

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

PEOPLE OF THE STATE OF ILLINOIS, )  
 )  
 Complainant, )  
 )  
 v. )  
 )  
 PROFESSIONAL SWINE MANAGEMENT, )  
 LLC, an Illinois limited liability corporation, )  
 HILLTOP VIEW, LLC, an Illinois limited )  
 liability corporation, WILDCAT FARMS, LLC, )  
 an Illinois limited liability corporation, )  
 HIGH-POWER PORK, LLC, an Illinois limited )  
 liability corporation, EAGLE POINT FARMS, )  
 LLC, an Illinois limited liability corporation, )  
 LONE HOLLOW, LLC, an Illinois limited liability )  
 corporation, TIMBERLINE, LLC, an Illinois )  
 limited liability corporation, PRAIRIE STATE )  
 GILTS, LTD, an Illinois corporation, LITTLE )  
 TIMBER, LLC, an Illinois limited liability )  
 corporation, )  
 Respondents. )

**PCB NO. 10-84  
(Enforcement)**

**NOTICE OF ELECTRONIC FILING**

To: See Attached Service List

PLEASE TAKE NOTICE that on April 18, 2011, I electronically filed with the Clerk of the Pollution Control Board of the State of Illinois, a MOTION FOR LEAVE TO FILE RESPONSE *INSTANTER* and COMPLAINANT'S RESPONSE TO RESPONDENTS' SUPPLEMENTAL FILING, copies of which are attached hereto and herewith served upon you.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS

LISA MADIGAN,  
Attorney General of the  
State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement/Asbestos  
Litigation Division

500 S. Second St.  
Springfield, IL 62706  
217/782-9031

BY:   
Jane E. McBride  
Sr. Assistant Attorney General  
Environmental Bureau

**CERTIFICATE OF SERVICE**

I hereby certify that I did on April 18, 2011, cause to be served by First Class Mail, with postage thereon fully prepaid, by depositing in a United States Post Office Box in Springfield, Illinois, a true and correct copy of the following instruments entitled NOTICE OF ELECTRONIC FILING, MOTION FOR LEAVE TO FILE RESPONSE *INSTANTER* and COMPLAINANT'S RESPONSE TO RESPONDENTS' SUPPLEMENTAL FILING upon the persons listed on the Service List.

  
\_\_\_\_\_  
JANE McBRIDE  
Sr. Assistant Attorney General

This filing is submitted on recycled paper.

**SERVICE LIST**

Mr. Edward W. Dwyer  
Ms. Jennifer M. Martin  
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3150 Roland Avenue  
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Carol Webb  
Hearing Officer  
Illinois Pollution Control Board  
1021 North Grand Avenue East  
Springfield, IL 62794

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

<b>PEOPLE OF THE STATE OF ILLINOIS,</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
<b>v.</b>	)	<b>PCB NO. 10-84</b>
	)	<b>(Enforcement)</b>
<b>PROFESSIONAL SWINE</b>	)	
<b>MANAGEMENT, LLC, an Illinois</b>	)	
<b>limited liability corporation, and</b>	)	
<b>HILLTOP VIEW, LLC, an Illinois</b>	)	
<b>limited liability corporation, WILDCAT</b>	)	
<b>FARMS, LLC, an Illinois limited</b>	)	
<b>liability corporation, HIGH-POWER</b>	)	
<b>PORK, LLC, an Illinois limited liability</b>	)	
<b>corporation, EAGLE POINT FARMS, LLC, an</b>	)	
<b>Illinois limited liability corporation,</b>	)	
<b>LONE HOLLOW, LLC, an Illinois limited</b>	)	
<b>liability corporation, TIMBERLINE, LLC,</b>	)	
<b>an Illinois limited liability corporation,</b>	)	
<b>PRAIRIE STATE GILTS, LTD, an Illinois</b>	)	
<b>corporation, LITTLE TIMBER, LLC, an</b>	)	
<b>Illinois limited liability corporation,</b>	)	
	)	
<b>Respondents.</b>	)	

**MOTION FOR LEAVE TO FILE RESPONSE *INSTANTER***

NOW COMES, Complainant, PEOPLE OF THE STATE OF ILLINOIS, and respectively requests leave to file a response *instanter* to Respondents' Motion for Leave to Supplement, on the following grounds:

1. On March 21, 2011, the parties participated in a telephone status conference regarding the above-captioned matter. At the time of the status conference, counsel for Complainant requested and obtained a period of 14 days to file a response to Respondents' motion for leave to supplement. As a result, Complainant's deadline to file a response was April 1, 2011.

2. On March 25, counsel for Complainant took temporary leave of her office to attend to a family emergency.
3. On April 1, 2011, Complainant's counsel's office contacted the hearing officer regarding counsel's family emergency. On April 4, 2011, the hearing officer issued an order granting a stay of the April 1, 2011 deadline.
4. Counsel has now returned to her office and respectfully requests leave to file the response *instanter*, with appreciation for the hearing officer's and parties' consideration and cooperation during this time.

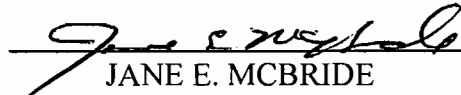
WHEREFORE, Complainant respectfully requests leave to file its response *instanter*. Said response is being filed contemporaneously with this motion.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,  
ex rel. LISA MADIGAN, Attorney General  
of the State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement Division

BY:

  
JANE E. MCBRIDE  
Sr. Assistant Attorney General

500 South Second Street  
Springfield, Illinois 62706  
(217) 782-9031

**BEFORE THE ILLINOIS POLLUTION CONTROL BOARD**

PEOPLE OF THE STATE OF ILLINOIS,	)	
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v.	)	PCB NO. 10-84
	)	(Enforcement)
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limited liability corporation, and	)	
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corporation, EAGLE POINT FARMS, LLC, an	)	
Illinois limited liability corporation,	)	
LONE HOLLOW, LLC, an Illinois limited	)	
liability corporation, TIMBERLINE, LLC,	)	
an Illinois limited liability corporation,	)	
PRAIRIE STATE GILTS, LTD, an Illinois	)	
corporation, LITTLE TIMBER, LLC, an	)	
Illinois limited liability corporation,	)	
	)	
Respondents.	)	

**COMPLAINANT'S RESPONSE TO RESPONDENTS' SUPPLEMENTAL FILING**

NOW COMES, Complainant, PEOPLE OF THE STATE OF ILLINOIS, *ex rel* Lisa Madigan, Attorney General of the State of Illinois, and responds to Respondents' motion for leave to supplement, as follows. The motion was submitted by Respondents Hilltop View, LLC, Wildcat Farms LLC, High-Power Pork, LLC, Eagle Point Farms, LLC, Lone Hollow, LLC, Timberline, LLC, Prairie States Gilts, LLC, Little Timber, LLC ("Respondent Facilities") regarding their Motion for Partial Dismissal, and joined by Respondent Professional Swine Management ("Respondent PSM").

**Objection**

1. Complainant objects to Respondents' motion for leave on the grounds that Respondents' proposed supplement is irrelevant to the issues before the Board. First, the Respondents' contention regarding use of the term "duty to apply" is simply a mincing of semantics, as set forth below. Second, also as set forth below, the Respondents' contention that the *Nat'l Pork Producers Council v. United States EPA*, 2011 U.S. App. LEXIS 5018 (5<sup>th</sup> Cir. Mar. 15, 2011) is potentially dispositive of the allegations of violation of Section 12(f) of the Act, 415 ILCS 5/12(f) is completely without merit.

2. Further, Complainant objects on the ground that Respondents' motion for leave to supplement is actually the supplement itself. Thus, it exists as a tactic that discounts and ignores the requirement to seek leave prior to submitting the filing.

**"Duty to Apply" Contention**

3. Pursuant to a document called "Nov. 2008 Compiled CAFO NPDES regulations and Effluent Limitations Guidelines and Standards", found at <http://www.dnr.mo.gov/env/wpp/cafo/>, attached hereto as Exhibit A, authority for the NPDES permit program is set forth as follows:

40 CFR Section 122.21. Application for a permit (applicable to State programs, see Section 123.25)

(a) Duty to apply.

(1) Any person who discharges or proposed to discharge pollutants or who . . . . The requirements for concentrated animal feeding operations are described in Section 122.23(d).

4. In a US EPA document, dated December 3, 2008, titled "Concentrated Animal Feeding Operations Final Rulemaking - Q&A" and attached hereto as Exhibit B, the second question reads:

- Q. Is there still a requirement for CAFOs to seek permit coverage?
- A. Yes. Under the final rule, CAFOs that discharge or propose to discharge have a **duty to apply** for NPDES permits. This is consistent with the **duty to apply** requirement for all NPDES point source categories. (Emphasis added.)

5. In an Illinois EPA document, dated 2/10/09, and titled "2008 Final Federal CAFO Rule Frequently Asked Questions", found at <http://www.epa.state.il.us/water/cafo/publications/2008-final-rule-faq.pdf>, attached hereto as Exhibit C, Question Number 4 reads:

- Q #4. Is there still a requirement for CAFOs to seek permit coverage?
- A #4. Yes. Under the final federal rule, effective December 20, 2008, CAFOs that discharge or propose to discharge have a **duty to apply** for NPDES permits. Existing CAFOs must apply on or before February 27, 2009. (Emphasis added.)

6. In the first five paragraphs of their supplement, Respondents' appear to take issue with Complaint's use of the phrase "duty to apply" relative to the 2008 Rule. As set forth immediately above, both the US EPA in federal rules as well as in guidance and the Illinois EPA in published guidance use the term "duty to apply" when referring to the "discharge or propose to discharge" standard that was promulgated as the 2008 Rule. The *Nat'l Pork Producers* Court, in its holdings, uses the term "duty to apply" when referring to the "discharge or propose to discharge" 2008 Rule standard.

7. The reference cited to in Respondents' Exhibit A, found on the second page of the



exhibit, sixth paragraph, in context, reads as follows:

. . . . Since there is no “duty to apply” for *all* CAFOS in the federal 2008 CAFO rule and Illinois has no separate state program, the Illinois EPA has no statutory authority to require all CAFOs to apply for a CAFO permit. . . . (Emphasis added.)

Obviously, the reference to “duty to apply” in this paragraph is the “duty to apply” standard that required all CAFOs to apply for a permit, found in the 2003 Rule.

8. Respondents have taken language in Respondents’ Exhibit A out of context and avoided language in that exhibit that does not cater to Respondents’ argument. Former Director Scott explains in the November 1, 2010 document that “The Illinois EPA will use criteria established in US EPA’s CAFO guidance in determining whether an NPDES permit is required.” The document goes on to reference Illinois EPA’s lack of authority to demand a permit where US EPA would not demand a permit. US EPA is clear that once a CAFO has discharged a pollutant, that CAFO must obtain a NPDES Permit. Thus, Illinois EPA is authorized to demand a permit from any CAFO at which a discharge of a pollutant has occurred. Each of the CAFOs involved in Count IV, Count V, Count VI, Count VII and Count IX of Complainant’s Amended Complaint have experienced a discharge of a pollutant.

9. There is absolutely nothing material, of merit, or relevant to the issues currently before the Board in this matter, in Respondents’ argument regarding the Complainant’s use of the phrase “duty to apply” relative to the 2008 Rule. The phrase clearly exists in the 2008 Rule itself, as set forth above, and is used by both federal and state agencies when discussing the “discharge or propose to discharge” standard.

**Holding on Failure to Apply Liability Inconsequential  
to Amended Complaint Allegations of Discharging Without a Permit**

10. In the consolidated case of *Nat'l Pork Producers*, the 5<sup>th</sup> Circuit case cited by Respondents, the Court held that US EPA has no authority to require a permit from a CAFO that *has not experienced a discharge*. (Emphasis added.) The 5<sup>th</sup> Circuit holding is of little consequence to the present case where each of the CAFOs involved in Count IV, Count V, Count VI and Count IX of Complainant's Amended Complaint have experienced a discharge of a pollutant.

11. The *Nat'l Pork Producers* case directly addresses the distinction between a cause of action for failure to apply for a permit and a cause of action for discharging without a permit:

“ . . . the 2008 Rule requires CAFOs that discharge or propose to discharge to apply for an NPDES permit – the duty to apply. If a CAFO discharges and does not have a permit, the CAFO will not only be liable for discharging without a permit, but also prosecuted for failing to apply for a permit – failure to apply liability.”

2011 U.S. App. LEXIS 5018, at 25.

In its holding, the Court eliminated the permitting authority's ability to bring a cause of action for failure to apply for a permit. However, a federal or state claim for discharging without a permit is clearly preserved and available:

“ . . . In fact, the text of the Act indicates that a discharging CAFO must have a permit. The CWA explains that discharging without a permit is unlawful, 33 USC § 1311, and punishes such discharges with civil and criminal penalties, 33 U.S.C § 1319. This has been the well-established statutory mandate since 1972. It logically follows that, at base, a discharging CAFO has a duty to apply for a permit.

2011 U.S. App. LEXIS 5018 at 32.

12. The allegations of Section 12(f) violations set forth in the Amended Complaint

are not allegations of failure to apply for a permit, but rather each and every one is an allegation of discharging without a permit.<sup>1</sup>

WHEREFORE, for the above-stated reasons, Complainant respectfully requests that the

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<sup>1</sup> The allegation of violation Section 12(f) for each count follows:

Count I:

24. By threatening, causing or allowing storm water run-off and sediment and soil erosion to discharge from the facility construction site without obtaining a construction storm water NPDES permit or otherwise complying with construction storm water requirements, Respondents Hilltop and PSM have caused, threatened or allowed the discharge of contaminants into the environment so as to cause or tend to cause water pollution in Illinois, and so as to violate the regulations or standards adopted by the Pollution Control Board, and thereby have violated Sections 12(a) and 12(f) of the Act, 415 ILCS 5/12(a), (f), and 35 Ill. Adm. Code 309.102(a).

25. By causing or allowing the discharge of livestock waste runoff from a land application field into a roadside ditch in such a manner as to threaten water pollution, Respondents Hilltop and PSM have violated Sections 12(a), 12(d), 12(f) and 35 Ill. Adm. Code 309.102(a).

Count II:

24. By causing or allowing the discharge of livestock wastewater to waters of the State without an NPDES permit, Respondents Wildcat and PSM have violated 12(f) of the Act, 415 ILCS 5/12(f), and 35 Ill. Adm. Code 309.102(a).

Count III:

22. By causing or allowing the discharge of livestock wastewater to waters of the State without an NPDES permit, Respondents High-Power and PSM have violated 12(f) of the Act, 415 ILCS 5/12(f), and 35 Ill. Adm. Code 309.102(a).

Count IV:

20. By causing or allowing the discharge of livestock wastewater to waters of the State without an NPDES permit, Respondents Eagle Point and PSM have violated 12(f) of the Act, 415 ILCS 5/12(f), and 35 Ill. Adm. Code 309.102(a).

Count V:

22. By causing or allowing the discharge of livestock wastewater to waters of the State without an NPDES permit, Respondents Lone Hollow and PSM have violated 12(f) of the Act, 415 ILCS 5/12(f), and 35 Ill. Adm. Code 309.102(a).

Count VI:

22. By causing or allowing the discharge of livestock wastewater to waters of the State without an NPDES permit, Respondents Timberline and PSM have violated 12(f) of the Act, 415 ILCS 5/12(f), and 35 Ill. Adm. Code 309.102(a).

Count VII:

27. By causing or allowing the discharge of livestock wastewater to waters of the State without an NPDES permit, Respondents Prairie State Gilts and PSM have violated 12(f) of the Act, 415 ILCS 5/12(f), and 35 Ill. Adm. Code 309.102(a).

Count VIII:

23. By causing or allowing the discharge of livestock wastewater to waters of the State without an NPDES permit, Respondents North Fork and PSM have violated 12(f) of the Act, 415 ILCS 5/12(f), and 35 Ill. Adm. Code 309.102(a).

Count IX:

33. By causing or allowing the discharge of livestock wastewater to waters of the State without an NPDES permit, Respondents Little Timber and PSM have violated 12(f) of the Act, 415 ILCS 5/12(f), and 35 Ill. Adm. Code 309.102(a).

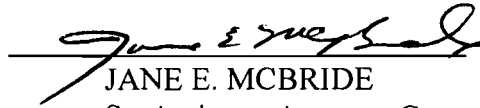
Board deny Respondents' motion for leave to supplement, or, in the alternative, find Respondents' supplement to be unpersuasive and, in fact, without merit, and, based on the foregoing as well as on Complainant's response and sur-reply to Respondents' original motions, deny Respondents' motions to dismiss and/or strike the Amended Complaint.

Respectfully submitted,

PEOPLE OF THE STATE OF ILLINOIS,  
ex rel. LISA MADIGAN, Attorney General  
of the State of Illinois

MATTHEW J. DUNN, Chief  
Environmental Enforcement Division

BY:

  
JANE E. MCBRIDE  
Sr. Assistant Attorney General

500 South Second Street  
Springfield, Illinois 62706  
(217) 782-9031

**PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT  
DISCHARGE ELIMINATION SYSTEM**

**Authority:** The Clean Water Act, 33 U.S.C. 1251 *et seq.*

**§ 122.21 Application for a permit (applicable to State programs, see § 123.25).**

(a) Duty to apply.

(1) Any person who discharges or proposes to discharge pollutants or who owns or operates a “sludge-only facility” whose sewage sludge use or disposal practice is regulated by part 503 of this chapter, and who does not have an effective permit, except persons covered by general permits under § 122.28, excluded under § 122.3, or a user of a privately owned treatment works unless the Director requires otherwise under § 122.44(m), must submit a complete application to the Director in accordance with this section and part 124 of this chapter. The requirements for concentrated animal feeding operations are described in § 122.23(d).

(2) Application Forms:

(i) All applicants for EPA-issued permits must submit applications on EPA permit application forms. More than one application form may be required from a facility depending on the number and types of discharges or outfalls found there. Application forms may be obtained by contacting the EPA water resource center at (202) 260-7786 or Water Resource Center, U.S. EPA, Mail Code 4100, 1200 Pennsylvania Ave., NW., Washington, DC 20460 or at the EPA Internet site [www.epa.gov/owm/npdes.htm](http://www.epa.gov/owm/npdes.htm). Applications for EPA-issued permits must be submitted as follows:

(A) All applicants, other than POTWs and TWTDS, must submit Form 1.

(B) Applicants for new and existing POTWs must submit the information contained in paragraph (j) of this section using Form 2A or other form provided by the director.

(C) Applicants for concentrated animal feeding operations or aquatic animal production facilities must submit Form 2B.

*[The remainder of § 122.21(a) through (h) is not specific to CAFOs and, therefore, is not included here.]*

(i) Application requirements for new and existing concentrated animal feeding operations and aquatic animal production facilities. New and existing concentrated animal feeding operations (defined in § 122.23) and concentrated aquatic animal production facilities (defined in § 122.24) shall provide the following information to the Director, using the application form provided by the Director:

(1) For concentrated animal feeding operations:

(i) The name of the owner or operator;

(ii) The facility location and mailing addresses;

(iii) Latitude and longitude of the production area (entrance to production area);

(iv) A topographic map of the geographic area in which the CAFO is located showing the specific location of the production area, in lieu of the requirements of paragraph (f)(7) of this section;

(v) Specific information about the number and type of animals, whether in open confinement or housed under roof (beef cattle, broilers, layers, swine weighing 55 pounds or more, swine weighing less than 55 pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, other);

(vi) The type of containment and storage (anaerobic lagoon, roofed storage shed, storage ponds, underfloor pits, above ground storage tanks, below ground storage tanks, concrete pad, impervious soil pad, other) and total capacity for manure, litter, and process wastewater storage(tons/gallons);

(vii) The total number of acres under control of the applicant available for land application of manure, litter, or process wastewater;

(viii) Estimated amounts of manure, litter, and process wastewater generated per year (tons/gallons);

(ix) Estimated amounts of manure, litter and process wastewater transferred to other persons per year (tons/gallons); and

(x) A nutrient management plan that at a minimum satisfies the requirements specified in § 122.42(e), including, for all CAFOs subject to 40 CFR part 412, subpart C or subpart D, the requirements of 40 CFR 412.4(c), as applicable.

*[The remainder of § 122.2 is not specific to CAFOs and, therefore, is not included here.]*

**§ 122.23 Concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25).**

(a) *Scope.* Concentrated animal feeding operations (CAFOs), as defined in paragraph (b) of this section or designated in accordance with paragraph (c) of this section, are point sources, subject to NPDES permitting requirements as provided in this section. Once an animal feeding operation is defined as a CAFO for at least one type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

(b) Definitions applicable to this section:

(1) *Animal feeding operation* ("AFO") means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

(i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and

(ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

(2) *Concentrated animal feeding operation* ("CAFO") means an AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section. Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes.

(3) The term *land application area* means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied.

(4) *Large concentrated animal feeding operation* ("Large CAFO"). An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:

- (i) 700 mature dairy cows, whether milked or dry;
- (ii) 1,000 veal calves;
- (iii) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;
- (iv) 2,500 swine each weighing 55 pounds or more;
- (v) 10,000 swine each weighing less than 55 pounds;
- (vi) 500 horses;
- (vii) 10,000 sheep or lambs;
- (viii) 55,000 turkeys;
- (ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;
- (x) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;
- (xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;
- (xii) 30,000 ducks (if the AFO uses other than a liquid manure handling system); or
- (xiii) 5,000 ducks (if the AFO uses a liquid manure handling system).

(5) The term *manure* is defined to include manure, bedding, compost and raw materials or other materials commingled with manure or set aside for disposal.

(6) *Medium concentrated animal feeding operation* ("Medium CAFO"). The term Medium CAFO includes any AFO with the type and number of animals that fall within any of the ranges listed in



paragraph (b)(6)(i) of this section and which has been defined or designated as a CAFO. An AFO is defined as a Medium CAFO if:

- (i) The type and number of animals that it stables or confines falls within any of the following ranges:
  - (A) 200 to 699 mature dairy cows, whether milked or dry;
  - (B) 300 to 999 veal calves;
  - (C) 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;
  - (D) 750 to 2,499 swine each weighing 55 pounds or more;
  - (E) 3,000 to 9,999 swine each weighing less than 55 pounds;
  - (F) 150 to 499 horses;
  - (G) 3,000 to 9,999 sheep or lambs;
  - (H) 16,500 to 54,999 turkeys;
  - (I) 9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system;
  - (J) 37,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;
  - (K) 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system;
  - (L) 10,000 to 29,999 ducks (if the AFO uses other than a liquid manure handling system); or
  - (M) 1,500 to 4,999 ducks (if the AFO uses a liquid manure handling system); and
- (ii) Either one of the following conditions are met:
  - (A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or
  - (B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(7) *Process wastewater* means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.

(8) *Production area* means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

(9) *Small concentrated animal feeding operation* ("Small CAFO"). An AFO that is designated as a CAFO and is not a Medium CAFO.

(c) *How may an AFO be designated as a CAFO?* The appropriate authority (i.e., State Director or Regional Administrator, or both, as specified in paragraph (c)(1) of this section) may designate any AFO as a CAFO upon determining that it is a significant contributor of pollutants to waters of the United States.

(1) Who may designate?

(i) *Approved States.* In States that are approved or authorized by EPA under Part 123, CAFO designations may be made by the State Director. The Regional Administrator may also designate

CAFOs in approved States, but only 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.

(ii) *States with no approved program.* The Regional Administrator may designate CAFOs in States that do not have an approved program and in Indian country where no entity has expressly demonstrated authority and has been expressly authorized by EPA to implement the NPDES program.

(2) In making this designation, the State Director or the Regional Administrator shall consider the following factors:

- (i) The size of the AFO and the amount of wastes reaching waters of the United States;
- (ii) The location of the AFO relative to waters of the United States;
- (iii) The means of conveyance of animal wastes and process waste waters into waters of the United States;
- (iv) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes manure and process waste waters into waters of the United States; and
- (v) Other relevant factors.

(3) No AFO shall be designated under this paragraph unless the State Director or the Regional Administrator has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program. In addition, no AFO with numbers of animals below those established in paragraph (b)(6) of this section may be designated as a CAFO unless:

- (i) Pollutants are discharged into waters of the United States through a manmade ditch, flushing system, or other similar manmade device; or
- (ii) Pollutants are discharged directly into waters of the United States which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(d) *Who must seek coverage under an NPDES permit?*

(1) *Permit Requirement.* The owner or operator of a CAFO must seek coverage under an NPDES permit if the CAFO discharges or proposes to discharge. A CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur. Specifically, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit. If the Director has not made a general permit available to the CAFO, the CAFO owner or operator must submit an application for an individual permit to the Director.

(2) *Information to submit with permit application or notice of intent.* An application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.

(e) Land application discharges from a CAFO are subject to NPDES requirements. The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14). For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

(1) For unpermitted Large CAFOs, a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural

utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi) through (ix).

(2) Unpermitted Large CAFOs must maintain documentation specified in § 122.42(e)(1)(ix) either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

(f) *When must the owner or operator of a CAFO seek coverage under an NPDES permit?*

Any CAFO that is required to seek permit coverage under paragraph (d)(1) of this section must seek coverage when the CAFO proposes to discharge, unless a later deadline is specified below.

(1) *Operations defined as CAFOs prior to April 14, 2003.* For operations defined as CAFOs under regulations that were in effect prior to April 14, 2003, the owner or operator must have or seek to obtain coverage under an NPDES permit as of April 14, 2003, and comply with all applicable NPDES requirements, including the duty to maintain permit coverage in accordance with paragraph (g) of this section.

(2) *Operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date.* For all operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date, the owner or operator of the CAFO must seek to obtain coverage under an NPDES permit by February 27, 2009.

(3) *Operations that become defined as CAFOs after April 14, 2003, but which are not new sources.* For a newly constructed CAFO and for an AFO that makes changes to its operations that result in its becoming defined as a CAFO for the first time after April 14, 2003, but is not a new source, the owner or operator must seek to obtain coverage under an NPDES permit, as follows:

- (i) For newly constructed operations not subject to effluent limitations guidelines, 180 days prior to the time CAFO commences operation;
- (ii) For other operations (*e.g.*, resulting from an increase in the number of animals), as soon as possible, but no later than 90 days after becoming defined as a CAFO; or

(iii) If an operational change that makes the operation a CAFO would not have made it a CAFO prior to April 14, 2003, the operation has until February 27, 2009, or 90 days after becoming defined as a CAFO, whichever is later.

(4) *New sources.* The owner or operator of a new source must seek to obtain coverage under a permit at least 180 days prior to the time that the CAFO commences operation.

(5) *Operations that are designated as CAFOs.* For operations designated as a CAFO in accordance with paragraph (c) of this section, the owner or operator must seek to obtain coverage under a permit no later than 90 days after receiving notice of the designation.

(g) *Duty to Maintain Permit Coverage.* No later than 180 days before the expiration of the permit, or as provided by the Director, any permitted CAFO must submit an application to renew its permit, in accordance with § 122.21(d), unless the CAFO will not discharge or propose to discharge upon expiration of the permit.

(h) *Procedures for CAFOs seeking coverage under a general permit.*

(1) CAFO owners or operators must submit a notice of intent when seeking authorization to discharge under a general permit in accordance with § 122.28(b). The Director must review notices of intent submitted by CAFO owners or operators to ensure that the notice of intent includes the information required by § 122.21(i)(1), including a nutrient management plan that meets the requirements of § 122.42(e) and applicable effluent limitations and standards, including those specified in 40 CFR part 412. When additional information is necessary to complete the notice of intent or clarify, modify, or supplement previously submitted material, the Director may request such information from the owner or operator. If the Director makes a preliminary determination that the notice of intent meets the requirements of §§ 122.21(i)(1) and 122.42(e), the Director must notify the public of the Director's proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's nutrient management plan, and the draft terms of the nutrient management plan to be incorporated into the permit. The process for submitting public comments and hearing requests, and the hearing process if a request for

a hearing is granted, must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Director may establish, either by regulation or in the general permit, an appropriate period of time for the public to comment and request a hearing that differs from the time period specified in 40 CFR 124.10. The Director must respond to significant comments received during the comment period, as provided in 40 CFR 124.17, and, if necessary, require the CAFO owner or operator to revise the nutrient management plan in order to be granted permit coverage. When the Director authorizes coverage for the CAFO owner or operator under the general permit, the terms of the nutrient management plan shall become incorporated as terms and conditions of the permit for the CAFO. The Director shall notify the CAFO owner or operator and inform the public that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(2) *For EPA-issued permits only.* The Regional Administrator shall notify each person who has submitted written comments on the proposal to grant coverage and the draft terms of the nutrient management plan or requested notice of the final permit decision. Such notification shall include notice that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(3) Nothing in this paragraph (h) shall affect the authority of the Director to require an individual permit under § 122.28(b)(3).

(i) *No Discharge Certification Option.*

(1) The owner or operator of a CAFO that meets the eligibility criteria in paragraph (i)(2) of this section may certify to the Director that the CAFO does not discharge or propose to discharge. A CAFO owner or operator who certifies that the CAFO does not discharge or propose to discharge is not required to seek coverage under an NPDES permit pursuant to paragraph (d)(1) of this section, provided that the CAFO is designed, constructed, operated, and maintained in accordance with the requirements of paragraphs (i)(2) and (3) of this section, and subject to the limitations in paragraph (i)(4) of this section:

(2) Eligibility Criteria. In order to certify that a CAFO does not discharge or propose to discharge, the owner or operator of a CAFO must document, based on an objective assessment of the conditions at the CAFO, that the CAFO is designed, constructed, operated, and maintained in a manner such that the CAFO will not discharge, as follows:

(i) The CAFO's production area is designed, constructed, operated, and maintained so as not to discharge. The CAFO must maintain documentation that demonstrates that:

(A) Any open manure storage structures are designed, constructed, operated, and maintained to achieve no discharge based on a technical evaluation in accordance with the elements of the technical evaluation set forth in 40 CFR 412.46(a)(1)(i) through (viii);

(B) Any part of the CAFO's production area that is not addressed by paragraph (i)(2)(i)(A) of this section is designed, constructed, operated, and maintained such that there will be no discharge of manure, litter, or process wastewater; and

(C) The CAFO implements the additional measures set forth in 40 CFR 412.37(a) and (b);

(ii) The CAFO has developed and is implementing an up-to-date nutrient management plan to ensure no discharge from the CAFO, including from all land application areas under the control of the CAFO, that addresses, at a minimum, the following:

(A) The elements of § 122.42(e)(1)(i) through (ix) and 40 CFR 412.37(c); and

(B) All site-specific operation and maintenance practices necessary to ensure no discharge, including any practices or conditions established by a technical evaluation pursuant to paragraph (i)(2)(i)(A) of this section; and

(iii) The CAFO must maintain documentation required by this paragraph either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

(3) Submission to the Director. In order to certify that a CAFO does not discharge or propose to discharge, the CAFO owner or operator must complete and submit to the Director, by certified mail



or equivalent method of documentation, a certification that includes, at a minimum, the following information:

- (i) The legal name, address and phone number of the CAFO owner or operator (see § 122.21(b));
- (ii) The CAFO name and address, the county name and the latitude and longitude where the CAFO is located;
- (iii) A statement that describes the basis for the CAFO's certification that it satisfies the eligibility requirements identified in paragraph (i)(2) of this section; and
- (iv) The following certification statement: "I certify under penalty of law that I am the owner or operator of a concentrated animal feeding operation (CAFO), identified as [Name of CAFO], and that said CAFO meets the requirements of 40 CFR 122.23(i). I have read and understand the eligibility requirements of 40 CFR 122.23(i)(2) for certifying that a CAFO does not discharge or propose to discharge and further certify that this CAFO satisfies the eligibility requirements. As part of this certification, I am including the information required by 40 CFR 122.23(i)(3). I also understand the conditions set forth in 40 CFR 122.23(i)(4), (5) and (6) regarding loss and withdrawal of certification. I certify under penalty of law that this document and all other documents required for this certification were prepared under my direction or supervision and that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons directly involved in gathering and evaluating the information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."; and
- (v) The certification must be signed in accordance with the signatory requirements of 40 CFR 122.22.

(4) Term of Certification. A certification that meets the requirements of paragraphs (i)(2) and (i)(3) of this section shall become effective on the date it is submitted, unless the Director establishes an effective date of up to 30 days after the date of submission. Certification will remain in effect for five

years or until the certification is no longer valid or is withdrawn, whichever occurs first. A certification is no longer valid when a discharge has occurred or when the CAFO ceases to meet the eligibility criteria in paragraph (i)(2) of this section.

(5) Withdrawal of Certification.

(i) At any time, a CAFO may withdraw its certification by notifying the Director by certified mail or equivalent method of documentation. A certification is withdrawn on the date the notification is submitted to the Director. The CAFO does not need to specify any reason for the withdrawal in its notification to the Director.

(ii) If a certification becomes invalid in accordance with paragraph (i)(4) of this section, the CAFO must withdraw its certification within three days of the date on which the CAFO becomes aware that the certification is invalid. Once a CAFO's certification is no longer valid, the CAFO is subject to the requirement in paragraph (d)(1) of this section to seek permit coverage if it discharges or proposes to discharge.

(6) Recertification. A previously certified CAFO that does not discharge or propose to discharge may recertify in accordance with paragraph (i) of this section, except that where the CAFO has discharged, the CAFO may only recertify if the following additional conditions are met:

(i) The CAFO had a valid certification at the time of the discharge;

(ii) The owner or operator satisfies the eligibility criteria of paragraph (i)(2) of this section, including any necessary modifications to the CAFO's design, construction, operation, and/or maintenance to permanently address the cause of the discharge and ensure that no discharge from this cause occurs in the future;

(iii) The CAFO has not previously recertified after a discharge from the same cause;

(iv) The owner or operator submits to the Director for review the following documentation: a description of the discharge, including the date, time, cause, duration, and approximate volume of the discharge, and a detailed explanation of the steps taken by the CAFO to permanently address

the cause of the discharge in addition to submitting a certification in accordance with paragraph (i)(3) of this section; and

(v) Notwithstanding paragraph (i)(4) of this section, a recertification that meets the requirements of paragraphs (i)(6)(iii) and (i)(6)(iv) of this section shall only become effective 30 days from the date of submission of the recertification documentation.

(j) *Effect of certification.*

(1) An unpermitted CAFO certified in accordance with paragraph (i) of this section is presumed not to propose to discharge. If such a CAFO does discharge, it is not in violation of the requirement that CAFOs that propose to discharge seek permit coverage pursuant to paragraphs (d)(1) and (f) of this section, with respect to that discharge. In all instances, the discharge of a pollutant without a permit is a violation of the Clean Water Act section 301(a) prohibition against unauthorized discharges from point sources.

(2) In any enforcement proceeding for failure to seek permit coverage under paragraphs (d)(1) or (f) of this section that is related to a discharge from an unpermitted CAFO, the burden is on the CAFO to establish that it did not propose to discharge prior to the discharge when the CAFO either did not submit certification documentation as provided in paragraph (i)(3) or (i)(6)(iv) of this section within at least five years prior to the discharge, or withdrew its certification in accordance with paragraph (i)(5) of this section. Design, construction, operation, and maintenance in accordance with the criteria of paragraph (i)(2) of this section satisfies this burden.

**§ 122.28 General permits (applicable to State NPDES programs, see § 123.25).**

*[The first part of § 122.28 ((a) through (b)(2)) is not specific to CAFOs and, therefore, is not included here.]*

*[§ 122.28(b)(2) Authorization to discharge, or authorization to engage in sludge use and disposal practices](ii) The contents of the notice of intent shall be specified in the general permit and shall require the submission of information necessary for adequate program implementation, including*

at a minimum, the legal name and address of the owner or operator, the facility name and address, type of facility or discharges, and the receiving stream(s). General permits for storm water discharges associated with industrial activity from inactive mining, inactive oil and gas operations, or inactive landfills occurring on Federal lands where an operator cannot be identified may contain alternative notice of intent requirements. All notices of intent shall be signed in accordance with § 122.22. Notices of intent for coverage under a general permit for concentrated animal feeding operations must include the information specified in § 122.21(i)(1), including a topographic map.

*[§ 122.28(b)(2)(iii) through (vi) is not specific to CAFOs and, therefore, is not included here.]*

(vii) A CAFO owner or operator may be authorized to discharge under a general permit only in accordance with the process described in § 122.23(h).

*[The remainder of § 122.28 is not specific to CAFOs and, therefore, is not included here.]*

**§ 122.42 Additional conditions applicable to specified categories of NPDES permits (applicable to State NPDES programs, see § 123.25).**

*[The first part of § 122.42 ((a) through (d)) is not specific to CAFOs and, therefore, is not included here.]*

(e) *Concentrated animal feeding operations (CAFOs)*. Any permit issued to a CAFO must include the requirements in paragraphs (e)(1) through (e)(6) of this section.

(1) *Requirement to implement a nutrient management plan*. Any permit issued to a CAFO must include a requirement to implement a nutrient management plan that, at a minimum, contains best management practices necessary to meet the requirements of this paragraph and applicable effluent limitations and standards, including those specified in 40 CFR part 412. The nutrient management plan must, to the extent applicable:

(i) Ensure adequate storage of manure, litter, and process wastewater, including procedures to ensure proper operation and maintenance of the storage facilities;

- (ii) Ensure proper management of mortalities (i.e., dead animals) to ensure that they are not disposed of in a liquid manure, storm water, or process wastewater storage or treatment system that is not specifically designed to treat animal mortalities;
- (iii) Ensure that clean water is diverted, as appropriate, from the production area;
- (iv) Prevent direct contact of confined animals with waters of the United States;
- (v) Ensure that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater, or storm water storage or treatment system unless specifically designed to treat such chemicals and other contaminants;
- (vi) Identify appropriate site specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the United States;
- (vii) Identify protocols for appropriate testing of manure, litter, process wastewater, and soil;
- (viii) Establish protocols to land apply manure, litter or process wastewater in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater; and
- (ix) Identify specific records that will be maintained to document the implementation and management of the minimum elements described in paragraphs (e)(1)(i) through (e)(1)(viii) of this section.

(2) *Recordkeeping requirements.*

- (i) The permittee must create, maintain for five years, and make available to the Director, upon request, the following records:
  - (A) All applicable records identified pursuant paragraph (e)(1)(ix) of this section;
  - (B) In addition, all CAFOs subject to 40 CFR part 412 must comply with record keeping requirements as specified in § 412.37(b) and (c) and § 412.47(b) and (c).
- (ii) A copy of the CAFO's site-specific nutrient management plan must be maintained on site and made available to the Director upon request.

(3) *Requirements relating to transfer of manure or process wastewater to other persons.* Prior to transferring manure, litter or process wastewater to other persons, Large CAFOs must provide the recipient of the manure, litter or process wastewater with the most current nutrient analysis. The analysis provided must be consistent with the requirements of 40 CFR part 412. Large CAFOs must retain for five years records of the date, recipient name and address, and approximate amount of manure, litter or process wastewater transferred to another person.

(4) Annual reporting requirements for CAFOs. The permittee must submit an annual report to the Director. The annual report must include:

- (i) The number and type of animals, whether in open confinement or housed under roof (beef cattle, broilers, layers, swine weighing 55 pounds or more, swine weighing less than 55 pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, other);
- (ii) Estimated amount of total manure, litter and process wastewater generated by the CAFO in the previous 12 months (tons/gallons);
- (iii) Estimated amount of total manure, litter and process wastewater transferred to other person by the CAFO in the previous 12 months (tons/gallons);
- (iv) Total number of acres for land application covered by the nutrient management plan developed in accordance with paragraph (e)(1) of this section;
- (v) Total number of acres under control of the CAFO that were used for land application of manure, litter and process wastewater in the previous 12 months;
- (vi) Summary of all manure, litter and process wastewater discharges from the production area that have occurred in the previous 12 months, including date, time, and approximate volume;
- (vii) A statement indicating whether the current version of the CAFO's nutrient management plan was developed or approved by a certified nutrient management planner; and
- (viii) The actual crop(s) planted and actual yield(s) for each field, the actual nitrogen and phosphorus content of the manure, litter, and process wastewater, the results of calculations conducted in accordance with paragraphs (e)(5)(i)(B) and (e)(5)(ii)(D) of this section, and the

amount of manure, litter, and process wastewater applied to each field during the previous 12 months; and, for any CAFO that implements a nutrient management plan that addresses rates of application in accordance with paragraph (e)(5)(ii) of this section, the results of any soil testing for nitrogen and phosphorus taken during the preceding 12 months, the data used in calculations conducted in accordance with paragraph (e)(5)(ii)(D) of this section, and the amount of any supplemental fertilizer applied during the previous 12 months.

(5) *Terms of the nutrient management plan.* Any permit issued to a CAFO must require compliance with the terms of the CAFO's site-specific nutrient management plan. The terms of the nutrient management plan are the information, protocols, best management practices, and other conditions in the nutrient management plan determined by the Director to be necessary to meet the requirements of paragraph (e)(1) of this section. The terms of the nutrient management plan, with respect to protocols for land application of manure, litter, or process wastewater required by paragraph (e)(1)(viii) of this section and, as applicable, 40 CFR 412.4(c), must include the fields available for land application; field-specific rates of application properly developed, as specified in paragraphs (e)(5)(i) through (ii) of this section, to ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater; and any timing limitations identified in the nutrient management plan concerning land application on the fields available for land application. The terms must address rates of application using one of the following two approaches, unless the Director specifies that only one of these approaches may be used:

(i) *Linear approach.* An approach that expresses rates of application as pounds of nitrogen and phosphorus, according to the following specifications:

(A) The terms include maximum application rates from manure, litter, and process wastewater for each year of permit coverage, for each crop identified in the nutrient management plan, in chemical forms determined to be acceptable to the Director, in pounds per acre, per year, for each field to be used for land application, and certain factors necessary to determine such rates. At a minimum, the factors that are terms must include: the outcome

of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field; the crops to be planted in each field or any other uses of a field such as pasture or fallow fields; the realistic yield goal for each crop or use identified for each field; the nitrogen and phosphorus recommendations from sources specified by the Director for each crop or use identified for each field; credits for all nitrogen in the field that will be plant available; consideration of multi-year phosphorus application; and accounting for all other additions of plant available nitrogen and phosphorus to the field. In addition, the terms include the form and source of manure, litter, and process wastewater to be land-applied; the timing and method of land application; and the methodology by which the nutrient management plan accounts for the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied.

(B) Large CAFOs that use this approach must calculate the maximum amount of manure, litter, and process wastewater to be land applied at least once each year using the results of the most recent representative manure, litter, and process wastewater tests for nitrogen and phosphorus taken within 12 months of the date of land application; or

(ii) *Narrative rate approach.* An approach that expresses rates of application as a narrative rate of application that results in the amount, in tons or gallons, of manure, litter, and process wastewater to be land applied, according to the following specifications:

(A) The terms include maximum amounts of nitrogen and phosphorus derived from all sources of nutrients, for each crop identified in the nutrient management plan, in chemical forms determined to be acceptable to the Director, in pounds per acre, for each field, and certain factors necessary to determine such amounts. At a minimum, the factors that are terms must include: the outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field; the crops to be planted in each field or any other uses such as pasture or fallow fields (including alternative crops identified in accordance with paragraph (e)(5)(ii)(B) of this section); the realistic yield goal for each crop or use identified



for each field; and the nitrogen and phosphorus recommendations from sources specified by the Director for each crop or use identified for each field. In addition, the terms include the methodology by which the nutrient management plan accounts for the following factors when calculating the amounts of manure, litter, and process wastewater to be land applied: results of soil tests conducted in accordance with protocols identified in the nutrient management plan, as required by paragraph (e)(1)(vii) of this section; credits for all nitrogen in the field that will be plant available; the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied; consideration of multi-year phosphorus application; accounting for all other additions of plant available nitrogen and phosphorus to the field; the form and source of manure, litter, and process wastewater; the timing and method of land application; and volatilization of nitrogen and mineralization of organic nitrogen.

(B) The terms of the nutrient management plan include alternative crops identified in the CAFO's nutrient management plan that are not in the planned crop rotation. Where a CAFO includes alternative crops in its nutrient management plan, the crops must be listed by field, in addition to the crops identified in the planned crop rotation for that field, and the nutrient management plan must include realistic crop yield goals and the nitrogen and phosphorus recommendations from sources specified by the Director for each crop. Maximum amounts of nitrogen and phosphorus from all sources of nutrients and the amounts of manure, litter, and process wastewater to be applied must be determined in accordance with the methodology described in paragraph (e)(5)(ii)(A) of this section.

(C) For CAFOs using this approach, the following projections must be included in the nutrient management plan submitted to the Director, but are not terms of the nutrient management plan: the CAFO's planned crop rotations for each field for the period of permit coverage; the projected amount of manure, litter, or process wastewater to be applied; projected credits for all nitrogen in the field that will be plant available; consideration of multi-year phosphorus application; accounting for all other additions of plant available

nitrogen and phosphorus to the field; and the predicted form, source, and method of application of manure, litter, and process wastewater for each crop. Timing of application for each field, insofar as it concerns the calculation of rates of application, is not a term of the nutrient management plan.

(D) CAFOs that use this approach must calculate maximum amounts of manure, litter, and process wastewater to be land applied at least once each year using the methodology required in paragraph (e)(5)(ii)(A) of this section before land applying manure, litter, and process wastewater and must rely on the following data:

(1) a field-specific determination of soil levels of nitrogen and phosphorus, including, for nitrogen, a concurrent determination of nitrogen that will be plant available consistent with the methodology required by paragraph (e)(5)(ii)(A) of this section, and for phosphorus, the results of the most recent soil test conducted in accordance with soil testing requirements approved by the Director; and

(2) the results of most recent representative manure, litter, and process wastewater tests for nitrogen and phosphorus taken within 12 months of the date of land application, in order to determine the amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied.

(6) *Changes to a nutrient management plan.* Any permit issued to a CAFO must require the following procedures to apply when a CAFO owner or operator makes changes to the CAFO's nutrient management plan previously submitted to the Director:

(i) The CAFO owner or operator must provide the Director with the most current version of the CAFO's nutrient management plan and identify changes from the previous version, except that the results of calculations made in accordance with the requirements of paragraphs (e)(5)(i)(B) and (e)(5)(ii)(D) of this section are not subject to the requirements of paragraph (e)(6) of this section.

(ii) The Director must review the revised nutrient management plan to ensure that it meets the requirements of this section and applicable effluent limitations and standards, including those specified in 40 CFR part 412, and must determine whether the changes to the nutrient management plan necessitate revision to the terms of the nutrient management plan incorporated into the permit issued to the CAFO. If revision to the terms of the nutrient management plan is not necessary, the Director must notify the CAFO owner or operator and upon such notification the CAFO may implement the revised nutrient management plan. If revision to the terms of the nutrient management plan is necessary, the Director must determine whether such changes are substantial changes as described in paragraph (e)(6)(iii) of this section.

(A) If the Director determines that the changes to the terms of the nutrient management plan are not substantial, the Director must make the revised nutrient management plan publicly available and include it in the permit record, revise the terms of the nutrient management plan incorporated into the permit, and notify the owner or operator and inform the public of any changes to the terms of the nutrient management plan that are incorporated into the permit.

(B) If the Director determines that the changes to the terms of the nutrient management plan are substantial, the Director must notify the public and make the proposed changes and the information submitted by the CAFO owner or operator available for public review and comment. The process for public comments, hearing requests, and the hearing process if a hearing is held must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Director may establish, either by regulation or in the CAFO's permit, an appropriate period of time for the public to comment and request a hearing on the proposed changes that differs from the time period specified in 40 CFR 124.10. The Director must respond to all significant comments received during the comment period as provided in 40 CFR 124.17, and require the CAFO owner or operator to further revise the nutrient management plan if necessary, in order to approve the revision to the terms of the nutrient management plan incorporated into the CAFO's permit. Once the Director incorporates the

revised terms of the nutrient management plan into the permit, the Director must notify the owner or operator and inform the public of the final decision concerning revisions to the terms and conditions of the permit.

(iii) Substantial changes to the terms of a nutrient management plan incorporated as terms and conditions of a permit include, but are not limited to:

(A) Addition of new land application areas not previously included in the CAFO's nutrient management plan. Except that if the land application area that is being added to the nutrient management plan is covered by terms of a nutrient management plan incorporated into an existing NPDES permit in accordance with the requirements of paragraph (e)(5) of this section, and the CAFO owner or operator applies manure, litter, or process wastewater on the newly added land application area in accordance with the existing field-specific permit terms applicable to the newly added land application area, such addition of new land would be a change to the new CAFO owner or operator's nutrient management plan but not a substantial change for purposes of this section;

(B) Any changes to the field-specific maximum annual rates for land application, as set forth in paragraphs (e)(5)(i) of this section, and to the maximum amounts of nitrogen and phosphorus derived from all sources for each crop, as set forth in paragraph (e)(5)(ii) of this section;

(C) Addition of any crop or other uses not included in the terms of the CAFO's nutrient management plan and corresponding field-specific rates of application expressed in accordance with paragraph (e)(5) of this section; and

(D) Changes to site-specific components of the CAFO's nutrient management plan, where such changes are likely to increase the risk of nitrogen and phosphorus transport to waters of the U.S.

(iv) *For EPA-issued permits only.* Upon incorporation of the revised terms of the nutrient management plan into the permit, 40 CFR 124.19 specifies procedures for appeal of the permit

decision. In addition to the procedures specified at 40 CFR 124.19, a person must have submitted comments or participated in the public hearing in order to appeal the permit decision.

**§ 122.62 Modification or revocation and reissuance of permits (applicable to State programs, see § 123.25)**

*[§ 122.62(a)(1) through (16) is not specific to CAFOs and, therefore, is not included here.]*

*[§122.62(a) Causes for modification](17) Nutrient Management Plans.* The incorporation of the terms of a CAFO's nutrient management plan into the terms and conditions of a general permit when a CAFO obtains coverage under a general permit in accordance with §§ 122.23(h) and 122.28 is not a cause for modification pursuant to the requirements of this section.

*[The remainder of § 122.62 is not specific to CAFOs and, therefore, is not included here.]*

**§ 122.63 Minor modification of permits.**

*[§ 122.63(a) through (g) is not specific to CAFOs and, therefore, is not included here.]*

(h) Incorporate changes to the terms of a CAFO's nutrient management plan that have been revised in accordance with the requirements of § 122.42(e)(6).

**§ 123.36 Establishment of technical standards for concentrated animal feeding operations.**

If the State has not already established technical standards for nutrient management that are consistent with 40 CFR 412.4(c)(2), the Director shall establish such standards by the date specified in § 123.62(e).

**PART 412—CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFO) POINT**

**SOURCE CATEGORY**

**Authority:** 33 U.S.C. 1311, 1314, 1316, 1317, 1318, 1342, and 1361.

**§ 412.1 General applicability.**

This part applies to manure, litter, and/or process wastewater discharges resulting from concentrated animal feeding operations (CAFOs). Manufacturing and/or agricultural activities which may be subject to this part are generally reported under one or more of the following Standard Industrial Classification (SIC) codes: SIC 0211, SIC 0213, SIC 0214, SIC 0241, SIC 0251, SIC 0252, SIC 0253, SIC 0254, SIC 0259, or SIC 0272 (1987 SIC Manual).

**§ 412.2 General definitions.**

As used in this part:

- (a) The general definitions and abbreviations at 40 CFR part 401 apply.
- (b) *Animal Feeding Operation (AFO)* and *Concentrated Animal Feeding Operation (CAFO)* are defined at 40 CFR 122.23.
- (c) *Fecal coliform* means the bacterial count (Parameter 1) at 40 CFR 136.3 in Table 1A, which also cites the approved methods of analysis.
- (d) *Process wastewater* means water directly or indirectly used in the operation of the CAFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other CAFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs, or bedding.
- (e) *Land application area* means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter, or process wastewater from the production area is or may be applied.
- (f) *New source* is defined at 40 CFR 122.2. New source criteria are defined at 40 CFR 122.29(b).
- (g) *Overflow* means the discharge of manure or process wastewater resulting from the filling of wastewater or manure storage structures beyond the point at which no more manure, process wastewater, or storm water can be contained by the structure.

(h) *Production area* means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

(i) *Ten (10)-year, 24-hour rainfall event, 25-year, 24-hour rainfall event, and 100-year, 24-hour rainfall event* mean precipitation events with a probable recurrence interval of once in ten years, or twenty five years, or one hundred years, respectively, as defined by the National Weather Service in Technical Paper No. 40, "Rainfall Frequency Atlas of the United States," May, 1961, or equivalent regional or State rainfall probability information developed from this source.

(j) *Analytical methods*. The parameters that are regulated or referenced in this part and listed with approved methods of analysis in Table 1B at 40 CFR 136.3 are defined as follows:

- (1) Ammonia (as N) means ammonia reported as nitrogen.
- (2) BOD5 means 5-day biochemical oxygen demand.
- (3) Nitrate (as N) means nitrate reported as nitrogen.
- (4) Total dissolved solids means nonfilterable residue.

(k) The parameters that are regulated or referenced in this part and listed with approved methods of analysis in Table 1A at 40 CFR 136.3 are defined as follows:

- (1) Fecal coliform means fecal coliform bacteria.
- (2) Total coliform means all coliform bacteria.

**§ 412.3 General pretreatment standards.**

Any source subject to this part that introduces process wastewater pollutants into a publicly owned treatment works (POTW) must comply with 40 CFR part 403.

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

(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.

#### **Subpart A-Horses and Sheep**

##### **§ 412.10 Applicability.**

This subpart applies to discharges resulting from the production areas at horse and sheep CAFOs. This subpart does not apply to such CAFOs with less than the following capacities: 10,000 sheep or 500 horses.

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

(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.

**§ 412.13 Effluent limitations attainable by the application of the best available technology economically achievable (BAT).**

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

(b) Whenever rainfall events cause an overflow of process wastewater from a facility designed, constructed, operated, and maintained to contain all process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the point source, any process wastewater pollutants in the overflow may be discharged into U.S. waters.

**§ 412.14 [Reserved]**

**§ 412.15 New source performance standards (NSPS).**

(a) Except as provided in paragraph (b) of this section, any new source subject to this subpart must achieve the following performance standards: There must be no discharge of process wastewater pollutants into U.S. waters.

(b) Whenever rainfall events cause an overflow of process wastewater from a facility designed, constructed, operated, and maintained to contain all process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the point source, any process wastewater pollutants in the overflow may be discharged into U.S. waters.

**Subpart B-Ducks**

**§ 412.20 Applicability.**

This subpart applies to discharges resulting from the production areas at dry lot and wet lot duck CAFOs.

This subpart does not apply to such CAFOs with less than the following capacities: 5,000 ducks.

**§ 412.21 Special definitions.**

For the purposes of this subpart:

(a) *Dry lot* means a facility for growing ducks in confinement with a dry litter floor cover and no access to swimming areas.

(b) *Wet lot* means a confinement facility for raising ducks which is open to the environment, has a small number of sheltered areas, and with open water runs and swimming areas to which ducks have free access.

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

(a) Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart shall achieve the following effluent limitations representing the degree of effluent reduction attainable by the application of the (BPT):

Regulated parameter	Maximum daily <sup>1</sup>	Maximum monthly average <sup>1</sup>	Maximum daily <sup>2</sup>	Maximum monthly average <sup>2</sup>
BOD <sub>5</sub> .....	3.66	2.0	1.66	0.91
Fecal coliform .....	( <sup>3</sup> )	( <sup>3</sup> )	( <sup>3</sup> )	( <sup>3</sup> )

<sup>1</sup> Pounds per 1000 ducks.

<sup>2</sup> Kilograms per 1000 ducks.

<sup>3</sup> Not to exceed MPN of 400 per 100 ml at any time.

(b) [Reserved]

**§ 412.25 New source performance standards (NSPS).**

(a) Except as provided in paragraph (b) of this section, any new source subject to this subpart must achieve the following performance standards: There must be no discharge of process waste water pollutants into U.S. waters.

(b) Whenever rainfall events cause an overflow of process wastewater from a facility designed, constructed, operated, and maintained to contain all process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the point source, any process wastewater pollutants in the overflow may be discharged into U.S. waters.

**§ 412.26 Pretreatment standards for new sources (PSNS).**

(a) Except as provided in 40 CFR 403.7 and in paragraph (b) of this section, any new source subject to this subpart must achieve the following performance standards: There must be no introduction of process waste water pollutants to a POTW.

(b) Whenever rainfall events cause an overflow of process wastewater from a facility designed, constructed, operated, and maintained to contain all process-generated wastewaters plus the runoff from a 25-year, 24-hour rainfall event at the location of the point source, any process wastewater pollutants in the overflow may be introduced to a POTW.

**Subpart C-Dairy Cows and Cattle Other Than Veal Calves**

**§ 412.30 Applicability.**

This subpart applies to operations defined as concentrated animal feeding operations (CAFOs) under 40 CFR 122.23 and includes the following animals: mature dairy cows, either milking or dry; cattle other than mature dairy cows or veal calves. Cattle other than mature dairy cows includes but is not limited to heifers, steers, and bulls. This subpart does not apply to such CAFOs with less than the following capacities: 700 mature dairy cows whether milked or dry; 1,000 cattle other than mature dairy cows or veal calves.

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

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. Except as provided in paragraphs (a)(1) through (a)(2) of this section, there must be no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. from the production area.

(1) Whenever precipitation causes an overflow of manure, litter, or process wastewater, pollutants in the overflow may be discharged into U.S. waters provided:

(i) The production area is designed, constructed, operated and maintained to contain all manure, litter, and process wastewater including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event;

(ii) The production area is operated in accordance with the additional measures and records required by § 412.37(a) and (b).

(2) Voluntary alternative performance standards. Any CAFO subject to this subpart may request the Director to establish NPDES permit effluent limitations based upon site-specific alternative technologies that achieve a quantity of pollutants discharged from the production area equal to or less than the quantity of pollutants that would be discharged under the baseline performance standards as provided by paragraph (a)(1) of this section.

(i) Supporting information. In requesting site-specific effluent limitations to be included in the NPDES permit, the CAFO owner or operator must submit a supporting technical analysis and any other relevant information and data that would support such site-specific effluent limitations within the time frame provided by the Director. The supporting technical analysis must include calculation of the quantity of pollutants discharged, on a mass basis where appropriate, based on a site-specific analysis of a system designed, constructed, operated, and maintained to contain all

manure, litter, and process wastewater, including the runoff from a 25-year, 24-hour rainfall event. The technical analysis of the discharge of pollutants must include:

(A) All daily inputs to the storage system, including manure, litter, all process waste waters, direct precipitation, and runoff.

(B) All daily outputs from the storage system, including losses due to evaporation, sludge removal, and the removal of waste water for use on cropland at the CAFO or transport off site.

(C) A calculation determining the predicted median annual overflow volume based on a 25-year period of actual rainfall data applicable to the site.

(D) Site-specific pollutant data, including N, P, BOD5, TSS, for the CAFO from representative sampling and analysis of all sources of input to the storage system, or other appropriate pollutant data.

(E) Predicted annual average discharge of pollutants, expressed where appropriate as a mass discharge on a daily basis (lbs/day), and calculated considering paragraphs (a)(2)(i)(A) through (a)(2)(i)(D) of this section.

(ii) The Director has the discretion to request additional information to supplement the supporting technical analysis, including inspection of the CAFO.

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

(b) For CAFO land application areas. Discharges from land application areas are subject to the following requirements:

(1) Develop and implement the best management practices specified in § 412.4;

(2) Maintain the records specified at § 412.37 (c);

(3) The CAFO shall attain the limitations and requirements of this paragraph by December 31, 2006.

**§ 412.32 Effluent limitations attainable by the application of the best conventional pollutant control technology (BCT).**

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 BCT:

(a) For CAFO production areas: the CAFO shall attain the same limitations and requirements as § 412.31(a).

(b) For CAFO land application areas: the CAFO shall attain the same limitations and requirements as § 412.31(b).

**§ 412.33 Effluent limitations attainable by the application of the best available technology economically achievable (BAT).**

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 BAT:

(a) For CAFO production areas: the CAFO shall attain the same limitations and requirements as § 412.31(a).

(b) For CAFO land application areas: the CAFO shall attain the same limitations and requirements as § 412.31(b).

**§ 412.34 [Reserved]**

**§ 412.35 New source performance standards (NSPS).**

Any new point source subject to this subpart must achieve the following effluent limitations representing the application of NSPS:

(a) For CAFO production areas. The CAFO shall attain the same limitations and requirements as § 412.31(a)(1) and § 412.31(a)(2):



(b) For CAFO land application areas: The CAFO shall attain the same limitations and requirements as § 412.31(b)(1) and § 412.31(b)(2).

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

(d) Any source subject to this subpart that commenced discharging after April 14, 1993, and prior to April 14, 2003, which was a new source subject to the standards specified in § 412.15, revised as of July 1, 2002, must continue to achieve those standards for the applicable time period specified in 40 CFR 122.29(d)(1). Thereafter, the source must achieve the standards specified in § 412.31(a) and (b).

**§ 412.37 Additional measures.**

(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.

(b) *Record keeping requirements for the production area.* Each CAFO must maintain on-site for a period of five years from the date they are created a complete copy of the information required by 40 CFR 122.21(i)(1) and 40 CFR 122.42(e)(1)(ix) and the records specified in paragraphs (b)(1) through (b)(6) of this section. The CAFO must make these records available to the Director and, in an authorized State, the Regional Administrator, or his or her designee, for review upon request.

- (1) Records documenting the inspections required under paragraph (a)(1) of this section;
- (2) Weekly records of the depth of the manure and process wastewater in the liquid impoundment as indicated by the depth marker under paragraph (a)(2) of this section;
- (3) Records documenting any actions taken to correct deficiencies required under paragraph (a)(3) of this section. Deficiencies not corrected within 30 days must be accompanied by an explanation of the factors preventing immediate correction;
- (4) Records of mortalities management and practices used by the CAFO to meet the requirements of paragraph (a)(4) of this section.
- (5) Records documenting the current design of any manure or litter storage structures, including volume for solids accumulation, design treatment volume, total design volume, and approximate number of days of storage capacity;
- (6) Records of the date, time, and estimated volume of any overflow.

(c) *Recordkeeping requirements for the land application areas.* Each CAFO must maintain on-site a copy of its site-specific nutrient management plan. Each CAFO must maintain on-site for a period of five years from the date they are created a complete copy of the information required by § 412.4 and 40 CFR 122.42(e)(1)(ix) and the records specified in paragraphs (c)(1) through (c)(10) of this section. The CAFO must make these records available to the Director and, in an authorized State, the Regional Administrator, or his or her designee, for review upon request.

- (1) Expected crop yields;
- (2) The date(s) manure, litter, or process waste water is applied to each field;
- (3) Weather conditions at time of application and for 24 hours prior to and following application;
- (4) Test methods used to sample and analyze manure, litter, process waste water, and soil;
- (5) Results from manure, litter, process waste water, and soil sampling;
- (6) Explanation of the basis for determining manure application rates, as provided in the technical standards established by the Director.
- (7) Calculations showing the total nitrogen and phosphorus to be applied to each field, including sources other than manure, litter, or process wastewater;
- (8) Total amount of nitrogen and phosphorus actually applied to each field, including documentation of calculations for the total amount applied;
- (9) The method used to apply the manure, litter, or process wastewater;
- (10) Date(s) of manure application equipment inspection.

#### **Subpart D-Swine, Poultry, and Veal Calves**

##### **§ 412.40 Applicability.**

This subpart applies to operations defined as concentrated animal feeding operations (CAFOs) under 40 CFR 122.23 and includes the following animals: swine; chickens; turkeys; and veal calves. This subpart does not apply to such CAFOs with less than the following capacities: 2,500 swine each weighing 55 lbs.

or more; 10,000 swine each weighing less than 55 lbs.; 30,000 laying hens or broilers if the facility uses a liquid manure handling system; 82,000 laying hens if the facility uses other than a liquid manure handling system; 125,000 chickens other than laying hens if the facility uses other than a liquid manure handling system; 55,000 turkeys; and 1,000 veal calves.

**§§ 412.35-412.42 [Reserved]**

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

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 December 31, 2006.

**§ 412.44 Effluent limitations attainable by the application of the best conventional pollutant control technology (BCT).**

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 BCT:

(a) For CAFO production areas: the CAFO shall attain the same limitations and requirements as § 412.43(a).

(b) For CAFO land application areas: the CAFO shall attain the same limitations and requirements as § 412.43(b).

**§ 412.45 Effluent limitations attainable by the application of the best available technology economically achievable (BAT).**

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 BAT:

(a) For CAFO production areas: the CAFO shall attain the same limitations and requirements as § 412.43(a).

(b) For CAFO land application areas: the CAFO shall attain the same limitations and requirements as § 412.43(b).

**§ 412.46 New source performance standards (NSPS).**

Any new source subject to this subpart must achieve the following effluent limitations representing the application of NSPS:

(a) For CAFO production areas. There must be no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. from the production area, subject to paragraphs (a)(1) through (a)(3) of this section.

(1) Any CAFO subject to this subpart may request that the Director establish NPDES permit best management practice effluent limitations designed to ensure no discharge of manure, litter, or process wastewater based upon a site-specific evaluation of the CAFO's open surface manure storage structure. The NPDES permit best management practice effluent limitations must address the CAFO's entire production area. In the case of any CAFO using an open surface manure storage structure for which the Director establishes such effluent limitations, "no discharge of manure, litter, or process wastewater pollutants," as used in this section, means that the storage structure is designed, operated, and maintained in accordance with best management practices established by

the Director on a site-specific basis after a technical evaluation of the storage structure. The technical evaluation must address the following elements:

- (i) Information to be used in the design of the open manure storage structure including, but not limited to, the following: minimum storage periods for rainy seasons, additional minimum capacity for chronic rainfalls, applicable technical standards that prohibit or otherwise limit land application to frozen, saturated, or snow-covered ground, planned emptying and dewatering schedules consistent with the CAFO's Nutrient Management Plan, additional storage capacity for manure intended to be transferred to another recipient at a later time, and any other factors that would affect the sizing of the open manure storage structure.
- (ii) The design of the open manure storage structure as determined by the most recent version of the National Resource Conservation Service's Animal Waste Management (AWM) software. CAFOs may use equivalent design software or procedures as approved by the Director.
- (iii) All inputs used in the open manure storage structure design including actual climate data for the previous 30 years consisting of historical average monthly precipitation and evaporation values, the number and types of animals, anticipated animal sizes or weights, any added water and bedding, any other process wastewater, and the size and condition of outside areas exposed to rainfall and contributing runoff to the open manure storage structure.
- (iv) The planned minimum period of storage in months including, but not limited to, the factors for designing an open manure storage structure listed in paragraph (a)(1)(i) of this section. Alternatively the CAFO may determine the minimum period of storage by specifying times the storage pond will be emptied consistent with the CAFO's Nutrient Management Plan.
- (v) Site-specific predicted design specifications including dimensions of the storage facility, daily manure and wastewater additions, the size and characteristics of the land application areas, and the total calculated storage period in months.
- (vi) An evaluation of the adequacy of the designed manure storage structure using the most recent version of the Soil Plant Air Water (SPAW) Hydrology Tool. The evaluation must include all

inputs to SPAW including but not limited to daily precipitation, temperature, and evaporation data for the previous 100 years, user-specified soil profiles representative of the CAFO's land application areas, planned crop rotations consistent with the CAFO's Nutrient Management Plan, and the final modeled result of no overflows from the designed open manure storage structure.

For those CAFOs where 100 years of local weather data for the CAFO's location is not available, CAFOs may use a simulation with a confidence interval analysis conducted over a period of 100 years. The Director may approve equivalent evaluation and simulation procedures.

(vii) The Director may waive the requirement of (a)(1)(vi) for a site-specific evaluation of the designed manure storage structure and instead authorize a CAFO to use a technical evaluation developed for a class of specific facilities within a specified geographical area.

(viii) Waste management and storage facilities designed, constructed, operated, and maintained consistent with the analysis conducted in paragraphs (a)(1)(i) through (a)(1)(vii) of this section and operated in accordance with the additional measures and records required by § 412.47(a) and (b), will fulfill the requirements of this section.

(ix) The Director has the discretion to request additional information to support a request for effluent limitations based on a site-specific open surface manure storage structure.

(2) The production area must be operated in accordance with the additional measures required by § 412.47(a) and (b).

(3) Provisions for upset/bypass, as provided in 40 CFR 122.41(m)-(n), apply to a new source subject to this provision.

(b) For CAFO land application areas: the CAFO shall attain the same limitations and requirements as § 412.43(b)(1).

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

(d) Any source subject to this subpart that commenced discharging after April 14, 1993, and prior to April 14, 2003, which was a new source subject to the standards specified in § 412.15, revised as of July 1,

2002, must continue to achieve those standards for the applicable time period specified in 40 CFR 122.29(d)(1). Thereafter, the source must achieve the standards specified in § 412.43(a) and (b).

(e) Any source subject to this subpart that commenced discharging after April 14, 2003, and prior to **[insert date of 60 days after date of publication]**, which was a new source subject to the standards specified in § 412.46(a) through (d) in the July 1, 2008, edition of 40 CFR part 439, must continue to achieve those standards for the applicable time period specified in 40 CFR 122.29(d)(1).

**§ 412.47 Additional measures.**

- (a) Each CAFO subject to this subpart must implement the requirements of § 412.37(a).
- (b) Each CAFO subject to this subpart must comply with the record-keeping requirements of § 412.37(b).
- (c) Each CAFO subject to this subpart must comply with the record-keeping requirements of § 412.37(c).





U.S. Environmental  
Protection Agency

Office of  
Wastewater  
Management

December 3, 2008



**Concentrated Animal Feeding Operations  
Final Rulemaking – Q & A**

*EPA has finalized revisions to the National Pollutant Discharge Elimination System (NPDES) permitting requirements and Effluent Limitations Guidelines (ELG) for Concentrated Animal Feeding Operations (CAFOs). This rulemaking is in response to the decision in Waterkeeper Alliance, et al. v. EPA, issued by the Second Circuit Court of Appeals in February 2005. The final rule was published in the Federal Register on November 20, 2008 (73 FR 70418).*

**Q: What action is EPA taking as a result of the Second Circuit decision in *Waterkeeper Alliance et al. v. EPA*?**

A: In response to the court's decision, EPA revised the National Pollutant Discharge Elimination System (NPDES) permitting requirements (40 CFR Part 122) and Effluent Limitations Guidelines and Standards (ELGs) (40 CFR Part 412) for CAFOs. First, EPA is requiring owners and operators of CAFOs that discharge or propose to discharge to seek coverage under an NPDES permit. Second, EPA is requiring CAFOs seeking coverage under a permit to submit their nutrient management plan (NMP) with their application for an individual permit or notice of intent for coverage under a general permit. Permitting authorities are then required to review the NMPs, identify the terms that will be incorporated into the permit and provide the public with an opportunity for meaningful review and comment. Permitting authorities are required to incorporate terms of the NMP as enforceable elements of the NPDES permit. The final rule lays out a process for including these site-specific terms into general permits. Third, the rule modifies the no-discharge 2003 new source performance standards in two ways. It deletes the provision that authorized compliance with the no-discharge limitations for new source large swine, poultry, and veal calf facilities through design, construction, operation and maintenance of waste and storage facilities that would contain runoff and direct precipitation from the 100-year, 24-hour rainfall event. Next, it adds a new provision that authorizes permit writers, upon request by swine, poultry, and veal calf CAFOs that are new sources, to establish best management practice no discharge effluent limitations.

This final rule also responds to the court's remand orders regarding water-quality based effluent limitations (WQBELs). EPA is clarifying that WQBELs may be required in permits with respect to production area discharges and discharges from land application areas that are not exempt as agricultural stormwater. Finally, the court remanded the selection of best pollutant control technology (BCT) for fecal coliform. EPA clarifies its selection of BCT technology for fecal coliform, and reaffirms its decision to set the BCT limitations for fecal coliform equal to the best practicable control technology currently available (BPT) limits and BCT limitations for other conventional pollutants established in the 2003 CAFO rule. EPA is making the finding that the BCT limitations established in 2003 with respect to other conventional pollutants are based on technology controls that also represent BCT for fecal coliform.

**Q: Is there still a requirement for CAFOs to seek permit coverage?**

A: Yes. Under the final rule, CAFOs that discharge or propose to discharge have a duty to apply for NPDES permits. This is consistent with the duty to apply requirement for all NPDES point source categories.

**Q: How will CAFO owners/operators know whether or not they need to apply for an NPDES permit?**

A: Under this final rule, any CAFO that discharges or proposes to discharge is required to seek permit coverage. EPA is clarifying that “a CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur.” This means that the evaluation of whether the CAFO discharges or will discharge is based on a factual objective assessment.

**Q: What is the benefit to the CAFO owner/operator of having an NPDES permit?**

A: Because the CWA prohibits discharges from unpermitted CAFOs, NPDES permit coverage provides certainty to CAFO operators regarding activities and actions that are necessary to comply with the Clean Water Act. Compliance with the permit is deemed compliance with the CWA under section 402(k) and thus acts as a shield against EPA or State CWA enforcement or against citizen suits under section 505 of the CWA. Furthermore, NPDES permits for Large CAFOs incorporate effluent limitations prescribed by the effluent limitations guideline, which allow for discharge when precipitation causes an overflow from a structure that is designed, constructed, operated, and maintained in accordance with the permit. Finally, upset provisions can afford permittees a defense when emergencies or natural disasters cause discharges beyond their reasonable control, as provided in 40 CFR 122.41(n).

Under the CWA, operators that do not apply for permits operate at their own risk because any discharge from an unpermitted CAFO (other than agricultural stormwater) is a violation of the CWA subject to enforcement action, including third party citizen suits.

**Q: What happened to the “no potential to discharge” determination process?**

A: Because the court vacated the requirement to seek permit coverage solely on the basis of a CAFO’s *potential* to discharge, there is no need for a CAFO to obtain a “no potential to discharge” determination from the permitting authority. Therefore, this final rule removes the “no potential to discharge” determination provision from the federal regulations.

**Q: Will a CAFO whose only discharge is agricultural stormwater need to apply for an NPDES permit?**

A: No; however, the CAFO must implement site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients as specified previously

under the 2003 rule. Also, an unpermitted CAFO must maintain documentation of its nutrient management practices and make such documentation available to the permitting authority upon request in order for a precipitation-related discharge from the land application area to qualify for the agricultural stormwater exemption.

**Q: Why should an unpermitted CAFO certify if it is not going to discharge?**

A: By following the elements of the rigorous evaluation prescribed in the certification requirements and by conducting the necessary operation and maintenance to achieve no discharge, the operator will be able to demonstrate that the CAFO is designed, constructed, operated and maintained such that a discharge will not occur.

In the event of a discharge from a properly certified CAFO, the CAFO will not be liable for prior failure to seek permit coverage. The CAFO, however, remains liable for discharging without an NPDES permit. Only CAFOs with NPDES permits can invoke the "upset and bypass" defense provisions of the NPDES regulations.

**Q: If a CAFO previously discharged and has permanently fixed the cause of the discharge, does it still need to apply for a permit?**

A: Only CAFOs that discharge or propose to discharge are required to apply for NPDES permits. A CAFO that has had a discharge in the past but has taken the steps necessary to permanently fix the cause of the discharge and is designed, constructed, operated and maintained such that a discharge will not occur is not required to apply for a permit. The CAFO's decision as to whether to apply for a permit involves an objective assessment of conditions at the operation. CAFOs should consider seeking advice from third-party professionals. EPA encourages CAFOs to consider the set of criteria for no discharge certification when deciding whether to seek permit coverage.

**Q: If a properly certified CAFO has more than one discharge from the same cause, can it recertify?**

A: No. In the event that a certified CAFO does discharge, the rule limits the ability of that CAFO to recertify. Specifically, a certified CAFO that discharges twice from the same cause would not be able to recertify again. EPA believes the benefits of certifying should not be available to CAFOs with a recurring discharge.

**Q: How will the process for seeking coverage under a general or individual permit change for CAFOs?**

A: In the past, a CAFO general permit allowed a facility that submitted a notice of intent (NOI) for coverage under that permit to be covered without permitting authority approval and public review because all of the terms and conditions of the general permit underwent public review and comment during the process to issue the general permit. However, as a result of the *Waterkeeper* decision, EPA is requiring CAFOs to submit site-specific NMPs as part of the NOI to be covered by a general permit. Further, the

permitting authority is required to review the NMP, make NMPs and NOIs available for public review and notify the public of the terms of the NMP that the permitting authority proposes to incorporate into the permit as terms and conditions applicable to that CAFO. Following public comment and an opportunity for public hearing, the permitting authority will issue a final determination incorporating the terms of the NMP into the general permit for that CAFO. However, for an individual permit, the process has not changed substantially. A CAFO applying for an individual permit must include its NMP as part of the permit application (which is public information), and the permitting authority will identify terms from this NMP to include in the draft permit that will be made available to the public for review and comment.

**Q. Is the entire NMP incorporated into the permit?**

A. The permitting authority must incorporate the “terms of the NMP” into the permit, which are the information, protocols, best management practices (BMPs) and other conditions in the NMP necessary to meet the NMP requirements of the 2003 rule. The permitting authority must include, at a minimum, the specific terms identified in the 2008 final rule as terms and conditions of the permit. When incorporating the terms, the permitting authority may attach the entire NMP to the permit or incorporate the terms of the NMP by reference, however the enforceable terms and conditions of the permit must be clearly identified.

**Q. Is the entire NMP required to be made publicly available?**

A. Yes, the final rule requires the permitting authority to make the NMP and NOI or application publicly available (as with any NPDES permit application) for comment.

**Q: With respect to land application, what are the two approaches in the final rule for expressing rates of application?**

A: The final rule provides two approaches which a CAFO may use in its NMP to identify annual maximum rates of application of manure, litter, and process wastewater by field and crop for each year of permit coverage:

- The “linear approach” expresses field-specific maximum rates of application in terms of the amount of nitrogen and phosphorus from manure, litter, and process wastewater allowed to be applied.
- The “narrative rate approach” expresses the field-specific rate of application as a narrative rate prescribing how to calculate the amount of manure, litter, and process wastewater allowed to be applied.

**Q: What happens if the CAFO operator wants to change its NMP after the permit has been issued?**

A: The CAFO operator is required to submit the revised NMP to the permitting authority. Not every change to the NMP is a change to a “term of the NMP,” so a permit modification may not be necessary. If the permitting authority determines that the

changes to the NMP are changes to any permit requirements, the rule establishes a two-tier process for modifying the permit: non-substantial changes will be made without the need for public review and comment and reflected in the annual report available to the public; substantial changes will be subject to public notice and comment and an opportunity for public hearing before the permit is modified.

**Q: Do either of the two approaches in the final rule for identifying terms of the NMP with respect to rates of application address the concern that operators often change their course of action within a 5-year permit term and do not want to have to revise their permits every time a need to change land application plans occurs?**

A: Yes. The narrative rate approach allows CAFO operators to change their crop rotation, form and source of manure, litter, and process wastewater, as well as the timing and method of application. The narrative rate approach allows the use of "real time" data for determining rates of application and provides the most flexible approach for farmers.

**Q: What constitutes a substantial change to the NMP and requires a permit modification?**

A: The final rule includes a list of changes to the NMP that constitute a substantial change to the terms of a CAFO's NMP. Examples of such substantial changes include addition of new land application areas not previously included in the CAFO's NMP and addition of any crop not included in the terms of the CAFO's NMP and corresponding field-specific rates of application.

**Q: Why didn't EPA add requirements regarding pathogens to the regulations?**

A: EPA's regulation of CAFO discharges controls the discharge of all pollutants and as a consequence will control the discharge of pathogens. In this final rule, EPA concluded that the existing BPT/BCT limitations represent the best conventional technology for controlling fecal coliform, the one pathogen that is a conventional pollutant, even though there are no specific limitations for fecal coliform. The existing limitations prohibit the discharge of manure, litter, or process wastewater into waters of the U.S. from the production areas of CAFO except in limited circumstances. EPA is not promulgating more stringent limitations for fecal coliform because it concluded that there is no available, achievable, and cost reasonable technology on which to base such limitations.

**Q: What additional limitations can be imposed in a CAFO's permit?**

The final rule explicitly recognizes the permitting authority's authority to impose water quality-based effluent limitations (WQBELs) on all production area discharges and any land application discharges other than agricultural stormwater discharges if technology-based effluent limitations are insufficient to meet applicable water quality standards. Discharges to waters of the U.S. via groundwater with a direct hydrologic connection to waters of the U.S. should be assessed on a case-by-case basis and additional effluent limits for those discharges may be appropriate.

**Q: How much time will states have to update their programs?**

A: Following issuance of this rule, authorized states have up to one year to revise, if necessary, their NPDES regulations to adopt the requirements of this rule, or two years if statutory changes are needed, as provided in 40 CFR 123.62. States are not required to adopt the provisions for no discharge certification since certification is not a program requirement and is a *voluntary* option for CAFOs that are not required to have NPDES permit coverage.

**Q: If a CAFO already has coverage under a permit, will the operator need to submit a new application by 2/27/09?**

A: No. EPA recognizes that approximately 9,000 CAFOs already have NPDES permit coverage. These CAFOs must comply with the conditions of their existing permits so long as those permits remain in effect. Upon expiration of existing individual or general permits, EPA expects permitting authorities to issue new individual or general permits that will then need to reflect the requirements of this rule. EPA will work with permitting authorities to transition to the new requirements. Permitting authorities may request NMPs at any time based on the 2003 rule, and newly permitted CAFOs will need to submit an NMP when seeking permit coverage.

**Q: What are the compliance deadlines for newly defined CAFOs?**

A: The compliance deadline to apply for NPDES permits for operations that were newly defined as CAFOs by the 2003 rule is February 27, 2009.

**Q: What resources are available to help CAFOs develop their NMPs?**

A: EPA has awarded \$8 million in federal grants for providing technical assistance to livestock operators, including animal feeding operations, for the prevention of water discharges and reduction of air emissions. Under these grants CAFOs, can obtain an NMP at no cost to the operator. For more information see <http://livestock.rti.org/> and <http://www.erc-env.org/CLEANMP.htm>. The Manure Management Planner (MMP) software program, under development by a grant from EPA and USDA to Purdue University, is a computer program that will provide permitting authorities and producers assistance in NMP development. MMP is currently being adopted by the majority of States and is tailored to the State's technical standards. MMP supports 34 States and has been recently updated to include Phosphorus Indexes and other phosphorus risk assessment tools for 22 of these States. This program is free for use by all operators. For additional information and to download the MMP software, see the Purdue University website at <http://www.agry.purdue.edu/mmp/>. In addition, USDA has a long-term program for assisting CAFOs with nutrient management planning and offers a range of support services.

**2008 FINAL FEDERAL CAFO RULE  
FREQUENTLY ASKED QUESTIONS**

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**Q #1: What is an "AFO"?**

**A #1:** The term "animal feeding operation" (AFO) is defined as a "lot or facility" where animals "have been, are or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period and crops, vegetation, forage growth, or post harvest residues are not sustained in the normal growing season over any portion of the lot or facility." An operation must be defined as an AFO before it can be defined as a concentrated animal feeding operation (CAFO). Whether an AFO is a CAFO depends primarily whether there is a discharge of livestock waste to a river, lake or stream.

**Q #2: What is a Large CAFO?**

**A #2:** An AFO is defined as a Large CAFO if it stables or confines as many or more than the numbers of animals specified in any of the following categories:

- 700 mature dairy cows, whether milked or dry;
- 1,000 veal calves;
- 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;
- 2,500 swine, each weighing 55 pounds or more;
- 10,000 swine, each weighing less than 55 pounds;
- 500 horses;
- 10,000 sheep or lambs;
- 55,000 turkeys;
- 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;
- 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;
- 82,000 laying hens, if the AFO uses other than a liquid manure handling system;
- 30,000 ducks (if the AFO uses other than a liquid manure handling system); or
- 5,000 ducks (if the AFO uses a liquid manure handling system)

**Q #3: What is a Medium CAFO?**

**A #3:** The term Medium CAFO includes any AFO with the type and number of animals that fall within any of the ranges listed below and which has been defined or designated as a CAFO. An AFO is defined as a Medium CAFO if:

1. The type and number of animals that it stables or confines falls within any of the following ranges:
  - 200 to 699 mature dairy cows, whether milked or dry;
  - 300 to 999 veal calves;
  - 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;
  - 750 to 2,499 swine each weighing 55 pounds or more;
  - 3,000 to 9,999 swine each weighing less than 55 pounds;
  - 150 to 499 horses;
  - 3,000 to 9,999 sheep or lambs;
  - 16,500 to 54,999 turkeys;
  - 9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system;
  - 37,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;
  - 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system;
  - 10,000 to 29,999 ducks (if the AFO uses other than a liquid manure handling system); or
  - 1,500 to 4,999 ducks (if the AFO uses a liquid manure handling system);

2. **AND** either one of the following conditions is met:
- Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; **OR**
  - Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

**Q #4: Is there still a requirement for CAFOs to seek permit coverage?**

**A #4:** Yes. Under the final federal rule, effective December 20, 2008, CAFOs that discharge or propose to discharge have a duty to apply for NPDES permits. Existing CAFOs must apply on or before February 27, 2009.

**Q #5: How will CAFO owners/operators know whether or not they need to apply for an NPDES permit?**

**A #5:** Under this final federal rule, any CAFO that discharges or proposes to discharge is required to seek permit coverage from the Illinois EPA. U.S. EPA is clarifying that a CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur. This means that the evaluation of whether the CAFO discharges or will discharge is based on a factual objective assessment. The CAFO's decision as to whether to apply for a permit involves an objective assessment of conditions at the operation. CAFOs should consider seeking advice from third-party professionals. Illinois EPA encourages CAFOs to consider the set of criteria (see the three criteria in Q #7, below, regarding certification) for no discharge certification when deciding whether to seek permit coverage.

**Q #6: What is meant by a voluntary no discharge certification?**

**A #6:** A no discharge certification documents the CAFO operator's basis for making an informed decision not to seek permit coverage because the CAFO does not discharge or propose to discharge. A CAFO that certifies in accordance with the requirements of the federal final rule is properly certified so long as the CAFO maintains its eligibility.

**Q #7: What are the eligibility requirements for certification?**

**A #7:** Eligibility for certification means meeting the following criteria at the time certification is established and continuing to meet the eligibility criteria throughout the period of certification as new information or situations arise. The three criteria are:

1. An objective evaluation which shows that the CAFO's production area is designed, constructed, operated, and maintained so as not to discharge;
2. Development and implementation of a nutrient management plan (NMP) to ensure no discharge (other than agricultural stormwater discharges) that addresses operation and maintenance practices for the production area and land application areas under the control of the CAFO; and
3. Maintenance of the documentation required for certification either on site or where it can be made readily available to the permitting authority upon request.

**Q #8: Is a no discharge certification subject to review by Illinois EPA or the public?**

**A #8:** A CAFO's no discharge certification is not subject to review by the Illinois EPA in order for it to become effective and the Illinois EPA is not required to make the certification available to the public for comment.

**Q #9: Can Medium CAFOs seek a no discharge certification?**

**A #9:** No. All Medium CAFOs, by definition "discharge or propose to discharge" by way of a man-made device or other means (see the definition of a Medium CAFO in Q #3, above) and are required to seek permit coverage.



**Q #10: Can Large CAFOs seek a no discharge certification?**

**A #10:** A Large CAFO's decision as to whether to apply for a permit should be based on an objective assessment of conditions at that operation in order to meet the criteria. If the CAFO is designed, constructed, operated, or maintained in a manner such that it cannot or will not discharge, then the Large CAFO is not required to seek permit coverage and may want to submit a voluntary no discharge certification.

**Q #11: Why should an unpermitted CAFO certify if it is not going to discharge?**

**A #11:** By following the elements of the rigorous evaluation prescribed in the certification requirements and by conducting the necessary operation and maintenance to achieve no discharge, the operator will be able to demonstrate that the CAFO is designed, constructed, operated, and maintained such that a discharge will not occur. In the event of a discharge from a properly certified CAFO, the CAFO will not be liable for failure to seek permit coverage. The CAFO, however, remains liable for discharging without an NPDES permit.

**Q #12: What is the benefit to the CAFO owner/operator of having an NPDES permit?**

**A #12:** Compliance with the permit demonstrates compliance with the federal Clean Water Act, and therefore acts as a shield against federal or state enforcement for not having a permit if a discharge occurs, or against citizen suits under the federal Clean Water Act.

**Q #13: Will a CAFO whose only discharge is agricultural stormwater need to apply for an NPDES permit?**

**A #13:** No. However, the CAFO must implement site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients.

**Q #14: If a CAFO previously discharged and has permanently fixed the cause of the discharge, does it still need to apply for a permit?**

**A #14:** A CAFO that has had a discharge in the past but has taken the steps necessary to *permanently* fix the cause of the discharge and is designed, constructed, operated, and maintained such that a discharge will not occur is not required to apply for a permit.

**Q #15: If a properly certified CAFO has more than one discharge from the same cause, can it recertify?**

**A #15:** No. In the event that a certified CAFO does discharge, the rule limits the ability of that CAFO to recertify. Specifically, a certified CAFO that discharges twice from the same cause would not be able to recertify again. U.S. EPA, in writing the federal CAFO rule, believes the benefits of certifying should not be available to CAFOs with a recurring discharge.

**Q #16: Is the entire NMP incorporated into the permit?**

**A #16:** The Illinois EPA must incorporate the "terms" of the NMP into the permit, which are the information, protocols, best management practices (BMPs) and other conditions, in the NMP. When incorporating the terms, the Illinois EPA may attach the entire NMP to the permit or incorporate the terms of the NMP by reference.

**Q #17: With respect to land application, what are the two approaches in the final rule for expressing rates of application?**

**A #17:** A CAFO may use one of two approaches in its NMP to identify annual maximum rates of application of manure, litter, and process wastewater by field and crop for each year of permit coverage:

1. The "*linear approach*" expresses field-specific maximum rates of application in terms of the amount of nitrogen and phosphorus from manure, litter, and process wastewater allowed to be applied.
2. The "*narrative rate approach*" expresses the field-specific rate of application as a narrative rate prescribing how to calculate the amount of manure, litter, and process wastewater allowed to be applied.

**Q #18: Do either of the two approaches address the concern that operators often change their course of action within a 5-year permit term and do not want to have to revise their permits every time a need to change land application plans occurs?**

**A #18:** Yes. The narrative rate approach allows CAFO operators to change their crop rotation, form and source of manure, litter, and process wastewater, as well as the timing and method of application. The narrative rate approach allows the use of "real time" data for determining rates of application and provides the most flexible approach for farmers.

**Q #19: What happens if the CAFO operator wants to change its NMP after the permit has been issued?**

**A #19:** The CAFO operator is required to submit the revised NMP to the Illinois EPA. Not every change to the NMP is a change to a "term" of the NMP, so a permit modification may not be necessary. If the Illinois EPA determines that the changes to the NMP are changes to permit requirements, there is a two-tier process for modifying the permit:

1. Non-substantial changes will be made without the need for public review and comment and will later be reflected in the annual report submitted to the Illinois EPA and that is then available to the public.
2. Substantial changes will be subject to public notice and comment and an opportunity for public hearing before the permit is modified by the Illinois EPA.

**Q #20: What constitutes a "substantial change" to the NMP and requires a permit modification?**

**A #20:** The final federal rule includes a list of changes to the NMP that constitute a substantial change to the terms of a CAFO's NMP. Examples of such substantial changes include (1) addition of new land application areas not previously included in the CAFO's NMP, and (2) addition of any crop not included in the terms of the CAFO's NMP and corresponding field-specific rates of application.

**Q #21: If a CAFO already has coverage under a permit, will the operator need to submit a new application by February 27, 2009?**

**A #21:** No. CAFOs that already have NPDES permit coverage must comply with the conditions of their existing permits so long as those permits remain in effect. Upon expiration of existing individual or general permits, U.S. EPA expects the Illinois EPA to issue new individual or general permits that will then need to reflect the requirements of this rule. Illinois EPA may request NMPs at any time based on the 2003 rule, and newly permitted CAFOs will need to submit an NMP when seeking permit coverage.

**Q #22: What are the compliance deadlines for newly defined CAFOs?**

**A #22:** The compliance deadline to apply for NPDES permits for operations that were newly defined as CAFOs by the 2003 rule is February 27, 2009.

**Q #23: How will NMPs be made available for public review and how will the Illinois EPA respond to comments?**

**A #23:** The final rule requires the Illinois EPA to make the NMP and the application publicly available for comment.

**Q #24: I do not have a CNMP, but I feel I need to either self-certify or apply for a permit? What information do I need to provide IEPA by February 27?**

**A #24:** If you have a facility that can or does have a discharge, then an application needs to be filed by February 27, 2009, the deadline in the federal CAFO rule. Anyone who does not have a facility that does or could result in a discharge due to the type of construction, operation and management, can voluntarily self-certify that they do not need an NPDES permit.

**Q #25: I have a CNMP in the works, but will not have it completed until May or June and I want to self-certify. What information does Illinois EPA need by February 27?**

**A #25:** Self-certification could happen at any time but sooner would be better given that Agency staff may want to review the justification for the "no discharge" presumption.

**Q #26: I have a CNMP in the works, but will not have it completed until May or June and I want to apply for a CAFO Permit. What information does Illinois EPA need by February 27?**

**Q #26:** All applications for new facilities must be submitted 180 days prior to starting operations. In the case of CAFOs, starting operations means the production, handling and storage of livestock waste. You need to apply ASAP.

**Q #27: Are there forms available for self-certification, or for permits?**

**Q #27:** There are no forms for self-certification, but the operator should follow the instructions for filing published in the federal CAFO rule. There are specific application forms for the CAFO NPDES permit (federal forms 1 General and 2B), as well as other documents that the Illinois EPA requires, e.g., NMPs, stormwater plans, and emergency plans.

**Q #28: Will I be inspected after I submit a self-certification declaration?**

**Q #28:** No decision has been made as to whether filing for self-certification will automatically result in an Illinois EPA inspection.

**Q #29: Will a CNMP provide all the information needed for self-certification or for a permit?**

**A #29:** No. As indicated above, there are specific requirements for both the permit application and the self-certification process.

**Q #30: Is Illinois EPA scheduling any meetings or training in respect to the new federal CAFO Rule?**

**A #30:** Illinois EPA will be providing information at the Illinois Farm Bureau's 2009 Government Affairs Leadership Conference in February and at the Illinois Livestock Manure Management Conference in March (two locations and dates). Ongoing Certified Livestock Managers Training courses offered by the Illinois Extension Service also contains information on the CAFO program.