the EPA, where appropriate, will collect CAFO information using existing sources of information, including state NPDES programs, other regulations, and other programs at the federal, state, and local level. The EPA believes, at this time, it is more appropriate to obtain CAFO information by working with federal, state, and local partners instead of requiring CAFO information to be submitted pursuant to a rule. Today's withdrawal does not preclude the Agency from initiating the same or similar rulemaking at a future date.

ADDRESSES:

Docket: All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., confidential business information (CBI) or other information whose disclosure is restricted by statute. Certain other

material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Water Docket, EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., NW, Washington, D.C. 20004. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding federal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426.

FOR FURTHER INFORMATION CONTACT: For additional information, contact Becky Mitschele, Water Permits Division, Office of Wastewater Management (4203M), U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW, Washington, D.C. 20460; telephone number: (202) 564-6418; fax number: (202) 564-6384; e-mail address:

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SUPPLEMENTARY INFORMATION:

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A. *What Entities Are Potentially Interested in This Final Action?*

Entities potentially interested in this final action include animal feeding operations (AFOs), including AFOs that are CAFOs as defined in the National Pollutant Discharge Elimination System (NPDES) regulations at 40 CFR 122.23(b)(2), pursuant to section 502(14) of the Clean Water Act (CWA). An AFO is a CAFO if it meets the regulatory definition of a Large or Medium CAFO (40 CFR 122.23(b)(4) or (6)) or has been designated as a CAFO (40 CFR 122.23 (c)) by an authorized state or by the EPA. The following table provides the size thresholds for Large, Medium, and Small CAFOs in each animal sector.

Table 1 – SUMMARY OF CAFO SIZE THRESHOLDS FOR ALL SECTORS

Sector	Large	Medium ¹	Small ²
Cattle or cow/calf pairs.....	1,000 or more.....	300–999.....	Less than 300.
Mature dairy cattle.....	700 or more.....	200–699.....	Less than 200.
Veal calves.....	1,000 or more.....	300–999.....	Less than 300.
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Swine (weighing over 55 pounds).....	2,500 or more.....	750–2,499.....	Less than 750.
Swine (weighing less than 55 pounds).....	10,000 or more.....	3,000–9,999.....	Less than 3,000.
Horses.....	500 or more.....	150–499.....	Less than 150.
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Sheep or lambs.....	10,000 or more.....	3,000–9,999	Less than 3,000.
Turkeys.....	55,000 or more.....	16,500–54,999.....	Less than 16,500.
Laying hens or broilers (liquid manure handling system).	30,000 or more.....	9,000–29,999.....	Less than 9,000.
Chickens other than laying hens (other than a liquid manure handling system).	125,000 or more....	37,500–124,999	Less than 37,500.
Laying hens (other than a liquid manure handling system).	82,000 or more.....	25,000–81,999.....	Less than 25,000.
Ducks (other than a liquid manure handling system).	30,000 or more.....	10,000–29,999	Less than 10,000.
Ducks (liquid manure handling	5,000 or	1,500–	Less than 1,500.

system) | more..... | 4,999..... |

Notes:

¹May be designated or must meet one of the following two criteria to be defined as a Medium CAFO: (1) Discharges pollutants through a man-made device; or (2) directly discharges pollutants into waters of the United States which pass over, across, or through the facility or otherwise come into direct contact with the confined animals. 40 CFR 122.23(b)(6).

²Not a CAFO by regulatory definition, but may be designated as a CAFO on a case-by-case basis. 40 CFR 122.23(b)(9).

This table is not intended to be exhaustive. It provides a guide for entities likely to be interested in today's action. If you have questions regarding this action, consult the person listed in the preceding FOR FURTHER INFORMATION CONTACT section.

B. Legal Authority

This action withdraws the proposed NPDES CAFO Reporting Rule. 76 FR 65431, October 21, 2011. Today's final action is issued pursuant to sections 301, 304, 305, 308, 309, 402, 501, and 504 of the CWA (33 U.S.C. 1311, 1314, 1315, 1318, 1319, 1342, 1361, and 1364).

II. Background

A core provision of the CWA is the NPDES permit program which authorizes and regulates the discharge of pollutants from point sources to waters of the United States. 33 U.S.C. 1342. Section 502(14) of the CWA includes "concentrated animal feeding operation" (CAFO) in the definition of "point source." The EPA initially issued national effluent guidelines and standards (ELGs) for feedlots on February 14, 1974, and NPDES CAFO regulations on March 18, 1976. 39 FR 5704, February 14, 1974; 41 FR 11458, March 18, 1976.

In 2008, the EPA issued revised NPDES permitting regulations for CAFOs. 73 FR 70418, November 20, 2008. Subsequently, environmental groups and industry filed petitions for review of the 2008 rule, which were consolidated in the U.S. Court of Appeals for the Fifth Circuit. On May 25, 2010, the EPA signed a settlement agreement with the environmental petitioners in which the EPA committed to propose a rule, pursuant to CWA section 308, 33 U.S.C. 1318, to require all owners or operators of CAFOs to submit certain information to the EPA.

On October 21, 2011, the EPA proposed a rulemaking that contained regulatory options for obtaining specified information from CAFOs to support the EPA in meeting its water quality protection responsibilities under the CWA. The EPA solicited comment on the additional items listed in the settlement agreement that the Agency did not propose to collect. The EPA also requested comment on three alternative approaches to improve water quality including: collecting data from existing sources, requiring states to submit the information to the EPA, and expanding the EPA's network of compliance assistance and outreach tools. The Federal Register notice contains detailed descriptions and a discussion of each option proposed. 76 FR 65431, October 21, 2011.

In the settlement agreement, the EPA committed to take final action on the proposal by July 13, 2012. The settlement agreement does not commit the EPA to any particular final action. The settlement agreement expressly states that nothing in the agreement shall be construed to limit or modify the discretion accorded the EPA by the CWA or by general principles of administrative law. Today's final action fulfills the Agency's commitments per the settlement agreement with the petitioners.

III Summary of Comments Received

The comment period for the proposed rule ended on January 19, 2012, and the EPA received 1,403 comment letters. The commenters on the proposed rule included, among others, states, state associations, industry organizations, environmental advocacy groups, and individuals. The public comments and the EPA's supporting documents are available in Docket EPA-HQ-OW-2011-0188.

Generally, state and state association commenters questioned the need for new regulations in light of states already having the information the EPA was seeking by virtue of existing CAFO programs at the state and local level. Industry commenters opposed the proposed rule arguing, among other things, that much of the data had already been submitted to the states and the EPA and that the information could be collected through means other than a rule. Environmental advocacy groups commented in support of the proposed rule and argued that the EPA should collect more than the five items of information proposed. Individual comments ranged from opposition of the proposed rule to support of the proposed rule. Individuals who opposed the proposal commented that it would be too burdensome for CAFOs to comply with the proposed rule. Individuals who supported the proposal commented that the proposed rule is necessary to implement the CAFO program and that more information than proposed should be collected from CAFOs.

IV. The EPA's Considerations Since Proposal

Since the EPA proposed the rulemaking on October 21, 2011, the EPA conducted a preliminary evaluation of information publicly available on the Internet from all state permitting authorities, expanding on the effort the Agency conducted prior to proposal. Prior to proposal, the EPA evaluated a subset of existing state programs and identified publicly accessible site-specific information for CAFOs. That information informed the EPA's decision to develop the

voluntary state submission process and the alternative approach that relies on existing data sources in the proposed NPDES CAFO Reporting Rule. 76 FR 65437, October 21, 2011. The docket contains examples of CAFO site-specific information that is publicly available on the Internet.

The EPA's post-proposal evaluation of available information included a review of 37 state permitting authority websites to determine if information about CAFOs is accessible online. The EPA notes that although, at present, there are 47 states authorized to implement the NPDES program, a number of those states either have no CAFOs or are not authorized to implement the CAFO portion of the NPDES program. In states where the EPA administers the NPDES program for CAFOs, the EPA has information for CAFOs with NPDES permit coverage from permit applications or notices of intent. The review of the 37 state permitting websites yielded information on 7,473 operations that confine animals. Some of the information includes operations that are not federally defined as CAFOs or operations that are required under state law to have state non-NPDES permits. The EPA compiled these results into a summary report, which can be found in the docket.

In July 2012, the EPA also established a memorandum of understanding (MOU) with the Association of the Clean Water Administrators (ACWA) that specifically will assist the Agency in collecting information about CAFOs. ACWA is an independent, nonpartisan, non-profit corporation of state and interstate water program managers. The EPA believes cooperation with the states will assist the EPA in obtaining needed CAFO information. This collaborative effort between the EPA and ACWA will focus on identifying CAFOs and assist the EPA in obtaining pertinent information about CAFOs on a state-by-state basis.

V. The EPA's Rationale for Withdrawal of the Proposed Rule

In today's final action, the EPA has chosen not to promulgate a regulation. Instead, the EPA is pursuing an approach that relies on a range of existing sources of information, other regulations, and other programs at the federal, state, and local level to gather basic information about CAFOs. The EPA believes at this time it is more appropriate to obtain CAFO information from existing sources. Some states commented that they have the information proposed to be collected by the rule and expressed interest in working with the EPA to exchange that information. Since the EPA has established relationships with states, as well as the U.S. Department of Agriculture (USDA), U.S. Geological Survey (USGS), and other federal partners, the EPA believes that working through existing partnerships will yield timely and useful results in obtaining much of the needed CAFO information. In developing animal agricultural programs since the 2003 CAFO rule, states have longstanding relationships with owners and operators of operations that confine animals. These relationships will facilitate information sharing between relevant stakeholders.

CAFOs play an important role in water quality planning, due to the fact that they are potential sources of nitrogen, phosphorus, pathogens, and other pollutants. The EPA continues to believe that the gathering and evaluating of information about CAFOs can assist local, state, and federal governments, regulated entities, interest groups, and the public in making more informed decisions toward meeting the objective of the CWA to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). EPA explained how information about CAFOs would assist in implementation of CWA programs in the proposed rule. 76 FR 65436, October 21, 2011. Through the approach outlined in this notice, the EPA will seek to collect CAFO information items listed in the proposed rule, as well

as other information that is available from existing resources, which includes continuing to work with USDA, USGS, and other agencies to address sources of nutrient pollution.

Based on the comments received, the EPA believes that it can obtain much of the desired CAFO information from federal agencies, states, and other existing data sources. The EPA noted in the proposal that the existing NPDES permitting program requires CAFOs with NPDES permit coverage to submit information as part of the application process as well as in annual reports. 76 FR 65439, October 21, 2011. Pursuant to 40 CFR 122.21(i), information on a CAFO permit application must include the following: 1) name of the owner or operator, 2) facility location and mailing address, 3) latitude and longitude of the production area (entrance of the production area), 4) a topographic map of the geographic area in which the CAFO is located showing the specific location of the production area, 5) specific information about the number and type of animals, whether in open confinement or housed under roof, 6) the type of containment and storage and total capacity for manure, litter, or process wastewater, 7) the total number of acres under control of the applicant available for land application of manure, litter, or process wastewater, 8) estimated amounts of manure, litter, and process wastewater generated per year, 9) estimated amounts of manure, litter, and process wastewater transferred to other persons per year, and 10) a nutrient management plan that at a minimum satisfies the requirements specified in 40 CFR 122.42(e), including, for all CAFOs subject to the effluent limitations and standards, the requirements of 40 CFR 412.4(c), as applicable. Also, pursuant to 40 CFR 123.24(b)(3), a memorandum of agreement between State Directors and the Regional Administrators specifies the frequency and content of reports, documents, and other information which the state is required to submit to the EPA. States are required to allow the EPA to routinely review state records, reports, and files relevant to the administration and enforcement

of the approved program. See also 40 CFR 123.41, 40 CFR 123.43. Because these two provisions are part of the NPDES program, the EPA believes, at this time, NPDES authorized states have basic information from the permit application for at least those CAFOs with NPDES permit coverage, and that states will share that information with the EPA. In states where the EPA administers the NPDES program for CAFOs, the EPA has information for CAFOs with NPDES permit coverage from permit applications or notices of intent.

The EPA believes an efficient approach that does not duplicate efforts is the appropriate next step to collecting CAFO information. Thus, the EPA believes that before determining whether to issue a rule requiring CAFOs to submit information, the Agency should obtain existing information from federal agencies, states, local partners, and other resources that already collect data. This decision also recognizes that many CAFOs have provided their information to some governmental entity, although perhaps not to the EPA. While the EPA may not be the entity that received the information initially, it is reasonable at this time for the EPA to work with its federal, state, and local partners to obtain existing information rather than asking CAFOs to re-submit information that they have already submitted to another governmental entity. Collecting existing information, evaluating it, and compiling it in one format will better inform the Agency of what additional information may be needed and the best way to collect that information, if necessary.

Continued implementation of the permitting program for CAFOs likely will result in improvements in data tracking and availability and analysis of CAFO information. For example, some states with established programs have comprehensive data on CAFOs. The EPA described existing data sources in the proposed CAFO Reporting Rule, of which state permitting authorities are just one source. In addition to working with the state permitting authorities to

exchange information mainly on CAFOs with NPDES permit coverage, the EPA may need to use other existing sources of data to obtain information about CAFOs without NPDES permit coverage. The EPA acknowledges some states will have information about CAFOs without NPDES permit coverage through other state programs, such as state operating permits. To fill in information gaps, the Agency may use existing tools, such as site visits and individual information collection requests.

At this time, the EPA has concluded that working with USDA and states, who maintain direct relationships with CAFO owners or operators is an effective approach to obtaining CAFO information that will minimize the burden on states and CAFOs.

VI. Impact Analysis

Because the EPA is not promulgating a regulatory reporting requirement, there are no compliance costs or impacts associated with today's final action.

VII. Statutory and Executive Order Reviews

Today's action does not establish new regulatory requirements. Hence, the requirements of other regulatory statutes and Executive Orders that generally apply to rulemakings (e.g., the Unfunded Mandate Reform Act) do not apply to this action.

National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding
Operation Reporting Rule, Withdrawal

List of Subjects

40 CFR Part 9

Environmental protection, Reporting and recordkeeping requirements.

40 CFR Part 122

Administrative practice and procedure, confidential business information, hazardous
substances, reporting and recordkeeping requirements, water pollution control.

Dated: July 13, 2012

A handwritten signature in black ink, appearing to read 'Lisa P. Jackson', written over the printed name.

Lisa P. Jackson,

Administrator