

allow for alternative data gathering methods. Some commenters acknowledged that the alternative methods of data collection proposed by EPA can indicate situations where a potential water quality problem exists; however, most commenters asserted that on-site inspections by knowledgeable personnel are the only fair and accurate method of determining whether an AFO is a significant contributor of pollutants.

The SBAR Panel raised concern over the proposed changes to the designation criteria, and the potential to cause more small businesses to be subject to regulation. The Panel supported the retention of the existing designation criteria and process.

Rationale. EPA has decided to retain the existing designation criteria and process because the existing criteria strike an appropriate balance for ensuring protection of surface water quality while maintaining flexibility for States to assist small and medium operations before they become subject to NPDES requirements for CAFOs. Retaining the requirement for an on-site inspection will help ensure a reasoned assessment of the situation has been performed and make the operation aware that it may be designated a CAFO.

AFOs that do not meet the regulatory definition of a CAFO can often be effectively addressed by State voluntary programs or regulatory non-NPDES programs focused on the elimination of the conditions that pose a threat to water quality. Implementing these voluntary or non-NPDES State programs can help to ensure that medium and small operations implement proper practices and are not designated as CAFOs. If documented threats to water quality are not addressed by the owner or operator of particular AFOs, the NPDES CAFO regulations provide States with appropriate flexibility to use designation as an effective mechanism to designate these operations as CAFOs on a case-by-case basis. Once designated as CAFOs, these operations are subject to the permitting requirements defined in today's action. Note that the ELGs apply only to Large CAFOs. For Medium and Small CAFOs appropriate permit limits should be established according to the BPJ of the permitting authority.

Although no change has been made to either the former designation criteria or the requirement for an on-site inspection, EPA is adopting as final a technical correction to the regulatory language on designation, changing the term from "significant contributor of pollution" to "significant contributor of pollutants." for the reasons discussed in the proposal. This technical correction

makes the NPDES CAFO regulations consistent with the rest of the NPDES program. EPA received very few public comments on this revision.

If, after conducting an on-site inspection, the NPDES authorized State (or EPA in certain circumstances—see below) determines that an AFO is a significant contributor of pollutants to waters of the United States, the AFO may be designated as a CAFO. The determination of whether an AFO is a significant contributor of pollutants to waters of the United States should consider the cumulative impacts of multiple AFOs that may be causing or contributing to the exceedance of water quality standards.

8. Can EPA Designate an AFO as a CAFO Where the State Is the Permitting Authority?

Today's final rule explicitly authorizes the EPA Regional Administrator to designate CAFOs in NPDES authorized States where the Regional Administrator has determined that one or more pollutants in the AFO's discharge contributes to an impairment in a downstream or adjacent State or Indian country water that is impaired for that pollutant. Upon designation, the operation would be required to apply to the appropriate permitting authority for permit coverage. It should be noted that EPA is not assuming authority or jurisdiction to issue permits to the CAFOs that it designates in authorized NPDES States (except for those in Indian Country). That authority would remain with the authorized States.

What did EPA propose? EPA proposed to explicitly authorize EPA designation of AFOs as CAFOs in NPDES authorized States, without limiting this authority to AFOs contributing to impairments in downstream or adjacent jurisdictions.

What were the key comments? In comments submitted on the proposed rule, States and the livestock and poultry industry were generally opposed to EPA designation in NPDES authorized States. A number of commenters argued that EPA did not have the authority to designate in a State with an authorized NPDES permit program. Environmental organizations and allied commenters were generally supportive of EPA's designation authority. Those supportive of EPA's proposal believed that this authority would be an important component of ensuring that the revised regulations are fairly implemented across the entire country.

Rationale. After careful consideration of the comments, EPA has decided to limit EPA designation authority, in

NPDES authorized States, to circumstances where the Regional Administrator has determined that one or more pollutants in the AFO's discharge contributes to an impairment in a downstream or adjacent State or Indian country water that is impaired for that pollutant. In these situations, the State in which the discharge is located may not have the same incentives for designating sources as it would if the impaired water affected by the discharger were located in the State. This approach will ensure consistent implementation of designation requirements across State boundaries where there are serious water quality concerns. EPA expects NPDES authorized States to ensure consistency within State boundaries. It is not EPA's intention to make such designations lightly or without close coordination with affected States. EPA's designation authority will be helpful in sensitive situations where one State finds it difficult to resolve water quality impairments caused by AFOs in another State.

EPA disagrees with those commenters who believe that the Agency does not have the legal authority to designate CAFOs in authorized States. In today's action, EPA is asserting similar, albeit more limited, authority to designate CAFOs as compared to designation of storm water point sources. See 40 CFR 122.26(a)(1)(v) and 122.26(a)(9).

Ultimately, EPA's authority to designate derives from the CWA itself. CWA Section 501(a) provides the Agency with the authority to designate point sources subject to regulation under the NPDES program, even in States approved to administer the NPDES permit program. This interpretive authority to define point sources and nonpoint sources was recognized by the D.C. Circuit in *NRDC v. Costle*, 568 F.2d 1369, 1377 (DC Cir. 1977). The interpretive authority arises from CWA Section 501(a) when EPA interprets the term "point source" at CWA Section 502(14).

9. How Can States Use Non-NPDES Programs To Prevent Medium and Small Operations From Being Defined or Designated as CAFOs?

EPA promotes the efforts of States to actively use a variety of strategies to work with owners and operators of AFOs to ensure that they do not meet the criteria that would result in their being defined or designated Small or Medium CAFOs.

Operators of medium and small facilities are encouraged to participate in voluntary programs that promote sustainable agriculture and the