

will occur. In addition, there may be instances where after preliminary review of the demonstration, the permitting authority may require the submission of supplemental information to assist in making a determination.

EPA disagrees with commenters' statements that the demonstration of "no potential to discharge" will place an impossible or excessively costly burden on facilities. EPA believes that, in many instances, the information that is specified in 40 CFR 122.23(f)(2) will be adequate for the Director to determine whether or not the facility has a potential to discharge. In such instances, there would be no greater cost to the facility than if it were to apply for a permit. If additional information is necessary, the Agency does not believe that it will result in greatly increased costs, because such information (including, for example, design specifications or other technical information) would be readily available to the facility and could be easily provided to the permitting authority.

Today's rule requires that a request for a no potential to discharge determination include most of the information required for a permit application, as specified in § 122.21(f) and (i)(1)(i) through (ix). This information will serve as the primary source of information relating to the facility's qualifications to avoid an NPDES permit. While some additional information may be available to the Director, including for example regional rainfall, soil, and hydrological conditions, the Director may require supplemental, site-specific information to make this determination. However, EPA is not requiring a CAFO owner or operator pursuing a no potential to discharge determination to certify to the development of its nutrient management plan, as required by § 122.21(i)(1)(x) for a CAFO that seeks permit coverage after December 31, 2006.

Within 90 days of receiving a request for a no potential to discharge

determination the permitting authority will notify the CAFO of its decision on the request. During this review period, a CAFO that has submitted a request for a no potential to discharge determination does not have a duty to seek coverage under an NPDES permit. The final rule differs from the proposal in not imposing a duty to apply on CAFOs that have submitted a no potential to discharge request until there is a denial of the request by the Director. EPA believes that this is a preferable approach, because it does not risk the imposition of NPDES permit requirements on CAFOs even though they may qualify for a determination that they have no potential to discharge. To guard against abuse of this provision, the Agency is establishing a limited time of 90 days for the Director to make its determination.

If the permitting authority finds that no potential to discharge has not been demonstrated, the CAFO owner or operator must seek permit coverage within 30 days of the denial of the request. States may use the information submitted with the request for a no potential to discharge determination to proceed with individual permit development or for coverage under a general permit. However, in order to obtain coverage, the CAFO owner or operator would also be required to provide a request for coverage and include the information required by § 122.21(i)(1)(x), when applicable.

After all necessary information is submitted, and before making a final decision to grant a "no potential to discharge" determination, today's rule requires the Director to issue a public notice stating that a no potential to discharge request has been received. This notice must be accompanied by a fact sheet which includes, when applicable: (1) A brief description of the type of facility or activity which is the subject of the no potential to discharge determination; (2) a brief summary of the factual basis, upon which the

request is based, for granting the no potential to discharge determination; and (3) a description of the procedures for reaching a final decision on the no potential to discharge determination. The Director must base the decision to grant a no potential to discharge determination on the administrative record, which includes all information submitted in support of a no potential to discharge determination and any other supporting data gathered by the permitting authority. If the Director's final decision is to deny the "no potential to discharge" determination, the CAFO owner or operator must submit a permit application within 30 days after denial of the no potential to discharge determination.

The Agency believes that the process described above addresses concerns raised by commenters that States might abuse the intended effect of this provision and allow facilities that should be permitted as CAFOs to avoid permitting. The Agency believes this process should ensure that the Director has adequate information to properly decide whether a facility has a potential to discharge or not, and also ensures that the public will be made aware of such determinations and can act appropriately if it appears that determinations are not being made as required by this provision. Also, as noted above, facilities that actually do discharge without a permit are subject to enforcement for a violation of the Clean Water Act—even if they have previously received a no potential to discharge determination. This should provide a strong incentive to CAFOs not to file a frivolous request.

### 3. When Must CAFOs Seek Coverage Under a NPDES Permit?

Table 4.2 summarizes the time frames by which CAFOs (existing and new sources) must apply for an NPDES permit. Refer to section IV.A.11 of this preamble for a discussion of the new source definition.

TABLE 4.2.—TIME FOR SEEKING COVERAGE UNDER AN NPDES PERMIT

CAFO status	Time frame to seek coverage under an NPDES permit	Examples
Operations defined as CAFOs prior to April 14, 2003.	Must have applied by the date required in 40 CFR 122.21(c).	Operations that previously met the definition of a CAFO and were not entitled to the 25-year, 24-hour storm permit exemption.
Operations defined as CAFOs as of April 14, 2003, and that were not defined as CAFOs prior to that date (e.g. existing operations that become defined as a CAFO as a result of changes in this rule).	As specified by the permitting authority, but no later than April 13, 2006.	For example, "dry" chicken operations (operations that did not use a liquid manure handling or continuous overflow watering system), stand-alone immature swine, heifer and calf operations, and those AFOs that were entitled to the permitting exemption for discharging only in the event of a 25-year, 24-hour storm.