

This final rule provides that Large CAFOs may request and submit technical information as the basis for a permitting authority to determine that there is no potential to discharge. Today's rule also establishes requirements for the permitting authority to issue a public notice that such a request has been received. The request for a no potential to discharge determination must be submitted by the date upon which the CAFO is required to seek permit coverage (See 40 CFR 122.23(g) and section IV.B.3 and Table 4.2 of this preamble). Within 90 days of receiving the request, the Director will let the CAFO know whether or not the request for a no potential to discharge determination has been granted. If the request is denied, the CAFO must seek permit coverage within 30 days after the denial.

*What did EPA propose?* EPA proposed that Large CAFOs have a duty to apply for an NPDES permit unless the permitting authority, upon request from the CAFO, makes a case-specific determination that a CAFO has no potential to discharge pollutants to water of the United States.

*What were the key comments?* Trade associations and industry commenters generally opposed the requirement to demonstrate "no potential to discharge." Their objections largely follow from their view that CAFOs should not be required to apply for a permit in the first instance absent evidence of an actual discharge. Having to show "no potential to discharge" in order to avoid a permit would place a difficult or impossible burden on operations to prove a negative, in their view. They also expressed concerns over the resources and expense of showing "no potential to discharge" and about how permitting authorities will be able to interpret and apply this standard consistently. Certain environmental groups, on the other hand, were also opposed to this provision, but their view is that CAFOs should be required to apply for permits without exception, and there should be no allowance for CAFOs to avoid permitting based on a finding of "no potential to discharge." They also voiced concerns that this provision will invite abuse by States that seek to avoid permitting responsibilities. On the subject of whether the rules should include a public process for the "no potential to discharge" determination, public commenters expressed views both for and against including this process. Those seeking to have a public process included their belief that it will serve as a check against any abuses in making these determinations.

*Rationale.* Today's rule requires all CAFOs to apply for a permit unless they have received a determination by the Director that the facility has "no potential to discharge." The "duty to apply" provision is based on the presumption that every CAFO has a potential to discharge and therefore must seek coverage under an NPDES permit. However, the Agency does not agree with commenters that there should be no opportunity to rebut this presumption and avoid permitting because EPA recognizes that, although they may be infrequent, there may be instances where a CAFO truly does not have a potential to discharge. For example, the CAFO may have no potential to discharge because it is located at a great distance from any water of the United States (see further discussion on this subject below). In such circumstances, it would make little sense to impose NPDES permit requirements in order to protect against such discharges. Therefore, the Agency believes that it is reasonable to allow facilities that demonstrate "no potential to discharge" to be released from the requirement to seek coverage under an NPDES permit. Although today's regulation allows facilities to submit "no potential to discharge" claims, an unpermitted CAFO that does in fact discharge pollutants to waters of the U.S., with or without a determination of "no potential to discharge," would be in violation of the Clean Water Act.

The requirement for demonstrating no potential to discharge is not being extended to small and medium AFOs since the specific criteria that must be met prior to becoming CAFOs requires the existence of a discharge. Whereas large AFOs are defined as CAFOs based on number of animals alone, small and medium AFOs only become CAFOs after meeting specific discharge-related criteria. A small AFO can only be designated as a CAFO by the State Director or Regional Administrator where it is determined that it is a significant contributor of pollutants to waters of the U.S. A medium AFO can become a CAFO by designation or definition. As in the case of small AFOs, a medium AFO can only be designated where it is determined to be a significant contributor of pollutants to waters of the United States. A medium AFO that is a CAFO by definition must meet one of the two "method of discharge" criteria prior to being defined as a CAFO. Thus, it is meaningless to consider such facilities as having no potential to discharge.

EPA's intention is that the term "no potential to discharge" is to be narrowly interpreted and applied by permitting

authorities. This provision is intended to be a high bar that excludes those Large CAFOs from having an NPDES permit only where the CAFO can demonstrate to a degree of certainty that they have no potential to discharge to the waters of the United States. The no potential to discharge status is intended to provide relief where there truly is no potential for a CAFO's manure or wastewater to reach waters of the United States under any circumstances or conditions. Such circumstances would include, for example, CAFOs that are located in arid areas and far from any water body or those that have completely closed cycle systems for managing their wastes and that do not land apply their wastes. For example, a CAFO that meets the following conditions might be able to demonstrate no potential to discharge: (1) Located in an arid or semi-arid environment; (2) stores all its manure or litter in a permanent covered containment structure that prevents wind dispersal and precipitation from contacting the manure or litter; (3) has sufficient containment to hold all process wastewater and contaminated storm water and (4) does not land apply CAFO manure or litter because, for example, the CAFO sends all its manure or litter to a regulated, offsite fertilizer plant or composting facility. In particular, EPA believes that land application of its manure and wastewater would, in most cases, be enough by itself to indicate that a CAFO does have a potential to discharge (although conceivably no potential to discharge could be shown based on the physical features of the site, such as lack of proximity to waters of the United States). This discussion should help to address commenters concerns that there could be inconsistencies in how permitting authorities could interpret and apply the standard for "no potential to discharge".

The term "no potential to discharge" means that there is no potential for any CAFO manure, litter, or wastewater to be added to waters of the United States from an operation's production or land application areas, without qualification. If a Large CAFO chooses to make a demonstration of no potential to discharge, it is the CAFO's responsibility to provide appropriate supporting information that the permitting authority can use when reviewing the demonstration. The supporting information should include, for example, a detailed description of the types of containment used for manure focusing on the attributes of the containment that ensure no discharges