

required as part of the permit application process, thereby addressing the other concern raised by the Panel.

In providing comments on the proposed rule, a number of commenters appear to have confused EPA's proposal to eliminate the 25-year, 24-hour storm event as a permit exemption with issues relating to the design standard for the effluent limitation guideline. In this final rule, the Agency is eliminating the use of the 25-year, 24-hour storm only for the purpose of determining who is required to be covered by an NPDES permit. The Agency is retaining the existing design standard for containment based on the 25-year, 24-hour storm event (except for new sources in certain animal sectors, as discussed elsewhere in this preamble).

The elimination in today's rule of the 25-year, 24-hour storm exemption from permitting is also compatible with today's requirement for all CAFOs to apply for a NPDES permit. In section IV.B.1 below, EPA explains the reasons for adopting a more comprehensive "duty to apply" today, including the unique characteristics of CAFOs and the zero discharge regulatory approach (except for large storm events) that applies to them, the historical experience showing the lack of permitting of Large CAFOs, and the need to simplify and clarify the applicability of the rule. Retaining the 25-year, 24-hour storm exemption from permitting would not be compatible with these reasons and indeed would perpetuate confusion over which operations are required to apply for a permit.

Having eliminated the 25-year, 24-hour storm exemption from permitting, today's rule nevertheless allows operations to avoid permitting if they can demonstrate that they truly have no potential to discharge (*see* section IV.B.2). However, operations that do have the potential to discharge, even if just in the 25-year, 24-hour storm, may not receive a determination of no potential to discharge.

#### 5. How Are Land Application Discharges of Manure and Process Wastewaters at CAFOs Covered by This Rule?

Today's rule clarifies that runoff from the application of CAFO manure, litter, or process wastewaters to land that is under the control of a CAFO is a discharge from the CAFO and subject to NPDES permit requirements, except where it is an agricultural storm water discharge. All permits for CAFOs must contain terms and conditions on land application in order to ensure

appropriate control of discharges that are not agricultural storm water.

*What did EPA propose?* EPA proposed to define an AFO to include both the animal production areas of the operation and any land areas under the control of the owner or operator on which manure and process wastewaters are applied. The definition of a CAFO is based on the AFO definition and therefore would have included the land application areas as well. Accordingly, a CAFO's permit would include requirements to control discharges from both its production area and its land application area.

*What were the key comments?* A number of commenters asserted that EPA lacks the authority to include permit requirements governing a CAFO's land application of manure and process wastewaters. They claim generally that the runoff from such land application is a nonpoint source discharge and therefore is not subject to NPDES requirements. In particular, they argue that because land application areas are not places where animals are concentrated or fed, there is no basis in the Act for including them in the definitions of AFO and CAFO. In addition, in their view, runoff of CAFO manure and process wastewaters from land application areas is excluded from the point source definition because it is "agricultural storm water." They believe that land application runoff is appropriately addressed only through nonpoint source, voluntary, incentive-based programs. Accordingly, these commenters objected to the proposal to include land application areas in the definition of an AFO and CAFO.

One commenter also stated that EPA's policy reasons for including land application areas in the AFO and CAFO definitions are not convincing. Excluding land application areas from the AFO and CAFO definitions, this commenter notes, does not necessarily mean that CAFO generated manure could be land applied without concern for the environment. For example, as a nonpoint source discharge, land application discharges would still be subject to State controls, the Clean Water Act nonpoint source program (section 319), and the TMDL program.

In contrast, certain other commenters indicated that there is a significant need to better address manure and related discharges from CAFO land application areas and therefore they agreed with the proposal to include the land application areas in the AFO/CAFO definitions. These commenters stated that this approach is consistent with recent court decisions and that addressing land

application runoff is critical to ensuring water quality protection.

*Rationale.* EPA noted in the proposal that the runoff from land application of manure at CAFOs is a major route of pollutant discharges from CAFOs; that in some regions of the country, the amount of nutrients present in land-applied manure has the potential to exceed the nutrient needs of the crops; that areas exist of widespread phosphorus saturation of the soils; and that research shows a high correlation between areas with impaired lakes, streams and rivers due to nutrient enrichment and areas where there is dense livestock and poultry production.

EPA fundamentally disagrees with those commenters who asserted that the Agency lacks authority over land application discharges at CAFOs because this is an attempt to regulate nonpoint source pollution. Under the Clean Water Act, the Agency has broad discretion to determine what are point source discharges from CAFOs. EPA explained in the proposal why it is appropriate to clearly specify that land application discharges of manure and process wastewater from areas where CAFO manure and process wastewaters have been overapplied are discharges by the CAFO that are subject to NPDES requirements rather than being nonpoint source discharges. In brief, EPA stated in the proposal that the pipes and other manure-spreading equipment that convey CAFO wastes to the fields are an integral part of the CAFO, and so discharges from this equipment should be considered discharges from the CAFO. Further, land application areas are integral to CAFO operations, and there have been significant discharges in the past attributed to land application of CAFO wastes. The proposal noted in addition that defining CAFOs in this way is consistent with EPA's effluent limitations guidelines for other industries, which consider on-site waste treatment systems to be part of the production facilities in that the regulations restrict discharges from the total operation.

EPA believes that, in explicitly including CAFOs in the definition of a point source (CWA Sec. 502(14)), Congress intended that discharges of manure and process wastewater from a CAFO to waters of the U.S. should be regulated through the NPDES permit program. Since one important manner by which CAFOs may produce such discharges is to apply manure and process wastewater to land areas under their control, EPA believes that Congress must have intended discharges from a CAFO's land application area to be at least potentially included as