

Rationale. Based on public comment and further consideration, EPA concludes that the proposal to revise the AFO definition to exclude areas “that sustain crops or forage growth during the entire time that animals are present” created further concern and confusion, rather than clarification. EPA’s intent was to make a minor change to the AFO definition to clarify how it would apply to wintering/grazing operations and to incidental vegetation that may exist in the area of confinement. EPA is retaining the existing definition for animal feeding operation because of the widespread familiarity that exists with the existing definition and because EPA’s desired clarification can be achieved through preamble language rather than a change to the rule.

In an attempt to address some of the public comments and confusion created by the proposal, EPA is clarifying three topics in this preamble. First, EPA is reiterating that true pasture and rangeland operations are not considered AFOs, because operations are not AFOs where the animals are in areas such as pastures, croplands or rangelands that sustain crops or forage growth during the normal growing season. In some pasture based operations, animals may freely wander in and out of particular areas for food or shelter; this is not considered confinement. However, pasture and grazing-based operations may also have confinement areas (e.g. feedlots, barns, pens) that may qualify as an AFO. Second, incidental vegetation in a clear area of confinement, such as a feedlot or pen, would not exclude an operation from meeting the definition of an AFO. Third, in the case of a winter feedlot, the “no vegetation” criterion in the AFO definition is meant to be evaluated during the winter, when the animals are confined. Therefore, use of a winter feedlot to grow crops or other vegetation during periods of the year when animals are not confined would not exclude the feedlot from meeting the definition of an AFO. Note that animals must be stabled or confined for at least 45 days out of any 12 month period to qualify the operation as an AFO. EPA assumes that AFOs and permitting authorities will use common sense and sound judgement in applying this definition.

2. What Is a CAFO?

In today’s final rule, EPA is retaining the existing structure for determining which AFOs are CAFOs, as well as retaining the existing conditions for defining Medium CAFOs. EPA is also retaining the existing conditions for designation of AFOs as CAFOs. Large facilities are considered CAFOs if they

fall within the size range provided in § 123.23(b)(4). Medium AFOs are defined as CAFOs only if they fall within the size range provided in § 122.23(b)(6) and they meet one of the two specific criteria governing the method of discharge: (1) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or (2) pollutants are discharged directly into waters of the United States that originate outside the facility and pass over, across, or through the facility or otherwise come into direct contact with the confined animals. Small facilities are CAFOs only if they are so designated by EPA or the State NPDES permitting authority. Refer to Table 4.1 in section IV.A.3 of this preamble for explicit definitions of Large, Medium, and Small CAFOs in each animal sector. Also, as proposed, EPA is no longer using the term “animal units” to define size classes in this final rule. Instead, EPA is setting thresholds by specifying the actual number of animals. EPA believes that using the number of animals at an operation to define thresholds more simply illustrates which operations are regulated. Using the number of animals also eliminates any confusion caused by the difference between EPA’s and USDA’s definitions of the term “animal unit.”

What did EPA propose? EPA co-proposed two alternative ways to structure the NPDES regulations for defining which AFOs are CAFOs. The first alternative was a “two-tier structure,” and the second was a “three-tier structure.” In the first alternative, EPA proposed that all AFOs with the equivalent of 500 animal units or more would be defined as CAFOs, and those with fewer than the equivalent of 500 animal units would be CAFOs only if they are designated as such by EPA or the State NPDES permitting authority. In the second alternative, EPA proposed to retain a three-tier structure whereby all large operations are CAFOs, medium operations are CAFOs if they meet specified risk-of-discharge criteria, and small operations are CAFOs only if they are so designated by EPA or the State NPDES permitting authority. EPA also proposed to significantly revise the conditions whereby a medium AFO could be defined as a CAFO. Finally, EPA proposed to require all medium AFOs to certify to the permitting authority that they do not meet any of the conditions for being defined a CAFO.

What were the key comments? The predominance of public comment did not support the two-tier structure, as

proposed, whereby all operations with the equivalent of 500 animal units or more would be CAFOs. Many commenters opposed such a low threshold as imposing unnecessary permitting and engineering costs on small operations and on operations that do not discharge, and would very likely cause many small operators to go out of business. Opponents also indicated that the proposal did not recognize geographic differences such as arid regions. Many of those same comments were, however, supportive of a two-tier structure if the regulatory threshold was set at the equivalent of 1,000 animal units or even 750 animal units, leaving discretion for the permitting authority to address all operations below that threshold. Conversely, some commenters indicated that 500 animal units was too high, because it did not address the pollution from smaller operations in their region. There was some preference for a two-tier structure that regulates all facilities above the equivalent of 300 AU, believing that all those operations pose risk to the environment and should be regulated as CAFOs.

Many commenters, including many State agencies, preferred to retain the existing three-tier structure because so many of their existing programs are based on the three-tier structure established in the 1976 regulations. They believe it would be very disruptive to their ongoing programs to have to change the basic structure of the regulations that define who is a CAFO.

Additionally, there was little support among the commenters for the three-tier structure, as proposed, with the new set of broad conditions that were proposed for redefining which of the medium facilities would be CAFOs. Many commenters believed that the existing conditions were adequate for addressing risk of discharge from medium facilities, and that the proposed new conditions would be an unnecessary expansion of who would be considered CAFOs. Further, many commenters indicated that the revised conditions did not add clarity and would not improve implementation. For example, many commenters indicated that one of the proposed conditions, whether an AFO was within 100 feet of waters of the United States, did not take into account facilities that are implementing BMPs to control runoff. The condition for evidence of discharge in the last five years did not take into account operations that may have instituted new practices or corrected problems to prevent future discharges, especially in light of the fact that, in the last two or three years, there has been heightened