

described in section V.C of this preamble.

#### *D. When Must States Issue New CAFO NPDES Permits?*

EPA does not typically establish requirements for when States must develop and issue NPDES permits. However, today's regulations require CAFOs to seek NPDES permit coverage under general permits within certain time frames, and CAFOs may not discharge any pollutants to waters of the United States without a permit. Thus, it is in States' interests to issue new or revised NPDES permits in a timely manner. It is EPA's expectation that new general permits will be available no later than the date on which CAFOs have a duty to apply for an NPDES permit. See section IV.B.3 for a full description of when CAFOs must seek permit coverage.

#### *E. What Types of NPDES Permits Are Appropriate for CAFOs?*

The NPDES regulations provide the permitting authority with the discretion to determine the most appropriate type of permit for a CAFO. The two basic types of NPDES permits are individual and general permits. An individual permit is a permit specifically tailored for a specific facility, while a general permit is developed and issued by a permitting authority to cover multiple facilities with similar characteristics.

EPA recognizes that most CAFOs will likely be covered by NPDES general permits; however, there are some circumstances where an individual permit might be appropriate (e.g., exceptionally large facilities, facilities that have a history of noncompliance, or facilities applying for approval to use an alternative performance standard in lieu of baseline technology-based effluent guidelines). The decision whether to issue a general or individual permit lies with the NPDES permitting authority. Section VI of the preamble discusses opportunity for public involvement in the NPDES permitting process.

As permit authorities explore innovative permitting approaches, the use of "watershed-based NPDES permits" might become more prevalent. For example, a watershed-based permit could be issued to CAFOs within a specific watershed. EPA is currently promoting pilot projects to help evaluate the benefits of watershed-based permitting and encourages States to use such a flexible tool to address the varied needs of specific watersheds.

#### *F. What Flexibility Exists for States To Use Other Programs To Support the Achievement of the Goals of This Regulation?*

In designing this final rule, EPA has striven to maximize the flexibility for States to implement appropriate and effective programs to protect water quality and public health by ensuring proper management of manure and related wastewater. This rule establishes binding legal requirements for Large CAFOs and maintains substantial flexibility for States to set other site-specific requirements for CAFOs as needed to achieve State program objectives. EPA encourages States to maximize use of voluntary and other non-NPDES programs to support efforts by medium and small operations to implement appropriate measures and correct problems that might otherwise cause them to be defined or designated as a CAFO. EPA encourages States to use the flexibility available under the rule so that their State non-NPDES programs complement the required regulatory program. The following examples can illustrate opportunities for this State flexibility:

- States are encouraged to work with State agriculture agencies, conservation districts, USDA and other stakeholders to create proactive programs to fix the problems of small and medium operations in advance of compelling the facilities to apply for NPDES permits.
- Where a small or medium facility has been covered by an NPDES permit, the permitting authority may allow the facility to exit the permit program at the end of the 5-year permit term if the problems that caused the facility to be defined or designated as a CAFO have been corrected to the satisfaction of the permitting authority.
- A small or medium AFO might be taking early voluntary action in good faith to develop and implement a comprehensive nutrient management plan, yet might have an unexpected situation that could be the basis for the facility's being defined or designated as a CAFO. EPA encourages the permitting authority to provide an opportunity to address the cause of the discharge before defining or designating the operation a CAFO.

These examples are intended to illustrate the flexibility that EPA is promoting with regard to medium and small operations. They are not applicable to Large CAFOs.

*What did EPA propose?* EPA's proposed rule included an option to expand substantially the criteria for when medium and small AFOs could be defined or designated as CAFOs. The

effect of these proposed changes to the structure and definition of a CAFO was to require a substantially larger number of medium and small operations to be brought into the NPDES regulatory program. EPA estimated that as many as 30,000 medium and small AFOs could be brought into the regulatory program under this option. Another option presented in the proposal was to structure the permitting requirements to build in inherent flexibility for the medium facilities. In addition, the proposal and the subsequent 2001 Notice introduced a variety of more specific options for State flexibility, including one under which a State with an effective non-NPDES program could request to operate under a simplified permitting structure.

*What were the key comments?* The proposed expansion of the NPDES program for medium and small operations caused great concern, particularly among the States. Many comments from both States and facility operators centered on the desire that EPA recognize the effectiveness of existing State CAFO programs. More specifically, many States wanted EPA to allow effective State non-NPDES programs to operate in lieu of a State-run NPDES program, particularly in the event that EPA in the final rule expanded the criteria for defining medium facilities as CAFOs.

In general, comments from environmental groups expressed opposition to most types of flexibility because of concerns regarding potential loss of accountability at facilities and reduced public participation. Industry commenters generally supported State flexibility as necessary to address factors such as soil, climate, and site and regional characteristics that vary within and among States. Commenters maintained that State flexibility promotes those program elements States have found to be most effective and allows States and industry to achieve workable solutions to water quality issues. States also supported maintaining a high degree of flexibility both to accommodate State-specific characteristics and priorities and to preserve their investment in existing good quality programs. Some State and industry commenters asserted that EPA's options for flexibility were too limited.

*Rationale.* EPA recognizes that EPA's proposed expansion of the criteria for when medium and small AFOs would be defined or designated as CAFOs would have had the effect of eliminating the flexibility for States to use voluntary and other programs. EPA is also aware that many of the States authorized to