

regulated point source discharges. However, Sec. 502 also includes a specific exclusion from the definition of a point source for "agricultural storm water discharges." EPA explains in the following section how it interprets these two statutory provisions in order to identify which discharges from a CAFO's land application area are agricultural storm water discharges and therefore are not point source discharges.

Because the runoff from land application of manure at CAFOs is a major route of pollutant discharges from CAFOs, and for the other reasons articulated above, EPA does not believe it is sufficient to rely on non-regulatory controls cited by one of the commenters, such as the CWA section 319 program, or State non-NPDES authorities.

While EPA is today making explicit in the regulations that a CAFO's land application of CAFO manure and process wastewaters is subject to NPDES requirements, the Agency is doing so through different regulatory language from what was proposed. EPA proposed to amend the AFO definition to include the land application areas at the facility as well as the animal production areas. Following the proposal, however, concerns were raised that this language could be misconstrued to mean that CAFO permits must include terms and conditions on any pollutants running off the operation's land application areas (for example, runoff of pesticides). This was not EPA's intent. The focus of this rulemaking is on the CAFO manure and process wastewaters that may be discharged by the CAFO. Therefore, EPA has chosen not to include the land application areas at an animal feeding operation within the definition of an AFO or CAFO in the final regulations. Instead, EPA has added section 122.23(e), entitled "Land application discharges from a CAFO are subject to NPDES requirements," which states as follows: "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)." This provision goes on to state that a discharge of manure or process wastewater from a CAFO's land application areas is an agricultural storm water discharge under certain conditions, as discussed in the next preamble section.

The Agency emphasizes that in today's amendments to the CAFO

regulations, a CAFO's responsibility for land application discharges extends only to the CAFO's own land application areas, which includes areas at the CAFO itself or otherwise under the CAFO owner's or operator's control. Also, as noted, today's land application rule provisions apply only to the application of manure, litter, and process wastewaters at the CAFO, and not to other pollutants that may exist at the operation.

As explained above, EPA also believes that the final rules adopted today appropriately account for the exclusion of "agricultural storm water discharges" from the definition of a point source in the Clean Water Act. This subject is discussed in the following section.

6. How Is EPA Applying the Agricultural Storm Water Exemption With Respect to Land Application of CAFO Manure and Process Wastewaters?

EPA is clarifying in today's rule that discharges of manure, litter, and process wastewaters from the land application areas of a CAFO are agricultural storm water discharges where the manure 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 or process wastewater. Such practices, as specified in 122.42(e)(1) (vi)–(ix) must be included in all CAFO permits.

What did EPA propose? For purposes of land application of manure from an AFO or CAFO, EPA proposed to define the term "agricultural storm water discharge" as a discharge composed entirely of storm water, as defined in § 122.26(a)(13), from a land area upon which manure and/or wastewater has been applied in accordance with proper agricultural practices, including land application of manure or wastewater in accordance with either a nitrogen-based or, as required, a phosphorus-based manure application rate. Also, as noted, the proposed effluent guidelines included technology-based requirements for a CAFO's land application areas that were based on the CAFO's use of proper agricultural practices. (See 66 FR at 3029–32).

What were the key comments? A number of the commenters who claimed that EPA does not have authority to regulate land application at CAFOs focused on the exclusion for agricultural storm water discharges. In their view, under this exclusion, all runoff of manure, litter, or process wastewaters from a CAFO's crop fields is exempt from the NPDES program as agricultural storm water. In contrast, other

commenters took the view that because of the Act's specific naming of CAFOs as point sources, none of the runoff from CAFO crop fields is entitled to the agricultural storm water exemption.

Rationale. The CWA states that the term "point source" does not include "agricultural storm water discharges" (section 502(14)). Nothing in the statutory language or legislative history indicates that Congress did not mean to include agricultural storm water discharges from a CAFO in this exclusion. EPA therefore believes that in order to interpret the inclusion of CAFOs as point sources and the agricultural storm water exclusion consistently, it is necessary to identify the conditions under which discharges from the land application area of a CAFO are point source discharges that are subject to NPDES permitting requirements and those under which they are agricultural storm water discharges and therefore are not point source discharges.

EPA has determined that it is appropriate to base the distinction between agricultural storm water discharges and regulated point source discharges of manure, litter, and process wastewater from a CAFO on whether or not the manure and process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure or process wastewater. The specific types of practices that EPA believes are needed to ensure this are specified in 122.42(e) (1)(vi)–(ix). Where such practices have been used, EPA believes it is reasonable to conclude that any remaining discharge is agricultural storm water. Conversely, where such practices have not been used, EPA believes it is reasonable to conclude that land application discharges of manure, litter, or process wastewater are not agricultural storm water but are discharges that Congress meant to subject to NPDES permitting requirements when it explicitly included CAFOs in the definition of a point source.

When manure or process wastewater is applied in accordance with practices designed to ensure appropriate agricultural utilization of nutrients, it is a beneficial agricultural production input. This fulfills an important agricultural purpose, namely the fertilization of crops, and it does so in a way that minimizes the potential for a subsequent discharge of pollutants to waters of the U.S. EPA recognizes that even when the manure, litter, or process wastewater is land applied in accordance with practices designed to