

awareness of the impacts of AFOs and renewed effort by States to implement both regulatory and non-regulatory AFO programs. The condition defining a facility as a CAFO if it transferred excess manure to off-site recipients also did not correlate closely enough to whether a facility had a risk of discharging, especially in arid regions.

The SBAR Panel did not make a recommendation specifically on the structure of the CAFO regulations. The Panel noted that some States already have effective permitting programs for CAFOs in place and recommended that EPA consider the impact of any new requirements on existing State programs and include in the proposed rule sufficient flexibility to accommodate such programs where they meet the minimum requirements of federal NPDES regulations. The Panel further recommended that EPA continue to consult with States in an effort to promote compatibility between federal and State programs.

Rationale. The Clean Water Act specifically lists CAFOs as point sources, and EPA has broad discretion under the Act to define that term. In the proposal, EPA noted a range of different factors that it considered relevant to determining which operations should be defined as CAFOs.

EPA has concluded that a three-tier structure is preferable to a two-tier structure because it is better suited to identifying those operations that, through a combination of size, concentration and potential to discharge, are more industrial and point source-like in nature and pose the greatest risk to water quality and therefore are appropriate to define as CAFOs. Another important reason to retain a three-tier structure is that changing to a two-tier structure at this point in time would be unnecessarily disruptive in the number of States that currently have three-tier CAFO programs in place. Many of these States have had these programs in place for over two decades, and they have many years of practical experience in operating their programs and issuing permits based on this existing definition. Changing to a two-tier structure not only would be disruptive to the States that are carrying out existing programs but would also create an unnecessary need to build a new understanding of the regulations in the CAFO industry. For these reasons, a three-tier structure is preferable even though it does not have the simplicity of a two-tier structure.

Establishing a two-tier structure at a low threshold, e.g., at either 300 animal

units or 500 animal units would be highly burdensome to permit authorities and AFO operators. While some parts of the country experience problems from concentrations of small facilities, this would impose significant costs on the regulated community and permit authorities in all parts of the country, including those areas that do not experience these problems. On the other hand, while it might seem desirable to provide flexibility for States with effective non-NPDES programs by establishing a threshold on the higher end, say at 750 or 1,000 animal units, using such a high threshold across-the-board would apply equally in States that do not have fully developed and effective programs to address water quality risks posed by operations with fewer than 1,000 animal units. This could lead to a definition that would not appropriately identify those operations that are large and concentrated enough and pose enough of a risk of discharge (taking into account the absence of effective State non-NPDES programs in some areas) that they should be identified as CAFOs. A high threshold might also undercut the ability of some permit authorities to address water quality problems associated with smaller facilities, especially in States that have restrictions on imposing CAFO NPDES requirements that are stricter than federal requirements.

Although the final rule retains the three-tier structure for defining who is a CAFO, after consideration of the public comments, EPA has not adopted the new set of conditions that were proposed for defining which medium operations are CAFOs. Instead, EPA is retaining the two conditions in the existing regulations. After careful consideration of the comments, EPA agrees with those commenters who believe that the new set of conditions proposed under the three-tier structure for determining when a medium facility is a CAFO would not necessarily have improved the clarity, effectiveness or enforceability of the regulations, which were the Agency's intended goals. The proposed new conditions were an attempt to better identify those medium operations that are of sufficient size and concentration and pose enough of a risk of discharge that they should be defined as CAFOs. While these conditions may have been environmentally protective on the whole, they were not finely targeted enough to identify the operations that meet these criteria; instead, EPA now believes that they would have caused substantial permitting burden and imposed costs on

essentially all operations above 300 animal units.

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 awareness of the impacts of AFOs and renewed effort by States to implement both regulatory and non-regulatory AFO programs. The conditions defining a facility as a CAFO if it did not have a permit nutrient plan or if it transferred excess manure to off-site recipients also did not correlate closely enough to whether a facility had a risk of discharging, especially in arid regions.

EPA has concluded that retaining the existing two criteria provide an appropriate basis for defining which medium-size operations are CAFOs, while maintaining flexibility for States to tailor NPDES and non-NPDES programs for more comprehensive risk factors that may vary from State to State and even watershed to watershed.

3. What Types of Animals Are Covered by Today's Rule?

Today's revisions to the CAFO effluent guidelines address beef, dairy, swine, veal calves and poultry operations and do not change the effluent guidelines regulations for sheep, horses or ducks. On the other hand, today's final revisions to the NPDES permit regulations generally apply to all CAFOs regardless of species, and specifically address the size thresholds for defining which beef, dairy, swine, veal calves, poultry, sheep, horses, and duck operations are CAFOs. The following sections discuss changes made to the size thresholds for defining which operations in these sectors are CAFOs.

Although the following discussion focuses primarily on circumstances where an AFO is defined as a CAFO, it is important to note that small and medium-size AFOs can be designated as CAFOs by EPA or an NPDES authorized State. Refer to section IV.A.7 and 8 for a discussion of designation.

The thresholds for defining Large, Medium, and Small CAFOs in each sector are summarized in Table 4.1 below.