

to apply for a permit until three years from the effective date of today's rule.

Today's rule does not extend the date by which operations that were defined as CAFOs under the prior regulations should have applied for a permit (see 40 CFR 122.21). In particular, EPA notes that those operations that previously met the criteria for being a CAFO, but who erroneously claimed the 25-year, 24-hour storm exemption and avoided applying for an NPDES permit on that basis, continue to be in violation of the regulations and need to immediately apply for NPDES permit coverage. Today's rule also does not extend the date by which operations that have previously been designated as a CAFO should have applied for an NPDES permit.

The third category described in Table 4.2 pertains to a category of permittees who become CAFOs subsequent to the effective date of today's rule, but who are not defined as "new sources" in accordance with the new source criteria. For example, a newly constructed Medium CAFO falls in this category, since it is not subject to the new source performance standards in Part 412. Newly constructed CAFOs in this category must seek coverage under an NPDES permit 180 days prior to the time the CAFO commences operation. This requirement is designed to parallel the time for permit application for new sources. Other operations that become CAFOs after the effective date of today's rule, including, for example, operations that increase the number of animals in confinement to a level that would result in the operation being defined as a CAFO, but that are not new sources, are required to seek permit coverage as soon as possible but no later than 90 days after being defined as a CAFO. EPA is establishing this date by which such new dischargers must seek coverage under an NPDES permit in consideration of the unique nature of AFO operations. In other industries, a facility would typically require significant capital improvements to become a newly discharging point source. AFOs, on the other hand, may become a new discharger merely by increasing the number of animals housed in confinement at the facility. Moreover, the increase necessary to meet the threshold numbers necessary to be defined as a CAFO could be relatively small. Such an increase could be necessary in response to fast-changing market conditions, in which case it would be an undue burden on the AFO to encounter a delay of 180 days before being able to operate as a CAFO. Inasmuch as CAFOs are not continuous dischargers, the Agency

believes that it is reasonable and sufficient for a CAFO that is a new discharger (other than those that are newly constructed operations) to seek coverage within 90 days after becoming defined as a CAFO.

EPA is establishing an additional permit application deadline in this category of three years where the change that causes the operation to be defined as a CAFO would not have caused it to be defined as a CAFO if the change had occurred prior to the effective date of today's rule. This would include, for example, a dry poultry operation that, sometime after the effective date of today's rule, adds animals and exceeds the threshold for becoming defined as a CAFO. The Agency is establishing this permit application deadline since it is appropriate to treat such facilities on an equal footing to dry poultry operations that become defined as CAFOs as of the effective date of today's rule and who therefore have three years to apply for a permit. It would have been inequitable to have allowed a dry poultry operation that exists at the time this rule becomes effective to have three years to apply but to require a dry poultry operation that becomes a CAFO because it adds a small number of animals shortly after this rule becomes effective to apply within 90 days.

4. What Are the Different Types of Permits?

Today's final rule allows the permitting authority to determine the most appropriate type of permit coverage for a CAFO. Under the NPDES regulations, the two basic types of NPDES permits that can be used are individual permits and general permits. Refer to section V.E. of this preamble for further discussion about the different types of permits.

What did EPA propose? The proposed rule would have required States to conduct a public process for determining which criteria, if any, would require a CAFO owner or operator to apply for an individual rather than a general permit. The proposed rule also would have added a set of CAFO-specific criteria for when the Director may require an individual permit: (1) CAFOs located in an environmentally or ecologically sensitive area; (2) CAFOs with a history of operational or compliance problems; (3) CAFOs that are exceptionally large operations as determined by the permitting authority; and (4) significantly expanding CAFOs. EPA noted in the preamble to the rule as well that it had considered identifying a specific size threshold for individual permits, such as 5,000AU or 10,000AU,

and solicited comment and information relating to such a threshold.

What were the key comments?

Comments from industry and State agencies by and large were both against setting criteria for individual permits and against establishing a public process for developing such criteria. States in particular felt that existing NPDES regulations already adequately defined the process for developing individual and general permits, and strongly advocated against being told at the federal level what criteria to use in issuing permits. Environmental groups commented that they wanted strict federal criteria for individual permits out of concerns regarding the need for federal oversight over large operations and because of their keen interest in the public involvement afforded by individual permits. Many of these commenters stated that all Large CAFOs (*i.e.*, all with what was formerly termed 1,000 AU) should be required to have an individual permit.

Rationale. EPA elected not to set conditions for determining which CAFOs must have individual rather than general permits or to require the States to establish such conditions. The Agency determined that selecting a set of specific thresholds fundamentally fails to recognize the diversity of feeding operations in States across the nation. What may be a "large" facility in one State is often not viewed as such in another. This view was confirmed by the Agency's findings on this issue that although many States set criteria for who must have individual rather than general permits, these conditions vary greatly from State to State and are generally dominated by regional environmental concerns.

5. How Does a CAFO Apply for a Permit?

CAFO owners or operators must submit an application for an individual permit or submit a NOI (or the State's comparable form) for coverage under an applicable general permit. If a general permit is not available, the CAFO does not meet the eligibility requirements for coverage under the general permit, or the CAFO would otherwise prefer to be covered by an individual permit, the CAFO owner or operator must submit to the permitting authority an application (EPA's Form 2B for CAFOs and Aquatic Animal Production Facilities or the State's comparable form) for an individual permit. Today's final rule does not make any changes in how a CAFO applies for a permit.