

No Potential to Discharge Determinations for CAFOs

State of Michigan

Selected US EPA Guidance

The Producers Compliance Guide for CAFOs
Pages 1-3 and 17-18

and

NPDES Permit Writers Guidance Manual for CAFOs
Pages 1, 3-18 to 3-21, example NPTDD Request Form (with state instructions)

The entire documents are available from EPA at <http://cfpub.epa.gov/npdes/afo/info.cfm#guidedocs>

Federal Rules for NPTDDs for CAFOs: 40 CFR 122.23(f)

and

7201- 7203 Federal Register / Vol. 68, No. 29 / Wednesday, February 12, 2003 / Rules and Regulations
(Background information on the federal NPTDD Rule)

State Rules for NPTDDs for CAFOs: Part 323.2196(4)

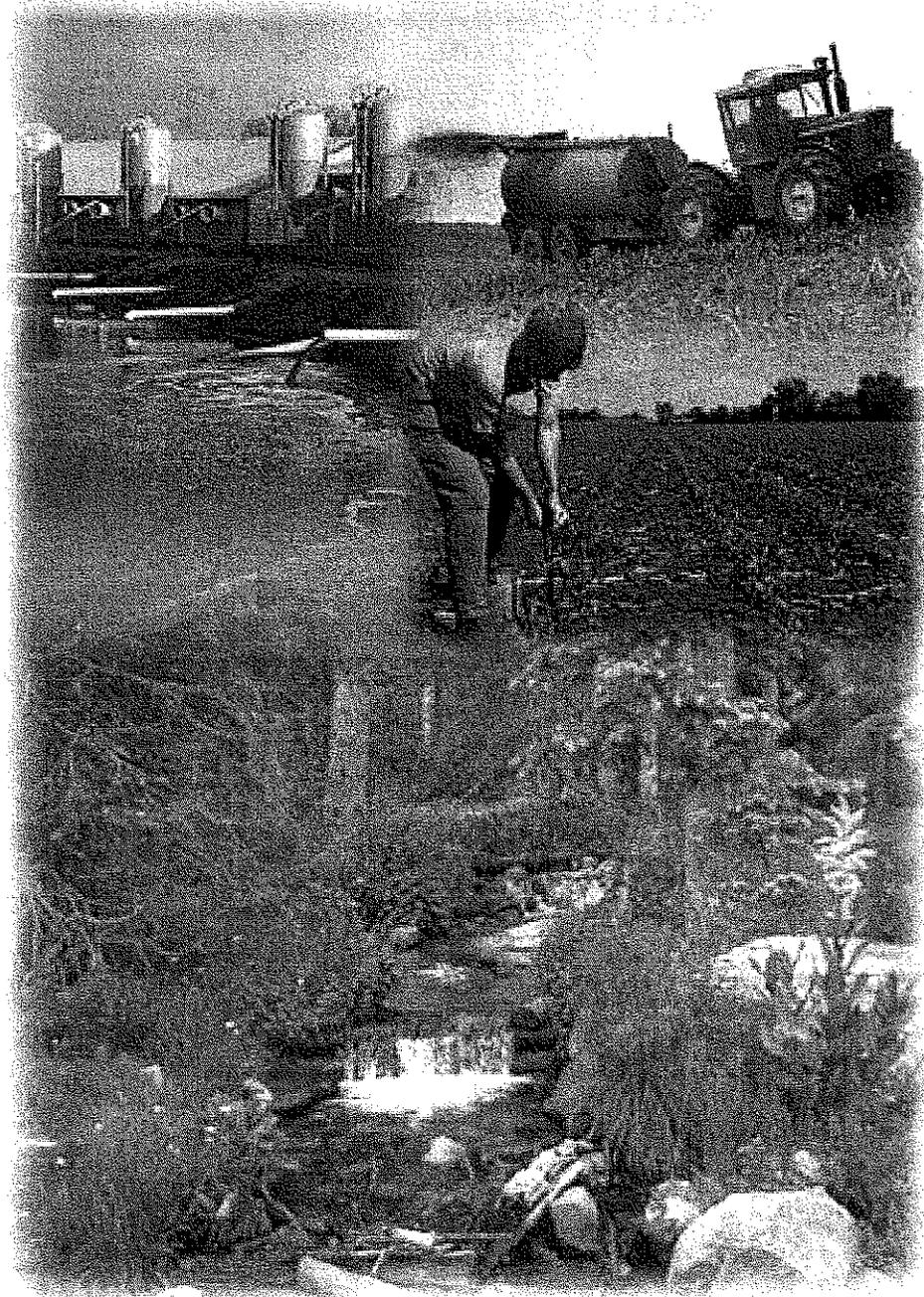


Producers' Compliance Guide for CAFOs

Revised Clean Water Act Regulations for Concentrated Animal
Feeding Operations (CAFOs)

*A guide to complying with EPA's 2003 revisions to the National Pollutant Discharge
Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards
for Concentrated Animal Feeding Operations*

Selected pages on No Potential to Discharge Determinations



This document is only a guide to help you determine whether you might be regulated under the revised regulations for Concentrated Animal Feeding Operations (CAFOs) and, if you are, what you might be required to do. This guide gives a general description of the federal CAFO regulations and therefore it does not necessarily contain the full set of detailed requirements in those regulations. It is very important to read the federal regulations and any state regulations for CAFOs and check with the agency that regulates CAFOs in your state to find out whether you need a permit and what your other legal requirements might be. If you do need a permit for your operation, you must carefully read the requirements in your permit and work with your permitting authority to find out exactly how to comply. Meeting the requirements described in this guide is not enough to ensure that you are in compliance with all the legal requirements that apply to your operation.



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Producers' Compliance Guide for CAFOs

Revised Clean Water Act Regulations for Concentrated Animal Feeding Operations (CAFOs)

Office of Water
Office of Wastewater Management
U.S. Environmental Protection Agency

NOTICE

Small Entity Compliance Guides are prepared pursuant to section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Public Law 104-121. The statements in this document are intended solely as guidance to aid EPA, the States, and the public in applying the associated regulations. In any civil or administrative action against a small business, small government or small non-profit organization for a violation of the regulations, the court or administrative agency may consider the contents of this Small Entity Compliance Guide when determining what type of fine or penalty, if any, is reasonable and appropriate.

This document is not a substitute for applicable legal requirements, nor is it a regulation itself. Thus, it does not impose legally binding requirements on any party, including EPA, States, or the regulated community. In particular, the use of the term "should" in this document is not intended to be legally binding. This guide may not apply in a particular situation based upon the circumstances, and EPA retains the discretion to adopt approaches on a case-by-case basis that differ from this guide where appropriate. Any decisions regarding a particular facility will be made based on the statute and regulations. Therefore, interested parties are free to raise questions and objections about the substance of this guide and the appropriateness of its application to a particular situation. EPA will, and States should, consider whether the recommendations or interpretations in this guide are appropriate in that situation. EPA may decide to revise this guide without public notice to reflect changes in EPA's approach to implementing the regulations or to clarify and update text. To determine whether EPA has revised this guide, contact EPA's Small Business Ombudsman Office or EPA's Office of Water.

In some places throughout the guide, EPA suggests alternative approaches that might make compliance easier and maybe even reduce costs. Because many of the decisions you must make to comply will depend on the specific conditions at your operation, you might need additional information. EPA encourages you to contact your permitting authority, local conservation district, NRCS office, Cooperative Extension Service, and/or other qualified professionals for advice.

Small Business Ombudsman

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Washington, DC 20460
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Office of Water

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manure handling system is subject to thresholds for the sector “Ducks (operations with a liquid manure handling system)” (Table 11).

Are any other kinds of operations considered to be CAFOs?

An AFO with a kind of animal not identified in the regulations might be a CAFO. Animals not identified in the regulations include, for example, ostriches, llamas, or bison. The only way for such an AFO to be a CAFO is for the permitting authority to designate it as a CAFO. (See “Which AFOs may be designated as CAFOs?” on page 9 of this guide to find out how an operation can be designated as a CAFO.)

Are there any CAFOs that do not need a permit?

Large CAFOs that do not have the potential to discharge don’t need NPDES permits. Your Large CAFO doesn’t need an NPDES permit if (1) you provide evidence to your permitting authority that there is no potential for your operation to discharge manure, litter, or process wastewater to surface waters; (2) your permitting authority agrees; and (3) your permitting authority gives you notice that your CAFO has “no potential to discharge” manure, litter, or process wastewater. “No potential to discharge” means that the CAFO must not discharge manure, litter, or process

Medium and Small CAFOs cannot qualify for a “no potential to discharge” determination because those operations must have a discharge to be defined or designated as CAFOs in the first place.

wastewater from either the production areas or any land application areas to surface waters, even by accident or because of human error.

A Large CAFO can qualify for a “no potential to discharge” determination if

- The owner or operator can show that there is no possibility for any CAFO manure, litter, or wastewater to be added to surface waters under any circumstances or conditions.
- The operation has not had a discharge for at least the past 5 years.

The “no potential to discharge” status is intended to provide relief where there truly is no potential for a CAFO’s manure or wastewater to reach surface waters under any circumstances or conditions. For example, the operator of a CAFO that meets the following conditions might be able to demonstrate to the permitting authority that the CAFO has no potential to discharge:

- Located in an arid or semiarid environment.
- Stores all its manure or litter in a permanent, covered containment structure that precludes wind dispersal and prevents precipitation from contacting the manure or litter.
- Has sufficient containment to hold all process wastewater and contaminated storm water.
- Does not land apply CAFO manure or litter because, for example, the CAFO sends all its manure or litter to a regulated, off-site fertilizer plant or composting facility.

Regulation: 40 CFR 122.23(f) [68 FR 7267]
Preamble: IV.B.2 [68 FR 7201]

How can I get a “no potential to discharge” determination?

If you believe your facility has no potential to discharge, you must still contact your permitting authority to find out whether you need to apply for a permit.

You may request a “no potential to discharge” determination from your permitting authority. You must make your request on or before your permit application deadline. “When do I have to get an NPDES permit?” on page 22 of this guide describes the permit application deadlines. You must show in your request that there is no possibility that your CAFO will discharge pollutants. Contact your permitting authority to find out exactly what information it needs. Your permitting authority might ask for more information and inspect your facility before it makes a decision on your request.

In most cases, land application of CAFO manure and process wastewater would be enough to indicate that a CAFO does have a potential to discharge. “No potential to discharge” might be demonstrated in limited circumstances, such as where the CAFO is so far from waters of the United States that any runoff from the land application areas could never reach them.

Your permitting authority has 90 days to decide whether to grant your request for a “no potential to discharge” determination. Your permitting authority will review your information and any other available information that helps it make a decision about whether your operation could discharge.

If your permitting authority agrees that your operation has no potential to discharge, it will issue a public notice before making a final decision. In the public notice, the permitting authority will describe the activity at your facility, the basis for granting your operation a “no potential to discharge” determination, and the procedures for reaching a final decision. During the public notice period, interested citizens will have a chance to submit comments to the permitting authority about your “no potential to discharge” request. At the end of the public notice period, your permitting authority will tell you whether it intends to issue a “no potential to discharge” determination for your CAFO.

The permitting authority will not grant your CAFO a “no potential to discharge” determination if

- *An accident or human error could lead to a discharge or*
- *Your CAFO has had a discharge within the past 5 years.*

If the permitting authority denies your request for a “no potential to discharge” determination, you must apply for an NPDES permit within 30 days after you receive notice of the denial.

What happens after I get a “no potential to discharge” determination?

If you receive a “no potential to discharge” determination for your CAFO, you must make sure that your operation does not discharge. If your operation does discharge, even with a “no potential to discharge” determination, you will be in violation of the Clean Water Act. If you’re planning to make changes at your CAFO that could lead to a discharge, you should contact your permitting authority to get an NPDES permit before you make those changes.

Your permitting authority may reverse the “no potential to discharge” determination if conditions at your facility change, new information is discovered, or the permitting authority has another reason to believe that your operation could discharge. If the permitting authority reverses the “no potential to discharge” determination, you must apply for a permit.

How can I avoid being covered by these regulations?

Large CAFO:

If you own or operate a Large CAFO, the only way to avoid the CAFO requirements is to request and be granted a “no potential to discharge” determination.

Medium AFO:

If you own or operate a medium-sized AFO, you can avoid having your operation defined or designated as a CAFO by

- **Eliminating any condition that meets the discharge criteria (see “Which AFOs are defined as CAFOs?”, under the heading “Medium CAFOs” on page 8, and “Which AFOs may be designated as CAFOs?” on page 9 of this guide) and**



Selected pages on No Potential to Discharge Determinations

**NPDES PERMIT WRITERS' GUIDANCE MANUAL
AND EXAMPLE NPDES PERMIT
FOR
CONCENTRATED ANIMAL FEEDING OPERATIONS**

December 31, 2003

United States Environmental Protection Agency
Office of Water
Office Wastewater Management
Water Permits Division

EPA-833-B-04-001

New discharger CAFOs are those operations that become defined as CAFOs after April 14, 2003, but that are not defined as “new sources” in accordance with the new source criteria. Such operations may be new, but not subject to NSPS and therefore not “new sources,” or may have changed some aspect of their operations after April 14, 2003, such that they become defined as CAFOs. The following are examples of such operations:

- A newly constructed Medium CAFO operation (constructed after April 14, 2003), because the CAFO NSPS apply only to Large CAFOs
- An existing operation that increases the number of animals confined and thus meets the threshold of a CAFO, but does not meet the definition of a new source.

Existing CAFOs as of April 14, 2003, are those operations that met the definition of a CAFO under the CAFO regulations in place at that time or any operation that otherwise met the CAFO definition, but erroneously claimed the 25-year, 24-hour storm event exemption that existed prior to April 14, 2003.

3.3.5 What is the “no potential to discharge” determination?

The NPDES CAFO regulations require all CAFOs to apply for a permit. An exception is that in lieu of a permit application, Large CAFOs can request a “no potential to discharge” determination from the permitting authority where there is no potential for any CAFO manure, litter, or process wastewater to be added to waters of the United States under any circumstances or climatic condition. If the permitting authority makes a determination that the CAFO has “no potential to discharge”, the operation would not need to apply for an NPDES permit. The “no potential to discharge” determination is not relevant to small or medium operations because these operations are defined or designated as CAFOs based on the existence of a discharge. It is important to note that the “no potential to discharge” determination applies to both the production area and land application areas under the control of the CAFO. The “no potential to discharge” determination process may include a site visit to verify the information submitted by the CAFO operator or to gather additional information necessary to make the determination.

3.3.5.1 What information needs to be provided by the CAFO to support a request for a “no potential to discharge” determination?

If a Large CAFO chooses to make a request for a “no potential to discharge” determination, it must submit to the permitting authority sufficient documentation to support the claim. The documentation submitted by the CAFO requesting the determination must include the information required for a permit application, as specified in 40 CFR 122.21(f) and (i)(1)(i) through (ix). Appendix E provides an example of a “no potential to discharge” determination request form that can be used by the permitting authority. This information will serve as the primary basis for determining whether the facility meets the “no potential to discharge” standard. In many cases this information will be sufficient to make the determination. The permitting authority may request a written justification, supported by the information that has been submitted, documenting the technical basis for granting a “no potential to discharge” determination. In making such a determination, the Director of the permitting authority may wish to request additional information to ensure the operation meets the “no potential to discharge” standard (e.g., regional rainfall; soil; hydrological conditions; supplemental, site-specific information, including use of an on-site inspection).

3.3.5.2 What is the timing of a “no potential to discharge” request?

The owner or operator must request a “no potential to discharge” determination by the applicable permit application date specified in 40 CFR 122.23(g). Within 90 days of receiving the request, the Director will inform the CAFO whether or not the request has been granted. During this review period, a CAFO that has submitted a request for a “no potential to discharge” determination does not have a duty to seek coverage under an NPDES permit. The 90-day period begins once the permitting authority has all of the information necessary to make a determination. The permitting authority may need to request additional information from the operation and conduct a site visit to verify submitted information or gather additional information. If the “no potential to discharge” request is denied, the CAFO must seek permit coverage within 30 days following the denial (i.e., submit a completed NOI or permit application, as directed by the permitting authority). Appendix F presents an example of a tracking form that can be used by the permitting authority to facilitate the review and processing of these requests.

3.3.5.3 What are the criteria to be used in making a “no potential to discharge” determination?

EPA’s intention is that the term “no potential to discharge” is to be narrowly applied by permitting authorities. This provision is intended to be a protective standard that does not require an NPDES permit only where the Large CAFO can demonstrate to a degree of certainty that it has “no potential to discharge” to the waters of the United States from either its production or land application areas. The “no potential to discharge” status is intended to provide relief where there truly is no potential for a CAFO’s manure or wastewater to reach waters of the United States under any circumstance or climatic condition. In particular, the fact that an operation has developed and is implementing a site-specific nutrient management plan addressing the land application areas of the CAFO does not by itself provide a basis for making a “no potential to discharge” determination. To the contrary, land application of manure and wastewater would, in most cases, be enough by itself to indicate that a CAFO does have the potential to discharge (although conceivably “no potential to discharge” could be shown based on the physical features of the site, such as a lack of proximity to waters of the United States).

The specific criteria to be used in making a determination of “no potential to discharge” are established at the discretion of the permitting authority. This guidance provides examples of some sector-specific operational characteristics that may result in a determination of “no potential to discharge” (see Exhibit 3-1). Provided below are recommended criteria for any “no potential to discharge” determination. These recommended criteria are

- All manure and wastewater within the production area, including solids, liquids, and litter, are protected from contact with rainfall, regardless of the severity of the event.
- Provisions are made for adequate storage of manure and process wastewater and the storage area is protected such that the potential for rainfall runoff is eliminated.
- Manure and wastewater are not land applied (except in arid climates and where runoff will not reach waters of the United States).
- All manure and wastewater generated by the operation will be transferred to other persons.
- All operations, including mixed animal operations, will need to address the potential to discharge from all production and land application areas.
- The operation is not located in a 100-year floodplain.
- The operation is not located in a watershed impaired by nutrients or pathogens.

Exhibit 3-1. Generic Sector-Specific Example NPTD Operations

DAIRY CATTLE SECTOR - EXAMPLE NPTD OPERATION

- All cows are housed under roof at all times
- Manure and wastewater are not land applied
- Manure and wastewater will be transferred to other persons
- Not located in floodplain
- No potential to discharge under any circumstance or climatic condition

SWINE SECTOR - EXAMPLE NPTD OPERATION

- All hogs are housed under roof at all times
- Manure and wastewater storage is provided under the barn
- Manure and wastewater are not land applied
- Manure and wastewater will be transferred to other persons
- Not located in floodplain
- No potential to discharge under any circumstance or climatic condition

POULTRY SECTOR - EXAMPLE NPTD OPERATION

- Poultry are confined to enclosed houses
- No pollutants are exhausted from houses that may come into contact with stormwater
- All litter is stored under roof and properly protected from rainfall
- Litter is not land applied
- Litter will be transferred to other persons
- Not located in floodplain
- No potential to discharge under any circumstance or climatic condition

MIXED ANIMAL OPERATION* - EXAMPLE NPTD OPERATION

- All animals are housed under roof at all times
- Manure and wastewater storage is provided underneath the barn
- Manure and wastewater are not land applied
- Manure and wastewater will be transferred to other persons
- Not located in floodplain
- No potential to discharge under any circumstance or climatic condition

* Where at least one animal type meets the threshold of a Large CAFO

BEEF CATTLE SECTOR - EXAMPLE NPTD OPERATION

- Based upon existing industry practices most beef cattle operations will probably not qualify for an NPTD determination. This is based on the following factors:
- Beef cattle are generally not housed in roofed facilities
- It is difficult to provide storage adequate to prevent discharge, although discharge may be unlikely in arid conditions
- In most cases liquid effluent is land applied
- Only manure solids can be sent to regulated compost facilities or other processing operations

3.3.5.4 *What are the public notice requirements associated with a “no potential to discharge” determination?*

Once all of the information necessary for the permitting authority to make a “no potential to discharge” determination has been submitted, and before making a final decision to grant a “no potential to discharge” determination, the permitting authority must issue a public notice stating that a “no potential to discharge” request has been received. This public notice must be accompanied by a fact sheet which includes, when applicable: (1) a brief description of the location and type of facility or activity which is the subject of the “no potential to discharge” determination; (2) a brief summary of the factual basis upon which the request is based, for granting the “no potential to discharge” determination; and (3) a description of the procedures for reaching a final decision on the “no potential to discharge” determination. The decision to grant a “no potential to discharge” determination must be based on the administrative record, which includes all information submitted in support of a “no potential to discharge” determination and any other supporting data gathered by the permitting authority.

3.3.5.5 *What is the effect of a “no potential to discharge” determination?*

If a permitting authority issues a “no potential to discharge” determination the operation remains defined as a CAFO, but the CAFO is exempted from the duty to apply requirements. However, the issuance of a determination by the permitting authority does not provide any relief from potential penalties under the Clean Water Act if the operation has a discharge in the future. A discharge from the operation would be a discharge from a point source without a permit, which is a violation of the Clean Water Act. Permitting authorities may elect to follow up with the facility to determine whether the basis for the “no potential to discharge” determination has changed and the facility should apply for an NPDES permit. When issuing a “no potential to discharge” determination, the notice to the facility operator should state that the permitting authority retains the right to collect additional information and conduct on-site inspections to verify the operational status of the facility.

**APPENDIX E
EXAMPLE
LARGE CAFO "NO POTENTIAL TO DISCHARGE" DETERMINATION
REQUEST FORM**

CAFO No Potential To Discharge Determination Request Requirements

State of Michigan additional instructions

A NPTDD request must include:

- (1) An adequate demonstration/explanation of why the CAFO does not have any potential to discharge;
A likely candidate for a NPTDD would be a facility where the production area is entirely inside with no opportunity for wastes to leave the building other than in a secure transport vehicle. Wastes cannot be subject to wind erosion or water contact. Wastes tracked out by, or spilled from, transport vehicles would not be acceptable. Also the applicant cannot land apply any of the wastes. All wastes must be given away or sold, or otherwise disposed of in a manner where there is no potential to discharge (i.e. disposed of in a licensed landfill).
- (2) proof that the CAFO is verified under the Livestock System of MAEAP;
- (3) evidence that the CAFO has not had any discharges in the last five years; and,
- (4) all of the information listed below.

The following is adapted from 40 CFR 122.21(f) and (i). (Highlighted items are those missing from US EPA's NPTDD example request form.)

- (1) Name, mailing address, and location of the facility for which the application is submitted.
- (2) Up to four SIC codes which best reflect the principal products or services provided by the facility and include a brief description of the type and nature of the CAFO.**
- (3) The operator's, and owner's if different, name, address, telephone number, ownership status, and status as Federal, State, private, public, or other entity.**
- (4) Latitude and longitude of the production area (entrance to production area);
- (5) A topographic map of the geographic area in which the CAFO is located showing the specific location of the production area, in lieu of the requirements of paragraph (f)(7) of this section;
- (6) Whether the facility is located on Indian lands.**
- (7) A listing of all permits or construction approvals received or applied for under any of the following programs:**
 - (i) Hazardous Waste Management program under RCRA.**
 - (ii) UIC program under SDWA.**
 - (iii) NPDES program under CWA.**
 - (iv) Prevention of Significant Deterioration (PSD) program under the Clean Air Act.**
 - (v) Nonattainment program under the Clean Air Act.**
 - (vi) National Emission Standards for Hazardous Pollutants preconstruction approval under the Clean Air Act.**
 - (vii) Ocean dumping permits under the Marine Protection Research and Sanctuaries Act.**
 - (viii) Dredge or fill permits under section 404 of CWA.**
 - (ix) Other relevant environmental permits, including State permits.****(the sample request form asks for information on other permits but is not specific)**
- (8) Specific information about the number and type of animals, whether in open confinement or housed under roof (beef cattle, broilers, layers, swine weighing 55 pounds or more, swine weighing less than 55 pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, other);
- (9) The type of containment and storage (anaerobic lagoon, roofed storage shed, storage ponds, underfloor pits, above ground storage tanks, below ground storage tanks, concrete pad, impervious soil pad, other) and total capacity for manure, litter, and process wastewater storage(tons/gallons);
- (10) The total number of acres under control of the applicant available for land application of manure, litter, or process wastewater; (this should be zero)**
- (11) Estimated amounts of manure, litter, and process wastewater generated per year (tons/gallons);
- (12) Estimated amounts of manure, litter and process wastewater transferred to other persons per year (tons/gallons);

LARGE CAFO¹ "NO POTENTIAL TO DISCHARGE" DETERMINATION REQUEST

Instructions: Use this form to request a "No Potential to Discharge" determination from [insert name of permitting authority]. Your completed request must include all of the information specified at 40 CFR 122.21(f) and (i)(1)(i) through (ix) plus any additional information you determine necessary to demonstrate that there will not be, under any circumstances, any discharge from either the production or land application areas of your operation. Use extra sheets and attach documents where needed.
¹See definition of a Large CAFO at 40 CFR 122.23(b)(4)

I. OWNER/OPERATOR INFORMATION

A. CONTACT INFORMATION	B. FACILITY STATUS
Owner/or Operator Name: _____ Address: _____ City: _____ State: _____ Zip Code: _____ Telephone: (____) _____ Facsimile: (____) _____	Check one: • •1. Existing Facility • •2. Proposed Facility

II. FACILITY INFORMATION

A. GENERAL INFORMATION

Name: _____ Telephone: (____) _____
 Address: _____ Facsimile: (____) _____
 City: _____ State: _____ Zip Code: _____
 County: _____ Latitude: ____° ____' ____" Longitude: ____° ____' ____"
 Average Annual Rainfall ____"

1. Check to indicate that you have attached a topographic map that clearly shows the location of your production area(s). • •

2. Have any other permits been issued for this operation? • •No • •Yes
 If yes:

Permit Type	Issuing Agency	Permit Number
_____	_____	_____
_____	_____	_____
_____	_____	_____

3. Has this operation had a discharge of manure, litter, or process wastewater to waters of the United States in the past 5 years? • •No • •Yes

4. Has there ever been a discharge at this operation? • •No • •Yes
 If yes, explain the circumstances of the discharge and the actions that have been taken to ensure that no future discharges will occur at this operation.

B. ANIMALS IN CONFINEMENT

Complete the following table to show the maximum number of each type of animal confined at any one time and the type of confinement structure used for each (e.g., open feedlot, under roof, etc.).

Type	No. of Animals	Type of Confinement
Mature Dairy Cows		
Dairy Heifers		
Veal Calves		
Other Cattle		
Swine (55 lb. or more)		
Swine (under 55 lb.)		
Horses		
Sheep or Lambs		
Turkeys		
Chickens (broilers)		
Chickens (layers)		
Ducks		
Other: (specify) _____		

C. MANURE, LITTER, AND WASTEWATER GENERATION, CONTAINMENT AND STORAGE

1. How much manure and/or litter is generated at this facility each year? _____ tons
2. How much process wastewater is generated at this facility each year? _____ gallons

D. MANURE, LITTER, AND WASTEWATER STORAGE

Check the box and provide the capacity in both days and tons or gallons for each type of storage structure present at this facility.

Type of Storage	Capacity (Days)	Capacity (tons or gallons)	
<input type="checkbox"/> Treatment Lagoon			
<input type="checkbox"/> Storage Pond			
<input type="checkbox"/> Evaporation Pond			
<input type="checkbox"/> Aboveground Storage Tanks			
<input type="checkbox"/> Underground Storage Tanks			
<input type="checkbox"/> Underhouse Pit			
<input type="checkbox"/> Roofed Storage Shed			
<input type="checkbox"/> Concrete Pad ^a			
<input type="checkbox"/> Impervious Soil Pad ^a			

^a Attach documentation of the methods used to prevent runoff

<input type="checkbox"/> Other: (specify) _____			
E. STORM WATER AND RUNOFF CONTAINMENT			
1. Check the box and give the total design basis including total capacity for each type of storm water and runoff containment structure present at this facility.			
Type of Containment	Total Capacity (gallons)		
<input type="checkbox"/> Treatment Lagoon			
<input type="checkbox"/> Storage Pond			
<input type="checkbox"/> Holding Pond			
<input type="checkbox"/> Evaporation Pond			
<input type="checkbox"/> Other: (specify) _____			
2. What is the total amount of land (in acres) that contributes storm water runoff to these containment structures? _____ acres			
F. MANURE, LITTER, AND WASTEWATER USE, TRANSFER, AND DISPOSAL			
1. How much manure and litter is applied to land under the control of this CAFO each year? _____ tons			
2. How much wastewater is applied to land under the control of this CAFO each year? _____ gallons			
3. What is the total number of acres used at this CAFO to land apply manure, litter, or process wastewater each year? (Do not include land that is not under the control of this CAFO.) _____ acres			
4. How much manure and litter is transferred from this CAFO to other persons each year? _____ tons			
5. How much wastewater is transferred from this CAFO to other persons each year? _____ gallons			
6. Describe any other manure, litter, or wastewater use or disposal method employed at this CAFO:			

G. NUTRIENT MANAGEMENT PLAN*			
1. Has a nutrient management plan been developed for this CAFO? <input type="checkbox"/> Yes <input type="checkbox"/> No			
a. If yes, is the plan currently being implemented? <input type="checkbox"/> Yes <input type="checkbox"/> No			
b. If no, when will a nutrient management plan be developed? _____/_____ (mm/yyyy)			
2. Was (or will) this CAFO's nutrient management plan prepared or reviewed by a certified nutrient management planner? <input type="checkbox"/> Yes <input type="checkbox"/> No			
* The development and implementation of a nutrient management plan is not a basis for granting a no potential to discharge determination. In general, land application activities will result in a facility not being granted a determination of no potential to discharge.			

III. ADDITIONAL INFORMATION

Provide a statement describing the conditions and/or practices at this CAFO that eliminate the potential to discharge pollutants to waters of the United States. (Such information might include precipitation data and/or maps, soil conditions, soil maps, hydrologic conditions, distance to waters of the U.S., or site-specific management or waste treatment practices.) Attach additional sheets, if needed.

Please identify all documentation provided with this "no potential to discharge" determination request.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

IV. CERTIFICATION

I certify under penalty of law that this document and all attachments were prepared under my direct supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage this system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signature: _____ Date: _____

Print Name: _____

Submit to *[permitting authority and address]*

Federal Rules for No potential to Discharge Determinations for CAFOS

40 CFR 122.23(f)

(f) ``No potential to discharge'' determinations for Large CAFOs.

(1) Determination by the Director. The Director, upon request, may make a case-specific determination that a Large CAFO has ``no potential to discharge'' pollutants to waters of the United States. In making this determination, the Director must consider the potential for discharges from both the production area and any land application areas. The Director must also consider any record of prior discharges by the CAFO. In no case may the CAFO be determined to have ``no potential to discharge'' if it has had a discharge within the 5 years prior to the date of the request submitted under paragraph (f)(2) of this section. For purposes of this section, the term ``no potential to discharge'' means that there is no potential for any CAFO manure, litter or process wastewater to be added to waters of the United States under any circumstance or climatic condition. A determination that there is ``no potential to discharge'' for purposes of this section only relates to discharges of manure, litter and process wastewater covered by this section.

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

(3) Process for making a ``no potential to discharge'' determination. Before making a final decision to grant a ``no potential to discharge'' determination, the Director must issue a notice to the public stating that a ``no potential to discharge'' request has been received. This notice must be accompanied by a fact sheet which includes, when applicable: a brief description of the type of facility or activity which is the subject of the ``no potential to discharge'' determination; a brief summary of the factual basis, upon which the request is based, for granting the ``no potential to discharge'' determination; and a description of the procedures for reaching a final decision on the ``no potential to discharge'' determination. The Director must base the decision to grant a ``no potential to discharge'' determination on the administrative record, which includes all information submitted in support of a ``no potential to discharge'' determination and any other supporting data gathered by the permitting authority. The Director must notify any CAFO seeking a ``no potential to discharge'' determination of its final determination within 90 days of receiving the request.

(4) What is the deadline for requesting a ``no potential to discharge'' determination? The owner or operator must request a ``no potential to discharge'' determination by the applicable permit application date specified in paragraph (g) of this section. If the Director's final decision is to deny the ``no potential to discharge'' determination, the owner or operator must seek coverage under a permit within 30 days after the denial.

(5) The ``no potential to discharge'' determination does not relieve the CAFO from the consequences of an actual discharge. Any unpermitted CAFO that discharges pollutants⁴ into the waters of the United States is in violation of the Clean Water Act even if it has received a ``no potential to discharge'' determination from the Director. Any CAFO that has received a determination of ``no potential to discharge,'' but who anticipates changes in circumstances that could create the potential for a discharge, should contact the Director, and apply for and obtain permit authorization prior to the change of circumstances.

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

2. How Can a CAFO Make a Demonstration of No Potential To Discharge?

Today's rule specifies that a Large CAFO need not have an NPDES permit if the permitting authority finds that the operation has no potential to discharge. This final rule provides that Large CAFOs may request and submit technical information as the basis for a permitting authority to determine that there is no potential to discharge. Today's rule also establishes requirements for the permitting authority to issue a public notice that such a request has been received. The request for a no potential to discharge determination must be submitted by the date upon which the CAFO is required to seek permit coverage (See 40 CFR 122.23(g) and section IV.B.3 and Table 4.2 of this preamble). Within 90 days of receiving the request, the Director will let the CAFO know whether or not the request for a no potential to discharge determination has been granted. If the request is denied, the CAFO must seek permit coverage within 30 days after the denial.

What did EPA propose? EPA

proposed that Large CAFOs have a duty to apply for an NPDES permit unless the permitting authority, upon request from the CAFO, makes a case-specific determination that a CAFO has no potential to discharge pollutants to water of the United States.

What were the key comments?

Trade associations and industry commenters generally opposed the requirement to demonstrate "no potential to discharge." Their objections largely follow from their view that CAFOs should not be required to apply for a permit in the first instance absent evidence of an actual discharge. Having to show "no potential to discharge" in order to avoid a permit would place a difficult or impossible burden on operations to prove a negative, in their view. They also expressed concerns over the resources and expense of showing "no potential to discharge" and about how permitting authorities will be able to interpret and apply this standard consistently. Certain environmental groups, on the other hand, were also opposed to this provision, but their view is that CAFOs should be required to apply for permits without exception, and there should be no allowance for CAFOs to avoid permitting based on a finding of "no potential to discharge." They also voiced concerns that this provision will invite abuse by States that seek to avoid permitting responsibilities. On the subject of whether the rules should include a public process for the "no potential to discharge" determination, public commenters expressed views both for and against including this process. Those seeking to have a public process included their belief that it will serve as a check against any abuses in making these determinations.

Rationale.

Today's rule requires all CAFOs to apply for a permit unless they have received a determination by the Director that the facility has "no potential to discharge." The "duty to apply" provision is based on the presumption that every CAFO has a potential to discharge and therefore must seek coverage under an NPDES permit. However, the Agency does not agree with commenters that there should be no opportunity to rebut this presumption and avoid permitting because EPA recognizes that, although they may be infrequent, there may be instances where a CAFO truly does not have a potential to discharge. For example, the CAFO may have no potential to discharge because it is located at a great distance from any water of the United States (see further discussion on this subject below). In such circumstances, it would make little sense to impose NPDES permit requirements in order to protect against such discharges. Therefore, the Agency believes that it is reasonable to allow facilities that demonstrate "no potential to discharge" to be released from the requirement to seek coverage under an NPDES permit.

Although today's regulation allows facilities to submit "no potential to discharge" claims, an unpermitted CAFO that does in fact discharge pollutants to waters of the U.S., with or without a determination of "no potential to discharge," would be in violation of the Clean Water Act. The requirement for demonstrating no potential to discharge is not being extended to small and medium AFOs since the specific criteria that must be met prior to becoming CAFOs requires the existence of a discharge. Whereas large AFOs are defined as CAFOs based on number of animals alone, small and medium AFOs only become CAFOs

after meeting specific discharge-related criteria. A small AFO can only be designated as a CAFO by the State Director or Regional Administrator where it is determined that it is a significant contributor of pollutants to waters of the U.S. A medium AFO can become a CAFO by designation or definition. As in the case of small AFOs, a medium AFO can only be designated where it is determined to be a significant contributor of pollutants to waters of the United States. A medium AFO that is a CAFO by definition must meet one of the two "method of discharge" criteria prior to being defined as a CAFO. Thus, it is meaningless to consider such facilities as having no potential to discharge.

EPA's intention is that the term "no potential to discharge" is to be narrowly interpreted and applied by permitting authorities. This provision is intended to be a high bar that excludes those Large CAFOs from having an NPDES permit only where the CAFO can demonstrate to a degree of certainty that they have no potential to discharge to the waters of the United States. The no potential to discharge status is intended to provide relief where there truly is no potential for a CAFO's manure or wastewater to reach waters of the United States under any circumstances or conditions. Such circumstances would include, for example, CAFOs that are located in arid areas and far from any water body or those that have completely closed cycle systems for managing their wastes and that do not land apply their wastes. For example, a CAFO that meets the following conditions might be able to demonstrate no potential to discharge: (1) Located in an arid or semi-arid environment; (2) stores all its manure or litter in a permanent covered containment structure that prevents wind dispersal and precipitation from contacting the manure or litter; (3) has sufficient containment to hold all process wastewater and contaminated storm water and (4) does not land apply CAFO manure or litter because, for example, the CAFO sends all its manure or litter to a regulated, offsite fertilizer plant or composting facility. In particular, EPA believes that land application of its manure and wastewater would, in most cases, be enough by itself to indicate that a CAFO does have a potential to discharge (although conceivably no potential to discharge could be shown based on the physical features of the site, such as lack of proximity to waters of the United States). This discussion should help to address commenters concerns that there could be inconsistencies in how permitting authorities could interpret and apply the standard for "no potential to discharge".

The term "no potential to discharge" means that there is no potential for any CAFO manure, litter, or wastewater to be added to waters of the United States from an operation's production or land application areas, without qualification. If a Large CAFO chooses to make a demonstration of no potential to discharge, it is the CAFO's responsibility to provide appropriate supporting information that the permitting authority can use when reviewing the demonstration. The supporting information should include, for example, a detailed description of the types of containment used for manure focusing on the attributes of the containment that ensure no discharges will occur. In addition, there may be instances where after preliminary review of the demonstration, the permitting authority may require the submission of supplemental information to assist in making a determination.

EPA disagrees with commenters' statements that the demonstration of "no potential to discharge" will place an impossible or excessively costly burden on facilities. EPA believes that, in many instances, the information that is specified in 40 CFR 122.23(f)(2) will be adequate for the Director to determine whether or not the facility has a potential to discharge. In such instances, there would be no greater cost to the facility than if it were to apply for a permit. If additional information is necessary, the Agency does not believe that it will result in greatly increased costs, because such information (including, for example, design specifications or other technical information) would be readily available to the facility and could be easily provided to the permitting authority.

Today's rule requires that a request for a no potential to discharge determination include most of the information required for a permit application, as specified in § 122.21(f) and (i)(1)(i) through (ix). This information will serve as the primary source of information relating to the facility's qualifications to avoid an NPDES permit. While some additional information may be available to the Director, including for example regional rainfall, soil, and hydrological conditions, the Director may require supplemental, site-specific information to make this determination. However, EPA is not requiring a CAFO owner or operator pursuing a no potential to discharge determination to certify to the development of its nutrient

management plan, as required by § 122.21(i)(1)(x) for a CAFO that seeks permit coverage after December 31, 2006.

Within 90 days of receiving a request for a no potential to discharge determination the permitting authority will notify the CAFO of its decision on the request. During this review period, a CAFO that has submitted a request for a no potential to discharge determination does not have a duty to seek coverage under an NPDES permit. The final rule differs from the proposal in not imposing a duty to apply on CAFOs that have submitted a no potential to discharge request until there is a denial of the request by the Director. EPA believes that this is a preferable approach, because it does not risk the imposition of NPDES permit requirements on CAFOs even though they may qualify for a determination that they have no potential to discharge.

To guard against abuse of this provision, the Agency is establishing a limited time of 90 days for the Director to make its determination. If the permitting authority finds that no potential to discharge has not been demonstrated, the CAFO owner or operator must seek permit coverage within 30 days of the denial of the request. States may use the information submitted with the request for a no potential to discharge determination to proceed with individual permit development or for coverage under a general permit. However, in order to obtain coverage, the CAFO owner or operator would also be required to provide a request for coverage and include the information required by § 122.21(i)(1)(x), when applicable. After all necessary information is submitted, and before making a final decision to grant a "no potential to discharge" determination, today's rule requires the Director to issue a public notice stating that a no potential to discharge request has been received. This notice must be accompanied by a fact sheet which includes, when applicable: (1) A brief description of the type of facility or activity which is the subject of the no potential to discharge determination; (2) a brief summary of the factual basis, upon which the request is based, for granting the no potential to discharge determination; and (3) a description of the procedures for reaching a final decision on the no potential to discharge determination.

The Director must base the decision to grant a no potential to discharge determination on the administrative record, which includes all information submitted in support of a no potential to discharge determination and any other supporting data gathered by the permitting authority. If the Director's final decision is to deny the "no potential to discharge" determination, the CAFO owner or operator must submit a permit application within 30 days after denial of the no potential to discharge determination. The Agency believes that the process described above addresses concerns raised by commenters that States might abuse the intended effect of this provision and allow facilities that should be permitted as CAFOs to avoid permitting. The Agency believes this process should ensure that the Director has adequate information to properly decide whether a facility has a potential to discharge or not, and also ensures that the public will be made aware of such determinations and can act appropriately if it appears that determinations are not being made as required by this provision. Also, as noted above, facilities that actually do discharge without a permit are subject to enforcement for a violation of the Clean Water Act—even if they have previously received a no potential to discharge determination. This should provide a strong incentive to CAFOs not to file a frivolous request.

State Rules for No Potential To Discharge Determinations

DEPARTMENT OF ENVIRONMENTAL QUALITY

WATER BUREAU

WATER RESOURCES PROTECTION

PART 21. WASTEWATER DISCHARGE PERMITS

(4) In making determinations for no potential to discharge for large CAFOs, all of the following apply:

(a) The department, upon request, may make a determination that a specific large CAFO has no potential to discharge pollutants to waters of the state. In making this determination, the department shall consider the potential for discharges from both the production area and any land application areas. The department shall also consider any record of prior discharges by the CAFO. In no case may the CAFO be determined to have no potential to discharge if it has had a discharge within 5 years before the date of the request submitted under subdivision (b) of this subrule. For purposes of this rule, the term 'no potential to discharge' means that there is no potential for any CAFO production area waste or CAFO process wastewater to be added to waters of the state under any circumstance or climatic condition. A determination that there is no potential to discharge only relates to discharges of production area waste and CAFO process wastewater covered by this rule.

(b) In requesting a determination of no potential to discharge, the CAFO owner or operator shall submit any information that will support such a determination. Such information shall include all of the information specified in 40 C.F.R. §§122.21(f) and (i)(1)(i) to (ix) (2003) and include documentation showing that the CAFO has been verified under the livestock system of the Michigan agriculture environmental assurance program (MAEAP), or successor program, if such a program is available. The department has discretion to require additional information to supplement the request, and may also gather additional information through physical inspection of the CAFO.

(c) Before making a final decision to grant a no potential to discharge determination, the department shall issue a notice to the public stating that a no potential to discharge request has been received. This notice shall be accompanied by a fact sheet which includes the following, if applicable:

(i) A brief description of the type of facility or activity which is the subject of the no potential to discharge determination.

(ii) A brief summary of the factual basis, upon which the request is based, for granting the no potential to discharge determination.

(iii) A description of the procedures for reaching a final decision on the no potential to discharge determination.

The department shall base the decision to grant a no potential to discharge determination on the administrative record, which includes all information submitted in support of or against a no potential to discharge determination and any other data gathered by the department. The department shall notify any CAFO seeking a no potential to discharge determination of its final determination within 180 days of receiving the request.

(d) The owner or operator shall request a no potential to discharge determination by the applicable permit application dates. If the department's final decision is to deny the no potential to discharge determination, then the owner or operator shall seek coverage under a permit within 30 days after notice of the denial.

(e) The no potential to discharge determination does not relieve the CAFO from the consequences of an actual discharge. Any unpermitted CAFO that discharges pollutants into the waters of this state is in violation of the act even if it has received a no potential to discharge determination from the department. Any CAFO that has received a determination of no potential to discharge, but who anticipates changes in circumstances that could create the potential for a discharge, shall contact the department and apply for and obtain NPDES permit authorization prior to the change of circumstances. If any CAFO that has received a determination of no potential to discharge has unanticipated changes in circumstances that could create the potential for a discharge, then the CAFO shall immediately notify the department and submit a complete application for coverage under an NPDES permit within 30 days after the change in circumstances.

(f) Where the department has issued a determination of no potential to discharge, the department retains the authority to subsequently require NPDES permit coverage for any of the following:

- (i) If circumstances at the facility change.
- (ii) If new information becomes available.
- (iii) If there is another reason for the department to determine that the CAFO has a potential to discharge.

(g) Notwithstanding any other provision of this section, a CAFO that has received a no potential to discharge determination from the department is not required to seek coverage under an NPDES permit that would otherwise be required.