

all persons and vessels must comply with the instructions of the Captain of the Port or his or her designated representative.

(3) The U.S. Coast Guard may be assisted in the patrol and enforcement of the security zone by Federal, State and local agencies.

(c) *Effective period.* This section is effective from 7:30 a.m. through 2 p.m. on April 17, 2008.

Dated: February 25, 2008.

**Brian D. Kelley,**

*Captain, U.S. Coast Guard, Captain of the Port, Baltimore, Maryland.*

[FR Doc. E8-4463 Filed 3-6-08; 8:45 am]

BILLING CODE 4910-15-P

## POSTAL SERVICE

### 39 CFR Part 111

#### New Standards Prohibit the Mailing of Replica or Inert Munitions

**AGENCY:** Postal Service™.

**ACTION:** Proposed rule.

**SUMMARY:** The Postal Service is proposing new standards to prohibit the mailing of replica or inert munitions such as grenades or other simulated explosive devices.

**DATES:** We must receive your comments on or before April 7, 2008.

**ADDRESSES:** Mail or deliver written comments to the Manager, Mailing Standards, U.S. Postal Service, 475 L'Enfant, Plaza, SW., Room 3436, Washington, DC 20260-3436. You may inspect and photocopy all written comments at USPS Headquarters Library, 475 L'Enfant, Plaza, SW., 11th Floor N, Washington, DC between 9 a.m. and 4 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:**

Michael F. Lee, 202-268-7263.

**SUPPLEMENTARY INFORMATION:** Current Postal Service standards do not prohibit look-alike weapons from the mail. In order to ensure safety of postal employees and prevent damage to postal property or other mailpieces, inert munitions have been handled as "live ammunition" when found in the mail. In the past, facilities have been evacuated when inert replicas have been identified in the mailstream. In 2006, the Postal Service recorded 849 suspicious incidents involving mail that exhibited characteristics of possible explosives. Postal facilities were evacuated on 100 separate occasions due to these occurrences. Postal Inspectors or local emergency first responders reacted to each of these occurrences to assess the items.

Evacuations cost the Postal Service time and money, create unnecessary stress for employees, and can impact service commitments.

Most importantly, employee safety can be jeopardized when facsimiles of potentially dangerous items are permitted in the mail. Both real and replica explosives have been found in the mail and the replicas often are not readily distinguishable from the real articles. The Postal Service is concerned that without prohibition of these types of mail pieces, continued exposure to replicated munitions, over time, will lead to desensitized reactions should an employee encounter items in the mail that should be regarded as dangerous.

This proposed rule is part of our ongoing commitment to increase the safety of the mail and provide a safe working environment for our employees.

Although we are exempt from the notice and comment requirements of the Administrative Procedure Act [5 U.S.C. of 553(b), (c)] regarding proposed rulemaking by 39 U.S.C. 410(a), the Postal Service invites public comment on the following proposed revisions to *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM), incorporated in the *Code of Federal Regulations*. See 39 CFR 111.1.

#### List of Subjects in 39 CFR Part 111

Administrative practice and procedure, Postal Service.

#### PART 111—[AMENDED]

1. The authority citation for 39 CFR part 111 continues to read as follows:

**Authority:** 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 414, 416, 3001-3011, 3201-3219, 3403-3406, 3621, 3622, 3626, 3632, 3633 and 5001.

2. Revise the following sections of *Mailing Standards of the United States Postal Service*, Domestic Mail Manual (DMM) as follows:

\* \* \* \* \*

#### 600 Basic Standards for All Mailing Services

##### 601 Mailability

\* \* \* \* \*

#### 11.0 Other Restricted and Nonmailable Matter

\* \* \* \* \*

[Renumber current 11.5 through 11.20 as 11.6 through 11.21. Insert new 11.5 to read as follows:]

#### 11.5 Replica or Inert Munitions

Replica or inert munitions that bear a realistic appearance, such as simulated

grenades or other simulated explosive devices, are not permitted in the mail.

\* \* \* \* \*

We will publish an appropriate amendment to 39 CFR part 111 to reflect these changes if the proposal is adopted.

**Neva R. Watson,**

*Attorney, Legislative.*

[FR Doc. E8-4459 Filed 3-6-08; 8:45 am]

BILLING CODE 7710-12-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 122

[EPA-HQ-OW-2005-0037; FRL-8539-9]

RIN 2040-AE94

#### Revised National Pollutant Discharge Elimination System Permit Regulations for Concentrated Animal Feeding Operations; Supplemental Notice of Proposed Rulemaking

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Supplemental notice of proposed rulemaking.

**SUMMARY:** This action is a supplemental notice of proposed rulemaking (SNPRM) to EPA's June 30, 2006, notice of proposed rulemaking (NPRM) revising the National Pollutant Discharge Elimination System (NPDES) permitting requirements for concentrated animal feeding operations (CAFOs), in response to the order issued by the U.S. Court of Appeals for the Second Circuit in *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005). In the June 2006 NPRM, EPA proposed to require only CAFOs that discharge or propose to discharge to seek coverage under a permit. In this SNPRM, EPA is proposing a voluntary option for CAFOs to certify that the CAFO does not discharge or propose to discharge based on an objective assessment of the CAFO's design, construction, operation, and maintenance. The June 2006 proposal also discussed the terms of the nutrient management plan (NMP) that would need to be incorporated into NPDES permits. This SNPRM proposes a framework for identifying the terms of the NMP and three alternative approaches for addressing rates of application of manure, litter, and process wastewater when identifying terms of the NMP to be included in the permit. This supplemental proposal focuses solely on certification and terms of the NMP and is not opening any other provisions of the June 2006 proposal and existing NPDES regulations or

Effluent Limitations Guidelines and Standards for public comment.

**DATES:** Comments must be received on or before April 7, 2008.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-HQ-OW-2005-0037 by one of the following methods:

(1) *http://www.regulations.gov*:

Follow the online instructions for submitting comments.

(2) *E-mail: ow-docket@epa.gov*, Attention Docket ID No. EPA-HQ-OW-2005-0037.

(3) *Mail:* Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mail Code 2822T, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. OW-2005-0037.

(4) *Hand Delivery:* Deliver your comments to: EPA Docket Center, EPA West, Room B102, 1301 Constitution Avenue, NW., Washington, DC, Attention Docket ID No. OW-2005-0037. Such deliveries are only accepted during the Docket's normal hours of operation and special arrangements should be made for deliveries of boxed information.

*Instructions:* Direct your comments to Docket ID No. EPA-HQ-OW-2005-0037. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *www.regulations.gov*, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *www.regulations.gov* or e-mail. The *www.regulations.gov* Web site is an "anonymous access" system,

which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm*.

*Docket:* All documents in the docket are listed in the *www.regulations.gov* index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *www.regulations.gov* or in hard copy at the Water Docket, EPA Docket Center, EPA West, Room 3334, 1301 Constitution Ave., NW., Washington, DC. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744, and the telephone number for the Water Docket is (202) 566-2426.

**FOR FURTHER INFORMATION CONTACT:** Rebecca Roose, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564-0758; e-mail address: *roose.rebecca@epa.gov*.

**SUPPLEMENTARY INFORMATION:**

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**I. General Information**

*A. Does This Action Apply to Me?*

This action applies to concentrated animal feeding operations (CAFOs), included as point sources in section 502(14) of the Clean Water Act and defined in the NPDES regulations at 40 CFR 122.23. The following table provides a list of standard industrial codes for operations covered under this revised rule.

TABLE 1.—ENTITIES POTENTIALLY REGULATED BY THIS RULE

Category	Examples of regulated entities	North American industry code (NAIC)	Standard industrial classification code
Federal, State, and Local Government: Industry .....	Operators of animal production operations that meet the definition of a CAFO:		
	Beef cattle feedlots (including veal) .....	112112	0211
	Beef cattle ranching and farming .....	112111	0212
	Hogs .....	11221	0213
	Sheep .....	11241, 11242	0214
	General livestock except dairy and poultry .....	11299	0219
	Dairy farms .....	11212	0241
	Broilers, fryers, and roaster chickens .....	11232	0251
	Chicken eggs .....	11231	0252
	Turkey and turkey eggs .....	11233	0253
	Poultry hatcheries .....	11234	0254
	Poultry and eggs .....	11239	0259

TABLE 1.—ENTITIES POTENTIALLY REGULATED BY THIS RULE—Continued

Category	Examples of regulated entities	North American industry code (NAIC)	Standard industrial classification code
	Ducks .....	112390	0259
	Horses and other equines .....	11292	0272

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility may be regulated under this rulemaking, you should carefully examine the applicability criteria in 40 CFR 122.23. If you have questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

*B. What Should I Consider as I Prepare my Comments for EPA?*

1. *Submitting Confidential Business Information.* Do not submit this information to EPA through [www.regulations.gov](http://www.regulations.gov) or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD-ROM that you mail to EPA, mark the outside of the disk or CD-ROM as CBI and then identify electronically within the disk or CD-ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. *Tips for Preparing Your Comments.* It will be helpful if you follow these guidelines as you prepare your written comments:

i. Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).

ii. Follow directions—The Agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

iii. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

iv. Describe any assumptions and provide any technical information and/or data that you used.

v. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

vi. Provide specific examples to illustrate your concerns, and suggest alternatives.

vii. Explain your views as clearly as possible.

viii. Make sure to submit your comments by the comment period deadline identified.

## II. Background

Congress enacted the Federal Water Pollution Control Act (1972), also known as the Clean Water Act (CWA), to “restore and maintain the chemical, physical, and biological integrity of the nation’s waters” (CWA section 101(a)). Among the core provisions, the CWA establishes the NPDES permit program to authorize and regulate the discharge of pollutants from point sources to waters of the U.S. (CWA section 402). Section 502(14) of the CWA specifically includes CAFOs in the definition of the term “point source.” Section 502(12) defines the term “discharge of a pollutant” to mean “any addition of any pollutant to navigable waters from any point source” (emphasis added). EPA has issued comprehensive regulations that implement the NPDES program at 40 CFR part 122. The Act also provides for the development of technology-based and water quality-based effluent limitations that are imposed through NPDES permits to control the discharge of pollutants from point sources. CWA sections 301(a) and (b).

EPA began regulating wastewater and manure from CAFOs in the 1970s. EPA initially issued national effluent limitations guidelines and standards for feedlots on February 14, 1974 (39 FR 5,704), and NPDES CAFO regulations on March 18, 1976 (41 FR 11,458).

In February 2003, EPA issued revisions to these regulations, focusing on the 5% of the nation’s animal feeding operations (AFOs) that present the highest risk of impairing water quality and public health (68 FR 7,176) (“the 2003 CAFO rule”). The 2003 CAFO rule

required the owners or operators of all CAFOs<sup>1</sup> with a potential to discharge to apply for an NPDES permit. A number of CAFO industry organizations (American Farm Bureau Federation, National Pork Producers Council, National Chicken Council, and National Turkey Federation (NTF), although NTF later withdrew its petition) and several environmental groups (Waterkeeper Alliance, Natural Resources Defense Council, Sierra Club, and American Littoral Society) filed petitions for judicial review of certain aspects of the 2003 CAFO rule. This case was brought before the U.S. Court of Appeals for the Second Circuit. On February 28, 2005, the court ruled on these petitions and upheld most provisions of the 2003 rule but vacated and remanded others. *Waterkeeper Alliance, et al. v. EPA*, 399 F.3d 486 (2d Cir. 2005). Provisions of the 2003 CAFO rule that were challenged by the petitioners but upheld by the court include the Agency’s land application regulatory framework and interpretation of “agricultural stormwater,” and the Agency’s determination regarding effluent limitations guidelines pertaining to groundwater controls and best available technology for waste management. The court vacated the 2003 rule requirement that all CAFOs must apply for permits or demonstrate that they do not have the potential to discharge. The court also found that the terms of the nutrient management plan (NMP) are themselves “effluent limitations” and, therefore, must be made part of the permit and be enforceable as required by CWA sections 301 and 402, made subject to public comment, and reviewed and approved by the permitting authority. The court also remanded several aspects of the 2003 CAFO rule for further clarification and analysis.

On June 30, 2006, EPA published a proposed rule to revise several aspects of the Agency’s regulations governing discharges from CAFOs in response to

<sup>1</sup> The Clean Water Act regulates the conduct of persons, which includes the owners and operators of CAFOs, rather than the facilities or their discharges. To improve readability in this preamble, reference is made to “CAFOs” as well as “owners and operators of CAFOs.” No change in meaning is intended.

the *Waterkeeper* decision. 71 FR 37,744. EPA is briefly describing the proposed revisions to the 2003 CAFO here for context only. The proposed provisions in response to the *Waterkeeper* decision are beyond the scope of this final rule, and EPA is not addressing those provisions in this final rule.

In summary, EPA proposed to require only owners or operators of those CAFOs that discharge or propose to discharge to seek authorization to discharge under a permit. Second, EPA proposed to require CAFOs seeking authorization to discharge under individual permits to submit their NMPs with their permit applications or, under general permits, with their notices of intent. Permitting authorities would be required to review the NMP and provide the public with an opportunity for meaningful public review and comment. Permitting authorities would also be required to incorporate terms of the NMP as NPDES permit conditions. The proposed rule also addressed the remand of issues for further clarification and analysis. These issues concern clarifications regarding the applicability of water quality-based effluent limitations (WQBELs); new source performance standards for swine, poultry, and veal CAFOs; and “best conventional technology” effluent limitations guidelines for fecal coliform.

In addition to the proposed revisions in the 2006 proposed rule, EPA has extended certain deadlines in the NPDES permitting requirements and ELGs in two separate rulemakings in order to allow the Agency adequate time to complete this rulemaking in response to the *Waterkeeper* decision, in advance of those deadlines. The first rule revised dates established in the 2003 CAFO rule by which facilities newly defined as CAFOs were required to seek permit coverage and by which all permitted CAFOs were required to develop and implement nutrient management plans. 71 FR 6978. Because EPA was unable to complete this final rule prior to July 31, 2007, EPA again revised the compliance dates on July 24, 2007, further extending those dates from July 31, 2007, to February 27, 2009. 72 FR 40248.

### III. This Proposal

This notice supplements the 2006 proposed rule by proposing additional options being considered by EPA for inclusion in the rulemaking to respond to the Second Circuit’s decision in the *Waterkeeper* case. EPA is only seeking comment on the issues presented in this supplemental proposal. No provisions promulgated in the 2003 final rule are affected or reopened by this supplemental proposal, nor is EPA

reopening the comment period on the 2006 proposed rule. In addition, EPA is taking comment on the compliance deadlines established in the second date change rule.

#### A. No Discharge Certification

In this notice, the Agency is proposing a new provision that would allow CAFOs to voluntarily certify that the CAFO does not discharge or propose to discharge. This supplemental proposal seeks comment on this voluntary certification option, described below.

##### 1. Background

The 2003 CAFO rule required all CAFOs to seek coverage under an NPDES permit unless the Director determined that the CAFO has no potential to discharge. 68 FR 7176 (Feb. 12, 2003). This duty to apply for a permit based on a potential discharge was successfully challenged. *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486 (2nd Cir. 2005). The court found that the duty to apply, which the Agency had based on a presumption that most CAFOs have at least a potential to discharge, was invalid because the CWA subjects only actual discharges to permitting requirements rather than potential discharges. *Waterkeeper*, 399 F.3d at 506. The court acknowledged EPA’s policy considerations for seeking to impose a duty to apply solely on the basis of a CAFO’s potential to discharge but found that the Agency lacked statutory authority to do so.

In June 2006, in response to the *Waterkeeper* decision, EPA proposed to amend the duty to apply provision for CAFOs, found at 40 CFR 122.23(d), to require all CAFOs that “discharge or propose to discharge” to seek NPDES permit coverage. 71 FR 37744 (June 30, 2006). As discussed in the preamble to the 2006 proposed rule, the CAFO operator would decide whether or not to apply for a permit. 71 FR 37749. EPA received several hundred comments on the 2006 proposed rule related to how a CAFO operator would decide whether to seek permit coverage. In particular, many commenters asked EPA to specify conditions at a CAFO that would clearly trigger the requirement to apply for a permit, while others stated the position that there is no “duty to apply” for CAFOs in advance of any discharge because an NPDES permit is only required for actual discharges. In response to these comments EPA has developed an option that would allow a CAFO that determines it does not need to seek permit coverage to certify to the Director that the operation does not

discharge or propose to discharge. The proposal would establish clear criteria, described in detail below, that a CAFO must meet in order to be eligible for the certification. The certification option proposed in this notice would not change the duty to apply requirement proposed in 2006 that CAFOs that discharge or propose to discharge would be required to seek permit coverage. It would, however, provide a structured process for CAFOs that wish to certify to establish that they do not discharge or propose to discharge. EPA believes that such a structured process would be helpful to CAFOs as they determine whether or not to seek permit coverage. Furthermore, a CAFO with a valid no discharge certification would not be subject to liability for violation of the duty to apply at 122.23(d) in the unlikely event that a discharge should occur, though it would still be liable for violation of the prohibition on unpermitted discharges in CWA section 301. EPA wishes to emphasize that submission of a no discharge certification is voluntary. Only CAFOs that discharge or propose to discharge would be subject to NPDES permit requirements, whether or not they submit a certification.

##### 2. Overview of Certification

EPA is proposing a voluntary option for CAFOs to certify to the Director that the CAFO does not discharge or propose to discharge based on an objective assessment of the CAFO’s design, construction, operation, and maintenance. This objective assessment would take into account the CAFO’s production area design and construction and its operating parameters as described in its nutrient management plan (NMP). The CAFO operator would certify that the CAFO does not discharge or propose to discharge by signing and submitting a certification statement to the Director. A CAFO’s no discharge certification would not be subject to approval by the permitting authority and there would not be an opportunity for the public to comment and request a hearing regarding the certification. The proposed eligibility requirements, submission requirements, and conditions for a valid certification are discussed in detail below.

##### 3. Certification Eligibility Criteria

EPA is proposing to establish specific eligibility criteria for CAFO certification at 40 CFR 122.23(h)(2). Meeting these criteria would establish that the CAFO does not “discharge or propose to discharge” for purposes of proposed § 122.23(d), for as long as the certification is valid. The two proposed

criteria are as follows: (1) An objective evaluation of the production area design, construction, operation, and maintenance, which shows that the production area will not discharge, and (2) development, implementation, and maintenance on-site of a nutrient management plan (NMP) that addresses the elements set forth in 40 CFR 122.42(e)(1) and 412.37(c), including operation and maintenance practices for the production area and land application areas under the control of the CAFO. While a description of how the CAFO meets the eligibility criteria would be required to be submitted to the Director, this proposed rule would not require that the documents necessary to meet the eligibility criteria be submitted to the permitting authority, nor would they be subject to permitting authority approval. However, during the certification period a properly certified CAFO would be required to maintain such documents on site or make them readily available, along with any associated records created to support the basis for the certification. Certified CAFOs, like any other permitted or unpermitted CAFO, would be subject to potential inspection by EPA or State inspectors, during which they could be required to produce the documentation showing that the CAFO meets the eligibility criteria, including that the CAFO has been and is being operated and maintained in accordance with the NMP.

The first proposed eligibility criterion for valid certification would cover the design, construction, operation, and maintenance of the CAFO's production area. Proposed § 122.23(h)(2)(i) would require the CAFO to maintain documentation on site to demonstrate that the CAFO's production area is designed, constructed, operated, and maintained so as not to discharge. This demonstration would be the same as the demonstration provided for in proposed 40 CFR 412.46 (71 FR 37786), which would allow swine, poultry, and veal calf operations subject to new source performance standards (NSPS) to demonstrate that there will be no discharge from their production area. However, the no discharge certification would be available to all unpermitted CAFOs that do not discharge or propose to discharge, not just new sources in the swine, poultry and veal calf sectors with open storage. Due to the variations in production area design based on the type of containment system used at the operation, the proposed regulatory text for the first eligibility criterion has two parts: the first for open manure storage

structures and the second for any part of the production area not considered to be open containment.

EPA is proposing that any CAFO with an open surface manure storage structure seeking to certify that it does not discharge or propose to discharge would be required to perform a technical evaluation. This evaluation would include the same elements as the technical evaluation required for open storage new source swine, poultry and veal calf operations seeking to demonstrate no discharge under 40 CFR 412.46(a)(1). In the 2006 proposed rule, EPA proposed to revise the provisions at 40 CFR 412.46(a)(1) to allow such new sources with open containment to meet the no discharge requirement for their NPDES permit using best management practices based in part on a rigorous site-specific technical evaluation that includes use of the Soil Plant Air Water (SPAW) Hydrology Tool or equivalent model. See the 2006 proposed regulation at 71 FR 37786–87 and corresponding preamble discussion at 71 FR 37760–62. Under this proposed certification, any unpermitted CAFO with open storage seeking to certify its operation as no discharge, not just new source swine, poultry, and veal calf operations, would be required to undertake a technical evaluation in accordance with the elements of the technical evaluation in § 412.46(a)(1)(i)–(vii) to demonstrate that it meets the production area requirement for certification under proposed § 122.23(h)(2)(i)(A). Today's proposed rule does not reopen for additional comment the 2006 proposed revisions to section 412.46 relating to NSPS. The comment period on the revised NSPS requirements is closed. Rather, EPA is now seeking comment on whether the elements of the technical evaluation set forth in proposed § 412.46(a)(1)(i)–(vii) provide an appropriate basis for an unpermitted CAFO to certify, on the basis of its design, construction, operation, and maintenance, that its open surface manure storage structure will not discharge.

In order to meet the second part of the first eligibility criterion, this proposed rule would require, in § 122.23(h)(2)(i)(B), that any certifying CAFO must demonstrate that all of its production area, as defined at 40 CFR 122.23(b)(8), not just open surface containment structures, is designed, constructed, operated, and maintained such that there will be no discharge of manure, litter, process wastewater, or raw materials, such as feed, to surface waters. For a CAFO without open containment, this provision would require a demonstration of no discharge

from the entire production area. For a CAFO that has an open containment structure, this provision would require a demonstration that the remainder of the production area (other than the open containment structure subject to the demonstration in 122.23(h)(2)(i)(A)), also will not discharge. Because of the special risk of discharge from open manure storage structures, greater specificity is provided regarding the elements of the demonstration in 122.23(h)(2)(i)(A); however, the demonstration in 122.23(h)(2)(i)(B) must also be technically sound and must be adequate to demonstrate that the production area is designed, constructed, operated and maintained for no discharge. This demonstration must be based on an evaluation of site-specific characteristics, including, among others, the amount of manure generated during the storage period, the size of the storage structure, control measures to ensure diversion of clean water, and seasonal restrictions on land application. Some CAFOs may have a combination of open manure storage structures and covered structures, while others will house all animals and store all manure, feed and by-products under cover. In either case, all parts of the production area will need to be covered by the demonstrations required under § 122.23(h)(2)(i)(A) and (B). In addition, like permitted new source swine, poultry, and veal calf operations, any unpermitted CAFO seeking to certify no discharge would be required to implement the measures set forth in 40 CFR 412.37(a) and (b) for the production area. These additional measures pertain to operation and maintenance and include provisions for visual inspections, depth markers for all open surface liquid impoundments, corrective action, mortality handling and recordkeeping. Since both these permitted new source operations and unpermitted certified CAFOs would need to ensure no discharge from the production area under the permit and certification requirements, respectively, EPA believes it is appropriate to rely, in part, on those provisions to establish eligibility criteria for no discharge certification. The documents that would be necessary to satisfy this eligibility requirement would include design documentation and all recordkeeping and operation and maintenance planning necessary to address the elements of proposed § 122.23(h)(2)(i), which includes the measures set forth in § 412.37(a) and (b). EPA is considering developing a recordkeeping checklist for use by certified CAFOs. Such a checklist would be made available to all CAFO

operators through EPA guidance published subsequent to issuance of the final CAFO rule. EPA requests comment on whether such a checklist would be useful.

The second eligibility criterion would require the CAFO to develop, implement, and maintain on site an NMP that addresses, at a minimum, the elements set forth in 40 CFR 122.42(e)(1) and 40 CFR 412.37(c), and addresses all operation and maintenance practices necessary to ensure that the CAFO will not discharge. The NMP would include provisions regarding nutrient management in the production area as well as in all land application areas under the control of the CAFO where the CAFO will land-apply manure. EPA believes that implementation of an NMP is an essential component of any CAFO's efforts to ensure that it will not discharge from its production or land application areas. EPA notes that a comprehensive nutrient management plan (CNMP), developed in accordance with Natural Resources Conservation Service (NRCS) technical guidance for CNMPs,<sup>2</sup> would be sufficient to meet this eligibility criterion as long as the CNMP addresses the minimum elements set forth in 40 CFR 122.42(e)(1) and § 412.37(c), and the CAFO addresses all the necessary operation and maintenance protocols either in the CNMP or one or more operation and maintenance plans. It is common for an operation to have one or more operation and maintenance plans in order to properly implement a number of NRCS conservation practice standards simultaneously. Also, to the extent that the necessary operation and maintenance requirements to implement any provision of the NMP are not included in the NMP itself, those requirements would need to be included in an operation and maintenance plan to be implemented and maintained on site.

Proper certification would require the CAFO to revise its NMP if any of the design specifications, practices or other NMP provisions changed over time. For example, if the CAFO decided to land-apply manure on a field that was not included in the NMP, the CAFO would need to calculate rates of application in accordance with the protocols required by § 122.42(e)(1)(viii) and revise the NMP to include the new field and the corresponding application rates. Because valid certification would require the CAFO to at all times be

designed, constructed, operated, and maintained such that it meets the eligibility criteria to establish that the operation does not discharge or propose to discharge (see proposed § 122.23(h)(4), discussed below), to maintain a valid certification, a CAFO should make the adjustments necessary to accommodate a change in circumstances, before the circumstances change. For example, if an increase in animals would cause the operation to exceed the existing storage capacity for precipitation, manure and process wastewater required for no discharge, to remain certified the CAFO would need to remedy the storage capacity problem prior to bringing the additional animals to the operation.

EPA would encourage a CAFO preparing the documents necessary for the proposed certification to consult with a professional engineer and an NRCS-certified technical service provider (TSP) or other qualified nutrient management planner. Any professional consulted by the CAFO should have the requisite training, experience and expertise to conduct and/or substantively review the required analyses, and to advise the owner or operator as to whether the CAFO is, in fact, designed, constructed, operated, and maintained such that it will not discharge.

#### 4. Submitting the Certification

Under the proposed certification option, a CAFO seeking to certify that it does not discharge or propose to discharge would be required to submit the certification to the permitting authority. Under proposed § 122.23(h)(3), the submission to the Director would include: (1) The CAFO owner or operator's name, address and phone number; (2) information regarding the CAFO's location, including latitude and longitude; (3) a description of the manner in which the CAFO satisfies the eligibility requirements of § 122.23(h)(2); (4) the certification statement set forth in proposed § 122.23(h)(3)(iv); and (5) an official signature that meets the signatory requirements of 40 CFR 122.22. The signed certification would make the CAFO legally responsible for its representations to the Director regarding the design, construction, operation, and maintenance of the CAFO. The language regarding legal liability for making a false statement under the proposed option is consistent with language in 40 CFR 122.26(g) which applies to facilities seeking to obtain a "no exposure" exclusion for industrial storm water.

Today's proposed rule would make no changes to the existing regulations concerning how CAFOs may make Confidential Business Information (CBI) claims with respect to information they must submit to the permitting authority and how those claims will be evaluated. A facility may make a claim of confidentiality under the existing regulations at 40 CFR part 2, subpart B.

The third item the Agency is proposing for submission to the Director, as listed above, is a statement describing the manner in which the CAFO satisfies the certification eligibility criteria. EPA believes that, at a minimum, the description to be submitted to the Director should include: (1) The type and number of animals; (2) the type and capacity of manure and wastewater storage and/or containment; (3) storm size used as basis for containment design; (4) whether the CAFO consulted with a professional engineer or TSP; (5) identification of the documents maintained on site in accordance with the eligibility criteria; and (6) any technical standards, tools (e.g., RUSLE and Phosphorus Index) and formulas used to calculate application rates of manure, litter, and process wastewater. EPA seeks comment on whether this is the scope and type of information that should be submitted, as well as suggestions of other information that should be included in the eligibility description submitted for certification.

The authority given to the permitting authority under section 308 of the CWA to conduct inspections at point source operations would not be affected by this proposed rule. Therefore, any CAFO, whether it is certified, permitted, or neither, may be subject to an information gathering request or inspection, at the Director's discretion and for any of the reasons provided by section 308 of the Clean Water Act. 33 U.S.C. 1318.

Under the proposal, the certification would become effective upon submission to the Director. The proposed rule would require the use of certified mail or equivalent method of documentation for identifying the date of submission.

#### 5. Limitations on Certification

This proposed rule also includes several limitations on certification related to the term of a valid certification, reporting, and re-certification when a certification becomes invalid. EPA proposes that the certification would be valid for five years from the date of certification or would terminate when the CAFO has either discharged or ceases to be

<sup>2</sup> Technical Guidance for Developing Comprehensive Nutrient Management Plans, USDA Natural Resources Conservation Service (2003), available at <http://policy.nrcs.usda.gov/viewerFS.aspx?id=3073>.

designed, constructed, operated and maintained in accordance with the documentation supporting the certification (i.e., its production area design documentation and nutrient management plan), whichever is sooner. See proposed § 122.23(h)(4). EPA is proposing that a valid certification would need to be renewed, if desired by the CAFO, every five years. This is the maximum statutory term of an NPDES permit. The permit renewal process provides the opportunity for operations of a permitted CAFO to be reviewed to ensure that they still meet the requirements of the Clean Water Act and for new conditions to be imposed as necessary. EPA believes that a five-year term for no discharge certifications will similarly prompt the CAFO to periodically reevaluate whether it is designed, constructed, operated, and maintained so as not to discharge and make adjustments to operations where necessary. EPA seeks comment on whether five years is an appropriate length of time for a no discharge certification.

In the unlikely event of a discharge from a certified CAFO, the CAFO operator, although subject to liability for the discharge itself, would not be liable for a violation of the duty to apply in § 122.23(d), but the certification would cease to be valid. Similarly, should a CAFO fail to continue to meet any of the eligibility criteria, the CAFO's certification would no longer be valid. Circumstances that could result in the certification becoming invalid would include, for example, an increase in animals that exceeds the capacity of the production area for manure storage and handling, a loss of land application areas such that the assumptions in the NMP concerning land application would no longer be appropriate, and a discharge of pollutants to waters of the United States (other than discharges of agricultural stormwater from the land application area, which is exempt from permitting requirements).

Once a certification ceased to be valid, the operator would not be able to rely on it if an enforcement action were brought for a subsequent violation of the duty to apply for a permit. In sum, a discharge by the CAFO or failure of a certified CAFO to continue to be designed, constructed, operated, and maintained in accordance with the eligibility criteria and certification statement would render the certification invalid and put the CAFO in the same position as any other unpermitted and uncertified CAFO.

Failure to continue to meet the eligibility requirements for certification in proposed § 122.23(h)(2) would not, in

and of itself, be a violation of any regulatory requirement, since certification would be strictly voluntary. For example, failure to implement the measures set forth in § 412.37(a)–(b), which would be required for no discharge certification eligibility under proposed § 122.23(h)(2)(i), would not be a violation of § 412.37(a)–(b) but would render the certification invalid.

Under proposed § 122.23(h)(5) a CAFO could withdraw its certification at anytime by notifying the Director, by certified mail or equivalent method of documentation, that it was withdrawing its certification. The certification would be withdrawn on the date the notification was submitted to the Director. If a CAFO certification becomes invalid, proposed § 122.23(h)(5) would require the CAFO operator to withdraw its certification within three days of the date on which the CAFO's no discharge certification became invalid.

The CAFO operator would not be required to notify the Director of the reason for withdrawing the certification, or even if it was withdrawn because some change in circumstances had rendered it invalid or merely because the operator no longer chooses to maintain it. For example, an operator might decide that particular recordkeeping requirements needed for certification were more burdensome than the certification was worth, and choose to withdraw the certification so as not to have to keep such records. While EPA believes it is important for permitting authorities to have an accurate and up-to-date record of which unpermitted CAFOs have a valid no discharge certification, and thus to require operators to withdraw any certification which ceases to be valid, EPA also wishes to emphasize that certification is strictly voluntary, and can be withdrawn by the operator without explanation at any time.

If a certification is withdrawn because it ceases to be valid, the operator could seek to re-certify that the CAFO does not discharge or propose to discharge by revising its operations to address the deficiency and submitting a new certification statement. If the certification was rendered invalid by a discharge, under proposed § 122.23(h)(5), in order to re-certify, a CAFO would have to submit to the Director the information required under § 122.23(h)(3) and additional information describing the discharge, including the time, date, cause, and approximate volume of the discharge, and the steps taken by the CAFO to permanently address the cause of the discharge, i.e., to ensure that no

discharge from this cause occurs in the future. While review and approval of the technical basis for certification by the permitting authority is not generally required, EPA believes it is appropriate in situations where a certified CAFO has in fact discharged and still believes that it can certify that it does not discharge or propose to discharge, for the operator to provide sufficient information to assure the Director that the cause of the discharge has been adequately addressed to ensure that there will not be future such discharges. EPA would generally consider a recurring discharge as evidence that a CAFO is not eligible for certification or re-certification and would need to seek permit coverage.

#### 6. Additional Rationale

As stated above, under the 2006 proposed revisions to 40 CFR 122.23(d)(1), a CAFO that does not discharge or propose to discharge would not be subject to the duty to apply for an NPDES permit. However, as discussed in the preamble to the 2006 proposed rule, if an unpermitted CAFO discharges, the CAFO would be in violation of section 301(a) of the CWA due to the unpermitted discharge and could be in violation of the duty to apply if the CAFO could have reasonably foreseen that the discharge would occur and did not seek permit coverage prior to discharge. A valid certification, however, would document the CAFO operator's basis for making an informed decision not to seek permit coverage because the CAFO does not discharge or propose to discharge, and would protect the CAFO from being held liable for not applying for the permit prior to discharge. In the unlikely event that a properly certified CAFO discharges, the CAFO would not be subject to liability for failure to seek permit coverage prior to discharge in violation of 40 CFR 122.23(d) and section 308 of the CWA. However, any discharge even from a properly certified CAFO would be an unpermitted discharge in violation of CWA section 301 subject to applicable injunctive relief and penalties.

EPA believes that providing protection from liability for violation of 40 CFR 122.23(d) and section 308 for a properly certified CAFO is reasonable and justified. Certification would require a CAFO owner or operator to undertake and document a rigorous analysis of the operation's structure and design, and to be committed to operation and maintenance protocols designed to ensure no discharge. As stated above, certification is entirely voluntary for a CAFO that does not discharge or propose to discharge. EPA

believes that a CAFO owner or operator that would make the effort and take the steps needed to certify no discharge should be afforded protection from enforcement for failure to have applied for a permit prior to discharge if, in the future, there is an unanticipated discharge from the CAFO, so long as there has been no lapse in the CAFO's eligibility for certification. The operator of an unpermitted CAFO choosing not to make and document this certification in accordance with each element listed in 40 CFR 122.23(h)(2)–(3) would not receive the liability protection provided by a no discharge certification.

Unlike the 2003 rule that *required* all CAFOs to seek permit coverage in order to operate unless they obtained a determination of “no potential to discharge,” the certification provision proposed here would be entirely voluntary. The purpose of the certification would be to provide a mechanism by which a CAFO can document that it does not discharge or propose to discharge and be assured that even if the CAFO does discharge in the future, it would not face an enforcement action for failure to apply for a permit. The certification process would not, in and of itself, establish whether the CAFO must apply for a permit. As proposed in 2006, the requirement for a CAFO to apply for a permit would be triggered only when a CAFO discharges or proposes to discharge. 71 FR 37,784. The decision to seek permit coverage or no discharge certification would be made by the operator based on an objective assessment of conditions at the facility, in contrast to the 2003 rule, which required the operator either to seek permit coverage or prove to the satisfaction of the Director that the CAFO had no potential to discharge. Therefore, under this proposed rule and § 122.23(d)(1), the operator would decide whether (1) to obtain permit coverage; (2) to certify under the provisions at 122.23(h); or (3) to operate without either a permit or certification. EPA notes that a CAFO that chooses to operate without a permit implicitly faces more stringent requirements than permitted CAFOs because discharges in any size storm event are prohibited from unpermitted CAFOs, while certain exceptions may be applicable to permitted CAFOs. NPDES permit coverage reduces CAFO operator risk and provides certainty to CAFO operators regarding activities and actions that are necessary to comply with the Clean Water Act.

### *B. Terms of the Nutrient Management Plan*

In this notice, the Agency is proposing a framework for identifying the terms of the nutrient management plan (NMP) that must be enforceable requirements of a CAFO's NPDES permit. The proposed framework includes three alternative approaches for specifying terms of the NMP with respect to rates of application, which are needed to satisfy the requirement that the NMP include “protocols to land apply manure, litter or process wastewater \* \* \* that ensure appropriate agricultural utilization of the nutrients.” 40 CFR 122.42(e)(1)(viii). For Large CAFOs, these proposed alternatives would also satisfy the requirements set forth in 40 CFR 412.4. The proposed framework would include supplemental annual reporting requirements for permitted CAFOs to accompany these proposed alternative approaches. In addition, this supplemental proposal includes two revisions to the 2006 proposed rule with respect to changes to a CAFO's NMP, including revisions to the proposed conditions that would constitute substantial change to the terms of the NMP. This supplemental proposal seeks comment on the proposed framework for specifying terms of the NMP to be included in an NPDES permit, and on the proposals for changes to the NMP included in this notice. No NMP provisions promulgated in the 2003 final rule are affected or reopened by this supplemental proposal, nor is EPA reopening the comment period on the 2006 proposed rule.

#### 1. Background

As discussed in the June 2006 proposed rule, the *Waterkeeper* court held that the “terms of the NMP” are effluent limitations that must be included in the permit. *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 502 (2d Cir. 2005). In the preamble to the proposed rule, EPA discussed how the “terms” of a CAFO's NMP could be identified and included in the permit. As stated in the June 2006 proposed rule, the terms of the NMP would need to address the nine minimum required elements in 40 CFR 122.42(e)(1)(i)–(ix) and 412.4(c) (for Large CAFOs, as applicable). 71 FR 37753.

The 2006 proposed rule preamble identified a number of factors that are necessary to the development of an NMP, including: The maximum amount of manure that the CAFO may apply to land application areas under its control; an inventory of the fields for land application and the associated acreage,

soil types, soil tests and testing protocols; setbacks and other conservation measures; and a list of all of the crops the CAFO may wish to grow on each of those fields with a matrix of the associated realistic yield expectations and land application rates consistent with the various field conditions. 71 FR 37755. The Agency also stated that the NMP should include calculations necessary to determine rates of application for the array of crops most likely to be planted in accordance with the cropping system utilized by the CAFO operator and could include likely alternative scenarios for other crops that could be planted. In the Agency's view, listing alternative cropping plans would allow a CAFO some flexibility in utilizing different combinations of crops and crop rotations for land application. However, the Agency added that the NMP should reasonably forecast the practices most likely to be utilized by the CAFO. In the proposed rule preamble, EPA solicited comment on the degree of flexibility that should be allowed in NMPs, particularly regarding the terms of the NMP included as permit conditions, and highlighted the advantages and disadvantages of allowing some flexibility to the CAFO operator. 71 FR 37753–55.

With respect to portions of the NMP that would be incorporated as permit terms, the Agency also proposed regulatory language for accommodating changes to the NMP that involve changes to the terms during the permit period. The proposed rule identified changes to the terms of the NMP that would be considered substantial changes and those that would be considered nonsubstantial changes. The items listed as constituting a substantial change to the terms of the NMP included changes that could result in an increase in runoff of manure, litter, or process wastewater from the facility and changes that could result in an increase in the rate of nutrients from manure, litter, or process wastewater applied to the land application area that is significant in relation to technical standards established by the Director. 71 FR 37,756.

EPA received many comments on the NMP issues highlighted in the proposed rule preamble. Commenters stressed the complexity associated with nutrient management planning, particularly with respect to land application, and the need to address changes in operation as well as changes due to circumstances beyond the CAFO's control arising during the permit term, especially where such changes would lead to different rates of application of manure, litter, and process wastewater. Many

commenters wanted clarification of the terms associated with land application, and a number of commenters suggested factors that should be included as terms of the NMP.

In reviewing these comments, the Agency has determined that a provision specifically identifying the terms of the NMP required to be included in the permit would address a number of these concerns. In particular, the comments indicated a need to clarify what constitutes the terms of the NMP regarding rates of application, given the complexity of factors used to determine rates of application and the dynamics associated with such factors. This clarification would facilitate a common understanding of the terms of the NMP required in a CAFO's permit, and thereby reduce the likelihood of confusion and promote better awareness of what the permitting authority must do to ensure that the permit complies with the Clean Water Act and these regulations and of what a CAFO must do to comply with its permit. Moreover, specifically identifying the terms that must be included for each CAFO would enhance the public's ability to participate meaningfully in the development, revision, and enforcement of the terms of the NMP as called for by the Second Circuit in the *Waterkeeper* decision.

## 2. Supplemental Proposal for Terms of the NMP To Be Included in the Permit

In light of these concerns, EPA is supplementing the June 2006 proposed rule with a proposal to specify in the regulation what elements of the NMP would be terms of the NMP that would be required to be included as enforceable terms of a CAFO's NPDES permit. The rule would require that the terms of the NMP must include the information, protocols, best management practices, and other conditions identified in a CAFO's nutrient management plan and determined by the permitting authority to be necessary to meet the requirements of 40 CFR 122.42(e)(1). For Large CAFOs subject to the land application requirements of the effluent limitations guideline, the terms would include the best management practices in 40 CFR 412.4(c) in addition to the requirements of part 122.

The "information, protocols, best management practices, and other conditions" that would constitute the terms of the NMP would include what the CAFO operator would be required to do to properly implement its NMP and determinative conditions upon which such actions are based. For example, both the structural design capacity

necessary to satisfy the storage requirement of § (e)(1)(i) and the associated operational and maintenance conditions necessary to ensure adequate storage, would be considered terms of the NMP. Likewise, the terms of the NMP would need to ensure, for example, proper management of mortalities and diversion of clean water. However, the number of animals confined would not necessarily need to be a term of the NMP because a CAFO operator would be required to properly operate and maintain the CAFO's storage facilities regardless of the number of animals or the volume of manure, litter, or process wastewater generated. On the other hand, the Director could, for example, include an upper limit on the number of animals as a term.

For CAFOs that land apply manure, litter, and process wastewater, the fields the CAFO plans to use for land application would be a term of the NMP. Similarly, as discussed in greater detail below, field-specific, crop-specific application rates would be terms of the NMP, as would certain factors needed to determine the rates. However, background information that is fixed and unchangeable, such as actual historic yields used in the development of an NMP, while important for determining rates of application, would not need to be terms of the NMP.

## 3. Rates of Application

40 CFR 122.42(e)(1)(viii) requires the nutrient management plan to include "protocols to land apply manure, litter or process wastewater in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater." As EPA noted in the June 2006 proposed rule, the *Waterkeeper* court focused on rates of application as perhaps the most important term of the NMP, in particular the provisions of the effluent limitations guidelines in 40 CFR 412.4(c), and emphasized their site-specific nature. 71 FR 37753. In considering the elements of an NMP that should be identified as the minimum terms with respect to land application rates, in light of comments received on the 2006 proposed rule, two general principles emerged. First, rates of application depend on the information on which they are based, such as information about the field, crops, and nutrient content of the manure. Second, this information can change, and in order to address changing circumstances during the period of a permit (ordinarily five

years), there is a need for some flexibility in establishing rates of application. The Agency proposes three alternative approaches, discussed below, which vary in the degree of flexibility with respect to expressing rates of application and factors to be included in the permit as terms of the NMP. However, all three approaches would ensure that legally-enforceable field- and crop-specific application rates are included in the permit.

Rates of application are field-specific and are designed to ensure that crops receive sufficient nutrients to meet yield goals, while minimizing the amounts of nutrients that could be transported from the field. The total amount of plant available nutrients necessary to meet yield goals includes residual nutrients already in the field and the nutrients added for a particular crop. Residual nutrients are those in the soil or on the field remaining from prior applications of manure, litter, process wastewater, or chemical fertilizer, or from other sources such as crop residues and nitrogen fixing legumes. The addition of nutrients to a field includes application of chemical fertilizer, as well as application of manure, litter, or process wastewater.

The NMP must consider the capacity of the field for manure, litter, or process wastewater application, generally depending on the capacity of the soil to retain phosphorus. State technical standards generally require the use of the phosphorus index or a similar tool for assessing the potential for nutrient transport from a field and for determining the limiting nutrient (phosphorus or nitrogen) for application of manure, litter, or process wastewater. The outcome of the assessment of the potential for phosphorus transport does not typically change from year to year. However, because soil phosphorus levels tend to change incrementally depending upon the buffering capacity of the soil, this assessment may limit the amount of phosphorus, and thus the amount of manure, litter, and process wastewater, that may be added to a field.

Once the residual nutrients and potential for nutrient transport from the fields has been determined, the next step is to identify the crops to be planted, or other uses, for each field where land application will occur and the nitrogen and phosphorus needs of these crops or other uses. The NMP also must identify the realistic yield expected from the crop or crops planted in the field, in order to calculate the proper amount of nutrients to apply. A crop's nutrient needs are generally determined in accordance with the

nutrient recommendations for a given crop (or other planting, such as forage or pasture) and the per acre realistic yield goal for such crop, both of which are typically set by the State land grant university or based on equations provided by the land grant university. The realistic yield rate can also be based on historic field-specific yield data.

Finally, the amount of manure, litter, or process wastewater, in tons or gallons, to be land applied in order to meet, but not exceed, crop nutrient needs (after considering residual nutrients and potential for nutrient transport from fields) depends on the nutrient content of the manure, litter, and process wastewater, as well as the source and form of nutrients to be land applied and the method and timing of land application. Whereas one CAFO operator may wish to follow the planned sequence of steps for planting crops and applying manure, litter, and process wastewater described in the NMP submitted to the Director, another operator may want or need to vary from that linear sequence of events, due to choices made in the course of normal operations, or in response to events or circumstances beyond the CAFO's control, such as weather, crop failure, or market conditions. EPA addressed these concerns in the preamble to the 2006 proposed rule, and stated that the proposed approach could accommodate such changes.

In the proposed rule preamble discussion concerning changes to the terms of the nutrient management plan, EPA encouraged CAFO operators to develop NMPs that anticipate contingencies and changes in operations that may occur over the term of the permit. Such contingencies may include other potential crops that could be planted, or possible crop rotations or other alterations in cropping patterns with accompanying field-specific calculations for manure, litter, and process wastewater application rates based on realistic crop yield goals, soil characteristics, typical weather patterns, and other site-specific field conditions. The Agency noted that the public would then have the opportunity to review all anticipated operational scenarios and associated field-specific manure, litter, and process wastewater application rates, including the calculations on which these rates were based. The Agency viewed this approach as allowing an NMP to address most year-to-year changes in nutrient management practices anticipated during the period of permit coverage and greatly reduce the need for NMP and associated permit modifications, as the NMP would have

already accounted for a range of potential operational scenarios.

With respect to identifying annual rates of application as terms of the NMP, a number of commenters stated that it was unrealistic for EPA to expect all CAFOs to be able to establish rates of application as terms of the NMP for the full period of permit coverage and asked EPA for a process to establish rates on an annual basis. They based their comments on the variability, range, and interdependency of factors associated with the determination of rates of application. Some commenters preferred greater flexibility for CAFO operators in setting such rates, while others thought that application rates should be made available for public comment each year.

In this supplemental proposal, EPA is proposing to include in the rule three distinct alternative approaches for expressing the terms of the nutrient management plan with respect to rates of application. Each approach would establish annual maximum rates of application of manure, litter, and process wastewater by field and crop for each year of permit coverage and would identify the minimum required terms of the NMP specific to that approach. Each approach would also require annual reporting requirements to provide actual data that would be publicly available concerning compliance with permit requirements during the previous year.

The three approaches would express field-specific maximum rates of application, respectively, as follows: (1) As tons or gallons of manure, litter, and process wastewater to be applied; (2) as the amount of nitrogen and phosphorus from manure, litter, and process wastewater to be applied; or (3) as a narrative rate for calculating the amount of manure, litter, and process wastewater to be applied. The first approach would require a permit modification to exceed the amount of manure, litter, and process wastewater specified for a particular crop or field in the original permit. The second approach is more flexible in that it would allow CAFOs to adjust the level, method and timing of manure, litter, and process wastewater application as long as the field- and crop-specific amounts of nutrients were not exceeded without having to seek permit modifications. The third approach is the most flexible, because it would use a methodology and actual field data to calculate in real time the amount of manure, litter, and process wastewater to be land applied, and is thus best suited to allow the operator to adjust application rates in response to changes in field specific conditions.

All three approaches would require the CAFO operator to develop an NMP that projects for each field and for each year of permit coverage the crops to be planted, crop rotation, crop nutrient needs, expected yield, and projected rates of application of manure, litter, and process wastewater. However, each approach is different in identifying which of these projections would be required to be "terms of the NMP." Each approach would result in annual rates of application of manure, litter, and process wastewater that are maximum application rates stated in the permit and that would be enforceable, and each would require that application rates be specific for each crop that would be planted on a specific field.

A properly developed NMP must evaluate the condition of the fields to be used for land application based on soil test levels, the form(s) and amount(s) of manure, litter, or process wastewater generated by the CAFO, and the uses for each field; for example, crop, pasture, or fallow land. An NMP must also describe on a field-by-field basis how the application rates are calculated, which for large CAFOs must be in accordance with State technical standards.

These calculations must also take into account, with respect to each crop to be grown or other agricultural use, the source and form of nutrients to be land applied, the method of application of manure, litter, and process wastewater, and the timing of when application will occur. Although a properly developed NMP involves consideration of all of these factors, some operators may have multiple sources of manure, litter, or process wastewater and may need to make the determination as to which source to draw from for land application to a particular field in a given year at some point in time after the NMP has been developed. The method of application depends on the source and form of manure, litter, or process wastewater, on the location of a particular field and the equipment available for such field, and on the crop to be planted. For example, wastewater may be spray-irrigated, surface applied, or injected, whereas poultry litter is most likely to be surface applied by a manure spreader.

The forms of plant available nitrogen and phosphorus to be factored into calculations for rates of application should be identified in the technical standards established by the Director or in other documentation referenced in the State's technical standards. Typically, the amounts of plant available phosphorus are determined based on the amount of phosphate and the amount of organic phosphorus that

will mineralize during the growing season, and the amount of plant available nitrogen is based on the amount of nitrate and ammonium-nitrogen and the amount of organic nitrogen that will mineralize during the growing season. As previously discussed, it is the plant available forms of nitrogen and phosphorus that are relevant in determining rates of application. If there is any disagreement as to the appropriate forms of nitrogen and phosphorus to be factored into these calculations, the Director would determine the acceptable approach. The amount of plant available nitrogen also depends on the nitrogen volatilization rate associated with the source of nutrients and the timing and method of land application.

EPA expects a complete NMP to also account for any other additions of crop available nutrients during the crop year, such as chemical fertilizer, irrigation water (groundwater may have measurable concentrations of nutrients), and biosolids, where applied. Crediting for all residual nitrogen and phosphorus in the field that will be plant available, including crediting for additions from each prior year of the permit term, as well as accounting for other additions of nitrogen and phosphorus, should be done in accordance with the directions provided in the technical standards (required for all permitted Large CAFOs). Since organic forms of nutrients typically become plant available when they are converted to inorganic forms, such as nitrate, ammonium, and phosphate, crediting generally identifies the amount of organic nutrients likely to be converted to inorganic forms that will be plant available. Credits would be based on the soil test results included in the NMP and projected applications of nutrients from manure, litter, and process wastewater during intervening years, as well as other additions, including from crops (e.g., where crops are plowed under or residues are left on the field), commercial fertilizer, and other sources of nutrients remaining on the field that would be plant available during the next growing season. Credits would also be based on mineralization rates and crop uptake of nutrients.

Because a CAFO operator could plant more than one crop on a field in a given year, the plant available amount of nitrogen and phosphorus would need to be calculated with reference to the nutrient needs of all the crops to be planted on such field in a given year in order to be accurate. This would include accounting for other field uses for agricultural purposes, such as pasture and cover crops, because EPA expects a

complete NMP to account for other uses of a field.

Under all three of the proposed approaches, the terms of the NMP would be required to include specific factors used for the development of rates of application. These would include:

- The outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field;
- The crop or crops to be planted in each field or any other uses such as pasture or fallow fields;
- The realistic annual yield goal for each crop or use identified for each field; and
- The nitrogen and phosphorus recommendations from sources acceptable to the Director for each crop or use identified for each field.

The phrase “outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field” reflects the terminology typically associated with the use of the phosphorus index in accordance with the USDA conservation practice standard 590 that has been adopted by many States. However, EPA contemplates that, since the 590 standard allows States to use other methodologies, such as soil test phosphorus and phosphorus threshold, any one of these would satisfy the requirements of this proposed rule. Ultimately, the purpose of the field-specific assessment of the potential for nitrogen and phosphorus transport is to determine the appropriate limiting nutrient for developing land application rates, i.e., whether phosphorus or nitrogen limits the amount of manure, litter, or process wastewater that can be applied and the degree to which the limiting nutrient restricts land application.

Each of the three approaches differ in the way that they would account for other information necessary for determining the appropriate rates of application. This information relates to: (1) Credits for residual nitrogen and phosphorus available in each successive year during the five-year term of the permit; (2) accounting for additions of commercial fertilizer and other additions of nitrogen and phosphorus during each successive year; (3) the form (liquid, solid) and source (e.g., lagoon, compost, process wastewater) of the material to be land applied; (4) nitrogen and phosphorus content of the manure, litter, or process wastewater; (5) timing of application; and (6) method of application (e.g. spreading, spray, injection).

The following three sections of the preamble describe the specific aspects

of each of the approaches and how each approach accounts for these factors. See the table that summarizes what the terms would be for each of the three approaches, available in the docket for this rulemaking, EPA-HQ-OW-2005-0037.

(a) Linear Approach—Rates Expressed in Tons and Gallons of Manure, Litter, and Process Wastewater

The first proposed approach would allow the CAFO to express rates of application as tons of manure or litter, and gallons of manure or wastewater. The terms of the NMP would include maximum application rates for each year of permit coverage, for each crop identified in the NMP, in tons of manure or litter, or gallons of manure or process wastewater, per acre, per year, for each field to be used for land application. In addition, the terms of the NMP would include:

- The outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field;
- The crop or crops to be planted in each field or any other uses such as pasture or fallow fields;
- The realistic annual yield goal for each crop or use identified for each field;
- The nitrogen and phosphorus recommendations from sources acceptable to the Director for each crop or use identified for each field;
- Credits for all nitrogen and phosphorus in the field that will be plant available;
- Accounting for all other additions of plant available nitrogen and phosphorus to the field;
- The form and source of manure, litter, and process wastewater to be land applied; and
- The timing and method of land application.

This approach is considered a “linear” approach because it is based on the use of only those crops included in the planned crop rotations in the NMP; the amounts of manure, litter, and process wastewater to be land applied according to the planned schedule for land application (including source and method and timing of application); and the projected values for plant available nitrogen and phosphorus from other sources. Under this approach, rates would follow the conventions by which NMPs have been developed and would require the CAFO to follow the sequence identified in the NMP for each field-specific crop rotation and each planned step for land application of manure, litter or process wastewater.

While important to the development of the NMP, some underlying factors necessary for calculating rates of application using this linear approach in the NMP, and necessary to be included in the NMP, would not be required to be terms of the NMP. These factors include the methodology for determining rates of application, and the values and formulas used in the methodology for calculating volatilization rates for nitrogen and mineralization rates for organic nitrogen and phosphorus. Because the maximum rates of application using this approach are expressed as amounts of manure, litter, or process wastewater and are terms of the NMP, and are based on the use of these factors, these factors themselves do not need to be terms of the NMP. Whether these factors been applied correctly and whether the rates as calculated in the NMP are consistent with applicable requirements, are issues which are properly addressed when the NMP is subject to review by the Director and by the public. These are analogous to the types of calculations and data submitted in a permit application and found in the fact sheet that accompanies a draft NPDES permit for other types of permitted point sources.

Under this approach, the CAFO would land apply manure, litter, and process wastewater, in the amounts specified for each field in the NMP, following the schedule and the methods of application described in the NMP. However, Large CAFOs would need to take into account the annual manure test results required by the 2003 final rule, so as to not exceed the nutrient needs of the crops, and limit actual rates of application by adjusting the amount of manure, litter, and process wastewater to be applied if the concentrations of nitrogen or phosphorus in the manure were higher than those projected in the plan.

The environmental and operational integrity of this approach hinges on the CAFO making accurate predictions in the NMP that are not disrupted by changes to the CAFO's operation or by circumstances beyond the control of the CAFO operator. Any changes to the terms of the NMP would constitute a change to the terms of the permit, which would require a permit modification. (See discussion of substantial changes below.) For example, any changes to the planned crop sequence, such as the addition of a second crop to a field, where a CAFO might need to land apply more than the maximum amount of manure, litter, or process wastewater in a given year would require a permit modification.

On the other hand, the advantage of this approach is simplicity for the CAFO operators with predicable land application needs and for the public. This would be particularly suitable for operations that consistently plant one crop or two crops in rotation on the same fields, using the same source and form of manure, litter, or process wastewater, and that land apply on a regular annual schedule using the same application method(s).

EPA notes that even under the linear approach, operators could retain some flexibility by specifying more than one field-specific crop rotation plan in the NMP, with application rates of manure, litter, and process wastewater specified for each alternative plan and included in the permit. This might be practical for operators who are reasonably confident that they will follow one of two or three potential crop rotations. EPA has developed the other two approaches for operators needing a greater degree of flexibility.

(b) Matrix Approach: Application Rates Expressed as Pounds of Phosphorus and Nitrogen

The second proposed approach ("matrix approach") would express, for each year of permit coverage, rates of application as the maximum amount of plant available nitrogen and phosphorus, in pounds, from manure, litter, and process wastewater that could be land applied for a particular crop on a given field in a given year, rather than amounts, in tons or gallons, of the manure, litter, and process wastewater. Also, under this approach, operators would be able to identify for each field alternative crops that they would reasonably expect to plant in a given year, along with allowable rates of application for nitrogen and phosphorus for each specified crop on the field.

This option would provide more flexibility to operators than the first approach because it would allow the operator to vary the sequence of crops in the planned rotation or substitute other crops for those identified in the planned rotation if the permit specified different maximum rates of application of nitrogen and phosphorus for each crop and field for a given year, without relying on permit modifications to allow such changes. Such flexibility would be possible because credits, when utilizing such flexibility, would be based on the "baseline" amount of residual nitrogen and phosphorus determined when the NMP was developed and then used to calculate maximum rates of application for each of the crops identified in the NMP for a given field. Addition or substitution of other crops identified in

the NMP and changes to the sequence described in the NMP would then result in the CAFO being limited to use of the crop-specific maximum rates of nitrogen and phosphorus from manure litter and process wastewater for the crop actually planted.

Typically, an NMP is written with crop rotations that extend over several years and generalized schedules for land application of manure, litter, or process wastewater. EPA is proposing that CAFO operators who choose this approach for expressing rates of application would be allowed to identify in the NMP other crops that could be planted on a field in the form of a matrix, with field-specific yield goals, nutrient recommendations, and maximum rates of nitrogen and phosphorus application for each crop.

Unlike the linear approach, which would rely on projections of the amount, in tons or gallons, of manure, litter, and process wastewater to be land-applied, based on prescribed sources, methods of application, and timing, in the matrix approach, the terms of the NMP would include maximum limitations on the amount of nitrogen and phosphorus, in pounds, from manure, litter, and process wastewater that could be land applied and the methodology by which these factors would be used to calculate how much manure, litter, and process wastewater would be allowed to be applied so that the maximum application rates of nitrogen and phosphorus would not be exceeded. This would provide flexibility to the CAFO in selecting the source of manure, litter or process wastewater, and the choice of method of application, all of which could vary during the period of permit coverage. This approach would ensure that the amount of manure, litter, or process wastewater allowed to be land-applied would be based on the results of the most recent annual manure test (which, for permitted Large CAFOs, must be done at least annually, as required by 40 CFR 412.4(c)(3)), rather than on manure tests and projections used in the development of the NMP.

For CAFOs using the matrix approach, the minimum factors used to determine the rates of application in the CAFO's NMP that would be required to be included as terms of the NMP would be:

- The outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field;
- The crop or crops to be planted in each field or any other uses such as pasture or fallow fields;

- The realistic annual yield goal for each crop or use identified for each field;
- The nitrogen and phosphorus recommendations from sources acceptable to the Director for each crop or use identified for each field;
- Credits for all nitrogen and phosphorus in the field that will be plant available;
- And accounting for all other supplemental plant available additions of nitrogen and phosphorus to the field.

In addition, this second approach would add as a term of the NMP the methodology by which the NMP accounts for the following factors when calculating the amounts of manure, litter, and process wastewater to be land applied:

- The form and source of manure, litter, and process wastewater;
- The timing and method of application; and
- The values and formulas used to calculate volatilization of nitrogen and mineralization of organic nitrogen and phosphorus, which are necessary for determining the availability of nitrogen and phosphorus for crop uptake in different forms of manure, depending on method and timing of land application.

Under this approach, none of these latter factors would itself be a term of the NMP. Rather, the methodology used in the NMP, which would be a term, would allow the Director and the public to predict how rates of application of manure, litter, and process wastewater would be calculated based upon consistent use of the methodology in accounting for all of these factors.

Most CAFO operators plan a specific crop rotation around several crops that may be planted on a given field. Although crops are generally planted in a manner that follows established crop rotations, an operator may make farming decisions that result in a different crop being planted than was scheduled for a given year in the CAFO's NMP. A CAFO may change its rotation for any number of reasons including but not limited to, drought, excessive rainfall, or changed market conditions. The advantage of the matrix approach is that it would not lock the CAFO into a single planting sequence for each field, nor into applying manure from a particular source, at a particular time, in a particular way, thus reducing the need for CAFOs to seek permit modifications.

A concern associated with the matrix approach is that, in determining maximum rates of application when deviating from the planned rotation, the levels of crop available nutrients in the soil used for calculating rates would be

the baseline levels established when the NMP is developed and so would not take into account any changes in crop available nitrogen and phosphorus on the field up to that point in the term of the permit. Instead, the methodology would need to estimate current levels of crop available nutrients by estimating residuals remaining from the prior year(s) of crops, land application, and other additions of nutrients since the beginning of the permit period. Thus, a CAFO applying at the maximum levels of nitrogen and phosphorus allowed by the permit could actually overapply nitrogen and phosphorus if the amount of crop available nitrogen or phosphorus in the field were in fact higher than the amounts estimated using the soil test data available when the NMP was developed. Conversely, if the crop available nitrogen or phosphorus on the field was lower than the amount used in calculating the maximum rates incorporated into the permit, a CAFO applying at the maximum rate allowed by the permit might be applying less nitrogen and phosphorus from manure, litter, and process wastewater than the amount needed for the crop, and would need to seek a permit modification if more nutrients from manure, litter, and process wastewater were needed.

This problem also exists to a lesser degree for the linear approach, in that factors not under the control of the operator (eg, actual crop yields) might affect the residual nutrients on the field and thus the appropriate amounts of manure, litter, and process wastewater to apply. Where the maximum application rates, under either approach, are too high, because residual nutrients on the field are higher than projected, the operator may adjust the application rates downward to reflect these changes. However, where the maximum rates are insufficient to provide for the nutrient needs of the crops, the operator will need to either (1) increase the supply of nutrients from other sources (eg, commercial fertilizer) or (2) apply for a change to the permit. EPA expects that operators will generally use realistic yield assumptions that will minimize, but not eliminate, the need for such permit changes. The third approach for determining permit terms, discussed below, avoids this problem by allowing the operator to recalculate the specific amounts of manure, litter, and process wastewater to be applied based on field-specific conditions in the year of application.

(c) Narrative Rate Approach—Rates Derived From Total Amounts of Crop Available Nitrogen and Phosphorus

EPA is proposing a third approach that would allow rates of application to be expressed as a narrative rate that includes the total amount of crop available nutrients from all sources combined with a specific, quantitative method for calculating the amount, in tons or gallons, of manure, litter, and process wastewater to be land applied. For this quantitative approach, the terms of the NMP would include the maximum amounts of *total* nitrogen and phosphorus from *all sources* of nutrients for each year of permit coverage for each crop or other field use identified in the nutrient management plan in chemical forms determined to be acceptable to the Director in pounds per acre per year for each field.

The narrative rate approach would include as terms the four terms required under all three approaches:

- The outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport from each field;
- The crop or crops to be planted in each field or any other uses such as pasture or fallow fields;
- The realistic annual yield goal for each crop or use identified for each field; and
- The nitrogen and phosphorus recommendations from sources acceptable to the Director for each crop or use identified for each field.

In addition, as in the matrix approach, this second approach would include as a term of the NMP the methodology by which the NMP accounts for certain factors when calculating the amounts of manure, litter, and process wastewater to be land applied.

Unlike the linear approach, the amount of manure, litter, and process wastewater to be applied as projected in the NMP submitted with the permit application or NOI would not be a term of the NMP. Instead, the rate would be the amount of manure, litter, and process wastewater calculated using the methodology and based on actual amounts of plant available nitrogen and phosphorus from all sources at the time of land application. The amounts of total nitrogen and phosphorus from all sources would include the amounts, in pounds, of plant available nitrogen and phosphorus already on the field and applied as commercial fertilizer, as well as the amounts in the manure, litter, and process wastewater to be land applied.

This approach would eliminate certain issues associated with a five-year planning cycle previously discussed in

connection with the two approaches presented above. A key difference of this proposed approach is that it would require the use of annual soil tests for determining actual soil phosphorus levels. EPA is proposing this approach to allow CAFOs that may need to adjust their rates of application of manure, litter, and process wastewater due to changes in soil levels of nitrogen and phosphorus to do so without requiring the permit to be modified. Therefore, it is important to ensure that the actual changes in soil levels of plant available nitrogen and phosphorus are taken into account, rather than relying on projected fluctuations provided in the NMP. The results of the annual soil test and manure test data would be used to calculate, in real time, the amount of manure, litter and wastewater to be applied, to supply the remaining nitrogen and phosphorus needed for the actual crop being planted on the field.

In addition to accounting for the crop and field information, the methodology for making this calculation would be required to account for a number of other variables, including the form and source of the manure, litter, and process wastewater and the timing and method of application. In other words, the maximum application rate for land application of manure, litter, and process wastewater would be a requirement that the operator apply not more than the maximum amount of nitrogen and phosphorus calculated using the methodology.

As stated above, the terms of the NMP would include the complete methodology for calculating the amount of manure, litter, or process wastewater to be applied. The proposed rule would require the methodology to account for the following factors:

- Results of soil tests conducted in accordance with protocols identified in the nutrient management plan, as required by 40 CFR 122.42 (e)(1)(vii);
- Credits for all nitrogen and phosphorus in the field that will be plant available;
- The amount of nitrogen and phosphorus in the manure, litter, and process wastewater to be applied;
- All other additions of plant available nitrogen and phosphorus to the field;
- The form and source of manure, litter, and process wastewater;
- The timing and method of land application; and
- The values and formulas used to calculate volatilization of nitrogen and mineralization of organic nitrogen and phosphorus.

The factors listed above would not themselves be terms in the narrative rate

approach, but the methodology used to account for them in the CAFO's permit would be. Thus, the terms of the NMP under this approach would not include the amount of nitrogen and phosphorus in the manure, litter, or process wastewater to be land-applied as set forth in the NMP. Nor would the terms of the NMP include the predicted source, form, timing, and method of application of manure, litter, or process wastewater set forth in the NMP. These factors would be subject to recalculation during the period of permit coverage, using the methodology in the NMP for calculating the amount of manure, litter or process wastewater allowed to be applied.

Under this proposed approach, the NMP would include planned crop rotations for each field and corresponding projected amounts, in tons or gallons, of manure, litter, and process wastewater to be applied, including all of the calculations for determining such projected amounts, for the period of permit coverage. This would give the permitting authority and the public an opportunity to review, prior to permit issuance, the adequacy of the CAFO's methodology and the way the CAFO would use the methodology to calculate the appropriate amount of manure, litter, and process wastewater to be applied, based on the operator's planned crop rotation at the time of permit issuance.

The narrative rate approach would require the CAFO to recalculate the application rates projected in the NMP, in tons and gallons, of manure, litter, and process wastewater, using the methodology in the NMP, at least once a year, throughout the period of permit coverage. In recalculating these rates, a CAFO would be required to use annual soil tests and concurrent calculations of credits for all plant available nitrogen and phosphorus in the field. The CAFO would then calculate the maximum amount of nitrogen and phosphorus from manure, litter, and process wastewater allowed to be applied, as a portion of the total amount of nitrogen and phosphorus from all sources, using the methodology in the NMP. In order to ensure that such recalculations are made available to the Director and the public, the recalculations and the new data from which they are derived would be required to be reported in the CAFO's annual report for the previous twelve months. In other words, the rate of application would be an objective, enforceable rate, because the permit would specify the methodology required for calculating the rate, certain values or sources of information required to be used in the methodology, and would

limit the total amount of nitrogen and phosphorus from all sources for each year of the permit. Failure to comply with the rate established under the permit would be a violation of the permit.

EPA believes that the flexibility of this proposed approach would reduce the burden on permitting authorities and CAFO operators by decreasing the number of substantial changes to the permit, which require public notice and comment, arising from changes to the CAFO's crop rotations, while ensuring that all effluent limitations applicable to a permitted CAFO are incorporated as terms of the permit, as required by the *Waterkeeper* decision.

As many commenters on the 2006 proposed rule pointed out and EPA recognizes, there may be changes in field conditions or practices at a CAFO, including, for example, those that alter the projected levels of crop available nitrogen and phosphorus in the soil, or in the manure, over the period of permit coverage. Such changes introduce some uncertainty in setting application rates for five years as enforceable terms of the permit. This third approach is designed to accommodate these concerns, by allowing a CAFO to compensate for changes in soil levels of crop available nutrients, in manure content, or in the timing and method of application, by adjusting the application rates accordingly without the need for a permit modification. However, the operator would be limited to the total crop-specific amount of nitrogen and phosphorus from all sources and would have to adhere to a methodology that would establish the way in which such rates could be calculated. Thus, in the second and later years of the permit term, this approach would provide an accurate and verifiable means of achieving realistic production goals while minimizing transport of phosphorus and nitrogen from the field. This would help CAFOs to avoid the possibility of over-application of nitrogen or phosphorus because of increased levels of nutrients in the soil, compared to what was projected at the time of permit issuance, and, conversely, the possibility of failing to meet crop agronomic needs due to under-application of nitrogen or phosphorus.

#### 4. Changes to Nutrient Management Plans

It is well understood that agricultural operations modify their nutrient management and farming practices during the normal course of their operations. Such alterations may require

changes to a permitted CAFO's NMP during the period of permit coverage.

As discussed in the preamble to the 2006 proposed rule, the permit does not need to be modified for all operating changes. Because of the way NMPs are developed, most routine changes at a facility should not require changes to the NMP itself. To minimize the need for revision, nutrient management plans should anticipate and accommodate routine variations inherent in agricultural operations such as anticipated changes in crop rotation, as well as changes in numbers of animals and volume of manure, litter, or process wastewater resulting from normal fluctuations or a facility's planned expansion. Typically, an NMP is developed to accommodate, for example, normal fluctuations in herd or flock size, capacity for manure, litter, and process wastewater storage, the fields available for land application and their capacity for nutrient applications. Moreover, as discussed in this preamble, EPA would encourage operators to develop an NMP that includes reasonably predictable alternatives that a CAFO may implement during the period of permit coverage. However, unanticipated changes to a nutrient management plan may nevertheless be necessary.

In the 2006 proposed rule, EPA proposed a process that CAFOs and the permitting authority would need to follow when a CAFO makes changes to its NMP. The proposal also included criteria for determining when a change to a CAFO's NMP should be considered a substantial change. In this supplemental notice, the Agency is soliciting comment on several modifications to the 2006 proposal.

(a) Changes to a Permitted CAFO's Nutrient Management Plan

EPA is proposing to revise the proposed list of changes to the NMP that would constitute a substantial change to the terms of a facility's NMP, thus triggering public notice and permit modification. Substantial changes would include: (1) Addition of new land application areas not previously included in the CAFO's nutrient management plan; (2) any changes to the maximum field-specific land application rates for nitrogen and phosphorus, as expressed in accordance with either the linear approach, the matrix approach or the narrative rate approach; (3) addition of any crop not included in the terms of the CAFO's nutrient management plan and corresponding field-specific rates of application; and (4) changes to field-specific components of the CAFO's

nutrient management plan, where such changes are likely to increase the risk of nitrogen and phosphorus transport from the field to waters of the U.S.

EPA is also proposing one exception to the first type of substantial change (a land application area being added to the nutrient management plan), where such additional land is already included in the terms of another existing nutrient management plan incorporated into an existing NPDES permit. If, under the revised NMP, the CAFO owner or operator applies manure, litter, or process wastewater on such land application area in accordance with the existing field-specific terms of the existing permit, such addition of new land would not be a substantial change to the terms of the CAFO owner or operator's nutrient management plan.

The Agency believes that these revised proposed criteria are better designed to address changes that most directly affect fundamental components of the NMP that relate to the land application of manure, litter, and process wastewater, which was a primary focus of the *Waterkeeper* decision. First, by proposing the addition of new land application areas not originally included in the terms of the NMP as a substantial change, the Agency makes clear that the fields to be used for land application would be fundamental permit conditions, as all permitted CAFOs would be required to land apply manure, litter, and process wastewater at *field-specific* agronomic rates. The identification of land application areas in the NMP is essential for determining the effluent limitations applicable to a particular CAFO, which the *Waterkeeper* decision required be made available for public review and comment and incorporated into the permit. Under *Waterkeeper*, the public must have such opportunity to review the fields planned for land application during both the initial permit issuance phase and any subsequent permit modification phase. The proposed exception for the addition of new fields already covered by an existing NPDES permit is consistent with the *Waterkeeper* decision because the rates of application for those land application areas will have already been publicly reviewed, approved, and incorporated into a permit as required by *Waterkeeper*.

The second proposed substantial change is any change to the field-specific maximum rates of application. The *Waterkeeper* decision makes clear the importance of these rates as terms of the NMP.

The third proposed substantial change is the addition to the NMP of crops not

previously included in the CAFO's NMP, together with the corresponding maximum field-specific rates of application for those crops. Because rates of application are based on the yield goals for each specific crop, any crops newly added to the plan will require corresponding newly calculated rates of application. Because the maximum rates of application must be made available to the public for review prior to incorporation as terms of the permit, consistent with *Waterkeeper*, the addition of new crops and their corresponding rates of application would be considered a substantial change.

Finally, any change to field-specific components of the CAFO's nutrient management plan that is likely to increase the risk of nitrogen and phosphorus transport from the field to waters of the U.S. would be a substantial change. The Agency recognizes a number of changes as potentially triggering this requirement, including the following examples: (1) Alternate timing of land application that would diminish the potential for plant nutrient uptake; (2) methods of land application not provided for in the NMP calculation of amount of manure, litter, and process wastewater to be applied; (3) changes to conservation practices; and (4) changes in the CAFO's procedures for handling, storage, or treatment of manure, litter, and process wastewater. The actual crop planted, timing and method of land application, crop uptake, and conservation practices utilized with respect to the land application areas are all key factors that affect nitrogen and phosphorus runoff from the land application area. Changes to any of the planning considerations listed above can directly (and measurably) alter the outcome of the decisions made in an NMP and the efficacy of that plan in ensuring appropriate agricultural utilization of those nutrients that are land applied.

Such substantial changes would apply to all permitted CAFOs, regardless of which of the three proposed approaches for expressing rates of application was followed in the CAFO's NMP. However, the specific changes that would constitute substantial changes would necessarily, to some extent, be dependent on which of the three proposed approaches was used. For example, while a change to the method or timing of application might be a substantial change under the linear approach, if it increased the risk of nutrient transport to surface waters, it would not be a substantial change under the matrix or calculated rate approaches, provided that the

methodology (itself a permit term) for converting maximum amounts of nutrients into allowable amounts of manure, litter, or process wastewater was able to appropriately account for the change in method or timing.

#### (b) Limited Exceptions

Because changes to the NMP could result in a change to a permit term, the 2006 proposed rule provided that whenever a CAFO makes any change to its NMP, the owner or operator would be required to provide the Director with the revised NMP and identify the changes from the previous version submitted. EPA is proposing a limited exception for CAFOs following either the second (“matrix”) or third (“quantitative”) approaches described above for the terms of the NMP regarding rates of application. Such CAFOs would not be required to submit to the Director any changes in crop rotations so long as the rates of application of nitrogen and phosphorus are in accordance with the outcome of the field-specific assessment of the potential for nitrogen and phosphorus transport, do not exceed the maximum application rates identified in the nutrient management plan for the crop actually planted, and account for any residual nitrogen and phosphorus in the field.

#### 5. Annual Reporting Requirements

In the 2006 proposed rule, EPA discussed the use of annual reports to balance greater flexibility for CAFO operators in making cropping decisions with ensuring appropriate permitting authority and public oversight of permit compliance. The preamble solicited comment as to whether the annual report requirements should be modified to require all permitted CAFOs to submit information in their annual reports indicating how the CAFO achieved substantive compliance with the terms of the NMP as set forth in the permit. In this supplemental notice, the Agency is proposing additional annual reporting requirements for CAFOs that relate to the proposed provisions in this notice regarding the terms of the NMP. This proposal would not affect any of the annual report requirements promulgated in the 2003 CAFO rule, and EPA is not taking comment on any revisions to the requirements promulgated in 2003.

The Agency is proposing to require all permitted CAFOs to include in their annual reports the actual crop(s) planted and actual yield(s) for each field, the actual nitrogen and phosphorus content of the manure, litter, and process wastewater, and the amount of manure,

litter, or process wastewater applied to each field during the previous 12 months. The Agency believes that it would be important for the permitting authority to obtain this information on an annual basis in order to ensure that the CAFO has been operating in compliance with the terms of its permit. The annual report would inform the Director and the public how the operator has operated, given the flexibility proposed for the terms of the NMP incorporated into the permit.

The Agency is also proposing to require CAFOs that follow the third (“narrative rate”) approach for describing rates of application in the NMP to submit as part of their annual report the results of all soil testing and concurrent calculations to account for residual nitrogen and phosphorus in the soil, all recalculations, and the new data from which they are derived. The CAFO would be required to report the amounts of manure, litter, process wastewater and the amount of chemical fertilizer applied to each field during the preceding 12 months. Together with the total amount of crop available nitrogen and phosphorus from all sources, the information that would be required to be included in the annual report would provide the information necessary to determine that the CAFO was adhering to the terms of its permit when recalculating rates of application. The Agency seeks comment on these proposed annual reporting requirements for each of the approaches to identifying terms of the NMP for rates of application.

#### C. Compliance Deadlines

As discussed in the Background section of this notice, EPA has twice extended the compliance dates for several requirements which were originally established in the 2003 final rule. February 27, 2009, is the date by which the following must occur: (1) Operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date, must seek NPDES permit coverage; (2) operations that become defined as CAFOs after April 14, 2003, due to operational changes that would not have made them a CAFO prior to April 14, 2003, and that are not new sources, must seek NPDES permit coverage; and (3) permitted CAFOs are required to develop and implement nutrient management plans. As explained in the preamble to the second compliance date revision, February 27, 2009, is an appropriate deadline for these requirements because it would provide additional time from the date of the final rule in response to the *Waterkeeper* decision for States, the

regulated community, and other stakeholders to adjust to the new regulatory requirements. See 72 FR 40,248 (July 24, 2007).

EPA plans to complete the regulatory revisions in response to *Waterkeeper* in the summer of 2008, since the Agency has had adequate time to consider the comments submitted on the 2006 proposed rule and the scope of this supplemental notice of proposed rulemaking is narrow relative to the context of what was proposed in 2006. This would leave six to eight months from promulgation of the final rule until the February 27, 2009, deadline for AFOs not previously defined as CAFOs to submit permit applications, for CAFOs to submit nutrient management plans to their permitting authorities, and for permitting authorities to incorporate the terms of these nutrient management plans as enforceable permit conditions in accordance with the provisions of the final rule. Given that both operators and permitting authorities have known for several years generally what will be required under the final rule, EPA believes that six to eight months is sufficient time for these remaining permitting actions to be completed, and is thus not intending at this time to extend those deadlines. However, the Agency is interested in taking comment on this issue.

#### IV. Statutory and Executive Order Reviews

##### A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51,735, October 4, 1993), this action is not a “significant regulatory action.”

##### B. Paperwork Reduction Act

The information collection requirements in this supplemental notice have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.* The Information Collection Request (ICR) document prepared by EPA has been assigned EPA ICR number 1989.05.

This SNPRM contains three proposed regulatory actions that would add to the paperwork burden associated with the CAFO NPDES regulations as presented in the PRA analysis for the 2006 proposed rule. First, today’s notice proposes supplemental annual reporting requirements for permitted CAFOs as part of all three proposed approaches for specifying terms of the NMP with respect to rates of application. In addition, the notice proposes a no discharge certification option and a new

narrative rate approach for incorporating the terms of an NMP into the permit. The no discharge certification and the quantitative approach would both be optional for CAFOs. Nevertheless, EPA has assessed the administrative burden associated with these approaches in order to characterize the burden likely to be experienced by facilities that elect to pursue these options.

This impact analysis covers a three year period from 2008–2010. Over this time period, the industry is expected to experience slight growth from approximately 20,700 facilities in 2008 to 22,100 facilities in 2010. Projections for burden hours according to the various additional requirements in this supplemental proposal were derived using these projections, and then annualized over the three years in calculating overall results. These analyses are very complex in that they also take into account the activities that are already occurring in the field in some cases, and rough estimates of the number of facilities that will be meeting these requirements, which grows over the three year period. Therefore, some of the impact results presented below and how they match up with the number of CAFOs and the projected burden hours will not be immediately apparent. For example, as described below, due to the additional annual reporting requirements, the Agency estimates an annual burden of 15,800 hours. The basis for this burden estimate is that for 2008 it is estimated that approximately 15,300 CAFOs would incur an additional hour of time to meet this requirement. On the surface, that would equate to an added annual burden of 15,300 hours. However, because this is an analysis that is annualized over a 3 year period, the burden is actually calculated to be 15,800 hours, which takes into account the growth of the industry over the 3 years. The Agency directs the reader to the public docket to review the draft ICR report which provides details of all calculations.

Compared to the 2006 proposed rule, the total administrative burden is expected to increase by approximately \$1.4 million (52,600 hours) annually due expressly to the proposed options in this supplemental notice. This change derives from annual increases of \$480,000 (15,800 hours) due to the expanded requirements for annual reporting, \$460,000 (14,500 hours) due to the added cost of certification, and \$470,000 (22,300 hours) due to the added cost of the new narrative rate approach.

For purposes of costing the burden increment that would arise from the

additional requirements for annual reporting, EPA assumed that the new requirements would add an extra hour of labor burden to the existing costs per facility for annual reporting. This new burden would be incurred by all permitted CAFOs annually as part of completing the required annual reports, with the result that the burden increment would be experienced by an estimated 15,300 CAFOs as of 2008.

For purposes of costing the burden increment due to certification, EPA assumed that the burden per CAFO for certification would add 6.5 hours of labor burden every five years when a facility submits its certification. EPA's burden calculations further assumed that the certification option would be chosen by 25 percent of all CAFOs, yielding an estimate of approximately 5,400 CAFOs that would choose to certify as of 2008.

To cost the burden for soil sampling under the narrative rate approach, EPA assumed that CAFOs would incur an average of 10 hours of additional labor burden per facility annually to complete the sampling. In addition, the burden estimate is based on an assumption that one-half of permitted CAFOs that land-apply would use the proposed narrative rate approach for expressing rates of application. This assumption resulted in a projection that as of 2008, roughly 5,900 CAFOs would use the narrative rate approach—approximately 30 percent of the current projection of 20,700 total CAFOs for 2008. Note that EPA discounted the sampling burden for CAFOs in states that are already requiring this practice. EPA's estimate of the PRA burden impact due to the narrative rate approach also took into account the burden reduction that permitting authorities could potentially experience as a result of needing to process fewer permit modifications due to changes to NMPs. For this aspect of the analysis, EPA estimated that permitting authorities would process roughly 300 fewer permit modifications annually, each representing a labor savings of approximately 12 hours. These calculations represent a projected burden reduction compared to the number of permit modifications projected for the PRA analysis originally presented for the 2006 proposed rule.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and

maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR Part 9.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques, EPA has established a public docket for this proposed rule, which includes this ICR, under Docket ID number EPA–HQ–OW–2005–0037. Submit any comments related to the ICR for this proposed rule to EPA and OMB. See **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after March 7, 2008, a comment to OMB is best assured of having its full effect if OMB receives it by April 7, 2008. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

### *C. Regulatory Flexibility Act*

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's supplemental notice on small entities, small entity is defined as: (1) A small business as defined by the Small Business Administration (SBA) at 13 CFR 121.201 size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a

population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's supplemental notice of proposed rulemaking on small entities, I certify that this action will not have a significant adverse economic impact on a substantial number of small entities. The proposed approaches for incorporating the terms of an NMP into the permit are generally consistent with the 2006 proposed rule, but with greater specificity. Within these approaches, the expanded annual reporting requirements for permitted facilities would not impose a "significant adverse economic impact" on any small entities. With the exception of the soil sampling data, the information that would be reported is all information that small entities are required to prepare and maintain under the 2003 CAFO rule; only the requirement to include this information in the annual report to the Director is new.

The other two revisions proposed in today's notice, the no discharge certification option and the new narrative rate approach, would be voluntary, so presumably small entities will only choose them if they see an economic advantage from doing so.

This supplemental notice would not affect small governments, as the permitting authorities are State or federal agencies. We continue to be interested in the potential impacts of the proposed rule on small entities and welcome comments on issues related to such impacts.

#### D. *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and to adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section

205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that this supplemental notice would not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Today's supplemental notice is in fact anticipated to result in a net reduction in burden to State permitting authorities as a consequence of needing to process fewer permit modifications due to changes to NMPs. Specifically, State permitting authorities are projected to experience a net burden reduction of approximately \$169,000 (4,200 hours) annually. The supplemental notice would increase the burden to CAFOs by approximately \$1.6 million (56,800 hours) annually due collectively to activities called for under the new annual reporting requirements, the certification option, and the new quantitative approach. Thus, today's supplemental notice is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reason, EPA has determined that this supplemental notice contains no regulatory requirements that might significantly or uniquely affect small governments. Thus, today's supplemental notice is not subject to the requirements of section 203 of UMRA.

#### E. *Executive Order 13132: Federalism*

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in

the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Under section 6(b) of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. Under section 6(c) of Executive Order 13132, EPA may not issue a regulation that has federalism implications and that preempts State law, unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

EPA has concluded that this supplemental notice does not have Federalism implications. It will not have any direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. In addition, EPA does not expect this rule to have any impact on local governments.

Further, the revised regulations would not alter the basic State-Federal scheme established in the Clean Water Act under which EPA authorizes States to carry out the NPDES permitting program. EPA expects the revised regulations to have little effect on the relationship between, or the distribution of power and responsibilities among, the Federal and State governments. Thus, Executive Order 13132 does not apply to this proposed rule.

Consistent with EPA policy, EPA nonetheless consulted with representatives of State governments early in the process of developing the Agency's response to the *Waterkeeper* court ruling to permit them to have meaningful and timely input into its development. Through a variety of meetings with State associations, States have been apprised of the issues related to addressing the court's decisions. States provided input during these meetings. State concerns generally focused on the process for incorporating NMPs into permits and the related public review process, and also on guidance related to what is a discharge from a CAFO given that the 2006 proposed rule would require only those

operations that discharge or propose to discharge to apply for a permit. This supplemental notice provides additional guidance addressing both of these concerns.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this supplemental notice from State and local officials.

*F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175, entitled, "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications."

This supplemental notice does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this rule.

In the spirit of Executive Order 13175, and consistent with EPA policy to promote communications between EPA and tribal governments, EPA specifically solicits additional comment on this supplemental notice from tribal officials.

*G. Executive Order 13045: Protection of Children From Environmental Health and Safety Risks*

Executive Order 13045: "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under E.O. 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This supplemental notice is not subject to Executive Order 13045 because it is not economically significant as defined under E.O. 12866,

and because the Agency does not have reason to believe the environmental health and safety risks addressed by this action present a disproportionate risk to children. The benefits analysis performed for the 2003 CAFO rule determined that the rule would result in certain significant benefits to children's health. (Please refer to the *Benefits Analysis* in the record for the 2003 CAFO final rule.) Today's action does not affect the environmental benefits of the rule.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)) because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act*

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Public Law 104-113, Section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standard bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The 2006 proposed rule involved the use of technical standards for land application of manure and elimination of discharges from the production area. In the 2006 proposal, EPA noted that the specific standards applicable to a specific operator are generally determined by the permitting authority on a State-wide or site-specific best professional judgment basis. Today's supplemental notice does not pertain to this aspect of the CAFO rulemaking, and EPA continues to encourage the use by permitting authorities of voluntary consensus standards, such as those developed by USDA, in establishing the site-specific technical requirements in CAFO permits.

**List of Subjects in 40 CFR Part 122**

Environmental protection, Administrative practice and procedure,

Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

Dated: March 3, 2008.

**Stephen L. Johnson,**  
*Administrator.*

For the reasons stated in the preamble, the Environmental Protection Agency proposes to amend 40 CFR part 122 as follows:

**PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM**

1. The authority citation for part 122 continues to read as follows:

**Authority:** The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Section 122.23 is amended by revising paragraph (h) to read as follows:

**§ 122.23 Concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25).**

\* \* \* \* \*

(h) *No Discharge Certification Option.*

(1) The owner or operator of a CAFO that meets the eligibility criteria in paragraph (h)(2) of this section may certify to the Director that the CAFO does not discharge or propose to discharge. A CAFO owner or operator who certifies that the CAFO does not discharge or propose to discharge is not required to seek coverage under an NPDES permit pursuant to paragraph (d)(1) of this section, provided that the CAFO is designed, constructed, operated, and maintained in accordance with the documents and certification required by paragraphs (h)(2) through (3) of this section, and subject to the limitations in paragraph (h)(4) of this section.

(2) *Eligibility Criteria.* In order to certify that a CAFO does not discharge or propose to discharge, the owner or operator of a CAFO must document, based on an objective assessment of the conditions at the CAFO, that the CAFO is designed, constructed, operated, and maintained in a manner such that the CAFO will not discharge, as follows:

(i) The CAFO's production area is designed, constructed, operated, and maintained so as not to discharge. The CAFO must maintain documentation on site that demonstrates that:

(A) Any open surface manure storage structures are designed, constructed, operated, and maintained to achieve no discharge based on a technical evaluation in accordance with the elements of the technical evaluation set forth in 40 CFR 412.46(a)(1)(i)-(vii);

(B) Any part of the CAFO's production area that is not addressed by paragraph (h)(2)(i)(A) of this section is designed, constructed, operated, and maintained such that there will be no discharge of manure, litter, or process wastewater; and

(C) The CAFO implements the additional measures set forth in 40 CFR 412.37(a) and (b); and

(ii) The CAFO maintains on site and implements an up-to-date nutrient management plan that addresses, at a minimum, the elements of § 122.42(e)(1)(i) through (ix) and 40 CFR 412.37(c), and that includes all land application areas under the control of the CAFO where the CAFO will land-apply manure, litter, or process wastewater, and that includes all operation and maintenance practices necessary to ensure that the CAFO will not discharge.

(3) *Submission to the Director.* In order to certify that a CAFO does not discharge or propose to discharge, the CAFO owner or operator must complete and submit to the Director, by certified mail or equivalent method of documentation, a certification that includes, at a minimum, the following information:

(i) The legal name, address and phone number of the CAFO owner or operator (see § 122.21(b));

(ii) The CAFO name and address, the county name and the latitude and longitude where the CAFO is located;

(iii) A statement that describes the manner in which the CAFO satisfies the eligibility requirements identified in paragraph (h)(2) of this section; and

(iv) The following certification statement: "I certify under penalty of law that I am the owner or operator of a concentrated animal feeding operation (CAFO), identified as [Name of CAFO], and that said CAFO meets the requirements of 40 CFR 122.23(h). I have read and understand the eligibility requirements of 40 CFR 122.23(h)(2) for certifying that a CAFO does not discharge or propose to discharge and further certify that this CAFO satisfies the eligibility requirements. As part of this certification, I am including the information required by 40 CFR 122.23(h)(3). I also understand the conditions set forth in 40 CFR 122.23(h)(5) regarding loss of certification. I certify under penalty of law that this document and all other documents required for this certification were prepared under my direction or supervision and that qualified personnel properly gathered and evaluated the information submitted. Based upon my inquiry of the person or persons directly involved in gathering and evaluating the

information, the information submitted is to the best of my knowledge and belief true, accurate and complete. I am aware there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."; and

(v) The certification must be signed in accordance with the signatory requirements of 40 CFR 122.22.

(4) *Term of Certification.* Certification shall be effective for five years from the date on which it is submitted or until the certification is no longer valid or is withdrawn, whichever occurs first. A certification is no longer valid when a discharge has occurred or when the CAFO ceases to meet the eligibility criteria in paragraph (h)(2) of this section.

(5) *Withdrawal of Certification; Re-certification.* (i) At any time, a CAFO may withdraw its certification by notifying the Director by certified mail or equivalent method of documentation. A certification is withdrawn on the date the notification is submitted to the Director. The CAFO does not need to specify any reason for the withdrawal in its notification to the Director.

(ii) If a certification becomes invalid in accordance with paragraph (h)(4) of this section, the CAFO must withdraw its certification within three days of the date on which the CAFO's certification becomes invalid. Such a CAFO remains subject to the requirement under paragraph (d) of this section to seek permit coverage if it discharges or proposes to discharge.

(iii) A previously certified CAFO may re-certify in accordance with paragraph (h) of this section, provided the following additional criteria are met if the previous certification was invalidated due to an actual discharge from the CAFO:

(A) The owner or operator modifies the CAFO's design, construction, operation, and/or maintenance as necessary to permanently address the cause of the discharge and ensure that no discharge from this cause occurs in the future; and

(B) In addition to the certification submission requirements provided in paragraph (h)(3) of this section, the CAFO submits to the Director a description of the discharge, including the date, time, cause, duration, and approximate volume of the discharge, and a detailed explanation of the steps taken by the CAFO to permanently address the cause of the discharge.

[FR Doc. E8-4504 Filed 3-6-08; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 271

[EPA-R08-RCRA-2006-0127; FRL-8538-2]

#### Utah: Final Authorization of State Hazardous Waste Management Program Revision

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** Utah has applied to EPA for final authorization of the changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). The EPA proposes to grant final authorization to the hazardous waste program changes submitted by Utah. In the "Rules and Regulations" section of this **Federal Register**, EPA is authorizing the State's program changes as an immediate final rule. EPA did not make a proposal prior to the immediate final rule because we believe these actions are not controversial and do not expect comments to oppose them. We have explained the reasons for this authorization in the preamble to the immediate final rule. Unless we get written comments opposing this authorization during the comment period, the immediate final rule will become effective and the Agency will not take further action on this proposal. If we receive comments that oppose these actions, we will publish a document in the **Federal Register** withdrawing this rule before it takes effect. EPA will then address public comments in a later final rule based on this proposal. Any parties interested in commenting on these actions must do so at this time. EPA may not provide further opportunity for comment.

**DATES:** Comments must be received on or before April 7, 2008.

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R08-RCRA-2006-0127, by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>.

Follow the on-line instructions for submitting comments.

- *E-mail:* [daly.carl@epa.gov](mailto:daly.carl@epa.gov).

- *Fax:* (303) 312-6341.

- *Mail:* Send written comments to Carl Daly, Solid and Hazardous Waste Program, EPA Region 8, Mailcode 8P-HW, 1595 Wynkoop Street, Denver, Colorado 80202-1129.

- *Hand Delivery or Courier:* Deliver your comments to Carl Daly, Solid and Hazardous Waste Program, EPA Region 8, Mailcode 8P-HW, 1595 Wynkoop