



# **Responsiveness Summary**

**For**

**Public Comments Received**

on the

NEW YORK STATE

DEPARTMENT OF ENVIRONMENTAL CONSERVATION

CWA SPDES GENERAL PERMIT

CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOs)

Permit No. GP-0-19-001

January 2019

Issued Pursuant to Article 17, Titles 7, 8 and Article 70

Of the Environmental Conservation Law

## Introduction

The New York State Department of Environmental Conservation (“the Department”) is issuing a new State Pollutant Discharge Elimination System (SPDES) General Permit for Concentrated Animal Feeding Operations (CAFOs). The Clean Water Act (CWA) SPDES General Permit for CAFOs (GP-0-19-001) replaces SPDES General Permit GP-0-16-002. The Environmental Conservation Law (ECL) SPDES General Permit for CAFOs (GP-0-16-001) will remain in effect and unchanged.

The CWA CAFO general permit is being re-issued pursuant to the April 23, 2018 and June 1, 2018 decisions of the Albany County Supreme Court in *Riverkeeper Inc., et al., v. NYSDEC et al.* In accordance with those decisions, the Department must issue this new CWA CAFO general permit by February 7, 2019. The new CWA CAFO general permit will be effective on July 8, 2019 and will expire on July 23, 2022.

The Department has prepared this responsiveness summary to address the comments that were received on the draft GP-0-19-001. That draft general permit was published for public review and comment in the Environmental Notice Bulletin on September 5, 2018 and in newspapers in general circulation on or before September 11, 2018. The public comment period ended October 11, 2018.

This responsiveness summary generally addresses all relevant comments received. Several comments were received urging the Department to expand the regulatory requirements or reopen the Environmental Conservation Law (ECL) CAFO permits to incorporate the changes related to public participation as proposed in the draft CWA CAFO permits<sup>1</sup>. However, the requested changes are beyond the scope of this permit. Furthermore, there was no judicial challenge to the ECL general permit. The Department will consider making appropriate changes to the ECL general permit upon renewal of that permit.

By in large, the Department only made changes to this permit to address the specific items discussed in the Court’s April 23, 2018 and June 1, 2018 decisions and did not make changes to the technical requirements that were already finalized in GP-0-16-002. However, in this Response to Comments the Department includes responses to comments unrelated to the court order. Many of these responses were already provided in the responsiveness summary for GP-0-16-002, but have been re-stated here.

The comments have been organized to follow the format of the final permit. Frequently raised issues are summarized and presented as one set of comments for brevity. Generally, all other relevant comments have been repeated verbatim with the exception of correction of typographical errors, consistent use of acronyms or abbreviated terms or to clarify the section of the permit referenced by the comment. All comments received as part of the public notice process are available online (<http://www.dec.ny.gov/chemical/102611.html>) on the DEC webpage.

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<sup>1</sup> Comments received from Terrence Cuddy, Auburn City Councilor; James Giannettino, Jr., Auburn City Councilor; Edward Wagner, Chair, Owasco Lake Watershed Management Council; and Patty Beer, Resident.

Commenters on draft GP-0-19-001

	Organization	Date
1	Earthjustice	10-11-2018
	Riverkeeper, Inc.	
	Cortland-Onondaga Federation of Kettle Lake Associations, Inc.	
	Sierra Club Atlantic Chapter	
	Waterkeeper Alliance, Inc.	
	Theodore Gordon Flyfishers, Inc.	
2	New York Farm Bureau	10-11-2018
3	Northeast Dairy Producers Association	10-11-2018
4	Western NY Crop Management Association	10-11-2018
5	David Kukella	10-11-2018

[\*] Comments have been summarized and/or combined for brevity.

**I. PERMIT COVERAGE AND LIMITATIONS**

A. Permit Coverage

Comment 1: DEC Must Ensure that all CAFOs Obtain Appropriate Permit Coverage. Several commenters raised concerns that many CAFOs that previously were authorized under the CWA CAFO permit improperly sought and obtained coverage under the ECL Permit and urged DEC to revise the Draft Permit to include a description of the characteristics of CAFOs that must seek coverage under the CWA permit, as opposed to the ECL permit. Other commenters expressed support of DEC’s proposed qualifications for eligibility under this CWA permit draft. [1][2][\*]

Response: No changes to the final CWA general permit were made in response to this comment. The Department administers two State Pollutant Discharge Elimination System (SPDES) general permits for Concentrated Animal Feeding Operations (CAFOs) – one based on the requirements of the Clean Water Act (CWA or GP-0-19-001) and one based on the New York State Environmental Conservation Law (ECL or GP-0-16-001). There are different conditions in each of the general permits which reflect the states regulations pertaining to CAFOs and describe which permit the CAFO qualifies for. A farm must determine, and certify, which conditions fit its operation and apply for coverage under the appropriate permit, which is then reviewed by the Department. For compliance with the eligibility requirements of the permit, DEC’s Division of Water (DOW) staff conducts site inspections, reviews reports (e.g. annual and incident), and

responds to citizen complaints to ensure compliance with the eligibility requirements. Additionally, the state has invested millions of dollars on construction and implementation of best management practices (BMPs) over the past 20 years to help farms achieve the “no discharge” condition of GP-0-16-001. The transition to GP-0-16-001 from GP-04-02 reflects the success of this effort.

The eligibility requirements for the CWA general permit are discussed in Part I.A.1 of the CWA general permit and the permit conditions required by facilities with coverage under the CWA general permit are defined in I.B.2 of the CWA general permit.

CAFOs that do not meet the eligibility criteria for either of the CAFO general permits must immediately contact the Department to determine an appropriate pathway to compliance before they can be covered under either of the CAFO general permits.

Additionally, in his June 1, 2018 Decision and Order in *Riverkeeper, Inc. v. Seggos* (Index No. 902103), Judge Weinstein denied the request of Petitioners to “order DEC to include in its revised permit a clear explanation of the permit’s scope – that is, a description of the characteristics of CAFOs that must seek coverage under the new CWA – compliance CAFO permit.” (Petitioners’ letter dated May 4, 2018). Judge Weinstein stated that the request was not an issue in litigation and so was not properly within the scope of his Judgment. Additionally, Judge Weinstein noted that the record before him was insufficient to grant such relief.

#### B. Effluent Limitations for the Production Area

Comment 2: We recommend Part I.B.2 in the CWA permit specify “ongoing” discharges of process wastewater to surface waters of the State, so that a one-time violation that has been corrected and practices are now in place to prevent a recurrence does not disqualify a farm from the permit. [2]

Response: The draft CWA general permit did not include changes to the exclusions from coverage and no further changes have been made to the final CWA general permit in response to this comment. The final permit (Part I.B.2), does not authorize the discharge of process wastewater from the production area unless the conditions in Part I.B.2.a are met. A discharge in circumstances beyond those specified in Part I.B.2.a is a violation of the CWA general permit, but does not necessarily preclude the CAFO from maintaining coverage under the CWA general permit. Each situation will be looked at individually.

#### C. Effluent Limitations for the Land Application Area

Comment 3: The Department received multiple comments requesting the effluent limitations outlined in Part I.C.1 of the permit include references to NY NRCS 590. [2][3][4][\*]

Response: No changes have been made to the final CWA general permit in response to this comment. Part I.C was added to the draft permit to clarify the CWA requirements and appropriately and adequately identifies the effluent limitations that must be met by CAFOs. Part III.A.2 of the final permit addresses how CAFOs are expected to achieve the effluent limitations required and it is this section of the permit that requires the use of NY NRCS 590.

Comment 4: The Department received multiple comments requesting the soil sampling requirement added to Part I.C.1.(f) and Part III.A.2.g. be revised to be consistent with 40 C.F.R 412.4(c)(3) and the soil sampling requirements of NY NRCS 590. Specifically, it was requested that the requirement to sample soils for nitrogen content be removed. [2][3][4][\*]

Response: Part I.C.1(f) was added to the draft CWA general permit to clarify the CWA requirements. The Department agrees with this request, though, and the final CWA general permit has corrected language in Parts I.C.1(f) to be consistent with the 40 CFR 412.4(c)(3).

Comment 5: Commenters recommended that the lead-in language to the list in Part I.C.1(a)-(h) reference the language in 40 CFR § 412.4(c) and 40 CFR § 412.31(b)(1) that refers to these practices as “best management practices.” [2][\*]

Response: No changes have been made to the final CWA general permit in response to this comment. Part I.C.1(a) thru (h) was added to the draft permit to clarify the CWA requirements for effluent limitations for land application areas. The best management practices are those planned elements that are implemented to comply with the effluent limitations described in Part I.C.1. Part III.A.2 sets out the best management practices required to be implemented.

## **II. OBTAINING/TERMINATING/CHANGING PERMIT COVERAGE**

### **A. Duty to File Notice of Intent and Nutrient Management Plan (NMP)**

Comment 6: Information that may be sensitive to the farm should be redacted [from the NOI and NMP available for public comment] so as to keep location of water sources, location of houses, and other biosecurity related areas be kept confidential. [2]

Response: No changes have been made to the final CWA general permit in response to this comment. Part II.A was added to the draft CWA general permit

to meet the CAFO federal rule public participation requirements. The CWA general permit does not require submission to the Department of the location of water sources, houses or biosecurity related areas in the NOI or the NMP. However, if such information is included in the documents submitted to the Department for review and approval, a CAFO may assert that information submitted to the Department is exempt from disclosure, pursuant to New York State Public Officers Law section 87.

Comment 7: Commenters requested DEC only consider “significant comments” received during the 30-day public comment period that pertain to the farm’s application for coverage under the CWA permit. Additionally, they request DEC amend Part II.A to include a specified timeframe for agency response to the farmer after receipt and approval of their NOI and NMP, specifically requesting a response no later than 60 days following submission of their NOI and NMP. [2][\*]

Response: Part II.A was revised in the draft CWA general permit to meet the CAFO federal rule. The Department will make best efforts to respond within 60 days from receipt of the NOI and NMP. However, that timeframe includes a 30-day comment period, the possibility of a hearing, and consideration by the Department of the comments received so a guaranteed timeframe cannot be provided.

#### B. Duty to File Change of Operation Form

Comment 8: The Department received several comments related to the Change of Operation form and implementation schedule for newly acquired Animal Feeding Operations or Concentrated Animal Feeding Operations (CAFO) by a permitted CAFO. The commenters suggested the Department consider a reasonable grace period to allow NMPs and Change of Operation Forms to be submitted when operations with animals are acquired by permitted facilities. [2][3][4][\*]

Response: The Department agrees that a reasonable amount of time is necessary to accommodate the purchase of previously unregulated operations by permitted facilities. However, the Department must also comply with the language of the CAFO federal rule 40 C.F.R. 122.42(e)(6). The Department reiterated the requirements of Part III.D.3.b.1. (Duty to Amend and Submit the Nutrient Management Plan) in Part III.A.4.c.1., in that CAFOs are not allowed to apply manure in any newly acquired areas prior to obtaining coverage under the CWA general permit. The Department also made changes to Part III.A.4.c.1. for consistency with Part I.B. (Change of Operation).

### III. NUTRIENT MANAGEMENT PLANS

#### A. Minimum NMP Content

Comment 9: DEC requires that all areas under control of the CAFO where nutrient sources are produced, land applied or stored on or for use by the CAFO shall be addressed in the NMP. NYFB does not object to this language, but would like DEC to clarify in an FAQ or Factsheet that the definition of nutrient sources only includes manure, process wastewater, and litter and does not apply to commercial fertilizer. [2]

Response: The draft CWA general permit did not include changes to the requirements related to the definitions of “production areas” or “land application areas” and no further changes have been made to the final CWA general permit in response to this comment. The existing language is clear and offers as support the definition of “land application areas” already in Appendix A., section BB. of the CWA general permit. This definition states that land application areas are “land on which manure, litter, food processing waste, digestate, or process wastewater is applied and the CAFO owner/operator controls the application acreage, application rate or application times.” It is important to note that commercial fertilizer is a nutrient source and must be considered and included in the calculated application rates when added to “land application areas” (i.e. those areas which receive manure, litter, food processing waste, digestate, or process wastewater). The Department anticipates developing an FAQ to help clarify further.

Comment 10: The commenters support the use of NY NRCS 590 for soil and manure tests, protocols, and application procedures. They note that in Part III.A.2.h., the permit references the need to establish protocols for land applying manure, litter, or process wastewater, and request that the Department allow those protocols to be developed utilizing NRCS 590 as well as Cornell University guidelines. Additionally, they request the language in letter (h) be amended to remove “while minimizing nitrogen and phosphorus movement to surface waters” and insert “in consultation with NRCS 590.” [2][\*]

Response: No changes have been made to the final CWA general permit in response to this comment. The CWA general permit does require implementation of the protocols in NRCS NY 590 (see second paragraph under Part III.A.2.h). Additionally, the purpose of NRCS NY 590 is to “minimize agricultural nonpoint source pollution of surface and groundwater resources”. This statement is functionally equivalent to the statement provided in letter (h).

Comment 11: Part III.A.2.(e). Chemical Handling and Disposal- NYFB believes that the permit clarifies that farm waste storage systems can be utilized to treat

certain non-pesticide chemicals related to animal health, along with manure. We suggest that the word “specifically” be deleted from the first sentence of this provision. This is an appropriate practice that a farm should be able to continue in accordance with appropriate guidance from the Department and/or Cornell University. [2]

Response: The draft CWA general permit did not include changes to the requirements for Chemical Handling and Disposal and no further changes have been made to the final CWA general permit in response to this comment. As noted in the response to comments dated January 2017, “Prohibition on Unauthorized Substances: Sanitary waste, unless authorized pursuant to Part 360; unused pesticides, unless done in accordance with label instructions; and any other material that cannot be properly handled at the CAFO, is prohibited from being stored in waste storage areas or conveyed through the waste storage transfer structures, or land applied.” Additionally, the CWA general permit specifically defines “Process Wastewater” to mean “any water directly or indirectly used in the operation of an Animal Feeding Operation including spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing of calf hutches, pens, barns, manure storage areas or manure pits, or other AFO facilities; direct contact swimming, washing, spray-cooling of animals, or dust control...”. If the non-pesticide chemical falls within these provision of the permit, it is permissible.

Comment 12: DEC should work with experts in agencies and with university roles to develop guidance on how to implement the linear and narrative approaches in New York State. [2][3][\*]

Response: The Department agrees that education and outreach related to implementation of the different approaches is needed. In conjunction with Cornell and the NYS Department of Agriculture and Markets, the Department has developed a tool to assist with implementation of the linear and narrative approaches already required and described in the CWA general permit. That tool will be available on the Department’s CAFO public webpage as soon as its finalized.

Comment 13: Part III.A.3. NMP Standards –NYFB supports language which allows all existing BMPs that meet the water quality protection intent of the current NRCS standards or BMPs that can be updated to meet their water quality protection intent (through either structural or non-structural changes) to remain in place, through certification of the BMP. [2]

Response: Comment noted. The Department agrees that it is important to allow for certification of existing practices, including those that can be upgraded, when equivalence to required standards can be shown as described in Part III.A.3.e.

Comment 14: NRCS Standards. We think it would add clarity if the permit language itself recognized that the NRCS NY 590 standard dated January 2013 is the standard that applies to the draft CWA Permit. [3]

Response: The draft CWA general permit (GP-0-19-001) did not include changes to the language related to NRCS Standards and no further changes have been made to the final CWA general permit in response to this comment. The final permit (Part III.A.3.a.(1)) continues to reference Nutrient Management – NY 590 - 01/2013.

Comment 15: Part III.A.4 Implementation Schedule. The Department received several comments related to the Change of Operation form and implementation schedule for newly acquired Animal Feeding Operations or Concentrated Animal Feeding Operations (CAFO) by a permitted CAFO. The commenters suggested the Department consider a reasonable grace period to allow NMPs and Change of Operation Forms to be submitted when operations with animals are acquired by permitted facilities. [2][3][4][\*]

Response: See response to Comment 8 above.

Comment 16: Part III.A.4.e. BMP Enhancements – NYFB strongly supports enhancement practices on the farm whenever possible but appreciates the stated clarification that enhancement practices are not subject to the requirements and timeframes established in this section. [2]

Response: The draft CWA general permit did not include changes to the language related to BMP enhancements and no further changes have been made to the final CWA general permit in response to this comment. The final CWA general permit continues to include this language to encourage continued planning and improvements to operations. The CWA general permit sets the minimum requirements necessary to meet the CWA.

Comment 17: Part III.A.7.c&d. Winter Weather Applications & Wet Weather Applications. Some commenters asserted that the draft permit fails to meet federal law, specifically 40 C.F.R. § 122.42(e)(1)(viii), in that the permit allows for winter and wet weather spreading in some cases. Additionally, they urged the Department to revise the draft permit to clarify that, in almost every instance, daily land application of manure and other wastes during the winter months is impermissible. Other commenters expressed support of the Departments approach to include winter spreading restrictions vs. a calendar-based winter spreading ban. [1][2][\*]

Response: The draft CWA general permit did not include changes to the winter spreading requirements and no further changes have been made to the final CWA general permit in response to this comment as these requirements are consistent with those required by the CAFO federal regulations. The final permit

(Part III.a.7(a)(1)(a)) prohibits land application on saturated soils and establishes protocols to land apply manure, litter or process wastewater in accordance with site specific nutrient management practices. NMPs must include BMPs and operation and maintenance procedures, as well as application rates, timing and methods to ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater.

Comment 18: Some commenters contend that the definition of “winter spreading conditions” is narrow and inconsistent with relevant guidance. They also requested that the Department mandate compliance with the Cornell Guidance and NRCS NY 590 and prohibit any application of manure in any conditions either authority deems “high-risk,” “very risky,” “higher risk,” “risky,” and “should-be-avoided” in order to ensure appropriate agricultural utilization of the nutrients in manure and other wastes. These commenters also assert that winter spreading restrictions are inconsistent with expert guidance, including EPA’s NPDES Permit Writers Manual for CAFOs, noting that the manual states, “there could be an increased likelihood that runoff from CAFO land application areas could reach waters of the United States...when the soil is frozen or covered with ice or snow.”[1] Other commenters support the reference to NRCS 590 and the Cornell Guidance and believe the permit provides appropriate requirements and recommendations for farmers to consider when deciding to spread or not. [2][\*]

Response: The draft CWA general permit did not include changes to the winter spreading requirements and no further changes have been made to the final CWA general permit in response to this comment. The final permit (Part III.A.7.c) continues to include heightened requirements during periods with higher-level risk when soil is “frozen or covered with ice and snow”. The final permit (Appendix A – winter spreading conditions) continues to define the specific conditions associated with an increased risk and includes specific protocols to be addressed in the NMP and followed during those periods. Winter application procedures must be developed in accordance with Cornell Guidance and NRCS NY 590 and must be implemented whenever winter spreading conditions exist (see Part III.A.7.c.1 of the final permit). The final permit (Part III.A.7.c.2), also requires that the NMP must identify specific low-risk fields to be used for winter applications. These requirements are consistent with EPA’s CAFO Permit Writers Manual, which states that winter spreading is allowed provided it complies with the state’s technical standards. Consistent with protocols specified in EPA’s CAFO Permit Writers Manual, Cornell guidance and NY technical standards “account for the form of material that would be applied (e.g., liquid, semi-solid, or dry manure); the time at which the materials would be applied relative to periods when runoff could occur; the fraction of precipitation that runs off the land in meltwater and in response to winter rains (as affected, in part, whether the soil is frozen or not); the time it takes runoff to travel to waters of the U.S. (as affected by slope, distance to waters, roughness of the land surface,

and whether runoff is in contact with the land surface); and, other relevant factors, as appropriate” (EPA’s CAFO Permit Writers Manual).

Comment 19: Some commenters contend that the restrictions on wet weather spreading do not ensure appropriate agricultural utilization of the nutrients in manure and other wastes and request the permit be modified to require Cornell Guidance be followed during wet weather. Other commenters support the reference to NRCS 590 and the Cornell Guidance and believe the permit provides appropriate recommendations for farmers to consider when deciding to spread to not. [1][2][\*]

Response: The draft CWA general permit did not include changes to the requirements for wet weather spreading and no further changes have been made to the final CWA general permit in response to this comment. The final permit (Part III.A.7.d) continues to recommend that Cornell Guidelines for wet weather be followed because the variability of wet weather makes it difficult to strictly require implementation of the protocols in NRCS 590 and the Cornell Guidelines. There are, however, other provisions of the CWA general permit that prevent nutrient pollution from wet weather spreading, including Part III.A.7 which prohibits runoff during application, and Part III.A.7.c which prohibits land application on saturated soils.

## B. Additional NMP Content

Comment 20: Part III.B.1. Non-Contact Cooling Water (NCCW) Systems – NYFB supports the discharge of NCCW, of up to 100,000 gallons per day to non-trout waters with the conditions listed in the subsections 1-4. This provides a viable alternative for farmers to discharge water that is used to cool milk and cannot be utilized in other sources on the farm, like watering animals. [2]

Response: The draft CWA general permit did not include changes to the requirements for noncontact cooling water and no further changes have been made to the final CWA general permit in response to this comment. The Department agrees that the conditions listed in the final permit (Part III.B.1) are sufficient to protect the classified water use and assure compliance with the water quality standard for thermal discharges.

Comment 21: Part III.B.3. Waste Storage Structures – NYFB supports waste storage structures under the CWA permit being maintained to the 25-year, 24-hour storm event, with one foot of freeboard. NYFB continues to work with both DEC and the Department of Agriculture and Markets to install manure storages on CAFO operations across the state. [2]

Response: The draft CWA general permit did not include changes to the requirements for waste storage structures and no further changes have been

made to the final CWA general permit in response to this comment. Governor Cuomo's \$2.5 billion Clean Water Infrastructure Act is providing support to help communities across the state upgrade aging infrastructure to improve water quality, including \$50 million to help farmers comply with the CWA general permit. Additionally, since 2011, New York State has invested \$80 million to support the Agricultural Nonpoint Source Abatement and Control Program, which was established to reduce manure and fertilizers that get into streams. The program is funded through the state Environmental Protection Fund.

Comment 22: Part III.B.5. Leachate Collection and Control Facilities –NYFB does respectfully recommend amending the first sentence of this section as follows: “Leachate collection and control facilities must be implemented, operated and maintained in accordance with Part III.A.3 of this permit to prevent overflow or discharge of the concentrated, low-flow leachate products.” We feel the reference to NRCS standards alone narrows the tools available to farmers to develop the best environmental strategy for their farm. As drafted, this provision does not promote voluntary adoption of any new guidelines that may enhance water quality protection as it pertains to leachate. [2]

Response: The draft CWA general permit did not include changes to the requirements for leachate collection and control facilities and no further changes have been made to the final CWA general permit in response to this comment. Adding the reference to Part III.A.3, as suggested by the comment, would narrow the tools and the voluntary adoption of any new guidelines.

Comment 23: The language on Water Well Protection in Part III.B.10 should be amended as follows, “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 CAFO” to account for improperly constructed wells that are impacted by spreading. [2][\*]

Response: The draft CWA general permit did not include changes related to water well protection and no further changes have been made to the final CWA general permit in response to this comment. NYS ECL section 17-0501 prohibits any person from causing or contributing to a water quality standard violation. See also 6 NYCRR 750-2.1(b) and Part VI.Q “Compliance with Water Quality Standards,” of the Standard Permit Conditions of the CWA general permit. If there is a situation where a drinking water source has potentially been impacted, the Department would review the facts of the situation, including compliance with the NMP.

Comment 24: Part III.B.11. Pesticides. This section is superfluous as the provisions of this section are duplicative of existing statute and regulatory oversight, particularly 6 NYCRR Part 326. NYFB respectfully requests this paragraph be removed from the permit draft. This section also states,

“Certification of pesticide applicators may be required.” NYFB respectfully requests clarification on specific parameters when this provision is applicable and when it is not for purposes of CAFO compliance. [2]

Response: The draft CWA general permit did not include changes related to pesticides and no further changes have been made to the final CWA general permit in response to this comment. Part III.B.11, and specifically the statement “Certification of pesticide applicators may be required,” was included to put CAFOs on notice that there may be additional requirements beyond the scope of the SPDES program. Part IV.P does not relieve the owner/operator from the need to obtain and comply with any other permits required by law. CAFO owner/operators should consult with 6 NYCRR Part 326 to determine whether certification is required.

#### C. Certification of the NMP

Comment 25: Part III.C. Certification of the NMP – DEC is requiring that both the owner/operator and the AEM certified planner certify the NMP and its compliance with applicable NRCS standards. While NYFB supports the certification and employment of certified planners in the NMP development process, New York’s standards for completing the NMP go above and beyond federal requirements, which highlights New York farmers’ commitment to environmental responsibility. [2]

Response: The draft CWA general permit did not include changes to the certification requirements and no further changes have been made to the final CWA general permit in response to this comment. The Department agrees that the certification of NMPs, by both the owner/operator and the AEM planner, highlights NYs commitment to environmental protection and goes beyond the federal requirements.

#### D. Duty to Amend/Submit the NMP

Comment 26: Part III.D. Duty to Amend/Submit the NMP. Some commenters believe the Department must provide at least a 30-day public comment period for substantial changes, citing ECL § 17-0805(1)(a) and (b) and 40 CFR § 124.10(b)(1) in support. [1] Others provided comments in support of the 14-day public comment period noting the importance of implementation in order to ensure adequate growing times for crops and reduce environmental risks associated with unplanted fields, among other things and requested that the notification of approval be made as quickly as possible. [2][3][4][\*]

Response: In response to these comments, Part III.D of the final CWA general permit was revised to include a 30-day public comment period. 40 CFR 122.42(e)(6)((ii)(B) allows the Department to set a reasonable timeframe for the

public to review substantial changes. The Department will use this permit term to gather information on an appropriate timeframe for public comment and may re-assess upon permit renewal or modification.

Comment 27: Part III.D. Duty to Amend the CNMP – The Department should add language to Part III.D.3.b.1 that states, “If the newly acquired land will not receive manure, process wastewater, or litter, this is not considered a substantial change under this permit” in order to clarify that if a CAFO only applies commercial fertilizer to newly acquired land, a revised NMP would not be required to be submitted. [2][\*]

Response: See response to Comment 9 above.

Comment 28: The Department should clarify what is considered a substantial change under the Linear and Narrative Approaches described in the permit. In addition, the Department should provide a contact person for the public who is responsible for answering questions regarding potential changes to a NMP. Finally, the Department should clarify whether alternative plans can be provided in NMPs to allow for options without the need to obtain additional approvals. [2][\*]

Response: No change was made to the final CWA general permit in response to the comment. Part III.A.2 of the permit identifies the BMPs required to be included in the NMP and which are necessary to comply with federal regulations (40 CFR § 122.42(e)(1), § 412.4 and § 412.31). Part III.D.3.b of the permit identifies what constitutes a substantial change. The final CWA general permit allows for alternative plans to minimize the need for revisions. The Department encourages advanced planning and incorporation of alternative crops to minimize the need for revisions. Furthermore, the Department has developed a tool to help CAFOs implement what the “terms of the permit” are within the NMP, as already set forth in Part III.A., and when a change to those “terms of the permit” would be considered a substantial change, as already set forth in Part III.D.3.b of the CWA general permit. The Department will also identify a contact person and contact information for questions regarding the CAFO permit on the Departments CAFO public webpage.

Comment 29: Subsection (d) does not outline the hearing process, if requested, and what a farmer’s responsibilities would be in those circumstances. NYFB requests that DEC provide guidance on how this process would work either through a FAQ or Factsheet. [2]

Response: Article 70 of the NYS ECL (Uniform Procedure Act) and 6 NYCRR Parts 621 and 624 dictate the hearing procedures.

## IV. Additional Permit Conditions

### A. Emergency Action Plan

Comment 30: NYFB supports a farm having an Emergency Action Plan to address any manure, process wastewater, and pesticide spillage as well as catastrophic emergency situations. NYFB supports a farm working with its local Soil and Water Conservation District (SWCD) and/or NRCS office to develop such a plan and have materials ready to address an emergency. NYFB requests that DEC work with the Department of Agriculture and Markets to help local SWCDs purchase materials that are needed in these emergency situations. [2]

Response: The draft CWA general permit did not include changes to the emergency action requirements and no further changes have been made to the final CWA general permit in response to this comment. The final permit (Part IV.A) continues the requirements for Emergency Action Plans, which are a necessary component of the NMP, that have proven to provide appropriate environmental protections during emergency situations. The Department encourages CAFO owner/operators to work with local SWCDs and or NRCS in development of such plans and supports any funding requests made by SWCDs to implement them.

### B. Contractor Certification Statement:

Comment 31: NYFB supports the requirement that contracted professional manure applicators only need to sign the statement prior to the initial application of nutrients (manure, process wastewater, or litter). [2]

Response: The draft CWA general permit did not include changes to the contractor certification requirements and no further changes have been made to the final CWA general permit in response to this comment. The final permit (Part IV.B) continues to require contractors sign the contractor certification statement prior to the initial application on the date of service (i.e. for each day they are applying nutrients) and not just prior to the initial application as suggested. Open and clear communications between the contracted professional and the owner/operator on the date(s) of service is a reasonable and responsible requirement given the dynamic nature of the conditions associated with application (i.e. weather changes).

### C. Planner On-Site NMP Review:

Comment 32: Commenter supports the on-site review requirement of the permit and encourages all farms to attend manure applicator training. They also suggest removal of the language identifying Cornell's Manure Applicator webinar

as an option to meet the education requirement described in Part IV.C of the permit as the webinar does not currently exist at this time. [2][\*]

Response: The draft CWA general permit did not include changes to the applicator training requirements and no further changes have been made to the final CWA general permit in response to this comment. The final permit (Part IV.C.2) continues to require manure applicator staff from both large and medium size farms to attend a Department endorsed manure applicator training or participate in a planner-led discussion of Cornell's Manure Applicator webinar at least once per permit term. The webinar is close to completion and will likely be available prior to the end of the permit term.

## **V. MONITORING, REPORTING & RETENTION of RECORDS**

### **E. Additional Inspection and Recordkeeping for All CAFOs**

Comment 33: Commenter notes that the recordkeeping requirements of the permit are burdensome and questions the importance of operators to keep records of forecasted weather conditions. [2][\*]

Response: The draft CWA general permit did not include changes to the recordkeeping requirements and no further changes have been made to the final CWA general permit in response to this comment. 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 facility's compliance with the CWA general permit and to investigate allegations of water quality violations, should they arise

### **F. Recordkeeping requirements for CAFOs using an Anaerobic Digester**

Comment 34: 6 NYCRR Part 360 governs the safe and productive use of food grade by-products and food processing wastes in its permit process. If a CAFO does not add any of these by-products or sanitary waste to the anaerobic digester, 6 NYCRR Part 360 is not applicable and no record keeping is required. NYFB requests that the final CAFO permit draft reflect this same policy and not require recordkeeping for CAFOs that are only feeding on-farm manure and other on-farm material to its anaerobic digester. Volume reporting and traceability of on-farm materials feeding the anaerobic digester are already accomplished in the CAFO's NMP. As drafted, this section is a duplicative requirement that would hinder growth of anaerobic digester facilities and their corresponding environmental and economic benefits. [2]

Response: The draft CWA general permit did not include changes to the recordkeeping requirements for use of an anaerobic digester and no further changes have been made to the final CWA general permit in response to this comment. This requirement was included in GP-0-16-002 at the request of Department inspectors to help determine compliance with Part V.F of this general permit.

#### H. Electronic Recordkeeping

Comment 35: Commenter requests that the Department acknowledge electronic recordkeeping is acceptable. [2][\*]

Response: The draft CWA general permit did not include changes to the recordkeeping requirements and no further changes have been made to the final CWA general permit in response to this comment. The final permit (Part V.H) continues to allow electronic submissions pursuant to 6 NYCRR 750-2.5(c)(3). This regulatory provision gives the CAFO the ability to store records electronically so long as the records are preserved in a manner that reasonably assures their integrity and are acceptable to the Department. Such records must also be in a format which is accessible to the Department.

## VI. STANDARD PERMIT CONDITIONS

#### M. Inspection and Entry

Comment 36: Commenter requests notice of CAFO inspections be made whenever possible to mitigate any biosecurity concerns. [2][\*]

Response: The draft CWA general permit did not include changes to the inspection and entry language and no further changes have been made to the final CWA general permit in response to this comment. 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 CAFO program staff, for the Department's Division of Water, 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 prior to an unannounced site visit by DOW staff. There is no requirement in NYS ECL section 17-0829 or 6 NYCRR 750-2.3 that the Department provide advance notice of an inspection.

#### S. Availability of Reports

Comment 37: NYFB is extremely disappointed with the denial of all claims of confidentiality for NOIs, permits, effluent data, Annual NMP submittals and Annual Compliance Reports (ACR). From the perspective of the farm business owner, the NMP, ACR and its individual components are confidential business information and very clearly qualify for consideration for protection under the NYS Freedom of Information Law provided under the NYS Public Officers Law (Article 6-A). At a minimum, NYFB objects to such information being disclosed without prior notice to the farm/submitter when such information has been designated confidential business information (CBI) by the farm. NYFB respectfully requests that this specific provision be removed from the final permit draft. [2]

Response: The draft CWA general permit did not include changes to the inspection and entry language and no further changes have been made to the final CWA general permit in response to this comment. See response to comment 36 above.

## **Appendix A – DEFINITIONS**

Comment 38: M. Medium Concentrated Animal Feeding Operation (Medium CAFO) – NYFB acknowledges the change in the definition of a Medium CAFO as it relates to mature dairy cows from “a. 200 to 699 mature dairy cows, whether milked or dry, except that an AFO that stables or confines 200-299 mature dairy cows, whether milked or dry, that does not cause a discharge, would not be considered a Medium CAFO;” to the definition of the current draft permit, “a.200 to 699 mature dairy cows.” Because the CWA permit is for farms that discharge, state regulations encompass a smaller herd size under the permit. While NYFB accepts this definition, as part of New York State law, smaller farms are further burdened by the CWA permit requirements, if they discharge.

Response: In the final CWA general permit, the definition of a medium CAFO was changed back to the definition in GP-0-16-002: “200 to 699 mature dairy cows, whether milked or dry, except that an AFO that stables or confines 200-299 mature dairy cows, whether milked or dry, that does not cause a discharge, would not be considered a Medium CAFO” in the final CWA compliant CAFO general permit in order to be consistent with the State’s definition of a medium CAFO (See 6 NYCRR 750-1.2(a)(23)(ii)). This remains consistent with the definition provided in 40 C.F.R. 122.23(b)(6).

Comment 39: P. Depth Marker – It is our understanding that this definition’s intent is not to measure manure in an open storage but to determine the amount of available freeboard or remaining capacity until maximum fill. Storage depth does not accurately reflect maximum storage capacity. To make prudent nutrient management decisions, a farmer should be focused on his/her last 18 inches of

freeboard rather than concern themselves with the day's manure depth. For this reason, "depth marker" should be replaced with the term "freeboard marker" to be consistent with the actual intent of this provision. The same change should be made in Appendix A (P) for the definition of depth marker, and in Part III.B.3.a regarding Waste Storage Structures. [2]

Response: The draft CWA general permit did not include changes to the depth marker requirements and no further changes have been made to the final CWA general permit in response to this comment. The purpose of the depth marker is to provide a visual reference for the farmer which indicates how much room they have available for storage. "Depth marker" is the appropriate term and is defined appropriately.

## **Appendix C –NUTRIENT MANAGEMENT PLAN CERTIFICATION STATEMENT**

Comment 40: Owner/ Operator Certification – Language has been added to the certification that states, "All BMPs necessary to implement the NMP are completed and are functioning as designed." NYFB requests that this language be removed from the certification. In accordance with the permit, a farmer may be working towards completing BMPs so that their farm can be in compliance and by signing this statement, it forces them to sign a document that may not be entirely truthful based on the compliance timeline outlined in the permit terms. This statement may make a farmer believe they are out of compliance or not eligible for the permit. [2]

Response: The draft CWA general permit did not include changes to the owner/operator certification requirements and no further changes have been made to the final CWA general permit in response to this comment. An owner/operator that is in compliance with an implementation schedule contained in an approved NMP is truthfully certify that all BMPs necessary to implement the NMP are completed if all BMPs have been completed according the schedule of compliance.

Comment 41: Planner Certification – The Planner Certification now requires the planner certify to full conformance with requirements of the NY NRCS standards as well as the General Permit, which NYFB believes to be a good thing, but again the issue of a farm that has not fully implemented all BMPs raises concerns on Permit coverage and certifying the NMP. [2]

Response: The draft CWA general permit did not include changes to the planner certification requirements and no further changes have been made to the final CWA general permit in response to this comment. The planner certification does not include language that the BMPs are fully implemented as suggested but rather that the NMP, NMP updates and NMP attachments (collectively the NMP)

that have been developed for the certified operation are in full conformance with the requirements of the NRCS standards and the New York State Pollutant Discharge Elimination System (SPDES) CAFO General Permit and that the planner has reviewed the NMP and all BMPs necessary to implement the NMP with the owner and/or operator responsible for the proper operations of the CAFO.

## GENERAL COMMENTS

Comment 41: When a nutrient plan is put into effect with a farm there should be periodic mandated inspections to be sure the plan is actually working to prevent excessive runoff. [5]

Response: The Department regularly inspects CAFOs throughout the state as part of our normal course of business. Review of the NMP by Department staff is a significant part of those facility inspections.

Comment 42: Prior to permit issuance, DEC should review whether the changes in the CWA permit and its associated program may lead to significant environmental impacts, which would then trigger further SEQRA review. This issue is of particular concern because of the number of CAFOs seeking coverage under the ECL permit, as discussed above. [1]

Response: The SEQR determination for this permit was reviewed and found to be a Type II action. 6 NYCRR 617.5(c)(4) provides that it is a Type II action if the action consists of “agricultural farm management practices, including construction, maintenance and repair of farm buildings and structures, and land use changes consistent with generally accepted principles of farming.” The final CWA general permit is comprised of agricultural farm management practices and requires adherence to applicable NRCS standards and the terms of NMPs that have been prepared by certified planners to ensure nutrients and waste associated with farming are stored, applied and disposed of appropriately. The requirements in the permit have been carefully analyzed by Division of Water staff and are consistent with generally accepted principles of farming. Furthermore, the technical requirements and environmental protections provided by GP-0-16-002 remain the same in the final CWA general permit (see 6 NYCRR 617.5(c)(32)). The changes were made to comply with a court decision and order (See 6 NYCRR 617.5(c)(35)). CAFOs seeking coverage under the ECL permit are subject to environmental protections contained in that permit (See also response to comment 1).

Comment 43: Several places throughout the draft permit, the draft permit is numbered as GP-0-19-001. The current CWA permit is GP-0-16-002 and the current ECL permit is GP-0-16-001. NYFB requests that in order to avoid confusion, the new CWA permit be numbered GP-0-19-002. [2]

Response: No change to the final CWA general permit has been made in response to this comment. Numbering general permits is done sequentially starting with the first general permit issued in each calendar year.

Comment 44: The CAFO permit is not an educational tool but a tool for identification of conservation needs on the farm. Farmer education must go hand in hand with development of the CAFO permit to bring continual and lasting water quality protection – the end goal of the CAFO program. This is particularly important for this permit cycle where several new CAFO program requirements have been introduced and with which implementation and compliance are expected immediately. NYFB respectfully requests specific outreach by DEC for these new permit elements in order for farmers to become fully aware of the requirements under the CWA permit. [2]

Response: The Department agrees that outreach and education on the new requirements is necessary and has developed a roll out plan to ensure the new requirements are understood.

Comment 45: Commenters would like to see uniformity in compliance inspections throughout the regions in NY and recommends that a clear, reliable, uniform standard be communicated to and followed by all CAFO inspectors [2][\*]

Response: The Department has a compliance strategy that outlines our inspection goals and minimum responses to promote consistency in oversight and enforcement. In addition, we hold regular meetings with the Department's central office and regions in an effort to provide consistency throughout the state. The Department will continue to work toward consistent responses throughout the regions.

Comment 46: Commenter supports the Environmental Protection Fund, particularly the Agricultural Nonpoint Source (AgNPS) funding as it is critical for many farms to achieve environmental protection but also, in many cases, drives a farms profitability. Additionally, the commenter shows strong support for continued reimbursement funding for County Soil and Water Conservation Districts as they serve as the front-line technicians for farm projects. Finally, the commenters believe successful sustainable environmental agriculture cannot exist without the foundation provided by local Land Grant University research that is state and region-specific and can best define risk assessment tools, BMPs and other sustainable farm activities and for that reason, they strongly support continued state support and funding for the PRO-DAIRY program. [2][\*]

Response: The Department agrees that funding is critical to the CAFO Program for NY. This was most recently reflected in Governor Cuomo's \$2.5 billion Clean Water Infrastructure Act discussed in the response to comment 21 above.

Comment 47: Commenter supports a robust Quality Assurance/Quality Control Program for planner audits and requests DEC and NYSDAM support and assist the program through funding, staffing and other resources to ensure its success and availability to the planner and farm community. [2][\*]

Response: The Department agrees that the Planner QA/QC Program is critical to the success of the CAFO Program and will continue to direct funding towards its continued implementation.

Comment 48: Commenter raised concerns about future electronic reporting requirements citing apprehension by constituents over the security and confidentiality of information, the cost associated with the practice, and finally the lack of broadband or reliable Internet service to many rural and isolated communities throughout the state. [2][\*]

Response: The draft CWA general permit did not include changes to the reporting requirements and no further changes have been made to the final CWA general permit in response to this comment. The Department understands the concerns raised by this comment and voiced those concerns to the federal government for consideration when rolling out the e-Reporting Rule in NY. Nonetheless, NY is obligated to comply with this federally mandated requirement.

Comment 49: Commenter raised concerns regarding a farms ability to comply during the unprecedented low farm incomes being experienced currently throughout the state. Commenter requests that the Department work with farmers who are making strides to comply but may need additional time due to financial constraints. [2][\*]

Response: The Department understands the concerns raised regarding the financial state of the dairy industry, however, the Department must comply with State laws and regulations.