

reduction of environmental impacts. EPA anticipates that participation in these programs will assist them in eliminating conditions which would result in the AFO being defined or designated as a CAFO. For example, it may be that an operation that confines 500 cattle and that participates in a voluntary program to develop and implement a CNMP, as defined by USDA, could proactively fix situations that may otherwise cause them to meet the criteria for being defined or designated as a CAFO. EPA intends to develop a small entity compliance guide to assist small business and additional tools needed to assist AFOs in complying with this requirement. Please refer to a more extensive discussion of how this rule promotes and encourages State flexibility in section V.F.

#### 10. What CAFOs Are New Sources?

Today's final rule makes no changes to the definition of "new source" in 40 CFR 122.2 or the definition and criteria for new source determinations in 40 CFR 122.29 with respect to CAFOs. For purposes of applying the new source performance standards in today's final rule, a source would be a new source if it commences construction after April 14, 2003 (*see* 40 CFR 122.2). Each source that meets this definition is required to achieve the new New Source Performance Standard upon commencing discharge.

*What did EPA propose?* EPA proposed additional criteria for determining who is a new source, including:

1. The CAFO is constructed at a site at which no other source is located;
2. The CAFO totally replaces the housing including animal holding areas, exercise yards, and feedlot, waste handling system, production process, or production equipment that causes the discharge or potential to discharge pollutants at an existing source; or
3. The CAFO constructs a production area that is substantially independent of an existing source at the same site.

*What are the key comments?* Some industry commenters expressed the view that the new source definitions were too broad and would result in many existing CAFOs being considered by their permitting authority as new sources. Commenters interpreted the proposal to mean that operations undergoing routine operation and maintenance or replacement of individual structures and equipment could be considered a new source under the proposed language. These existing facilities defined as new would have to undergo costly improvements to comply with the NSPS. In addition, the new

source definition would be a disincentive to conduct routine maintenance and improvements at an operation. The commenters indicated that EPA did not provide enough rationale to include this language and that other industries do not have such a broad new source definition. Industry commenters, including some conservation districts, concluded that EPA should retain the existing definition.

Comments from environmental organizations and private citizens indicated their belief that all expanding AFOs should be considered CAFOs and subject to NSPS, and that these standards should be more restrictive than the existing source standards.

*Rationale.* After reviewing public comment and reconsidering this proposed revision, EPA has concluded that the existing regulation at § 122.29(b) provides adequate criteria for determining who is a new source. EPA's intention was to provide permit writers with clear and specific criteria applicable to CAFOs to improve clarity of these regulations. In retrospect, the only clarification that was provided was related to § 122.29(b)(ii), which refers to when the new construction "totally replaces the process or production equipment that causes the discharge of pollutants at an existing source." While the Agency disagrees with commenters that the proposed revisions would expand the scope of the existing regulation, EPA decided that it was not necessary to adopt the proposal as the existing regulation is sufficient for EPA to provide guidance on determining new sources. Further, EPA is not adopting the proposal in the interest of keeping the regulation simple. Nevertheless, EPA believes some clarity as to which CAFOs are new sources is appropriate. In response to commenters who believe that EPA should consider any facility that expands to be a new source, EPA did not propose such a definition, the reasons for which are discussed at 66 FR 3066 of the proposed rulemaking. EPA is clarifying that it is not the intent of this section to serve as a disincentive to CAFOs to maintain, upgrade, or otherwise enhance facilities and waste management systems to improve their operational and environmental performance. Thus, EPA is clarifying that an expanding source is not automatically defined as a new source. For example, a facility that expands its operation by simply extending existing housing structures by constructing new housing adjacent to existing housing, is not typically considered a new source. Under existing provisions at § 122.29(b) such

expansions at an existing facility would not result in the facility becoming defined as a new source unless the modifications totally replace the process or production equipment that causes the discharge of pollutants, or the new/modified facility's production and waste handling processes are substantially independent of the preexisting source.

#### B. Who Needs a Permit and When?

##### 1. Who Needs To Seek Coverage Under an NPDES Permit?

Today's rule requires all CAFO owners or operators to seek coverage under an NPDES permit, except in very limited situations where they make an affirmative demonstration of "no potential to discharge," as discussed below. This "duty to apply" applies without exception; it makes no difference, for example, whether the CAFO manure management system has been appropriately designed and operated to prevent discharges except during large storm events. Recognizing that there may be certain situations in which no reasonable potential to discharge exists, EPA has also established the ability for a CAFO owner or operator to demonstrate that the facility has no potential to discharge from either its production areas or its land application areas. If the permitting authority agrees with the demonstration of no potential to discharge, the operation would not need to obtain an NPDES permit. The no potential to discharge demonstration is not relevant to small or medium operations because an actual discharge is a required criterion for a small or medium operation to be considered a CAFO.

*What did EPA propose?* EPA proposed to require all CAFOs to seek coverage under an NPDES permit, except where they can demonstrate no potential to discharge.

*What were the key comments?* Environmental groups were largely in favor of the duty to apply provision, and sought to ensure that all Large CAFOs in particular had a duty to apply. These commenters expressed concern about the impacts of unregulated operations, the potential for CAFOs to discharge, and the lack of permitting of CAFOs under the current regulations. Many commenters stated that because of the potential to discharge CAFOs should have NPDES permits.

Trade associations and industry commenters were largely opposed to the duty to apply requirement. A number of these commenters questioned EPA's legal authority for requiring permit applications from CAFOs that claim not to discharge. They argued that the Clean