

section. Specifically, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit. If the Director has not made a general permit available to the CAFO, the CAFO owner or operator must submit an application for an individual permit to the Director.

(2) *Exception.* An owner or operator of a Large CAFO does not need to seek coverage under an NPDES permit otherwise required by this section once the owner or operator has received from the Director notification of a determination under paragraph (f) of this section that the CAFO has “no potential to discharge” manure, litter or process wastewater.

(3) *Information to submit with permit application.* A permit application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.

(e) *Land application discharges from a CAFO are subject to NPDES requirements.* The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14). For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)–(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

(f) *“No potential to discharge” determinations for Large CAFOs.*

(1) *Determination by the Director.* The Director, upon request, may make a case-specific determination that a Large CAFO has “no potential to discharge” pollutants to waters of the United States. In making this determination, the Director must consider the potential for discharges from both the production area and any land application areas. The Director must also consider any record of prior discharges by the CAFO. In no case may the CAFO be determined to have “no potential to discharge” if it has had a discharge within the 5 years prior to the date of the request submitted under paragraph (f)(2) of this section.

For purposes of this section, the term “no potential to discharge” means that there is no potential for any CAFO manure, litter or process wastewater to be added to waters of the United States under any circumstance or climatic condition. A determination that there is “no potential to discharge” for purposes of this section only relates to discharges of manure, litter and process wastewater covered by this section.

(2) *Information to support a “no potential to discharge” request.* In requesting a determination of “no potential to discharge,” the CAFO owner or operator must submit any information that would support such a determination, within the time frame provided by the Director and in accordance with paragraphs (g) and (h) of this section. Such information must include all of the information specified in § 122.21(f) and (i)(1)(i) through (ix). The Director has discretion to require additional information to supplement the request, and may also gather additional information through on-site inspection of the CAFO.

(3) *Process for making a “no potential to discharge” determination.* Before making a final decision to grant a “no potential to discharge” determination, the Director must issue a notice to the public stating that a “no potential to discharge” request has been received. This notice must be accompanied by a fact sheet which includes, when applicable: a brief description of the type of facility or activity which is the subject of the “no potential to discharge” determination; a brief summary of the factual basis, upon which the request is based, for granting the “no potential to discharge” determination; and 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. The Director must notify any CAFO seeking a “no potential to discharge” determination of its final determination within 90 days of receiving the request.

(4) *What is the deadline for requesting a “no potential to discharge” determination?* The owner or operator must request a “no potential to discharge” determination by the applicable permit application date specified in paragraph (g) of this section. If the Director’s final decision is to deny the “no potential to discharge”

determination, the owner or operator must seek coverage under a permit within 30 days after the denial.

(5) *The “no potential to discharge” determination does not relieve the CAFO from the consequences of an actual discharge.* Any unpermitted CAFO that discharges pollutants into the waters of the United States is in violation of the Clean Water Act even if it has received a “no potential to discharge” determination from the Director. Any CAFO that has received a determination of “no potential to discharge,” but who anticipates changes in circumstances that could create the potential for a discharge, should contact the Director, and apply for and obtain permit authorization prior to the change of circumstances.

(6) *The Director retains authority to require a permit.* Where the Director has issued a determination of “no potential to discharge,” the Director retains the authority to subsequently require NPDES permit coverage if circumstances at the facility change, if new information becomes available, or if there is another reason for the Director to determine that the CAFO has a potential to discharge.

(g) *When must a CAFO seek coverage under an NPDES permit?*

(1) *Operations defined as CAFOs prior to April 14, 2003.* For operations that are defined as CAFOs under regulations that are in effect prior to April 14, 2003, the owner or operator must have or seek to obtain coverage under an NPDES permit as of April 14, 2003, and comply with all applicable NPDES requirements, including the duty to maintain permit coverage in accordance with paragraph (h) of this section.

(2) *Operations defined as CAFOs as of April 14, 2003, who were not defined as CAFOs prior to that date.* For all CAFOs, the owner or operator of the CAFO must seek to obtain coverage under an NPDES permit by a date specified by the Director, but no later than February 13, 2006.

(3) *Operations that become defined as CAFOs after April 14, 2003, but which are not new sources.* For newly constructed AFOs and AFOs that make changes to their operations that result in becoming defined as CAFOs for the first time, after April 14, 2003, but are not new sources, the owner or operator must seek to obtain coverage under an NPDES permit, as follows:

(i) For newly constructed operations not subject to effluent limitations guidelines, 180 days prior to the time CAFO commences operation; or

(ii) For other operations (e.g., resulting from an increase in the number of animals), as soon as possible,