

Water Act requires an NPDES permit only for an actual discharge of pollutants to the waters of the United States. Commenters also noted that imposing a duty to apply is inconsistent with EPA's past interpretations of the Clean Water Act, pointing to past instances in which EPA has stated that permits are required only for actual discharges.

An industry commenter also disagreed with EPA's reasons for finding that there is a need to impose a duty to apply for a permit for CAFOs. The commenter disagreed with EPA's belief that many large AFOs have not applied for permits because of widespread confusion over the CAFO regulatory requirements and stated that any confusion in the regulations can easily be remedied by EPA. The commenter noted that there could be other reasons these operations are not permitted (for example, the operation does not discharge, it discharges only in a 25-year, 24-hour storm, or is a dry poultry facility). Commenters also questioned EPA's finding that many CAFOs are discharging without a permit and stated their belief that CAFO discharges are no more intermittent (and thus no more difficult to detect and document) than those in other industries.

These commenters also asserted that EPA is not authorized and not justified in putting the burden on the CAFO to show that it does not discharge. According to the commenters, this presumption of a discharge weakens the requirement of an actual discharge in the Act and will result in EPA regulating facilities that Congress intended to exclude from the NPDES program.

State comments were mixed. Most supported the duty to apply provision, including the no potential to discharge determination, agreeing with EPA that any operation that meets the definition of a CAFO should be required to apply for a permit. Some States indicated that the criteria for becoming a CAFO needed to be clear, and then facilities would know when they are CAFOs and would comply with the duty to apply. Other States opposed this proposal for a variety of reasons, including that shifting the burden of proof to the facility would be onerous, especially if EPA lowers the regulatory threshold; that there was no need to impose a permit in order to ensure that livestock operations have nutrient management plans; and that EPA should not create duplicative efforts in States with effective programs.

Although the SBAR Panel did not comment on the proposed duty to apply requirements, the Panel did comment

on EPA's proposal to require all medium facilities either to certify that they are not CAFOs or to seek coverage under an NPDES permit. The Panel recommended that EPA carefully consider the burden of such requirements. The Panel also was concerned that requiring full permit applications from the number of Medium CAFOs contemplated at proposal may impose a significant burden with limited environmental benefits, and recommended that EPA carefully consider appropriate streamlining options. Finally, the SBAR Panel recommended that, before adding any new application or certification requirements for operators in this size range, EPA should carefully weigh the burden and environmental benefits of expanding the scope of the regulations in this way.

Rationale. After careful consideration of the comments, EPA is adopting the "duty to apply" in today's final regulations. This revised duty to apply is designed to identify and ultimately to prevent actual unauthorized discharges to the waters of the United States, consistent with the intent and goals of the Clean Water Act. CAFOs that demonstrate that they do not have a potential to discharge will not need to seek coverage under a permit, as discussed in section IV.B.2 of this preamble.

EPA continues to believe that there is a strong need and a sound basis for adopting this duty to apply and that it is within the Agency's authority to do so. EPA fully discussed its rationale for this provision in the proposal. There, the Agency discussed the duty for CAFOs, other than those which discharge only in the event of a 25-year, 24-hour storm, to apply for a permit under the existing NPDES regulations (40 CFR 122.21(a)) and explained a number of reasons behind the need for a clarified and more broadly applicable duty to apply for CAFOs.

EPA disagrees with the comment that there is no need for a duty to apply because there may be legitimate reasons for so many operations being unpermitted at present. In fact, there are numerous documented instances in the administrative record of actual discharges at unpermitted CAFOs that are not associated with 25-year, 24-hour storms. EPA also disagrees that CAFO discharges are no more intermittent than those in other industries. Operations in other industries are typically designed to routinely discharge after appropriate treatment; this is not the case at CAFOs, where discharges are largely unplanned and intermittent. It is thus much easier for CAFOs to avoid permitting by not

reporting their discharges. EPA continues to believe that imposing a duty to apply for all CAFOs is appropriate given that the current regulatory requirements are being misinterpreted or ignored. Moreover, simply clarifying the regulations would not necessarily be adequate, because operations might still claim that the Clean Water Act requires no permit application if the facility claims not to discharge. As discussed in the proposal, Congress contemplated that EPA could set effluent standards at zero discharge, where appropriate, and that EPA would effectuate these standards through permits; this statutory scheme would be negated if CAFOs were allowed to avoid permitting by claiming that they already meet a zero discharge standard.

EPA noted in the proposal that it had not previously sought to categorically adopt a duty to apply for an NPDES permit for all facilities within a particular industrial sector. The Agency explained that it is doing so for reasons that involve the unique characteristics of CAFOs and the zero discharge regulatory approach (except for large storm events) that applies to them. EPA also noted that since the inception of the NPDES permitting program in the 1970s, only a small number of Large CAFOs have actually sought permits. The Agency is adopting this revised duty to apply for all of these reasons, including this historical experience showing the lack of permitting of Large CAFOs, while numerous documented discharges occurred over time. This change also serves to substantially simplify and clarify the applicability of the rule.

In addition, there is a sound basis in the administrative record for the presumption that all CAFOs have a potential to discharge to the waters of the United States such that they should be required to apply for a permit, unless they can show no potential to discharge. EPA does not agree with the claim that the presumption of a discharge will weaken the requirement of an actual discharge in the Clean Water Act and will result in EPA regulating facilities that Congress intended to exclude from the NPDES program. CAFOs will have the opportunity to demonstrate that they do not have a potential to discharge and therefore would not be required to apply for a permit.

2. How Can a CAFO Make a Demonstration of No Potential To Discharge?

Today's rule specifies that a Large CAFO need not have an NPDES permit if the permitting authority finds that the operation has no potential to discharge.