No. 20-71554

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOOD & WATER WATCH, INC., et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

On Petition for Review of Final Action of the United States Environmental Protection Agency

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RESPONDENT'S ANSWERING BRIEF

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INTRODUCTION

Petitioners here challenge the lack of continuous effluent limit monitoring in the EPA's National Pollutant Discharge Elimination System ("NPDES") General Permit for Concentrated Animal Feeding Operations ("CAFOs") in Idaho (the "Idaho Permit" or "Permit"). This petition should be denied. The Idaho Permit both implements a longstanding national regime of CAFO regulatory requirements and imposes discharge limitations, monitoring requirements, and sampling requirements that go beyond those in the regulations, and therefore, the Permit's monitoring requirements are reasonable.

Under the Clean Water Act, EPA regulates discharges from point sources through NPDES permits which establish effluent limits and conditions for those discharges. Through a series of rulemakings, EPA crafted a regime of NPDES regulations, including national effluent limitations guidelines and associated permitting requirements[1] for discharges from Concentrated Animal Feed Operations ("CAFOs"). The national CAFO regulations were challenged in federal courts of appeal and largely upheld, as relevant here. These CAFO regulations must be implemented in NPDES permits for CAFOs, and the Idaho

[1] For convenience, in this brief we generally refer to the underlying CAFO effluent limitations and associated CAFO permit rules collectively as "CAFO regulations" as these related requirements were developed and promulgated together in the same rulemakings.

Permit does so. *See* 40 C.F.R. § 122.42(e) ("Any permit issued to a CAFO must include....").

The CAFO regulations prohibit discharges from the production area except under limited circumstances, and provide that manure and other wastewater must be applied to land in accordance with site-specific nutrient management practices. In addition, the regulations include monitoring requirements that require permittees to take steps to ensure that the effluent limitations in the Idaho Permit are met.

To the extent that Petitioners are challenging the monitoring requirements established in the CAFO regulations through lengthy rulemaking processes over two decades, and that have withstood previous legal challenges—their claims are untimely and should be rejected. To the extent that Petitioners are challenging the adequacy of the Permit's *additional* monitoring requirements, which are more stringent than the requirements in the CAFO regulations, those claims also cannot stand.

The question before the court is whether the monitoring requirements can "assure compliance with permit limitations" and are "sufficient to yield data which are representative of the monitored activity." 40 C.F.R. §§ 122.44(i)(1); 122.48(b), 122.41(j)(1). The permit is well within the "broad authority" the Clean Water Act provides EPA to set monitoring requirements for NPDES permits. *U.S. Steel Corp. v. Train*, 556 F.2d 822, 850 (7th Cir. 1977). EPA's issuance of the Idaho

Permit, incorporating the CAFO regulations as well as additional discharge controls and monitoring requirements, was reasonable and not arbitrary and capricious. This petition should be denied.

STATEMENT OF JURISDICTION

The Clean Water Act, 33 U.S.C. § 1369(b)(1)(F), authorizes review of any EPA action "in issuing or denying any permit under [33 U.S.C. § 1342]." A petition for review of an NPDES permit must be filed within 120 days from the date of permit issuance. 33 U.S.C. § 1369(b)(1). EPA published its issuance of the Idaho Permit on May 13, 2020. The petition here was filed within 120 days of the Idaho Permit's issuance and the challenge to the Idaho Permit therefore is timely. As discussed herein, however, to the extent that Petitioners' challenge EPA's underlying 2003 and 2008 regulations, the petition is untimely.

STATEMENT OF THE ISSUE

NPDES permits must include monitoring provisions that ensure compliance with the permit's effluent limitations and are representative of the monitored activity—that is, controls on discharges to waters of the United States from CAFOs. The monitoring provisions in the Idaho Permit implement the requirements in EPA's CAFO regulations, and go beyond those requirements. Specifically, the Idaho Permit contains a monitoring regime that includes, among other things, routine daily and weekly visual inspections of the production areas,

sampling of manure and soil to determine proper land application rates to avoid discharges, visual inspections of the land application equipment, and sampling and reporting of any discharges from manure and wastewater storage structures that may occur. Given that the monitoring requirements in the permit are adequate to assure compliance with the permit's effluent limitations and are representative of the monitored activity:

a. Is Petitioners' challenge to the Idaho Permit's monitoring requirements, which are consistent with EPA's 2003 CAFO regulations, an untimely attack on those regulations?

b. Is the Idaho Permit's monitoring regime, which faithfully implements the CAFO regulations, arbitrary and capricious?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations not in Petitioners' addendum are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

I. Legal Background

A. The Clean Water Act and NPDES Permits

The Clean Water Act generally prohibits the "discharge of any pollutant" from a "point source" to waters of the United States unless authorized by another provision of the Act. Principal among those provisions is the National Pollutant

Discharge Elimination Systems (NPDES), a permitting program for direct dischargers). 33 U.S.C. §§ 1311, 1342. A "point source" is defined to include a "concentrated animal feeding operation," but expressly does not include "agricultural stormwater discharges and return flows from irrigated agriculture." *Id.* § 1362(14). Under the Clean Water Act, EPA, or an authorized State, may issue NPDES permits that authorize the discharge of pollutants subject to effluent limitations and conditions imposed by 33 U.S.C. §§ 1311, 1314, 1316, 1341, and 1343. *Id.* § 1342. At the time the Idaho Permit was issued, EPA was the permitting authority.[2]

The Clean Water Act provides for two types of effluent limits to be included in NPDES permits: technology-based effluent limits and water quality-based effluent limits. Technology-based effluent limits reflect a specified level of pollutant-reducing technology available and economically achievable for the type of facility being permitted. See 33 U.S.C. §§ 1311(b)(1)(A), 1314. Where technology-based limits are not as stringent as necessary to meet water quality

[2] General permitting authority for NPDES permits transferred to the State of Idaho on July 1, 2020. However, pursuant to the NPDES Memorandum of Agreement between the State of Idaho Department of Environmental Quality and EPA Region 10 ("MOA"), EPA retains jurisdiction over the Idaho Permit until this Petition is resolved. MOA at VI.3.b, *available at*: https://www.deq.idaho.gov/media/60183555/ipdes-moa-0717.pdf.

standards, a more stringent water quality-based effluent limit for a particular pollutant must be included in an NPDES permit. See 33 U.S.C. § 1311(b)(1)(C).

Effluent limitations, both technology-based and water quality-based, can be expressed as numeric or narrative limits. Of note, instead of numeric effluent limits, a permit may require "best management practices" (BMPs) to control pollutants when those BMPs are "reasonably necessary to achieve effluent limitations and standards." 40 C.F.R. § 122.44(k)(4).

The Clean Water Act gives EPA broad discretion regarding monitoring requirements in NPDES permits. The statute requires the owner or operator of a point source to use "monitoring equipment or methods" to sample effluents "in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe." 33 U.S.C. § 1318(a). The regulations implementing this provision require that for any NPDES permit, "samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity" and state that permittees must maintain records of all monitoring activities. 40 C.F.R. § 122.41(j)(1)-(3). Additional monitoring requirements may be required, when applicable, "to assure compliance with the permit limitations," and may include "other measures as appropriate" rather than monitoring of the mass of effluent discharged. 40 C.F.R. § 122.44(i).

The monitoring provisions in the Permit must be judged against these requirements.

B. EPA's Regulation of CAFOs

EPA has long regulated wastewater from CAFOs within the NPDES permitting scheme of the Clean Water Act. CAFOs generate significant quantities of manure, litter, and process wastewater. CAFOs handle this waste in a variety of ways, but predominantly by collecting and storing manure and wastewater in large storage structures and then "land applying" the wastes—that is, spreading them on cropland as fertilizer. As a result, EPA establishes controls on CAFO discharges from two areas: (1) production areas, which are defined as the animal confinement areas and other parts of the facility, including manure storage areas, raw materials storage areas, and waste containment areas; and (2) land application areas, which are defined as land to which manure, litter, or process wastewater from the production area is or may be applied. 40 C.F.R. § 122.23(b)(3), (8).

1. History of EPA's CAFO Regulations

In January 2001, EPA proposed a comprehensive revision of the then-existing regulations for CAFOs. 66 Fed. Reg. 2960 (Jan. 12, 2001). After a two-year rule making process, in February 2003 EPA promulgated its final Rule (the "2003 Rule"). 68 Fed. Reg. 7176 (Feb. 12, 2003). This rule included effluent limitations guidelines (ELGs) and associated permit requirements for CAFOs.

Among other things, the rule required permittees to develop and implement site-specific nutrient management plans, and clarified the relationship between wet weather discharges from CAFOs and the agricultural stormwater exemption. *Id.*

During the rulemaking process for the 2003 Rule, EPA "considered, but rejected, requiring CAFOs to sample surface waters adjacent to feedlots and/or land under control of the feedlot to which manure is applied" because of concerns about the difficulty of designing and implementing a monitoring program capable of "detecting, isolating, and quantifying the pollutant contributions reaching surface waters from individual CAFOs." 68 Fed. Reg. 7217. EPA also rejected requirements in the final rule establishing controls on discharges to groundwater with a hydrologic connection to surface waters, including requirements to have CAFOs sample groundwater to demonstrate there is no discharge. *Id*. at 7216. The site-specific variation and scientific uncertainties of the groundwater to surface water connection would have rendered a national technology-based standard inappropriate. *Id.*

Environmental groups challenged the monitoring requirements in the 2003 Rule, as well as the exemption for agricultural stormwater, in the Second Circuit. *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486 (2d Cir. 2005). The Second Circuit upheld both provisions. *Id.* at 509, 515. The court rejected the argument that EPA should have required groundwater monitoring and discharge controls for

both production and land-application areas, finding EPA's approach, based on site-specific considerations, was reasonable. *Waterkeeper*, 399 F.3d at 509. Further, the court upheld EPA's interpretation that the statutory agricultural stormwater exemption only applies when a CAFO land-applies in accordance with site specific nutrient management practices. *Id.* at 509. Finally, the court found that the 2003 Rule unlawfully allowed permitting authorities to issue permits without reviewing the terms of the nutrient management plans.

EPA revised its CAFO regulations in 2008 (the "2008 Rule") and again in 2012, clarifying which CAFOs are required to obtain an NPDES permit, but did not change the applicable effluent limitations and permitting requirements. 73 Fed. Reg. 70,481 (Nov. 20, 2008). The 2008 Rule was challenged in the Fifth Circuit, and largely upheld, as relevant here. *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th Cir. 2011).

2. EPA's CAFO Regulations

The 2003 CAFO regulations include effluent limitations guidelines in 40 C.F.R. part 412 and permitting requirements in 40 C.F.R. part 122. These national regulations establish a technology-based requirement for production areas that requires "no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. from the production area." 40 C.F.R. §§ 412.12(b), 412.31(a)(1)(i)-(ii), 412.43(a)(1). The sole exception to this "no discharge"

prohibition is when "precipitation causes an overflow of … process wastewater" provided "the production area is designed, constructed, operated and maintained to contain manure, litter, and process wastewater including the runoff and the direct precipitation from a 25-year, 24-hour rain event" and the production area is "operated in accordance with" specified "additional measures and records." *Id.*

In addition, the CAFO regulations establish a requirement to develop and implement a nutrient management plan that contains BMPs to address discharges from the land application areas. 40 C.F.R. § 122.42(e)(1). The nutrient management plan is required to address "the form, source, amount, timing, and method of application of nutrients … to achieve realistic production goals, while minimizing nitrogen and phosphorus movement to surface waters." 40 C.F.R. § 412.4(c)(1).

To determine the appropriate application rate, the CAFO regulations require CAFOs to regularly sample both manure nutrient content and soil nutrient content of every field to which they land apply manure, litter and process wastewater. 40 C.F.R. § 412.4(c)(3). When manure, litter, and process wastewater are applied in accordance with the nutrient management plan (e.g., at agronomic rates), precipitation-related discharges of these substances are "agricultural stormwater," which the Clean Water Act exempts from permitting requirements. *See* 33 U.S.C. § 1362(14); 40 C.F.R. § 122.23(e).

Since nearly all pollutant controls specified in the regulations are best management practices, the accountability requirements, (i.e., monitoring and inspection conditions) are appropriately suited to that framework. Accordingly, CAFOs are also required to conduct an array of inspections and sampling to confirm that BMPs are functioning properly, and to maintain records to documenting the nutrient management plan implementation. 40 C.F.R. § 122.42(e)(2). The nutrient management plan requires CAFOS to use manure at an appropriate agronomic rate, i.e., at a rate that the crops will use; if it does so, any remaining discharges are deemed agricultural stormwater. See 40 C.F.R. § 122.23(e); *see also Waterkeeper*, 399 F.3d at 509. The CAFO must also sample soil for phosphorous content at least once every five years. 40 C.F.R. §§ 412.4(c)(3), (4) and 412.37(a)(1)(i)-(iii). In addition, CAFOs must report annually to the permitting authority all sampling data, inspection results and other information demonstrating permit compliance. 40 C.F.R. § 122.42(e)(4).

Discharges not addressed by the CAFO regulations must be controlled through technology-based effluent limits (and, if necessary, water quality-based effluent limits) developed on a case-by-case basis by the permit writer using best professional judgement, or a combination of the two methods. 40 C.F.R. § 125.3.[3]

[3] The national effluent limitations guidelines and standards for CAFOs are found at 40 C.F.R. part 412. Permitting requirements for CAFOs are found in 40 C.F.R. part 122.

In issuing the revised CAFO regulations in 2008, EPA expressly stated its expectation that most CAFO permitting would occur through general permits. 2008 Rule, 73 Fed. Reg. at 70,437. This has proven true. States and EPA often issue general permits to address discharges from CAFOs as general permits provide an efficient and lawful way to provide permit coverage to dischargers. See, e.g., *Environmental Defense Center v. EPA*, 344 F.3d 832, 853 (9th Cir. 2003) (General permitting has long been recognized as a lawful means of authorizing discharges); *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). Most general permits, including this one, provide coverage to dischargers who file a notice of intent to be covered. Excerpts of Record, Volume 1, "1 E.R." 3 (Permit at I.B).

II. Factual Background

A. The Idaho Permit

The Idaho Permit is a general permit for CAFOs in Idaho[4] that both implements the national CAFO effluent limitation guidelines described above and goes beyond them. The Permit establishes discharge prohibitions as well as inspection and monitoring requirements, where necessary, for both the production

[4] The Permit applies to CAFOs in the State of Idaho, excluding Indian Country, that meet the eligibility requirements in Section I.A of the Permit. 1 E.R. 3 (Permit at I.A).

and land-application areas. 1 E.R. 8-9 (Permit at II.A.2.a, e); 1 E.R. 10 (Permit at II.B.7), implementing 40 C.F.R. §§ 122.42(e) and part 412. In addition, the Permit requires that the CAFO owner or operator develop and implement a nutrient management plan. 1 E.R. 11 (Permit at III.A); 40 C.F.R. § 412.4(c)(1). The nutrient management plan "must include site-specific practices and procedures" to minimize the discharge of nitrogen and phosphorus to waters of the United States. *Id.*

1. Production Area Requirements

Under the Permit, as in the CAFO regulations, there must be "no discharge" from the production area, with one narrow exception —when precipitation causes an overflow from the production area and the production area has been "designed, constructed, operated, and maintained" to contain wastes, as well as the runoff and precipitation, from a 25-year, 24-hour storm event. 1 E.R. 7-8 (Permit at II.A.1.a); 40 C.F.R. §§ 412.12(b), 412.31(a)(1)(i), 412.43(a)(1). Further, the Permit requires CAFOs to use specific runoff and design calculations to ensure that the storage capacity is met. 1 E.R. 8 (Permit at II.A.1.b). Sufficient storage capacity reflects a properly designed and constructed storage structure. 1 E.R. 11 (Permit at III.A.2.a).

To ensure any deficiency is identified before a discharge occurs and necessary corrective action is taken, the Permit requires "routine visual

inspections" of the CAFO production area and specifies that at "a minimum" the following elements must be visually inspected. 1 E.R. 8 (Permit at II.A.2.a); 40 C.F.R. § 412.37(a)(1).

Daily	• All water lines, including drinking water lines and cooling water lines.
Weekly	• Storm water diversion devices • Runoff diversion structures • Devices channeling contaminated storm water to the wastewater or manure storage structures • Manure, litter, and process wastewater impoundments, storage and containment structures.

During the weekly inspection of the impoundments, or storage and containment structures, the permittee must also note, and record, the level of liquid present against a "depth marker" that "clearly indicates the minimum capacity necessary to contain the runoff and direct precipitation of the 25-year, 24-hour rain fall event." 1 E.R. 8 (Permit at II.A.2.a-b); 40 C.F.R. § 412.37(a)(2). If any deficiencies are found, the Permit requires that they be corrected as soon as possible. 1 E.R. 8 (Permit at II.A.2.c); 40 C.F.R. § 412.37(a)(3).

In addition to the specific requirements in the CAFO regulations, the Idaho Permit requires that if there is a discharge or overflow to waters of the U.S. from a manure or wastewater storage structure—for any reason—the permittee is required

to sample that discharge within 30 minutes of detection of the discharge and analyze the sample for total nitrogen, nitrate nitrogen, ammonia nitrogen, total phosphorus, *E. coli*, five-day biological oxygen demand, total suspended solids, pH and temperature, at a minimum. 1 E.R. 21-22 (Permit at IV.D). The requirement to sample the discharge, and analyze that sample, is not part of the CAFO regulations but rather is a site-specific condition of the Idaho Permit. Further, in the event of an unauthorized discharge, the permittee must notify EPA Region 10 within 24 hours and the relevant state and county authorities within 5 days. 1 E.R. 20-21 (Permit at IV.C). Similar to the overflow sampling requirement, this provision goes beyond what is required in the CAFO regulations and ensures that unauthorized discharges are reported.

2. Land Application Requirements

The Idaho Permit implements the requirements in the national CAFO regulations that establish best management practices for land application areas developed and implemented via a nutrient management plan. 1 E.R. 13 (Permit at III.A.2.f, h); 40 C.F.R. §§ 122.42(e)(1), 412.4(c)(5). The nutrient management plan must set forth field-specific land application rates that minimize the transport of phosphorus and nitrogen from the fields to waters of the United States and must establish buffers or equally effective alternative conservation practices to reduce

pollutant transport to waters of the U.S. 1 E.R. 13 (Permit at III.A.2.f, h and II.B.8); 1 E.R. 116; 40 C.F.R. § 412.4(c)(1), (5).

To ensure land-application rates correspond to crop needs, and are consistent with the CAFO regulations, the nutrient management plan requires CAFO operators to sample the stored manure, litter, and process wastewater to determine land application rates, at least once annually for nitrogen and phosphorus. 1 E.R. 9-10 (Permit at II.B.6); 40 C.F.R. § 412.4(c)(3). In addition, the Idaho Permit requires annual sampling, as opposed to the five-year sampling requirement established in the regulations. Compare 1 E.R. 9-10 (Permit at II.B.6) with 40 C.F.R. § 412.4(c)(3). The results of this sampling are used to develop an "annual nutrient budget." 1 E.R. 9 (Permit at II.B.2); and E.R. 14 (Permit at III.A.2.h); 40 C.F.R. § 412.4(c)(3).

The Idaho Permit goes beyond the national requirements in establishing two water quality-based effluent limits applicable to CAFO land application areas. First, the Idaho Permit prohibits dry weather discharges from land-application areas. 1 E.R. 10 (Permit at II.B.9). If a precipitation-related discharge from the CAFO land application area occurs and the permittee is properly implementing the nutrient management plan, precipitation-related discharges constitute "agricultural stormwater," which the Clean Water Act exempts from permitting requirements. 33 U.S.C. § 1362(14); 40 C.F.R. § 122.23(e).

Second, the Idaho Permit establishes a water-quality based effluent limitation that prohibits land application on frozen, snow-covered, or soil saturated from rainfall, snowmelt, or irrigation—or when current or predicted weather is capable of producing such conditions. 1 E.R. 10 (Permit at II.B.10). As with discharges from the production area, if an unauthorized discharge from the land application area occurs, the permittee must report the discharge to EPA within 24 hours and must also report the discharge to the additional agencies set forth in the Permit within five days. 1 E.R. 20-21 (Permit at IV.C.1). As previously stated, the requirement to report unauthorized discharges from the land application area is an additional requirement beyond the monitoring measures required under the national CAFO regulations.

Finally, CAFO operators must maintain records documenting the implementation of the nutrient management plan. 1 E.R. 19 (Permit at IV.A.2.a-f); 40 C.F.R. § 412.37(c). This includes maintaining a record of each instance of land application, including the application method, soil surface conditions, weather conditions, and amount of waste applied. *Id.*

B. Idaho Permit Procedural History

On October 23, 2019, EPA issued for public comment a draft Permit and Fact Sheet for the Idaho Permit. 84 Fed. Reg. 56,809. The comment period closed on December 9, 2019. *Id.* EPA received public comments from various

individuals, including Petitioners. 1 E.R. 204-40. Petitioners submitted numerous comments on the Permit including comments related to the monitoring conditions in the Permit. *Id.* at 231-32. Petitioners argued, as they do in their Petition, that the Idaho Permit should include "effluent monitoring"—and suggest that this monitoring would "likely include" monitoring surface water, groundwater, and discharge points from production areas (such as ditches), as well as at tile drain outfalls at fields where CAFO waste is applied. *Id.* at 232.

EPA responded to those comments by referring to their response to an earlier, similar comment—which stated that the existing CAFO regulations "prohibit regular / ongoing discharges and establish monitoring requirements in CAFO permits that focus on maintaining that framework." *Id.* at 220. EPA then explained that because this regulatory framework—including "daily and weekly inspections in the production area, manure and soil analyses, and land application equipment inspections" is already incorporated in the permit, EPA did not change the Idaho Permit as a result of the comment. 1 E.R. 220. EPA issued the Permit on May 13, 2020. 1 E.R. 204-40; 1 E.R. 202-03.

SUMMARY OF ARGUMENT

Petitioners assert that because the Idaho Permit does not include continuous effluent monitoring, it is arbitrary and capricious. This, however, ignores that the Idaho Permit's monitoring requirements implement, and exceed, the requirements

set out in the CAFO regulations that were first promulgated in 2003, as required. 40 C.F.R. § 122.42(e) ("Any permit issued to a CAFO must include...."). To the extent that Petitioners' quarrel is with those permit requirements specified in the regulations themselves, the time to have challenged those regulations has long since passed. The Clean Water Act sets out a statutory time limit for petitions for review of agency actions—including promulgating any effluent limitation—requiring that such an "application shall be made within 120 days" from the date of promulgation. 33 U.S.C. § 1369(b)(1). Statutory time limits, such as these, "are jurisdictional in nature such that if a challenge is brought after the statutory time limit" a court is "powerless to review the agency's action." *Texas Municipal Power Agency v. EPA*, 799 F.2d 173, 174-75 (5th Cir. 1986); *Ackels v. EPA*, 7 F.3d 862, 869 (9th Cir. 1993)(holding petitioners' challenge to national effluent limitations guidelines time-barred).

Even if Petitioners challenge is not time barred, the Idaho Permit's monitoring requirements comply with the Clean Water Act. Petitioners argue that the Permit "does not contain the required effluent monitoring to confirm whether a CAFO, through the implementation of these practices, achieves these effluent limits." Opening Brief at 24. This argument fails, however, because the Clean Water Act does not mandate continuous effluent monitoring, and instead grants EPA broad discretion to tailor monitoring requirements to the permit at issue.

Petitioners ignore the broad discretionary language in the Clean Water Act that gives EPA discretion to include monitoring requirements only when they are "required to carry out the objective" of the NPDES permitting regime. 33 U.S.C § 1318(a). While the Act states that permits shall include conditions to assure compliance—it notably does not specify required conditions, instead granting the Administrator discretion to prescribe "such other requirements as he deems appropriate." *Id.* § 1342(a)(2).

Here, EPA's implementation of the monitoring regime set out by the long-settled CAFO regulations is inherently reasonable. Further, to the extent the Permit incorporates additional requirements beyond those required by the CAFO regulations, the monitoring regime as a whole is a reasonable exercise of EPA's discretion to require monitoring that can "assure compliance with permit limitations" and are "sufficient to yield data which are representative of the monitored activity." 40 C.F.R. §§ 122.44(i)(1); 122.48(b), 122.41(j)(1).

The Idaho Permit, implementing the CAFO regulations, prohibits discharges into waters of the United States except in limited circumstances. To ensure compliance, again implementing the CAFO regulations, the Permit contains inspection provisions to determine if discharges are occurring, as well as monitoring and reporting requirements where a discharge does occur.

For production areas, the Idaho Permit implements the regulation's requirements for daily and weekly visual inspections of impoundments and other structural controls such as diversions and storage and containment structures designed and maintained to ensure there are no discharges. The Permit also requires noting—and recording—the depth of the stored waste on a weekly basis. If there is a discharge from any manure or wastewater storage structure, permittees must immediately sample the discharge and report it to EPA as well as state and local officials.

For land application areas, the Permit requires permittees to sample both the manure and the soil in each field to determine the relevant nitrogen and phosphorus levels. Based on this sampling, permittees develop a nutrient budget for each field and, using the methodology identified in the Permit, determine an agronomic application rate for each field designed to minimize any discharges into waters of the United States. When permittees land apply in accordance with the nutrient management plan, wastewater discharges from the land application area are exempt agricultural stormwater. Permittees are required to record, and report, information on each land application—including the volume applied and weather conditions at the time of application. The Permit prohibits dry weather discharges, but if one occurs, the permittee is required to report the unauthorized discharge to EPA within 24 hours. These provisions are sufficient to ensure compliance with

the Permit and are representative of the monitored activity under the Clean Water Act.

Petitioners' attempt to analogize the Idaho Permit to inapposite point source categories—including wastewater treatment plants, slaughterhouses, or aquaculture facilities—but such analogies fail. While effluent monitoring may be appropriate for point sources with continuous or recurring discharges that does not mean effluent monitoring is required for all NPDES permits.

Finally, Petitioners assert that the lack of ongoing effluent monitoring inhibits the ability of citizens to bring enforcement actions. This claim lacks merit because the Idaho Permit requires permittees to report unauthorized discharges, and—for discharges from the production area—sample those discharges. Since the Idaho Permit essentially prohibits discharges with limited exceptions, the only information that a citizen with standing needs to bring a citizen suit is the fact that an unauthorized discharge to waters of the United States took place. Therefore, the Idaho Permit provides ample information that would allow citizens to participate in the permitting process, as the CWA envisioned, including bringing citizen suits under the Clean Water Act.

While Petitioners may prefer that the Permit contain additional or different types of monitoring requirements, Petitioners have failed to show that EPA was

arbitrary and capricious in issuing the Idaho Permit. Accordingly, this petition should be denied.

STANDARD OF REVIEW

General permits that EPA issues under the Clean Water Act are reviewed pursuant to Section 509 of the Clean Water Act. 33 U.S.C. § 1369(b)(1)(F). Agency action may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Northwest Coalition for Alternatives to Pesticides v. EPA*, 544 F.3d 1043, 1047 (9th Cir. 2008) (internal quotation marks omitted). The arbitrary and capricious standard is "highly deferential, presuming the agency action to be valid" and requires "affirming the agency action if a reasonable basis exists for its decision." *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006); *see also Alaska Eskimo Whaling Commission v. EPA*, 791 F.3d 1088, 1095-96 (9th Cir. 2015).

Accordingly, the scope of review under this standard "is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicles Manufacturer's Ass'n v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43 (1983). The pertinent standard is whether the agency's "decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Id.* at 42-43 (internal quotation marks omitted).

Further, regarding scientific or technical findings, courts "must defer to a great extent to the expertise of the EPA." *Natural Resources Defense Council, Inc. v. EPA*, 863 F.2d 1420, 1430 (9th Cir. 1988) (citing *Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983); *see also Texas Oil & Gas Ass'n v. EPA*, 161 F.3d 923, 933-34 (5th Cir. 1998)) (evaluation of complex scientific data places a "considerable burden" on challenger to overcome EPA's chosen course of action); *New York v. Reilly*, 969 F.2d 1147, 1152 (D.C. Cir. 1992) (stating that courts must be "extremely deferential" in such cases).

ARGUMENT

I. Petitioners' challenge to the Idaho Permit's monitoring requirements implementing the CAFO regulations is untimely.

In 2003, EPA promulgated a comprehensive revision of its then-existing CAFO regulations, and included within those regulations a set of effluent limitations guidelines and permitting requirements that remain largely in place today. 68 Fed. Reg. 7176 (2003 Rule). The CAFO regulations prohibit most discharges from a CAFO's production and land application areas. 40 C.F.R. §§ 412.12(b), 412.31(a), (b), 412.43(a)(1). Further, these regulations set out monitoring requirements designed to maintain that framework—including daily and weekly inspections in the production area, manure and soil analyses, and land application equipment inspections. 40 C.F.R. §§ 412.37(a)(1); 412.4(c)(3),(4).

The Idaho Permit incorporates and implements these CAFO regulations, as required. 40 C.F.R. § 122.42(e) ("Any permit issued to a CAFO must include...."); 40 C.F.R. § 125.3(a); 68 Fed. Reg. at 7185 (2003 Final Rule, stating both "general permits and individual permits are used to implement the same pollution control standards."). In addition to implementing the CAFO regulations, the Idaho Permit goes further and includes requirements for permittees beyond those required by the regulations.

To the extent that Petitioners' challenge requirements specified in the CAFO regulations themselves, that ship has sailed. The Clean Water Act sets out a statutory time limit for petitions for review of agency actions—including promulgating any effluent limitation—requiring that such an "application shall be made within 120 days" from the date of promulgation. 33 U.S.C. § 1369(b)(1). Statutory time limits, such as these, "are jurisdictional in nature such that if a challenge is brought after the statutory time limit" a court is "powerless to review the agency's action." *Texas Municipal Power Agency*, 799 F.2d at 174-75; *see also Ackels*, 7 F.3d at 869.

This statutory time limitation has been enforced against similar petitioners, in the context of challenges to the CAFO regulations at issue here. *See National Pork Producers Council*, 635 F.3d at 753-54. In *National Pork Producers Council*, a group of farm petitioners, challenging the 2008 Rule, argued that EPA's

requirement that nutrient management plans address protocols for land application exceeded EPA's authority. *Id.* The court concluded, however, that because this requirement had been promulgated as part of the 2003 Rule, the farm petitioners were time-barred from the challenging the requirement. *Id.* at 755.

Here, Petitioners claim that the Idaho Permit should contain "effluent monitoring requirements." Opening Brief at 35. During the public comment period on the Permit, petitioners specifically suggested that such effluent monitoring requirements would "likely include monitoring surface water and/or groundwater where a direct hydrological connection exists." 1 E.R. 232. However, EPA considered, and rejected, these types of monitoring requirements on a national basis during the 2003 rulemaking. *See* 68 Fed. Reg. at 7216 (rejecting establishing requirements related to discharges to surface water that occur via groundwater with a direct hydrologic connection); *Id.* at 7217 (rejecting requirement to sample surface waters adjacent to production or land application areas).

Further, following the 2003 Rule's promulgation, a group of petitioners challenged—as petitioners do here—EPA's decision not to include groundwater monitoring in the Second Circuit. *See Waterkeeper*, 399 F.3d at 515. The Second Circuit rejected the challenge. *Id.* The Court found that "after reviewing an array of various pollution control technologies and best management practices" EPA's

decision to not require groundwater monitoring and discharge controls was reasonable. *Id.* at 513-15 (citing *National Wildlife Federation v. EPA*, 286 F.3d 554, 566 (D.C. Cir. 2002)).

Like the petitioners' claims in *National Pork Producers Council*, Petitioners claims here take issue with regulations promulgated in 2003. Petitioners had ample opportunity to challenge those regulations then and should not be given a second bite at the apple. The 2003 Rule and 2008 Rule were both subject to extensive litigation by both environmental and industry groups, including challenges to the monitoring provisions. As the current CAFO regulations are incorporated into the Idaho Permit, Petitioners' challenge to these regulations is both untimely and misplaced. To the extent that Petitioners believe the CAFO regulations should have been written differently, the time to challenge those regulations was within 120 days of the promulgation of the 2003 Rule. 33 U.S.C. § 1369(b)(1). Accordingly, Petitioners' challenge to the Idaho Permit's effluent monitoring requirements as inconsistent with the Act is untimely and should be dismissed.

II. The Idaho Permit's monitoring requirements comply with the Clean Water Act which does not require continuous effluent monitoring.

Even if Petitioners challenge is not time barred, the Idaho Permit's monitoring requirements comply with the Clean Water Act. Petitioners argue that

the Permit "does not contain the required effluent monitoring to confirm whether a CAFO, through the implementation of these practices, achieves these effluent limits." Opening Brief at 24. This argument fails, however, because the Clean Water Act does not mandate continuous effluent monitoring, and instead grants EPA broad discretion to tailor monitoring requirements to the permit at issue.

Petitioners ignore the broad discretionary language in both Clean Water Act Sections 308 and 402. 33 U.S.C. §§ 1318(a), 1342. Section 308(a)'s opening clause gives EPA discretion to include monitoring requirements only when they are "required to carry out the objective" of the NPDES permitting regime. 33 U.S.C § 1318(a). Section 308 continues, stating that any required sampling of effluents shall be carried out "in such manner as the Administrator shall prescribe." *Id.* § 1318(a)(2)(A)(iv). Similarly, Section 402 states that NPDES permits shall include conditions to assure compliance—but does not specify required conditions, instead granting the Administrator discretion to prescribe "such other requirements as he deems appropriate." *Id.* § 1342(a)(2).

This framework gives EPA the necessary discretion to craft a monitoring regime to suit the unique requirements of each NPDES permit. EPA's implementing regulations similarly grant EPA broad discretion, requiring only that monitoring measures in NPDES permits are "sufficient to yield data which are

representative of the monitored activity," 40 C.F.R. §§ 122.48(b), 122.41(j)(1); and "assure compliance with permit limitations." 40 C.F.R. § 122.44(i).

Courts have long recognized the Clean Water Act's grant of broad discretion to EPA regarding the nature of monitoring required in NPDES permits. *U.S. Steel Corp.*, 556 F.2d at 850 (CWA grants EPA "broad authority" in setting monitoring requirements for NDPES permits). This includes the discretion to require visual inspections, or other types of assessment measures, rather than continuous effluent monitoring, to ensure compliance with the terms of the permit.[5] *See* e.g., *Natural Resources Defense Council*, 863 F.2d at 1433-34 ("*Visual Sheen Case*") (approving "visual sheen test" to monitor compliance with NPDES permit that set a zero-discharge limit on oil discharges).

EPA is therefore authorized to impose monitoring requirements in the form of a variety of assessment measures, and has promulgated regulations governing the establishment of monitoring requirements in NPDES permits through several regulatory provisions. These regulations provide that monitoring measures "assure compliance with permit limitations" and are "sufficient to yield data which are

[5] Visual inspection requirements for NPDES permits are routine. For example the *Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity* (MSGP) requires routine visual inspections of control measures; visual inspections of samples for color and odor (among other characteristics). *Available at:* https://www.epa.gov/sites/production/files/2015-10/documents/msgp2015_finalpermit.pdf.

representative of the monitored activity." 40 C.F.R. §§ 122.48(b), 122.41(j)(1), 122.44(i); *see also* 40 C.F.R. § 122.44(i)(1) (permits may require monitoring in the form of other measurements as appropriate rather than mass effluent discharged). Nothing in the Act, implementing regulations, or case law limits EPA's discretion with respect to monitoring requirements nor do they require permits to specifically include continuous effluent discharge sampling as opposed to types of monitoring EPA deems more appropriate, including inspections. The form of monitoring required in the Idaho Permit is typical for permits like this one that do not authorize continuous discharges or do not authorize discharges through discrete conveyances with "end-of-pipe" discharge points.

Petitioners further argue that EPA "conflates" operating requirements with monitoring requirements, and assert that implementing "effluent limitations is distinct from, and cannot take the place of, monitoring the actual pollution from CAFO discharges." Opening Brief at 48. This view is unnecessarily formalistic and ignores the EPA's broad discretion under the Clean Water Act to craft a monitoring regime tailored to the monitored activity. The Clean Water Act requires that a permit contain only monitoring measures "to assure compliance with the permit limitations," and be representative of the monitored activity, and does not require continous effluent monitoring. 40 C.F.R. §§ 122.44(i)(1); 122.48(b), 122.41(j)(1).

Neither of the cases cited by Petitioner support the proposition that continous effluent monitoring is required. First, Petitioners argue that the Idaho Permit is "akin to defendants' interpretation" of the NPDES permit in *Natural Resources Defense Council, Inc. v. County of Los Angeles*, 725 F.3d 1194, 1207 (9th Cir. 2013) ("*County of Los Angeles*"), where defendants argued that the monitoring program was not "designed to measure any individual permittees' compliance" with a permit. In *County of Los Angeles*, the permit at issue was a municipal separate storm sewer system permit that included monitoring stations downstream from outfalls that discharged, from multiple sources, each time it rained. The court held that this "mass-emission monitoring data" could be used to determine liability (whether levels were exceeded) but not for remedy (determining which sources were responsible). *Id.* at 1206-07.

Unlike the defendants' argument in *County of Los Angeles*, here the Idaho Permit is consistent with *County of Los Angeles* and the agency regulation it cites, 40 C.F.R. § 122.44(i)(1). Section 122.44(i)(1) requires that NPDES permits include monitoring requirements "to assure compliance with the permit limitations." *Id.* The Idaho Permit generally prohibits discharges and requires monitoring and reporting of discharges that do occur from the production area or

during dry-weather land-application.[6] These requirements, like the monitoring stations in *County of Los Angeles*, serve the precise purpose of ensuring compliance with the permit and representing the monitored activity.

Further, Petitioners' reliance on *Natural Resources Defense Council, Inc. v. EPA*, 808 F.3d 556 (2d Cir. 2015) ("*Vessel General Permit Case*") is misplaced. Opening Brief at 40. The *Vessel General Permit Case* involved a general permit for the discharge of ballast water from vessels, which only required vessels to report "expected" discharges. The court concluded that because the permit only required information on expected discharges there was "no way to derive from that information whether a vessel is actually in compliance." *Id.* However, unlike the Vessel General Permit, the Idaho Permit requires monitoring and reporting of actual discharges from the production area, an approach the court in the *Vessel General Permit Case* noted would likely be sufficient. *Id.* at 583.

Accordingly, contrary to Petitioner's assertion, the Clean Water Act does not require specific measures, such as continuous effluent monitoring, to ensure

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[6] As discussed more fully in the next section, wet-weather discharges from CAFO land application areas are considered "agricultural stormwater" that is *exempt* from Clean Water Act regulation so long as all permit requirements relating to land application (e.g., nutrient management plan requirements) are met. *See* 33 U.S.C. § 1362(14); 40 C.F.R. § 122.23(e). This approach was upheld in *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 509 (2d Cir. 2005). This further distinguishes *County of Los Angeles*, which, as explained in the text, involved monitoring requirements for regulated discharges.

compliance with a NPDES permit. Because EPA has broad discretion to craft a monitoring regime to the specifics of the discharges to be monitored, the Petitioners' narrow reading of the Clean Water Act should be rejected.

III. The Idaho Permit's monitoring requirements are consistent with the CAFO regulations and are an otherwise lawful exercise of EPA's discretion.

The Idaho Permit's monitoring requirements are reasonable because they implement the CAFO regulations, and include additional provisions based on the permit writer's reasonable exercise of discretion. Permitting authorities, such as EPA, have discretion to include additional monitoring provisions on a case-by-case basis. *See* 68 Fed. Reg. at 7217. EPA did include meaningful requirements in the Idaho Permit beyond those required by the national regulations. All Petitioners argue is that more monitoring is required without a case-specific reason for including additional effluent monitoring in the Permit Petitioners fail to provide any basis for concluding that EPA abused its discretion in not adopting an even more extensive set of additional monitoring provisions that Petitioners advocate.

For both the production and land application areas, the Idaho Permit includes monitoring and reporting requirements that are consistent with underlying regulations, assure compliance with the effluent limitations, and representative of the monitored activity. The monitoring and reporting in the Permit are therefore fully compliant with the Clean Water Act. The absence of continuous effluent

monitoring requirements in the Idaho Permit was neither arbitrary nor capricious and this petition should be denied for this reason as well.

A. The Idaho Permit's production area monitoring requirements assure compliance with the effluent limitations and are representative of the activity monitored.

As required by the CAFO regulations, the Idaho Permit prohibits any discharges from the production area into waters of the United States, except for overflows from a system that is designed, constructed and maintained to handle 25-year, 24-hour storm events. 1 E.R. 7-8 (Permit at II.A.1); 40 C.F.R. §§ 412.12(b), 412.31(a)(1)(i), 412.43(a)(1). This prohibition is an effluent limit for the permittee's production area.

As required by the CAFO regulations, certain monitoring conditions are included in the Idaho Permit. To monitor the facility's compliance with the discharge limit, CAFOs are required to perform "routine visual inspections" of the production area, including daily visual inspections of all water lines; weekly visual inspections of all diversion devices; and weekly inspections of the impoundments, storage and containment structures. 1 E.R. 8 (Permit at II.A.2.a); 40 C.F.R. § 412.37.

During the weekly inspection of any open surface liquid impoundment, the permittee is required to note the level of liquid as recorded by a "depth marker" which must "clearly indicate the minimum capacity necessary to contain the runoff

and direct precipitation of the 25-year, 24-hour rainfall event." 1 E.R. 8 (Permit at II.A.2.b); 40 C.F.R. § 412.37(a)(2). If any deficiencies are found during these inspections and assessments, the permittee must take corrective action as soon as possible. E.R. 8 (Permit at II.A.2.c); E.R. 11 (Permit at III.A.2.a.i); and E.R. 16 (Permit at III.B); 40 C.F.R. § 412.37(a)(3).

These "routine visual inspections" allow permittees to ensure that their production areas comply with the permit's discharge prohibition by ensuring there is adequate capacity in the impoundments for additional waste and allowing the permittee to quickly identify any discharges that may occur. E.R. 8 (Permit at II.A.2.a); 40 C.F.R. § 412.37(a)(2). Like the "visual sheen test" which allowed operators to monitor for discharges of oil based on observations to ensure compliance with a permit that prohibited such discharges, *Visual Sheen Case*, 863 F.2d at 1433-34, these "routine visual inspections" are sufficient to monitor the CAFO production areas. EPA implemented these requirements in the Idaho Permit as required by the national CAFO guidelines.

EPA went beyond the required national effluent limitations guidelines and permitting regulations and included certain additional more protective measures in the Idaho Permit. In the event of a discharge from a manure or wastewater storage structure, permittees are required to immediately sample the effluent discharge and report the results. E.R. 21-22 (Permit at IV.D). Immediate sampling is not required

under the CAFO regulations. Yet this monitoring, combined with the required routine visual inspections, ensures compliance with the permit's effluent limitations and is "sufficient to yield data which are representative of the monitored activity"—that is, the discharge of pollutants to waters of the United States—and thus satisfy the Clean Water Act. 40 C.F.R. §§ 122.48(b), 122.41(j)(1).

Petitioners assert that the Permit fails to account for expected discharges from the production area "to subsurface flows directly connected to surface waters," citing potential leaky lagoon liners that may allow leaking into the groundwater. Opening Brief at 50. This ignores the fact that EPA's decision not to require regular monitoring of such discharges dates back to 2003 and, if arbitrary, should have been challenged then. 68 Fed. Reg. at 7216. As explained above (pp. 24-27), any challenge to that decision is now time-barred. 33 U.S.C. § 1369(b). Petitioners reference no technical evidence specific to this particular permit that was raised in public comments that would warrant additional monitoring here. Accordingly, EPA's decision not to require monitoring of subsurface flows in the Idaho Permit is reasonable.

Further, the Idaho Permit addresses the risk of subsurface flows from leaks in lagoon liners. As noted above, impoundments must be regularly inspected—and if a liner failed so significantly that it resulted in a discharge to waters of the

United States, the Idaho Permit requires the permittee to monitor that discharge. 1 E.R. 21-22 (Permit at IV.D). The Permit also requires that lagoon liners conform to Idaho Natural Resources Conservation Service (NRCS) practice standards and that damage to the liner must be evaluated by a Professional Engineer and corrected within 30 days of the damage. 1 E.R. at 16 (Permit at III.B). Accordingly, the Idaho Permit's monitoring and reporting requirements are sufficient to ensure that the effluent limits in the Permit are met and are representative of the monitored activity for production areas; thus, these requirements are not arbitrary and capricious.

B. The Idaho Permit's land application monitoring ensures compliance with limitations and is representative of the monitored activity.

For land application areas, the Idaho Permit contains an effluent limit more stringent than the national CAFO regulations, which prohibits dry weather discharges from the land application area to waters of the U.S. 1 E.R. 10 (Permit at II.B.9). The regulations clarify that precipitation-related discharges are expressly exempt from the Clean Water Act when land application is undertaken consistent with the nutrient management plan. 40 C.F.R. § 122.23(e).

The CAFO regulations, implemented in the Idaho Permit, require that CAFOs develop a nutrient management plan to minimize nitrogen and phosphorus transport from the fields to surface waters, by requiring that land application

maximize crop uptake. 1 E.R. 9-10 (Permit at II.B.1-10); 1 E.R. 11-14 (Permit at III.A.2f-h); 40 C.F.R. § 412.4(c). Further, the regulations, as implemented by the Permit, require the implementation of appropriate conservation measures such as buffers and set-backs that will intercept discharges to waters of the U.S. 1 E.R. 9-10 (Permit at II.B.4, 8); 40 C.F.R. §§ 412.4(c)(5) and 122.42(e)(1)(vi). Additionally, permittees must periodically inspect equipment used for land application for leaks. 1 E.R. 10 (Permit II.B.7); 40 C.F.R. § 412.4(c)(4). Permittees are also required, as set out in the CAFO regulations, to document each instance of land application—by recording, among other things, the application method, soil surface conditions, weather conditions, and amounts of nitrogen and phosphorus applied. 1 E.R. 14 (Permit at III.A.2.i); 40 C.F.R. §§ 412.37(c) and 122.42(e)(4).

In addition to the requirements of the CAFO regulations described above, the Idaho Permit goes further by minimizing transport of pollutants to waters of the United States by prohibiting application to frozen, snow-covered, or rain-saturated soils. 1 E.R. 9-10 (Permit at II.B.2, 10). Further, while the regulations require soil sampling at least "every five years," the Idaho Permit requires annual sampling to provide a more precise assessment of soil conditions. 1 E.R. 9-10 (Permit at II.B.6).

These measures are not arbitrary and capricious as they both implement, and exceed, the CAFO regulations and are sufficient to assure compliance with the permit's terms and are representative of the monitored activity. Precipitation-related discharges are exempt under the Clean Water Act if the permittee has land-applied in compliance with the nutrient management plan. Monitoring for precipitation-related discharges is unnecessary—as any violation would be shown not by the specific pollutant values in the discharge, but rather the permittee's non-compliance with permit terms in the nutrient management plan.

For dry-weather discharges, any discharge is unauthorized and permittees are required to report such discharges to EPA. Further, when documenting each land application, permittees are required to record weather conditions, soil conditions, and other factors that would allow them to observe—and require them to report - any dry weather discharges. In addition, permittees are required to inspect land application equipment to determine if it is leaking and thus causing dry weather discharges. 1 E.R. 10 (Permit II.B.7); 40 C.F.R. § 412.4(c)(4).

Petitioners assert that sampling manure and soil is a means of "implementing" the nutrient management plan and thus "cannot take the place of monitoring the actual pollution a CAFO discharges." Opening Brief at 48. While Petitioners are correct that soil and manure sampling implements the nutrient management plan, the claim is overly formalistic and narrow, as these data also

provide quantitative information that can help demonstrate permit compliance. *See U.S. Steel Corp.*, 556 F.2d at 850. For a permit of this nature, using sampling to derive a nutrient budget, then carefully tracking adherence to that budget, is sufficient to ensure compliance with the permit's terms and is sufficiently representative of the monitored activity to meet the Clean Water Act's requirements.

Because these monitoring and sampling provisions for land application areas have long been part of the CAFO regulations, EPA's incorporation of these inherently reasonable and well-settled methods of monitoring land-application are sufficient to ensure that permit conditions are met and are representative of the monitored activity. Therefore they are sufficient under the Clean Water Act. 40 C.F.R. §§ 122.48(b), 122.41(j)(1), 122.44(i).

IV. Petitioners' analogies to other point source categories are inapposite.

Petitioners' attempt to characterize the monitoring provisions in the Permit as inadequate by pointing to monitoring requirements in permits for other point source categories. Opening Brief at 51-56. These are red herrings. Monitoring requirements are specific to the discharge being permitted and EPA has broad discretion when determining the scope of such requirements in NPDES permits. *U.S. Steel Corp.*, 556 F.2d at 850.

First, Petitioners' comparison with monitoring for wastewater treatment plants, slaughterhouses, or aquaculture is simply inapposite. Opening Brief at 52-54. Unlike CAFOs, a wastewater treatment plant has a continuous effluent stream and a municipal separate storm sewer system has a precipitation-driven effluent stream. Petitioners cite regular effluent monitoring requirements that EPA requires in NPDES permits for a wastewater treatment facility and aquaculture operations. *See* Opening Brief at 52-53 (citing *EPA's Authorization to Discharge Under NPDES for Lander Street Wastewater Treatment Facility, City of Boise* (ID-002044-3) 5-6; *Authorization to Discharge Under NPDES for Aquaculture Facilities in Idaho Excluding Facilities Discharging Into the Upper Snake-Rock Subbasin or in Indian Country in Idaho* (IDG131000), 14-16). But both of those permits contain lists of specific numeric effluent limitations for particular discharges that must be tested at specified outfalls. Ongoing monitoring of continuous or anticipated discharges is appropriate to determine if there are violations of the effluent limits in those permits.

However, the Idaho Permit treats CAFOS differently from those types of facilities because it generally prohibits discharges and does not contain a similar list of "end-of-pipe" numeric pollutant limits. As already explained (pp. 32-39), the Clean Water Act provides EPA with ample discretion to tailor its monitoring requirements to particular facilities and pollutant controls.

The Idaho Permit generally does not allow any effluent discharges except in limited circumstances, and any discharge outside the terms of the Idaho Permit is a violation. Additionally, any discharge from wastewater or manure storage structures must be immediately sampled and monitored. Thus, ongoing monitoring of either the production or land application area is not necessary to determine if a permittee is in compliance with the Permit. Further, given the distinct structure and operation of CAFOs, and the absence of specific numeric effluent limits that require regular sampling and often do not have discrete outfall pipes designed to discharge into receiving waters, EPA reasonably concluded that the monitoring requirements in the Idaho Permit were sufficient to assure compliance with the effluent limits and are representative of the monitored activity. 40 C.F.R. §§ 122.44(i)(1); 122.48(b), 122.41(j)(1).

Similarly, Petitioners' efforts to analogize to EPA's guidance regarding water quality trading is irrelevant as the passages quoted deal with monitoring of *nonpoint sources*. Opening Brief at 56 (citing EPA, Office of Wastewater Management, Water Quality Trading Toolkit for Permit Writers ("Toolkit")). This guidance document simply notes that "extra care should be taken to ensure that nonpoint source load reduction uncertainty is addressed" before stating that monitoring is a method that *may be* used "to account for uncertainties inherent in trading with nonpoint sources." Toolkit at 17-18 (emphasis added); *see also*

Toolkit, Trading Scenario: Point Source-Nonpoint Source Trading at 28 (suggesting permitting authority require the nonpoint source to provide monitoring information). The Idaho Permit addresses point source discharges from CAFOs, not nonpoint sources.

V. Publicly available data are sufficient to allow citizen enforcement.

As Petitioners note, "the NPDES program fundamentally relies on self-monitoring." Pet. Brief at 58 (citing *County of Los Angeles*, 725 F.3d at 1208). Here, as is the case with NPDES permits generally, the permittees are responsible for monitoring and assessing whether their production and land-application areas are in compliance with the effluent limitations established in the Permit. They are required to report any unauthorized discharges, and the public has access to these data.

To the extent petitioners seek monitoring of wet-weather discharges from CAFO land application areas, EPA's regulations—as upheld by the Second Circuit—specifically exempt from permitting precipitation-related discharges when the CAFO has complied with nutrient management practices. *Waterkeeper*, 399 F.3d at 506-09. The Clean Water Act only requires monitoring of regulated discharges—not exempt discharges. The content of a wet-weather discharge is not what makes it a violation—it is whether the CAFO has complied with the terms of the nutrient management plan in determining the land-application rate.

That information is available through annual reports, where permittees are required to provide a wide array of information, including results of inspections; how much manure was applied to every field in the reporting year; deficiencies identified and actions taken to correct them; results of manure and soil sampling; dates, times and estimated volumes of any overflows. This information is adequate to permit citizens to assess compliance with the provisions of the permit. 1 E.R. 18-20 (Permit at IV.A and B).

Petitioners assert that CAFOs should be required to conduct continuous discharge monitoring, pointing to cases involving NPDES permits with specific effluent limitations established for ongoing or regular discharges from traditional point sources (i.e., point sources with a discrete conveyance). Opening Brief at 59-60 (citing *United States v. STABL, Inc.* 800 F.3d 476, 480 (8th Cir. 2015) (animal rendering plant had daily-maximum limits for ongoing discharges to treatment plant); *Public Interest Research Group v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 68 (3d. Cir. 1990)(chemical storage facility had a discharge from routine spillage)).

These cases, which involve different factual situations from what is at issue here, are not relevant. As discussed above, the Idaho Permit requires permittees to report any unauthorized discharge. E.R. 20-21 (Permit at IV.C). And making a false statement to the government is prohibited by law. 18 U.S.C. § 1001. As in

the cases cited by the Petitioners, it is the permittee's reporting of any unauthorized discharge that forms the basis of both EPA enforcement action and potential citizen suits.

While Petitioners may wish to have additional monitoring data to use when bringing citizen suits, their judgment should not be substituted for EPA's. *See* e.g., *BP Exploration & Oil Inc. v. EPA*, 66 F.3d 784, 791-92 (6th Cir. 1995) ("Congress set forth the goal of the Clean Water Act and left its implementation and details to the EPA."). Accordingly, the only issue here is "whether the agency 'abused its discretion in exercising the quasi-legislative authority delegated to it by Congress, or on the other hand, whether its decision was based on a consideration of the relevant factors" and was not the product of "a clear error in judgment." *Id.* (citing *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1025 (D.C. Cir. 1978)).

The Idaho Permit requires permittees to report unauthorized discharges, and—for discharges from the production area—sample those discharges. The only information that a citizen needs to bring a citizen suit is the fact there was an unauthorized discharge to waters of the United States. Accordingly, the Idaho Permit provides ample information that would allow citizens to participate in the permitting process, as the CWA envisioned, including bringing citizen suits under the Clean Water Act.

CONCLUSION

For the foregoing reasons, EPA's issuance of the Idaho Permit was consistent with the Clean Water Act and governing regulations, and was not arbitrary, capricious nor an abuse of discretion. Accordingly, the Petition for Review should be denied.

Respectfully submitted,

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November 23, 2020

DJ # 90-5-1-7-21733

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 20-71554

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This brief contains 9,706 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

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Signature s/ Benjamin J. Grillot

Date November 23, 2020

STATUTORY AND REGULATORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

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§ 1001. Statements or entries generally

Effective: July 27, 2006
Currentness

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully--

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to--

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

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Subchapter III. Standards and Enforcement (Refs & Annos)

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§ 1316. National standards of performance

Currentness

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

(3) The term "source" means any building, structure, facility, or installation from which there is or may be the discharge of pollutants.

(4) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a source.

(5) The term "construction" means any placement, assembly, or installation of facilities or equipment (including contractual obligations to purchase such facilities or equipment) at the premises where such equipment will be used, including preparation work at such premises.

(b) Categories of sources; Federal standards of performance for new sources

(1)(A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

pulp and paper mills;

paperboard, builders paper and board mills;

meat product and rendering processing;

dairy product processing;

grain mills;

canned and preserved fruits and vegetables processing;

canned and preserved seafood processing;

sugar processing;

textile mills;

cement manufacturing;

feedlots;

electroplating;

organic chemicals manufacturing;

inorganic chemicals manufacturing;

plastic and synthetic materials manufacturing;

soap and detergent manufacturing;

fertilizer manufacturing;

petroleum refining;

iron and steel manufacturing;

nonferrous metals manufacturing;

phosphate manufacturing;

steam electric powerplants;

ferroalloy manufacturing;

leather tanning and finishing;

glass and asbestos manufacturing;

rubber processing; and

timber products processing.

(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality, environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) State enforcement of standards of performance

Each State may develop and submit to the Administrator a procedure under State law for applying and enforcing standards of performance for new sources located in such State. If the Administrator finds that the procedure and the law of any State require the application and enforcement of standards of performance to at least the same extent as required by this section, such State is authorized to apply and enforce such standards of performance (except with respect to new sources owned or operated by the United States).

(d) Protection from more stringent standards

Notwithstanding any other provision of this chapter, any point source the construction of which is commenced after October 18, 1972, and which is so constructed as to meet all applicable standards of performance shall not be subject to any more stringent standard of performance during a ten-year period beginning on the date of completion of such construction or during the period of depreciation or amortization of such facility for the purposes of section 167 or 169 (or both) of Title 26 whichever period ends first.

(e) Illegality of operation of new sources in violation of applicable standards of performance

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

CREDIT(S)

(June 30, 1948, c. 758, Title III, § 306, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 854.)

Notes of Decisions (33)

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter IV. Permits and Licenses (Refs & Annos)

33 U.S.C.A. § 1341

§ 1341. Certification

Currentness

(a) Compliance with applicable requirements; application; procedures; license suspension

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1313, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1313, 1316, or 1317 of this title.

(6) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

CREDIT(S)

(June 30, 1948, c. 758, Title IV, § 401, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 877; amended Pub.L. 95-217, §§ 61(b), 64, Dec. 27, 1977, 91 Stat. 1598, 1599.)

Notes of Decisions (141)

33 U.S.C.A. § 1341, 33 USCA § 1341
Current through P.L. 116-188. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter IV. Permits and Licenses (Refs & Annos)

33 U.S.C.A. § 1343

§ 1343. Ocean discharge criteria

Currentness

(a) Issuance of permits

No permit under section 1342 of this title for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued, after promulgation of guidelines established under subsection (c) of this section, except in compliance with such guidelines. Prior to the promulgation of such guidelines, a permit may be issued under such section 1342 of this title if the Administrator determines it to be in the public interest.

(b) Waiver

The requirements of subsection (d) of section 1342 of this title may not be waived in the case of permits for discharges into the territorial sea.

(c) Guidelines for determining degradation of waters

(1) The Administrator shall, within one hundred and eighty days after October 18, 1972 (and from time to time thereafter), promulgate guidelines for determining the degradation of the waters of the territorial seas, the contiguous zone, and the oceans, which shall include:

(A) the effect of disposal of pollutants on human health or welfare, including but not limited to plankton, fish, shellfish, wildlife, shorelines, and beaches;

(B) the effect of disposal of pollutants on marine life including the transfer, concentration, and dispersal of pollutants or their byproducts through biological, physical, and chemical processes; changes in marine ecosystem diversity, productivity, and stability; and species and community population changes;

(C) the effect of disposal, of pollutants on esthetic, recreation, and economic values;

(D) the persistence and permanence of the effects of disposal of pollutants;

(E) the effect of the disposal of varying rates, of particular volumes and concentrations of pollutants;

(F) other possible locations and methods of disposal or recycling of pollutants including land-based alternatives; and

(G) the effect on alternate uses of the oceans, such as mineral exploitation and scientific study.

(2) In any event where insufficient information exists on any proposed discharge to make a reasonable judgment on any of the guidelines established pursuant to this subsection no permit shall be issued under section 1342 of this title.

CREDIT(S)

(June 30, 1948, c. 758, Title IV, § 403, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 883.)

Notes of Decisions (5)

33 U.S.C.A. § 1343, 33 USCA § 1343
Current through P.L. 116-188. Some statute sections may be more current, see credits for details.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter D. Water Programs
Part 125. Criteria and Standards for the National Pollutant Discharge Elimination System (Refs & Annos)
Subpart A. Criteria and Standards for Imposing Technology–Based Treatment Requirements Under Sections 301(b) and 402 of the Act

40 C.F.R. § 125.3

§ 125.3 Technology-based treatment requirements in permits.

Effective: June 12, 2019
Currentness

(a) General. Technology-based treatment requirements under section 301(b) of the Act represent the minimum level of control that must be imposed in a permit issued under section 402 of the Act. (See §§ 122.41, 122.42 and 122.44 for a discussion of additional or more stringent effluent limitations and conditions.) Permits shall contain the following technology-based treatment requirements in accordance with the following statutory deadlines;

(1) For POTW's, effluent limitations based upon:

(i) Secondary treatment—from date of permit issuance; and

(ii) [Reserved by 84 FR 3338]

(2) For dischargers other than POTWs except as provided in § 122.29(d), effluent limitations requiring:

(i) The best practicable control technology currently available (BPT)—

(A) For effluent limitations promulgated under Section 304(b) after January 1, 1982 and requiring a level of control substantially greater or based on fundamentally different control technology than under permits for an industrial category issued before such date, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b) and in no case later than March 31, 1989;

(B) For effluent limitations established on a case-by-case basis based on Best Professional Judgment (BPJ) under Section 402(a)(1)(B) of the Act in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established and in no case later than March 31, 1989;

(C) For all other BPT effluent limitations compliance is required from the date of permit issuance.

(ii) For conventional pollutants, the best conventional pollutant control technology (BCT)—

(A) For effluent limitations promulgated under section 304(b), as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989.

(B) For effluent limitations established on a case-by-case (BPJ) basis under section 402(a)(1)(B) of the Act in a permit issued after February 4, 1987, compliance as expeditiously as practicable but in no case later than three years after the date such limitations are established and in no case later than March 31, 1989;

(iii) For all toxic pollutants referred to in Committee Print No. 95–30, House Committee on Public Works and Transportation, the best available technology economically achievable (BAT)—

(A) For effluent limitations established under section 304(b), as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989.

(B) For permits issued on a case-by-case (BPJ) basis under section 402(a)(1)(B) of the Act after February 4, 1987 establishing BAT effluent limitations, compliance is required as expeditiously as practicable but in no case later than three years after the date such limitations are promulgated under section 304(b), and in no case later than March 31, 1989.

(iv) For all toxic pollutants other than those listed in Committee Print No. 95–30, effluent limitations based on BAT—

(A) For effluent limitations promulgated under section 304(b) compliance is required as expeditiously as practicable, but in no case later than three years after the date such limitations are promulgated under section 304(b) and in no case later than March 31, 1989.

(B) For permits issued on a case-by-case (BPJ) basis under section 402(a)(1)(B) of the Act after February 4, 1987 establishing BAT effluent limitations, compliance is required as expeditiously as practicable but in no case later than 3 years after the date such limitations are established and in no case later than March 31, 1989.

(v) For all pollutants which are neither toxic nor conventional pollutants, effluent limitations based on BAT—

(A) For effluent limitations promulgated under section 304(b), compliance is required as expeditiously as practicable but in no case later than 3 years after the date such limitations are established and in no case later than March 31, 1989.

(B) For permits issued on a case-by-case (BPJ) basis under Section 402(a)(1)(B) of the Act after February 4, 1987 establishing BAT effluent limitations compliance is required as expeditiously as practicable but in no case later than three years after the date such limitations are established and in no case later than March 31, 1989.

(b) Statutory variances and extensions.

(1) The following variances from technology-based treatment requirements are authorized by the Act and may be applied for under § 122.21;

(i) For POTW's, a section 301(h) marine discharge variance from secondary treatment (subpart G);

(ii) For dischargers other than POTW's;

(A) A section 301(c) economic variance from BAT (subpart E);

(B) A section 301(g) water quality related variance from BAT (subpart F); and

(C) A section 316(a) thermal variance from BPT, BCT and BAT (subpart H).

(2) The following extensions of deadlines for compliance with technology-based treatment requirements are authorized by the Act and may be applied for under § 124.53:

(i) For POTW's a section 301(i) extension of the secondary treatment deadline (subpart J);

(ii) For dischargers other than POTW's:

(A) A section 301(i) extension of the BPT deadline (subpart J); and

(B) A section 301(k) extension of the BAT deadline (subpart C).

(c) Methods of imposing technology-based treatment requirements in permits. Technology-based treatment requirements may be imposed through one of the following three methods:

(1) Application of EPA-promulgated effluent limitations developed under section 304 of the Act to dischargers by category or subcategory. These effluent limitations are not applicable to the extent that they have been remanded or withdrawn. However, in the case of a court remand, determinations underlying effluent limitations shall be binding in permit issuance proceedings where those determinations are not required to be reexamined by a court remanding the regulations. In addition,

dischargers may seek fundamentally different factors variances from these effluent limitations under § 122.21 and subpart D of this part.

(2) On a case-by-case basis under section 402(a)(1) of the Act, to the extent that EPA-promulgated effluent limitations are inapplicable. The permit writer shall apply the appropriate factors listed in § 125.3(d) and shall consider:

(i) The appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information; and

(ii) Any unique factors relating to the applicant.

[Comment: These factors must be considered in all cases, regardless of whether the permit is being issued by EPA or an approved State.]

(3) Through a combination of the methods in paragraphs (d)(1) and (2) of this section. Where promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the Act.

(4) Limitations developed under paragraph (d)(2) of this section may be expressed, where appropriate, in terms of toxicity (e.g., "the LC_{50} for fat head minnow of the effluent from outfall 001 shall be greater than 25%"). *Provided*, That is shown that the limits reflect the appropriate requirements (for example, technology-based or water-quality-based standards) of the Act.

(d) In setting case-by-case limitations pursuant to § 125.3(c), the permit writer must consider the following factors:

(1) For BPT requirements:

(i) The total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application;

(ii) The age of equipment and facilities involved;

(iii) The process employed;

(iv) The engineering aspects of the application of various types of control techniques;

(v) Process changes; and

(vi) Non-water quality environmental impact (including energy requirements).

(2) For BCT requirements:

(i) The reasonableness of the relationship between the costs of attaining a reduction in effluent and the effluent reduction benefits derived;

(ii) The comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources;

(iii) The age of equipment and facilities involved;

(iv) The process employed;

(v) The engineering aspects of the application of various types of control techniques;

(vi) Process changes; and

(vii) Non-water quality environmental impact (including energy requirements).

(3) For BAT requirements:

(i) The age of equipment and facilities involved;

(ii) The process employed;

(iii) The engineering aspects of the application of various types of control techniques;

(iv) Process changes;

(v) The cost of achieving such effluent reduction; and

(vi) Non-water quality environmental impact (including energy requirements).

(e) Technology-based treatment requirements are applied prior to or at the point of discharge.

(f) Technology-based treatment requirements cannot be satisfied through the use of "non-treatment" techniques such as flow augmentation and in-stream mechanical aerators. However, these techniques may be considered as a method of achieving water quality standards on a case-by-case basis when:

(1) The technology-based treatment requirements applicable to the discharge are not sufficient to achieve the standards;

(2) The discharger agrees to waive any opportunity to request a variance under section 301 (c), (g) or (h) of the Act; and

(3) The discharger demonstrates that such a technique is the preferred environmental and economic method to achieve the standards after consideration of alternatives such as advanced waste treatment, recycle and reuse, land disposal, changes in operating methods, and other available methods.

(g) Technology-based effluent limitations shall be established under this subpart for solids, sludges, filter backwash, and other pollutants removed in the course of treatment or control of wastewaters in the same manner as for other pollutants.

(h)(1) The Director may set a permit limit for a conventional pollutant at a level more stringent than the best conventional pollution control technology (BCT), or a limit for a nonconventional pollutant which shall not be subject to modification under section 301 (c) or (g) of the Act where:

(i) Effluent limitations guidelines specify the pollutant as an indicator for a toxic pollutant, or

(ii)(A) The limitation reflects BAT-level control of discharges of one or more toxic pollutants which are present in the waste stream, and a specific BAT limitation upon the toxic pollutant(s) is not feasible for economic or technical reasons;

(B) The permit identifies which toxic pollutants are intended to be controlled by use of the limitation; and

(C) The fact sheet required by § 124.56 sets forth the basis for the limitation, including a finding that compliance with the limitation will result in BAT-level control of the toxic pollutant discharges identified in paragraph (h)(1)(ii)(B) of this section, and a finding that it would be economically or technically infeasible to directly limit the toxic pollutant(s).

(2) The Director may set a permit limit for a conventional pollutant at a level more stringent than BCT when:

(i) Effluent limitations guidelines specify the pollutant as an indicator for a hazardous substance, or

(ii)(A) The limitation reflects BAT-level control of discharges (or an appropriate level determined under section 301(c) or (g) of the Act) of one or more hazardous substance(s) which are present in the waste stream, and a specific BAT (or other appropriate) limitation upon the hazardous substance(s) is not feasible for economic or technical reasons;

(B) The permit identifies which hazardous substances are intended to be controlled by use of the limitation; and

(C) The fact sheet required by § 124.56 sets forth the basis for the limitation, including a finding that compliance with the limitations will result in BAT-level (or other appropriate level) control of the hazardous substances discharges

identified in paragraph (h)(2)(ii)(B) of this section, and a finding that it would be economically or technically infeasible to directly limit the hazardous substance(s).

(iii) Hazardous substances which are also toxic pollutants are subject to paragraph (h)(1) of this section.

(3) The Director may not set a more stringent limit under the preceding paragraphs if the method of treatment required to comply with the limit differs from that which would be required if the toxic pollutant(s) or hazardous substance(s) controlled by the limit were limited directly.

(4) Toxic pollutants identified under paragraph (h)(1) of this section remain subject to the requirements of § 122.42(a)(1) (notification of increased discharges of toxic pollutants above levels reported in the application form).

(Clean Water Act, Safe Drinking Water Act, Clean Air Act, Resource Conservation and Recovery Act: 42 U.S.C. 6905, 6912, 6925, 6927, 6974)

Credits

[44 FR 32948, June 7, 1979, as amended at 45 FR 33512, May 19, 1980; 48 FR 14293, Apr. 1, 1983; 49 FR 38052, Sept. 26, 1984; 50 FR 6941, Feb. 19, 1985; 54 FR 257, Jan. 4, 1989; 84 FR 3338, Feb. 12, 2019]

SOURCE: 44 FR 32948, June 7, 1979; 65 FR 30913, May 15, 2000, unless otherwise noted.

AUTHORITY: The Clean Water Act, 33 U.S.C. 1251 et seq., unless otherwise noted.

Notes of Decisions (118)

Current through November 5, 2020; 85 FR 70948, except for titles 10, 16, 40, and 50, which are current through October 29, 2020; 85 FR 68703.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter N. Effluent Guidelines and Standards
Part 412. Concentrated Animal Feeding Operations (Cafo) Point Source Category (Refs & Annos)

40 C.F.R. § 412.4

§ 412.4 Best management practices (BMPs) for land application of manure, litter, and process wastewater.

Currentness

(a) Applicability. This section applies to any CAFO subject to subpart C of this part (Dairy and Beef Cattle other than Veal Calves) or subpart D of this part (Swine, Poultry, and Veal Calves).

(b) Specialized definitions.

(1) Setback means a specified distance from surface waters or potential conduits to surface waters where manure, litter, and process wastewater may not be land applied. Examples of conduits to surface waters include but are not limited to: Open tile line intake structures, sinkholes, and agricultural well heads.

(2) Vegetated buffer means a narrow, permanent strip of dense perennial vegetation established parallel to the contours of and perpendicular to the dominant slope of the field for the purposes of slowing water runoff, enhancing water infiltration, and minimizing the risk of any potential nutrients or pollutants from leaving the field and reaching surface waters.

(3) Multi-year phosphorus application means phosphorus applied to a field in excess of the crop needs for that year. In multi-year phosphorus applications, no additional manure, litter, or process wastewater is applied to the same land in subsequent years until the applied phosphorus has been removed from the field via harvest and crop removal.

(c) Requirement to develop and implement best management practices. Each CAFO subject to this section that land applies manure, litter, or process wastewater, must do so in accordance with the following practices:

(1) Nutrient Management Plan. The CAFO must develop and implement a nutrient management plan that incorporates the requirements of paragraphs (c)(2) through (c)(5) of this section based on a field-specific assessment of the potential for nitrogen and phosphorus transport from the field and that addresses the form, source, amount, timing, and method of application of nutrients on each field to achieve realistic production goals, while minimizing nitrogen and phosphorus movement to surface waters.

(2) Determination of application rates. Application rates for manure, litter, and other process wastewater applied to land under the ownership or operational control of the CAFO must minimize phosphorus and nitrogen transport from the field to surface waters in compliance with the technical standards for nutrient management established by the Director. Such technical standards for nutrient management shall:

(i) Include a field-specific assessment of the potential for nitrogen and phosphorus transport from the field to surface waters, and address the form, source, amount, timing, and method of application of nutrients on each field to achieve realistic production goals, while minimizing nitrogen and phosphorus movement to surface waters; and

(ii) Include appropriate flexibilities for any CAFO to implement nutrient management practices to comply with the technical standards, including consideration of multi-year phosphorus application on fields that do not have a high potential for phosphorus runoff to surface water, phased implementation of phosphorus-based nutrient management, and other components, as determined appropriate by the Director.

(3) Manure and soil sampling. Manure must be analyzed a minimum of once annually for nitrogen and phosphorus content, and soil analyzed a minimum of once every five years for phosphorus content. The results of these analyses are to be used in determining application rates for manure, litter, and other process wastewater.

(4) Inspect land application equipment for leaks. The operator must periodically inspect equipment used for land application of manure, litter, or process wastewater.

(5) Setback requirements. Unless the CAFO exercises one of the compliance alternatives provided for in paragraph (c)(5)(i) or (c)(5)(ii) of this section, manure, litter, and process wastewater may not be applied closer than 100 feet to any down-gradient surface waters, open tile line intake structures, sinkholes, agricultural well heads, or other conduits to surface waters.

(i) Vegetated buffer compliance alternative. As a compliance alternative, the CAFO may substitute the 100–foot setback with a 35–foot wide vegetated buffer where applications of manure, litter, or process wastewater are prohibited.

(ii) Alternative practices compliance alternative. As a compliance alternative, the CAFO may demonstrate that a setback or buffer is not necessary because implementation of alternative conservation practices or field-specific conditions will provide pollutant reductions equivalent or better than the reductions that would be achieved by the 100–foot setback.

SOURCE: 68 FR 7269, Feb. 12, 2003, unless otherwise noted.

AUTHORITY: 33 U.S.C. 1311, 1314, 1316, 1317, 1318, 1342, 1361.

Notes of Decisions (1)

Current through November 5, 2020; 85 FR 70948.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter N. Effluent Guidelines and Standards
Part 412. Concentrated Animal Feeding Operations (Cafo) Point Source Category (Refs & Annos)
Subpart A. Horses and Sheep

40 C.F.R. § 412.12

§ 412.12 Effluent limitations attainable by the application of the best practicable control technology currently available (BPT).

Currentness

(a) Except as provided in 40 CFR 125.30 through 125.32, and subject to the provisions of paragraph (b) of this section, any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BPT: There shall be no discharge of process waste water pollutants to navigable waters.

(b) Process waste pollutants in the overflow may be discharged to navigable waters whenever rainfall events, either chronic or catastrophic, cause an overflow of process waste water from a facility designed, constructed and operated to contain all process generated waste waters plus the runoff from a 10–year, 24–hour rainfall event for the location of the point source.

SOURCE: 68 FR 7269, Feb. 12, 2003, unless otherwise noted.

AUTHORITY: 33 U.S.C. 1311, 1314, 1316, 1317, 1318, 1342, 1361.

Notes of Decisions (19)

Current through November 5, 2020; 85 FR 70948, except for titles 10, 16, 40, and 50, which are current through October 29, 2020; 85 FR 68703.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter N. Effluent Guidelines and Standards
Part 412. Concentrated Animal Feeding Operations (Cafo) Point Source Category (Refs & Annos)
Subpart C. Dairy Cows and Cattle Other than Veal Calves

40 C.F.R. § 412.37

§ 412.37 Additional measures.

Effective: December 22, 2008
Currentness

(a) Each CAFO subject to this subpart must implement the following requirements:

(1) Visual inspections. There must be routine visual inspections of the CAFO production area. At a minimum, the following must be visually inspected:

(i) Weekly inspections of all storm water diversion devices, runoff diversion structures, and devices channelling contaminated storm water to the wastewater and manure storage and containment structure;

(ii) Daily inspection of water lines, including drinking water or cooling water lines;

(iii) Weekly inspections of the manure, litter, and process wastewater impoundments; the inspection will note the level in liquid impoundments as indicated by the depth marker in paragraph (a)(2) of this section.

(2) Depth marker. All open surface liquid impoundments must have a depth marker which clearly indicates the minimum capacity necessary to contain the runoff and direct precipitation of the 25–year, 24–hour rainfall event. In the case of new sources subject to effluent limitations established pursuant to § 412.46(a)(1) of this part, all open surface manure storage structures associated with such sources must include a depth marker which clearly indicates the minimum capacity necessary to contain the maximum runoff and direct precipitation associated with the design storm used in sizing the impoundment for no discharge.

(3) Corrective actions. Any deficiencies found as a result of these inspections must be corrected as soon as possible.

(4) Mortality handling. Mortalities must not be disposed of in any liquid manure or process wastewater system, and must be handled in such a way as to prevent the discharge of pollutants to surface water, unless alternative technologies pursuant to § 412.31(a)(2) and approved by the Director are designed to handle mortalities.

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter N. Effluent Guidelines and Standards
Part 412. Concentrated Animal Feeding Operations (Cafo) Point Source Category (Refs & Annos)
Subpart D. Swine, Poultry, and Veal Calves

40 C.F.R. § 412.43

§ 412.43 Effluent limitations attainable by the application of the best practicable control technology currently available (BPT).

Effective: July 24, 2007
Currentness

Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BPT:

(a) For CAFO production areas.

(1) The CAFO shall attain the same limitations and requirements as § 412.31(a)(1) through (a)(2).

(2) The CAFO shall attain the limitations and requirements of this paragraph as of the date of permit coverage.

(b) For CAFO land application areas.

(1) The CAFO shall attain the same limitations and requirements as § 412.31(b)(1) and (b)(2).

(2) The CAFO shall attain the limitations and requirements of this paragraph by February 27, 2009.

Credits
[71 FR 6984, Feb. 10, 2006; 72 FR 40250, July 24, 2007]

SOURCE: 68 FR 7269, Feb. 12, 2003, unless otherwise noted.

AUTHORITY: 33 U.S.C. 1311, 1314, 1316, 1317, 1318, 1342, 1361.

Current through November 5, 2020; 85 FR 70948, except for titles 10, 16, 40, and 50, which are current through October 29, 2020; 85 FR 68703.

