

the best and most efficient production processes and wastewater treatment technologies. As a result, NSPS represents the greatest degree of effluent reduction attainable through the application of the best available demonstrated control technology for all pollutants (conventional, non-conventional, and priority pollutants). In establishing NSPS, EPA is directed by the Clean Water Act to take into consideration the cost of achieving the effluent reduction and any non-water quality environmental impacts and energy requirements.

3. Effluent Guidelines Planning Process—Section 304(m) Requirements

Section 304(m) of the Clean Water Act, added by the Water Quality Act of 1987, requires EPA to establish schedules for (1) reviewing and revising existing effluent limitations guidelines and standards and (2) promulgating new effluent guidelines. On May 28, 1998, EPA published a Notice of Proposed Effluent Guidelines Plan (63 FR 102) that established schedules for developing new and revised effluent guidelines for several industry categories. One of the industries for which the Agency established a schedule was “Feedlots” (swine, poultry, dairy and beef cattle).

a. Clean Water Act Section 304(m) consent decree. The Natural Resources Defense Council (NRDC) and Public Citizen, Inc. filed suit against the Agency, alleging violation of section 304(m) and other statutory authorities that require promulgation of effluent guidelines (*NRDC et al. v. Whitman*, Civ. No. 89–2980 (D.D.C.)). Under the terms of the consent decree in that case, as amended, EPA agreed, among other things, to propose effluent guidelines for swine, poultry, beef and dairy portions of the animal industry by December 15, 2000, and to take final action by December 15, 2002.

B. Existing Clean Water Act Requirements Applicable to CAFOs

EPA’s regulation of CAFOs dates to the 1970s. The existing NPDES CAFO regulations were issued on March 18, 1976 (41 FR 11458). The existing national effluent limitations guidelines and standards for feedlots were issued on February 14, 1974 (39 FR 5704). The discussion below provides an overview of the scope and requirements imposed under the existing NPDES CAFO regulations and feedlot effluent guidelines. It also explains the relationship of these two regulations, and it briefly summarizes other federal and State regulations that potentially affect AFOs.

1. Scope and Requirements of the 1976 NPDES Regulations for CAFOs

This section provides a simplified summary of the previous NPDES regulation to provide context for today’s action. The previous NPDES CAFO regulations promulgated in 1976, determined which AFOs were defined or could be designated as CAFOs under the Clean Water Act and therefore subject to NPDES permit regulations. Under those regulations, CAFOs were defined as AFOs that confined more than 1,000 animal units (AU). In addition, an AFO that confined 300 to 1,000 AU was defined as a CAFO if it discharged pollutants through a man-made device or if pollutants were discharged to waters of the United States that ran through the facility or otherwise came into contact with the confined animals. AFOs were not defined as CAFOs, however, if they discharged only during a 25-year, 24-hour storm. Under the 1976 NPDES CAFO regulations, the permitting authority could also designate any AFO a CAFO, including those with fewer than 300 AU, if it met the discharge criteria specified above and was determined to be a significant contributor of pollution.

2. Scope and Requirements of the 1974 Feedlot Effluent Guidelines

This section provides a simplified summary of the previous effluent guidelines to provide context for today’s action. EPA uses the effluent guidelines to establish national requirements limiting discharges to waters of the United States. EPA established the effluent guidelines for feedlots in 1974 based on the best available technology that was economically achievable for the industry. The guidelines were applicable to those facilities in specified sectors (or subcategories) with as many as or more than 1,000 AU that were to be issued an NPDES permit. The 1974 effluent guidelines did not allow discharges of pollutants from CAFOs into the Nation’s waters except when a chronic or catastrophic storm caused an overflow from a facility that had been designed, constructed, and operated to contain manure, process wastewater and runoff resulting from a 25-year, 24-hour storm. For permitted facilities where the ELGs did not apply (those with fewer than 1,000 AU), technology-based discharge limits were established using the permit writer’s best professional judgment.

C. USDA–EPA Unified National Strategy for Animal Feeding Operations

In 1998, EPA and USDA jointly developed a unified national strategy to minimize the water quality and public health impacts of AFOs. EPA and USDA jointly published a draft *Unified National Strategy for Animal Feeding Operations* on September 21, 1998. After sponsoring and participating in 11 public listening sessions and considering public comments on the draft strategy, a final *Unified National Strategy for Animal Feeding Operations* was published on March 9, 1999. A copy of the *Strategy* is available on the EPA and USDA web sites. The *Unified National Strategy for Animal Feeding Operations* established national goals and performance expectations for all AFOs. The general goal is for AFO owners and operators to take actions to minimize water pollution from confinement facilities and land where manure is applied. To accomplish this goal, the *Strategy* established a national performance expectation that all AFOs should develop and implement technically sound, economically feasible, and site-specific CNMPs to minimize impacts on water quality and public health.

The *Unified National Strategy for Animal Feeding Operations* identified seven strategic issues that should be addressed to better resolve concerns associated with AFOs. These are (1) fostering CNMP development and implementation; (2) accelerating voluntary, incentive-based programs; (3) implementing and improving the existing regulatory program; (4) coordinating research, technical innovation, compliance assistance, and technology transfer; (5) encouraging industry leadership; (6) increasing data coordination; and (7) establishing better performance measures and greater accountability. Today’s action addresses the third strategic issue—implementing and improving the existing regulatory program.

III. How Was This Final Rule Developed?

The preamble to the proposed rule presented a detailed discussion of the history of EPA actions addressing CAFOs, including issuance of the original NPDES CAFO regulations and effluent limitations guidelines (ELGs) for feedlots, development of the EPA/State Feedlot Workgroup Report (1993), outreach dialogues with representatives of the pork industry and poultry industry, EPA AFO strategy development, and collaboration with USDA on the development of the

Unified National Strategy for Animal Feeding Operations (66 FR 2965). The discussion below briefly summarizes the key events that have been part of the process of preparing today's final rule.

A. Small Business Advocacy Review (SBAR) Panel

To address small business concerns, EPA's Small Business Advocacy Chairperson convened a Small Business Advocacy Review (SBAR) Panel under section 609(b) of the Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA). Participants included representatives of EPA, the Small Business Administration (SBA) and the Office of Management and Budget (OMB). "Small Entity Representatives" (SERs), who advised the Panel, included small business livestock and poultry producers as well as representatives of the major commodity and agricultural trade associations. Information on the Panel's proceedings and recommendations is in the April 7, 2000, *Final Report of the Small Business Advocacy Review Panel on EPA's Planned Proposed Rule on National Pollutant Discharge Elimination System (NPDES) and Effluent Limitations Guideline (Effluent Guidelines) Regulations for Concentrated Animal Feeding Operations* (hereinafter called the "Panel Report"), along with other supporting documentation included as part of the Panel process. The *Panel Report* details the process that EPA followed, provides meeting summaries, and offers other information, including the composition of both the panel and the SERs.

The report also includes the Panel's recommendations on specific issues concerning the NPDES CAFO regulation and ELGs. Key panel recommendations were to: streamline reporting requirements; minimize burden of any required certifications and testing requirements; and carefully weigh the costs and benefits of removing the 25-year, 24-hour storm exemption for operations with less than 1,000 animal units and of modifying the specific criteria for defining medium-sized AFOs as CAFOs. The entire SBAR report is available in the administrative record for this rulemaking, which is available for public review.

B. Proposed Rule

On January 12, 2001, EPA published a proposal to revise and update two regulations to ensure that manure, wastewater, and other process waters generated by CAFOs do not impair water quality (66 FR 2959). These two

regulations were (1) the NPDES provisions that define which operations are CAFOs and establish permit requirements and (2) the ELGs, or effluent guidelines, for feedlots (beef, dairy, swine and poultry subcategories), which establish the technology-based effluent discharge standards for CAFOs. Key proposed changes that would affect the CAFO definition included options for establishing either two or three size categories of CAFOs, the thresholds for different size operations defined as CAFOs, criteria applicable to medium operations, inclusion of dry chicken operations that meet specified size thresholds, and potential revisions to the designation criteria and process. In addition, the proposed rule also presented options for co-permitting entities that exercise substantial operational control over a CAFO, ensuring appropriate public participation in permitting, and encouraging proper management of excess manure that is transferred off-site. Key proposed changes to the ELGs for feedlots included updating the guidelines based on current practices and technologies, the increased use of BMPs, and application of technology options to both the CAFO production area and the land application area (including nutrient management planning).

C. 2001 Notice of Data Availability

On November 21, 2001, EPA published a Notice of Data Availability (hereinafter referred to as the "2001 Notice") that presented a summary of new data and information submitted to EPA during the public comment period on the proposed CAFO regulations, including data received from USDA (66 FR 58556). The notice had four main components: (1) Discussion of new data and changes EPA was considering to refine its cost and economics model; (2) discussion of new data and changes EPA was considering to refine its nutrient loading and benefits analysis; (3) new data and changes EPA was considering to the proposed NPDES permit program regulations; and (4) new data and changes EPA was considering to the proposed ELG regulations. EPA's 2001 Notice also discussed options that the Agency was considering to enhance flexibility for the use of State NPDES and non-NPDES CAFO programs, including implementation of environmental management systems (EMS).

D. 2002 Notice of Data Availability

On July 23, 2002, EPA published a second Notice of Data Availability (hereinafter referred to as the "2002

Notice") that presented a summary of new data and information submitted to EPA during the public comment period on the proposed CAFO regulations, including data received after publication of the 2001 Notice. The 2002 Notice had three main components: (1) A discussion of alternative regulatory thresholds for chicken operations using dry litter management practices; (2) the potential creation of alternative performance standards to encourage CAFOs to implement new technologies; and (3) financial data and changes EPA was considering to refine its economic analysis models. The 2002 Notice made these data and potential changes available for public review and comment.

E. Public Comments

A general summary of public comments is included in the discussions of the various issues addressed in this preamble. EPA has prepared a *Comment Response Document* that includes responses to comments submitted for the proposed rule and both notices. All of the comments including supporting documents submitted on today's action are available for public review in the administrative record for this final rule which is filed under docket number W-00-27.

The proposed regulations were published in the **Federal Register** on January 12, 2001 (66 FR 2959), and the comment period closed on July 30, 2001. EPA received approximately 11,000 comments in total on the proposed rule. EPA received comments from a multitude of sources, including private citizens, facility owners and operators, environmental groups, local and State agencies, members of the academic community, banks and insurance companies, congressional representatives, and representatives (including trade associations) from each of the animal sectors (beef, dairy, swine, poultry, horses, ducks, turkey, and others). The comments are addressed in the *Comment Response Document* prepared by EPA in support of today's final rule.

The comment period for the 2001 Notice was from November 21, 2001, through January 15, 2002 (66 FR 58556). Approximately 300 comments were received on the 2001 Notice. Responses to each of these comments are also included in the *Comment Response Document*.

EPA prepared and published in the **Federal Register** a second notice (2002 Notice) during the development of today's final rule. The comment period

for the 2002 Notice was from July 23, 2002, through August 22, 2002. Approximately 150 comments were received on the 2002 Notice. Responses to each of these comments are also included in the *Comment Response Document*.

In addition to the public comments received on the proposal and the two Notices, approximately 200 additional comments on the two Notices were received from various stakeholders. Responses to each of these comments are included in the *Comment Response Document*.

F. Public Outreach

In support of both the proposed rule and today's final rule, EPA has conducted extensive outreach activities. These activities are documented in the administrative record for the final rule, which is available for public review under docket number W-00-27. The discussion that follows is focused on key outreach activities that EPA has conducted.

1. Pre-Proposal Activities

During the development of the proposed regulations for CAFOs, EPA met with many members of the stakeholder community through meetings, conferences, and site visits. EPA convened a SBAR Panel to address small entity concerns, provided outreach materials to and met with several national organizations representing State and local governments, and conducted approximately 110 site visits to collect information on waste management practices at livestock and poultry operations. EPA also established a workgroup that included representatives from USDA, seven States, EPA regions, and EPA headquarters. More detailed information on EPA's public outreach efforts was published in section XII of the **Federal Register** notice for the proposed rule (66 FR 3120).

2. Post-Proposal Activities

a. Public meetings and stakeholder outreach. Following publication of the proposed rulemaking, EPA conducted nine public outreach meetings on the proposed CAFO regulations. In addition, EPA continued to meet with representatives of various stakeholder groups, including representatives from various industry trade associations and environmental groups, as well as researchers from select land grant universities and research organizations. The land grant university staff consulted on this rulemaking included researchers at the Food and Agricultural Policy Research Institute (FAPRI) at the

University of Missouri and researchers at The National Center for Manure and Animal Waste Management, composed of researchers from 16 land grant universities supported by USDA-Cooperative State Research, Education and Extension Service (CSREES). EPA has also consulted with State and local governments and several national associations representing State governments. A more detailed account of these efforts is provided in the 2001 Notice (66 FR 58557-58558).

b. USDA-EPA Workgroup meetings. In April 2001 USDA initiated a process to review the proposed revisions to EPA's CAFO rule and identify issues and concerns posed by the rule. USDA identified 15 specific areas of concern and a number of overarching issues. As a follow-up to this process, USDA and EPA's Office of Water initiated monthly meetings on issues of significance for agriculture and the environment, specifically water quality. The goal was to foster greater communication between the two agencies to provide better information to the public and policy makers on areas of mutual concern related to agriculture and water quality, and to facilitate informed decisions on approaches and needs to address the key agriculture and environment issues. In July 2001 EPA and USDA convened a joint workgroup to address the issues identified by the two agencies and begin to develop options for EPA leadership to consider in developing the final rule. The collaboration fostered increased understanding on the part of both agencies with respect to the issues, data, and analyses used to finalize today's CAFO rule.

c. Other outreach activities. As part of the development of this rulemaking, EPA used several additional means to provide outreach to stakeholders. Most notably, EPA has managed a number of Web sites that post information related to these regulations. Supporting documents for the proposed rule were posted to these sites, including the *Technical Development Document*, *Economic Analysis*, *Environmental Assessment*, *Environmental and Economic Benefit Analysis* of the proposed CAFO regulations, and cost methodology reports and guidance related to Permit Nutrient Plans. These are available at <http://www.epa.gov/guide/cafo/>. Other outreach materials are available at <http://www.epa.gov/npdes/caforule> and include brochures describing the proposed CAFO regulations, a compendium of AFO-related State program information, and various materials related to permitting issues to facilitate an understanding of

the NPDES program and development of comments on the proposed rule by the public.

IV. CAFO Roles and Responsibilities

A. Who Is Affected by This Rule?

1. What Is an AFO?

In today's final rule, EPA is retaining the definition of an animal feeding operation (AFO) as it was defined in the 1976 regulation at 40 CFR 122.23(b)(1). An animal feeding operation means a lot or facility (other than an aquatic animal production facility) where the following conditions are met: (1) Animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and (2) crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility. (**Note:** EPA is making a typographical correction to the AFO definition. The comma between vegetation and forage growth had been inadvertently dropped from the 1976 final rule in subsequent printings of the **Federal Register**).

What did EPA propose? In the January 12, 2001, proposed rule, the Agency proposed to change the definition of an AFO, intending to eliminate ambiguities about which facilities and operations would be defined as AFOs in certain circumstances where the animals strip the ground of vegetation. The proposal stated that " * * * Animals are not considered to be stabled or confined when they are in areas such as pastures or rangeland that sustain crops or forage growth during the entire time that animals are present * * *."

What were the key comments? While it was EPA's intent to clarify the existing AFO definition, the proposed new regulatory language created substantial confusion. For example, many commenters from the beef cattle industry and others strongly believed that the proposed language would include pastures, rangeland, and unconfined wintering operations as AFOs and, in essence, would bring the entire beef industry under the regulations, none of which was intended. These commenters strongly recommended that the existing regulations should be kept intact to avoid new ambiguity. The view of commenters from the dairy sector and the Sustainable Agriculture Coalition was that the exclusion of pastureland and rangeland from the AFO definition was clear in the proposed rule and they found the proposed language acceptable. Other livestock sectors and environmental groups generally did not comment extensively on this issue.