

**Responsiveness Summary
For
Public Comments Received
On the**

New York State
Department of Environmental Conservation

SPDES General Permit
For
Concentrated Animal Feeding Operations

General Permit No. GP-0-09-001

Issued Pursuant to Article 17, Title 7 and Article 70
Of the Environmental Conservation Law

June 12, 2009

Background

The New York State Department of Environmental Conservation (the Department) is issuing a New York SPDES Environmental Conservation Law General Permit (the General Permit) for Concentrated Animal Feeding Operations (CAFOs) (GP-0-09-001). This General Permit is issued pursuant to Article 17, Title 7 and Article 70 of the Environmental Conservation Law (ECL).

The SPDES General Permit for Concentrated Animal Feeding Operations (CAFOs), GP-0-09-001, issued pursuant to Article 17, Title 7 and Article 70 of the Environmental Conservation Law (ECL), does not replace the SPDES General Permit for CAFOs, GP-04-02. An owner or operator of a CAFO that is deemed eligible for coverage under this General Permit must obtain coverage prior to operation of the CAFO facility. Operations that fit the definition of a CAFO facility, as defined in Article 17-0105 (16), 6 NYCRR 750-1.2(a) and Appendix A of this General Permit, constitute construction of a point source and therefore, pursuant to Articles 17-0701 (1)(a) and Article 17-0105 (16) of the ECL, the owner or operator must have coverage under a SPDES permit prior to operation of a CAFO facility.

Applicants seeking authorization for coverage under GP-0-09-001, are required to file a Notice of Intent and either a Comprehensive Nutrient Management Plan Certification or Annual Nutrient Management Plan Submittal to obtain such coverage. Applicable eligibility criteria are delineated in Part I of the General Permit.

Introduction

The New York State Department of Environmental Conservation has prepared this responsiveness summary to address the comments that were received on the draft SPDES General Permit for Concentrated Animal Feeding Operations, GP-0-09-001.

The draft General Permit was published for public review and comment in the Environmental Notice Bulletin (ENB) on December 10, 2008. The Department provided a 45 day comment period that ended on January 26, 2009. A list of the parties that commented on the draft General Permit begins on page 3.

The responsiveness summary generally addresses all comments received, with the exception of comments dealing with editorial or formatting changes. The comments have been organized to follow the format of the draft General Permit with general comments addressed at the end of the responsiveness summary.

LISTING OF COMMENTERS

1	Gary Abraham	Concerned Citizens for Cattaraugus County
2	Timothy & Renee Alford	Locust Hill Farm
3	Leslie Armstrong	New York State Resident
4	William Ashley	New York State Resident
5	Darrel J. Aubertine	New York State Senate
6	John Azzone	New York State Resident
7	Larry Bailey	Walker Farms, LLC
8	Gene Baur	Farm Sanctuary, Inc.
9	Paul Bencal	New York State Resident
10	Eric Bever	Champlain Valley Agronomics
11	Brian Beyer	New York State Resident
12	Brian J. Boerman	Certified Planner, Agricultural Consulting Services, Inc.
13	Kristen Bossard	AEM certified planner Oneida County SWCD
14	Mark Bray	New York State Resident
15	Carol Brodie	New York State Resident
16	Jay Canzonier	Certified Crop Advisor
17	William Cook	New York State Resident
18	John Crouch	New York State Resident
19	Daniel Crowell	New York State Resident
20	John Currie	New York State Resident
21	Andy Dugan	Blue Seal
22	Dawn Durow	New York State Resident
23	Raymond Dykeman	New York State Resident
24	Larry Eckhardt	New York State Resident
25	Adrienne Esposito	Citizens Campaign for the Environment
26	Sonia Faruqi	New York State Resident
27	Jo-Anne M. Faulkner	Oneida County SWCD
28	Harry Fefee	New York State Resident
29	David Fisher	Mapleview Dairy, LLC
30	Lisa Flanzraich	New York State Resident
31	Paula Flanzraich	New York State Resident
32	Franklin Flis	Certified Planner, MGK Enterprises, LLC
33	Marianne Friers	New York State Resident
34	Ana A. Garcia	New York State Resident
35	Ed Gates	Seneca Valley Farms
36	John Gingerich	New York State Poultry Association
37	Brad Goldberg	Animal Welfare Advocacy
38	Suzanne Gorman	New York State Resident
39	Jon Greenwood	Dairy Farmer
40	Ted Greenwood	New York State Resident
41	Barry Griffiths	Stitzel's Waterpoint Farms, Inc.
42	Cecile Gunset	New York State Resident

43	Norman Gustafson	New York State Resident
44	Brian Hall	CPESC, CCA, Onondaga County SWCD
45	Charles Hanehan	New York State Resident
46	Kurt Hanehan	Dairy Farmer
47	Kurt Hanehan	New York State Resident
48	David Hardie	New York State Resident
49	Fred Harrington	New York State Resident
50	Meghan Hauser	Table Rock Farm, Inc.
51	Wenonah Hauter	Food & Water Watch
52	Dale Hemminger	Hemdale Farms and Greenhouses
53	Marcus Henley	New York State Resident
54	David Huse	New York State Resident
55	Angela Inglis	New York State Resident
56	Vickie Jennings	New York State Resident
57	George Kappelt	New York State Resident
58	Jennifer Karelus	New York State Resident
59	Brad Keating	Dairy Farmers of America Northeast Council
60	Mark Kenyon	Dairy Farmer
61	Diana Kurz	New York State Resident
62	Patrick Kwan	Humane Society of the United States
63	Chuck Kyle	New York State Resident
64	Robert Laskowski	New York State Resident
65	Fred Lightfoote	New York State Resident
66	Lyn Main	Berkshire Valley Holsteins
67	Terry McClelland	Certified Planner
68	Helena Mc Donnell	New York State Resident
69	Stephen McKnight	McKnight's River Breeze Farm
70	Jean McMahan	New York State Resident
71	Russ Mead	Farm Sanctuary
72	Dale Morse	Morse Agronomics Ltd.
73	Wendy Moscow	New York State Resident
74	Anna Meyer	New York State Resident
75	Jeffrey Mural	New York State Resident
76	Katherine Nadeau	Environmental Advocates of New York
77	John A. Noble	Noblehurst Farms, Inc.
78	Jeffrey Odefey	Waterkeeper Alliance, Inc
79	David Page	New York State Resident
80	Bennett Palmer	New York State Resident
81	Jennifer Parrucci	New York State Resident
82	David Peck	Peckhaven Farm
83	James R. Peck	Certified Planner, ConsulAgr, Inc.
84	Roger Peck	New York State Resident
85	Ted Peck	New York State Resident
86	Laura Pedersen	New York State Resident
87	Jane E. Phillips	Ohio Alliance for Responsible Agriculture
88	Ronald F. Porter	Dairy Farmer

89	Caroline Potter	Northeast Dairy Producers Association
90	Adrienne Prettyman	New York State Resident
91	Edward Primrose	New York State Resident
92	James & Margaret Puszcz	New York State Resident
93	Ernest Ramsey	New York State Resident
94	Connie and Dan Randolph	Environmentally Concerned Citizens of Montezuma
95	Lou (aka Lucille) Rathbun	New York State Resident
96	Lisa Reff	New York State Resident
97	Meghan Reiff	New York State Resident
98	Greg Rejman	Sunnyside Farms
99	Greg Rejman	New York State Resident
100	Erin Riddle	Sierra Club Atlantic Chapter
101	Sharon Rossiter	Dairy Farmer
102	Sharon Rossiter	New York State Resident
103	Douglas Shelmidine	New York State Resident
104	Robert A. Smith	First Pioneer Farm Credit, Farm Credit of Western New York and Yankee Farm Credit
105	Aaron Stauffer	New York State Resident
106	Daniel L. Steward	Certified Planner Western New York Crop Management Association
107	John R. Tauzel	New York Farm Bureau
108	Jonathan Taylor	New York State Resident
109	Robyn Taylor	Farm Sanctuary
110	Elizabeth Ungar	New York State Resident
111	Christine Watkins	NYS Conservation District Employees Association
112	Ron and Alice Wellenstein	Stitzel's Waterpoint Farms, Inc.
113	Greg Wickham	Dairylea Cooperative Inc.
114	Brian J. Wohnsiedler	Jefferson County SWCD
115	Sandra Wright	New York State Resident
116	Bill Young	Farmer
117	Dirk Young	Twin Birch Dairy LLC
118	Douglas Young	New York State Resident
119	Kelly Young	New York State Resident
120	Stuart Young	New York State Resident
121	Thomas Young	New York State Resident

Late Commenters

122	Anna Gallo	New York State Resident
123	Dan Randolph	New York State Resident
124	Edgar King	New York State Resident
125	Edgar King	Kings-Ransom Farm LLC
126	MariJane Post	New York State Resident
127	Gregg W McConnell	First Pioneer Farm Credit, ACA
128	Robert F. Hagemann III	Jefferson County Office of the Administrator

Responsiveness Summary

Preface

Comment 1: DEC states that application for permit coverage requires the submission of a notice of intent and either CNMP certification or Annual NMP. NYFB requests that this be amended to only require an NOI and a CNMP Certification. (107)

Response: Comment noted. However, the requirement for Large CAFOs to submit an Annual Nutrient Management Plan as part of the application for permit coverage is necessary for the Department to oversee the regulatory compliance of these facilities.

Comment 2: DEC notes that an owner or operator must obtain permit coverage “prior to operation of the CAFO facility.” We do not believe this appropriately takes into account existing operations. Therefore we request the insertion of language clarifying existing CAFO situations. For example: ...prior to the operation of a new CAFO facility or within one year of permit issuance for existing CAFO facilities, or as determined by DEC for farms transitioning from the CWA CAFO permit . The one year time frame specified for existing facilities acknowledges that existing operations have six months from permit issuance to file an NOI and appropriate CNMP Certification, it then provides 6 months time for DEC to review and determine whether to grant permit coverage. The final clause of the added language allows for farms under the CWA CAFO permit to transition in the future should they achieve a no-discharge or propose to discharge status. (107)

Response: The Department has added text to the preface of the General Permit to reflect this comment.

Comment 3: The executive summary states “DEC may take action if staff observe ‘gross water quality violations’ caused by farm practices that can be traced to the source, even if the practice was in compliance with the Comprehensive Nutrient Management Plan (CNMP) of the farm.” The undersigned recommend that the permit should mandate action by DEC for “gross water quality violations.” (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: ECL 17-0501 prescribes that it is illegal for a person to directly or indirectly cause or contribute to a Water Quality Standards violation, whether deemed “gross” or “minor”. The General Permit articulates requirements for permittees to follow and does not prescribe actions for Department staff.

Part I. PERMIT COVERAGE AND LIMITATIONS

A. Facilities Eligible To Be Covered By This Permit

Comment 4: Public Notice. The General Permits and the Notices of Intent (NOI) should be published in both the state’s Environmental Notice Bulletin (ENB) and in the newspaper/s serving the area where the CAFO under consideration is located. All eligibility determinations should also be noticed in the ENB and in local

newspapers where the CAFO is located. Members of the public should be allowed to request notice by mail or electronically of the receipt of an NOI, the permitting authority's proposed action, and the terms of the NMP proposed to be incorporated into the permit, as suggested by EPA (Federal Register Vol. 73, No. 225 pg. 7040). For each NOI, the DEC should solicit comments from the municipality in which the CAFO is located. Again, neighbors and local governments often have valuable information regarding nearby CAFO operations, and by soliciting comment from the municipality, the DEC can further involve those with on-the-ground information. (76)

Response: The public has a right to review non-privileged, final agency determinations through the FOIL process if the information requested is not first voluntarily provided by the administrative agency. Documents generated as part of an administrative agency's decision-making process are exempt from public disclosure as privileged, inter-agency communications and can be withheld pursuant to the NY Public Officer's Law Section 87(2)(g).

Comment 5: NYFB is generally supportive of DEC's proposed qualifications for eligibility under the ECL permit. We believe that farms that have implemented BMPs as proposed by DEC do not discharge and do not propose to discharge. We note that the eligibility requirements provided in this section relating to existing Medium CAFOs do not provide a complete picture of needed BMP implementation for permit eligibility. We suggest including a reference to Part III(C)(a)(iii) of the permit. (107)

Response: The Department has added a reference to Part III.C. to the eligibility requirements for Medium CAFOs.

Comment 6: Permit Eligibility. The DEC permit should not be a "no discharge" permit. This designation does not follow the example set forth by the EPA. It puts NY producers at an automatic disadvantage by which they are being assigned guilt they would not be exposed to under the CWA permit. Change it to a "discharge", or "propose to discharge permit" to mirror the language in the CWA permit. (16)

Response: Facilities that discharge or propose to discharge are not eligible for coverage under GP-0-09-001 and must obtain Clean Water Act SPDES permit coverage.

Comment 7: Please clarify "New Medium" and "New Large" CAFO. Does "New" refer to newly permitted (may have been more than 200 cows for some time) as well as brand new operations and operations that have newly expanded to more than 200 or 700 cows? (89)

Response: As defined in Appendix A – Definitions: New CAFO means those operations that meet the definition of a Medium or Large CAFO and are constructed after the effective date of this General Permit. Therefore, facilities that "may have been more than 200 cows for some time" would not be considered "new CAFOs". These facilities would be considered "existing CAFOs".

Comment 8: Existing Facilities. Is an "Existing Medium CAFO" a farm that is permitted under the current permit or one that meets the size threshold? (89)

Response: As defined in Appendix A – Definitions: Existing CAFO means a CAFO that met the definition of a CAFO as of the effective date of this General Permit. CAFOs are defined by animal numbers and stabling or confining animals for a total of 45 days or more in any 12-month period in animal confinement areas that do not sustain crops, vegetation, forage growth, or post-harvest residues in the normal growing season.

Comment 9: Existing Large CAFOs. It seems that many Large CAFO’s will want to apply for this permit; questions remain about the liability associated with farms seeking this permit and the actual protections afforded specifically to the Large CAFO’s in New York instead of the CWA permit. It’s apparent that the DEC will ultimately decide which farms they accept into the state permit with a process that seems it could lend itself to subjective decision making. (12)

Response: The Department will review permit applications submitted by existing Large CAFOs that believe they have met the eligibility requirements described in Part I of this General Permit and have submitted the required information. Department staff cannot speculate as to how many Large CAFOs will apply for General Permit coverage. In determining whether a facility discharges or proposes to discharge, staff will examine each facility’s eligibility based upon Part I. of the General Permit and the individual facility’s compliance history.

Comment 10: DEC is generally proposing that existing Large CAFOs be eligible for permit coverage provided they have implemented all practices identified in the CNMP. This would seem to imply that all practices installed for enhancement purposes must also be complete. As we understand, enhancement practices are those that go above and beyond what is required within the permit to protect water quality. We do not believe that DEC’s intention is to limit permit coverage for farms wishing, over a period of time, to provide enhanced environmental protection. We therefore suggest that the word ‘required’ be added so that the provision reads: Unless excluded from coverage...Large CAFOs that have fully implemented all required practices identified in the CNMP are eligible.... (107)

Response: The Department has added language to the General Permit to address this concern.

Comment 11: We are strongly supportive of allowing both medium and Large CAFO farms to be eligible under the ECL permit. (107)

Response: The Department accepts and appreciates this comment.

B. Maintaining Water Quality

Comment 12: DEC notes that it shall be a violation of this permit to create a contravention of water quality pursuant to specific rules and regulations of the Department (6 NYCRR). This is the first instance of several within the permit where the Department references specific statutory and regulatory citations. It is our understanding that these citations refer to the regulations as written on the effective date of the permit. This enables regulated farms to understand fully the implications of filing for permit coverage. We are requesting that the Department

clarify in the response to comments that subsequent revisions to the cited regulations would not be enforceable as part of this permit. (107)

Response: CAFOs must continue to operate in conjunction with all current federal and state laws and regulations, local ordinances and obtain any permits required for such compliance. Specifically, if the Environmental Conservation Law or any associated state regulations are revised during the pendency of the General Permit, CAFOs will need to adjust operations to remain in compliance. However, any changes to NRCS standards during the pendency of the General Permit will need to be addressed by the facility when the permit is re-issued in 2014.

Comment 13: Please clarify that while certain precipitation-related runoff from fields could be a violation of water quality standards under the ECL, such runoff is not, on its face, a violation of the CWA as per the agricultural stormwater exemption. (89)

Response: Field or production area discharges from a CAFO could cause or contribute to a Water Quality Standards violation (ECL 17-0501) if the discharge impacts a water of the state, in excess of the limits noted in 6 NYCRR Parts 700-705. The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14). Where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge. Clarifying language has been added to the General Permit to address this concern.

Comment 14: In CAFO Work Group meetings, we have heard a distinction made between “overflows” and “discharges.” This distinction is ignored in I.B. and the terms should not be used interchangeably. Please clarify each term’s correct use, including the provision of examples. (89)

Response: Comment noted. Department staff crafted this language in Part I.B. to distinguish between an overflow and a discharge. Please reference Appendix A of the General Permit for these definitions. Part I.B. provides that under certain circumstances (e.g., extreme weather), pollutants may overflow from the production area even though the CAFO is following its CNMP. This overflow of pollutants then becomes a discharge when it contacts with a surface water of the state.

Comment 15: We recommend a clear statement regarding the CNMP’s role in achieving compliance with the Permit. As such, we recommend this addition: “A facility does not discharge or propose to discharge when it has implemented a CNMP.” (89)

Response: Comment noted. However, as defined by EPA in the 2008 CAFO Rule, a facility does not discharge or propose to discharge when it is designed, constructed,

operated and maintained such that they do not discharge. Therefore, simply implementing the provisions of a CNMP that is updated annually does not assure adherence with the necessary daily operational and maintenance requirements needed to prevent a discharge.

Comment 16: Extreme Precipitation. We are strongly supportive of the provisions of this subpart. (107)

Response: The Department accepts and appreciates this comment.

Comment 17: A zero discharge as defined in the permit from the production area versus a water quality standard seems nearly impossible to reach or maintain. (88)

Response: Comment noted. However, facilities that discharge or propose to discharge are not eligible for coverage under GP-0-09-001 and must obtain Clean Water Act SPDES permit coverage.

Comment 18: Releases from Properly Operated and Maintained BMPs. In the second paragraph of the subpart, DEC discusses wastewater treatment strips. Again, we are supportive of this provision. We do suggest, however, that DEC expand this provision to include not just those filter strips in accordance with the current NRCS NY635, but all filter strips deemed to “substantially meet the intent of the current NRCS standard” as such process is defined in Part III(A)(c)(ii)(1). Such vegetative filter strips would meet the intent of the current NRCS NY 635 from a water quality protection perspective and therefore should be provided the same consideration under this provision. (107)

Response: Comment noted. However, the paragraph noted has been removed. Facilities that discharge or propose to discharge are not eligible for coverage under GP-0-09-001 and must obtain Clean Water Act SPDES permit coverage.

Comment 19: Releases from Properly Operated and Maintained BMPs. We agree that outflow from a “properly designed, constructed, operated and maintained” wastewater treatment strip does not constitute a discharge. To clarify this point, we suggest stating: “Any and all outflow from a structure that is properly designed, constructed, operated and maintained in accordance with the NRCS Conservation Practice Standards in place at the time the structure was installed is not a discharge.” (89)

Response: Comment noted. However, the paragraph noted has been removed. Facilities that discharge or propose to discharge are not eligible for coverage under GP-0-09-001 and must obtain Clean Water Act SPDES permit coverage.

Comment 20: Releases from Properly Operated and Maintained BMPs. This paragraph is confusing in its goal. It’s OK to “overflow” but not “discharge”? Can the farm and the planner determine what amounts to an “overflow” versus a “discharge”? This language creates conflict in interpretation b/w the regulator (DEC) and the administrator (Farm/Planner) of the permit which could create undue disagreement or litigation. We recommend eliminating the language about

overflows from a functioning BMP and stick to not allowing farms to discharge. (12)

Response: Part I.B. of the General Permit provides that under certain circumstances (e.g., extreme weather), pollutants may overflow from the production area even though the CAFO is following its CNMP. This overflow of pollutants then becomes a discharge when it contacts with a surface water of the state.

C. Exclusions From Coverage Under This Permit

Comment 21: Medium CAFOs which have been notified by the Department to file for a CWA CAFO SPDES General Permit. When is this going to happen? We recommend DEC define how and when a farm will be notified so the farm can plan accordingly for summer 2009 or eliminate the need of the Department to notify. (12)

Response: Comment noted. However, facilities may be notified at any time that Clean Water Act CAFO SPDES permit coverage is necessary based on how the facility is designed, constructed operated or maintained such that a discharge is occurring or is being proposed.

Comment 22: Medium CAFO Eligibility. Please clarify that Medium CAFOs do not have to certify that they do not discharge or propose to discharge in order to be eligible for this permit. While no such requirement is included in I.C. for Medium CAFOs, the “Fact Sheet” accompanying this permit notes that the “draft State General Permit ...requires all medium and Large CAFOs who do not discharge or propose to discharge to seek State permit coverage.” (89)

Response: The Department has added additional language to Part I.A. to address this concern. Specifically, unless excluded from coverage in accordance with Part I.C. or Part I.D. of the General Permit, owners or operators of existing Medium CAFOs that have fully implemented all of the non-structural practices identified in the CNMP (unless the AEM certified planner and the owner and operator determine that a structural practice that is not yet scheduled to be installed is required in order for the non-structural practice to be fully operational), are complying with the implementation schedule requirements in Part III. and are appropriately operating and maintaining all implemented practices are eligible for coverage under this permit.

Comment 23: Large CAFOs that the Department has determined, prior to the date of coverage, to be causing or contributing to a water quality standards violation. Does this mean current consent agreement and any open violations? How far back is the department going to go back to find a discharge that will exclude a farm from permit coverage? It seems the department should be more transparent in this process. We recommend DEC define the period of time a farm has to be without a discharge or notice of violation to be excluded from permit coverage. (12)

Response: A facility that is causing or contributing to a water quality standards violation will be notified in writing by the Department of this situation including the necessary steps to eliminate the discharge(s) and to become eligible for coverage under this General Permit.

Comment 24: Large CAFOs which have been notified by the Department to file for a CWA CAFO SPDES General Permit. If a farm doesn't hear from the DEC and meets all other requirements outlined then it's implied that they will not be rejected in their request to be included in this permit? Give a date by which the Large Size farms the DEC want to exclude from this permit can expect this notification. (12)

Response: CAFOs that discharge or propose to discharge in accordance with Part I.B. of this General Permit and definitions provided in Appendix A of the General Permit must have Clean Water Act SPDES permit coverage. Language has been added to the General Permit to clarify this requirement.

Comment 25: The public has a right to review agency decisions. Under draft SPDES General Permit for CAFOs-0-09-001 DEC is also given the authority to notify a CAFO that it must "file for a CWA CAFO permit". Public review provides insight into DEC's use of its permitting discretion, and the public has the right to review the information on which DEC is basing that discretion. And as stated earlier, making information on which a government agency bases decisions freely available is a pillar of democracy. (76)

Response: CAFOs that discharge or propose to discharge in accordance with Part I.B. of this General Permit and definitions provided in Appendix A of the General Permit must have Clean Water Act SPDES permit coverage. The public has a right to review non-privileged, final agency determinations through the FOIL process if the information requested is not first voluntarily provided by the administrative agency. Documents generated as part of an administrative agency's decision-making process are exempt from public disclosure as privileged, inter-agency communications and can be withheld pursuant to the NY Public Officer's Law Section 87(2)(g).

D. Requiring An Individual SPDES Permit

Comment 26: The public has a right to review agency decisions. DEC is given discretion to require that a CAFO apply for an individual permit. Public review provides insight into DEC's use of its permitting discretion, and the public has the right to review the information on which DEC is basing that discretion. And as stated earlier, making information on which a government agency bases decisions freely available is a pillar of democracy. (76)

Response: Facilities that must file for an individual SPDES permit will be notified in writing by the Department of this situation including the necessary steps to obtain permit coverage. The public will have an opportunity to comment on the individual permit application as per 6 NYCRR Part 621.7.

Comment 27: We urge DEC to set a time for advance notice to farms that will be required to obtain an individual permit. Generally, please indicate what is expected under an individual permit scenario, for example 6 NYCRR 750-1.21(e)(2) allows 180 days before coverage under a General Permit would be terminated. Clarity of compliance requirements is needed, as well as a timeline for compliance after issuance of an individual SPDES permit. This latter timeline can be included in a Compliance Schedule within the Individual Permit. (89)

Response: Facilities that must file for an individual SPDES permit will be notified in writing by the Department of this situation including the necessary steps to obtain permit coverage.

Comment 28: Large CAFOs which have been notified by the Department to file for an individual SPDES permit as discussed.... When and how is this going to happen? Define how and when a farm will be notified so the farm can plan accordingly for summer 2009. (12)

Response: See response to comment 27.

E. Construction Activity at CAFO Facilities

Comment 29: NYFB is strongly supportive and appreciative of the proposed exemption from obtaining a SPDES General Permit for Stormwater Discharges from Construction Activity. (107)

Response: The Department has revised the language in the General Permit as construction activities identified in Sections C through E of Appendix B are now required to obtain coverage under the SPDES General Permit for Stormwater Discharges from Construction Activity by submitting a Notice of Intent (NOI) prior to commencing construction because this General Permit is issued pursuant to the Department's authority in ECL 17-0701 as a State Permit, dual coverage cannot be extended for the federally-delegated construction stormwater permit. The permit language specifies that the SPDES Construction Permit NOI shall be used by the owner to obtain coverage for these construction activities.

Comment 30: I strongly support the inclusion of an exemption from the Phase II Stormwater permit requirement in both CAFO permits. (3, 4, 6, 9, 11, 14, 15, 17, 18, 19, 20, 22, 23, 24, 28, 33, 40, 43, 45, 47, 48, 49, 53, 54, 56, 57, 58, 59, 63, 64, 65, 74, 75, 79, 80, 84, 85, 86, 91, 92, 93, 95, 99, 102, 103, 105, 108, 113, 115, 118, 119, 120, 121, 124, 126)

Response: See response to comment 29.

Comment 31: The inclusion of the Storm water permit is a positive change. (39)

Response: See response to comment 29.

Comment 32: We agree that farms under this permit should not be required to obtain a stormwater permit for construction. (89)

Response: See response to comment 29.

Comment 33: We believe that DEC needs to educate the agricultural community about the required practices during construction activities. (89)

Response: Comment noted.

Part II. OBTAINING PERMIT COVERAGE

A. Duty to File A Notice of Intent

Comment 34: Please specify what “such information at such times in such form” may mean. What information does DEC reasonably expect to request? Does DEC anticipate requesting additional information besides the information specifically requested under the NOI included in GP-04-02? (89)

Response: Comment noted. The information required for a facility to obtain coverage under this General Permit is provided in Part II.A. In short, existing Medium CAFOs will be required to submit a Notice of Intent and CNMP Certification and existing Large CAFOs will be required to submit a Notice of Intent and Annual Nutrient Management Plan to obtain permit coverage.

Comment 35: Does “existing Medium CAFOs” mean only those permitted under GP-04-02? (89)

Response: Existing Medium CAFO means a Medium CAFO that meets the definition of a CAFO as of the effective date of this General Permit.

Comment 36: New permit application via a new NOI. Will this result in new permit numbers and/or designations of various operations? (32)

Response: An existing facility granted coverage under this General Permit will maintain the same permit number.

Comment 37: How will decisions be made on existing vs. a new applicant? (32)

Response: See response to comment 35.

Comment 38: If a farm that is currently under a permit decides to reduce head size to less than 200 mature cows and less than 300 heifers after July 1st 2009, will they need to send in termination or just not send in a NOI for the new permit? (32)

Response: A farm that is less than 200 mature dairy cows or less than 300 heifers is not required to maintain permit coverage unless otherwise notified by the Department. A facility that intends to stay below the minimum animal thresholds defining a Medium CAFO and wishes to terminate permit coverage must submit a Notice of Termination to the Department.

Comment 39: We are supportive of Medium CAFOs only being required to submit an NOI and CNMP Certification to obtain permit coverage. (107)

Response: The Department accepts and appreciates this comment.

Comment 40: We believe Large CAFOs should also only be required to file an NOI and CNMP Certification to obtain permit coverage. (107)

Response: Comment noted. However, the requirement for Large CAFOs to submit an Annual Nutrient Management Plan as part of the application for permit coverage, annually and when major changes are implemented is necessary for the Department to oversee the regulatory compliance of these facilities.

Comment 41: As noted previously, the strength of New York’s CAFO program lies in the Certified Planner process. Unlike many states, New York has established a

third party audit system to ensure on-farm practices meet required standards and strategies. As an active partner in developing this system, DEC has the opportunity to ensure that planners in fact are designing CNMPs in-line with this permit. Therefore, we do not believe that water quality protection would be enhanced should the ECL permit require an Annual NMP submission for Large CAFOs. The submission of a CNMP Certification would provide the same guarantee that the CNMP has been updated in accordance with the permit standards. This approach would not weaken water quality protections since DEC always has the authority to request further information from farms. In fact, requiring a certification would streamline DEC's administration of the program. (107)

Response: Comment noted. However, the requirement for Large CAFOs to submit an Annual Nutrient Management Plan as part of the application for permit coverage, annually and when major changes are implemented is necessary for the Department to oversee the regulatory compliance of these facilities.

Comment 42: Annual NMP Submittal. DEC should require the submittal of a Notice of Intent and CNMP certification [for medium and Large CAFOs] because both require the use of a AEM certified planner. It is my belief that this alone is public supervision and should meet the CWA. (88)

Response: See response to comment 41.

Comment 43: Annual NMP Submittal. NEDPA does not believe Large CAFOs should be required to submit such a report and sees no environmental benefit for requiring an additional reporting duty. NEDPA strongly urges this requirement be omitted in its entirety from any and all sections of this Permit. (89)

Response: See response to comment 41.

Comment 44: Giving the public enforcement of technical rules that they do not fully understand would place an undue burden on farm families. (82)

Response: The state Environmental Conservation Law, unlike the federal Clean Water Act (33 U.S.C. 1365), does not extend the authority for third-party, citizen law suits for permit violations by CAFOs and other facilities. The DEC retains sole enforcement authority under this General Permit, unless the public seeks to enforce discharges that contravene water quality standards.

Comment 45: Our records and plans should be kept confidential. I do not feel it is in the best interest of the DEC to empower the general public to police our farms. If our plans have been made, reviewed and accepted by certified planners, how will the environment be better off with neighbors or environmental groups such as the Farm Sanctuary going through our records and plans? (98)

Response: See response to comment 41.

Comment 46: I am concerned that any public disclosure of information to the public would result in direct harm to farm families. I am concerned about everything from stolen identities to frivolous lawsuits. (82)

Response: See response to comment 41.

Comment 47: I believe it is very important that Comprehensive Nutrient Management Plans (CNMPs) not be subject to public release, either through public posting or Freedom of Information Law (FOIL) requests. These plans contain proprietary information the release of which could be potentially damaging to the farm operation if misused or misunderstood. The release of similar information is not a mandate on all businesses, and I don't think it should be a mandate on farm businesses. (5)

Response: Pursuant to 6 NYCRR Parts 616 and 750-1.22, DEC has already determined that the summary information contained within the NOI, CNMP certification, and Annual NMP (submitted as per Part I.C. of this General Permit) do not meet the specific criteria to qualify as proprietary or confidential information. In order for information submitted to DEC to be considered confidential, and therefore exempt from disclosure, it must either be a "trade secret," "confidential commercial information," or "critical infrastructure." Please reference 6 NYCRR Part 616, which is available on the DEC website, for these specific definitions.

Comment 48: Annual NMP Submittal. I do not agree with your reasoning for having Large CAFO information submitted to DEC and available for the public. Large CAFOs should not be asked to submit anything that other farms are not submitting. (29)

Response: See response to comment 41.

Comment 49: Annual NMP Submittal. The issue of what is reported to DEC and thus available to the public is of great concern to many farmers. We understand that we must annually report to the DEC on manure produced and applied, but to also include drawings or narratives of farmsteads, as well as the location of all fields, and the amount of manure to be applied could be detrimental to the farm operation in the hands of the wrong person. In an age when the risk of agriterrorism is high, public access to this information not only jeopardizes the farm business, but also the welfare of the farm's livestock, and employees. A possible solution is to only allow public access on a complaint basis. If a certain person makes a complaint, in writing, about the actions of one farm, and upon DEC review the complaint is legitimate, the person making the complaint would only then be allowed access to that farm's ANMP if requested. (52)

Response: See response to comment 41.

Comment 50: Publicly available NMPs. I am adamantly opposed to public access of CAFO plans. A family farm is not only a private business, but also our family's residence. Besides concerns for business confidentiality, it's essential to protect our farm from activist groups, vandalism, frivolous lawsuits and agri-terrorist threats. Our Privacy Rights need to be protected. (101)

Response: See response to comment 41.

Comment 51: Publicly available NMPs. I am adamantly opposed to public access to CAFO plans. The point here is that these private and confidential plans should

not be in the hands of any public agency because it creates too much opportunity for harassment, abuse and security dangers for the farmers. (72)

Response: See response to comment 41.

Comment 52: I am opposed to the FOIL provision. I feel that as long as the planner and DEC finds a farm to be in compliance with the regulations that the details should not be foilable. (35)

Response: Pursuant to 6 NYCRR Parts 616 and 750-1.22, DEC has already determined that the summary information contained within the NOI, CNMP certification, and Annual NMP do not meet the specific criteria to qualify as proprietary or confidential information. In order for information submitted to DEC to be considered confidential, and therefore exempt from disclosure, it must either be a "trade secret," "confidential commercial information," or "critical infrastructure." Please reference 6 NYCRR Part 616, which is available on the DEC website, for these specific definitions.

However, if a CAFO submits documents marked "proprietary" or "confidential" to the Department, except those public documents specifically noted in Part V.F. of this General Permit, and these documents are responsive to a FOIL request, staff must conduct a confidential business information review as per 6 NYCRR Part 616 to determine whether the documents will retain their confidentiality exemption from disclosure. The DEC is legally obligated to review the FOIL request to determine which documents must be disclosed and withheld pursuant to the exceptions provided in the NY Public Officer's Law Section 87(2), and then subsequently disclose these non-privileged, responsive documents to the requester.

Comment 53: FOILABLE information. This is a burdensome provision, especially as even in rural settings, very few local citizens have an active understanding of how a dairy farm operates. I request that information about nutrient management practices as well as other sensitive business information be kept confidential. (50)

Response: See response to comment 52.

Comment 54: I think we should be able to know of any foil request for our farms, so that we are aware of who has a interest in what we are doing. (117)

Response: See response to comment 52.

Comment 55: I don't believe that there is any reason why any permit information should ever need to be public information. (46)

Response: See response to comment 52.

Comment 56: No portion of our CAFO plan needs to be in the hands of the state or public. Such action will only impair agriculture and be cost prohibitive. (2)

Response: See response to comment 52.

Comment 57: The requirements of what is expected to be included in a Farmstead Facility map should be the layout of barns and location of manure storage. Further detail should be confidential. (39)

Response: See response to comment 52.

Comment 58: Our Nutrient Management Plans should not be open to the public. They should be for the use of the farm and subject to the DEC, but not for public disclosure. We do not individually police our neighbors financial records for the IRS because they is not enough IRS agents. The same should be true for our farm plans. (116)

Response: See response to comment 52.

Comment 59: Publicly available CNMPs. It is a long-held tenet in this state and throughout the country that the technology based limitations contained within Clean Water Act are the floor for protecting water quality— not the ceiling. Even if CNMPs are not directly tied to effluent limits under the draft state SPDES permit, if submitted to the department and made public, the information contained within them will provide the department and the public with tools to help protect New York’s water quality. (76)

Response: The Department accepts and appreciates this comment. The requirement for Large CAFOs to submit an Annual Nutrient Management Plan as part of the application for permit coverage, annually and when major changes are implemented delineates the site-specific practices and implementation necessary to meet the requirements of this General Permit. This submittal allows the Department to oversee the regulatory compliance of these facilities.

Comment 60: It is essential that the entire Nutrient Management Plan be made public so that citizens can watch for violations of the permit terms. (26, 30, 31, 34, 38, 55, 61, 68, 70, 73, 81, 90, 96, 97, 110, 122, 123)

Response: Part II.A. of the General Permit requires CAFOs to submit with the NOI either an Annual NMP or CNMP Certification which are available to the public through the FOIL process. Because the Department has already determined these are public documents and do not meet 6 NYCRR Part 616’s criteria to retain confidentiality, they will be disclosed upon request. Also, the state Environmental Conservation Law, unlike the federal Clean Water Act (33 U.S.C. 1365), does not extend the authority for third-party, citizen law suits for permit violations by CAFOs and other facilities. The Department retains sole enforcement authority under this General Permit, unless the public seeks to enforce discharges that contravene water quality standards.

Comment 61: Publicly available NMPs. To make any citizen enforcement scheme work, the entire Nutrient Management Plan (NMP) - i.e., the farms' waste disposal methods upon which the permit is based - must be made public. (71, 109)

Response: See response to comment 60.

Comment 62: Publicly available CNMPs. The draft contains no public process for commenting on CNMPs or requesting public hearings for CAFOs seeking coverage under this permit. (76)

Response: Comment noted. However, the public has been afforded with an opportunity to review and comment on this draft General Permit including the technical requirements

that must be met in each facility-specific CNMP. The public has a right to review non-privileged, final agency determinations through the FOIL process if the information requested is not first voluntarily provided by the administrative agency. Documents generated as part of an administrative agency's decision-making process are exempt from public disclosure as privileged, inter-agency communications and can be withheld pursuant to the NY Public Officer's Law Section 87(2)(g).

Comment 63: Publicly available CNMPs. CNMPs provide information about what is being done at the farm to protect water quality. In this way they act as the facility/project description that would be required for any other SPDES permit—they describe the 'upstream' measures that are implemented to ensure compliance with water quality standards and prevent violations. (76)

Response: The Department received this comment and cannot provide a response because it does not solicit one.

Comment 64: Publicly available CNMPs. Provisions contained within CNMPs can also provide information to the public about any additional provisions DEC or certified planners deem necessary for the farm to enact to protect local waters. It allows the public to better understand if there are special circumstances occurring on a farm to better protect water quality. Also, CNMPs can allow DEC and the public the ability to discriminate between facilities and waterways which will benefit from increased scrutiny and those where minimal oversight is protective—allowing DEC to maximize resources in difficult economic times. (76)

Response: The Department received this comment and cannot provide a response because it does not solicit one.

Comment 65: Publicly available CNMPs. DEC has the obligation to have CNMPs at the agency and available for review so that DEC has adequate information with which to develop the 2014 permits. Understanding the state of farming in New York, the measures that have already been taken by many farms and the measures that remain to be undertaken to protect our waters is and will be of critical importance to DEC for developing protective and proper limits on CAFOs during the next round of permitting. (76)

Response: The Department will complete a full review of the facility-specific CNMP during CAFO compliance inspections.

Comment 66: In the spirit of environmental protection and acknowledgement of the public's right to protect our shared waterways, DEC should embrace EPA's conclusion (Federal Register Vol. 73, No. 225, p.70442) and require full CNMP submittal, review, public comment, and opportunity for public hearings for all CAFOs seeking permit coverage. (76)

Response: Comment noted. However, all CAFOs are required to work with an AEM certified planner to develop and implement a site-specific CNMP. Detailed facility information will be available to the public from that submitted in the Notice of Intent, CNMP Certification or Annual NMP and Annual Compliance Report for each individual facility.

Comment 67: Public access to information. The permit clearly states that the Notice Of Intent (NOI), permit, effluent data, Nutrient Management Plan template, and annual compliance report cannot be claimed as confidential. We recommend that the final permit should explicitly state that no information, submitted to the Department, can be claimed as “confidential.” (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: See response to comment 52.

Comment 68: The current ECL permit does not provide a transition mechanism for Medium CAFOs and Large CAFOs that, at the issuance of these permits, require coverage under the CWA permit. We recommend that an additional clause be added allowing farms covered under a CWA permit that then obtain no-discharge or propose to discharge status at some point in the future to obtain the ECL permit without penalty. (107)

Response: The Department has added a paragraph to Part II.A. of the General Permit to address this concern.

Comment 69: DEC has not specified in the permit how farmers will be alerted that coverage has been granted under this permit. We request that farmers appropriately submitting an NOI and CNMP certification be notified not later than eight months following the date of permit issuance whether they are provided permit coverage under this permit. If DEC does not provide a denial within the eight month time period, automatic coverage should be provided. (107)

Response: An acknowledgment letter will be provided to each facility that submits the required forms in an acceptable format. This letter will serve to notify a facility if coverage has been granted under this General Permit.

Comment 70: For new operations or existing CWA permitted operations that at some point in the future request ECL permit coverage, we request that DEC provide response not later than 60 days following NOI submission whether coverage is granted. If DEC does not provide a denial within the sixty day time period, automatic coverage should be provided. (107)

Response: See response to comment 69.

Comment 71: DEC should provide an automatic approval or acknowledgement to a farm within 60 days of receiving notification by the farm, unless substantial issues are identified and communicated to the farmer. (3, 4, 6, 9, 11, 14, 15, 17, 18, 19, 20, 22, 23, 24, 28, 33, 40, 43, 45, 47, 48, 49, 53, 54, 56, 57, 58, 59, 63, 64, 65, 69, 74, 75, 79, 80, 84, 85, 86, 91, 92, 93, 95, 99, 102, 103, 105, 108, 113, 115, 118, 119, 120, 121, 124, 126)

Response: See response to comment 69.

Comment 72: To the extent that DEC does require approvals and acknowledgement of notification, clear timelines on DEC are necessary to provide a degree of certainty to the farmer and consideration given to a set timeframe (60 days) with automatic approval if no DEC objection is indicated. (104)

Response: See response to comment 69.

Comment 73: Owners or operators of existing CAFOs eligible to be covered by this permit shall submit.....within 6 months from the date of permit issuance. Why six months to file? Use the same 30 day prior notice you use for new or expanded facilities. (12)

Response: The Department has amended Part II.A. of the General Permit to require submittal of the appropriate documentation by March 31, 2010.

Comment 74: What permit are these facilities covered under after the old permit expires? (12)

Response: Prior to expiration of CAFO GP 04-02 on June 30, 2009, the Department will be extending continued coverage to CAFOs under GP-04-02 as per the NY State Administrative Procedure Act Section 401(2), in order to allow potentially eligible facilities to request coverage under this new State CAFO SPDES General Permit. The Department will issue the new federal Clean Water Act SPDES CAFO General Permit, GP-0-09-002, in the near future to address the changes to federal rule and to be in compliance with those requirements. The re-issued federal Clean Water Act SPDES CAFO General Permit will replace the current Clean Water Act SPDES CAFO General Permit, GP-04-02.

B. Duty to File A Notice of Termination

Comment 75: Some operations may terminate permit coverage due to decreasing animal numbers below the minimum Medium CAFO thresholds. In those situations, farms should not be required to close down waste storage facilities. Therefore we request the following language change: For farms that are terminating livestock raising activities, proper management and/or... (107)

Response: The Department has added language to Part II.B. of the General Permit to address this concern.

Comment 76: Duty to File Notice of Termination. We believe some distinction needs to be made between termination – no animals at facility – termination – animal numbers below CAFO threshold. In addition, the first paragraph refers to closure of waste impoundments. Perhaps this standard is better suited to termination of a farm than the wastewater treatment facility is. (111, 114)

Response: The Department has added language to Part II.B. of the General Permit to address this concern.

Comment 77: In paragraph two of this subpart the use of the term “animal threshold” needs further modifiers. As currently written, it is unclear whether a farm exceeding the minimum threshold that defines a Medium CAFO would be subject to this provision. We believe the wording should be amended to read: ...Thirty (30) days prior to a facility expansion beyond the maximum animal threshold that defines a Medium CAFO,... (107)

Response: The Department has added language to Part II.B. of the General Permit to address this concern.

Comment 78: We are opposed to the proposed response for Medium CAFOs that exceed the maximum animal threshold without prior notification to DEC. The proposed response for these operations would be the immediate termination of permit coverage. We believe such penalty is a disproportionate action compared to the offense. We would suggest instead that such farms be required to automatically file a Notice of Termination and apply for CWA CAFO General Permit coverage, regardless of whether the farm has fully implemented all BMPs. Under this scenario, the farm would not lose permit coverage during while applying for the CWA permit. (107)

Response: The Department has changed the language in Part II.B. to address this concern. Specifically, Medium CAFOs that expand to Large CAFOs must notify the Department, submit the required paperwork, and implement all necessary practices to be in compliance with this General Permit as a Large CAFO a minimum of 15 days prior to the expansion. Failure to do so is a violation of the General Permit.

Comment 79: We do not believe that farms that cross the threshold and which have met the requirements should be subject to invalidation/termination of the Permit solely if they did not inform DEC 30 days prior to exceeding the Large CAFO threshold. We suggest the 30 day prior notice requirement be deleted and that farms be allowed to notify DEC during the annual update. (89)

Response: The Department has changed the language in Part II.B. to address this concern. Specifically, Medium CAFOs that expand to Large CAFOs must notify the Department, submit the required paperwork, and implement all necessary practices to be in compliance with this General Permit as a Large CAFO a minimum of 15 days prior to the expansion. Failure to do so is a violation of the General Permit. Additionally, Medium CAFOs approaching the maximum Medium CAFO size threshold may apply for coverage as a Large CAFO well in advance of the expansion.

Comment 80: Duty to File Notice of Termination. The requirements included in the second paragraph should be stated in plain language: “Medium CAFOs expanding to Large CAFO size must have all BMPs required by their CNMP implemented before exceeding the Large CAFO animal threshold.” (89)

Response: The Department has added language to Part II.B. of the General Permit to clarify. Specifically, 15 days prior to a Medium CAFOs expanding to Large CAFO size, the facility must have all BMPs required by their CNMP implemented and meet the eligibility criteria for this General Permit as a Large CAFO as described in Part I.A. and Appendix A and submit a revised NOI and Annual NMP to the Department.

Comment 81: Duty to File Notice of Termination. If the farm is meeting the Permit requirements, we do not see any environmental benefit to DEC being notified 30 days in advance of crossing the Large CAFO threshold and are concerned that this is an unnecessary administrative burden for CAFOs. (89)

Response: See response to comment 79.

Comment 82: Duty to File Notice of Termination. Medium CAFOs growing to a large should not need to notify DEC before they reach 700 cows or 1000 heifers. (29)

Response: See response to comment 80.

C. Duty to File A Notice of Transfer

No Comments.

Part III. COMPREHENSIVE NUTRIENT MANAGEMENT PLANS

A. Comprehensive Nutrient Management Plan (CNMP)

Comment 83: We recommend adding language that states: “Compliance with the CNMP is deemed to be compliance with this Permit.” (89)

Response: Comment noted. Compliance with this General Permit is achieved by following a CNMP developed in accordance with the New York State NRCS 312 standard and other applicable New York State NRCS standards as well as meeting the provisions outlined in the General Permit such as requirements for reporting, record retention, deadlines, etc.

Comment 84: Contact Person. I just don’t understand the purpose of this identifying the specific individuals at the facility that are responsible for all the activities required by the CNMP. I was under the impression that ultimately it is the responsibility if the permittee that all the provisions are complied with. The permittee should be the contact person and it is their responsibility to address all aspects of the facility’s CNMP. (44)

Response: Comment noted. The permittee is responsible for compliance with the General Permit. The permittee may or may not be the contact person. A contact person is necessary to facilitate communications between the Department and the CAFO for items such as scheduling of inspections, etc.

Comment 85: Contact Person. I don’t believe that revisions can be made to the CNMP without the certified planner being involved. (44)

Response: Correct. The Department has added language to Part III.A. of the General Permit to clarify.

Comment 86: CNMP Content. We agree that the CNMP should include all land areas where manure, litter or process wastewaters are stored. We do not, however, feel that the CNMP should include full fields where fertilizers that are obtained from off-farm sources are solely used as nutrient additions. (107)

Response: The CNMP shall address all production areas and land application areas under the control of the CAFO operation where manure, litter, or process wastewater is produced, stored or land applied. The CNMP shall also address fertilizer applications on those land application areas under the control of the CAFO operation that receive

manure, litter or process wastewater applications during the crop rotation. The Department has added language to Part III.A. to clarify this requirement.

Comment 87: CNMP Content. All areas where manure, litter, process wastewater or fertilizers are produced, land applied or stored on or for use by the facility shall be addressed in the CNMP. Should fertilizers be included in this paragraph? It is our opinion that it should not be included. (106)

Response: See response to comment 86.

Comment 88: CNMP Content. Based on previous conversations with your office about whether a satellite facility needs to be included in an operation, it was our understanding that if fermented feed was stored at the satellite facility and used for feed at the main facility, it needed to be included in the calculation of animal numbers. Perhaps the statement “Areas under control of the CAFO operation where fermented forages are stored and exported to the CAFO for feed, need to be included in the CNMP.” (106)

Response: The Department has added language to Part III.A. of the General Permit to address this concern.

Comment 89: Compliance with NRCS Standards. Giving certified planners overseen by NRCS the ability to create a plan that protects the environment while making good use of all resources involved will help create a sustainable agricultural industry. What matters is that the water quality is protected. Mandating how it is protected regardless of the unique circumstances on the farm results in wasted resources and does not guarantee that water quality is protected. We must insure that Planners have the flexibility to create plans that work. (82)

Response: The NRCS Standards have been developed over time using the experience of professional conservationists combined with the best science available. There are no other standards available for conservation practices dealing with water quality that provide this level of performance. Therefore, the CNMP must be developed and implemented by an AEM certified planner in accordance with all applicable NRCS standards.

Comment 90: I am concerned about the requirements to use the NRCS standards within the permits, especially as the requirements relate to existing BMPs. A more workable solution that identifies true environmental risk needs to be found. (3, 4, 6, 9, 11, 14, 15, 17, 18, 19, 20, 22, 23, 24, 28, 33, 40, 43, 45, 47, 48, 49, 53, 54, 56, 57, 58, 59, 63, 64, 65, 74, 75, 79, 80, 84, 85, 86, 91, 92, 93, 95, 99, 102, 103, 105, 108, 113, 115, 118, 119, 120, 121, 124, 126)

Response: See response to comment 89.

Comment 91: Compliance with NRCS Standards. We agree that NRCS Standards should be the basis for all planned BMPs. However, we feel that farms should be able to implement variations, based on sound CNMP planning and engineer approval that meets the same water quality objectives of the standard. (10)

Response: See response to comment 89.

Comment 92: Compliance with NRCS Standards. “Any variations in the implementation of the applicable NRCS standard are allowed...” Please clarify, because this sounds like a potential “loophole.” What would be considered sufficient justification that a variation from the standard is equally protective of water quality? Visual observation? Research data? Would an NRCS standard from another state, i.e. Vermont, be allowed? (13)

Response: The Department has modified Part III.A. of the General Permit to address this comment. The CNMP must be developed by an AEM certified planner and implemented by a permitted facility in accordance with all applicable New York State NRCS standards.

Comment 93: Compliance with NRCS Standards. The realities of climate change force us to recognize that the frequency of 24-hour, 25-year storm events is expected to increase. New York should not wait for the next disaster, but rather be encouraging new designs to handle more frequent and intense weather events, including 50 or 100-year storm events. We recommend that the Department require increased stormwater capacity for newly built CAFOs or those that undergo substantial increases. (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: NRCS standards and therefore this permit, require design to the 25 year event. While information is now available for an update of the magnitude of the 25 year event, an update of NRCS standards cannot occur until an update of the intensity of the 25 year event is completed. This work is under contract but will not be completed until late in 2010. The actual change to a specific runoff/precipitation design amount is not anticipated to be more than 15% (and may actually be reduced from current amounts in some places). The most significant changes are predicted to be in the higher return periods.

Comment 94: Compliance with NRCS Standards. All structures and practices covered under the 2009 final CAFO permits should be built and designed for the 100-year/24-hour rain events to ensure that CAFOs can protect water quality even as the intensity and frequency of storms increases. (76)

Response: See response to comment 93.

Comment 95: Compliance with NRCS Standards. In order to more effectively keep up with changes to the standard, we recommend that NRCS should be required to inform the DEC and certified planners when there are changes to practice standards. (10)

Response: Changes to NRCS conservation practice standards are posted at: www.nrcs.usda.gov/technical/efotg.

Comment 96: Existing BMPs. Requiring farmers to rebuild BMP’s to conform to new standards creates a problem. Allowing certified planners to use their professional judgment to determine the effectiveness of these practices is an excellent way to circumvent this issue. However, in order for these evaluations to be carried out efficiently and effectively, planners need a list of the current NRCS

standards, with year of issuance, in use by the permit, and how these current standards vary from their older versions. This list should include, in detail, what exactly is different e.g. distance in feet for buffers, size in acres for filter strips etc. I would suggest that this section of the permit be modified to include a statement about where planners can access the complete list of NRCS standards in use and any modifications from previous editions. (52)

Response: See response to comment 95.

Comment 97: There is not an effective mechanism for conveying the changes that may occur to a standard or standards. While it is possible to "catch" an updated standard on the eFOTG website periodically, unless you are a government employee that is continually referencing the site there is no way to be notified of a revised standard. An email should be sent to subscribers of such changes if effort to reflect the most current standard within a plan. (67)

Response: See response to comment 95.

Comment 98: Compliance with NRCS Standards. We recommend that the first paragraph of this section read: Unless otherwise provided within this permit, facilities identified in the CNMP shall be designed, constructed and operated in accordance with the water quality protection provisions of "NRCS Conservation Practice Standard No. NY312", the water quality protection provisions of all applicable NRCS standards and based on available sound science. (107)

Response: The CNMP must be developed and implemented by an AEM certified planner in accordance with all applicable New York State NRCS standards.

Comment 99: New BMPs. We suggest striking all current proposed wording beginning with the third paragraph (Any variations in the implementation...) and rewriting the remainder of the section as follows: Variations to the NRCS standards shall be allowed in the following manner: For new BMPs: Any variations in the implementation of new practices from the applicable provisions of the NRCS standard are allowed, provided it is documented and justified in the CNMP to be equally protective of water quality by the AEM certified planner or engineer. This documentation must be submitted with the Annual Report. (107)

Response: Comment noted. However, all New BMPs must be designed and implemented in accordance with all applicable NRCS standards in place at the time this General Permit becomes effective.

Comment 100: Existing BMPs. For existing BMPs or BMPs requiring upgrading, if the AEM certified planner for the facility, utilizing AEM guidelines and in cooperation with an engineer where appropriate, deems the existing BMP to, substantially meet the intent of the applicable provisions of the current NRCS standard and to adequately be protecting surface and groundwater quality, such BMP shall be deemed to be in compliance with this permit. Any such evaluation shall be documented in the CNMP and provided in the Annual Report in addition to any prescribed monitoring requirements deemed appropriate by the AEM Certified Planner to ensure continued water quality protection. (107)

Response: The Department has added the language “utilizing AEM guidelines and in cooperation with an engineer where appropriate” to Part III.A. of the General Permit to address this concern.

Comment 101: Existing BMPs. We suggest if the AEM certified planner for the facility deems the existing BMP to NOT substantially meet the intent of the applicable provisions of the current NRCS standard, the following shall occur:

a. If such practice can, through physical amendments or implementation of non-structural practices as prescribed by the AEM Certified Planner, be upgraded to substantially meet the intent of the applicable provisions of the current NRCS standard, such upgraded practice will be deemed to be in compliance with this permit. Under this situation any structural amendment will be accomplished in line with Part III(C) of this permit for existing Medium CAFOs and within two years of permit issuance for existing Large CAFOs. Any prescribed non-structural practice or additional recordkeeping shall be implemented as soon as possible and not more than one year following evaluation. During these system upgrades, the CNMP must prescribe a management system to provide NRCS standard equivalent protection to water quality. All aspects of this requirement shall be reported in the CNMP and provided in the annual report.

Response: Comment noted. However, BMPs must be built in accordance with all applicable New York NRCS standards.

Comment 102: Existing BMPs. We suggest if the AEM certified planner for the facility, utilizing AEM guidelines and in cooperation with an engineer where appropriate, deems the existing BMP to not substantially meet the intent of the applicable provisions of the current NRCS standard, the following shall occur:

If such practice cannot be upgraded effectively, either due to technical or financial reasons, to perform in a manner that substantially meets the intent of the applicable provisions of the current NRCS standard, such practice will be replaced with a practice designed, constructed, operated and maintained in accordance with the applicable provisions of the current NRCS standards. Such replacement shall occur in accordance with Part III(C) of this permit for existing Medium CAFOs and within two years of permit issuance for existing Large CAFOs. During this practice upgrade, the CNMP must prescribe a management system to provide equivalent protection of water quality. All action taken pursuant to this provision shall be reported in the CNMP and provided in the annual report. (107)

Response: The Department has added language to Part III.C. of the General Permit such that existing BMPs including vegetative treatment areas, waste transfer structures and all practices that are not properly functioning shall be evaluated and updated as deemed necessary to meet the current, applicable NRCS standard.

Comment 103: Existing BMPs. We suggest striking all current proposed wording beginning with the third paragraph (Any variations in the implementation...) and rewriting the remainder of the section as follows: Variations to the NRCS standards shall be allowed in the following manner: For existing BMPs or BMPs requiring upgrading, except manure storages addressed in Part VI(E)(f):For purposes of this

section, any existing BMP on existing Medium or Large CAFOs covered by this permit shall be deemed to be implemented for the first two years following permit issuance or until BMP evaluation, whichever occurs first. Such consideration shall only apply if the existing BMP will adequately protect water quality, as determined by the AEM Certified Planner, until an evaluation can be undertaken.

The provisions of paragraph i and ii shall also apply to all new facilities that have previously operated below the minimum medium thresholds and that propose to expand. (107)

Response: The Department has added language to Part III.A. of the General Permit to allow Medium CAFOs to address structural updates to existing BMPs in accordance with the same schedule required for full implementation.

Comment 104: Compliance with NRCS Standards...., all applicable NRCS standards and based on available sound science. Whose sound science? Narrow the contributors “based on land grant university research” or Increase the contributors “based on the industry research” to include privately funded research. (12)

Response: The Department has deleted this language from Part III.A. of the General Permit to address this concern.

Comment 105: Compliance with NRCS Standards. We suggest striking “all applicable NRCS standards and based on available sound science” as redundant because NRCS NY 312 includes all applicable NRCS standards and is based on sound science. (89)

Response: See response to comment 104.

Comment 106: Compliance with NRCS Standards. We suggest adding “Facilities that meet these requirements do not discharge or propose to discharge.” (89)

Response: Comment noted. However, as defined by EPA in the 2008 CAFO Rule, a facility does not discharge or propose to discharge when it is designed, constructed, operated and maintained such that they do not discharge. Therefore, simply implementing the provisions of the NRCS standards does not afford absolute protection for a facility to prevent a discharge.

Comment 107: Compliance with NRCS Standards. We strongly suggest the following clarifying language be added : “When adding or updating/expanding BMPs, farm operators must take steps to ensure reasonable protection is provided during the construction and transition periods.” (89)

Response: The Department has added language to Part III.A. of the General Permit to address this concern.

Comment 108: Compliance with NRCS Standards. We strongly suggest the following clarifying language be added : “Each CNMP must indicate a schedule for implementation of updates and/or any new practices during the Permit period and make provisions to protect the environment during construction and transition periods.” (89)

Response: The Department has added language to Part III.A. of the General Permit to address this concern.

Comment 109: Compliance with NRCS Standards. We strongly suggest the following clarifying language be added : “New or modified BMPs must be designed and implemented in accordance with NRCS standards in place when this permit is issued, and any variations documented as described below.” (89)

Response: The CNMP must be developed and implemented by an AEM certified planner in accordance with all applicable New York State NRCS standards.

Comment 110: Compliance with NRCS Standards. We strongly suggest the following clarifying language be added : “Any variation in planning, design, engineering, implementation, etc. of new or previous NRCS standards is allowed, provided the reasons are documented in the CNMP with a statement indicating the variation is as protective of water quality in the best professional judgment of a AEM certified planner or engineer. This documentation must be submitted with the Annual NMP and Annual Report.” (89)

Response: See response to comment 109.

Comment 111: Existing BMPs. We strongly suggest the following clarifying language be added : “Existing BMPs must be evaluated by the AEM certified planner in consultation with the farm operator to determine if the practice is: 1) functioning as designed; 2) substantially meets the intent of the applicable NRCS standard in place when this Permit becomes effective; and 3) provides adequate protection to surface and groundwater quality. The outcome of this evaluation must also be documented in the CNMP as described above. Existing practices that do not meet all three requirements must be redesigned and implemented within five years of the date of coverage for the farm. Farms meeting these elements will be considered non-dischargers.” (89)

Response: See response to comment 102.

Comment 112: Existing BMPs. NYFB believes and requests that DEC allow all existing BMPs that meet the water quality protection intent of the current NRCS standards or that can be updated to meet the water quality protection intent through either structural or non-structural changes be allowed to remain in place. (107)

Response: See response to comment 102.

Comment 113: Existing BMPs. Farms that had adopted Best Management Practices (BMP) that are providing environmental protection, but that do not meet current NRCS standards, should be acceptable to DEC. To the degree possible, DEC should not expect dairy farms that have done a good job with BMPs to dismantle these practices and rebuild to new standards. Many New York dairy farms do not have the financial capacity for what might be viewed in some cases to be duplicative efforts. (104)

Response: See response to comment 102.

Comment 114: Existing BMPs. One of the biggest problems I see with the permit is the requirement to bring existing structures up to current standards. The certified planner should be able to make the determination on whether or not a structure is functioning as designed and adequately protecting the waters. The problem with the current language is what if there is no documentation on the standards the structure was built to, but it is working as designed and everything appears to be operating and has been operating for years without problems. If existing Structures are functioning as expected with little or no risk to the environment then they should be “grandfathered”. This determination should be made by the planner or Engineer. (39)

Response: See response to comment 102.

Comment 115: Existing BMPs. If a planner deems the existing BMPs to be functioning as designed and protecting water, and a DEC inspector’s opinion differs, what is the course of action by either? If there is no direct discharge and low risk, how can it be best documented? (32)

Response: Evaluation of an existing BMP must be documented in the CNMP by an AEM certified planner. Generally, the DEC affords much deference to an AEM certified planner’s expertise in assessing the effectiveness of BMPs. However, reasonable minds can differ at times. If the AEM certified planner and DEC inspector differ about the functionality of a BMP protecting water quality, then the DEC inspector will exercise their oversight during a compliance inspection at the CAFO. If this BMP affects the CAFO’s inspection rating and the DEC decides to issue a Notice of Violation (NOV) for the CAFO’s violations of this General Permit, the CAFO may attempt to offer mitigating information or evidence to address the violations alleged by DEC in the NOV.

Comment 116: Existing BMPs. We appreciate the discretion being given to the AEM certified planner to assess the functionality of an existing BMP to substantially meet the intent of a new NRCS standard. However, the specification here is that the existing BMP was originally constructed to NRCS standard. We believe that existing BMP’s that may not have originally been constructed to NRCS standards could also substantially meet the intent of a new NRCS standard, and that the AEM certified planner should be given discretion to approve the continued use of that BMP. Our recommendation is to eliminate the phrase “built in accordance with a previous NRCS standard.” (36)

Response: See response to comment 102.

Comment 117: Existing BMPs. I feel that existing practices that are well maintained and that met NRCS standards at the time of installation should be acceptable “as is” in future permits. The cost of engineering and construction is significant and needs to be considered. Most capital projects we do have a useful life of 10-15 years or more. Unless the farm makes changes that negatively impact the practice it should be acceptable for many years with the operation and maintenance plan that was in place when implemented. (29)

Response: See response to comment 102.

Comment 118: Existing BMPs. I think it is significantly more important that an existing BMP is properly functioning to “adequately protect surface and groundwater quality” than whether it “substantially meets the intent of the new NRCS standard.” A farm should only be forced to upgrade an existing BMP if there is a problem. It should be left up to planner (and if necessary, a P.E.) discretion to decide if the existing BMP is sufficient to address the resource concern. (13)

Response: See response to comment 102.

Comment 119: Existing BMPs. I am concerned about the requirements to use the NRCS standards within the permits, especially as the requirements relate to existing BMP’s. A more workable solution that identifies true environmental risk needs to be found. Planners and engineers should have some flexibility to make changes in how an NRCS standard is applied as long as water quality is protected. (29, 69)

Response: Comment noted. However, the NRCS Standards have been developed over time using the experience of professional conservationists combined with the best science available. There are no other standards available for conservation practices dealing with water quality that provide this level of performance.

Comment 120: The state permit suggests that some practices have a life expectancy that would ultimately require upgrading and require alternative systems to be in place prior to such upgrades. If a farm implements a practice and cannot appropriately manage, a more restrictive process must be implemented to achieve compliance. It would seem the need to have an alternative system in place prior to amending the current practice would be redundant and could expose the farm to additional environmental exposure since the back up plan would destabilize a larger footprint. If continued updating, operation and maintenance is required, and there is no way to address issues economically, it seems like total collection of runoff from a 25 year 24 hour rain event would be most prudent. If that is the case, why not shoot the moon and seek full coverage under the Clean Water Act? The CWA will at least allow me to have a discharge if I operate and maintain my practices within the 25 year 24 hour rain event. If I cause an ECL violation, I am responsible only for the ECL violation; under the state permit, I am responsible for ECL violations and for violating my permit coverage. Unless you cover me with a Consent Order am I not open to citizen action suits? (67)

Response: Comment noted. DEC cannot advise CAFOs through this responsiveness summary which General Permit to seek coverage under. After consultation with an AEM certified planner, the CAFO may determine that coverage under this General Permit is appropriate if the farm does not discharge or propose to discharge.

The federal Clean Water Act (33 U.S.C. 1365) authorizes third-parties to commence law suits for violations of the law. New York does not have a state citizen suit provision within the Environmental Conservation Law. If a CAFO was covered under this General Permit and discharged, the CAFO would be open to citizen suits for the discharge only under the federal Clean Water Act. The CAFO could not be sued for violations of this

General Permit, however. If the CAFO was covered under the Clean Water Act SPDES General Permit and discharged, the CAFO would be open to citizen suits for both permit violations and the discharge.

If a CAFO is sued by a third-party, citizen group for violations of the federal Clean Water Act and the CAFO has entered into an administrative consent order with DEC, the CAFO may assert this as a defense in the litigation. The CAFO can claim that because the consent order covers the violations, DEC has engaged in diligent prosecution as per the federal Clean Water Act. The CAFO must also be able to show the violations are past violations and do not have a substantial likelihood of recurring.

B. Certification of the CNMP

Comment 121: Specifically we suggest the following wording: The permittee and the AEM certified planner shall certify...that the CNMP has been prepared in accordance with “NRCS Conservation Practice Standard No. NY312,” and with other standards and evaluations, as allowed within the permit. (107)

Response: The Department has added language to Part III.B. to provide further clarification.

Comment 122: The final sentence appears counter to other provisions [Part II(A)] of this permit. Our understanding is that CNMP development and certification is needed prior to filing an NOI for all facilities. (107)

Response: The Department has added language to Part III.B. to provide further clarification.

C. Implementation of CNMP Requirements

Comment 123: CAFOs that are permitted under the current CAFO Permit must be allowed to be covered under the draft State Permit and allowed as much of the next permit term as needed to meet the permit’s conditions or as imposed by newly modified NRCS standards. (89)

Response: Comment noted. DEC has declined to extend the deadline for Large CAFOs to achieve full implementation of all General Permit requirements. Pursuant to Part I.A. of this General Permit, Large CAFOs must be fully implemented as a minimum to be eligible for coverage under this General Permit. The Department has added language to Part III.A. to provide further clarification as to the deadlines to address compliance of existing BMPs with current NRCS standards.

Comment 124: In general, we believe the provisions of this subpart need to be clarified. In every situation where the completion of practices are mandated we recommend the modifier “required” be added. This will clarify that the completion of enhancement practices are not held to the requirements and timeframes established throughout the subpart. (107)

Response: The Department has added language to Part III.C. to provide further clarification.

Comment 125: Schedule of Implementation. The sentence: “Prioritization shall be in accordance with the established Agricultural Environmental Management risk evaluation protocols,” does not provide any direct information to the permittee (other than he/she may have to look somewhere else to determine the permit’s requirements). Please indicate that implementation of practices will be generally prioritized based on “worst first”. (89)

Response: Comment noted. However, the established Agricultural Environmental Management risk evaluation protocols are already utilized in CNMP development by AEM certified planners for all CAFO facilities and therefore are an appropriate reference in the General Permit.

Comment 126: Schedule of Implementation. It should be clear that failing to meet the self-imposed “prioritized schedule” is not a violation of the Permit. Instead, a AEM certified planner should be able to certify that there has been/will be “consistent annual progress” toward the Permit established deadline even though a date/deadline on the schedule of implementation was not met, and, as a result, the failure to meet an implementation goal does not constitute a violation of the Permit. We recommend language such as: “Failure to meet the self-imposed dates specified in the CNMP’s schedule of implementation is not a violation of this Permit.” If DEC prefers, additional language may be added to address a modified schedule of implementation such as: “The Medium CAFO’s certified planner may choose to address a deviation from the date/deadline specified in the CNMP’s schedule of implementation by certifying that the CAFO is making consistent annual progress in order to comply with the implementation deadline as specified herein.” (89)

Response: The Department has added language to Part III.C. to provide further clarification. Specifically, Medium CAFOs must annually update the facility-specific implementation schedule including delineation of what practices were implemented in the previous year to assert compliance with the “consistent annual progress” elements of this section.

Comment 127: We believe the provisions allowing Medium CAFO’s to substitute non-structural practices in the short-term for structural practices is an appropriate measure. (107)

Response: The Department accepts and appreciates this comment.

Comment 128: All Medium CAFO’s shall have all Structural Practices necessary to eliminate discharges from the production area...” It’s my belief that any farm that has a discharge to the waters of the state isn’t qualified to apply for this permit? I’m not sure the intent is affected but this paragraph is confusing and seems to imply there could be a case where a discharging facility can get state permit coverage. Change language to “ No Medium CAFO facility seeking inclusion in the state permit shall have a discharge to the waters of the state” (12)

Response: Please refer to Part I.A. of the General Permit for clarification as to the eligibility requirements for Medium CAFOs.

Comment 129: NYFB is strongly supportive of the provisions provided by DEC in this draft permit regarding timeframes for required BMP completion by Medium CAFOs. (107)

Response: The Department accepts and appreciates this comment.

Comment 130: Medium CAFO Implementation Schedule. I strongly support the ability for medium-sized farms to obtain more time for best management practice (BMP) implementation. (3, 4, 6, 9, 11, 14, 15, 17, 18, 19, 20, 22, 23, 24, 28, 33, 40, 43, 45, 47, 48, 49, 53, 54, 56, 57, 58, 59, 63, 64, 65, 74, 75, 79, 80, 84, 85, 86, 91, 92, 93, 95, 99, 102, 103, 105, 108, 113, 115, 118, 119, 120, 121, 124, 126)

Response: The Department accepts and appreciates this comment.

Comment 131: Medium CAFO Implementation Schedule. I oppose the idea that a Medium CAFO should have more time to get in compliance. (29)

Response: Comment noted. However, the Department has decided to allow some additional time for Medium CAFOs to secure adequate financial resources to implement the necessary BMPs.

Comment 132: Medium CAFO Implementation Schedule. It has been suggested that on average a Medium CAFO will have an additional \$100,000 expenditure to fully meet the CAFO requirements. For a 200 cow dairy farm, this is an additional \$500 per cow – clearly a big challenge for a large portion of the farms and for capital expenditures that generally do not enhance efficiencies, productivity or otherwise generate additional income. It is for this reason that we encourage DEC to allow as much time as possible to comply with new requirements. It seems to us that a window of at least five years should be allowed to complete the requirements. (104)

Response: The Department has allowed up to five years for those Medium CAFOs that have made substantial efforts towards full implementation and can demonstrate financial constraints as described in Part III.C. of the General Permit.

Comment 133: Medium CAFO Implementation Schedule. Consider adding language that clarifies that the compliance deadline of June 30, 2011 serves as the compliance deadline for the entire permit and all of the obligations under the permit. We suggest adding: “For all Medium CAFOs, unless an exception under III.C.a.iv. applies, June 30, 2011 is the compliance deadline applicable to the entire Permit and all obligations stated hereunder.” (89)

Response: The Department has added language to Part III.C. to clarify this requirement.

Comment 134: Implementation Schedule. To the extent that DEC establishes new or revised environmental obligations, DEC should allow a compliance timeframe of at least five additional years to enable farm businesses to adjust and plan for the capital and operational expenditures necessary. This extended timeframe should apply to enhancements necessary for all size farms (State Permit and CWA). The current financial outlook for dairy farmers will create significant challenges for

many dairy farms and it could be years for many farms to recover and build the necessary financial base for major investments. (104)

Response: See response to comment 132.

Comment 135: Large CAFO Implementation. We suggest: “For All Large CAFOs all practices necessary for full compliance with this permit must be fully operational prior to permit coverage. It is expected that future BMPs will be added to the CNMP as required by changing conditions, including business growth. These BMPs must be planned and implemented along with the business changes, not after, in accordance with III.D. below.” (89)

Response: The Department has added language to Part III.C. to clarify the intent. Specifically, all necessary updates shall be done in accordance with Part III.A. of the General Permit.

Comment 136: Large CAFO Expansion. There should be a protocol in place to allow compliant Large CAFO's to acquire non compliant adjacent operations. There should be a workable transition period for the operation to be brought into compliance. It should be a statewide system that is not left up to the opinions or desires of local DEC inspectors. (16)

Response: Large CAFOs that acquire non-compliant Medium CAFOs must bring the medium facility into compliance with this General Permit before incorporating that facility into its operation. If, however, the Medium CAFO can be operated as an independent facility separate from the Large facility, where nutrients and waste are not co-mingled, it is appropriate to maintain separate permit coverage as a medium, which allows for implementation in accordance with Part III.C. of this General Permit.

D. Duty to Amend the CNMP

Comment 137: Prior Consultation with a AEM certified planner. It's great to have language in the permit to require farmers to talk to their planner and get planner approval prior to making any changes. I'm glad to see it in writing in the permit. It gives us planners more authority to insist on being kept in the loop. (13)

Response: The Department accepts and appreciates this comment.

Comment 138: We have concerns that “all changes in the operation...shall be recorded in the CNMP” is overbroad and unduly burdensome. Please list the operational changes DEC wants recorded so that farm managers, planners and inspectors do not have to guess. Is it only those changes specified in III.D.b., c., e. and f? (89)

Response: The Department has added language to Part III.D. to clarify the intent. Specifically, all changes in the operation of the facility or implementation of the CNMP as required by this permit shall be recorded in the CNMP. The intent of this section is to require records to be kept of changes related to CAFO compliance.

Comment 139: We suggest that paragraph e, f, g and h be deleted. At most, a letter notifying DEC of the changes, that a certified planner was consulted, and appropriate practices installed where necessary should suffice. (89)

Response: Comment noted. However, the requirement for facilities to provide notification prior to some significant facility changes is necessary for the Department to oversee the regulatory compliance of these facilities.

Comment 140: Part III.D.g and definition X of Appendix A appear to be in conflict. We suggest replacing Part III.D.g with the portion of definition X, as referenced below: “A revision to the CNMP in accordance with all applicable NRCS standards or appropriate deviations to address alterations in facility operation prior to the implementation of the change in direct consultation with a AEM certified planner is not considered a major change and the Department must be notified through the annual report submittal.” (89)

Response: Comment noted. The Department made some clarifying revisions to Part III.D. and Appendix A. to address this comment.

Comment 141: NYFB is not opposed to requiring farms that increase the number of animals by at least 20% beyond the number specified in the existing CNMP to report such changes to DEC. We do object, as noted in comment 8 to again requiring the submission of an Annual NMP. The purpose of resubmission would be to inform DEC that the farm has consulted with the AEM Certified Planner prior to expansion. Such documentation for Large CAFOs could be obtained by requiring a CNMP Certification instead. (107)

Response: Comment noted.

Comment 142: Why do we have to be so specific as to the field rotation and application at all times. During the spring many things change and we need to have the ability to adapt, as long as we stay within the spirit of the plan. (117)

Response: A facility must follow its’ CNMP in order to be in compliance with the General Permit. As conditions change, a facility must consult their AEM certified planner prior to make adjustments to the implementation of the CNMP. This consultation should be documented in the Conservation Assistance Notes in the CNMP.

Comment 143: The spreading of commercial fertilizer and manure on newly acquired lands should not be delayed by the permit requirements. (104)

Response: All applications of manure on lands under the control of a CAFO must be done in accordance with the CNMP.

Comment 144: Expanding existing CAFOs. Before existing CAFOs are approved for expansion, the undersigned recommend that the public be provided with a meaningful opportunity for public review and comment. (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: Comment noted. However, it is not the Department’s intent to necessitate approval of a facility expansion but rather to be made aware of said expansion and

assured of compliance with the requirements to implement all necessary BMPs prior to the expansion.

Comment 145: Expanding existing CAFOs. A fair timeline for adding cow numbers into any CAFO plan, should be made simple and easy; your departments should help not hinder us with this area especially. (101)

Response: If the CAFO plans to expand the CNMP should reflect the number of animals planned for and the practices to be implemented for this expansion. Prior to increasing the number of animals 20% above the plan number specified in the existing CNMP, the CAFO must update the CNMP, implement the necessary practices and notify the Department of the change as per Part III.D. of the General Permit.

Comment 146: Expanding existing CAFOs. DEC should work to ensure that CAFO regulations are not disruptive in any manner to dairy farm expansions and acquisitions. Acquisitions and expansions are necessary to allow for the next generation of farmers in New York. There should be a transitional provision for acquisitions and expansions to facilitate such actions and allow normal agricultural practices as allowed for under Agriculture and Markets law. (104)

Response: See response to comment 145.

Comment 147: Our organization strongly objects to the inclusion of provisions classifying the construction of a manure storage facility as a major change. We believe this provision should be removed completely from the permit. (107)

Response: Comment noted.

Comment 148: We are requesting that DEC commit that, should an objection to a major change not be presented by DEC to the farmer with sixty days of receipt, an automatic acknowledgement of receipt will be granted. (107)

Response: Comment noted. However, it is not the Department's intent to necessitate approval of a facility expansion but rather to be made aware of said expansion and assured of compliance with the requirements to implement all necessary BMPs prior to the expansion.

Comment 149: Major changes. Environmental Advocates strongly supports predicating the definition of a 'major change' which requires a CNMP update on the increase of the number of animals housed at a facility, as currently drafted in draft SPDES General Permit for CAFOs GP-0-09-001. (76)

Response: The Department accepts and appreciates this comment.

Comment 150: Major changes. Construction of a one million gallon waste storage facility should not be a major change. This requires both a certified planner and a state certified engineer before they can be built and would be listed in the annual report. (88)

Response: Comment noted. DEC has determined expansion of herd size by more than 20% and use of a 1,000,000 gallon lagoon or greater constitutes a major change to the CNMP and requires notification. DEC must exercise its statutory and regulatory

authority to ensure water quality remains adequately protected when a CAFO institutes certain potential risks to the environment.

Comment 151: Major changes. There should not be requirements to notify DEC of expansion by over 20% or the use of a lagoon over 1,000,000 gallons. It would be reasonable to expect that all new structures and practices would meet required standards. (29)

Response: See response to comment 150.

Comment 152: Major Changes. Amended NMP Submittal. We believe that a description of the change would be adequate notification instead of supplying a complete NMP. (111, 114)

Response: The Department has added language to Part III.D. of the General Permit such that a description of the change may be submitted in lieu of a complete Annual NMP submittal.

Comment 153: Major Changes. Amended NMP Submittal. Must a whole NMP be submitted with the change, or just the change itself? (32)

Response: See response to comment 152.

Comment 154: All major changes should require that the CNMP be updated, that the full, updated CNMP be available for public review for all CAFOs, and that the DEC review the appropriateness of the type of permit (Clean Water Act, state SPDES, or individual) that the facility is issued. (76)

Response: A revision to the CNMP conducted in accordance with all applicable NRCS standards to address facility operation changes prior to the implementation of the change in direct consultation with an AEM certified planner is required. An updated Annual NMP or CNMP Certification, or amended portion of these, will be available through the FOIL process. Additionally, the public has a right to review non-privileged, final agency determinations through the FOIL process if the information requested is not first voluntarily provided by the administrative agency. Documents generated as part of an administrative agency's decision-making process are exempt from public disclosure as privileged, inter-agency communications and can be withheld pursuant to the NY Public Officer's Law Section 87(2)(g).

Comment 155: The number of animals planned for under the existing CNMP.... Prior to increasing the number of animals 20% above the planned number... I believe this paragraph will begin the practice by planners of writing NMPs at current livestock numbers plus 20% on an annual basis where possible for contingencies. This sounds like a good practice, however I'm not sure it doesn't devalue the NMP for the farm as it is today. i.e. if I allocate 20% more manure than the farm has, the impression is they need less fertilizer. No changes requested. (12)

Response: See response to comment 150.

Comment 156: We should not be required to notify DEC before using a manure pit > 1,000,000 in size, if we want to expand our herd more than 20%, or if we grow from Medium CAFO size to Large CAFO size. (46)

Response: See response to comment 150.

Comment 157: BMP Enhancements. I don't believe it should be a requirement to inform the DEC annually about BMP enhancements being implemented beyond the requirements of the General Permit. This is an information gathering thing and is not needed to comply with the permit. They should only report on the required information. If the DEC is interested in BMP enhancements then they could send out a voluntary survey. (44)

Response: The Department has clarified in Part III.D. that the CNMP may prescribe BMP enhancements in some cases. These enhancements are not required to be submitted to the Department as part of the Annual NMP or Annual Compliance Report. However, BMP enhancements that will impact the design, construction, operation and maintenance of a CAFO facility and whether it will discharge or proposes to discharge must be implemented in accordance with the requirements of this General Permit.

Comment 158: BMP Enhancements. At what point does a planned enhancement need to be included, at the onset of the project or upon its completion and implementation? How should an enhancement be identified so that it is not considered a necessary BMP when it has not yet been completed so as to not trigger non-compliance? (32)

Response: See response to comment 157.

E. Compliance with the CNMP

Comment 159: For clarification purposes, we suggest the following language: The permittee shall comply with all provisions of the CNMP. Enhanced practices shall remain an optional part of the CNMP. (107)

Response: Comment noted. However, BMP enhancements will impact the design, construction, operation and maintenance of a CAFO facility and whether it will discharge or proposes to discharge. As such, these BMPs must be implemented in accordance with the requirements of this General Permit and included in the CNMP.

Part IV. INSPECTION AND MAINTANENCE REQUIREMENTS

A. Inspection and Entry

Comment 160: As CAFOs (especially Large CAFOs) are essentially 24-hour operations, DEC should state that inspections should be restricted to any time that the CAFO is operating. It is likely that intentional permit violations will occur when the permittee feels that they can get away with the violation. Clarifying the 'reasonable times' restriction will give enforcers the opportunities needed to target suspected bad actors. (76)

Response: Comment noted. ECL Articles 3 and 17 extend to the Department broad authority to inspect facilities, including CAFOs, to assurance compliance with all

applicable laws, regulations and permits. The Department will conduct unannounced site visits as needed to assure compliance with this General Permit.

Comment 161: As part of a Food Defense program mandated by SQF certification (“Safe Quality Foods”—which is now required by several customers) a comprehensive bio-security program must be set up for a food production facility. Part of that program is entry control requirements for employees and visitors. The reason is to protect the health of production animals and the safety of food being produced. Typically bio-security programs for poultry farms involve issues of exposure to pet birds and fowl of any type, as well as bio-protective clothing when entering the facility. We propose adding “.....or any duly authorized agent thereof, upon prior inquiry of bio-security requirements for visitors and full adherence to those requirements, and upon the presentation of credentials.....”. (36)

Response: The Department’s environmental protection efforts do not normally require entrance into sensitive biosecurity areas of the farm such as animal housing areas or feed storage areas. All Department Division of Water CAFO staff have received instructions for proper biosecurity measures. A CAFO may provide additional site-specific bio-security requirements to the Department’s regional office for review to assure adherence during an unannounced site visit.

Comment 162: Entrance. In order to provide protections to animal security and access to inspectors, notice of a farm inspection should be made. The Permit can require that access will not be unreasonably withheld. (89)

Response: See response to comment 161.

Comment 163: Sampling. NEDPA requests the inclusion of the following language: “DEC shall provide the permittee with split samples of all samples taken. The permittee shall receive any laboratory analysis and/or data from samples collected and submitted by DEC directly from the analyzing laboratory.” (89)

Response: The Department will provide results of all sampling activities upon request from the facility or individual.

B. Proper Operation and Maintenance

Part V. MONITORING, REPORTING AND RETENTION OF RECORDS

Comment 164: The time required to evaluate all the reporting requirements for this report is more time than most spend on tax planning. A specific recording format needs to be outlined by the department to allow uniformity and consistency in managing data from farm to farm. For instance, if a deficiency is recorded 5 times should that trigger a change in how that practice is managed, or will the department hold the farm accountable after 3 times? (67)

Response: Recordkeeping is necessary to assurance compliance with the technical requirements of this General Permit. Many AEM certified planners have tools and

methods available to provide a streamlined format for facilities to comply with these requirements.

A. Anticipated Non-Compliance

Comment 165: NEDPA believes the use of “may result in noncompliance” is vague and unenforceable. Further, if such language must be included, it should be consistent with the language of 6 NYCRR § 750-2.7(a): “Anticipated Non-Compliance. The permittee shall give advance notice to the Department of any planned changes in the permitted facility or activity which may is very likely or certain to result in noncompliance with permit requirements. Such advance notice shall be in accordance with 6 NYCRR 750-2.7(a).” (89)

Response: The Department has amended Part V.A. of the General Permit to address this comment.

B. Discharge Reporting

Comment 166: We request that the department specify whether the 5 day time frame refers to business days, as we believe it should. (107)

Response: The Department has clarified in Part V. that facilities are required to submit an incident report form within 5 business days of the incident.

Comment 167: We recommend the following changes: “...or CAFO-related spill ... or other violations of 6 NYCRR Parts 700 or 703.” This CAFO permit can only require the notifications in subparts V.B(a) and (b) for CAFO-related spills. CAFO owner/operators who become aware of other (non-CAFO) spills will still be required to report spills as required by other laws and regulations. Further, while NEDPA recognizes that the stated Discharge Reporting “triggers” are derived directly from the 6 NYCRR § 703.2 narrative water quality standards for turbidity and solids, it must be recognized that determining violations of all of the §703.2 narrative water quality standards is subjective at best. NEDPA requests that DEC’s Response to Comments on these draft CAFO Permits, explicitly recognize this subjectivity. (89)

Response: The Department has deleted the term “spill” are replaced it with the term “overflow” to address this comment. Appendix A of the General Permit defines “overflow”.

Comment 168: Please select one office (and refer to Appendix C for the mailing address if regional offices are selected) to receive the CAFO Incident Report. This seems like one more area where a CAFO can get caught out of compliance and dual notification is outside the bounds of 6 NYCRR § 750-2.7(b), (c). (89)

Response: The Department has made this change. Incident Reports must be submitted to the Regional Water Engineer located in the appropriate DEC Regional Office. Please refer to Appendix C of this Permit for contact information.

Comment 169: Please specify that the five-day written report period begins to run from the time of discovery that a discharge has occurred. (89)

Response: Clarification added.

C. All Other Non-Compliance

D. Penalties for Falsification of Reports or Monitoring Systems

E. Retention of Records

F. Availability of Reports

Comment 170: It is our position that the Department does not have the authority to completely exempt Annual NMPs from applicable provisions of the Public Officer's Law. DEC appears to believe that total Annual NMP would qualify as effluent data. We disagree with that interpretation. While we acknowledge that it is reasonable for field specific information to be considered "effluent data" in that it is used to determine nutrient application rates, the proposed Annual NMP required information detailing the farmstead as well as the BMP implementation schedule cannot be construed to be providing data on effluent limitations. Since the proposed Annual NMP not only contains effluent data, it is not fully covered by ECL §17-0805 (4). For that reason, those sections referenced of the Annual NMP should be allowed to be claimed as confidential under POL Article 6-A and should be covered by protections under the Freedom of Information Law (POL Article 6). (107)

Response: Pursuant to 6 NYCRR Parts 616 and 750-1.22, DEC has already determined that the summary information contained within the Annual NMP does not meet the specific criteria to qualify as proprietary or confidential information. In order for information submitted to DEC to be considered confidential, and therefore exempt from disclosure, it must either be a "trade secret," "confidential commercial information," or "critical infrastructure." Please reference 6 NYCRR Part 616, which is available on the DEC website, for these specific definitions.

Comment 171: Farm NMPs should have to undergo a NYS Freedom of Information Law review before being released to the public. This is essential to protect farms against agri-terrorist threats. (3, 4, 6, 9, 11, 14, 15, 17, 18, 19, 20, 22, 23, 24, 28, 33, 40, 43, 45, 47, 48, 49, 53, 54, 56, 57, 58, 59, 63, 64, 65, 69, 74, 75, 79, 80, 84, 85, 86, 91, 92, 93, 95, 99, 102, 103, 105, 108, 113, 115, 118, 119, 120, 121, 124, 126)

Response: See response to comment 170.

Comment 172: "Availability of reports.... NOI's, permits and effluent data, including Annual NMP's and annual compliance reports shall not be considered confidential. It's my opinion that manure handling, treatment and transfer systems, manure analysis, crop rotations, yields, forage storage, and site planning and utility information contained in farmstead drawings are considered as confidential by many farms and would not want this information available to the general public. How much opportunity is there for a farm to challenge the confidentiality of a system developed by the farm? If the farm is to stamp CBI will the farm have the opportunity to defend its position or be made aware of a FOIL request for the information? We recommend allowing farms to claim CBI for any

system or piece of the plan they feel they want to protect and let the farm know when the information is being requested. (12)

Response: Pursuant to 6 NYCRR Parts 616 and 750-1.22, the Department has already determined that the summary information contained within the NOI, CNMP Certification, and Annual NMP (submitted as per Part I.C. of this General Permit) do not meet the specific criteria to qualify as proprietary or confidential information. In order for information submitted to DEC to be considered confidential, and therefore exempt from disclosure, it must either be a "trade secret," "confidential commercial information," or "critical infrastructure." Please reference 6 NYCRR Part 616, which is available on the DEC website, for these specific definitions.

However, if a CAFO submits documents marked "proprietary" or "confidential" to the DEC, except those public documents specifically noted in Part V.F. of this General Permit, and these documents are responsive to a FOIL request, staff must conduct a confidential business information review as per 6 NYCRR Part 616 to determine whether the documents will retain their confidentiality exemption from disclosure. The DEC is legally obligated to review the FOIL request to determine which documents must be disclosed and withheld pursuant to the exceptions provided in the NY Public Officer's Law Section 87(2), and then subsequently disclose these non-privileged, responsive documents to the requester.

Comment 173: Availability of reports. Included in most NMPs, and sometimes in compliance reports, is information that should be protected by confidentiality. For example, maps, well locations, control technologies, etc. are considered by the industry to be confidential business information (CBI) that, if disclosed, could negatively impact a farm's bio-security or competitive position. Therefore, a provision must be included to protect confidential information from disclosure. This would still allow maps showing well locations, engineering drawings of existing or planned control technologies, etc. to be provided to DEC where such information would provide more clarity or expand on aspects of other submitted compliance reports. A new sentence should be added at Section V.F "...for this information will be denied. Maps, engineering drawings and other information clearly marked as "CBI" submitted with NMPs and annual compliance reports will not be made available to the public." (89)

Response: See response to comment 172.

G. Duty to Provide Information

H. Incomplete Information

I. Other Information

J. Signatories and Certification

Comment 174: We strongly support the option for farmers to file documents with DEC electronically. With that in mind, we request that the Department clarify in the permit if electronic signatures will be accepted and if so, what is the appropriate protocol to submit such signatures. (107)

Response: The Department has adjusted this requirement to allow for optional electronic submissions. However, electronic submissions are strongly encouraged.

Comment 175: I do not believe farms should be required to file documents electronically. (3, 4, 6, 9, 11, 14, 15, 17, 18, 19, 20, 22, 23, 24, 28, 33, 40, 43, 45, 47, 48, 49, 53, 54, 56, 57, 58, 59, 63, 64, 65, 69, 74, 75, 79, 80, 84, 85, 86, 91, 92, 93, 95, 99, 102, 103, 105, 108, 113, 115, 118, 119, 120, 121, 124, 126)

Response: See response to comment 174.

Comment 176: The requirement for electronic submission should be optional. (39)

Response: See response to comment 174.

Comment 177: Environmental Advocates strongly supports the new provisions requiring that any and all reporting be handled in electronic format. (76)

Response: See response to comment 174.

K. On-Site Rain Gauge

Comment 178: It is my understanding that is the DEC's opinion that snow fall events are not required to be documented. That opinion is not indicated here. Either keep as is and require recording snowfall events or identify exemption for snowfall events. (12)

Response: The Department has clarified in Part IV.K. that rainfall events are required to be documented. However, other precipitation events, i.e. snowfall, may have impacts to waste applications and should be monitored.

Comment 179: We suggest the following language: "The permittee shall install and maintain a standard rain gauge in the proximity of the production area. All precipitation events in excess of 0.3 inch shall be measured, recorded and kept as part of normal CNMP recordkeeping." (89)

Response: The Department has amended Part V.K. to address this comment.

L. Annual Nutrient Management Plan Submittal

Comment 180: Electronic submission. DEC's proposed requirement for mandatory pdf formatted electronic submission by Large CAFOs of the proposed Annual NMP violates the protections provided farmers in the NYS Technology Law. (107)

Response: See response to comment 174.

Comment 181: Electronic submission. The requirement to submit the Annual Nutrient Management Plans in electronic (PDF only) format ..., will cause some serious hardship for a significant number of Permit holders and their planners. High-speed Internet connections are not universal in many rural areas of NYS. Some acceptable alternatives for handling the electronic submission of NMPs should

be available. Allowing the use of CDs or DVDs that are formatted in a common format and mailed to the Department may be a possible solution. (83)

Response: See response to comment 174.

Comment 182: Electronic submission. There are Large CAFOs whose location, limited computer technologies and internet access, and/or the ability to produce and execute PDF files makes this very difficult, or even impossible to do. By stating “PDF only”, suggests that the DEC is limiting options for reporting. (32)

Response: See response to comment 174.

Comment 183: Electronic submission. The undersigned strongly support the Department requiring CAFO operators or their certified planner to submit permits and or reports electronically. This conserves resources, increases efficiency, and provides for more transparency to the public. (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: See response to comment 174.

Comment 184: Electronic submission. Berkshire Valley Holsteins currently does not have the technology or the expertise to provide information in this manor. Alternate formats (non-electronic) would be more achievable. (66)

Response: See response to comment 174.

Comment 185: Electronic submission. Creating this new report and providing this material in pdf format will increase costs without any apparent environmental benefit. (89)

Response: See response to comment 174.

Comment 186: Annual Nutrient Management Plan Submittal. We do not believe there is any environmental benefit over the current annual report system by requiring Large CAFOs to submit an Annual Nutrient Plan. We recommend deletion of this section. CAFOs are already required to produce a CNMP yearly under the direction of a certified planner and, where applicable, in conjunction with a NYS licensed engineer. (89)

Response: Comment noted. However, the requirement for Large CAFOs to submit an Annual Nutrient Management Plan as part of the application for permit coverage is necessary for the Department to oversee the regulatory compliance of these facilities.

Comment 187: Annual Nutrient Management Plan Submittal. NYFB does not believe it is appropriate to require the submission of an Annual NMP document by Large CAFOs. (107)

Response: See response to comment 186.

Comment 188: Annual Nutrient Management Plan Submittal. This should be removed for two reasons. First is the need for a planner in New York State already shows more training required and outside participation. Second is the fact that it is only just as you call it, “a plan”. When dealing with nature many changes and decisions need to be made very fast and frequent. (88)

Response: See response to comment 186.

Comment 189: Annual Nutrient Management Plan Submittal. We appreciate the opportunity for farms to provide farmstead facility plan narratives. (107)

Response: The Department accepts and appreciates this comment.

Comment 190: Annual Nutrient Management Plan Submittal. I don't really understand why the general public should have access to this information, these are private businesses. If it is going to be available to the general public I suggest it is in a much simplified version. A farm plan map should be nothing more than what you can access on www.googleearth.com. Nothing more and no labels. These are private businesses on private properties. Giving the general public detailed farmstead information could very well create a security issue. Field maps should follow same idea. Tract maps and outlines of the fields included in the plan only. I don't believe the detailed information field by field is needed. Why would the general public need this detailed information? They would not be qualified to examine it anyway. (44)

Response: See response to comment 186.

Comment 191: Annual Nutrient Management Plan Submittal. The requirements of what is expected to be included in a Farmstead Facility map should be clarified and should at most require layout of barns and location of manure storage. Field maps should not be required to be submitted as other field information should be more than adequate. (39)

Response: See response to comment 186.

Comment 192: Farmstead/Production Area Elements. This information has already been supplied to DEC via the inspection process in per-inspection information provided to Region 5. Making detailed information available to just anyone may pose unnecessary risk to the livelihood of the farming operation. What liability does DEC want to assume if they distribute this information to someone who compromises bio-security or causes harm and economic loss to the dairy business? The same holds true for Item b. the field maps and information, where damage could be done to crops and may encourage trespassing by "concerned citizens". (7)

Response: See response to comment 186.

Comment 193: Farmstead/Production Area Elements. Berkshire Valley has provided this information to DEC for pre-inspection, and all engineering documents with NRCS are considered confidential business information. The concern is bio-security. What will DEC's liability be for providing this information to someone who compromises bio-security, causing economic loss? Located at Berkshire Valley there are some high dollar value cattle, which cause concern for the dissemination of this information. It would seem that the annual reports and inspections should provide verification to DEC and the environment without site specific information. (66)

Response: See response to comment 186.

Comment 194: Annual Nutrient Management Plan Submittal. It is not sufficient to only require Large CAFOs to submit “Annual Nutrient Management Plans” for public review, and all CAFOs should be required to submit CNMPs. It is inexcusable that DEC is not calling for any public review or public availability of CNMPs or even annual nutrient management plans for Medium CAFOs. (76)

Response: Comment noted. Large CAFOs are required to provide an Annual NMP submittal to DEC including the material aspects of each facility’s operations relative to ECL objectives. Medium CAFOs are not required to submit the same type and volume of information to DEC because these facilities maintain less animals, less waste and nutrients on site, and do not possess the same potential for environmental harm or impact as Large CAFOs. DEC continues to conduct inspections of Medium facilities to ensure compliance with all environmental laws and regulations. Additionally, DEC continues to require all Medium and Large CAFOs under this General Permit to work with AEM certified planners and generate site-specific CNMPs.

Comment 195: Annual Nutrient Management Plan Submittal. Medium CAFOs also should be required to submit an annual NMP, so that there is accountability for those farms as well. Currently, DEC has no real way to make sure Medium CAFOs are actually following their NMP, since these farms only submit an annual report. I know from experience as a planner that medium farms are the ones that really need to be checked up on, because they often do not follow their NMP closely (if at all, in some cases!). If they had to submit an annual NMP, followed by a report of what was actually done at the end of the year, it would force them to follow their plan more closely, because they would know they would be checked up on. (13)

Response: See response to comment 194.

Comment 196: Annual Nutrient Management Plan Submittal. If DEC is committed to the unwise practice of using “annual nutrient management plans”, the same “annual nutrient management plan” requirements should apply to all CAFOs—regardless of size. (76)

Response: See response to comment 194.

Comment 197: Annual Nutrient Management Plan Submittal. The contents of the required “annual nutrient management plan” (and any related forms) should be subject to public review and comment. (76)

Response: See response to comment 194.

Comment 198: Annual Nutrient Management Plan Submittal. As the DEC is relying on Natural Resources Conservation Service (NRCS) standards as the best management practices to ensure compliance with CAFO permits and to protect water quality, any and all alternative practices employed on a CAFO must be individually listed in “annual nutrient management plans”—for both permits. This

information must be publically available to ensure independent analysis of the alternative practices. (76)

Response: Pursuant to 6 NYCRR Parts 616 and 750-1.22, the Department has already determined that the summary information contained within the Annual NMP does not meet the specific criteria to qualify as proprietary or confidential information. In order for information submitted to DEC to be considered confidential, and therefore exempt from disclosure, it must either be a "trade secret," "confidential commercial information," or "critical infrastructure." Therefore, the information submitted will be available to the public through a FOIL request.

Comment 199: Annual Nutrient Management Plan Submittal. The public should have access to review and provide meaningful comment on the information required to be included by CAFO operators on the NMP form. At public information sessions, the Department indicated that the CAFO workgroup would be asked to prepare the document. We recommend that once the draft is developed that the public is afforded an opportunity to review and provide meaningful comment. (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: Comment noted. However, the forms associated with the General Permit are not subject the public notice and comment provisions of 6 NYCRR Part 621.7.

Comment 200: We have significant concerns about the release of field maps and the potential that exists for acts of agri-terrorism against the farm due to the release of such information. We therefore do not believe the agency should request such information from any farm unless it is absolutely essential for the Department to undertake program administration actions on specific permitted farms. (107)

Response: Comment noted. However, the requirement for Large CAFOs to submit an Annual Nutrient Management Plan as part of the application for permit coverage is necessary for the Department to oversee the regulatory compliance of these facilities.

Comment 201: We believe farmstead maps are not covered under the confidentiality exemptions (since they do not provide effluent data). They therefore should be subject at all times to FOIL review. (107)

Response: Pursuant to 6 NYCRR Parts 616 and 750-1.22, the Department has already determined that the summary information contained within the NOI, CNMP Certification, and NMP (submitted as per Part I.C. of this General Permit) do not meet the specific criteria to qualify as proprietary or confidential information. In order for information submitted to DEC to be considered confidential, and therefore exempt from disclosure, it must either be a "trade secret," "confidential commercial information," or "critical infrastructure." Please reference 6 NYCRR Part 616, which is available on the DEC website, for these specific definitions.

Comment 202: We would like to see some sort of tracking or traceability for those individuals who chose to obtain specific farm information, provided by the Department, on the internet. One solution could be to require the individual interested in downloading specific farm information to submit their name and email address prior to gaining access to the department's server. (10)

Response: The Department will provide CAFO related information to individuals in response to a request for information. When a person submits a written or electronic mail request for information to a state agency, this request is dealt with under the NY's Freedom of Information Law. The request is routed to DEC's Records Access & Management Office in Central Office, is assigned a unique identification number, and internally routed to all divisions who may possess responsive documents. Each division and regional office within DEC has a FOIL coordinator to receive and direct the particular FOIL request. DEC's Records Access & Management Office, then, provides the requester with an acknowledgment letter within five (5) days of receiving the FOIL request. DEC must respond to the FOIL request within twenty (20) days, unless some alternate date is provided or arrangement is made. If some responsive documents are withheld from the requester because they are privileged, the requester has ten (10) days from receipt of the denial letter to appeal denial of access. The Records Access & Management Office utilizes a computer operating system to track the status of each FOIL request received by DEC. All public requests for information from DEC are handled in this manner, in accordance with NY's Freedom of Information Law.

Comment 203: Confidential business information most likely will not be upheld by the department since there is "nothing" from an infrastructure perspective that cannot be provided to the public. Cropland is part of the farms infrastructure. A farm with prime-farmland is more sustainable than a farm without. (67)

Response: Pursuant to 6 NYCRR Parts 616 and 750-1.22, the Department has already determined that the summary information contained within the NOI, CNMP certification, and Annual NMP (submitted as per Part I.C. of this General Permit) do not meet the specific criteria to qualify as proprietary or confidential information. In order for information submitted to DEC to be considered confidential, and therefore exempt from disclosure, it must either be a "trade secret," "confidential commercial information," or "critical infrastructure." Please reference 6 NYCRR Part 616, which is available on the DEC website, for these specific definitions.

However, if a CAFO submits documents marked "proprietary" or "confidential" to the DEC, except those public documents specifically noted in Part V.F. of this General Permit, and these documents are responsive to a FOIL request, staff must conduct a confidential business information review as per 6 NYCRR Part 616 to determine whether the documents will retain their confidentiality exemption from disclosure. The DEC is legally obligated to review the FOIL request to determine which documents must be disclosed and withheld pursuant to the exceptions provided in the NY Public Officer's Law Section 87(2), and then subsequently disclose these non-privileged, responsive documents to the requester.

Comment 204: The reporting of field elements and field information must be considered carefully. The number of loads of manure, source, tanker size and volume should not be provided to the public. There are limitations to software and making a plan that fits all situations that a farm can conform is not realistic. Providing the public with total nutrients to be applied to a field along with timing should be sufficient. This will allow the management to adjust allocations of

nutrients according to the Nutrient Management Plan without having to be concerned with the fact that he applied 27 loads to the field instead of 21. (67)

Response: Comment noted. However, changes to the CNMP are expected and allowed with prior approval of the AEM certified planner and documentation of the changes in the CNMP. Only those changes as described in Part III.D. of the General Permit require Department notice.

Comment 205: We are highly concerned about any information which could be obtained by FOIL which could be used to aid attacks by groups with these intents. We believe that maps of any type which provide specific location identifier information about farmstead features or crop land falls into that category, and should not be included in an annual NMP. We believe that the availability of maps on-site for examination by the Department should satisfy the needs of the Department. We recommend striking maps from both the Farmstead/Production Area Elements, and Field Elements. (36)

Response: See response to comment 200.

Comment 206: Annual NMP Submission Date. The proposed date of March 31 should be moved to April 30. (83)

Response: Comment noted. However, the Department has determined the March 31st submittal date to be appropriate to maintain consistency with the Annual Reporting submittal requirement.

Comment 207: Annual NMP Submission Date. We recommend that the submission date for the annual NMP be changed from March 31 to April 30. (36)

Response: See response to comment 206.

Comment 208: Annual NMP Submission Date. We would recommend a May 31st deadline for NMP submittal. This would give the planner additional time to digest the past year's records and adequately incorporate this information into the coming years plan. (111, 114)

Response: See response to comment 206.

Comment 209: Annual NMP Submission Date. We would like for the Department to consider a change to the annual compliance report and proposed annual NMP submittal date. It is our opinion that a plan developed or updated at this time may not match the actual application of manure nutrients at the farm level. For example, nutrients that are applied in October after harvest are actually for the coming year's crop. A compliance submittal date plan start year October 1st would more closely follow how we operate in the field. (10)

Response: See response to comment 206.

Comment 210: The annual reporting of applications or of proposed plans should be on a crop year basis rather than a calendar year basis. Because crop nutrient applications of manure and fertilizers are commonly applied in the fall and spring, the calendar year reporting of applications becomes confusing and misleading. A

possible solution may be to allow for either crop year or calendar year reporting for nutrient applications or for the submitted NMPs. (83)

Response: See response to comment 206.

M. Annual Compliance Report

Comment 211: March 31 due date for the Annual Compliance report is still workable (83)

Response: The Department accepts and appreciates this comment.

Comment 212: The annual reporting of applications or of proposed plans should be on a crop year basis rather than a calendar year basis. Because crop nutrient applications of manure and fertilizers are commonly applied in the fall and spring, the calendar year reporting of applications becomes confusing and misleading. A possible solution may be to allow for either crop year or calendar year reporting for nutrient applications or for the submitted NMPs. (83)

Response: Comment noted. However, the Department intends to maintain the calendar year reporting requirements for the Annual Compliance Reports.

N. Manure Analyses

O. Additional Facility Inspection Requirements for Medium CAFOs

Comment 213: Correction of deficiencies. It is not always reasonable that an identified issue be corrected immediately if the expected correction may actually increase environmental risk. Thus, we recommend: “Any deficiencies found as a result of inspections required under paragraphs b or e above must be addressed immediately.” (89)

Response: Comment noted. However, it is reasonable to expect a facility to immediately correct these deficiencies.

Comment 214: Forecasted Weather Conditions. One way to help streamline this requirement would be only requiring forecasted weather conditions starting from the day spreading began (as opposed to 24 hours prior). It makes little difference if the previous day’s forecast is known, since such dated information would not be utilized by the farmer to make manure spreading decisions. (107)

Response: Comment noted. However, forecasted weather conditions are critical to the manure application decision making process. Keeping records of these conditions ensures facilities are utilizing all available information prior to manure applications to prevent and minimize environmental impact. A CAFO’s recordkeeping, specifically recorded weather information, is necessary for the Department to assess a facilities’ compliance with this General Permit and to investigate allegations of water quality violations.

Comment 215: Forecasted Weather Conditions. Precipitation records are already kept as required by Part V.K. (On-Site Rain Gauge). The vagueness of the

requirements are troublesome and the fact remains that one cannot “unspread” a field for a rain event the day after, whether or not it was forecasted. (89)

Response: See response to comment 214.

Comment 216: Forecasted Weather Conditions. Recording the weather forecast is an unnecessary burden. Recording the weather forecast (which is wrong half the time anyway) won't gain them anything, it will only waste time. (13)

Response: See response to comment 214.

Comment 217: It does not make sense to keep weather records of the days before and after manure application and we recommend deleting any language to this effect. (89)

Response: See response to comment 214.

Comment 218: The recording of weather conditions before, during and after manure application is redundant and unnecessary as we are already need to record rain falls. (39)

Response: See response to comment 214.

Comment 219: Weather forecasts included in the reports should be standardized to forecasts made by the National Weather Service (such forecasts are available on the National Weather Service website and broadcast on weather band radio). (76)

Response: See response to comment 214.

Comment 220: Weather forecasts. This should not include weather forecast. The inability of forecasters to be even close to accurate makes this information useless. (88)

Response: See response to comment 214.

Comment 221: Weather reporting during manure spreading should be more limited. This information is widely available through many weather stations even in rural areas and there is no need for each of us to duplicate these records. (29)

Response: See response to comment 214.

Comment 222: I would suggest removing the requirement of recording weather before and after manure spreading with the understanding that this information can be found by referring to the farms rainfall records. (52)

Response: See response to comment 214.

Comment 223: I believe record keeping requirements need to be kept to a minimum. (3, 4, 6, 9, 11, 14, 15, 17, 18, 19, 20, 22, 23, 24, 28, 29, 33, 40, 43, 45, 47, 48, 49, 53, 54, 56, 57, 58, 59, 63, 64, 65, 69, 74, 75, 79, 80, 84, 85, 86, 91, 92, 93, 95, 99, 102, 103, 105, 108, 113, 115, 118, 119, 120, 121, 124, 126)

Response: Comment noted. The Department has streamlined the recordkeeping requirements for CAFOs under this General Permit.

Comment 224: Weather reporting during manure spreading should be more limited than what DEC is proposing. (3, 4, 6, 9, 11, 14, 15, 17, 18, 19, 20, 22, 23, 24, 28, 33, 40, 43, 45, 47, 48, 49, 53, 54, 56, 57, 58, 59, 63, 64, 65, 69, 74, 75, 79, 80, 84, 85, 86, 91, 92, 93, 95, 99, 102, 103, 105, 108, 113, 115, 118, 119, 120, 121, 124, 126)

Response: See response to comment 223.

Comment 225: We favor changing the term “depth marker” to “surface level indicator” to provide more clarity and ease in compliance. (107)

Response: The Department clarified the recordkeeping requirements for depth markers in Appendix A of this General Permit by further defining what constitutes a depth marker.

Comment 226: Records of weekly inspections of the depth marker. You don’t want depth, you want available free board. Who cares how deep the manure is in the storage, it’s the last 16 inches we are concerned about. Change this language to “inspections of the maximum depth marker”. (12)

Response: See response to comment 225.

Comment 227: Mortality records. We believe this provision should read: *Records of method and timing of disposal of all dead animals.* This wording clarifies the element of time in the record keeping process. (107)

Response: The Department has clarified in Part V. of the General Permit that mortality records must include records of method, including annual capacity of method, and total annual number of animal mortalities.

Comment 228: Mortality records. Do you really want records of handling and disposing of dead animals? Or do you simply need to know how dead animals are handled and disposed of and average number of animals per year. (44)

Response: See response to comment 227.

Comment 229: Mortality records. We recommend deleting the proposed O.c. language and inserting: “Statement of the operation’s mortality handling methods (e.g. compost, burial or render).” (89)

Response: See response to comment 227.

Comment 230: All records filed by the CAFO should be filed with the DEC in addition to being maintained at the facility. These records can be compiled and averaged monthly as are some other SPDES discharge monitoring records and serve as valuable parts of the public record. (76)

Response: CAFO facilities are required to submit an Annual Compliance Report, this report is equivalent to the discharge monitoring reports required of other SPDES permitted facilities.

Comment 231: Recordkeeping Requirements. a. and d. should be combined into one heading (waste application requirements) since when you are applying waste both sets of information are to be recorded. (44)

Response: See response to comment 223.

Comment 232: Recordkeeping Requirements. b. and e. should be combined (waste handling requirements) since they should be completed at the same time. With regard to the frequency of these inspections seems to be a bit excessive. Is it really necessary to record the depth marker every week for six month storage? If your structures were properly designed and maintained then checking them during the drawdown should be adequate. (44)

Response: See response to comment 223 and 225.

Comment 233: Recordkeeping Requirements. There is a discrepancy between medium and Large CAFOs in the record keeping of forecasted weather conditions. Under medium it just says forecasted conditions, under large it says daily forecasted conditions. We believe that “daily” should be removed. Manure applications may not be on a daily basis, so it just makes it more cumbersome for a farm to track daily forecasts if it is not necessary. (111, 114)

Response: The Department has removed the term “daily” from Part V.P. of the General Permit.

P. Additional Recordkeeping Requirements for Large CAFOs

Comment 234: Forecasted Weather Conditions. One way to help streamline this requirement would be only requiring forecasted weather conditions starting from the day spreading began (as opposed to 24 hours prior). It makes little difference if the previous day’s forecast is known, since such dated information would not be utilized by the farmer to make manure spreading decisions. (107)

Response: See response to comment 214.

Comment 235: The recording of weather conditions before, during and after manure application is redundant and unnecessary as we are already need to record rain falls. (39)

Response: See response to comment 214.

Comment 236: Forecasted Weather Conditions. Recording the weather forecast is an unnecessary burden. Recording the weather forecast (which is wrong half the time anyway) won't gain them anything, it will only waste time. (13)

Response: See response to comment 214.

Comment 237: Weather forecasts included in the reports should be standardized to forecasts made by the National Weather Service (such forecasts are available on the National Weather Service website and broadcast on weather band radio). (76)

Response: See response to comment 214.

Comment 238: Weather forecasts. We recommend the deletion of “for 24 hours prior to and following application”. (89)

Response: See response to comment 214.

Comment 239: Weather forecasts. Please clarify that a printout from the national weather service or similar source of weather data kept with rainfall records is acceptable. (89)

Response: See response to comment 214.

Comment 240: Weather reporting during manure spreading should be more limited. This information is widely available through many weather stations even in rural areas and there is no need for each of us to duplicate these records. (29)

Response: See response to comment 214.

Comment 241: Weather reporting during manure spreading should be more limited than what DEC is proposing. (3, 4, 6, 9, 11, 14, 15, 17, 18, 19, 20, 22, 23, 24, 28, 33, 40, 43, 45, 47, 48, 49, 53, 54, 56, 57, 58, 63, 64, 65, 74, 75, 79, 80, 84, 85, 86, 91, 92, 93, 95, 99, 102, 103, 105, 108, 115, 118, 119, 120, 121, 124, 126)

Response: Comment noted. The Department has streamlined the recordkeeping requirements for CAFOs under this General Permit.

Comment 242: I believe record keeping requirements need to be kept to a minimum. In particular, the requirements for water line checks make little sense for New York's dairy industry. (3, 4, 6, 9, 11, 14, 15, 17, 18, 19, 20, 22, 23, 24, 28, 33, 40, 43, 45, 47, 48, 49, 53, 54, 56, 57, 58, 63, 64, 65, 74, 75, 79, 80, 84, 85, 86, 91, 92, 93, 95, 99, 102, 103, 105, 108, 115, 118, 119, 120, 121, 124, 126)

Response: This recordkeeping requirement has been removed from the General Permit.

Comment 243: I believe record keeping requirements need to be kept to a minimum. The requirement for waterline checks makes no sense for a New York dairy operation. When a line breaks or float leaks in a barn the extra water stays with the manure. People walk barns several times each day watching cows and checking on facilities. When there is a problem with a cow, water line, or manure system they get taken care of. I see no benefit to saving a piece of paper that someone initials to say they looked at a water line. (29)

Response: See response to comment 242.

Comment 244: Daily inspection of water lines. We respectfully request that this record keeping provision be removed from the permit. We do not believe this regulation is necessary to protect water quality on farms in New York State. (107)

Response: See response to comment 242.

Comment 245: Daily inspection of water lines. Other record keeping such as daily water line checks are not necessary. We have staff on duty 24 hours a day, and water leaks are fixed immediately, and they pose no water quality concerns. Fencing around lagoons are a good safety feature, but how do they protect water? (98)

Response: See response to comment 242.

Comment 246: Daily inspection of water lines. Unlike for some other livestock species, the daily water line inspection is not relevant in a dairy facility because the lines are not exposed and humans frequent dairy housing and milking facilities for normal husbandry activities. Please strike this requirement for dairies. We recommend: “Except for dairy operations, perform and record daily inspections of water lines...” (89)

Response: See response to comment 242.

Comment 247: Water lines. If there is a broken or leaky line it is corrected immediately. Daily inspections are most certainly done by default while feeding, milking, waste removal, etc. Daily record sheets excessive. (44)

Response: See response to comment 242.

Comment 248: Depth markers. We favor changing the term “depth marker” to “surface level indicator” to provide more clarity and ease in compliance. (107)

Response: See response to comment 225.

Comment 249: Depth markers. Storages should be marked indicating the maximum fill line (freeboard requirement plus the 25 year 24 hour storm requirement) rather than depth markers per se. It is very difficult to install and maintain a true depth marker and storage depth is irrelevant most of the time. (89)

Response: See response to comment 225.

Comment 250: Mortality records. We believe these two provisions should read: *Records of method and timing of disposal of all dead animals.* This wording clarifies the element of time in the record keeping process. (107)

Response: See response to comment 227.

Comment 251: Mortality records. We recommend deleting the proposed language and inserting: “Statement of the operation’s mortality handling methods (e.g. compost, burial or render).” (89)

Response: See response to comment 227.

Comment 252: Records of weekly inspections of the depth marker. You don’t want depth, you want available free board. Who cares how deep the manure is in the storage, it’s the last 16 inches we are concerned about. Change this language to “inspections of the maximum depth marker”. Change the culture of trying to measure manure in storage into one of concern with distance to the free board or maximum fill marker. (12)

Response: See response to comment 225.

Comment 253: All records filed by the CAFO should be filed with the DEC in addition to being maintained at the facility. These records can be compiled and averaged monthly as are some other SPDES discharge monitoring records and serve as valuable parts of the public record. (76)

Response: CAFO facilities are required to submit an Annual Compliance Report, this report is equivalent to the discharge monitoring reports required of other SPDES permitted facilities.

Comment 254: Stormwater Diversion Devices. I still believe that many of these records are excessive and unnecessary; this is another box checking exercise. Weekly inspections of storm water control structures. Every three months should be adequate. (44)

Response: Comment noted. The Department has streamlined the recordkeeping requirements for CAFOs under this General Permit.

Comment 255: Manure storage recordkeeping. Design estimate of volume of solids accumulation? Does this mean how much solids you are allowed to accumulate above the design treatment volume. (44)

Response: The design estimate of volume of solids accumulation means that the Professional Engineer recognizes and documents that when unloading a manure storage some residual material will remain. The volume of residual (solids) must be subtracted from the total volume to determine the usable volume of the structure.

Comment 256: Manure storage recordkeeping. Items P.f.i. through P.f.b. are manure storage engineering requirements that are not a regular recordkeeping type requirement and may not be available for storage structures that have been or will be certified post construction. This recordkeeping requirement should be omitted, as all relevant information, if available, would already be included in an operation's CNMP. (89)

Response: Comment noted. However, calculations need to be available for the total volume and the storage time for all storages. These should be in the CNMP for both designed storages and those that were built in the past and are now certified by a Professional Engineer.

Comment 257: Recordkeeping. I fail to see the need for other additional practices, such as checking water lines daily or the recording of weather before, during and after manure application. (50)

Response: See response to comment 254.

Comment 258: Correction of deficiencies. It is not always reasonable that an identified issue be corrected immediately if the expected correction may actually increase environmental risk. Thus, we recommend: "Any deficiencies found as a result of inspections required under paragraphs b or e above must be addressed immediately." (89)

Response: Comment noted. However, it is reasonable to expect a facility to immediately correct these deficiencies.

Part VI. GENERIC BEST MANAGEMENT PRACTICES

A. Prohibition on Unauthorized Substances.

Comment 259: NEDPA proposes the following modification of this requirement: “The retention and disposal of food processing wastewater is authorized only as provided for in the Comprehensive Nutrient Management Plan.” “The retention or storage and disposal or land application of food processing wastewater, food process biomass treatment residuals and/or recognizable food processing waste (as defined in 6NYCRR 360- 1.2(b)70) and/or food processing related biomass treatment residuals is authorized only if it is specified in the CNMP and done in accordance with 6NYCRR Part 360-4.2(A)(2).”

6 NYCRR § 360-1.2 contains definitions and does not establish any wastewater related requirements. It is counterproductive for this Permit to place any unnecessary restrictions on the types of wastes that can be co-mingled with CAFO-related wastes that are amendable to any of the existing and emerging wastewater and energy recovery techniques, so long as the extra nutrients are addressed in the CNMP. Further, as recommended above, by allowing co-mingling as authorized by the CNMP, the Permit still provides for a comprehensive review of any proposed co-digestion by the AEM certified Planner or engineer.

The term “incidental” should be deleted from the land application related requirements because as long as both the CNMP and 6 NYCRR § 360-4 requirements are met, the relative contribution of CAFO-related wastes and food processing related wastewater should not be specified. (89)

Response: Comment noted. However, the requirements for CNMP development and implementation are intended to address agriculturally derived wastes such as manure, litter and process wastewater. The inclusion of some incidental food waste into this system is allowable but shall not be the majority component of any waste storage structure unless specifically allowed under the regulatory authority of 6 NYCRR § 360. Additionally, no animal by-products shall be accepted under the CNMP or this General Permit.

B. Proper Operation and Maintenance Requirements

Comment 260: It is difficult to understand what this section is attempting to require. NEDPA suggests the following modifications: “Facilities following this permit are deemed to be in attainment of the effluent limitations required in Section I and all applicable Generic Best Management Practices (BMPs) used to comply with the effluent limitations in this permit. The documentation of such attainment is the Comprehensive Nutrient Management Plan (CNMP) required by Section III of this permit and the required documentation as stated therein.” (89)

Response: Comment noted. However, facilities must document the attainment of the effluent limitations required by the General Permit through the various recordkeeping, reporting and CNMP updates necessary for compliance with this General Permit.

C. Waste Application Requirements

Comment 261: The second sentence of section C is confusing, problematic and should be deleted. It is clearly a permit violation to cause or contribute to a water quality violation, whether from field or farmstead, and it need not be restated here. (89)

Response: Comment noted. However, restating the requirements of the Environmental Conservation Law as it specifically relates to land application of CAFO wastes is warranted.

Comment 262: We are opposed to the proposed ban on “excessive ponding” when applying manure. Of particular concern is the lack of definition DEC has provided for this term. Rather than include this ban, we suggest a more appropriate approach of updating the adverse weather and groundwater protection guidelines to address the avoidance of a reasonable definition of “excessive ponding.” (107)

Response: The term “excessive ponding” has been removed from the General Permit.

Comment 263: “In no case shall land application rates result in excessive ponding.” For how long, how deep? How many square feet is considered “excessive”? Define or remove “excessive ponding from the paragraph”. (12)

Response: See response to comment 262.

Comment 264: The term excessive ponding is vague and needs to be removed as if you have excessive ponding you could assume you will have runoff. (39)

Response: See response to comment 262.

Comment 265: We would like to see the definition of the term “ponding” clarified in regards to manure application limitations as outlined. Is the ponding from manure application or from prior precipitation/rainfall? (10)

Response: See response to comment 262.

Comment 266: We believe that a determination of what is “excessive” is highly arbitrary, and in itself is not of consequence. The ultimate concern is there is runoff. We recommend that the term “excessive ponding” be removed. (36)

Response: See response to comment 262.

Comment 267: Excessive Ponding. “Excessive ponding” is difficult to define and enforce; puddles may occur in many reasonable situations. (89)

Response: See response to comment 262.

Comment 268: NYFB is strongly supportive of the ability for farmers permitted under this permit to spread manure during all times of the year, provided it is done in accordance with the CNMP. (107)

Response: Comment noted. However, manure applications as prescribed in the CNMP are allowable provided they are made during appropriate weather and field conditions and in accordance with the requirements of this General Permit. The Cornell Guide, “Supplemental Manure Spreading Guidelines to Reduce Water Contamination Risk During Adverse Weather Conditions” must be considered as per Part VI.C.

Comment 269: Winter Manure Applications. Continuing to allow winter spreading of manure, based on appropriate risk evaluations, is critical for New York farms and is an additional provision that I support. (3, 4, 6, 9, 11, 14, 15, 17, 18, 19, 20, 22, 23, 24, 28, 29, 33, 40, 43, 45, 47, 48, 49, 53, 54, 56, 57, 58, 59, 63, 64, 65, 69, 74, 75, 79, 80, 84, 85, 86, 91, 92, 93, 95, 99, 102, 103, 105, 108, 113, 115, 118, 119, 120, 121, 124, 126)

Response: See response to comment 268.

Comment 270: Adverse Weather Emergency Applications. We support the inclusion of this provision. We believe the provision should read: Emergency applications of manure, litter and process wastewater during adverse weather conditions must be made under the considerations of Cornell University guidelines in place at the time of permit issuance. Nothing shall prevent the farm from utilizing more current guidelines. The CNMP must identify specific fields to be reserved for these emergency applications. (107)

Response: Comment noted. However, the Department is requiring consideration of the current Cornell Guide, “Supplemental Manure Spreading Guidelines to Reduce Water Contamination Risk During Adverse Weather Conditions” and cannot predict or presume support for future Cornell developed documents.

Comment 271: Adverse Weather Emergency Applications. The CNMP must identify specific fields to be reserved for these emergency applications. Reserved until when? Are these fields never to be spread on if there are no adverse weather conditions or can they be spread on in the spring if no adverse weather conditions were experienced over the winter. Perhaps the word “utilized” instead of “reserved should be used. (106)

Response: A CAFO facility is required to have fields available for applications at any point of the year when adverse weather and available storage volume may conflict and necessitate waste applications. If a facility has adequate storage volume to eliminate the need for winter applications then no fields need be reserved during the winter. However, if the storage volume does or may necessitate winter applications fields must be reserved for adverse weather emergency applications until such time as the storage has been all or partially emptied and the risk for adverse weather applications eliminated. Also, adverse weather applications are not limited to winter applications, if a facility does not maintain adequate storage volume throughout the remainder of the year they must also reserved fields for emergency applications as described above.

Comment 272: Adverse Weather Emergency Applications. The undersigned recommend the permit should require delaying spreading when conditions for runoff are high. (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: The Department has added language to Part VI.C. specifically prohibiting land application rates and timing that would cause runoff that causes or contributes to a violation of water quality standards.

Comment 273: Adverse Weather Emergency Applications. We agree that it is appropriate to have provisions for emergency manure applications. (89)

Response: The Department accepts and appreciates this comment.

Comment 274: Protection of groundwater. We request the provision read as follows: Applications of manure, litter and process wastewater in areas with at-risk groundwater as defined in the Cornell University recommendations at the time of permit issuance must be done under consideration of such recommendations and under the direction of a AEM certified planner. (107)

Response: The Department has deleted the term “or most recent version” from Part VI.C.b. to address this comment.

Comment 275: Protection of groundwater. The “at-risk groundwater areas” are poorly defined at this time. We agree that all producers should review and follow the guidelines to the extent they can identify risk areas, but because there can be a high degree of uncertainty for these sites, the guidelines do not need to be expressly required in the permit. Please delete any reference to the 2004 Cornell University “Manure and Groundwater: The Case for Protective Measures and Supporting Guidelines” document. (89)

Response: Comment noted. However, the requirement for consideration of the 2004 Cornell University “Manure and Groundwater: The Case for Protective Measures and Supporting Guidelines” as part of the decision making process for land applications is necessary to decrease the risk for groundwater contamination.

Comment 276: Applicator Training for Large CAFOs. Because of the undefined increased costs to farmers, lack of clear proposal from DEC, uncertainty of training availability and future Department resources, we insist that the manure applicator training not be mandatory. As an alternative, we would suggest that documented attendance at a manure training opportunity be viewed as a favorable point of consideration for the farm in the event of any DEC enforcement action taken against the farm. (107)

Response: The Department has adjusted the requirement for manure applicator training such that two individuals from each permitted Large CAFO facility must attend a NYSDEC endorsed manure applicator training within the permit term.

Comment 277: Manure Applicator Training. I believe you could accomplish this through a packet mailed out or delivered to the farm by there CNMP Planner. It would need to be signed and submitted to the DEC that all information was passed on to responsible employees. This passes the liability on to the permittee and doest require them to go to training on spreading manure. (44)

Response: Comment noted. However, the requirement for Large CAFOs to attend manure applicator training is necessary to ensure adequate protection of the environment during land application of manure, litter and process wastewater.

Comment 278: Manure Applicator Training. This provision seems unnecessary if proper development of a NMP has been done. (32)

Response: See response to comment 277.

Comment 279: Manure Applicator Training. We agree that all CAFO managers and staff need to continue to learn more about how to protect the environment, and that all CAFOs should participate in the CAFO Road Show or similar trainings if and when offered in the future. But these trainings must be relevant and truly educational. If they are, many CAFO owners/operators and their staff will attend. However, producers should not be forced to attend training sessions, there are no provisions for tracking and we are not assured of relevant material and availability of programs. (89)

Response: See response to comment 277.

Comment 280: Manure Applicator Training. Why is there a differentiation between Medium or Large Farms? Systems, Setback requirements, etc. are the same. And, why is it that not everyone who has animal waste to distribute be required to be supervised or trained, as all have the potential to compromise water quality? (32)

Response: Comment noted. However, the Department has reviewed the available data with respect to the concentration of animals per acre of available land for manure applications. This concentration is higher for Large CAFOs and therefore requires Large CAFOs to apply manure in greater quantities rather than a lower more distributed application as is the option for Medium CAFOs. These more concentrated applications require more careful decision making by the Large CAFOs, manure applicator training will aid in this decision making and therefore result in environmental benefit. After phasing-in manure applicator training for Large CAFOs, the Department will evaluate the merits of the program.

Comment 281: Manure Applicator Training. Berkshire Valley Holsteins, following CNMP, has manure application protocol in place. Management supervises and directs this process. It would seem that proper manure application should not be determined by the farm size, as any one load of manure could comprise water quality, if handled improperly. (66)

Response: See response to comment 280.

Comment 282: Manure Applicator Training. DEC should require all AFO's to seek continued training in manure application, not just Large CAFO's. (88)

Response: See response to comment 280.

Comment 283: Manure Applicator Training. I do not feel the manure applicator training requirement is appropriate. Since there is no training program in place, this requirement creates a mandate that cannot be fulfilled. Our farm has our planner review with key employees each year the spreading and storage monitoring guidelines for the coming season. If you need to require something why not get a video made that reviews the items that people doing application and monitoring on the farm need to know. This would be much more cost effective for both DEC and the farms. We could use this for all employees not just two. (29)

Response: Comment noted. However, the requirement for Large CAFOs to attend manure applicator training is necessary to ensure adequate protection of the environment during their land applications of manure, litter and process wastewater. Also, the requirement is for a minimum of two individuals to attend the training, additional individuals may also participate.

Comment 284: Manure Applicator Training. Training is essential to ensure proper application of nutrient rich manure and to ensure protection of our shared water resources. Manure application must be made by professional, educated, and certified applicators for both medium and Large CAFOs. Due to rapidly changing technology and science, manure applicators should be required annually. The undersigned recommend the Department requiring annual manure applicator training certification for large and Medium CAFOs. (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: See response to comment 280.

Comment 285: Manure Applicator Training. Manure is manure, regardless of the size of the CAFO. All CAFOs should have staff qualified by DEC in manure applicator training. (76)

Response: See response to comment 280.

Comment 286: Manure Applicator Training. The requirement to attend a manure applicator training every other year should apply to Medium CAFOs as well as Large CAFOs. Many medium farms spread significant amounts of manure, and it is just as important that they be doing a good job of it as it is for large farms. (13)

Response: See response to comment 280.

Comment 287: Manure Applicator Training. The requirement for training is unnecessary. We have a plan that needs to be followed. What is the training for? (39)

Response: See response to comment 277.

Comment 288: Manure Applicator Training. I believe in keeping precipitation records as we currently do, but I do not think it should be required for someone who is spreading manure to attend a "manure spreading school", restricted areas and practices are already outlined in each farms nutrient plan. (46)

Response: See response to comment 277.

Comment 289: Require certified manure applicator supervision. To ensure the best science and practice inform manure application, the undersigned recommend the Department mandating that the certified manure applicator is on CAFO premise, at all times when there will be any spreading. (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: Comment noted. This proposed requirement interferes with the certified AEM planning process and poses difficulty for Department staff to enforce against violations of this proposed General Permit provision. Staff adequately described the

Manure Applicator Training program within the General Permit. Please reference Part VI.C.c. of this General Permit for the specific training requirements.

Comment 290: I do not feel the manure applicator training requirement is appropriate. Since there is no training system in place, this requirement creates a mandate that cannot be fulfilled. A more effective method would be to provide positive enforcement posture to those farms participating in a training program. (3, 4, 6, 9, 11, 14, 15, 17, 18, 19, 20, 22, 23, 24, 28, 33, 40, 43, 45, 47, 48, 49, 53, 54, 56, 57, 58, 59, 63, 64, 65, 74, 75, 79, 80, 84, 85, 86, 91, 92, 93, 95, 99, 102, 103, 105, 108, 113, 115, 118, 119, 120, 121, 124, 126)

Response: See response to comment 277.

Comment 291: Manure applicator Training. Why require only Large Size CAFO's (an estimated 25% of the state's manure) for this training? Manure is manure and this policy should be followed by all facilities that spread manure in a program similar to the DEC pesticide program. Don't design a training program that stands to capture the least percentage of your target audience. Either require all farms that spread manure or eliminate this requirement. (12)

Response: See response to comment 280.

D. Field Setback Requirements

Comment 292: Field Setback Requirements—flowpath. We are supportive of the use of the modifier term “down-gradient” in the provisions barring manure, litter and process wastewater application within 100 feet of certain water quality related concerns. (107)

Response: The Department accepts and appreciates this comment.

Comment 293: Field Setback Requirements. The permit calls for a 100' buffer of manure spreading from waters of the state including wetlands and “known” wells. It is unclear if this 100' buffer includes the 100' wetlands buffer already in place. The undersigned recommend that the permit require manure application to occur 200' from wetlands. (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: The requirements of Part VI.D. of the General Permit requires a 100' setback not a 200' setback from a New York State Regulatory Freshwater Wetland with a surface connection to the field.

Comment 294: Field Setback Requirements. Requiring a 100' setback from intermittent streams is a significant change from the previous rule of a 20' setback, and will have a major impact on many farms, possibly reducing cropped acres. Please consider requiring a 100' setback from an intermittent stream *while flowing*, and keeping the 20' setback while the stream channel is dry. (13)

Response: Comment noted. However, the requirement for CAFOs to respect a 100' setback or to implement one of the alternatives as outlined in Part VI.D. of the General Permit is necessary to ensure adequate protection of the environment during their land applications of manure, litter and process wastewater.

Comment 295: Field Setback Requirements. I don't think a 15' setback with incorporation is a good option. 15' feet of vegetation will do very little to stop the flow of manure if there is the slightest down-gradient, or even just a little rain. A lot can happen within one day before incorporation is required. I don't think this practice will be effective in protecting water quality. However if this option is going to stay, please clarify the language if incorporation within one day means within 24 hours, or within 12 hours. (13)

Response: The Department has clarified in Part VI.D. of the General Permit that the conservation practice of incorporation must be completed within 24 hours of the application.

Comment 296: Field Setback Requirements. A farmer I work with would like to propose that a 15' manure spreading setback be allowed for summer applications of manure on hay ground, as long as the rate is reasonably light. (13)

Response: See response to comment 294.

Comment 297: Field Setback Requirements. Vegetated buffer. Please add: "...the CAFO may substitute the 100-foot setback described above with a 35-foot buffer to down gradient waters as described in VI.D(1), (2), and (3) above, with a 35-foot wide vegetated buffer..." (89)

Response: The Department has added clarification to the requirements for Field Setback Requirements in Part VI.D. of the General Permit to address this comment.

Comment 298: Field setback requirements. Alternative practice. Please add: ".. the CAFO may substitute the 100-foot setback described above with a 15-foot wide setback from down-gradient waters as described in VI.D(1), (2), and (3) above, when..." (89)

Response: The Department has added clarification to the requirements for Field Setback Requirements in Part VI.D. of the General Permit to address this comment.

Comment 299: Vegetative Buffer and Alternative practice. We strongly support the inclusion of these two options as a mechanism to meet spreading limitation setbacks. (107)

Response: The Department accepts and appreciates this comment.

Comment 300: There is no reference in this paragraph to the terms Hydrological Sensitive Areas (HSA's) and Hydrological Critical Areas (HCA's) and the difference between them. It would follow then that there is no longer a setback requirement for HSA's i.e. concentrated flows within the field, as there was in the last permit. No change is recommended. (12)

Response: CAFOs must develop and implement a CNMP developed in accordance with all applicable NRCS standards. This includes land applications under the requirements of NRCS Conservation Practice Standard NY590. As such, NY590 requires identification of hydrologically sensitive areas and setbacks or implementation of field specific

alternative conservation practices as deemed appropriate under the professional judgment of the AEM certified planner.

Comment 301: Concentrated flow areas are not specifically addressed. They occur quite frequently and should be addressed specifically so there are no loopholes. (13)

Response: See response to comment 300.

E. Other Best Management Practices

Comment 302: Facility expansion. Please modify to read: “Facilities shall not expand operations, either in size or numbers of animals, prior to amending or enlarging the wastehandling procedures and structures if necessary, to accommodate any additional wastes that will be generated...” (89)

Response: Comment noted. The Department has adequately described the requirements for facility expansions in the General Permit.

Comment 303: Silage Leachate collection. The proposed flexibility provided to planners in this provision should remain in place. (107)

Response: The Department accepts and appreciates this comment.

Comment 304: Silage Leachate Collection. Inspections of the concrete pad for bunk silo monitoring, excessive. (44)

Response: Comment noted. However, the requirement for CAFOs to develop and implement a monitoring strategy when the AEM certified planner deems low-flow silage leachate collection is not needed as outlined in Part VI.E. of the General Permit is necessary to ensure adequate protection of the environment.

Comment 305: The DEC’s proposed conditions on facilities (new or expansion of existing) within a 100-year floodplain are a reasonable approach to protecting water quality. The use of a professional engineer to ensure prevention from inundation provides that appropriate science-based considerations will be taken in construction of the facility. We are supportive of amending this requirement to include that protection from inundation shall include consideration of animal health in the event of a 100-year flood for such new facilities or expanded portions of existing facilities. (107)

Response: Commented noted. However, consideration of animal health is outside of the regulatory authority of this General Permit.

Comment 306: Open lots. Not sure what is meant by an “open Lot”? If it is a barnyard then the runoff from the barnyard has to be handled not just the clean water exclusion. If it is a pasture open lot then neither has to be handled if it is a vegetated pasture. Is there a case when there is an area where it is not pasture or a barnyard but is considered an “open lot”? (44)

Response: The Department has deleted the term “open lots” and replaced it with the term “barnyard”. Part VI.D. addresses the clean water exclusion but does not eliminate or

modify the requirement to address barnyard runoff within the CNMP in accordance with all applicable NRCS standards.

Comment 307: The undersigned strongly recommend that the permit should prohibit with no exceptions or exemptions the building of new CAFOs on 100-year floodplains. Furthermore, manure storage and silage leachate collection systems are designed by humans and subject to human error. Tragic consequences of manure storage or leachate collection failures should be considered when siting facility locations. The undersigned strongly recommend the Department explicitly prohibit siting manure storage or silage leachate collection facilities in floodplains. (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: Comment noted. Manure storage and silage leachate collection systems are required to be designed or evaluated by a Professional Engineer currently licensed to practice in New York State in accordance with all applicable NRCS standards.

Comment 308: New Facilities. DEC must not allow new CAFO facilities or new manure storage or silage leachate collection facilities (including on new manure and silage leachate collection facilities proposed on established CAFOs) in 100-year floodplains and the draft permits should be changed to reflect this. (76)

Response: The Department has changed the requirements in the General Permit to prohibit building of new CAFO facilities within the 100-year floodplain under this General Permit. The construction of a new CAFO facility within the 100-year floodplain therefore requires individual SPDES permit coverage prior to construction.

Comment 309: New Facilities and Structures – the 100 year flood plain restriction. In reality, during a 100 year flood, location in or outside the plain may not matter at all. That amount of rainfall or rain snow melt will move things from outside the plain to the plain. Additional engineer or engineering certification will add to the engineering expense. (32)

Response: Comment noted. However, the requirement for CAFOs to protect these structures and the wastes they contain from inundation during the 100-year flood as outlined in Part VI.E. of the General Permit is necessary to ensure adequate protection of the environment.

Comment 310: New Facilities and Structures: A 100 foot of a classified stream or protected waterway, classified stream needs to be defined. DEC defines a non-classified stream may take on the classification of a classified stream to which it flows. There is some confusion here. (32)

Response: The Department has clarified the definition of “Waters of the State” in Appendix A of this General Permit to address this comment.

Comment 311: New Facilities. New Facilities within 100 feet of a classified stream or water body. A better definition of what this includes is necessary. Some DEC officials say that a non-classified intermittent waterway may take on the classification of a classified water if it flows into that water. Clarification of this is important. (7)

Response: See response to comment 310.

Comment 312: We oppose DEC’s complete ban on construction of new waste and feed storage facilities within 100-feet of a NYS classified stream. We recommend amending the provision to allow all existing facilities and any existing farms expanding to the medium or Large CAFO levels to construct waste or feed storage structures within 100-feet of a NYS classified stream provided construction occurs in a manner to protect water quality and such construction is documented by a Professional Engineer. New facilities that have not previously been in operation should not be allowed to construct feed or waste storage within 100-feet of a NYS classified stream. (107)

Response: Comment noted. However, the prohibition on construction of new waste storage facilities or feed storage structures within 100’ of a NYS classified stream or protected waterbody as outlined in Part VI.E. of the General Permit is necessary to ensure adequate protection of the environment.

Comment 313: New facilities and structures. I believe your intent for feed structures is to keep leachate out of the streams, however not all feed structures produce leachate. Upright grain storages or other dried feed storages don’t produce leachate and this sentence would prohibit their placement. Identify the feed source of concern by percent moisture of the feed which determines how feed can be stored or say that “new feed storages within 100 feet of a stream shall be designed such that no runoff enters the stream.” (12)

Response: Comment noted. However, the prohibition on construction of all new feed storage structures within 100’ of a NYS classified stream or protected waterbody as outlined in Part VI.E. of the General Permit is necessary to ensure adequate protection of the environment.

Comment 314: New facilities and structures. The term feed storage should be refined to refer only to bunker silos. This provision should not be applicable to upright silos or grain bins since these feed storage units have little risk of causing water quality impairment. (107)

Response: See response to comment 313.

Comment 315: Existing waste storage structures that have not been designed or installed.....It is our belief that an additional sentence needs to be included along the lines of “Recommended deficiencies need to be addressed with a certification from the professional engineer that completed.” (106)

Response: The Department has made this modification.

Comment 316: We suggest that the provision be rewritten to say: Existing waste storage structures that have not been designed or installed under the direction of a PE...or NRCS employee...must be evaluated by a PE...in accordance with AEM waste storage evaluation procedures in place as the time of permit issuance. (107)

Response: The Department has made this modification.

Comment 317: Animals and contact with surface water. It is my understanding that this paragraph does not intend to include pastures. Is this made clear enough by your definition of production areas or confinement? (106)

Response: The requirement for exclusion of animals from waters of the State pertains to those animals confined in the animal feeding operation which, by definition, excludes pasture areas.

Comment 318: Animals and contact with surface water. Some CAFO operations still utilize pastures to a limited extent. Would this rule require pastured animals on CAFOs to be fenced out of streams? Or does it refer specifically to farmstead areas such as barns and barnyards? Please clarify. (13)

Response: See response to comment 317.

Comment 319: Animals and contact with surface water. We suggest the following language: Animals confined in the animal feeding operation must be prevented, to the degree possible, from coming into contact with the surface waters of the State, except when on pasture. Any unavoidable contact with surface water, such as stream crossings, shall be mitigated through consultation with the AEM Certified Planner. (107)

Response: See response to comment 317.

Comment 320: Animals and contact with surface water. At what point is feed water from a reservoir not considered “waters of the state”? Include “unless piped into the facility to be used to feed cattle”. (12)

Response: Waters of the State are clearly defined in Appendix A of this General Permit. Waters of the State do not include piped feed water.

Comment 321: Well water protections. NYFB opposes DEC’s general prohibition on the water quality impairments to public or neighboring private drinking water wells due to waste handling at the permitted facility. The first sentence of this provision should be rewritten to read: There shall be no water quality impairment to properly designed, constructed and maintained public or neighboring private drinking water wells due to waste handling at the permitted facility. (107)

Response: Comment noted. Both ground and surface water constitute waters of New York State and protection of each is the responsibility of the Department. The Department will continue to work collaboratively with State and County Health Departments in response to allegations of contaminated private drinking water wells.

Comment 322: Well water protections. It is critical to protect drinking water quality and all facilities take this seriously. However there is no standard State regulation for placement of private wells in proximity to agricultural fields. If a neighboring homeowner puts in a private well on the property line of a farmers field he now has to stay back 100 feet with a manure spreader, if a homeowner puts in a private well within 100 feet of a livestock building does this mean the farm has to take down or abandon the facility? Work on the State Health Department to create

standards for municipalities to follow which outline the proximity of private wells to property boundaries. (12)

Response: Comment noted. Both ground and surface water constitute waters of New York State and protection of each is the responsibility of the Department. DEC will continue to work collaboratively with State and County Health Departments in response to allegations of contaminated private drinking water wells. Also, citizens may raise legislative initiatives with the Department of Health outside of the regulatory authority of this General Permit.

Comment 323: Well water protections. Water quality impairments due to improper construction of neighbors well should not be the responsibility of the facility. (39)

Response: See response to comment 321.

Comment 324: Well water protections. Our producers feel that the DEC and Department of Health should collaborate on Appendix 5-B, Standards for Water Wells. We feel that the burden of compliance and public safety is being shifted to the permittee. In order for the regulation to be affective and fair, land owners should also be informed of their obligations as to where their wells should be sited according to state law. It has been our experience locally, that some State Department of Health laws are not currently being enforced to the general public. (10)

Response: The New York State Department of Health has regulatory authority over Appendix 5-B, Standards for Water Wells. Appendix 5-B standards require setbacks for siting of new water wells based on contaminant type, please see that document for specific information. Additionally, the NYS Building Code incorporates by reference Appendix 5-B requirements.

Comment 325: Well water protections. The coalition recognizes that wellhead identification is the responsibility of the well-owner to notify the manure applicator, however we believe CAFO operators should be proactive in ascertaining wellhead location to protect neighbor's health and property value. (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: Comment noted. This comment seeks actions outside the authority of this General Permit.

Comment 326: Public water supply protection. CAFOs located in protected watersheds like Skaneateles Lake or atop of sole source aquifers should be required to take extra precautions to protect high quality drinking water resources and the public health. (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: Comment noted. This comment seeks actions outside the authority of this General Permit.

Comment 327: The provision establishing setbacks for all retention facilities, holding pens and waste water disposal sites from water wells as specified in State regulations or health codes or State-issued permits does not take into account the

vast range of potential scenarios faced by farmers regarding water wells. For example, as written, the provision would require existing facilities located within the set back distances to water wells established in regulations to be reconstructed beyond the established distances. We suggest the following: Newly constructed retention facilities and structures, holding pens, or waste/wastewater disposal sites shall not be located closer to existing public or private, non-farm water wells than the distances specified by State regulations or health codes or State-issued permits unless such retention facility and structure, holding pen or waste/wastewater disposal site is designed, constructed and maintained under the approval of a Professional Engineer currently licensed to practice in New York State. Any newly constructed or reconstructed on-farm water well, public or private water well would need to meet the specific requirements of well owners, including adhering to setbacks specified in the above noted regulations. (107)

Response: Comment noted. This comment is outside of the regulatory authority of this General Permit. The New York State Department of Health has regulatory authority over Appendix 5-B, Standards for Water Wells. Appendix 5-B standards require setbacks for siting of new water wells based on contaminant type, please see that document for specific information. Additionally, the NYS Building Code incorporates by reference Appendix 5-B requirements.

Comment 328: Farm pesticide use. We respectfully request the removal of this paragraph. We feel that the first part of this provision is duplicative to existing statute and regulatory oversight and should not be included in these provisions. The final sentence of the paragraph related to wastes from dipping vats, etc is not objectionable to us. We do not believe items like foot baths will be restricted by this provision, provided they are handled in a way to prevent pollutants from entering the waters of the state. (107)

Response: Comment noted.

Comment 329: Farm pesticide use. The undersigned strongly support mandating pesticide application legally by certified applicators aimed at preventing contamination of the waters of the State. Additionally, we strongly support requiring “all wastes from dipping vats, pest and parasite-control units, and other facilities used for the application of potentially hazardous or toxic chemicals shall be handled and disposed of in a manner such as to prevent pollutants from entering the waters of the State.” (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: The Department accepts and appreciates this comment.

Comment 330: Mortality Management. We are supportive of the reference to Cornell University’s guidelines regarding composting livestock mortalities in addition to the applicable NRCS standards. We advise that DEC strike the specific reference to the Cornell document in order to facilitate more rapid, voluntary adoption of any guidelines issued after the date of permit issuance. The new sentence should read: Composting of dead animals must be made in accordance with Cornell University Waste Management Institute recommendations in place at

the time of permit issuance or applicable NRCS standards. Adoption of more currently released guidelines is strongly recommended. (107)

Response: The Department has made this modification.

Comment 331: Mortality Management. We agree that the natural rendering handbook provides many good suggestions for composting livestock mortalities and ought to be a guideline, but not mandated for farms that choose to compost mortalities. We recommend this modification: “Composting of dead animals may be conducted in accordance with the 2002 Cornell Waste Management... or most recent version as guidance. Other methods of mortality management may be used so long as they are deemed as protective of water quality as recommended composting methods according to the best professional judgment of a certified planner.” (89)

Response: Composting of dead animals must be made in accordance with the 2002 Cornell Waste Management Institute recommendations “[Natural Rendering: Composting Livestock Mortality & Butcher Waste](#)” or applicable NRCS standard.

Comment 332: Mortality Management. The 2002 Cornell Waste Management Institute recommendations are not practical for 6-10% mortality from Large facilities. Eliminate the connection to the Natural Rendering doc and require composting to meet applicable NRCS Standards which would trigger PE certification of composting systems. (12)

Response: See response to comment 331.

Comment 333: We recognize the reemphasis that BMPs must be designed in accordance with applicable NRCS standards. Due to the use within in the permit of other allowable standards in certain situations, we recommend modification in the following manner: ...must be managed in accordance with NRCS standards, unless otherwise allowed within this permit. (107)

Response: The CNMP must be developed and implemented by an AEM certified planner in accordance with all applicable NRCS standards.

Comment 334: Transfer of Manure, Litter and Process Wastewater. If selling or exporting manure to another operation, CAFO operators should be required to educate the purchaser on legal requirements to protect water quality and secure written documentation of the manure buyer’s obligations to apply in a manner protective of water resources, consistent with NRCS and Cornell best management practices. The undersigned recommend that the Department require written documentation for each bulk manure export detailing the purchaser’s understanding of the proper handling and application of manure to protect the waters of the state. (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: Commented noted. However, this comment is outside of the regulatory authority of this General Permit.

Comment 335: Transfer of Manure, Litter and Process Wastewater. The undersigned recommend that CAFO operators should be required to report manure

export data to the Department, include export figures in the annual report, and retain data onsite for 5 years. (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: CAFO facilities are required to maintain records showing the date and amount of manure, litter, and/or process wastewater that leaves the permitted operation; record the name and address of the recipient, provide the recipient(s) with representative information on the nutrient content of the manure, litter, and/or process wastewater; and retain these records on-site, for a period of five years, and to submit these to the Department upon request.

Part VII. GENERAL PROVISIONS

A. Duty to Comply

Comment 336: It was our understanding that this permit does not provide authorization to discharge. If this is the case, we question whether such authorization can therefore be removed. (107)

Response: The term discharge has been deleted from Part VII.A. of the General Permit.

B. Penalties for Violations of Permit Conditions

C. Continuation of the Expired General Permit

Comment 337: Is this language written to address DEC's insistence that there is a lapse of coverage under the current permit should no replacement be proffered within 180 days before its expiration? If so, we are glad there is a clear re-statement of 6 NYCRR 621's requirements. (89)

Response: This provision is inserted to prevent a lapse of General Permit coverage, in the event the succeeding General Permit is not issued immediately upon expiration of this General Permit. This provision articulates DEC's authority to extend this General Permit at the end of its 5-year cycle from the State Administrative Procedure Act §401(2).

D. Need to Halt or Reduce Activity Not a Defense

E. Duty to Mitigate

F. Property Rights

G. Severability

Comment 338: The language establishing severability is overly broad and vague. NYFB is particularly concerned by the use of the term circumstance. We recommend to provide better clarity, the following language is added: ...is held invalid, the application of such provision to other reasonably differing circumstances, and the remainder of this permit, shall not be affected. (107)

Response: Comment noted. The severability clause is a carry-over from GP-04-02. This is standard language utilized in DEC's Division of Water General Permits and DEC is disinclined to alter the language.

H. Department Orders

I. Permit Actions

J. Department Request for Information

K. Requirements for Other Permits

Comment 339: We request clarification on the need for reference to the Clean Water Act in this provision. (107)

Response: The reference to the Clean Water Act has been removed from Part VII.K. of the General Permit.

Comment 340: the Permit should affirmatively state that “Compliance with GP-0-09-001 is deemed to be compliance with the relevant provisions of both the Clean Water Act and NY’s ECL.” (89)

Response: Comment noted. Compliance with this General Permit is achieved by following a CNMP developed in accordance with the New York State NRCS 312 standard and other applicable New York State NRCS standards as well as meeting the provisions outlined in the General Permit such as requirements for reporting, record retention, deadlines, etc.

Comment 341: It is NEDPA’s understanding that the Permit’s language means that permittees meet the Clean Water Act because they have certified that their farm operations do not “discharge or propose to discharge,” and, thus are not required to obtain a permit under the Clean Water Act. It should be clarified that there is no Clean Water Act jurisdiction in the State Permit. Thus, despite the fact that compliance with GP-0-09-001 is deemed to be compliance with both the Clean Water Act and the ECL, GP-0-09-001 does not impose any requirements under the Clean Water Act. NEDPA is interested in making it abundantly clear that a violation of this permit cannot serve as the grounds for a Clean Water Act citizen suit. NEDPA recognizes that there may be some actions, events, etc. that 1) violate this permit and 2) *could* serve as a foundation for a Clean Water Act citizen suit. However, it must be clear that a violation of this permit is not a violation of the Clean Water Act per se (unless such violation independently violates the CWA, irrespective of the CAFO’s permit status under GP-0-09-001).

Response: The New York State Environmental Conservation Law, unlike the federal Clean Water Act (33 U.S.C. 1365), does not extend the authority for third-party, citizen law suits for permit violations by CAFOs and other facilities. The DEC retains sole enforcement authority under this General Permit, unless the public seeks to enforce discharges that contravene water quality standards.

L. Compliance With Water Quality Standards

Comment 342: To provide clarity to this section in-line with DEC authorized authority, we request that the final sentence of this provision be modified to read: The Department may also undertake any other compliance action related to water quality protection or as otherwise authorized by the Environmental Conservation Law. (107)

Response: The Department has modified Part VII.L. to address this comment.

Comment 343: This section appears to give DEC broad authority to override a CNMP. A regional inspector should not be able to make this decision alone. Further, this should not be done lightly, only in extenuating circumstances, and in consultation with the planner, the AEM Certification Committee and other experts from other agricultural agencies and organizations, as appropriate. In most cases, the NRCS standards or equivalent will produce very good environmental protection. (89)

Response: Comment noted. However, DEC possesses the legal and regulatory authority to require changes to a CAFO's CNMP where the plan is ineffective in preventing water quality contravention, the CAFO is not operating in accordance with the terms of its CNMP, the CNMP has not been developed in accordance with all applicable NRCS standards, the facility is causing water quality violations or violating the requirements of this General Permit or in other situations as deemed necessary by the Department.

M. Existing Permits

APPENDIX A – DEFINITIONS

Comment 344: Structural vs. Non-structural practices. These terms are used in regards to compliance dates and issues. It would be helpful to me as a planner to understand what practices DEC classifies under each term or a definition of each. (32)

Response: Structural practices include those practices that are constructed, operated and maintained on a facility whereas non-structural practices are management or planning practices that do not require construction.

Comment 345: Agricultural Stormwater Discharge. This sounds as if *only* the storm water can flow off of the field (“entirely of storm water”). Does this include sediment or plant material that may also be carried in the storm water? (7)

Response: Appendix A of this General Permit exempts flows composed entirely of stormwater as they meet the requirements of an Agricultural Stormwater Discharge. This definition intentionally excludes dry weather flows from agricultural fields as these would not be considered agricultural stormwater.

Comment 346: Agricultural Stormwater Discharge. We suggest modifying this definition so it is for Agricultural Stormwater, not an “Agricultural Stormwater Discharge” and that it read: “Agricultural Stormwater is stormwater from a land area upon which...” The inclusion of “Discharge” within the definition is repetitive of the definition of “discharge,” as defined elsewhere in the permit. (89)

Response: Comment noted. The Department has appropriately defined the term in accordance with 40 CFR 122.23(e) and 33 U.S.C. 1362(14).

Comment 347: Common Ownership. We suggest defining a “Facility” instead of defining “Common Ownership” because the issue is how to define the unit that must obtain a permit, and common ownership is only one aspect of this. Facility for permit purposes means the production area of an individual Animal Feeding

Operation, or two or more Animal Feeding Operations under common ownership if they:, (1) adjoin each other, including facilities that are separated by a right-of-way or public road: or , (2) if they use a common manure and wastewater storage and handling system, ; or (3) if they use a common land application area for manure. Operations sharing application systems (manure spreaders, etc) that do not result in mixing of nutrients are not, by virtue of such sharing, under common ownership. Then, definition J can be modified in the following way: “Concentrated Animal Feeding Operation (CAFO) means an Animal Feeding Operation (AFO) facility as defined in section X.H. that is a point source as defined pursuant to ECL Section 17-0105(16) and is a CAFO. When two or more AFOs constitute a facility, they are considered to be a single AFO for the purposes of determining the number of animals of an operation.” (89)

Response: The Department has amended the definition of “Common Ownership” in Appendix A of the General Permit to include “Common Facility” in response to this comment.

Comment 348: Common Ownership. Common ownership should not have anything to do with location but only how the business is run. (88)

Response: See response to comment 347.

Comment 349: Concentrated Animal Feeding Operation (CAFO). We recommend this modification to the definition of a CAFO: “When two or more AFOs constitute a facility they are considered to be a single AFO for the purposes of determining the number of animals of an operation”. (89)

Response: See response to comment 347.

Comment 350: Comprehensive Nutrient Management Plan. We recommend moving to this part of the Permit a portion of the definition of “Discharge or Propose to Discharge” that relates to a CNMP. “The system of practices detailed in the facility’s CNMP must have addressed the transfer, handling, storage and treatment of manure and process wastewater generated from the production areas including volumes, precipitation on open structures, storage capacities based on the site specific nutrient management plan, details of storage designs and certifications of practices based on NRCS standards and operation and maintenance requirement. In addition, the site-specific nutrient management plan for application of manure and process wastewater shall be compliant with NRCS-NY 590 to include compliant application methods, rates and timing based on manure and soil analyses, field specific risk assessments for nutrient and sediment transport potential, sheet and rill erosion control and application setbacks.” (89)

Response: The Department has added the additional language suggested but maintains that this is clarification only and does not change the requirements for a compliant CNMP.

Comment 351: Discharge or Propose to Discharge. The definition appears to create an entirely new series of evaluations and overrides any of the necessary certified Planner judgment that is critical to the permit scheme. Further, while these

elements appear to be a part of EPA's Final Rule "certification of no discharge" process, we do not think DEC or the regulated community has had sufficient time to consider the effect of DEC's insertion of these elements within the definition of "Discharge." As such, we strongly urge DEC to consider re-evaluating the appropriate place within the permit, if any, for the elements included within this definition. (89)

Response: The Department has moved language from Appendix A to Part I.B. of this General Permit to address this comment.

Comment 352: Discharge or Propose to Discharge. For consistency with the federal CAFO program, the word "litter" should be deleted from this proposed modification of the definition because "litter" is not included in the federal definition of "Process wastewater", "Production area" or "Manure" (40 CFR § 122.23(b)(5, 7 and 8), it is only included in the definition of a "Land application area" (40 CFR § 122.23(b)(13)). (89)

Response: Comment noted. The Department has adequately defined Discharge or Propose to Discharge in the General Permit.

Comment 353: Discharge or Propose to Discharge. NEDPA proposes the following changes to the draft definition: Discharge means any release of manure or process wastewater from a production area that directly enters waters which are both Waters of the United States and Waters of the State as those terms are defined in this Permit. (89)

Response: Comment noted. The Department has adequately defined Discharge or Propose to Discharge in the General Permit.

Comment 354: A facility does not discharge or propose to discharge if the discharge meets the definition of an Agricultural Stormwater. (89)

Response: The Department has added additional clarification to Part I.B. and Appendix A of the General Permit to address this comment.

Comment 355: A facility does not discharge or propose to discharge when it is designed, constructed, operated and maintained not to discharge, including Production areas whose process wastewater is currently treated by and operated in accordance with the NRCS Wastewater Treatment Strip Code 635 or equivalent and manure storage structures that were built under NRCS standards or that are/were approved and evaluated by a Professional Engineer. A facility does not discharge or propose to discharge when it has implemented a CNMP. For a Large CAFO permittee, this means that they have fully implemented all structural and non-structural management practices intended to prevent such discharges that are necessary to meet NRCS 312 as determined by an objective and certified assessment by an AEM certified planner documented in the facility's Comprehensive Nutrient Management Plan. This objective and certified assessment must consider the following elements as available:

a. Information to be used in the design of the open manure and process wastewater storage areas including, but not limited to, the following: minimum storage periods

as determined by the CAFO's CNMP, additional minimum capacity for precipitation, applicable technical standards that prohibit or otherwise limit land application during adverse weather conditions, planned emptying and dewatering schedules consistent with the CAFO's CNMP, additional storage capacity for manure and process wastewater intended to be transferred to another recipient at a later time, and any other factors that would affect the sizing of the open manure storage structure.

b. The design of the open manure and process wastewater storage areas as determined by a Professional Engineer to meet NRCS standards or by the most recent version of the Natural Resources Conservation Service's Animal Waste Management (AWM) software.

c. All key inputs used in the open manure and process wastewater storage areas design including actual climate data for the previous 30 years consisting of historical average monthly precipitation and evaporation values or, if not available, the most current available climate data, the number and types of animals, anticipated animal sizes or weights, any added water and bedding, any other process wastewater, and the size and condition of outside areas exposed to rainfall and contributing runoff to the open manure, litter and process wastewater storage areas.

d. The planned minimum period of storage in months or specification of the times that the open manure and process wastewater storage areas will be emptied consistent with the CAFO's CNMP.

e. Site-specific predicted design specifications including dimensions of the storage facility, daily manure and wastewater additions, the size and characteristics of the land application areas, and the total calculated storage period in months.

f. An annual re-evaluation of the adequacy of the designed open manure, litter and process wastewater storage areas is required. The preferred method for this evaluation shall be: (i) for ongoing consistency with the existing design, certification and operation and maintenance requirements of the wastewater storage areas and the fully implemented annually updated CNMP; (2) by either a Professional Engineer or by an AEM Certified Planner This annual reevaluation shall be documented in the CNMP

As an alternative to the above technical evaluation, the facility may choose to complete this annual evaluation using the most recent version of the Soil Plant Air Water (SPAW) Hydrology Tool. This must include all inputs to SPAW including but not limited to daily precipitation, temperature, and evaporative data for the previous 100 years, userspecified soil profiles representative of the CAFO's land application areas, planned crop rotations consistent with the CAFO's CNMP, and the final modeled result of no overflows from the designed open manure, litter and process wastewater storage areas. For those CAFOs where 100 years of local weather data for the CAFO's location is not available, CAFOs may use a simulation

with a confidence interval analysis conducted over a period of 100 years. This annual reevaluation shall be documented in the CNMP and Annual NMP.”

NEDPA’s changes are intended to make it clear which regulated waters the prohibition against discharge applies to. This definition would exclude groundwaters and “Storm sewers or conveyances, i.e. ditches” which are not waters of the US under the Rapanos decision. The exclusion of groundwater is allowed under the federal CAFO rules, because discharges to groundwaters are not regulated under the Clean Water Act. While “waters of the State” include groundwaters in New York, what constitutes a discharge to groundwater is very difficult to establish. Groundwaters underlie all land within New York. Because of this, the CAFO Permit establishes specific requirements, such as well setbacks and land application rates, which have been long proven to protect groundwater quality. There is no need for the various provisions in the draft Permit which related to discharges to regulated waters to include discharges for which groundwater is the first regulated water it enters. In addition, NEDPA recommends that the Permit also include reference to a Fact Sheet, to be developed by DEC, which will provide the integrated definition of these two sets of waters. (89)

Response: Comment noted. The Department has adequately defined Discharge or Propose to Discharge in the General Permit.

Comment 356: Extreme Precipitation. The definition does not account for intensity. Many systems, for example: barnyard or walkway runoff, are designed to handle the maximum intensity expected in a 24 hour, 25 year storm event. It is possible to have a microburst that may exceed that intensity, but not equal the total rainfall in a 24 hour period, and could result in an overflow from the controlled system. That could potentially result in creating a contrast in water of the state. Some provision for this should be addressed. (32)

Response: Contrast in waters of the state or substantial visible contrast is considered a water quality standards violation and is specifically prohibited by the General Permit.

Comment 357: Major Changes. We question the need for the inclusion of this definition. The definition of a major change is already being proposed in Part III(D)(e) and (f) of this permit and we are not certain it needs to again be included. Further, the two sections do not appear to match. While Part III(D)(e) defines a major change as the farm exceeding by 20% the number of animals specified in the CNMP, the appendix definition refers to it as increasing the number of animals over the allowable number identified in the CNMP. We request clarification on this issue. (107)

Response: Definition Y. has been amended to be consistent with Part III.D. of the General Permit.

Comment 358: Major Changes. We have discussed previously our opposition to the requirements of notice regarding a one million gallon storage and to obligations to for Large CAFOs to file an Annual NMP. (107)

Response: Comment noted.

Comment 359: The definition also includes provisions stating that a major change shall be considered efforts to remediate a CNMP that has proven ineffective in achieving the general objectives of preventing pollutants in discharges from the CAFO. While we feel this provision is not unreasonable, we request further clarification from the Department. Would a change in field spreading practices, for example, be considered a major change where the previous field spreading recommendations had resulted in water quality issues? (107)

Response: The Department has amended Part III.D. of the General Permit to address this comment.

Comment 360: New Source. The current version of this definition is not in-line with the use of the term new source or new facility in the permit language. We therefore request the update or removal of this definition. (107)

Response: The Department has deleted this term from Appendix A of the General Permit.

Comment 361: Pasture Area. Please clarify that animals are allowed to have contact with Waters of the State while in pastures. (89)

Response: While animal contact with Waters of the State in pastures is acceptable, it is inappropriate to include that in the definition of pasture area.

Comment 362: Point Source. The definition of point source should not single out one business. I would propose that the words “concentrated animal feeding operation” be taken out of the definition. (88)

Response: Comment noted. However, as per ECL 17-0105(16) a CAFO is defined as a point source.

Comment 363: Process Wastewater. Please replace “Process-generated wastewater does not include: precipitation related runoff from pastures; driveways; roof areas; or laneways where animals do not congregate; cropfields where manure is applied in accordance with “NRCS No. NY590”, or effluent from vegetated filter areas that are designed and maintained in accordance with “NRCS No. NY312” with “Process wastewater does not include: precipitation related runoff from pastures, driveways, roof areas, laneways where animals do not congregate, crop fields where manure is applied in accordance with “NRCS No. NY 590”, or effluent from wastewater treatment or vegetated filter areas that are designed and maintained in accordance with “NRCS No. NY 312.” (89)

Response: The Department has added this clarification.

Comment 364: Process Wastewater. NEDPA strongly agrees with DEC that outflow from a wastewater treatment strip is not a discharge of process wastewater as defined in Appendix A of the proposed CWA Permit. (89)

Response: The Department accepts and appreciates this comment.

Comment 365: Process Wastewater is considered dirty water and must be treated according to NRCS standards. Process-generated waste water occurs when precipitation comes into contact with spillage or overflow from manure storage areas or manure pits, places where organic materials are stored, fed, or treated. However, "process-generated wastewater does not include: precipitation related runoff from pastures; driveways; roof areas; or laneways where animals do not congregate.." If this is true, then why is it that there are some that would indicate the small amount of organics that are tracked from barns and roadways must be treated? It is impossible to keep all forage within a TMR mixer barring taking a broom to the surface of the equipment prior to leaving the bunker silo and delivering to the dairy. Wheels from skid steers' would need to be cleaned prior to going to another barn if inspectors do not respect the statement about what does not constitute process-generated wastewater. Please clarify. (67)

Response: This comment is outside the regulatory scope of this General Permit.

Comment 366: Retention Facility or Retention Structure. To ensure the completeness of this definition, we request the inclusion of existing certified waste storages not constructed in accordance with applicable provisions of the NRCS standard. We suggest that the final sentence be amended to read: These structures must be designed in accordance with all appropriate provisions of applicable NRCS standards (example NRCS NY313 Waste Storage Facility) or for certain existing structures, must be certified in accordance with Part VI of this General Permit. (107)

Response: The Department has added language to Appendix A of the General Permit to clarify this requirement.

Comment 367: Discharge or Propose to Discharge. "An annual re-evaluation of the adequacy of the designed open manure, litter and process wastewater storage is required. The system of practices detailed in the facility's CNMP..." I don't understand what you are asking the planning community to do? Is there going to be an "annual re-evaluation" form provided by the department? Manure structures are certified by a PE on the condition that O&M takes place and system is maintained as designed. Why does the liability of proper O&M transfer from the owner of the storage to AEM planners discretion? (12)

Response: Consistent with the requirements for the CAFO Annual Compliance Report submittals, an AEM certified planner and owner/operator are required to annually review the facilities' CNMP including delineation and implementation of any additional management practices necessary for compliance with this General Permit.

Comment 368: Waters or Waters of the State. Federal wetlands should be considered "waters of the state." It is my understanding that DEC doesn't map wetlands less than 12.5 acres in size. Often, we find significant numbers of areas on farms that are mapped as federal wetlands that are not mapped as DEC wetlands. Thus far, I have been treating these areas as if they were waters of the state, and planning sufficient buffers/setbacks etc. If these areas are not considered waters of

the state, I think it undermines what we are trying to accomplish by having setbacks from all other waterbodies. (13)

Response: Comment noted. New York State does not assert jurisdiction over wetlands less than 12.4 acres in area (5 hectares). National Wetland Inventory maps are a resource, not a jurisdictional determination. Wetlands on those maps may or may not be jurisdictional. Buffers for wetlands under federal jurisdiction aren't subject to the same buffer widths as New York State Wetlands. In New York State, as per Part VI.E. in the General Permit, CAFOs must maintain a 100' setback from NYS Wetlands.

Comment 369: Waters or Waters of the State. The definition of “waters of the state” specifically excludes road ditches, except at the point where they discharge to waters of the state. What about flow distance to the point where a ditch meets a water of the state, i.e. a stream? If a road ditch only flows 50' before it reaches a stream, shouldn't there be a spreading setback from that ditch? In the Phosphorus Index calculations, a flow distance of up to 300' from a stream is considered a risk. I think the same rule should apply to a road ditch that borders a field. If the road ditch flow reaches a stream (or other “water of the state) within 300', a spreading setback (as an intermittent stream) should be required. (13)

Response: The Department has clarified the definition of “Waters of the State” in Appendix A of this General Permit to address this comment.

Comment 370: Waters or Waters of the State. Please better define artificial water. This is a confusing term. What fits into artificial water? (7)

Response: The Department in this General Permit must conform to the Definition of Waters of the State as defined in ECL 17-0105(2). Examples of artificial water include, but are not limited to, canals and ponds.

Comment 371: Waters of the State. Some clarification of artificial water would help understanding where road ditches and field grassed diversion ditches, etc. would fit. (66)

Response: See response to comment 370.

Comment 372: Waters of the State. This needs a clear definition or explanation of artificial. Is a road ditch, etc. artificial? (32)

Response: See response to comment 370.

Comment 373: Waters of the State. NEDPA recommends: Storm sewers or conveyances, i.e. ditches, are not waters of the State unless they are classified, shown on the appropriate Reference map and specifically listed in 6 NYCRR Parts 800 to 941. Nonetheless, a discharge to such shall be regulated as a discharge at the point where the conveyance discharges to waters of the State.” The recommended addition of the phrase “shown on the Appropriate Reference map and specifically listed in 6 NYCRR Parts 800 to 941” is needed in order for permittees and the general public to easily determine if a discharge is to a Waters of the State. It is also meant to clarify that storm sewers and conveyances (ditches) are not included in the generic “streams or other bodies of water which are not shown on the reference maps herein shall be assigned to class D” which is included in the “Definitions and

Conditions” section of Parts 800 to 941. This addition should make the definition and interpretation consistent with the Rapanos decision. (89)

Response: The Department has clarified the definition of “Waters of the State” in Appendix A of this General Permit to address this comment.

APPENDIX B – PERMIT REQUIREMENTS FOR CONSTRUCTION ACTIVITIES AT CAFO FACILITIES

Comment 374: Under construction activity grouping D, Other Construction—Less than 5 Acre Disturbance. Our understanding is that the SPDES Construction Stormwater permit is only required for disturbances that exceed one acre, except that disturbances greater than 5,000 square feet in specific areas in the East of Hudson Watershed are required to obtain permit coverage. To ensure appropriate department authority we request that this provision be amended to read: D. Other Construction Activities—Greater than 1 Acre Disturbance (or 5,000 square feet in the East of Hudson Watershed) but less than 5 Acre Disturbance. (107)

Response: The Department has revised the language in Appendix B to address this comment.

Comment 375: According to the proposed rule, the CAFO has to submit a Notice of Intent (NOI) and SWPPP prior to starting construction activities. How will the administrative folks at DEC Albany know that the NOI is being submitted by a CAFO and that the CAFO is not subject to permit fees, etc? The NOI for CAFOs should be different than the one submitted by other construction sites. At a minimum, the existing NOI will need to be modified to clearly indicate that the applicant is a CAFO. (27)

Response: The Department has revised the language in Appendix B to address portions of this comment. Construction activities identified in Sections C through E of Appendix B are now required to obtain coverage under the SPDES General Permit for Stormwater Discharges from Construction Activity by submitting a Notice of Intent (NOI) prior to commencing construction because this General Permit is issued pursuant to the Department’s authority in ECL 17-0701 as a State Permit, dual coverage cannot be extended for the federally-delegated construction stormwater permit. The permit language specifies that the SPDES Construction Permit NOI shall be used by the owner to obtain coverage for these construction activities.

Comment 376: The timeline for the NOI should be clarified – does the farmer have permission to proceed with construction within 5 days of submitting the NOI or does the DEC have to approve the SWPPP? Will the farmer receive written notice in the mail with permission to proceed? (27)

Response: The owners of construction activities identified in Sections C through E of Appendix B will be authorized to commence construction in either 5 or 60 business days. The authorization period is 5 business days for SWPPPs that have been developed in accordance with the technical standards and 60 business days for SWPPPs that deviate from the technical standards. The Department will send the owner a NOI Letter of

Acknowledgment after the NOI is processed. This letter will include the authorization time frame and permit identification number.

Comment 377: The construction possibilities are designated as either greater than or less than 5 acres. Is there a minimum acreage, i.e., 1 acre? The way it's currently written, if someone puts in less than 1 acre of fencing, they need to pay someone to develop an Erosion and Sediment Control plan. This isn't very logical. (27)

Response: The Department has revised the language in Appendix B to address this comment.

Comment 378: If a farmer is putting in a 6 acre wetland mitigation project or 5 acres of grassed waterways or 5 acres of critical area protection, the farmer will be required to install a permanent stormwater storage structure designed to accommodate and treat the 100 year storm event. This doesn't make a lot of sense. (27)

Response: The Department has revised the language in Appendix B to address this comment.

Comment 379: In the GP-0-08-001, construction activities are prohibited if they occur on an E slope shown on a soil survey. However, if a farmer is going to put in a stream bank stabilization project, it's quite possible this could occur on an E slope. How will this be addressed? (27)

Response: Agricultural projects are not subject to ineligibility provisions included in Part I.D.7 and 8 of GP-0-08-001. The requirements in Part I.D.7 and 8 only apply to residential, commercial and institutional type construction activities.

Comment 380: Is the contractor putting in the project required to have a trained staff member on site every day per the requirements shown in Part IIIA5? (27)

Response: The owners of construction activities identified in Sections C through E of Appendix B must comply with Part III.A.5 of GP-0-08-001. Each contractor that has been identified pursuant to Part III.A.5 shall identify at least one individual (trained individual) from their company that will be responsible for the implementation of the SWPPP. That individual must receive four (4) hours of Department endorsed training within two (2) years of the date the new General Permit is issued. The owner or operator shall ensure that at least one of the trained individuals is on site on a daily basis when soil disturbance activities are being performed.

Comment 381: Does the farm have to go through the National Historic Register process if they are planning a project? In essence, if a farmer puts in fencing, do they need to go through the historic register process per part IIIA8? (27)

Response: The owners of construction activities identified in Sections C through E of Appendix B must comply with Part III.A.8 of GP-0-08-001. Fencing projects fall under Section B in Appendix B.

Comment 382: What are the inspection requirements? (27)

Response: The owners of construction activities identified in Sections C and E of Appendix B must comply with the inspection requirements included Part IV.C of GP-0-08-001. The owners of construction activities identified in Sections A, B, and D of Appendix B are not subject to the inspection requirements in Part IV.C of GP-0-08-001.

Comment 383: Is written permission required for greater than 5 acres open at once? (27)

Response: The owners of construction activities identified in Sections C through E of Appendix B must obtain prior written authorization to disturb greater than 5 acres of soil at any one time.

Comment 384: Is there a Notice of Termination required when the project is completed? (27)

Response: Yes, for the owners of construction activities identified in Sections C through E of Appendix B of the CAFO permit.

Comment 385: How does a farm within an MS4 comply? Specifically, if a farm is within an MS4, is the farm required to obtain a SWPPP approval form from the MS4 prior to submitting the NOI as is stated in GP-0-08-001? For example, if a farm is putting in 5 acres of grassed waterways, does an MS4 need to sign off on this? (27)

Response: The owner of a construction activity identified in Sections D and E of Appendix B is required to submit their SWPPP to the MS4 for review, unless the proposed construction activity is exempt from local laws/ordinances. If the owner is required to submit their SWPPP to the MS4 for review and acceptance, the owner must have the MS4 sign the MS4 SWPPP Acceptance form when their review is complete. The owner must submit this form along with a SPDES Construction Permit NOI to the Department to gain coverage under GP-0-08-001.

Comment 386: I think that the DEC could clarify a lot of the above issues if they do the following:

- a. Create a specific NOI form for CAFO construction activities.
- b. Identify which portions of GP-0-09-001 are relevant to CAFOs and which ones are not.
- c. Review the list of “Structural Ag BMPs” and ensure that the ground disturbing components of activities are clear – it really doesn’t accomplish anything to require a full SWPPP for fencing in and of itself unless the fencing requires shaping and grading activities. (27)

Response: The Department has revised the language in Appendix B to address this comment.

Comment 387: While this doesn’t apply in Oneida County, GP-0-08-001 contains a Phosphorous reduction component (part IIIB3) for specified watersheds. How will this affect construction projects on CAFOs in the affected watersheds (includes portions of Onondaga County)? (27)

Response: If the CAFO facility is located in one of the watersheds identified in Appendix C of GP-0-08-001, the owner must comply with the Enhanced Phosphorus Removal Standards in Part III.B.3 of GP-0-08-001 for all planned construction projects that are identified in Table 2 of Appendix B in GP-0-08-001. For example, construction of a barn or other agricultural building(e.g. silo) and structural practices as identified in Table II in the “Agricultural Management Practices Catalog for Nonpoint Source Pollution in New York State” that include the construction or reconstruction of *impervious area*, excluding projects that involve soil disturbances of less than five acres.

Comment 388: How is a “site” defined? Is the site the CAFO farm or is each field of the farm a different site? (27)

Response: A site is considered the portion of the production area that is being disturbed for construction activities. This does not include as portion of the land application areas.

Comment 389: I strongly support the inclusion of an exemption from the Phase 2 storm water permit requirement in both CAFO permits. (29, 69)

Response: Comment noted.

Comment 390: I believe it needs to be clearer that a CAFO must;

1. **Submit an NOI for construction activities**
2. **Follow all provisions in the Stormwater Construction permit (i.e. SWPPP, etc.)**

Explain that the only benefit the CAFO permit gives you is that you do not need to pay for a separate permit but must comply with the Stormwater permit completely. (44)

Response: The Department has revised the language in Part I.E. such that unless otherwise notified by the Department, an owner or operator a facility with coverage under this CAFO General Permit shall also obtain coverage under the SPDES General Permit for Stormwater Discharges from Construction Activity (SPDES Construction Permit) for certain construction activities. All applicable permit fees will apply. Prior to commencing any construction activity at the facility, the owner or operator must comply with the requirements in Appendix B of this permit.

APPENDIX C – DEC REGIONAL OFFICE CONTACT INFORMATION

GENERAL COMMENTS:

Comment 391: We urge DEC to continually recognize farm economic viability as the most important factor in promoting on-farm water quality protection. (107)

Response: Comment noted. Environmental protection is the Department’s top priority as part of its regulatory and compliance activities.

Comment 392: Some parties have suggested providing specific language authorizing nuisance lawsuits for permit violations. We note that private citizens already have access to such remedy; therefore this is no need for DEC to address this issue. Additionally, we note that the Commissioner of Agriculture & Markets,

pursuant to Agriculture & Markets Law §308 has the sole authority to determine sound agricultural practices. (107)

Response: Comment noted. The federal Clean Water Act extends third-party rights to citizens to pursue enforcement. Under this General Permit, citizens would have the authority to enforce water quality contravention.

Comment 393: I am concerned that the permit does not adequately protect me and my community from factory farm pollution. (26, 30, 31, 34, 38, 55, 61, 68, 70, 73, 81, 90, 96, 97, 110, 122, 123)

Response: Comment noted. This comment is conclusory because it does not elaborate as to how this General Permit is not adequately protective of the environment.

Comment 394: I am concerned that the permit does not adequately protect me and the surrounding communities from the pollution caused by Confined Animal Feeding Operations, or "factory farms." (42)

Response: Comment noted. This comment is conclusory because it does not elaborate as to how this General Permit is not adequately protective of the environment.

Comment 395: The draft permit under discussion does not protect the citizens of New York against some of the largest and least-regulated toxic waste generators in the state. (71, 109)

Response: Comment noted. This comment is conclusory because it does not elaborate as to how this General Permit is not adequately protective of the environment.

Comment 396: One main problem is that the DEC has no realistic way to enforce the permit – there are simply not enough state inspectors to effectively monitor over 600 factory farms. (26, 30, 31, 34, 38, 55, 61, 68, 70, 73, 81, 90, 96, 97, 110, 122, 123)

Response: Comment noted. However, this comment is beyond the regulatory authority of this General Permit.

Comment 397: The DEC has no realistic way to enforce the permit -- there are simply not enough state inspectors to effectively monitor over 600 factory farms. (42)

Response: Comment noted. However, this comment is beyond the regulatory authority of this General Permit.

Comment 398: Based on our review of the proposed permitting process, it is obvious that the state has no way to practically enforce the provisions of the permit. There are simply not enough inspectors to effectively monitor the approximately 600 industrial CAFOs (more than 80 percent dairy) in New York State, and the draft permit makes the state the only enforcement body. Furthermore, the state isn't even planning on investigating smaller violations of the permit. Without necessary provisions for public enforcement, the permit is meaningless. We recommend that a citizen enforcement provision be added to the permit. (71, 109)

Response: Comment noted. However, this comment is beyond the regulatory authority of this General Permit.

Comment 399: To help protect citizens and ensure fidelity to the intent of the permitting process, we propose two different enforcement methods: a public nuisance action and an Article 78 action. Consistent with existing laws, we urge language specifying that a violation of the permit be considered a public nuisance and presumptive evidence that the factory farm's agricultural practices are not sound. This language would allow private citizens to bring nuisance actions to force compliance with the permit, and also allows for discovery. In addition, duties of the factory farm under the Nutrient Management Plan should be incorporated into a facility's permit as non-discretionary duties. This allows an Article 78 action to be brought against a facility for failing to comply with its NMP. Of the two public enforcement methods, nuisance and Article 78, a nuisance action is preferred because using article 78 does not address the fundamental problem of there being an insufficient number of inspectors to effectively enforce the terms of the permit. In addition, in an Article 78 action, there is no discovery as there is with a nuisance action. Traditional discovery methods could be valuable in proving that a factory farm is violating the permit terms. Violations of the NMP should be considered prima facie evidence of a public nuisance to enable citizens to force compliance with the permit terms. (71, 109)

Response: Comment noted. However, private citizens may already advance common law nuisance claims as part of tort law. Adding the proposed language to this General Permit would inappropriately authorize third-party citizen suits. A legislative initiative is the proper vehicle to address third-party rights. This comment is beyond the regulatory authority of this General Permit.

Comment 400: The New York State Department of Environmental Conservation (DEC) should educate the public that a violation of the Nutrient Management Plan would be grounds to bring an Article 78 action or a nuisance action against a factory farm. (71, 109)

Response: Comment noted. However, private citizens may already advance common law nuisance claims as part of tort law. Adding the proposed language to this General Permit would inappropriately authorize third-party citizen suits. A legislative initiative is the proper vehicle to address third-party rights. This comment is beyond the regulatory authority of this General Permit.

Comment 401: It is critical that this permit contain provisions for public enforcement. (26, 30, 31, 34, 38, 55, 61, 68, 70, 73, 81, 90, 96, 97, 110, 122, 123)

Response: Comment noted. However, private citizens may already advance common law nuisance claims as part of tort law. A legislative initiative is the proper vehicle to address third-party rights. This comment is beyond the regulatory authority of this General Permit.

Comment 402: The DEC needs to include a meaningful way for the public to participate in enforcement actions in both permits. (76)

Response: Comment noted. However, adding the proposed language to this General Permit would inappropriately authorize third-party citizen suits. A legislative initiative is

the proper vehicle to address third-party rights. This comment is beyond the regulatory authority of this General Permit.

Comment 403: Neither DEC nor farmers need farm neighbors acting as enforcers of the CAFO regs. (35)

Response: Comment noted. The federal Clean Water Act conveys third-party rights in 33 U.S.C. §1365, authorizing private citizens the ability to commence suit for illegal discharges by a CAFO.

Comment 404: Factory farm operations have an impact on the entire community. Their waste disposal methods must be made public in the interest of public health, the environment and common decency. (26, 30, 31, 34, 38, 55, 61, 68, 70, 73, 81, 90, 96, 97, 110, 122, 123)

Response: Comment noted. The public has access to a Large CAFO's Annual NMP submittal and Annual Compliance Report through the Freedom of Information Law process. These documents are not confidential and are provided to the public upon request.

Comment 405: I strongly urge the DEC to do everything possible to make sure that the CAFO program in New York is not burdensome to our farm families who are working to protect the environment. (3, 4, 6, 9, 11, 14, 15, 17, 18, 19, 20, 22, 23, 24, 28, 33, 40, 43, 45, 47, 48, 49, 53, 54, 56, 57, 58, 59, 63, 64, 65, 69, 74, 75, 79, 80, 84, 85, 86, 91, 92, 93, 95, 99, 102, 103, 105, 108, 113, 115, 118, 119, 120, 121, 124, 126)

Response: Comment noted. This comment is vague because it does not elaborate as to if or how this General Permit contains burdensome requirements.

Comment 406: Deference to Certified Planners should be cornerstone in both permits. (3, 4, 6, 9, 11, 14, 15, 17, 18, 19, 20, 22, 23, 24, 28, 33, 40, 43, 45, 47, 48, 49, 53, 54, 56, 57, 58, 59, 63, 64, 65, 69, 74, 75, 79, 80, 84, 85, 86, 91, 92, 93, 95, 99, 102, 103, 105, 108, 113, 115, 118, 119, 120, 121, 124, 126)

Response: Comment noted. The Department continues to recognize the importance of AEM certified planners as part of New York's CAFO program.

Comment 407: New York State already has one of the strongest CAFO permit programs in the country. Certified planners have been the cornerstone of the improvements made to date and should have their flexibility maintained in the future. (29)

Response: Comment noted. The Department continues to recognize the importance of AEM certified planners as part of New York's CAFO program.

Comment 408: The thresholds established to apply for the state permit appear reasonable but need to be clarified. (3, 4, 6, 9, 11, 14, 15, 17, 18, 19, 20, 22, 23, 24, 28, 33, 40, 43, 45, 47, 48, 49, 53, 54, 56, 57, 58, 59, 63, 64, 65, 69, 74, 75, 79, 80, 84, 85, 86, 91, 92, 93, 95, 99, 102, 103, 105, 108, 113, 115, 118, 119, 120, 121, 124, 126)

Response: Comment noted. The Department has attempted to clarify the language of this General Permit in response to voluminous public comments. Please reference Part I.A. for eligibility requirements in this General Permit.

Comment 409: I strongly recommend redirecting your efforts to follow the EPA outline, which regulates only Large CAFOs, while providing them the option to certify out of the program. Allow Medium CAFOs to work and operate voluntarily with the regulations. There is a system in place to work with all farms and mediums should work with a planner to meet the state objectives as they see fit. Should the medium program become voluntary, and a Medium CAFO has a discharge but is closely working with a planner, then bring them into the state permit. However, if a Medium CAFO has a discharge and is not working with a planner to actively address environmental concerns, pull them into the Clean Water Act permit until they have addressed the concern(s). (67)

Response: Comment noted. However, the State of New York does not support a voluntary program for regulation of CAFO farms.

Comment 410: Let farms manage their own risk by clearly outlining the need to meet ECL regulations without onerous mandates associated with CAFO. If the farm can sufficiently remediate and demonstrate they do not cause an ECL violation, they should be able to opt out of the CAFO program. If they are reported for a violation and have not been actively working with planners, Soil and Water, or NRCS, toward controlling uncontrolled releases, throw them into the CAFO regulations like the AFOs are currently. (67)

Response: Comment noted. However, the State of New York does not support a voluntary program for regulation of CAFO farms.

Comment 411: The amount of documentation between planner and farm will significantly increase. Keep the process moving forward by relaxing requirements and providing stiff penalties for those that do not comply. (67)

Response: Comment noted. However, the State of New York does not support deregulation of our CAFO program as this is not adequately protective of the environment nor is it in the spirit of the Clean Water Act.

Comment 412: It must be noted that the proposed changes in the permit to some may seem minor, but will require significant revisions and changes to some plans. The implementation of the changes will cause a notable increase in the workloads of planners who will coordinate, update, and prepare for the additional reports and paper or digital work. The current system evolved over 10 years, changes although well intended will not occur over night. Patience will be appreciated. (83)

Response: Comment noted.

Comment 413: Following inspections farmers were told that they were not in compliance as standards and specifications for the practice have changed since installation and they are forced to spend more money to install new practices. The Board respectfully requests that your office support dairy farms in Jefferson

County by immediately working with the USDA Natural Resources Conservation Service to resolve compliance issues as these problems were caused by conflicting regulations between your agencies, and have place unnecessary burdens on farms that are trying to remain good stewards of our environment. (128)

Response: Comment noted. The Department has clarified the language within Part III.A. of this General Permit to address this comment.

Comment 414: Improved grievance process. The permit fails to clearly articulate a transparent and accountable grievance process. We recommend that the permit provides a centralized “complaint” hotline for CAFO neighbors and require all grievances and agency grievance responses to be reported in the annual report. (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: Comment noted. Citizens are always free to contact the Regional Water Engineer located in the relevant DEC Regional Office to discuss a particular CAFO’s compliance issues and lodge complaints. Please continue to report spills and discharges to the DEC Spills Hotline.

Comment 415: Municipal notification. Local governments should be explicitly notified in addition to Environmental Notice Bulletin (ENB) notification, on opportunities to participate in any CAFO related permit application. We recommend requiring CAFO permit seekers to directly notify potentially affected municipalities, up and downwind from the CAFO. (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: Comment noted. However, municipal notification is not required in this General Permit.

Comment 416: Impaired waterways. CAFOs located in watershed of an impaired waterway (303 (d)) for nutrients should also be required to also take additional efforts to ensure the CAFO is not contributing to the further denigration of the impaired water. The undersigned recommend that the Department require CAFO operators, in the watersheds of protected or impaired waterways, to exercise extra caution in land management practices to reduce potential for contamination and or agriculture runoff. (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: Comment noted.

Comment 417: The permit fails to address air quality impact from factory farms. We recognize that the Department limited the permit scope to protecting our water resources, however the undersigned strongly recommend that the Department take a multi-media approach, involve colleagues in the air program, and review the air quality impacts from medium and Large CAFOs. (1, 8, 25, 37, 51, 62, 78, 87, 94, 100)

Response: Comment noted. This comment is beyond the regulatory authority of this General Permit.

Comment 418: Regulation of Small Farms. If the end result is clean water, then why not regulate all size farms? I saw some figures a while back that showed CAFO operations are responsible for 25% of the manure produced in the state. Why would

the state only want to regulate 25% of the manure? Generally speaking, the larger farms have grown over the years by being progressive, proactive and often use systems and technologies not feasible to small farms. Why should we be regulated and the small farms can do what ever they want? I can take you to numerous small farms within 5 miles that discharge bunk waste and milkhouse waste on a daily basis and have no idea what the nutrient levels are in their fields. The past few farms we have purchased or rented were small. No soil samples had been taken in years and the P values near the farmstead are off the charts. This is not protecting water quality. (98)

Response: Comment noted. However, the Department does not regulate small farms, per se. Some small AFOs may be required to obtain coverage under this General Permit, the Clean Water Act General Permit, or seek an individual SPDES permit at the discretion of the Department for existing compliance issues.

Comment 419: Regulation of Small Farms. I believe that all farms should be regulated equally regardless of size. (69)

Response: See response to comment 418.

Comment 420: I feel like many of these proposals are going to limit the capability of my business to grow or thrive. The extra expenses and labor that goes into implementing these proposals would be great, and I feel like financial assistance to help offset these expenses (especially given the current economic status of the state), are going to continue to "dry up". With the current state of the dairy industry, most farms are already not going to be able to cash flow in the upcoming year. (46)

Response: Comment noted. The Department is unable to specifically respond to speculation.

Comment 421: I understand that there has to be some regulation in all industries, but I believe that there needs to be some flexibility given so that CAFO planners or agricultural engineers can suggest Best Management Practices, that best fit each farm case specifically, so long as water quality is protected. (46)

Response: Comment noted. The Department supports farm-specific BMPs evaluated and developed by AEM certified planners that are implemented in accordance with all applicable NRCS standards.

Comment 422: New York's dairy farmers are already under a tremendous financial burden, let's not add fuel to the fire by implementing many new, impractical regulations, and practices. (46)

Response: Comment noted. This comment is vague because it does not specifically identify what the commenter perceives as impractical terms of this General Permit.

Comment 423: Unfortunately these regulations are being proposed at a time when the farm milk price outlook is very poor for the coming year. Prices to dairy farmers are expected to be significantly below the cost of production throughout most of 2009 and possibly into 2010. In our view, few farms if any will have financial

resources available to make significant new investments in environmental enhancements in 2009 or 2010. (104)

Response: Comment noted. However, the objective of this General Permit is to ensure farming practices are adequately protective of the environment.

Comment 424: DEC should seek to avoid the establishment of regulatory burdens on New York dairy farms that create additional costs that dairy farms do not have in other states. Our farmers must be able to maintain a cost of production structure that is at comparable levels with other states. (104)

Response: Comment noted. However, the objective of this General Permit is to ensure farming practices are adequately protective of the environment.

Comment 425: With respect to expansions there is a significant concern relating to the financial impact of the permit requirements on an operation that is crossing over the 200 cow threshold. As noted previously, many farms must be able to grow to remain viable and efforts (appropriate waivers) should be made to allow such growth. (104)

Response: Comment noted. However, the objective of this General Permit is to ensure farming practices are adequately protective of the environment.

Comment 426: The adoption of the proposed permit system as it stands will certainly put NY producers at a significant economic disadvantage to producers in other states. If the proposed permitting system is adopted, there will have to be a state funded financial support package available to the affected producers to offset the cost of the significant financial burdens associated with the more stringent regulations. (16)

Response: Comment noted. However, the objective of this General Permit is to ensure farming practices are adequately protective of the environment. Funding proposals are beyond the regulatory authority of this General Permit.

Comment 427: It is important to keep reason and workability in place in the final permit. The more common sense the rules are the easier it is to train employees to follow them, and the more likely they will do as trained. (116)

Response: Comment noted.

Comment 428: Upstate New York's local/rural and semi-rural economies would be far better if these "CAFO's" were not allowed. These CAFO's/factory farming operations are NOT healthy for the animals or for the local communities – and should be outlawed. (42)

Response: Comment noted. This comment is beyond the regulatory authority of this General Permit. A legislative initiative is the proper vehicle to address these concerns.

Comment 429: These concerns range from the fear of being labeled out of compliance on some vague technicality to the fear of burdening the business with cost without provisions to implement as cash flow or cost sharing allows. New language also seems to limit planner problem solving creativity and throws more

issues into absolute (perhaps not always thoroughly researched) categories. Probably the largest fear is being labeled a sub-standard environmental steward of the land, water and air resources we work with by either DEC or our neighbors. (77)

Response: Comment noted.

Comment 430: Not having been actively involved but watching from the sidelines, I have been impressed that the dialog has been positive between all parties engaged in the process. From the DEC road shows to our CAFO planner workshops to NEDPA forums to working group discussions, all parties are attempting to design and write language into these regulations that assist the CAFO community continue to make environmental improvements to their businesses. It is difficult for the lay person to decipher the intent and ramifications the draft permit changes can have on the individual operations. It is important to be informed and responsive. It is also important to be cautious and careful to keep our businesses viable - not at the expense of the environment but as a steward to the environment. (77)

Response: Comment noted.

Comment 431: It is our opinion these regulations will do little if anything to improve water quality in the state. However they may greatly impair the agricultural industry in this state. (2)

Response: Comment noted. This comment is vague and speculative because it does not specifically identify how the commenter perceives this General Permit will impair the agricultural industry in New York.

Comment 432: Our planner has expressed no desire to continue working with Large CAFOs if our plan must allow public access. His workload could become insurmountable with ridiculous suspicions and accusations from unknowing people. (2)

Response: Comment noted. However, this comment is beyond the regulatory authority of this General Permit.

Comment 433: The current CAFO rule is sufficient to safeguard NY waters while maintaining a healthy agricultural industry. (2)

Response: Comment noted. However, this comment is beyond the regulatory authority of this State General Permit. The current CAFO General Permit is issued pursuant to New York's federally-approved Clean Water Act program, is set to expire on June 30, 2009, and must be replaced by a subsequent Clean Water Act General Permit. The current CAFO General Permit cannot legally continue on for another 5-year permit term because it is not aligned with the requirements of EPA's 2008 Rule and the *Waterkeeper* decision. New York determined a State ECL General Permit to be appropriate for all facilities that do not discharge or propose to discharge.

Comment 434: The cost of new rules will be an additional burden during this time of low milk prices. Each new rule costs DEC and farmers money to enforce and implement. (35)

Response: Comment noted. However, the objective of this General Permit is to ensure farming practices are adequately protective of the environment.

Comment 435: GP-0-09-001 is the new proposed CAFO rule. We are opposed to this rule because the impact has not been thought out; large dairy farms will not be able to comply so they will be forced out of business. That leads to ag-business being forced out. If that happens New York State will lose dairy farms as well as ag-businesses and transportation companies. This affects the state in the following ways: employment declines, taxes paid in to the state decline, capital investments decline as construction stops, and trucking and rail industry volume declines. CAFO has been a good, powerful tool for larger farms to improve their nutrient management practices. The proposed rule makes CAFO counterproductive. (21)

Response: Comment noted. However, this comment is vague and speculative because it does not specifically identify what provisions of this General Permit the commenter is opposed to, nor does it offer alternative language to address these concerns.

Comment 436: It is my belief that the financial stress this permit places on the dairy industry, which is price regulated, should be of great concern to the State of New York with dairy farming being one of the largest industries in the State. The lack of common sense used in both writing and implementing the current and proposed SPDES permit is and will make them unreachable. The lack of planners and financial resources will make this goal even harder in the current economic state. (88)

Response: Comment noted. However, this comment is vague because it does not specifically identify what provisions of this General Permit the commenter believes lack “common sense,” nor does it offer alternative language to address these concerns.

Comment 437: I believe all farms should be regulated under a CAFO plan, regardless of size. We all should have the same rules to follow. Be it Large, Medium or Small. All size farms should be required to file a Notice of Intent in 2009. (101)

Response: See response to comment 418.

Comment 438: We strongly encourage DEC to work with the Governor and Department of Agriculture and Markets in support of grants and other financial support to assist dairy farms with the necessary investment. We also urge you to work with the Environmental Facilities Corporation (EFC) to finalize plans for the Linked Investment – Linked Loan program that was approved by the State Legislature in 2006 and allow all projects required to be eligible. (104)

Response: Comment noted. However, this comment is outside the regulatory authority of this General Permit.

Comment 439: Certified Planner Costs. The role the certified planner will play in this new permit has seemingly increased substantially. These planners will more than likely increase their fees to farmers, which, in most cases, is an expense to the farm that will not generate a return other than to stave off fines and fees from DEC. Funding for such expenses is limited at this point, but one suggestion would be to

create a tax incentive for farmers who hire certified planners. It is apparent that many things in the new permit are contingent on the recommendations from a planner. If farms cannot afford to hire these planners to the extent necessary for the permit, then we are going backwards on environmental compliance. (52)

Response: Comment noted. However, this comment is outside the regulatory authority of this General Permit.

Comment 440: Financial Burden. I wish to comment on the ever-escalating cost to establish and subsequently maintain a CAFO-permitted operation. As farmers, we are regularly required to alter best management practices that were deemed acceptable as recently as the previous year. Although I understand the need to update practices when research identifies better methods, I fail to see the need for other additional practices, such as checking water lines daily or the recording of weather before, during and after manure application. The additional burdens, both financial and on available time, are significant. (50)

Response: Comment noted. However, the Department has amended the program requirements in Parts III.A. and IV.O. and IV.P. of this General Permit to address this comment.

Comment 441: Financial Burden. Barnyard runoff and filter areas. We are a medium farm. No matter how well managed, the filter area for barnyards does not “adequately” treat dirty water. To try and better achieve treatment, the standard was rewritten requiring larger filters and nutrient specs. The costs for those that chose to implement were significant. This expense cannot be handled by most farms today without outside funding. Operations and Maintenance continue to be a struggle. Since many fail and the costs are prohibitive the new standard will be to roof the area. If the economics were there in the first place, the farm would have already put up a structure. If it is now required, you can expect herds to increase in size to take advantage of what amounts to be another barn. Doesn’t that go against the very idea of the environmentalists to maintain smaller farmers? (41, 112)

Response: Comment noted.

Comment 442: Since we cannot control the price of our product, and we are already marginally profitable, provide for us the financial assistance to implement, operate and maintain these practices on an annual basis. As is the case this year, all available funds will be directed to keep the farm viable. (41, 112)

Response: Comment noted. However, this comment is beyond the regulatory authority of this General Permit.

Comment 443: Non-profitable, expenses will be cut just to stay alive. While grant money is helpful; perhaps, a line item tax deduction is possible, call if a “Farming Green” tax credit. The amount should be dependent on the number of, and type of practices implemented. (41, 112)

Response: Comment noted. However, this comment is beyond the regulatory authority of this General Permit. A legislative initiative is the proper vehicle to address these concerns.

Comment 444: Financial Burden. New York State is already considered one of the most expensive states in which to operate a business. The proposed new regulations will add extra time to our business, beyond what is required of farms in other states, and will not necessarily lead to improve water protection beyond what farmers are already required to do. (60)

Response: Comment noted. However, this comment is vague and speculative because it does not specifically identify what provisions of this General Permit the commenter believes will add extra time to a CAFO's operations, nor does it indicate how this General Permit will not lead to improved environmental protection.

Comment 445: There are already standards and penalties in place to protect against pollution and to punish ineffective practices. Farming is never an exact science – all kinds of factors can cause a farmer to have to change or modify a plan or a practice very quickly, without necessarily resulting in any discharge or pollution. It is unreasonable to add extra layers of paperwork and public scrutiny to a farm beyond the current requirements. (60)

Response: Comment noted. However, environmental protection is the Department's top priority as part of its regulatory and compliance activities.

Comment 446: Financial Burden. Our farm is a medium-sized CAFO. We are particularly concerned about the impact of these regulations without any additional funding for implementing them. Our planner feels that in order to appropriately follow the new requirements, he will need to be on the farm on a monthly, rather than quarterly basis, and that he will need to take more of a regulatory, rather than advisory approach to working with farms. Farms may have to undertake great expense in some cases to redesign systems according to changing NRCS standards, though there may be no problem with how well the current system is working, and the farm may not be polluting with their current system. (60)

Response: The Department has added language to Part III.C. of the General Permit such that certain existing BMPs not built in accordance with a previous NRCS standard shall be updated by the facility, under the oversight of an AEM certified planner, to meet the current, applicable NRCS standard.

Comment 447: If CAFO rules are enforced, they should be for all those (small, medium and large) who are considered commercial dairy producers and earn an income from shipping milk. (10)

Response: Comment noted. However, the Department does not regulate small farms, per se. Some Small AFOs may be required to obtain coverage under this General Permit, the Clean Water Act General Permit, or seek an individual SPDES permit at the Department's discretion for existing compliance issues.

Comment 448: Financial Burden. Many provisions in the new permit will increase the need for additional financial outlay. The current economy in the dairy industry will make it difficult, and as a planner, the additional work should require additional fees. (32)

Response: Comment noted. However, environmental protection is the Department's top priority as part of its regulatory and compliance activities.

Comment 449: Financial Burden. It is imperative that any new regulations incorporate a reasonable financial and operational burden on the farms involved. Farm net income is generally far lower than what investors expect in the general economy. Up till now, NYS DEC has allowed time for farms to come into compliance. This has allowed for sources of public funding to be found. This patient but steady approach remains essential so that farm businesses are not needlessly put out of business. Also, we recommend that NYS DEC not impose large annual fees or assessments since most of these businesses generally can't build that into their cost structure. (127)

Response: Comment noted. Please reference Part III.C. of this General Permit, this provides additional time for Medium CAFOs to implement all structural management practices.

Comment 450: Public Education. The public often is confused about a "permit to discharge". It sounds like a pipe going directly into a stream. More education is needed to allow NY residents to understand the challenges associated with running a commercially viable farm business. The "permit to discharge" is really the age old practice of replenishing the soils nutrients with natural fertilizer. (127)

Response: Comment noted. The Department will continue to support educational outreach programs, such as the CAFO Roadshow to educate producers and the general public. The DEC website is also a valuable educational tool.

Comment 451: Financial Burden. As your agency considers adding new requirements, please do not overlook the fact that we are meeting the current requirements that your agency places on waste disposal on our farms. This makes us responsible to the environment. Adding more regulation and or removing/diminishing our opportunity to continue current practices is unnecessary and would only add industry crippling costs. (125)

Response: Comment noted. However, this comment is beyond the regulatory authority of this General Permit. The current CAFO General Permit is issued pursuant to New York's federally-approved Clean Water Act program, is set to expire on June 30, 2009, and must be replaced by a subsequent Clean Water Act General Permit. The current CAFO General Permit cannot legally continue on for another 5-year permit term because it is not aligned with the requirements of EPA's 2008 Rule and the *Waterkeeper* decision. New York determined a State General Permit to be appropriate for all facilities that do not discharge or propose to discharge.

Comment 452: Inflict Least Harm. Remembering that farmers are by their very nature stewards of the land – it is after all the source and sustenance of their livelihoods – it is important that new regulation be weighed carefully to achieve the most benefit while inflicting the least harm. (5)

Response: Comment noted. The objective of this General Permit is to ensure farming practices are adequately protective of the environment and water quality.

Comment 453: Flexibility. I am concerned that the role nature plays in farming be given due consideration. Five-year plans are just that; plans. Latitude and respect for processes outside of the farmers' control must be factored into the General Permits. Weather conditions, crop and commodity pricing and other inputs are now fluctuating to greater degrees and with greater frequency than ever before. (5)

Response: Comment noted. CAFOs may alter and update their CNMPs to adjust to changing conditions. The Department recognizes that CNMPs are fluid documents, which must be adjusted to current conditions. However, certain changes (e.g., major changes) made by a CAFO involve informing the Department. Please reference Part III.D. of this General Permit for further information.

Comment 454: Turnaround Times. While it is not a provision of the draft General Permits, I am also very concerned about lengthy delays in the processing of CAFO applications by the Department. I recognize that staffing shortages are an ongoing problem for the Department. However, in a business subject to the seasons, farmers need a quicker turn around on submitted Notices of Intent. Additionally, delay in approving applications should not subject farm operations to standards that are revised during the pendency of their approval particularly if the changed standard is of minimal environment benefit. (5)

Response: Comment noted. The Department will continue to make best efforts to process NOIs and other paperwork in a timely manner, especially given the sensitive timelines CAFOs face.

Comment 455: The Department's rush to issue both draft permits, the short time frame provided for the public and the regulated community to respond with comments, and the short length of time before the draft permits are proposed to take effect has caused, and will continue to cause, an unnecessary burden on New York's agricultural operations. NEDPA urges the Department to refrain from claiming the draft permits must be issued within a specific time frame and, instead, focus on making sure both draft permits will appropriately and clearly implement the necessary requirements under the Clean Water Act (CWA) and New York's Environmental Conservation Law (ECL) without having a negative impact on the economic development of New York's agricultural operations. (89)

Response: Comment noted.

Comment 456: Recertification Process. EPA's Final Rule includes a provision that allows CAFOs to voluntarily certify that the CAFO does not discharge or propose to discharge and, should the CAFO have a discharge, to recertify the "no discharge" finding (with specific limitations). Also, EPA noted that while an unpermitted discharge from a properly certified CAFO is still a violation of the CWA (33 U.S.C. § 1311) and the "no discharge" certification would be terminated, the CAFO would *not* be in violation of the requirement that CAFOs that propose to discharge seek permit coverage pursuant to 40 C.F.R. § 122.23 (assuming the certification is done in accordance with the eligibility criteria in 40 C.F.R. § 122.23(i)(2)).

Neither the draft State Permit nor the draft CWA Permit include information regarding what would happen in the event that a Permittee has an accidental discharge, properly notifies the Department, and provides a documented plan to address whatever led to the discharge within a reasonable timeframe. NEDPA urges DEC to include language in both the State Permit and the CWA Permit that would allow permittees to remain covered by either permit, under the existing permit language, as the corrective action is being taken, regardless of whether the Department decides to take enforcement action. (89)

Response: Comment noted. EPA's 2008 Rule and its associated Fact Sheet provided that the voluntary "no discharge" certification can be optionally implemented by the States. The State of New York has decided to make the "no discharge" certification a mandatory cornerstone of this General Permit.

The Department will continue to exercise its enforcement discretion and evaluate the facts and circumstances surrounding each CAFO to determine whether continuing coverage under this General Permit is proper.

Comment 457: It is NEDPA's understanding that because the New York State ECL does not provide a citizen with a private right of action, and because the State Permit is not a CWA Permit, a violation of the State Permit cannot, by itself, result in a private right of action under either State or federal law. If this understanding is incorrect, the legal foundation for both the State and the CWA permits must be more clearly defined for the regulated community to weigh its permit choices and its liability risks. This can either be done in the Fact Sheet on the Final Permit, or in DEC's formal Response to Comments. (89)

Response: Comment noted. The federal Clean Water Act extends third-party rights to citizens to pursue enforcement. CAFOs covered under this General Permit cannot be sued by citizens for violations of this General Permit, however a CAFO could be liable for discharges under the Clean Water Act. The Department will clarify this issue in the Fact Sheet published with this General Permit.