§ 401.26 Security for Tolls.

* * * * *

(b) The security for the tolls of a vessel shall be sufficient to cover the tolls established in the St. Lawrence Seaway Tariff of Tolls for the gross registered tonnage of the vessel, cargo carried, and lockage tolls as well as security for any other charges estimated by the Manager.

* * * * *

6. In § 401.30 paragraph (e) (2) would be revised to read as follows:

§ 401.30 Ballast water and trim.

* * * * *

(e) * * *

(2) Every other vessel entering the Seaway that operates within the Great Lakes and the Seaway must agree to comply with the ''Voluntary Management Practices to Reduce the Transfer of Aquatic Nuisance Species Within the Great Lakes by U.S. and Canadian Domestic Shipping'' of the Lake Carriers Association and Canadian Shipowners Association dated January 26, 2001, while operating anywhere within the Great Lakes and the Seaway. For copies of the ''Code of Best Practices for Ballast Water Management'' and of the ''Voluntary Management Practices to Reduce the Transfer of Aquatic Nuisance Species Within the Great Lakes by U.S. and Canadian Domestic Shipping'' refer to the St. Lawrence Seaway Web site at *http://www.greatlakes-seaway.com.*

7. In § 401.74 paragraphs (a) and (g) are revised to read as follows:

§ 401.74 Transit declaration.

(a) Seaway Transit Declaration Form (Cargo and Passenger) shall be forwarded to the Manager by the representative of a ship, for each ship that has an approved preclearance except non-cargo ships, within fourteen days after the vessel enters the Seaway on any upbound or downbound transit. The form may be obtained from the St. Lawrence Seaway Management Corporation, 151 Ecluse Street, St. Lambert, Quebec, J4R 2V6 or from the St. Lawrence Seaway Web site at *http://www.greatlakes-seaway.com.*

* * * * *

(g) Where government aid cargo is declared, appropriate Canadian or U.S. customs form or a stamped and signed certification letter from the U.S. or Canada Customs must accompany the transit declaration form.

* * * * *

8. In § 401.81 paragraph (a) is revised to read as follows:

§ 401.81 Reporting an Accident.

(a) Where a vessel on the Seaway is involved in an accident or a dangerous occurrence, the master of the vessel shall report the accident or occurrence, pursuant to the requirements of the Transportation Safety Board Regulations, to the nearest Seaway and Canadian or U.S. Coast Guard radio or traffic stations, as soon as possible and prior to departing the Seaway system.

* * * * *

Issued at Washington, DC, on December 13, 2005

Saint Lawrence Seaway Development Corporation.

Albert S. Jacquez,

Administrator.

[FR Doc. 05–24235 Filed 12–20–05; 8:45 am]

BILLING CODE 4910–61–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 122 and 412

[EPA–HQ–OW–2005–0036; FRL–8011–7]

RIN 2040–AE80

Revised Compliance Dates for National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines for Concentrated Animal Feeding Operations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA proposes to extend certain compliance dates in the National Pollutant Discharge Elimination System (NPDES) permitting requirements (40 CFR part 122) and Effluent Limitations Guidelines and Standards (ELGs) (40 CFR part 412) for concentrated animal feeding operations (CAFOs) in conjunction with EPA's efforts to respond to the order issued by the Second Circuit Court of Appeals in *Waterkeeper Alliance et al.* v. *EPA,* 399 F.3d 486 (2nd Cir. 2005). The purpose of today's proposed rule is to address timing issues associated with the Agency's response to the Waterkeeper decision.

This proposal would revise dates established in the 2003 CAFO rule, issued on February 12, 2003, by which facilities newly defined as CAFOs were required to seek permit coverage and by which all CAFOs were required to have nutrient management plans (NMPs) developed and implemented. EPA is proposing to extend the date by which operations defined as CAFOs as of April 14, 2003, who were not defined as CAFOs prior to that date, must seek NPDES permit coverage, from February 13, 2006, to March 30, 2007. EPA is also proposing to amend the date by which 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, from April 13, 2006, to March 30, 2007. Finally, EPA is proposing to extend the deadline by which CAFOs are required to develop and implement NMPs, from December 31, 2006, to March 30, 2007. This proposal would revise all references to the date by which NMPs must be developed and implemented currently in the 2003 CAFO rule.

EPA will also be issuing a proposed rule to revise the 2003 CAFO regulations more broadly in order to address the Second Circuit Court of Appeals decision in a subsequent **Federal Register** Notice, which the Agency plans to propose for public comment in early 2006.

DATES: Comments on this proposed action must be received on or before January 20, 2006.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OW–2005–0036 by one of the following methods:

(1) *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.

(2) *E-mail: ow-docket@epa.gov,* Attention Docket ID No. EPA–HQ–OW–2005–0036.

(3) *Mail:* Send the original and three copies of your comments to: Water Docket, Environmental Protection Agency, Mail code 4203M, 1200 Pennsylvania Ave., NW., Washington, DC 20460, Attention Docket ID No. OW–2005–0036.

(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–2005–0036. 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–2005–0036. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://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 *http://www.regulations.gov* or e-mail. The *http://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 *http://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 *http://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 *http://www.regulations.gov* or in hard copy at the Water Docket in the EPA Docket Center, EPA West, Room B102, 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: Kawana Cohen, Water Permits Division, Office of Wastewater Management (4203M), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564–2345, e-mail address: *cohen.kawana@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

This action applies to concentrated animal feeding operations (CAFOs) as defined in section 502(14) of the Clean Water Act and 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
	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 is 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 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. *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

A. The Clean Water Act

Congress passed 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'' (33 U.S.C. 1251(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. 33 U.S.C. 1342. 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 section 301(a) and (b).

B. History of Actions To Address CAFOs Under the NPDES Permitting Program

EPA's regulation of wastewater and manure from CAFOs dates to the 1970s. EPA initially issued national effluent limitations guidelines and standards for feedlots on February 14, 1974 (39 FR 5704), and NPDES CAFO regulations on March 18, 1976 (41 FR 11458).

In February 2003, EPA issued revisions to these regulations that focused on the 5% of the nation's animal feeding operations (AFOs) that presented the highest risk of impairing water quality and public health (68 FR 7176) (the ''2003 CAFO rule''). The 2003 CAFO rule required the owner or operators of all CAFOs [1] to seek coverage under an NPDES permit. CAFO industry organizations (American Farm Bureau Federation, National Pork Producers Council, National Chicken Council, and National Turkey Federation (NTF), although later NTF later withdrew its petition) and 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 (2nd Cir. 2005). The court's decision is described below.

C. Ruling by the U.S. Court of Appeals for the Second Circuit

The Second Circuit's decision in Waterkeeper upheld certain challenged provisions of the 2003 rule and vacated or remanded others. This discussion is included in the preamble to provide the reader with background information and context why this proposed action is necessary. While today's proposal deals solely with the compliance dates, EPA plans to publish a subsequent rulemaking that will address more broadly the substantive changes to the 2003 rule in response to Waterkeeper. The Agency plans to make available the more comprehensive rulemaking for public comment in early 2006.

1. Issues Upheld by the Court

This section discusses provisions of the 2003 CAFO rule that were challenged by either industry or environmental petitions, but were upheld by the Waterkeeper court and therefore remain unchanged. EPA is not proposing to revise any of these provisions in today's notice and is not soliciting comment on them.

a. Land Application Regulatory Framework and Interpretation of ''Agricultural Storm Water''. The Waterkeeper court upheld EPA's authority to regulate, through NPDES permits, the runoff of manure, litter, and process wastewater that CAFOs apply to crop or forage land. The court rejected the Industry Petitioners' claim that land application runoff at CAFOs must be channelized before it can be considered to be a point source discharge subject to permitting. The court noted that the CWA expressly defines the term ''point source'' to include ''any * * * concentrated animal feeding operation * * * from which pollutants are or may be discharged,'' and found that the Act ''not only permits, but demands'' that land application discharges be construed as discharges ''from'' a CAFO. *Waterkeeper Alliance et al.* v. *EPA,* 399 F.3d at 510.

The Waterkeeper court also upheld EPA's determination in the 2003 CAFO rule that precipitation-related discharges of manure, litter, or process wastewater from land application areas under the control of a CAFO qualify as ''agricultural storm water'' only where the CAFO has applied the manure in

[1] 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.

accordance with NMPs that ensure ''appropriate agricultural utilization'' of the manure, litter, and process wastewater nutrients. EPA's interpretation of the Act in this regard was reasonable, the court found, in light of Congressional intent in excluding agricultural storm water from the meaning of the term ''point source'' and given the precedent set in an earlier Second Circuit case, *Concerned Area Residents for the Environment* v. *Southview Farm,* 34 F.3d 114 (2d Cir. 1994). *Waterkeeper Alliance et al.* v. *EPA,* 399 F.3d at 508–09.

b. Effluent Guidelines. The Waterkeeper court upheld the CAFO effluent guidelines against challenges from the litigants, except for the items remanded to EPA, as noted further below, as follows:

—Identification of best available technologies. The court rejected the environmental organizations' claim that when EPA chose the pollution control technologies on which to base effluent guidelines for CAFOs, the Agency did not meet its duty to identify the single CAFO with the best-performing technology. The court found that EPA had collected extensive data on the waste management systems at CAFOs and had considered approximately 11,000 public comments on the proposed CAFO rule, and on those bases, EPA had adequately justified its selection of ''best available technologies'' on which to base the regulations.

—Groundwater controls. The court upheld EPA's decision to leave groundwater discharges to be addressed at the state level or on a site specific basis. EPA had determined that because such discharges depend greatly on local geology and other site-specific factors, the need for controls on groundwater discharges was a matter to be evaluated at the local level rather than established in a national regulation.

—Economic methodologies. The court upheld the financial methodologies that EPA used for determining whether the technology-based permit requirements for CAFOs set in the 2003 rule would be economically achievable by the industry as a whole.

2. Issues Vacated by the Court

The following are the elements of the 2003 rule that the Waterkeeper court found to be unlawful and therefore vacated. EPA is not proposing to revise any of these provisions in today's notice and is not soliciting comment on them. As noted above, EPA intends to address the court's ruling vacating these provisions in a subsequent proposal that will follow in the coming months.

a. Duty to Apply. The CAFO industry organizations argued that the EPA exceeded its statutory authority by requiring all CAFOs to either apply for NPDES permits or otherwise demonstrate that they have no potential to discharge. The court agreed with the CAFO industry petitioners on this issue and therefore vacated the ''duty to apply'' provision of the 2003 CAFO rule.

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 regulation rather than potential discharges. The court acknowledged EPA's strong policy considerations for seeking to impose a duty to apply—''EPA has marshaled evidence suggesting that such a prophylactic measure may be necessary to effectively regulate water pollution from Large CAFOs, given that Large CAFOs are important contributors to water pollution'' (399 F.3d at 506, fn.22)[2]—but found that the Agency nevertheless lacked statutory authority to do so.

b. Nutrient Management Plans. The environmental organizations argued that the 2003 CAFO rule was unlawful because: (1) The rule empowered permitting authorities to issue permits without any meaningful review of the CAFO's NMP, (2) the rule failed to require that the terms of the NMP be included in the NPDES permit, and (3) the permitting scheme established by the rule violated the Clean Water Act's public participation requirements. The court agreed with the environmental petitioners on these three issues.

The court relied on provisions of the Act that authorize point source discharges only where NPDES permits ''ensure that every discharge of pollutants will comply with all applicable effluent limitations and standards,'' citing CWA sections 402(a)(1), (a)(2), and (b). Because the 2003 CAFO rule allowed CAFOs to write their own NMPs and because those plans were not required to be reviewed by the permitting agency or made available to the public for comment before the permit was issued, the court found that the rule did not ensure that each Large CAFO will develop a satisfactory plan. The court also found that the terms of the NMPs themselves are ''effluent limitations'' as that term is defined in the Act and therefore must be included in the permit under CWA sections 301 and 402. In addition, the court found that by not making the NMPs part of the permit and available to the public for review, the 2003 CAFO rule violated public participation requirements in sections 101(e) and 402 of the Act.

3. Issues Remanded by the Court

The court also remanded other aspects of the CAFO rule to EPA ''for further clarification and analysis.'' EPA is not proposing to revise any of these provisions in today's proposal and is not soliciting comment on them. As previously noted, the agency plans to address these issues in its forthcoming proposed rule. They are as follows:

a. Water Quality-Based Effluent Limits. The court agreed with EPA that agricultural storm water is excluded from the meaning of the term ''point source'' and therefore is not subject to water quality-based effluent limitations in permits. However, the court directed EPA to ''clarify the statutory and evidentiary basis for failing to promulgate water quality-based effluent limitations for discharges other than agricultural storm water discharges as that term is defined in 40 CFR 122.23(e),'' and to ''clarify whether States may develop water quality-based effluent limitations on their own.''

b. New Source Performance Standards—100-Year Storm. Standard. The 2003 CAFO rule set the new source performance standards (NSPS) for swine, poultry, and veal CAFOs at a level of zero discharge. A CAFO in these categories could fulfill this requirement by showing that either (1) Its production area was designed to contain all manure, litter, process wastewater, and precipitation from the 100-year, 24-hour storm, or (2) it would comply with ''voluntary superior performance standards'' based on innovative technologies, under which a discharge from the production area would be allowed if it was accompanied by an equivalent or greater reduction in the quantity of pollutants released to other media (*e.g.*, air emissions). The court found that EPA had not justified in the record nor provided adequate public participation with respect to either of these provisions. As a result, the court remanded these provisions to EPA to clarify, via a process that adequately

[2] Similarly, the United States Government Accountability Office concluded in 2003 that the measures in EPA's 2003 rule would solve the problems created by exemptions in the 1976 rule. (United States General Accounting Office. 2003. Livestock Agriculture: Increased EPA Oversight Will Improve Environmental Protection for Concentrated Animal Feeding Operations, Report to the Ranking Member, Committee on Agriculture, Nutrition and Forestry, U.S. Senate. GAO–03–285. Washington, DC)

involves the public, the statutory and evidentiary basis for their allowance.

c. BCT Effluent Guidelines for Pathogens. The court held that the 2003 CAFO rule violated the CWA because EPA had not made an affirmative finding that the BCT-based ELGs '' *i.e.*, the ''best conventional technology'' guidelines for conventional pollutants such as fecal coliform '' do in fact represent BCT technology. The court remanded this issue to EPA to make such a finding based on the best available control technology economically achievable (BAT)/best practicable control technology currently available (BPT) technologies EPA studied or to establish specific BCT limitations for pathogens based on some other technology.

D. What Requirements Still Apply to CAFOs?

The Waterkeeper decision either upheld or did not address most provisions of the 2003 CAFO rule. This section describes certain key portions of the rule that were not challenged in Waterkeeper. EPA is not proposing to revise any of these provisions and is not soliciting comment on them.

The definitions provided in 40 CFR 122.23(b) of the 2003 CAFO rule remain in effect and are unchanged. First, an operation must be defined as an animal feeding operation (AFO) before it can be defined as a concentrated animal feeding operation (CAFO). 40 CFR 122.23. The term ''animal feeding operation'' is defined by EPA regulation as a ''lot or facility'' where animals ''have been, are or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12 month period and crops, vegetation, forage growth, or post harvest residues are not sustained in the normal growing season over any portion of the lot or facility.''

Whether an AFO is a CAFO depends primarily on the number of animals confined, which is also unchanged. Large CAFOs are AFOs that contain more than the threshold number of animals detailed in 40 CFR 122.23(b)(4). Medium CAFOs contain fewer animals than Large CAFOs and also: (1) Discharge pollutants into waters of the U.S. through a man-made ditch, flushing system, or other similar man-made device; or (2) discharge pollutants directly into waters of the U.S. that originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the confined animals. 40 CFR 122.23(b)(6)(ii). The NPDES permitting authority also may, on a case-by-case basis, designate any AFO, including Small CAFOs, as a CAFO after conducting an on-site inspection and finding that the facility ''is a significant contributor of pollutants to waters of the United States.'' 40 CFR 122.23(c). The permitting authority may not exercise its authority to designate a facility as a Small CAFO unless pollutants are discharged into waters of the U.S. through a man-made ditch, flushing system, or other similar man-made device, or are discharged directly into waters of the U.S. which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

The 2003 CAFO rule also eliminated the provision in the original regulations stating that a facility was not defined as a CAFO if it discharged only in the event of a 25-year, 24-hour storm. The Waterkeeper decision did not affect this aspect of the 2003 rule, under which facilities no longer have an exemption from the definition of a CAFO if they discharge only in the event of a 25-year, 24-hour storm. Likewise, the Waterkeeper decision did not affect the 2003 rule's inclusion, for the first time, of certain animal sectors within the definition of a CAFO, such as chicken operations with dry systems for handling manure.

Any discharge of manure, litter, or process wastewater from the production area of a CAFO to a water of the U.S. violates the CWA unless it is authorized by an NPDES permit. By eliminating the 25-year, 24-hour storm exemption in the 2003 rule, any overflow (see definition in § 412.2(g)), from any containment structure under any climatic condition, including chronic or catastrophic rainfall events, is an illegal discharge unless authorized by a permit. Additionally, any runoff of manure, litter, or process wastewater from a CAFO land application area to waters of the U.S. that is not agricultural storm water is illegal unless authorized by a permit. Examples include, but are not limited to, the discharge of litter, manure, or process wastewater directly to waters of the United States (*e.g.*, application of liquid manure directly to surface water); dry-weather discharges due to the land application of manure, litter, or process wastewater; or the discharge of process wastewater or liquid manure from subsurface drains during dry weather.

Nutrient management planning requirements for permitted CAFOs established in the 2003 CAFO rule also remain in place following the court's ruling. All permitted CAFOs must develop and implement an NMP that meets the requirements of 40 CFR 122.42(e) and 40 CFR 412.4, where applicable. The NMP identifies the necessary actions to ensure that runoff is eliminated or minimized through proper and effective manure, litter, and wastewater management, including compliance with the ELGs. NMPs for Large CAFOs must also contain additional provisions regarding the land application of manure. Permitted CAFOs must comply with all applicable recordkeeping and reporting requirements including those specified in 40 CFR 122.42(e).

ELG requirements for existing Large CAFOs also are largely unchanged following the court's ruling. ELG requirements ensure the appropriate storage of manure, litter, and process wastewater and proper land application practices. They vary depending upon the types of animals confined: Subpart A for horses and sheep; Subpart B for ducks; Subpart C for dairy cattle, heifers, steers, and bulls; and Subpart D for swine, poultry, and veal calves (40 CFR part 412). Additionally, New Source requirements for beef and dairy operations remain unchanged (40 CFR 412.35).

Permitted Small and Medium CAFOs are not subject to the ELGs specified in part 412. Rather, they must comply with all case-by-case technology-based requirements developed by the permitting authority (*i.e.*, Best Professional Judgment (BPJ)).

E. Status of EPA's Response to the Waterkeeper Decision

EPA is developing a rulemaking to respond to all of the issues in the 2003 CAFO rule vacated or remanded by the Second Circuit Court of Appeals. EPA plans to issue a proposed rulemaking for public comment in early 2006 and a final rulemaking as expeditiously as possible.

F. Compliance Dates in the 2003 CAFO Rule Affected by the Waterkeeper Decision

The 2003 CAFO rule required all newly defined CAFOs, as of the date of the final rule, and some new dischargers to seek permit coverage by February 13, 2006, or April 13, 2006, respectively. The rule also required all CAFOs to develop and implement an NMP by December 31, 2006. EPA is proposing to revise each of these dates in order: (1) To provide the Agency sufficient time to take final action on the regulatory revisions it plans to propose in the near future with respect to the Second Circuit's decision; and (2) To require NMPs to be submitted at the time of the permit application, consistent with the court's decision.

III. Today's Proposal

Today's proposal is intended to extend certain dates for compliance specified in the 2003 CAFO rule. EPA proposes to extend the dates for newly defined CAFOs to seek NPDES permit coverage and the date by which all CAFOs must develop and implement NMPs. Because EPA is not likely to have completed the rulemaking responding to the Waterkeeper decision prior to the dates by which newly defined CAFOs must seek permit coverage, the Agency proposes in today's notice to revise these dates to a time that is subsequent to the forthcoming CAFO rule revision.

Inasmuch as these proposed revisions precede the other regulatory revisions that EPA plans to propose to respond to the Waterkeeper decision, they are made strictly in the context of existing regulations promulgated in the 2003 CAFO rule. Today's proposal is simply a means of avoiding conflict with existing deadlines that precede EPA's upcoming revisions to the 2003 rules. Today's proposal does not, for example, address issues associated with the court's vacature of the requirement that all CAFOs seek coverage under an NPDES permit. That issue and other related issues will be addressed in the separate upcoming rulemaking. Therefore, EPA is today soliciting comment only on its proposal to revise specific dates in the 2003 rule, as described below.

A. Application Deadline for Newly Defined CAFOs

1. Proposal To Extend Deadline for Seeking Permit Coverage

EPA is proposing to extend the date by which operations defined as CAFOs as of April 14, 2003, that were not defined as CAFOs prior to that date, must seek NPDES permit coverage, from February 13, 2006, to March 30, 2007. EPA is also proposing to amend the date by which 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, from April 13, 2006, to March 30, 2007.

Today's proposal would not affect the requirements applicable to new source CAFOs that discharge or propose to discharge, even those in categories that were added to the definition of a CAFO in the 2003 CAFO rule. New source CAFOs that discharge or propose to discharge are required by the 2003 CAFO rule to seek NPDES permit coverage at least 180 days prior to the time that they commence operating.

2. Background

The 2003 CAFO rule added facilities that had not been previously defined as CAFOs (in the 1976 regulations) to the definition of a CAFO. Operations newly defined as CAFOs in the 2003 CAFO rule included veal operations, chicken and layer operations using other than liquid manure handling systems, and AFOs that were previously not defined as CAFOs because they discharged only in the event of a 25-year/24-hour storm (see 40 CFR 122.23(b)). Those CAFOs in these categories that were in existence on the date the 2003 CAFO rule took effect (April 14, 2003) represent the group of CAFOs currently subject to the February 13, 2006, deadline (see 40 CFR 122.23(g)(2)). This group of CAFOs represented most of the newly defined CAFOs that were covered by the 2003 rule. In addition, other existing facilities that might become CAFOs, as a result of the revised CAFO definitions in the 2003 CAFO rule, are so-called ''new dischargers'' that might at some date subsequent to the effective date of the 2003 CAFO rule become a CAFO due to changes in their operations, where those changes would not have made the operation a CAFO prior to April 14, 2003. This second group of facilities is currently required to seek permit coverage by April 13, 2006, or 90 days after becoming defined as a CAFO (whichever date is later) (see 40 CFR 122.23(g)(3)(iii)).

Both of these groups of CAFOs were allowed three years to seek permit coverage when EPA issued the 2003 CAFO rule. In the preamble to the 2003 CAFO rule, EPA reasoned that such an approach was consistent with Congressional intent with respect to newly established point sources, in the 1972 Clean Water Act, and with Agency practice in a similar prior rulemaking. Moreover, the Agency believed that the three year delay provided other advantages, including adequate time for States to provide permit coverage for CAFOs that were not previously required to be permitted and to revise state regulatory programs (see 68 FR 7204).

3. Rationale

These newly defined CAFOs are required by the current regulations to seek NPDES permit coverage by the dates established in the 2003 CAFO rule (either in February 2006 or April 2006). Both of these dates occur before the time when EPA will be issuing the upcoming rule revisions. EPA is proposing to extend those dates to allow EPA time to complete that rulemaking. EPA believes that, under these circumstances, there are compelling reasons to provide these CAFOs, who are required to apply for an NPDES permit for the first time under the 2003 rule, an extension of time so that they need not apply for permits until after EPA has completed the forthcoming revisions to the 2003 rule. This is appropriate, for example, because among other things the revisions will address the court's ruling on which CAFOs need to apply for permits at all and, where permits are issued, the need to include terms of the NMPs in the permit.

Because today's proposed extension would add another year to the three years originally provided for these facilities to obtain NPDES permit coverage, EPA does not believe that a further extension beyond March 2007, is either necessary or appropriate at this time.

B. Deadline for Nutrient Management Plans

1. Proposal To Extend Deadline for Nutrient Management Plans

EPA is proposing to extend the deadline by which permitted CAFOs are required to develop and implement NMPs, from December 31, 2006, to March 30, 2007. This proposal would revise all references to the date by which NMPs must be developed and implemented currently in the 2003 CAFO rule. Thus the deadlines established in 40 CFR 122.21(i)(1)(x), 122.42(e)(1), 412.31(b)(3), and 412.43(b)(2) are all proposed to be revised accordingly.

Today's proposal would not affect CAFOs operating under existing permits so long as those permits remain in effect. If their existing permits require development and implementation of an NMP, currently permitted CAFOs must develop and implement their NMPs in accordance with the terms of their current permit.

2. Background

The 2003 CAFO rule required all CAFOs to develop and implement a NMP by December 31, 2006, except that CAFOs seeking to obtain coverage under a permit subsequent to that date were required to have a NMP developed and implemented upon the date of permit coverage. The same dates were established for the implementation of the land application requirements in the Effluent Limitation Guidelines (ELGs), including the NMP requirements in the ELGs. As discussed in the preamble to the 2003 CAFO rule, EPA believed that these dates were reasonable given that operations would have had three and a half years from the time the 2003 rule

was issued to employ the necessary planning and construction to implement an NMP. For Large CAFOs that are new sources (*i.e.*, those commencing construction after the effective date of the 2003 CAFO rule), the land application requirements at 40 CFR 412.4(c) applied immediately.

EPA concluded that this timeframe also allowed States to update their NPDES programs and issue permits to reflect the NMP requirements of the 2003 CAFO rule and provided flexibility for permit authorities to establish permit schedules based on specific circumstances, including prioritization of NMP development and implementation based on site-specific water quality risks and the available infrastructure for development of NMPs.

3. Rationale

The proposal to extend the date by which CAFOs must develop and implement their NMPs is consistent with today's proposal to extend the deadline for newly defined CAFOs to seek permit coverage, and would mean that CAFOs would be required to have developed and implemented an NMP as of the date they apply for an NPDES permit.

As previously discussed, EPA plans to address in a separate proposal the Second Circuit's ruling with respect to including terms of the NMP in permits issued to CAFOs. For present purposes, EPA notes that making these two deadlines coincide would be consistent with the Court's direction to include terms of the NMP in permits issued to CAFOs.

EPA does not believe that additional time beyond March 2007 is necessary at this time because the substantive NMP requirements have been in place since February 2003, and CAFOs have thus had adequate time to prepare NMPs. By extending the original deadline for NMP development by three additional months, today's proposal allows the CAFO operator time during the winter season to prepare the NMP paperwork and to begin implementing the practices in the NMP.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order 12866, (58 FR 51735; October 4, 1993), the Agency must determine whether the regulatory action is ''significant'' and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

1. Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

4. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

It has been determined that this proposed rule is not a ''significant regulatory action'' under the terms of Executive Order 12866 and, therefore, is not subject to OMB review.

B. Paperwork Reduction Act

This proposed action does not impose any new information collection burden. As discussed above, the purpose of today's proposed rule is solely to address timing issues associated with the Agency's response to the Waterkeeper court ruling based on litigation ensuing from the 2003 CAFO rule. However, the Office of Management and Budget (OMB) has previously approved the information collection requirements contained in the existing regulations at 40 CFR parts 9, 122, 123, and 412 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2040–0250. The EPA ICR number for the original set of regulations is 1989.02. A copy of the OMB approved Information Collection Request (ICR) may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW., Washington, DC 20460 or by calling (202) 566–1672.

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.

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 on 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 proposed rule on small entities, small entity is defined as: (1) A small business based on Small Business Administration (SBA) 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 proposed rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of the rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule.

The effect of the proposal, if implemented is solely to extend certain compliance deadlines related to NPDES CAFO permitting. EPA believes that this will have the effect of relieving the regulatory burden for affected CAFOs.

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 proposed rule 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. As discussed above, the purpose of today's proposed rule is solely to address timing issues associated with the Agency's response to the Waterkeeper court ruling based on litigation ensuing from the 2003 CAFO rule.

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 proposed rule does not have federalism implications. It will not 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, as specified in Executive Order 13132. EPA does not consider an annual impact of $2 million on States to be a substantial effect. 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 rule.

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 proposed rule 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 proposed rule 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 proposed rule 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 regulation 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.)

Since today's action would not affect the environmental benefits of the rule, these benefits are retained.

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

This proposed rule would not be 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.

This proposed rulemaking does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

List of Subjects

40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 412

Environmental protection, Feedlots, Livestock, Waste treatment and disposal, Water pollution control.

Dated: December 15, 2005.

Stephen L. Johnson,

Administrator.

For the reasons stated in the preamble, the Environmental Protection Agency proposes to amend 40 CFR parts 122 and 412 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. Amend § 122.21 by revising paragraph (i)(1)(x) to read as follows:

§ 122.21 Application for a permit (applicable to State programs, see § 123.25).

* * * * *

(i) * * *

(1) * * *

(x) For CAFOs that must seek coverage under a permit after March 30, 2007, certification that a nutrient management plan has been completed and will be implemented upon the date of permit coverage.

* * * * *

3. Sections 122.23 (g)(2) and (g)(3)(iii) are revised to read as follows:

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

* * * * *

(g) * * *

(1) * * *

(2) Operations defined as CAFOs as of April 14, 2003, who were not defined as CAFOs prior to that date. For all CAFOs, the owner or operator of the CAFO must seek to obtain coverage under an NPDES permit by a date specified by the Director, but no later than March 30, 2007.

(3) * * *

(iii) If an operational change that makes the operation a CAFO would not have made it a CAFO prior to April 14, 2003, the operation has until March 30, 2007, or 90 days after becoming defined as a CAFO, whichever is later.

* * * * *

4. Section 122.42 is amended by revising the third sentence in paragraph (e)(1) introductory text to read as follows:

§ 122.42 Additional conditions applicable to specified categories of NPDES permits (applicable to State NPDES programs, see § 123.25).

* * * * *

(e) * * *

(1) * * * Permitted CAFOs must have their nutrient management plans developed and implemented by March 30, 2007. CAFOs that seek to obtain coverage under a permit after March 30, 2007 must have a nutrient management plan developed and implemented upon the date of permit coverage. * * *

* * * * *

PART 412—CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFO) POINT SOURCE CATEGORY

1. The authority citation for part 412 continues to read as follows:

Authority: 33 U.S.C. 1311, 1314, 1316, 1317, 1318, 1342, 1361.

2. Amend § 412.31 by revising paragraph (b)(3) to read as follows:

§ 412.31 Effluent limitations attainable by the application of the best practicable control technology currently available (BPT).

* * * * *

(b) * * *

(3) The CAFO shall attain the limitations and requirements of this paragraph by March 30, 2007.

3. Amend § 412.43 by revising paragraph (b)(2) to read as follows:

§ 412.43 Effluent limitations attainable by the application of the best practicable control technology currently available (BPT).

* * * * *

(b) * * *

(2) The CAFO shall attain the limitations and requirements of this paragraph by March 30, 2007.

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