

# New York State Department of Environmental Conservation

## Division of Water

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Alexander B. Grannis  
Commissioner

## RESPONSIVENESS SUMMARY

### Comments on the DRAFT Division of Water Technical and Operational Guidance Series (1.4.2) Compliance and Enforcement of SPDES Permits, dated February 10, 2010

Document Date: June 15, 2010

The revised Compliance and Enforcement of SPDES Permits Technical and Operational Guidance Series (TOGS 1.4.2) was developed in response to a need for updated guidance for Division of Water staff in the implementation of the SPDES compliance and enforcement program. This revised guidance document provides Department staff with the enforcement options and operating guidelines to implement the compliance component of the SPDES programs. The 1988 guidance predated our current SPDES general permits for Stormwater and Concentrated Animal Feeding Operations (CAFOs). These programs are now addressed in the draft TOGS.

The draft TOGS also addresses some of the findings of the 2006 Environmental Protection Agency (EPA) review under the State Review Framework (SRF). Specifically, EPA was concerned with how statewide consistency and penalty assessment were handled by Department enforcement programs. The draft TOGS provides clear direction to Department staff on how to handle compliance and enforcement issues and how to assess penalties. The EPA SRF review was posted on the EPA website in the fall of 2009.

Notice of availability of a Draft revised TOGS 1.4.2 for public review was published in the February 24, 2010 Environmental Notice Bulletin. During the comment period, public information meetings were held in Syracuse, Albany and Yonkers, NY.

This Responsiveness Summary prepared by the project team represents the Department's responses to comments and questions submitted during the public comment period. Similar comments have been grouped for a single response. The Department received written comments from the following individuals:

- John R. Tausel, Senior Associate Director of Public Policy, New York Farm Bureau (NYFB)
- Thomas Whetham, President, New York Water Environment Association, Inc. (NYWEA)
- George Allen, Chair, NEDPA Environmental Committee, The Northeast Dairy Producers Association, Inc. (NEDPA)

The project team would like to thank all those who commented for their thoughtful critiques.

## GENERAL

1. Reissuance Commitment. The existing TOGS for SPDES Compliance and Enforcement have been in place, and appear to have remained unchanged since 1988. Just as permits are updated on a regular basis, we believe that TOGS addressing permit issues should also be periodically updated as sectors change and evolve. With that in mind, we request that DEC commit within the document to a five year review of the TOGS. This will ensure that, as permits are reauthorized, the TOGS will be updated to reflect new water quality protection approaches. (J. Tauzel, NYFB)

*Response: As Department activities are subject to budget considerations and an annual work planning process, a commitment to update this guidance at specific time intervals cannot be made within this TOGS.*

### Abbreviations and Acronyms

2. Please add both OGC and SNAP as utilized in the “violations on order of consent schedule requirements for individual permits” (page 12) to the list of explained abbreviations. (J. Tauzel, NYFB)

*Response: The acronym OGC has been replaced with “legal staff” in the TOGS. SNAP has been added to list of acronyms and abbreviations.*

### Section I - Guidance

3. Introductory Sentence. In other parts of the document, DEC makes careful note that it will pursue all options legally available to protect water quality (for example page 2 of the document notes —The Department will employ any available compliance...|| [underline added for emphasis]). We would recommend that the first sentence be amended to read: —The Department will pursue available actions to ensure...|| [underline added for clarity]. (J. Tauzel, NYFB)

*Response: “Any available compliance” has been changed to read “take appropriate action.”*

4. Applicability of guidance. The draft TOGS specifically address compliance and enforcement of existing SPDES permits (which are listed). However, there appears to be no place holder for new permits that may be established by DEC. An example of such a permit would be the general permit for winery wastewater. We would recommend that the draft TOGS be amended throughout to allow for the inclusion of sector specific strategies as new permits are developed and implemented. (J. Tauzel, NYFB)

*Response: It is not feasible to attempt to include and account for future general permits in this TOGS that may not be drafted. Any modification of this guidance would need to occur after development and issuance of a newly established permit which has undergone the public process.*

5. Further, while the draft SPDES enforcement TOGS is intended to “supplement existing [NYSDEC Division of Environmental Enforcement (DEE)] policy” (The draft TOGS can be found at [http://www.dec.ny.gov/docs/water\\_pdf/togs142feb10.pdf](http://www.dec.ny.gov/docs/water_pdf/togs142feb10.pdf)), many of the most important aspects of DEE “policy” upon which this draft TOGS is built, such as the non-negotiability of most Consent Orders and the current policy of not allowing “No Admit” clauses in Consent Orders are not included in the published DEE policies. Even though NYSDEC is already using them, these DEE policies have not been made available, in draft, for public comment. For the sake of consistency, NYWEA recommends that TOGS 1.4.2 should not be finalized until the updated DEE policies, which are the mechanism for how this TOGS will be implemented by the Department, are released for public comment and finalized. (T. Whetham, NYWEA)
  
6. Further, while the draft SPDES enforcement TOGS is intended to "supplement existing [NYSDEC Division of Environmental Enforcement (DEE)] policy (See Draft TOGS 1.4.2 at footnote 1 on page 2 and footnote 9 on page 7.), many of the most important aspects of DEE "policy" upon which this draft TOGS is built, such as the non-negotiability of most Consent Orders and the current policy of not allowing "No Admit" clauses in Consent Orders are not included in the published DEE policies. Further, even though NYSDEC is already using them, they have not been made available, in draft, for public comment. NEDPA believes that TOGS 1.4.2 should not be finalized until the published DEE policies, which are the mechanism for how this TOGS will be implemented by the Department, are released for public comment. (G. Allen, NEDPA)

*Response: TOGS 1.4.2 does not contain any sections that detail “Admit” clauses or the process of negotiating Orders on Consent. This document is guidance for Division of Water staff to use while preparing their referral to Department legal staff and is used for settlement purposes only.*

7. In reviewing this proposal, NYWEA is concerned that USEPA’s *Interim Significant Noncompliance Policy for Clean Water Act Violations associated with CSOs, SSOs, CAFOs, and Storm Water Point Sources* (“Interim Wet Weather SNC Policy), dated October 23, 2007 is not widely available. The aforementioned Policy is no longer available online on either EPA website or through a general web search (We do note that, when requested, NYSDEC quickly provided a copy to our representative. However, this does not make this USEPA Wet Weather SNC Policy “generally available”). Thus, NYWEA is concerned that the key underpinnings of this draft Guidance with regard to municipal wet weather are not readily available to the Permittees and/or may no longer reflect current EPA thinking on the subject. (T. Whetham, NYWEA)
  
8. In reviewing this proposal, NEDPA is troubled that USEPA's *Interim Significant Noncompliance Policy for Clean Water Act Violations associated with CSOs, SSOs, CAFOs, and Storm Water Point Sources* ("Interim Wet Weather SNC Policy), dated October 23,2007 is not widely available, as far as we can tell. Significant time was spent searching both the USEPA web site and the web in general for this guidance to no avail (We do note that, when requested, NYSDEC quickly provided a copy to our representative. However, this does not

make this USEPA Wet Weather SNC Policy “generally available”). The fact that it is no longer available and that it was issued under the prior Administration leads NEDPA to question whether it reflects EPA's current thinking on wet weather related enforcement. Thus NEDPA is very concerned that the key underpinnings of this draft Guidance with regard to CAFOs, which will most effect NEDPA members, is not readily available and may no longer reflect current EPA thinking. (G. Allen, NEDPA)

*Response: EPA has posted the Interim Wet Weather SNC on their website at the following URL: <http://cfpub.epa.gov/compliance/resources/policies/civil/cwa/>*

9. Focus of Compliance and Enforcement Activities—Watersheds. NYFB is concerned with DEC’s establishment of priority enforcement of specific watersheds (such as 303(d) and TMDL watersheds). A prime tenant of the Clean Water Act is not just to restore degraded waters but also to ensure continued purity of clean waters. This appears counter to the enforcement priorities established by DEC. We believe an equal enforcement approach across the entire state is more appropriate than DEC’s proposed priority watershed determination. (J. Tauzel, NYFB)

*Response: The Federal Clean Water Act requires states to assess and report on the quality of waters in their state. Section 303(d) of the Act also requires states to identify Impaired Waters, where specific designated uses are not fully supported. For these Impaired Waters, states must consider the development of a Total Maximum Daily Load (TMDL) or other strategy to reduce the input of the specific pollutant(s) restricting waterbody uses, in order to restore and protect such uses. The Department’s 604(b) grant condition with EPA requires targets and implementation of plans to facilitate the restoration of impaired watersheds and waterbodies. Therefore, these watersheds are a priority and additional permit requirements may be necessary and are listed as a response to Water Quality Standards violations. In addition, on October 15, 2009, the EPA issued the Clean Water Act Enforcement Action Plan. One of the primary objectives of the Plan is to “target enforcement to the most important water pollution problems.” The Department anticipates that it will collaborate with EPA to develop inspection, compliance and enforcement approaches to meet this directive.*

10. Focus of Compliance and Enforcement Activities—Nonpoint. The purpose of this document is to establish compliance and enforcement responses regarding point source facilities. NYFB does not contest that DEC does have certain regulatory authority over non-point sources, however we do not believe non-point sources should be included in these TOGS. Placing reference to non-point sources in this document, without clear explanation and citation of nonpoint compliance and enforcement strategies has the potential to create confusion among enforcement officials that these guidelines should be utilized in nonpoint source enforcement. We therefore believe references to “non-point source discharge” and “unregulated non-point source discharges” should be removed or, at the very least, clarifying language and references be added that non-point sources are addressed using other DEC established guidelines. (J. Tauzel, NYFB)

*Response: Reference to non-point source discharge is made merely to notify staff that the*

*Department has authority to address problems not specifically listed in this TOGS.*

11. The statement that “A facility discharging without a permit is subject to enforcement prior to issuance of a permit” should be deleted (or modified) as the Department should be able to accept and act upon applications for such discharges independent of the timetable through which the enforcement of the prior lack of a permit is moving. (T. Whetham, NYWEA)
12. The statement that "A facility discharging without a permit is subject to enforcement prior to issuance of a permit" should be deleted (or modified) as the Department should be able to accept and act upon applications for such discharges independent of the timetable through which the enforcement of the prior lack of a permit is moving. (G. Allen, NEDPA)

*Response: The Uniform Procedures Act (UPA) codified at 6 NYCRR Part 621.3 (e) Enforcement Actions, allows the Department to suspend a permit application if an enforcement action has been or is commenced against the applicant for alleged violations of the ECL or other environmental laws administered by the department at the facility or site that is the subject of the application. The alleged violations may be related to the activity for which the permit is sought or to other provisions of law administered by the department. Such suspension of processing and review may remain in effect pending final resolution of the enforcement action. Text has been added to the TOGS for clarification.*

## **Section II - Compliance Evaluation**

13. Water Priority Violations. Footnote 4 notes that “Water Priority Violations” are defined in TOGS 1.4.1. In examining that document, there is no specific definition of Water Priority Violations. For clarity purposes, we suggest replacing the term “defined” with the term “established”. (J. Tauzel, NYFB)

*Response: The term “defined” has been replaced with the term “established”.*

## **II. 2. Inspection**

14. Inspections. DEC notes the primary focus for inspections of individually permitted facilities but does not include the approach for general permit inspections. Our experience with the CAFO program has provided a perspective that regional DEC offices place differing emphasis on CAFO inspections. The result is that some farms have been inspected at a much higher frequency than others, simply for being located in a certain part of the state. This is no way meets the principle of equity that the DEC strives to achieve. We suggest that within the TOGS, priority for CAFO general permit inspections be established utilizing a risk-based approach that encompasses a state-wide perspective. This will ensure an appropriate and equitable enforcement presence across regions. (J. Tauzel, NYFB)

*Response: Inspection strategies are not within the scope of this TOGS. Inspections of facilities covered under general permits are established annually through the work planning process. A sentence has been added to the TOGS to clarify this process. In addition, EPA’s Clean Water Act Enforcement Action Plan will require strategies that focus inspections in areas that have water pollution problems.*

### **II. 3. Citizen Complaints**

15. Citizen Complaints (page 4). We strongly support DEC considering the authenticity of citizen complaints prior to taking responsive action. (J. Tauzel, NYFB)

*Response: This comment has been duly noted.*

### **Section III - Compliance Tools**

16. As DEC is aware, the true success of New York's CAFO program comes as a result of DEC utilizing the existing agricultural environmental support infrastructure as the first route to address farm water quality protection. Given this proven record of accomplishment, we believe that reference should be made directly in this section to the existing DEC *TOGS 5.3.1 Investigation of Agricultural Sources of Water Pollution*. The guidelines established in the draft SPDES compliance and enforcement TOGS will be utilized by a number of individuals across the state over a period of time. Some of these enforcement officials may not have knowledge of the existing DEC policy on agricultural related water quality issues and the existing network in place to address these issues. Providing reference in the compliance tools section will help provide awareness to inspectors who don't work with farms on a daily basis. (J. Tauzel, NYFB)

*Response: It is outside of the scope of TOGS 1.4.2 to make reference to all other TOGS, including TOGS 5.1.3 Investigation of Agricultural Sources of Water Pollution.*

### **III. A. Compliance Assistance**

17. NYFB believes a compliance assistance based perspective is the primary mechanism that DEC should utilize to assist farms in achieving water quality protection. We believe the inclusion of discussions on various compliance assistance options is highly appropriate for the TOGS. (J. Tauzel, NYFB)

*Response: This comment has been duly noted.*

### **III.A. 4. Technical Assistance**

18. Technical Assistance (page 5). The language utilized in the draft TOGS regarding technical assistance focuses solely on technical assistance that can be provided by DEC. Yet on farms, and in several counties, CAFO and stormwater technical assistance is often provided by other agencies and organizations such as local soil & water conservation districts, cooperative extensions and USDA-NRCS. Again, to ensure that the all regulators across the state, regardless of backgrounds, are familiar with the unique infrastructure system in place for the agricultural community, we recommend specific reference to these organizations within the technical assistance section. (J. Tauzel, NYFB)

*Response: This document only applies to activities directly under the control of the*

*Department and is used as a guidance tool for Division of Water staff in compliance and enforcement related matters.*

19. Water Priority Violations (page 6, footnote 8). Please refer to comment 6). (Original comment 6: Footnote 4 notes that “Water Priority Violations” are defined in TOGS 1.4.1. In examining that document, there is no specific definition of Water Priority Violations. For clarity purposes, we suggest replacing the term “defined” with the term “established”). (J. Tauzel, NYFB)

*Response: The term “defined” has been replaced with the term “established”.*

### **III. B. Enforcement**

#### **III. B. 1. Informal Enforcement**

20. Informal Enforcement (page 6). We greatly appreciate and support DEC’s statement regarding the benefits of voluntary compliance and the ability of enforcement officials to provide informal enforcement as a mechanism to achieve voluntary compliance. (J. Tauzel, NYFB)

*Response: This comment has been duly noted.*

#### **Notice of Violation**

21. NYWEA recommends that the statement that “all SPDES-related NOV’s must include a number of things, such as a notice that the violator may be subject to formal enforcement as a result of the violations” be removed from the Guidance. NYWEA believes that the goal of a NOV should be to put a Permittee on notice that a violation has been found and that certain enumerated steps must be taken to return the Permittee to full compliance. In order to incentivize the settlement and resolution of alleged violations through the NOV mechanism, the NOV should clearly state that **if** the required steps are taken by the specified date (or by another date subsequently agreed upon by the Department), than no further enforcement action on the specified alleged violations will be taken. If this statement is not removed, it should be modified. (While less desirable than actual deletion, if this statement remains it should at least be modified to state “at a minimum, [NOV’s must include a number of things, such as] a notice that the violator may be subject to formal enforcement as a result of the violations if the violation is not corrected in accordance with the requirements of this letter, including the stated compliance date.” NYWEA notes that expanding the statement in this manner would be consistent with USEPA’s Interim Wet Weather SNC Policy (at page 17)). (T. Whetham, NYWEA)
22. NEDPA requests that the statement that all SPDES-related NOV’s must include a number of things, such as a notice that the violator may be subject to formal enforcement as a result of the violations” be removed from the Guidance. NEDPA believes that the goal of a NOV should be to put a permittee on notice that a violation has been found and that certain enumerated steps must be taken to return the permittee to full compliance. In order to incentivize settlement and resolution of alleged violations through the NOV mechanism, the NOV should clearly state that **if** the required steps are taken by the specified date (or by another date subsequently agreed upon by the Department), than no further enforcement

action on the specified alleged violations will be taken. If this statement is not removed, it should be modified. (While less desirable than actual deletion, if this statement remains it should at least be modified to state “at a minimum, [NOVs must include a number of things, such as] a notice that the violator may be subject to formal enforcement as a result of the violations if the violation is not corrected in accordance with the requirements of this letter, including the stated compliance date.” NYWEA notes that expanding the statement in this manner would be consistent with USEPA’s Interim Wet Weather SNC Policy (at page 17)). (G. Allen, NEDPA)

*Response: The comments have been duly noted. The Department is able to pursue enforcement for violations which have occurred, even if corrective actions have been taken to prevent future violations. The Department may choose to exercise enforcement discretion in such cases, but it would undermine the Department’s authority if we stated in this TOGS that no further action will be taken for past violations because a permittee met the requested actions stated in an NOV.*

23. NYWEA also believes, at least with respect to alleged violations of municipal wet weather permits, that the final Guidance must specifically allow for some level of negotiation of NOVs and other enforcement-related documents. There are many complicating factors which must be factored in when setting compliance dates and required response actions. It is likely that many NOVs and other enforcement documents proposed by the Department will not have properly taken these factors into account. It is also likely that, for many of these, a fairly short, focused discussion between the Permittee and the Department will identify better steps and schedules which can be accepted by both parties and then implemented by the Permittee, resolving the alleged violation in a timely manner without requiring the expenditure of a significant amount of Department resources. (T. Whetham, NYWEA)
24. NEDPA also believes that, at least with respect to alleged violations of CAFO permits, the final Guidance must specifically allow for some level of negotiation of NOVs and other enforcement-related documents. There are many complicating factors which must be factored in when setting compliance dates and required response actions, especially in a farm setting. It is likely that many NOVs and other enforcement documents proposed by the Department will not have properly taken these factors into account. It is also likely that, for many of these, a fairly short, focused discussion between the farmer, the Certified Planner and the Department will identify better steps and schedules which can be accepted by both parties and then implemented by the permittee, resolving the alleged violation in a timely manner without requiring the expenditure of a significant amount of Department resources. (G. Allen, NEDPA)

*Response: Notices of Violation are not “negotiated” between the permittee and the Department. In any case where a permittee disputes a violation or a schedule included in an NOV, the permittee should contact Department staff to discuss if a compliance conference has not already been scheduled.*

### **III. B. 2. Formal Enforcement**

25. Formal Enforcement (page 7). We would appreciate if the first sentence of this subdivision is amended to read: “All SPDES violations [are] may be subject to formal enforcement actions.” The amended language makes clear that enforcement officials have the ability to pursue formal enforcement action for any permit violation but are not obligated to undertake formal enforcement. (J. Tauzel, NYFB)

*Response: A sentence has been added to the TOGS to clarify this.*

#### **Order on Consent**

26. Because repeated alleged “violations” of the same or similar provisions of the Permit can have increasing significant consequences under the proposed Guidance, many Permittees will be very hesitant to sign even a short form Consent Order if it does not include a “no-admit clause”, even if the Permittee is willing to agree to the other proposed terms. The mandatory exclusion of such clauses is a needless disincentive which will be a significant barrier to the streamlined enforcement process through which NYSDEC is hoping to settle most alleged violations. Such “no admit” clauses should not be automatically prohibited. This is particularly true given the risks of citizen suits under the CWA. (T. Whetham, NYWEA)
27. Because repeated alleged "violations" of the same or similar provisions of the CAFO Permit can have increasing significant consequences under the proposed Guidance, many Permittees, including farmers, will be very hesitant to sign even a short form Consent Order if it does not include a "no-admit clause", even if the farmer is willing to agree to the other proposed terms. The mandatory exclusion of such clauses is a needless disincentive which will be a significant barrier to the streamlined enforcement process through which NYSDEC is hoping to settle most alleged violations. Such "no admit" clauses should not be automatically prohibited. This particularly is true given the risks of citizen suits under the CWA. Where a CAFO O/O has signed a Consent Order without a no-admit clause, the CAFO O/O can arguably be excluded from coverage by its insurance carrier in a future claim. Such a result would surely bankrupt most operations. The Department's position on no-admit clauses is contrary to historical practice and unsupported by legal or policy analysis. (G. Allen, NEDPA)

*Response: TOGS 1.4.2 does not contain any sections that detail “Admit” clauses or the process of negotiating Orders on Consent. This document is guidance for Division of Water staff to use while preparing their referral to Department legal staff and is used for settlement purposes only.*

### **Appendix A SPDES Compliance and Enforcement Response Guide**

28. NYWEA agrees that the goal of returning a violator to compliance and deterring a Permittee from future violations should be the highest goal of any SPDES enforcement. However, we also strongly believe that this goal must be kept separate from, and prioritized higher than,

any secondary goal of deterring others in the regulated community. For the most part, potentially serious (from an environmental protection stand point) “violations” of many POTW and municipal wet weather related SPDES permit provisions will most likely arise either in the context of unexpected weather-related events or through differing interpretations of what CAFO permits require. (T. Whetham, NYWEA)

29. NEDPA agrees that the goal of returning a violator to compliance and deterring a permittee from future violations should be the highest goal of any SPDES enforcement. However, it strongly believes that this goal must be kept separate from, and prioritized higher than, any secondary goal of deterring others in the regulated community. For the most part, potentially serious (from an environmental protection stand point) "violations" of either the ECL or the future CWA CAFO Permit will most likely arise either in the context of unexpected weather-related events or through differing interpretations of what either CAFO permit requires. (G. Allen, NEDPA)

*Response: The Commissioner’s Civil Penalty Policy (DEE-1) reads: “Enforcement action should ensure that deterrence in both the general and specific sense is established. Penalties should persuade the violator to take precautions against falling into non-compliance again, as well as persuade others not to violate the law.” This policy places general and specific deterrence on an equal plane.*

30. Again, the preamble text to this Appendix should state that returning a violator to compliance and deterring the Permittee from future violations is the highest goal. For the reasons stated in Section B above this goal must be separate from, and prioritized much higher than, any secondary goal of deterring others in the regulated community. (T. Whetham, NYWEA)
31. Again, the preamble text to this Appendix should state that the goal of returning a violator to compliance and deterring the permittee from future violations is the highest goal. For the reasons stated in Section B above, this goal must be separate from and prioritized much higher than deterring others in the regulated community. (G. Allen, NEDPA)

*Response: The Commissioner’s Civil Penalty Policy (DEE-1) reads: “Enforcement action should ensure that deterrence in both the general and specific sense is established. Penalties should persuade the violator to take precautions against falling into non-compliance again, as well as persuade others not to violate the law.” This policy places general and specific deterrence on an equal plane.*

32. Response Time. Clarification is requested of the sentence: “Responses to violations should occur within thirty days of detection.” Is this referencing responses by DEC in enforcement actions or responses from the facility?

We strongly support guidance within the document that would clarify that DEC inspectors should provide response, including inspections reports, to farms within thirty days of any visit and request that such language be included within the finalized TOGS.

If the language is in reference to responses by permitted facilities, we believe more

clarification is needed for the sentence. Certain provisions for CAFOs allow a 60 day period prior to enforcement action being taken. (J. Tauzel, NYFB)

*Response: The word “Department” has been added to the document to clarify that the Department response to violations should occur within thirty days of detection. Guidance related to inspections (including the timing of delivery of inspection reports) is not within the scope of this TOGS.*

33. Similarly, when the Permittee is a municipal entity, NYWEA believes that the first step NYSDEC should take in any apparent violation of a SPDES permit requirement **must** be to contact the Permittee so that NYSDEC truly understands the situation before embarking on any enforcement, and especially before initiating “Formal Enforcement”. This is particularly true for the MS4 Permit, as to whether or not the alleged compliance failures occurred are truly often “judgment” issues. As the primary goal of the draft TOGS is for the discharger to return to compliance and to be deterred from future noncompliance, then a phone conversation between NYSDEC and the Permittee may quickly clarify whether there has been a violation and, if one has occurred, serve to educate the Permittee as to what is needed to avoid future violations of the same nature. (T. Whetham, NYWEA)

*Response: A Notice of Violation (NOV) is usually the first minimum response. This is the opportunity for the permittee to discuss the non-compliance with DEC. DEC staff may choose to contact the permittee before sending an NOV or commencing formal enforcement.*

34. Further, with respect to Tables H, J and L, NYWEA strongly endorses there being no minimum required enforcement responses for Annual Flow, Compliance or Certification Reports which are submitted less than 60 days late. NYWEA agrees that reports submitted less than 60 days late should be deemed to be a “Failure to meet non-significant permit requirements.” (T. Whetham, NYWEA)

*Response: The comment is duly noted. Despite the fact that there is no minimum response required in these cases, the Department does not consider these violations to be “Failure to meet non-significant permit requirements.” For example, Annual Flow Certification reports provided to the Department contain critical information regarding POTW flow and capacity. Failure to submit these reports on time does not allow the Department to efficiently evaluate risk factors related to capacity exceedances which may lead to noncompliance.*

35. NYWEA objects to one portion of EPA’s *Interim Wet Weather SNC Policy* being applied on every occasion within New York. As the Department is aware, that Policy has a fairly long list of factors and examples of when an “unauthorized discharge” is likely to become a *Significant Unauthorized Discharge* (USEPA’s *Interim Significant Noncompliance Policy for Clean Water Act Violations associated with CSOs, SSOs, CAFOs, and Storm Water Point Sources* (“Interim Wet Weather SNC Policy”), dated October 23, 2007). One of these factors is “the discharge or overflow is not weather related”. NYWEA believes that a dry weather overflow in and of itself is not always a “Significant Unauthorized Discharge” (SUD). NYWEA believes that, at the very least, a dry weather flow **must** subsequently enter a “water of the State” **and then cause or contribute to one of the other four factors** listed on

page 5 of the *Interim Wet Weather SNC Policy*, i.e., cause or contribute to an exceedance of a water quality standard, a fish kill, etc., an area that is already “disproportionately impacted” or the waterbody is one of the 8 enumerated sensitive water environments before it becomes a SUD.

The reason why this distinction must be emphasized is that once an unauthorized discharge has been deemed a *Significant Unauthorized Discharge*, Appendix A in multiple places mandates that NYSDEC Staff consult with a Department Attorney as to whether criminal or civil enforcement should be instituted. While water quality and water pollution professionals across the State work daily to prevent such dry weather discharges or overflows at unauthorized locations, all it takes is a pipe break, vandalism in a collection system (For example, the opening of manhole by an unauthorized person followed by the throwing in of large items which subsequently can impede flow within the collection system and lead to a dry weather overflow) to cause such an unplanned event. NYWEA agrees that these events are “unauthorized discharges” if they reach a waters of the State, but we cannot agree that every dry weather discharge or overflow must be treated as a SUD and hence is a SNC. (T. Whetham, NYWEA)

*Response: The definition of a “Significant Unauthorized Discharge” from EPA’s Interim Significant Noncompliance Policy for Clean Water Act Violations Associated with CSOs, SSOs, CAFOs, and Storm Water Point Sources (“Interim Wet Weather SNC Policy”) is as follows:*

1. *“IV. Factors to Determine Significant Unauthorized Discharge*

*NPDES authorities should evaluate whether a significant unauthorized discharge has occurred based on impact to human health or the receiving water, condition or quality of the receiving water, and any impairment of the actual and/or designated uses of the receiving water. For example, factors to consider to determine if a significant unauthorized discharge has occurred may include the following:*

- *the discharge has caused or contributed to an exceedance of any applicable water quality standard;*
- *the discharge or overflow is not weather-related;*
- *the discharge has caused or contributed to a fish kill, fish advisory, or shellfish bed or beach closing;*
- *the discharge impacts an area identified as being disproportionately impacted by pollutants from multiple environmental pathways;*
- *the waterbody impacted by the discharge is:*
  1. *a drinking water source, has drinking water intakes, or is in a source water protection area;*
  2. *a high quality habitat for aquatic organisms, fish, or wildlife;*
  3. *a habitat for endangered species;*
  4. *an Outstanding Natural Resource Water;*
  5. *a waterfowl staging or nesting area;*
  6. *used for shellfish harvesting;*

7. *used for primary or secondary contact recreation; and/or*
8. *a sensitive coastal area where habitat relies on adequate water quality to thrive.”*

As the definition states, a “Significant Unauthorized Discharge” applies to dry weather discharges. The text has been changed in Appendix A, Part I. to clarify the intent of the Department’s minimum response to the violation.

36. In addition, every section of Appendix A which lists Significant Unauthorized Discharge or other SNC as a violation, should also include the following statement adapted from the USEPA *Interim Wet Weather SNC Policy* (at page 15)

[NYSDEC] also has the discretion not to designate alleged violations that meet the SNC [or Formal Enforcement] criteria to account for unusual circumstances that result in SNC violations beyond a facility’s control. (T. Whetham, NYWEA)

37. Section E (and perhaps sections F through H also) should specifically include the following statement adapted from the *USEPA Interim Wet Weather SNC Policy* (at page 15)

[NYSDEC] also has the discretion not to designate alleged violations that meet the SNC [or Formal Enforcement] criteria to account for unusual circumstances that result in SNC violations beyond a facility's control. (G. Allen, NEDPA)

38. In addition, Section I (and perhaps sections J through O also) should specifically include the following statement adapted from the *USEPA Interim Wet Weather SNC Policy* (at page 15)

[NYSDEC] also has the discretion not to designate alleged violations that meet the SNC [or Formal Enforcement] criteria to account for unusual circumstances that result in SNC violations beyond a facility's control. (G. Allen, NEDPA)

*Response: It would be duplicative to include this statement, as the USEPA Interim Wet Weather SNC Policy is referenced in the document.*

39. Within each table is a violation for reporting false information. While we strongly encourage farms to provide the most accurate information possible to DEC, achieving full accuracy, given the complexity of a farm operation, is difficult. Unlike factories that have gages to measure outflow, farms don’t have the potential to distinguish between two-thirds a load of manure or three-quarters of a load of manure. Inaccuracies of this nature are not intentional and therefore should be treated much differently than intentionally falsifying information to DEC. We therefore believe that in each of the charts, the term “intentionally or negligently” should be added. (J. Tauzel, NYFB)

*Response: The intent of this item is not to capture unintentional inaccuracies, but to address intentional falsification, as described in Part 750-2.5(b)(2).*

## **Violations of Individual SPDES Permit Requirements**

### **Table A. Violations of Reporting Requirements**

40. Violations of Individual Permits - Reporting Requirements. Throughout the table regarding violations of reporting requirements of individual permits (beginning on page 10), language utilized creates confusion. Our understanding of the table is that in every instance the numbers assigned to specific circumstances are directly related to the corresponding number in the Department's minimum response. If that is indeed the issue, we are concerned about the term "repeated" without further clarification. For example in the "failure to report within 30 days" category two circumstances are provided. The first uses the term infrequent and the second uses the term repeated. Generally, our understanding is that however "infrequently" something occurs, it is a "repeated" incident. To avoid confusion, we request clarification of these terms. (J. Tausel, NYFB)

*Response: A sentence has been added to the TOGS to clarify that the best professional judgment of DEC staff will be used to determine whether a violation that occurs more than once is considered "infrequent" or "repeated."*

### **Table D. Violations of Order on Consent Schedule Requirements**

41. With respect to Table D (Violations of Order on Consent Schedule Requirements), NYWEA agrees that missing dates by less than 30 days should not be grounds for automatic referral to the OGC (Office of General Counsel). NYWEA also agrees that, on Table L, there should be no minimum response requirement for the "Failure to meet non-significant permit requirements." Further, we believe that Table D should specify a lower minimum response for interim deadlines which are missed by 30 or more days if the missing of the date does not block the achievement of the related final compliance date. (T. Whetham, NYWEA)

*Response: The listed responses in Table D are appropriate for violations of Orders on Consent. There is no minimum response listed in Table L for "Failure to meet non-significant permit requirements."*

## **Violations of General Permit Requirements, Combined Sewer Overflows and Sanitary Sewer Overflows**

### **Table I. Violations of CAFO General Permit Requirements**

42. There are currently two CAFO permits. One based on the Clean Water Act and one based on New York State Environmental Conservation Law. We would appreciate if DEC could provide clarity that the CERGL applies to farms permitted under both permits. NYFB believes the same approach should be taken with both permits. (J. Tausel, NYFB)

*Response: Clarification was added to Appendix A, Table I, denoting that the Compliance and Enforcement Response Guide applies to all CAFO general permits.*

43. Because of the seriousness of these issues and the fluid state of determining what the federal and New York CAFO requirements are, NEDPA requests that the CAFO section of

Appendix A (in Section I) **not be finalized** until the CAFO CWA General Permit itself is finalized. (G. Allen, NEDPA)

*Response: CAFO General Permit requirements are addressed through the generic permit requirements listed in Appendix A. All CAFO General Permit provisions in Appendix A would apply to the CAFO CWA General permit. Text has been added to the heading of Appendix A Table I to clarify this point.*

44. In the current atmosphere of heightened enforcement and significant negative publicity with respect to both the USEPA and the NYSDEC N/SPDES Permit enforcement, where the general public and the news media are pressuring both agencies to increase the number of N/SPDES enforcement actions, NEDPA is concerned that this Guidance, if finalized before the NY CWA CAFO General Permit is finalized, will lead to needless enforcement. If this Guidance, with its emphasis on little or no negotiation during enforcement of "minor" violations, is in effect at that time, then CAFO O/Os will have no option except to pursue drawn out, expensive (for both the CAFO O/O and New York) litigation concerning the alleged violations. This is not what CAFO O/Os want, nor is it in the spirit of the proposed TOGS. Likewise, it is not the best way to protect New York's water quality. (G. Allen, NEDPA)

*Response: This guidance offers numerous opportunities for communication between permittees and Department staff during the informal and formal enforcement process.*

45. NEDPA appreciates and understands NYSDEC's desire to update the SPDES related enforcement guidance. It also agrees that both the general public and SPDES permittees will benefit from having a more up-to-date statement of the range of enforcement-related responses that a SPDES Permit limit violation could trigger. At the same time, NEDPA reminds the Department that most SPDES permit violations, especially those by CAFO permittees, are totally unintended. In addition, in the case of CAFO permit violations, often they are triggered by unexpected weather events which are outside of the control of the permittee. (G. Allen, NEDPA)

*Response: The base penalty rates listed in Appendix C are based on an assumption of limited or accidental culpability. This is demonstrated in Appendix D by a penalty adjustment factor of 1.0 for limited or accidental culpability. Intentional or negligent violations are subject to a higher adjustment factor.*

46. While NEDPA agrees conceptually that all SPDES permittees should be treated consistently with respect to enforcement, we also believes that, as proposed, this draft Guidance mistakenly tries to lockstep minimum enforcement responses for individual, "traditional" SPDES permittees with those that will be applied to CAFOs. As it finalizes this draft Guidance, NYSDEC must keep in mind the unique nature of agriculture as compared to that of most SPDES permittees. New York CAFO Owner and Operators (CAFO O/Os) and other farmers continue, but in a much more high technology, scientifically sound manner than in the past, to take what would otherwise be a waste product, and spread it on fields to support the next crop, as opposed to disposing it. Such beneficial use yields many desirable effects,

not the least of which are reducing reliance on manufactured fertilizers and other soil amendments while reducing the cost of milk and other farm products. At the same time, this beneficial use is done in the out of doors, on extensive fields which are subject to the vagrancies of weather.

It is vitally important to make sure that finalization of this TOGS does not occur until the draft CAFO Appendix A Section (I) is significantly amended to factor this into the "Department's Minimum Response" column. In NEDPA's opinion, in many cases these mandated minimum responses should be different than those for similar sounding "violations" of the other more traditional SPDES Permits that are included in draft Appendix A. (G. Allen, NEDPA)

*Response: The Department took into consideration the unique nature of all permittees when developing this guidance, as demonstrated by the inclusion of separate response and penalty tables for each permit type.*

47. Except for specific comments included herein, DEC's overall minimum responses for CAFOs appear generally balanced in nature. NYFB opposes a more stringent minimum response to any of the violations. (J. Tauzel, NYFB)

*Response: This comment has been duly noted.*

48. NEDPA suggests that the first step in considering whether formal or informal enforcement is needed for a suspected violation of a CAFO permit should be for NYSDEC (or USEPA) to contact the CNMP Planner for the CAFO. Often the apparent "violation" will be a product of differing interpretation of the relatively new ECL (and the still unpublished draft NY CWA) CAFO Permit. This could be addressed through a note to Section 1.

Similarly, the first NYSDEC step in any apparent "Failure to implement the CNMP, "Failure to make 'consistent progress' " and Failure to amend the CNMP" violations **must** be to contact the Planner who wrote the CNMP so that NYSDEC truly understands the situation before embarking on any enforcement, and especially before initiating "Formal Enforcement". For CAFOs, whether such compliance failures occurred are truly often "judgment" issues. As the primary goal of the draft TOGS is to for the discharger to return to compliance and to be deterred from future noncompliance, than a short phone conversation between NYSDEC and the Planner may quickly clarify whether there has been a violation and, if one has occurred, educate the Planner as to what is needed to avoid future violations of the same nature. (G. Allen, NEDPA)

*Response: A Notice of Violation (NOV) is usually the first minimum response. This is the opportunity for the permittee to discuss the non-compliance with DEC. It is the responsibility of the permittee to invite the planner to such discussions. DEC staff may choose to contact the permittee before sending an NOV or commencing formal enforcement.*

49. As the Department is aware, there are numerous questions being discussed between CAFO permittees and NYSDEC with respect to how CAFO O/Os will be judged during inspections

under the relatively new "ECL" General CAFO permit, especially when an inspection is performed by USEPA. These questions are germane to this draft Guidance, because such inspections will be one of the main CAFO permit-related events which leads the Department to consider whether enforcement under this TOGS will be initiated. While NYSDEC and USEPA have indicated that USEPA will apply NYSDEC criteria during all CAFO inspections in New York, NEDPA questions whether this will, in fact, be possible. For example, the updated Clean Water Act (CWA) CAFO General Permit for New York has not even been proposed yet. When it is, NEDPA anticipates that there will be significant differences between the ECL and the CWA New York CAFO General Permits. Further, we believe that it will be difficult, if not impossible, for EPA trained CAFO inspectors to do a fair inspection of CAFOs which are covered by the New York ECL CAFO General Permit. For example, if a CAFO is covered by the ECL Permit, the Permittee has certified that the farm does not discharge, as that term is defined in the ECL General CAFO Permit. In contrast, the New York CWA General Permit is expected to be predicated on the assumption that all CAFOs (at least the large ones) are dischargers, and therefore need the CWA permit. If an EPA inspector, who has not been extensively trained on the New York ECL permit and particularly on the differences between the New York ECL and CWA General Permits, does an inspection of a New York ECL CAFO Permittee, more likely than not the inspector will identify as violations things that are compliant under the ECL CAFO General Permit. (G. Allen, NEDPA)

*Response: This guidance is for Department staff. Currently, DEC works with EPA to ensure inspectors are adequately trained with respect to applicable permit requirements. In any case where a permittee disputes a violation, they should contact Department staff to discuss.*

### **Failure to submit Annual Compliance Report**

50. Further, with respect to Section I (CAFO General Permits), NEDPA strongly endorses there being no minimum required enforcement responses for Annual Compliance Reports which are submitted less than 60 days late, e.g., such a late report will be deemed to be a "Failure to meet non-significant permit requirements." (G. Allen, NEDPA)

*Response: The comment is duly noted. Despite the fact that there is no minimum response required in these cases, the Department does not consider these violations to be "Failure to meet non-significant permit requirements."*

### **Failure to amend the CNMP**

51. With respect to the "Failure to Amend the CNMP" violation type, if a response to the NOV is filed that makes a reasonable case that the alleged "first" offense was not a violation, then even though the NOV was issued, the "number of violations clock" should be automatically "reset" at "zero offenses". (G. Allen, NEDPA)

*Response: If the Department determines that an alleged violation was not in fact a violation, it would not be considered a violation and would not be taken into account for a "number of violations clock."*

## **Failure to meet major milestones or reporting requirements**

52. “Failure to meet major milestones...” (page 17). The term “major milestones” is not consistent with verbiage utilized in the current CAFO permits. We therefore request that it be removed. It appears that DEC intends for the term “major milestones” to include the implementation of BMPs. For CAFO’s, the failure to implement required BMPs is already included in the violation of “failure to implement the CNMP.” If DEC believes it needs additional flexibility beyond the existing violation types, we suggest a separate violation category. The proposed timeframes provided for “major milestones” are inappropriate for BMP related concerns. Exceeding deadlines by thirty or even sixty days given weather conditions and resource constraints is highly possible on farms. For BMP implementation we suggest an NOV after 6 months and formal enforcement following one full construction season thereafter. The term “major milestones” should not be used or should be amended to only include “required BMPs” in line with existing permit language. (J. Tauzel, NYFB)

*Response: A footnote was added to the “Major milestone” definition in the definition section. The referenced violation listed in Appendix A Part I was also changed for clarity. For BMPs other than the “required” BMPs, the violation type “Failure to meet non-significant permit requirements” would apply.*

## **Failure to implement the CNMP or permit requirements**

53. “Failure to implement the CNMP or permit requirement” violations (page 16). NYFB opposes the terminology “highly probable” under circumstance i. While farms should be addressing high risk issues related to water quality, it is possible that rapidly changing environmental conditions create an immediate increased risk in a previous low or no risk area. In such cases the possibility for water quality issues becomes much more likely. Under the proposed minimum response, DEC would have no choice but to take formal enforcement action, even if the farm is working to quickly address the new situation. While we concur that ignoring a high risk situation is unacceptable, we do believe more flexibility should be provided to DEC staff to address rapidly developing situations where the farm is making a good faith effort.

Circumstance iii of the same violation discusses the construction of an undersigned waste storage structure. To ensure harmonization with current permit language we request that this provision read: “...an undersigned open waste storage structure.” Additionally, we understand the intent of this provision to mean any new open waste storage construction or the reconstruction of an existing waste storage structure must be done in accordance with an engineer approved design or face formal enforcement. As DEC is well aware, farms continue to make efforts to address existing open waste storage structures that were not originally designed by an engineer. Since many of these farms are making efforts to address these existing structures, particularly given the poor milk price, we do not feel formal enforcement action is correct for these farms. We request that DEC clarify this issue. (J. Tauzel, NYFB)

*Response: Language was changed in both sections to clarify the Department’s intent.*

54. In addition, on the "Failure to Implement the CNMP or Permit Requirements" violation category, the "iv" set of Circumstances ("all others") should have the phrase "*or permit requirements*" removed or modified to read "significant permit requirements". Throughout Appendix A, including later in Section I, the Department has recognized that there are "non-significant permit requirements" that the failure to meet should not have a "minimum response" prescribed by this TOGS. (G. Allen, NEDPA)

*Response: The requested change has been made.*

55. In addition, on the "Failure to Implement the CNMP or Permit Requirements" violation category, the "iv" set of Circumstances ("all others") should be divided into two Circumstances in recognition that some CNMP requirements are "non-significant" and hence failure to implement them should not trigger a prescribed minimum response. (G. Allen, NEDPA)

*Response: "Non-significant permit requirements" are included in Appendix A. Part I. and Appendix C. Part E.*

56. With respect to CNMP implementation, a critical example of where the understanding of site specific facts is needed in order to determine if noncompliance has occurred as well as the potential for disagreements on interpretation between an EPA trained inspector and a New York Certified Planner or CAFO/O who are operating under the New York ECL CAFO General Permit, is in the area of what qualifies for the "agricultural stormwater discharge exemption" from the prohibition against the discharge of CAFO-related process water.

Under the NY ECL CAFO General Stormwater permit,

- a. *Agricultural Stormwater Discharge* means a discharge composed entirely of stormwater from a land area upon which manure and/or wastewater has been applied in accordance with proper agricultural practices, including land application of manure or wastewater in accordance with a site-specific nutrient management plan.

NY General Permit No. GP-0-09-00 I, Appendix A, definition C. The underlying federal regulatory basis of this exclusion is worded slightly differently:

For purposes of this paragraph, 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.

While clearly these two provisions are intended to exempt the same stormwater runoff from the discharge prohibition, the differences are enough so that there may be differing opinions as to whether runoff from a field is eligible for the agricultural stormwater

discharge exemption. Such subtle, but all too real differences are critical, especially since such a discharge may be deemed (by the inspector/agency representative) to be a "Significant Unauthorized Discharge" under the *Interim Wet Weather SNC Policy*. Further, that Policy has a fairly long list of examples of when an "unauthorized discharge" becomes a *Significant Unauthorized Discharge*. (USEPA's *Interim Significant Noncompliance Policy for Clean Water Act Violations associated with CSOs, SSOs, CAFOs, and Storm Water Point Sources* ("Interim Wet Weather SNC Policy"), dated October 23, 2007 at 5). Once the runoff from a land application site has been deemed a *Significant Unauthorized Discharge*, Section I of Appendix A mandates that NYSDEC Staff consult with a Department Attorney as to whether criminal or civil enforcement should be instituted. As this example shows, because CAFOs often involve land application sites and practices, and because even the best managed land application program can sometimes still result in unplanned runoff leaving the field (with potentially some of it later entering a water of the State), NEDPA requests that the "Department's Minimum Response" specified in Section I of Appendix A, be modified to "Formal Enforcement" rather than referral to a Department Attorney. (G. Allen, NEDPA)

*Response: The definition of a "Significant Unauthorized Discharge" from EPA's Interim Significant Noncompliance Policy for Clean Water Act Violations Associated with CSOs, SSOs, CAFOs, and Storm Water Point Sources ("Interim Wet Weather SNC Policy") is as follows:*

#### *"IV. Factors to Determine Significant Unauthorized Discharge*

*NPDES authorities should evaluate whether a significant unauthorized discharge has occurred based on impact to human health or the receiving water, condition or quality of the receiving water, and any impairment of the actual and/or designated uses of the receiving water. For example, factors to consider to determine if a significant unauthorized discharge has occurred may include the following:*

- *the discharge has caused or contributed to an exceedance of any applicable water quality standard;*
- *the discharge or overflow is not weather-related;*
- *the discharge has caused or contributed to a fish kill, fish advisory, or shellfish bed or beach closing;*
- *the discharge impacts an area identified as being disproportionately impacted by pollutants from multiple environmental pathways;*
- *the waterbody impacted by the discharge is:*
  1. *a drinking water source, has drinking water intakes, or is in a source water protection area;*
  2. *a high quality habitat for aquatic organisms, fish, or wildlife;*
  3. *a habitat for endangered species;*
  4. *an Outstanding Natural Resource Water;*
  5. *a waterfowl staging or nesting area;*
  6. *used for shellfish harvesting;*
  7. *used for primary or secondary contact recreation; and/or*

8. *a sensitive coastal area where habitat relies on adequate water quality to thrive.”*

*As the definition states, a “Significant Unauthorized Discharge” applies to dry weather discharges. The text has been changed in Appendix A, Part I. to clarify the intent of the Department’s minimum response to the violation.*

### **Failure to comply with deadline stipulated in NOV**

57. Also in Section I, if, upon receipt of an NOV, the CAFO Owner/Operator has requested changes in the NOV compliance date within a reasonable timeframe after receiving a NOV, a further violation based on a "Failure to Comply with Deadline Stipulated in the NOV" should not occur. (G. Allen, NEDPA)

*Response: If the Department agrees to new dates as part of a schedule in an NOV, the CAFO’s time to comply would also be changed.*

### **Reporting false information**

58. Please refer to comment 17. (Original comment 17: Within each table is a violation for reporting false information. While we strongly encourage farms to provide the most accurate information possible to DEC, achieving full accuracy, given the complexity of a farm operation, is difficult. Unlike factories that have gages to measure outflow, farms don’t have the potential to distinguish between two-thirds a load of manure or three-quarters of a load of manure. Inaccuracies of this nature are not intentional and therefore should be treated much differently than intentionally falsifying information to DEC. We therefore believe that in each of the charts, the term “intentionally or negligently” should be added.) (J. Tausel, NYFB)

*Response: The intent of this item is not to capture unintentional inaccuracies, but to address intentional falsification, as described in Part 750-2.5(b)(2).*

### **Table J. Violations of General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems (MS4s) Requirements**

59. As part of the MS4 program, DEC has delegated the approval of Construction Stormwater Permits to MS4 communities. NYFB has long been concerned that agricultural projects requiring a construction stormwater permit within MS4 communities will be incorrectly delayed, not because of technical issues but rather due to local ideology opposing the project. This is counter not just Agriculture & Markets Law but also the sound science and engineering approach guiding the SPDES process. We strongly believe DEC should have the authority to ensure that MS4s are fulfilling their administrative roles. To accomplish this, we recommend the addition of another violation category entitled “Failure to undertake administrative duties.” This would allow DEC to ensure that administrative responsibilities are being taken seriously. (J. Tausel, NYFB)

*Response: At this time, the Department does not have the authority to regulate the time frames a regulated, traditional use control MS4 establishes as part of their local review and approval process. However, the Department will continue to be a resource to the MS4s and their consultants if they encounter questions that need to be addressed in order for them to complete their review.*

## **Appendix B SPDES Penalty Guidance**

### **I. Penalty Components**

60. Finally, in order not to bog down the violation settlement process, NYWEA recommends that alleged Natural Resource Damages not be included in the calculation of the Base Penalty amount, as it typically takes significant time (and possibly a prolonged, costly negotiation process), to reach agreement on the value of the lost natural resource. (T. Whetham, NYWEA)

61. Finally, in order not to bog down the violation settlement process, NEDPA recommends that alleged Natural Resource Damages not be included in the calculation of the Base Penalty amount, as it typically takes significant time (and possibly an elongated, costly negotiation process), to reach agreement on the value of the lost natural resource. (G. Allen, NEDPA)

*Response: Natural Resource Damage (NRD) is a separate penalty and is not included in the base penalty calculation. If the NRD information is available in a timely manner, it may be included as part of the case settlement. The Department reserves the right to bring future actions to recover NRD as more information becomes available. Clarification has been added to the text.*

62. Paragraph three discusses that natural resources damage would include "...visible evidence of contaminants..." While it is true that visible evidence of contaminants increases the potential for an area to be experiencing natural resource damage, the mere presence of a contaminant does not demonstrate environmental damage. We therefore request that the language be amended to read: "Some instances where natural resources damages [would] could occur are...." (J. Tausel, NYFB)

*Response: The requested change has been made to the document.*

63. In general, we believe the SPDES penalty guidance need further editing and clarification. There are a number inconsistent and undefined terms such as "gravity component" and "benefit" (apparently to refer to economic benefit). While concepts presented may be appropriate, additional explanation is necessary for document transparency. (J. Tausel, NYFB)

*Response: The term "benefit" has been changed to "economic benefit" for clarification purposes. The gravity component is briefly described in Appendix B, Part I. Staff refers the commenter to the Department's Civil Penalty Policy (Commissioner Policy DEE-1) for a more detailed discussion.*

64. We appreciate the amending of base penalty amounts on a regular basis to address the considerations of inflation. We believe that along with inflation, market issues, such as milk price, also need to be considered on a regular basis. We would appreciate DEC including language that every two years, sector economic issues will be considered to adjust base penalty amounts. (J. Tauzel, NYFB)

*Response: No new language has been added. The “ability to pay” factor would be the appropriate factor to address sector economic issues that impact a facility’s ability to pay.*

## **II. Penalty Calculation**

### **II. A. Base Penalty**

65. A. Base Penalty. We are opposed to the mandatory inclusion of “duration” on the total base penalty calculation. Under such a provision, a CAFO permitted farm failing to submit an annual report could be faced with a base penalty of \$270,000 (\$3,000 base rate x 90 days before formal enforcement). While we recognize that “duration” is important for certain types of violations, nothing within the draft TOGS provides flexibility for enforcement officials to consider differences or directs a flat base rate for certain violations. This is flexibility that should be included. (J. Tauzel, NYFB)

*Response: Failure to submit a CAFO annual report is associated with a flat base rate. Duration is measured by number of events, not by days late for this violation.*

66. As stated above in our comments on Appendix A, NYWEA believes that the Base Penalties (if any) for late report submittals, etc. should not begin to accrue until after the date that the late report triggers a Formal Enforcement “Minimum Response”. Further, in calculating the penalty, the first 60 or 90 days that a report is late (assuming that it has not been submitted until it is at least 91 days late, thus triggering Formal Enforcement) should be penalized at a rate significantly less than from day 91 days onward. To act as an incentive to get late reports in before they are more than 90 days late, the penalty amounts for this initial period of more than 60 but less than 90 days late should be half or less than those in proposed Appendix C. (T. Whetham, NYWEA)

67. NEDPA believes that the Base Penalties (if any) for late report submittals etc. by CAFOs O/Os should not begin to accrue until after the date that the late report triggers a "Formal Enforcement" "Minimum Response" under Section I of Appendix A. Further, in calculating the penalty, the first 60 or 90 days that a report is late (assuming that it has not been submitted until it is at least 91 days late, thus triggering Formal Enforcement) should be penalized at a rate significantly less than from day 91 days onward. To act as an incentive to get late reports in before they are more than 90 days late, the penalty amounts should be half or less than those in proposed Appendix C Section E. (G. Allen, NEDPA)

*Response: The trigger dates listed in Appendix A are not meant to imply a grace period for non-compliance by the permittee, but to indicate to Department staff the date by which they are expected to take action. The Base Penalties for failure to submit late reports in Appendix*

*C Section E are calculated on a per event basis and will be the same regardless of how late the report may be.*

## **II. C. Economic Benefit**

### **II.C.1.Benefit Analysis:**

68. NYFB also believes that a farm that moves forward in implementing permit requirements should have the economic benefit portion of the fee waived. For example, a farm would face an economic benefit fee of \$7,000 for failing to update a CNMP. The farm would also then need to pay \$7,000 to actually have the CNMP updated. In this case the farm hasn't gained an advantage from noncompliance and in fact, has faced excessive compliance penalties. Equity within the regulatory system occurs due to the base penalty. (J. Tausel, NYFB)

*Response: The economic benefit is the amount of money a violator saved by failing to comply in a timely manner. In the instance cited in the comment, if the remedy to the violation is to update the CNMP and there was no net financial gain by delaying this action, there would be no economic benefit to recover and this factor would not be used in the penalty calculation.*

### **II.C.2.Benefit Component Adjustments:**

69. C. Economic Benefit. Farms are unique businesses in that they provide substantial environmental benefits, such as working landscapes, to communities. Open farmland prevents increases in impervious surface that often accompanies development. Because of these environmental benefits, as well as the economic benefits farms provide many rural communities, DEC's inclusion of "benefit component adjustments," particularly "compelling public interest" considerations to reduce the economic benefit fines is appropriate and should be maintained. (J. Tausel, NYFB)

*Response: The Department recognizes that all businesses provide some type of benefit in the form of goods or services. It is beyond the scope of this TOGS to attempt to assign particular benefits to various businesses.*

## **III. Stipulated Penalty Assessment**

### **Table 1**

70. The proposed penalties in Table 1 are too high, particularly for farm operations. While generally, we've found DEC willing to work with farms on consent order deadlines, we are concerned that, particularly regarding "Short Order" forms, DEC will does not have flexibility to amend deadlines. Confirmation of the ability for DEC to extend "Short Order" deadlines on a case specific basis is requested. If this authority does not exist, the penalties proposed must be reduced. (J. Tausel, NYFB)

*Response: The stipulated penalties listed in the TOGS are the minimum recommended stipulated penalties. Typically stipulated penalties in Orders on Consent are higher than the amounts in the TOGS. The Department is able to modify milestone dates in both "short form" and "long form" Orders on Consent upon the respondent's request and a showing that the date cannot be met.*

## **Table 2**

71. NYWEA recommends that Table 2 in Appendix B (Facility Permitted Flow) be clarified to indicate that this Table only applies to permitted discharges from “wastewater treatment plants” rather than to all permitted “facilities.” Further, NYWEA recommends that this Table be based not on “permitted flows”, which often are much higher than actual flows, but on the average daily flow reported in the most recent Annual Flow Certification Form submitted by the Permittee. For the most part, it’s the pollutants in the flow, rather than the flow volume itself, which causes those “[wastewater treatment] facilities with greater capacities [to] have a greater potential for negative impacts to the environment.” (T. Whetham, NYWEA)
72. NEDPA recommends that Table 2 in Appendix B (Facility Permitted Flow) be clarified to indicate that this table only applies to "wastewater treatment plants" rather than to all permitted "facilities". For the most part, it's the pollutants in the flow, rather than the flow volume itself which causes those [wastewater treatment] facilities with greater capacity [to] have a greater potential for negative impacts to the environment. (G. Allen, NEDPA)

*Response: Clarification has been added to the text.*

## **Appendix C**

73. NYWEA suggests that an opening statement be included at the beginning of Appendix C which clearly states that the Base Penalty Tables in this Appendix only become applicable during “Formal Enforcement” responses, as specified in Appendix A. It should also state that there is **not** a requirement that all “Formal Enforcement” responses must include a monetary penalty. (T. Whetham, NYWEA)

*Response: The Base Penalty Tables contained in Appendix C should be used by Division of Water staff after a determination to collect a penalty has already been made. It is not necessary to spell out in the TOGS which “Formal Enforcement” tools require penalties, as this will be covered through staff training.*

## **Base Penalty Tables**

74. NYWEA agrees with the stated goal of making the SPDES enforcement program generally consistent across the State and across the increasing number of types of SPDES Permits being issued in the state. However, it is also concerned that SPDES enforcement may not remain focused on the stated ultimate goal, i.e., to protect the quality of our State’s water and to deter SPDES Permittees from future violations of its permits. SPDES enforcement should not and cannot be used as a revenue generator for the State. Further, while consistency is a laudable goal, the final version of this policy must be flexible enough to recognize that not all classes of Permittees are equal in terms of either their ability to control their influent and effluent quality or their ability to pay fines (as already acknowledged in the last paragraph on

page 48). Therefore, NYWEA urges the Department to both (i) re-visit the minimum base penalties included in Appendix C Tables A, B, C, D and F as they relate to municipalities (as the payers of such penalties are, ultimately, the individual citizens of New York who reside within the penalized municipality) and (ii) increase the flexibility given to the Department in Appendix D (Penalty Adjustment Factors) to adjust penalties downward as well as upwards for good cause, including the ability to pay. (T. Whetham, NYWEA)

*Response: The evaluation of a respondent's ability to pay is outside of the scope of this document because it is governed by the Commissioner's Civil Penalty Policy (DEE-1). The reference is included in TOGS 1.4.2 simply to make staff aware of this consideration.*

75. Similar to our recommendation above, NYWEA requests that every place in Appendix C where Base Penalties for SNC violations are given should specifically include the following statement adapted from the *USEPA Interim Wet Weather SNC Policy* (at page 15)

[NYSDEC] also has the discretion not to designate alleged violations that meet the SNC [or Formal Enforcement] criteria to account for unusual circumstances that result in SNC violations beyond a facility's control. (T. Whetham, NYWEA)

*Response: It would be duplicative to include this statement, as the USEPA Interim Wet Weather SNC Policy is referenced in the document.*

### **Individual SPDES Permits**

76. Individual SPDES permits C. Unpermitted Discharges. NYFB's understanding of the draft TOGS is that they relate solely to facilities that should be permitted under a SPDES permit. To that end, it is our understanding that the fees for "discharging at unpermitted facilities" or "causing or contributing to a water quality standards violation" would not apply to general farm operations. If this is not the case, we oppose the fees and believe this document is not appropriate to address on-farm water quality concerns outside of facilities requiring a CAFO or construction stormwater permit. (J. Tauzel, NYFB)

*Response: An introductory paragraph was added to Appendix C which clarifies the use of Table C for violations at unpermitted sites. In addition, a footnote was added to Table C to address this concern. If unpermitted discharges or Water Quality Standards violations are found at facilities that failed to obtain a required individual permit, are not required to obtain an individual permit or are not required to obtain coverage under a general permit (ex. a small farm which does not require a CAFO General Permit), the base penalty rates listed in Table C would apply. If unpermitted discharges or Water Quality Standards violations are found at facilities required to obtain coverage under a general permit, the base penalty rates listed in the tables for that specific permit would apply.*

### **Table E. Concentrated Animal Feeding Operation (CAFO) General Permit**

77. We are very concerned that the base penalty fees established for CAFOs are too high. As small businesses that have undergone significant economic crisis, high fees can create

significant hardship and impact the sustainability of the farm. This extends to the farm's ability to implement new Best Management Practices as well. Each dollar taken in fees by the state, reduces the farm's ability to install new BMPs.

While past fines have been more appropriate, the calculation proposal put forth in the draft TOGS exceeds a reasonable level of punishment. For example, a farm failing to submit an annual report would see an overall economic impact of \$17,000 (\$3,000 base rate + \$7,000 economic benefit [average cost of CNMP update] + \$7,000 actual CNMP update costs). Again having the ability to waive economic benefit fees for farms that implement enforced BMPs brings more balance to the proposed base penalty rates. (J. Tauzel, NYFB)

*Response: The economic benefit is the amount of money a violator saved by failing to comply in a timely manner. In the instance cited in the comment, if the remedy to the violation is to update the CNMP and there was no net financial gain by delaying this action, there would be no economic benefit to recover. The \$3,000 base penalty rate would apply for failure to update the CNMP.*

78. Regarding the establishment of flat base penalty rates, enforcement equity does not mean the same fee for all permitted facilities, rather it means that the gravity of each violation should impact facilities in a similar manner. DEC's proposed flat base rate is not in line with this approach. For example our calculations (Aug 05 data) suggest the average dairy farm with a CAFO permit has 445 milking cows. This would imply that the proposed base penalty rate for not submitting an annual compliance report (\$3,000) costs the average farm approximately \$6.70/cow. However, the same flat penalty rate would cost a 200 cow farm \$15/cow while a 1,000 cow would only see a \$3/cow penalty. This dramatic difference means the penalty is much more severe for certain operations than others, which contradicts an equity based enforcement approach.

To address this inherent inequity, we suggest that each base penalty rate be based on a per cow basis. To avoid dramatic charges on larger farms, ultimately pulling funding away from environmental improvements, the base rate should be capped at the proposed levels. As an example, based on the 2005 data, this would mean a 200 cow farm would face a base penalty of \$1,340 while a 500 cow farm would face a \$3,000 base penalty for the same violation. Calculations would be made on the average per animal cost for other livestock types. (J. Tauzel, NYFB)

*Response: No new language has been added. The "ability to pay" factor would be the appropriate factor to address financial issues that impact a facility's ability to pay.*

79. For each of the violations related to water quality issues (significant unauthorized discharge, unauthorized discharge, causing or contributing to water quality standards violation) NYFB is concerned that the proposed base penalty rate does not include consideration of the intent of a farm operation. Farms are unique from chemical plants in that they continually deal with changing weather patterns. This increases the potential for accidents to occur despite taking every precaution. These situations should be viewed differently than intentional or negligent water quality violations. As such we request that base fees be established for both

accidental discharges and water quality issues (at a lower rate) and intentional or negligent water quality violations (at the current rate). (J. Tausel, NYFB)

*Response: The base penalty rates listed in Appendix C are based on an assumption of limited or accidental culpability. This is demonstrated in Appendix D by a penalty adjustment factor of 1.0 for limited or accidental culpability. Intentional or negligent violations are subject to a higher adjustment factor.*

### **Failure to implement the CNMP**

80. In previous comments we discussed our concerns regarding violations related to failure to implement the CNMP. Those same concerns are extended to the penalty chart. (J. Tausel, NYFB)

*Response: This comment has been duly noted and language has been modified to address this concern.*

### **Failure to meet other (non-major) milestone**

81. We object to the inclusion of the penalties for failing to meet a permit milestone or other non-major milestone. Again, these violation types do not fit well within the context of the CAFO permit. If the purpose is to address inadequate BMP implementation, it should be stated as such. As discussed in comment 22, given the practical time frames for on-farm BMP implementation, a per day fee is not the most appropriate way to assign the base rate. A per missed deadline fee would be more appropriate. (J. Tausel, NYFB)

*Response: This comment has been duly noted and language has been modified to address this concern. Violations regarding implementation of BMPs will be addressed through “Failure to implement the CNMP or significant permit requirements” or “Failure to meet non-significant permit requirements”, depending on the nature of the BMP.*

### **Falsifying information on DEC submittal**

82. Consistent with previous comments, the base penalty for falsifying information reported to DEC does not take into account unintentional inaccurate information submittals. We request clarification that this base penalty applies to “intentional or negligent” falsifying of reports. (J. Tausel, NYFB)

*Response: The intent of this item is not to capture unintentional inaccuracies, but to address intentional falsification, as described in Part 750-2.5(b)(2).*

### **ECL violations not related to permit**

83. The inclusion of base penalties for ECL violations not related to the CAFO permit is inappropriate for this document and should be removed. Violations for deer management issues, for example, have nothing to do with water quality and should in no way be addressed

via the CAFO permit process. Establishing new fees for ECL violations may have the result of increasing the already statutorily mandated penalties for some sections of law. Such increases in penalties would occur without proper legislative authority. (J. Tausel, NYFB)

*Response: Clarifying language was added to the TOGS to make it clear that this violation type only refers to ECL Article 17 violations.*

### **Environmental Significance Multipliers**

84. As we have previously discussed, farms provide significant environmental benefits to society. With this in mind, NYFB believes enforcement officials should have the ability to provide an environmental significant multiplier that is less than one. In other words, provide recognition of net environmental benefit. An example of this would be a farm that fails to obtain a construction stormwater permit for a new barn. This farm should be penalized for not meeting the permit requirements, however since the barn will provide increased financial stability farm and thereby keep open space available, the penalty should not be as great. (J. Tausel, NYFB)

*Response: The base penalty rates listed in Appendix C are based on an assumption of minimal environmental impact. This is demonstrated in Appendix C by an environmental significance multiplier of 1.0 for minimal impact to the environment or human health. The Department recognizes that all businesses provide some type of benefit in the form of goods or services. It is not within the scope of this TOGS to provide a mechanism by which to weigh environmental benefits against environmental damage.*

### **Appendix D Penalty Adjustment Factors**

#### **Cooperation (Co)**

85. NYWEA recommends that the *Cooperation Component* "Excellent" be modified to specifically include self-reporting of compliance problems (through a vehicle other than the required DMRs and outside of those reports required by 6 NYCRR Part 750) by a Permittee. There also must be some affirmative statement that the requirement that the Permittee "admits responsibility" is limited to the Permittee having to admit that it is responsible to comply with its SPDES permit. We recommend that this phrase either be deleted or it clarified to state that this phrase is not intended to preclude Permittees who believe that a violation has not occurred, and who asserts this position during informal or formal enforcement-related discussions from qualifying for the "Excellent" penalty reduction cooperation component. To preclude Permittees who make fact-based assertions of innocence to qualify for this penalty reduction would violate their democratic right to dissent to which the Permittees are entitled. Further, NYWEA recommends that the lower end of the "Excellent" Cooperation component multiplier range be adjusted downward to 0.25 (from 0.5). (T. Whetham, NYWEA)

86. NEDPA recommends that the *Cooperation Component* "Excellent" be modified to specifically include self reporting of compliance problems by a permittee. There also must be

some affirmative statement that the requirement "admits responsibility" is limited to the permittee having to admit that it is responsible to comply with its CAFO general permit. This phrase must be either deleted or it must be clearly stated that this phrase is not intended to preclude permittees who believe that a violation has not occurred, and who asserts this position during informal or formal enforcement-related discussions from qualifying for the "Excellent" penalty reduction cooperation component. To preclude permittees who make fact-based ascertains of innocence to qualify for this penalty reduction would violate the very principals of democracy our country was founded on. Further, NEDPA recommends that the lower end of the "Excellent" Cooperation component multiplier range be adjusted downward to 0.25 (from 0.5). (G. Allen, NEDPA)

*Response: The descriptions included in the penalty adjustment factor tables are not meant to be comprehensive. Reference to denying or admitting responsibility has been removed from the "Cooperation" adjustment factor table. No change has been made to the range of the "Cooperation" multiplier.*

87. Similarly, NYWEA recommends that the lower range of the "Good" Cooperation component also be set less than 1.0 (NYWEA recommends a range of 0.50 to 1.0), because some Permittees may not meet the "Excellent" criteria, but clearly cooperate to a point where they should be eligible to be considered for a downward penalty adjustment. (T. Whetham, NYWEA)

88. Similarly, NEDPA recommends that the lower range of the "Good" Cooperation component also be set less than 1.0 (NEDPA recommends a range of 0.75 to 1.0), because some permittees may not meet the "excellent" criteria, but clearly cooperate to a point where they should be eligible to be considered for a minor downward penalty adjustment. (G. Allen, NEDPA)

*Response: No change has been made to the range of the "Cooperation" multiplier.*

89. Cooperation. We appreciate and support the ability for farmers to reduce fees by working with DEC. We do not believe that admitting responsibility should be one of the qualifiers (or that denying responsibility for an incident should be determined as uncooperative). Particularly as part of a consent order, admitting responsibility can have a significant impact on farm liability. Clarification is needed that not all listed considerations for "excellent cooperation" are necessary to achieve the multiplier. (J. Tauzel, NYFB)

*Response: This comment has been duly noted. The text listed under "Cooperation" in Appendix D has been changed in response to this comment.*

#### **Other factors (OF)**

90. NYWEA also recommends that under "Unique or Other Factors", the multiplier range be expanded because, especially with respect to wet weather or POTW-related alleged violations, there may be many unique factors, some of which can and should merit significant adjustments of the base penalty. NYWEA suggests a range of 0.25 to 1.75 (instead of 0.75 to

1.25). (T. Whetham, NYWEA)

91. NEDPA also recommends that under "Unique or Other Factors", the multiplier range be expanded because, especially with respect to farm-related alleged violations, there may be many unique factors, some of which can and should merit significant adjustments of the base penalty. NEDPA suggests a range of 0.25 to 1.75 (instead of 0.75 to 1.25). (G. Allen, NEDPA)

*Response: No change has been made to the range of the "Unique or Other Factors" multiplier.*

92. Regarding the calculated adjustment factor, the "ability to pay" is an absolutely critical component of the factor. NYFB strongly supports its inclusion. Dairy farms continue to see market turmoil and milk price volatility. These economic conditions are important points when creating a balance between farm financial viability and environmental protection. (J. Tausel, NYFB)

*Response: This comment has been duly noted.*