

ensure appropriate agricultural utilization of nutrients, some runoff of nutrients may occur during rainfall events, but EPA believes that this potential will be minimized and any remaining runoff can reasonably be considered an agricultural storm water discharge.

EPA notes that any dry weather discharge of manure or process wastewater resulting from its application to land area under the control of a CAFO would not be considered an agricultural storm water discharge and would thus be subject to Clean Water Act requirements. As a matter of common sense, only storm water can be agricultural storm water. Further, if manure or process wastewater were applied so thickly that it ran off into surface waters even during dry weather, this would not be consistent with practices designed to ensure appropriate agricultural utilization of nutrients.

In this rule, EPA is clarifying how it believes the scope of regulated point source discharges from a CAFO is limited by the agricultural storm water exemption. EPA does not intend its discussion of how the scope of point source discharges from a CAFO is limited by the agricultural storm water exemption to apply to discharges that do not occur as the result of land application of manure, litter, or process wastewater by a CAFO to land areas under its control and are thus not at least potentially CAFO point source discharges. In explaining how the scope of CAFO point source discharges is limited by the agricultural storm water exemption, EPA intends that this limitation will provide a "floor" for CAFOs that will ensure that, where a CAFO is land applying manure, litter, or process wastewater in accordance with site specific practices designed to ensure appropriate agricultural utilization of nutrients, no further effluent limitations will be authorized, for example, to ensure compliance with water quality standards. Any remaining discharge of manure or process wastewaters would be covered by the agricultural storm water exemption and would be considered nonpoint source runoff. Further, the Agency does not intend that the limitation on the scope of CAFO point source discharges provided by the agricultural storm water exemption be in any way constrained, so long as manure, litter, or process wastewater is land applied by the CAFO in accordance with site specific nutrient management practices that ensure appropriate utilization of nutrients. In particular, EPA does not intend that the applicability of the agricultural storm

water exemption to discharges from land application areas of a CAFO be constrained by requirements to control runoff resulting from the application of pesticides or other agricultural practices.

Although as noted above, manure and process wastewater discharges from the land application area are not directly subject to water quality-based effluent limits, EPA encourages States to address water quality protection issues in their technical standards for determining appropriate land application practices.

The Agency disagrees with the commenters who would interpret the agricultural storm water provision to exclude all of the runoff from a CAFO's land application areas. It would not be reasonable to believe that Congress intended to exclude as an "agricultural" storm water discharge any and all discharges of CAFO manure from land application areas, for example, no matter how excessively such manure may have been applied without regard to true agricultural needs. Similarly, EPA does not agree with the commenters who believe that the agricultural storm water discharge exclusion does not apply to all to CAFOs because Congress singled out CAFOs by specifically including them in the definition of point source. There is nothing in the text of the point source definition (CWA section 502(14)) that indicates that Congress intended the agricultural storm water discharge exclusion not to apply to CAFOs.

After considering all the comments, EPA has decided that it is not necessary to include a definition of the term "agricultural storm water" in the rule text at section 122.23(b). EPA believes that the amended regulatory text at 40 CFR 122.23(e), in combination with this preamble discussion, adequately clarifies the distinction between regulated point source discharges and non-regulated agricultural storm water discharges from the land application area of a CAFO.

Under the final rule, as proposed, discharges from the production area at the CAFO (e.g., the feedlot and lagoons) are not eligible for the agricultural storm water exemption at all, because they involve the type of industrial activity that originally led Congress to single out CAFOs as point sources.

Today's final rule also requires all permits for CAFOs to include terms and conditions to address land application. See section 122.42(e) and Part 412. The Agency has included this requirement because it has the authority to regulate point source discharges and any discharge of CAFO manure, litter, or process wastewaters from the land

application area of a CAFO which is not agricultural storm water is subject to the Clean Water Act. EPA believes that the only way to ensure that non-permitted point source discharges of manure, litter or process wastewaters from CAFOs do not occur is to require that CAFOs apply for NPDES permits that will establish requirements that ensure that manure, litter, and process wastewater are only applied to CAFO land application areas in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater.

7. When and How Is an AFO Designated as a CAFO?

In today's final rule, EPA is retaining the requirement for an on-site inspection and a determination that an AFO is a significant contributor of pollutants to waters of the United States prior to designating an AFO as a CAFO. A small AFO may be designated only if it discharges either: (1) Into waters of the United States through a man-made ditch, flushing system, or other similar man-made device or (2) directly into waters of the United States that originate outside of the facility and pass over, across, or through the facility or otherwise come into contact with the confined animals. Medium operations may also be designated as CAFOs even if they do not meet either of the two conditions for being defined as a CAFO.

What did EPA propose? In the proposed rule, EPA presented two options with respect to the designation criteria. EPA proposed to retain the existing criteria under a three-tier structure and proposed to eliminate them under a two-tier structure. In addition, EPA requested comment on several additional alternatives that would have retained the criteria only for small operations.

EPA also proposed to modify the on-site inspection requirement to explicitly include other forms of information gathering such as use of monitoring data, fly-overs, and satellite imagery. EPA also proposed a technical correction, changing the term "significant contributor of *pollution*" to "significant contributor of *pollutants*."

What were the key comments? EPA received limited comment concerning proposed changes to the designation criteria. Only a few States specifically supported the elimination of the criteria. A few representatives of the livestock industry generally supported elimination of the criteria for operations of all sizes. Commenters were generally opposed to EPA's proposal to modify the on-site inspection requirement to