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# Concentrated Animal Feeding Operations/Clean Water Act: Federal Appellate Court Addresses U.S. Environmental Protection Agency's Rejection of Environmental Organization's Petition for Rulemaking

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The United States Court of Appeals for the 9th Circuit ("9th Circuit") addressed in an October 2nd Memorandum an appeal of the United States Environmental Protection Agency's ("EPA") denial of a Petition for Rulemaking under the Clean Water Act submitted by Food & Water Watch and twelve other environmental organizations (collectively "FWW"). See *Food & Water Watch, et al., v. U.S. Environmental Protection Agency*, 2024 WL 4371122.

FWW had requested that EPA initiate a rulemaking and revise its regulations governing concentrated animal feeding operations ("CAFOs") that discharge animal waste and manure into United States waterways.

EarthJustice and other organizations had previously filed a Petition in 2022 also seeking a Clean Water Act rule change.

The FWW Petition requested (among other things) an evidentiary presumption that certain CAFOs discharge and are either subject to National Pollutant Discharge Elimination System ("NPDES") permitting or must rebut the presumption by demonstrating that they do not discharge.

EPA had characterized the Petition as requesting that it adopt a presumption that large CAFOs using wet manure management systems actually discharge pollutants under the Clean Water Act. This would therefore require an application for a Clean Water Act Permit.

EPA's response to both Petitions constituted a denial. However, EPA stated that it was instead committed to:

...pursuing a multi-prong strategy to evaluate the most effective means of improving EPA's CAFO program.

The 9th Circuit noted that EPA agreed that CAFOs may be responsible for unlawful water pollution. However, the previously referenced multi-pronged rulemaking that had been requested was deemed by the agency to not be:

...the best way to fix the problem.

EPA concluded that it would undertake instead two tasks:

1. Convene a committee of stakeholders to solicit insights into the problem.
2. Initiate a study addressing the efficacy of its current regulations.

EPA would then determine whether it could address water quality concerns related to CAFOs through either:

- Improvement to implementation, enforcement, and other non-regulatory initiatives; or,
- Whether regulatory revisions are appropriate.

The 9th Circuit states that FWW focused on three issues which were presented to EPA in the Petition which included:

1. EPA lacks requirements for CAFOs with NPDES Permits;
2. EPA's inadequate CAFO program which allows most discharging CAFOs to avoid Permit coverage; and,
3. EPA's broad agricultural stormwater exemption that independently stands in the way of adequate regulation of CAFOs.

EPA undertook a detailed response to these arguments. The 9th Circuit states that EPA's denial can only be set aside if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law".

EPA is held to not have acted unreasonably when it refused to undertake FWW's requested action to further regulate CAFOs. While the agency declined to initiate a rulemaking, it did not refuse to take any action with respect to its CAFO regulations. The seriousness of the problem was acknowledged, and the conclusion was to further study the Effluent Limitation Guidelines and to commission the stakeholder's subcommittee.

FWW's argument that EPA's actions were similar to those in *Massachusetts v. EPA*, 549 U.S. at 528-35, which found that the agency acted arbitrarily, capriciously, and contrary to law when it denied a Petition for rulemaking after determining that greenhouse gasses present a danger, but failed to articulate some reasonable explanation as to why it cannot or will not exercise its discretion was rejected. That decision was distinguished because EPA did not decline to act entirely, but instead it acknowledged it needed more information before it could act.

The 9th Circuit notes that an agency's refusal to institute rulemaking proceedings:

...is at the high end of the range of levels of deference we give to agency action under our arbitrary and capricious review...

Therefore, the 9th Circuit denied the Petition.

A copy of the Memorandum can be downloaded [here](#).