

implement the NPDES program supplement their NPDES CAFO requirements with additional State requirements. Some States currently regulate or manage CAFOs predominantly under State non-NPDES programs, or in conjunction with other water quality protection programs through participation in the CWA section 401 certification process (for permits) as well as through other means (e.g., development of water quality standards, development of TMDLs, and coordination with EPA). Several States have effective alternative or voluntary programs that are intended to help small and medium operations fix potential problems that could cause them to be defined or designated as a CAFO.

EPA is encouraging States to use their non-NPDES programs to help small and medium AFOs to reduce water quality impacts and to ensure that they do not become point sources under this regulation. To the extent the voluntary program eliminates the practice that results in the AFO's being defined or designated a CAFO, the AFO may not be required to obtain NPDES permit coverage. Given that EPA has not expanded the criteria for when AFOs would be defined as CAFOs, the Agency believes that States will have the flexibility necessary to leverage effective non-NPDES programs for medium and small AFOs. EPA has also offered specific examples of flexibility that permitting authorities can exercise.

Once a facility is determined to be a CAFO, however, coverage under a permit issued by a non-NPDES program will not satisfy the NPDES permit requirement. EPA is committed to work with States to modify existing non-NPDES State programs that currently regulate CAFOs to gain EPA's approval as NPDES-authorized programs. Such a change would require a formal modification of the State's authorized NPDES program, and the State would have to demonstrate that its program meets all of the minimum criteria specified in 40 CFR part 123, Subpart B, for substantive and procedural regulations. Among other things, these criteria include the restriction that permit terms may not exceed five years, procedures for public participation, and provisions for enforcement, including third party lawsuits and federal enforceability.

VI. Public Role and Involvement

The public has an important role in the entire implementation of the NPDES Program, including the implementation of NPDES permitting of CAFOs. The NPDES regulations in 40 CFR parts 122, 123, and 124 establish public

participation in EPA and State permit issuance, in enforcement, and in the approval and modification of State NPDES Programs. The purpose of this section is to provide a brief review of the key areas where the public has opportunities for substantial involvement. These opportunities for public involvement are long-standing elements of the NPDES Program. Nothing in today's final rule is intended to inhibit public involvement in the NPDES Program.

A. How Can the Public Get Involved in the Revision and Approval of State NPDES Programs?

Sections 123.61 and 123.62 of the NPDES regulations specify procedures for review and approval of State NPDES Programs. In the case of State authorization or a substantial program modification, EPA is required to issue a public notice, provide an opportunity for public comment, and provide for a public hearing if there is deemed to be significant public interest. To the extent that these final regulations require a substantial modification to a State's existing NPDES Program authorization, the public will have an opportunity to comment on the proposed modifications.

B. How Can the Public Get Involved if a State Fails To Implement Its CAFO NPDES Permit Program?

Section 123.64 of the NPDES regulations provides that any individual or organization having an interest may petition EPA to withdraw a State NPDES Program for alleged failure of the State to implement the NPDES permit program, including failure to implement the CAFO permit program.

C. How Can the Public Get Involved in NPDES Permitting of CAFOs?

Section 124.10 establishes public notice requirements for NPDES permits, including those issued to CAFOs. Under these existing regulations, the public may submit comments on draft individual and general permits and may request a public hearing on such a permit. Various sections of part 122 and § 124.52 allow the Director to determine on a case-by-case basis that certain operations may be required to obtain an individual permit rather than coverage under a general permit. Section 124.52 specifically lists CAFOs as an example point source where such a decision may be made. Furthermore, § 122.28(b)(3) authorizes any interested person to petition the Director to require an entity authorized by a general permit to apply for and obtain an individual permit. Section 122.28(b)(3) also provides

example cases where an individual permit may be required, including where the discharge is a significant contributor of pollutants. See § 122.23(f)(3) for opportunities for public involvement in the process for making a "no potential to discharge" determination (refer to section IV.B.2 of this preamble for further discussion). Nothing in today's final rule is intended to change these provisions.

D. What Information About CAFOs Is Available to the Public?

Today's rule requires that all CAFOs, Large, Medium, and Small, and whether covered by a general or an individual permit, report annually to the permitting authority the following information:

- The number and type of animals, whether in open confinement or housed under roof;
- The estimated amount of total manure, litter and process wastewater generated by the CAFO in the previous 12 months;
- The estimated amount of total manure, litter and process wastewater transferred to other person by the CAFO in the previous 12 months;
- The total number of acres for land application covered by the nutrient management plan;
- The total number of acres under control of the CAFO that were used for land application of manure, litter and process wastewater in the previous 12 months;
- A summary of all manure, litter and process wastewater discharges from the production area that have occurred in the previous 12 months, including date, time, and approximate volume; and
- A statement indicating whether the current version of the CAFO's nutrient management plan was developed or approved by a certified nutrient management planner.

EPA expects that the permitting authority will make this information available to the public upon request. This should foster public confidence that CAFOs are complying with the requirements of the rule. In particular, the information in the annual report will confirm that CAFOs have obtained coverage under an NPDES permit, are appropriately controlling discharges from the production area, and have developed and are implementing a nutrient management plan. The annual report will also provide summary information on discharges from the production area and the extent of manure production and available land application area. This will help foster public confidence that the manure is being land applied at rates that ensure