

determined that requiring manure and soil sampling and the record-keeping requirements included in 412.37(c) in advance of preparing and implementing the nutrient management plan would impose an unnecessary burden on CAFOs because, in the absence of a nutrient management plan that determines the appropriate application rates, these elements will not directly establish that manure will be applied in a manner that ensures appropriate utilization of nutrients. (Some of these actions, such as manure and soil sampling, may well be undertaken by the CAFOs as they develop their nutrient management plans, but EPA determined it was unnecessary for the regulation to impose these requirements in advance of nutrient management plan development and implementation.)

The land application BMPs, including the requirement to develop and implement a nutrient management plan, will immediately apply to all Large CAFOs who commence construction after the effective date of this rule (*i.e.*, new sources). Section 306(b)(1)(B) specifies that new source performance standards shall become effective upon promulgation. New sources engage in extensive site selection, facility design, and construction activities prior to commencing operations. Aspects addressed during this phase include location considerations (*e.g.*, climate and topographical factors), facility design variables to optimize the production process, and waste management considerations including the identification of optimal waste handling practices (*e.g.*, waste collection methods, the use of topographical elevation changes to facilitate waste handling) and disposal options (*e.g.*, on-site application on cropland, shipment to off-site markets). These activities undertaken by new sources prior to commencing construction are highly technical in nature, and CAFOs will typically engage the services of a number of consultants. While CAFOs are expected to engage the services of technical consultants to develop the nutrient management plans required by this rule, the analyses embodied within the nutrient management plan will not significantly add to the scope of analyses new sources will engage in prior to commencing operations.

EPA has considerable discretion under CWA section 304(b)(2) to determine whether and when a particular technology or process is BPT, BCT, or BAT. EPA also has broad authority to interpret CWA section 301. In *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), the Supreme Court accorded great deference to EPA

in promulgating effluent limitations guidelines as regulations under section 301, noting that “[CWA Section] 101(d) requires us to resolve any ambiguity on this score in favor of the Administrator.” *Id.* at 128. The Supreme Court also found that section 501(a) supports EPA’s broad use of its regulatory authority to implement section 301. *Id.* at 132. EPA believes that its decision to promulgate the land application BMPs, including the nutrient management plans, with a future date for implementation is authorized by sections 301 and 304. Section 301(b)(2) in particular directs EPA to promulgate ELGs that, within the constraints of economic achievability, “will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants.” Section 301(b)(2)(A).

EPA is aware that CWA sections 301(b)(2)(C) & (D) require ELGs to be achieved “in no case later than three years after the date such limits are promulgated under section 304(b), and in no case later than March 31, 1989.” This language does not speak to the precise question EPA confronts here: whether EPA can promulgate ELGs that are phased in over time. In this case, for the reasons discussed above, while EPA believes that the requirement to develop and implement a nutrient management plan will be an “available” technology in the near future, it is not now available for the large number of CAFOs subject to today’s rule. For this reason, EPA is, in essence, today promulgating what will be the available technology for the future, similar to what the Agency did for the pulp & paper effluent guideline. See 63 FR 18604 (Apr. 15, 1998). EPA is specifying the future date of December 31, 2006 because that is the date by which it predicts that sufficient capacity and capability to develop and implement a nutrient management plan and associated BMPs will be available to the great number of regulated sources. The availability of technical experts, including certified preparers, is a critically important component of the planning requirement, and in a sense is itself the technology basis for that BPT/BCT/BAT limitation. The Clean Water Act requires compliance with a promulgated ELG—*e.g.*, to develop a nutrient management plan—only once the technology ripens as the basis for that ELG, in this case as an available technology. While EPA is promulgating the nutrient management plan requirement as BPT/BCT/BAT in this rulemaking, EPA’s record indicates that it may not truly be available for the

subcategory as a whole until December 31, 2006.

*c. What are the production area requirements for all existing and new Large beef, dairy, and heifer CAFOs (Part 412, Subpart C)?* In today’s final rule, consistent with the 1974 ELG regulation, EPA is continuing to establish BMPs for the CAFO production area, which includes the animal confinement areas and the manure storage and containment areas. These BPT, BCT, BAT, and NSPS requirements are being established for the reasons discussed in this section, and consistent with the factors for consideration under the Clean Water Act, as discussed in Sections II.A.2 and IV.C.2.f of this preamble.

EPA is largely retaining the current effluent guidelines that apply to beef and dairy operations, and adding language extending these requirements to heifer-raising operations. These regulations, which are codified at 40 CFR Part 412, Subpart C, prohibit the discharge of manure, litter, and other process wastewaters, except for allowing discharge when rainfall causes an overflow from a facility designed, maintained, and operated to contain all manure, litter, and process wastewaters, including storm water, plus runoff from the 25-year, 24-hour rainfall event. In addition, today’s rule requires Large CAFOs to comply with the following BMPs:

- Perform weekly inspections of all storm water diversion devices, runoff diversion structures, animal waste storage structures, and devices channeling contaminated storm water to the wastewater and manure storage and containment structure;
- Perform daily inspections of water lines, including drinking water or cooling water lines;
- Install depth markers in all surface and liquid impoundments (*e.g.*, lagoons, ponds, tanks) to indicate the design volume and to clearly indicate the minimum capacity necessary to contain the 25-year, 24-hour rainfall event, including additional freeboard requirements;
- Correct any deficiencies found as a result of daily and weekly inspections as soon as possible;
- Do not dispose of mortalities in liquid manure or process wastewater treatment systems, and mortalities must be handled in such a way as to prevent discharge of pollutants to surface water, unless alternative technologies implemented under alternative performance standards are designed to handle mortalities; and
- Maintain on-site a complete copy of the records specified in 40 CFR