

**Secretary's Order No.: 2010-W-0034**

**RE: Approving Final 7201 Regulations Governing the  
Control of Water Pollution, Section 9.5**

**Date of Issuance: October 15, 2010**

**Effective Date of Regulations: November 11, 2010**

Under the authority vested in the Secretary of Natural Resources and Environmental Control (DNREC) and the Secretary of the Delaware Department of Agriculture (DDA) the following findings, reasons and conclusions are entered as an Order of the Secretaries in the above referenced rule making proceedings.

**BACKGROUND and PROCEDURAL HISTORY**

This Order considers the proposed regulations entitled "Regulations Governing the Control of Water Pollution, Section 9.5", which the Department of Natural Resources and Environmental Control (specifically the Division of Water), and the Department of Agriculture drafted and published in the July 1, 2010 Delaware Registrar of Regulations. The regulations establish requirements to control nitrogen and phosphorus from certain farms where poultry, swine, beef cattle, dairy cattle and horses are raised also known as an Animal Feeding Operation (AFO).

The federal Clean Water Act of 1972 established the National Pollution Discharge Elimination System (NPDES) to regulate the discharge of pollutants from point sources to Waters of the United States. The federal NPDES permit program expressly includes and defines Concentrated Animal Feeding Operations (CAFO) as a point source. In

1983, EPA delegated to the DNREC the authority to administer and enforce the NPDES program. In 1999, Delaware enacted the Nutrient Management Law which created the Nutrient Management Commission, housed in the Delaware Department of Agriculture (DDA) and established the Nutrient Management Program. The Nutrient Management Law mandates that all farmers, golf courses, and other nutrient handlers develop and implement nutrient management plans, maintain handling records, and submit annual reports. The actions initiated by the two State Agencies in cooperation with the Delaware Nutrient Management Commission (DNMC) are a necessary step to achieve Delaware's water quality goals, protect the "waters of the state" and to continue the United States Environmental Protection Agency's (USEPA) delegated program. Part 122, Sub Sections 122 and 412 of the Clean Water Act (CWA) require States to develop regulations governing the discharge of nutrients from farms into nearby waterways. These state regulations are required in order to keep our "at least equal to" status with USEPA's requirements. Failure to do so may result in the increased likelihood of federal enforcement actions against Delaware agricultural producers and the withdraw of Delaware's delegated authority to administer this NPDES program.

In 2000, DNREC and DDA (the Departments) signed a Memorandum of Agreement (MOA) that sets up a framework for DDA to jointly manage the Concentrated Animal Feeding Operation (CAFO) permit program in partnership with DNREC and in conjunction with the Nutrient Management Program. This MOA set the framework for joint (DDA and DNREC) promulgation of the Draft CAFO regulations under statutory authorities in Del. C., Title 3, Chapter 22, and Del. C., Title 7, Chapter 60. This

arrangement was reached in order to efficiently and effectively implement a CAFO program. It has become apparent through comments received during the regulation promulgation process and further examination of the current MOA by DDA and DNREC staff that the currently valid MOA should be redrafted to provide further clarity related to the roles of each agency. The Hearing Officer has recommended that a new MOA will be drafted and become effective by the implementation date of these regulations.

During regulatory development, public input was sought through-out the process. The initial draft of the regulations was presented to the public in a series of three public workshops on May 25, 26, and 27, 2010 at the Farmington Fire Hall, Laurel High School and Millsboro Fire Hall, respectively. A total of 143 people attended. The input received at those public workshops along with other input received at other meetings was valuable and further informed the process, as well as resulted in revisions to the draft regulations. Due to feedback received from the public workshops, and additional feedback from EPA, the workshop version of the Draft CAFO Regulations was revised. The revised Draft CAFO Regulations were then presented to the public for comment through the month of July 2010. The DNREC and DDA published the complete *Draft 7201 Regulations Governing the Control of Water Pollution, Section 9.5* (CAFO Regulations) in the July 1, 2010 Delaware Register of Regulations. A Public Hearing was held at the Delaware Department of Agriculture building in Dover, on July 22, 2010.

The public hearing record contains a thirty-five page verbatim transcript of the public hearing and documents marked as Exhibits which were admitted to the record during

the hearing, and other documents marked as exhibits admitted during the public comment period but subsequent to the hearing. (Please refer to the Hearing Officer's Report attached to this order as Appendix A for additional details.) Four individuals, representing three organizations, expressed views concerning the proposed Draft CAFO Regulations: Mr. Bruce Snow representing the Delaware Association of Conservation Districts (DACD); Mr. Jonathan Lobb and Ms. Mary Jacobson, both representing the Mid-Atlantic Environmental Law Center, and Henry Johnson, Sussex County Farmer. In addition, the Delaware Nature Society submitted written comments pre-hearing. Post-hearing, the Delaware Farm Bureau and the Environmental Integrity Project submitted written comments before the end of the public comment period.

The submitted comments varied widely in perspective and desired outcome. Many of the comments questioned definitions contained in the regulations. The Environmental Integrity Project questioned the appropriateness of managing a CAFO program through the Department of Agriculture and also brought into question the Memorandum of Agreement between DDA and DNREC. Some commenters such as, the Mid-Atlantic Environmental Law Center, the Environmental Integrity Project, and the Delaware Nature Society, believed that the regulations did not go far enough to protect water quality while other commenters, such as the Farm Bureau, Mr. Henry Johnson, and the DACD, believed the regulation went too far and may place undue burden on the regulated community.

The delegated Hearing Officer, Mark Davis, prepared a Hearing Officer's report, dated October 12, 2010 (Report). The Report recommends certain findings and the adoption

of these Regulations as attached to the full Report in Appendix C. In addition, a full “Response to Comments” narrative was developed by the technical staff of DDA and DNREC to address concerns, comments, and suggestions brought forward by the public during the public notice period. The “Response to Comments” are contained in Appendix A and B of the Report.

## **FINDINGS and DISCUSSION**

The majority of the Draft CAFO Regulations mirror the federal regulations, however; there were points of divergence and consensus that arose in discussions by and among the Departments, DNMC, USEPA and other agencies and stakeholders. The best science available was used to inform discussions, as was input from the regulated community. There was a concerted effort to develop regulations which meet the federal intent, protect water quality, and provide practical implementation methods that will enhance compliance. It is important to review the entire “Response to Comments” portion of the Report found in Appendices A and B; some of the more important issues raised related to definitions, regulatory authority, monitoring and enforcement, setback requirements, and stockpiling and field staging of poultry litter. We find that within the context of Delaware’s specific circumstances including: the MOA; research related to nutrient handling; the effective implementation of the Delaware Nutrient Management Law; and the demonstrated successful history of cooperation between the DNMC, DDA and DNREC that the Draft Regulations meet the intent of the federal requirements and in some cases exceed specific requirements, and final promulgation is in the best interests of the environment and the regulated community.

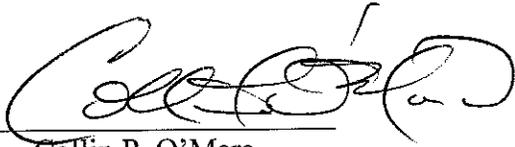
We find that the Draft Regulations, with non-substantive recommended revisions, are well supported by the record developed by the Departments and adopt the Report (with Appendices) to the extent it is consistent with this Order. We find that the Departments' experts fully developed the record to support adoption of these regulations. With adoption of this Order, Delaware will fully administer a CAFO program.

In conclusion, the following findings and conclusions are entered:

- 1.) The Department of Natural Resources and Environmental Control, and Department of Agriculture (Departments) have jurisdiction under their statutory authorities and in accordance with the current Memorandum of Agreement between the two agencies to adopt these Regulations as final;
- 2.) The Departments provided adequate public notice of the Draft Regulations, and provided adequate opportunity to comment on the Draft Regulations including a public hearing on June 21, 2010;
- 3.) The Departments held a public hearing in a manner required by the law and regulations;
- 4.) The Departments considered all timely and relevant public comments in making its determination;
- 5.) The Departments' Hearing Officer's Report, including its recommended record and the Regulations, as amended and set forth in Appendix C of the Report, are adopted to provide additional reasons and findings for this Order;

6.) The Departments determine the Draft Regulations, as amended and contained in Appendix C of the Report, as Final Regulations.

7.) The Departments shall submit this Order approving the Final Regulations to the *Delaware Registrar of Regulations* for publication in its next available issue and shall provide such other notice as the law and regulation require, and the Departments determine appropriate.



Collin P. O'Mara  
Secretary  
Department of Natural Resources  
And Environmental Control



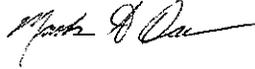
Ed Kee  
Secretary  
Department of Agriculture

## HEARING OFFICER'S REPORT

TO: The Honorable Colin O'Mara  
Secretary, Department of Natural Resources and Environmental Control

The Honorable W. Edwin Kee  
Secretary, Department of Agriculture

FROM: Mark Davis  
Delegated Hearing Officer,



RE: *Draft 7201 Regulations Governing the Control of Water Pollution, Section 9.5*

DATE: October 12, 2010

### I. BACKGROUND

This Report considers proposed regulations entitled "Regulations Governing the Control of Water Pollution, Section 9.5", which the Department of Natural Resources and Environmental Control, and the Department of Agriculture drafted and published in the July 1, 2010 Delaware Registrar of Regulations, which will establish requirements to control nitrogen and phosphorus from certain farms where poultry, swine, beef cattle, dairy cattle and horses are raised also known as an Animal Feeding Operation (AFO). Such farms can be substantial contributors to the pollution of the State's waterways if manure and other waste products are not properly managed. The actions proposed by the two State Agencies in cooperation with the Delaware Nutrient Management Commission (DNMC) are a necessary step to achieve Delaware's water quality goals, protect the "waters of the state" and to continue the United States Environmental Protection Agency's (USEPA) delegated program.

Part 122, Sub Sections 122 and 412 of the Clean Water Act (CWA) require States to develop regulations governing the discharge of nutrients from farms into nearby waterways. Farms (AFOs) identified to have such discharges, or propose to discharge, are required to obtain a National Pollutant Discharge System (NPDES) permit, more specifically a Concentrated Animal Feeding Operation (CAFO) permit. Under these proposed regulations the Delaware Department of Agriculture (DDA) and the Delaware Department of Natural Resources and Environmental Control (DNREC) will jointly manage such permits under DNREC's administrative supervision. The proposed state regulations are required in order to keep our "at least equal to" status with USEPA. Failure to do so may result in the increased likelihood of federal enforcement actions against Delaware agricultural producers and the withdraw of Delaware's delegated authority to administer this NPDES program.

The federal Clean Water Act of 1972 established the National Pollution Discharge Elimination System (NPDES) to regulate the discharge of pollutants from point sources to Waters of the United States. The federal NPDES permit program expressly includes and defines Concentrated Animal Feeding Operations (CAFO) as a point source. In 1983, EPA delegated to the DNREC the authority to administer and enforce the NPDES program. In 1999, Delaware created the Nutrient Management Commission, housed in the Delaware Department of Agriculture (DDA), and instituted the Nutrient Management Program. The Nutrient Management Law mandates that all famers, golf courses, and other nutrient handlers develop and implement nutrient management plans, maintain handling records, and submit annual reports. In 2000, DNREC and DDA signed a

Memorandum of Agreement (MOA) that sets up a framework for DDA to jointly manage the CAFO permit program in partnership with DNREC and in conjunction with the Nutrient Management Program. In accordance with the MOA, DDA will among other activities, primarily manage the day to day activities of Delaware's CAFO program. DDA will including limitations, be the initial point of contact with the regulated community, review and make permit determinations, perform inspections and enforcement actions if warranted, and review and make Nutrient Management Plan determinations. In accordance with the MOA, among other activities, DNREC retains supervision and enforcement authority, will promulgate CAFO regulations, is the Delaware point of contact with EPA, and will issue individual permits. This MOA set the framework for joint (DDA and DNREC) promulgation of the Draft CAFO regulations under statutory authorities in Del. C., Title 3, Chapter 22, and Del. C., Title 7, Chapter 60. It has become apparent through comments received during the regulation promulgation process and further examination of the current MOA by DDA and DNREC staff that the currently valid MOA should be redrafted to provide further clarity related to the roles of each agency. A new MOA will be drafted and become effective by the implementation date of these draft regulations.

In 2003, EPA issued new CAFO rules that required certain CAFO operators to seek coverage of a NPDES permit. These rules were appealed by industry and environmental groups. In 2005, the 2<sup>nd</sup> Circuit Court of Appeals ruled the CAFO rules did not comply with the 1972 Clean Water Act. To meet the 2<sup>nd</sup> Circuit Courts ruling, EPA revised the CAFO rules in 2006 and supplemented it in 2008. One consequence

of these actions is that CAFOs with potential to discharge effluent from manure, litter or processed wastewater must submit their Nutrient Management Plans with their NPDES CAFO permit applications, or under general permits, with their Notices of Intent (NOI). DNREC, DDA and the Commission have been working to develop a regulatory program which will meet this and other criteria, will achieve equal to status with new approved federal directives, and will most effectively and efficiently address nutrient pollution considering Delaware's particular circumstances. The Draft 7201 Regulations Governing the Control of Water Pollution, Section 9.5 are the result of that effort.

## II. PROCEDURAL HISTORY

Since February, 2009, through the first half of 2010, The Delaware Nutrient Management Commission (DNMC), DDA, DNREC, and the EPA (along with representatives from the University of Delaware, and the Delaware Natural Resources Conservation Service) have worked towards meeting the EPA requirements for CAFO programs tailored to Delaware's unique circumstances. Through a series of meetings among the above mentioned organizations, all parties worked diligently to satisfy the required legal and regulatory directives, impose reasonable and justifiable burdens on the regulated community, protect the environment, and improve opportunities for a successful implementation of the program within the regulated community. The regulatory development process was ongoing and consistent during that time period. The progress of those regulatory development efforts was often discussed within the public forum of the DNMC monthly meetings. The regulated community was informed of CAFO regulation development progress through attendance at the monthly DNMC

meetings. In addition, DDA, DNREC, and DNMC staff met with the Delmarva Poultry Industry Environmental Committee on May 11, 2010 to present the then current Draft CAFO Regulations and receive feedback.

The regulatory development process eventually led to draft regulations which were presented to the public in a series of three public workshops on May 25, 26, and 27, 2010 at the Farmington Fire Hall, Laurel High School and Millsboro Fire Hall, respectively. A total of 143 people attended. The input received at those public workshops along with other input received at other meetings was valuable and further informed the process, as well as resulted in revisions to the draft regulations. DDA, DNREC, and DNMC staff informed members of the Delaware General Assembly of CAFO regulation development progress at two meetings. The first, on April 28, 2010 was a joint meeting of the House and Senate Agriculture Committees, and the second on June 2, 2010 was a presentation before the House Agriculture Committee.

Due to feedback received from the public workshops, and additional feedback from EPA, the workshop version of the Draft CAFO Regulations was revised. The revised Draft CAFO Regulations were then presented to the public for comment through the month of July 2010. The DNREC and DDA published the complete Draft 7201 Regulations Governing the Control of Water Pollution, Section 9.5 in the July , 1, 2010 Delaware Register of Regulations. A Public Hearing was held at the Delaware Department of Agriculture building in Dover, on July 22, 2010.

### **III. SUMMARY OF THE PUBLIC HEARING RECORD**

As stated previously, the revised version of the CAFO Regulations, entitled "Regulations Governing the Control of Water Pollution, Section 9.5", was published in the July 1, 2010 Delaware Registrar of Regulations. The public hearing record contains a thirty-five page verbatim transcript of the public hearing and documents marked as Exhibits which were admitted to the record during the hearing, and other documents marked as exhibits admitted during the public comment period but subsequent to the hearing. The public comment period was open from July 1, 2010 to July 31, 2010 with the public hearing held 7:00 pm on July 22, 2010, at the Delaware Department of Agriculture office building in Dover, Delaware.

At the public hearing, Mark Davis, hearing officer, gave a brief statement of introduction and purpose for the hearing, as well as stated the procedures to be followed during the hearing. Roy Heineman, DNREC paralegal, entered documents into the record. Four individuals, representing three organizations, expressed views concerning the proposed Draft CAFO Regulations: Mr. Bruce Snow representing the Delaware Association of Conservation Districts (DACD) (see Exhibit 2); Mr. Jonathan Lobb and Ms. Mary Jacobson both representing the Mid-Atlantic Environmental Law Center (see Exhibit 3); and Henry Johnson, Sussex County Farmer (he did not submit written comments). In addition, the Delaware Nature Society submitted written comments pre-hearing (see Exhibit 1). Post-hearing, the Delaware Farm Bureau (see Exhibit 4) and the Environmental Integrity Project (see Exhibit 5) submitted written comments before the

end of the public comment period. The public hearing transcript, marked, Exhibit 6, was entered into the record post hearing.

The proposed Draft CAFO Regulations are also a part of the public record. The Draft CAFO Regulations are very briefly summarized below.

#### **PREAMBLE**

These regulations have been developed pursuant to 3 Del. C. §2201-2290 and 7 Del. C. §6000 et.al. and under DNREC's delegated authority. These statutory and regulatory authorities establish the requirement that a National Pollutant Discharge Elimination System (NPDES) permitting program for Concentrated Animal Feeding Operations (CAFOs) be implemented. These regulations will function as the baseline CAFO standards for compliance of NPDES CAFO permits applicable to certain farms. The Delaware Department of Agriculture (DDA) will administer these regulations in conjunction with DNREC. In general, NPDES CAFO permits, as provided in these regulations, are effective for five years. These regulations were developed by the Delaware Nutrient Management Commission, the Delaware Department of Agriculture and the Delaware Department of Natural Resources and Environmental Control. They are adopted with the guidance, advice and consent of the Delaware Nutrient Management Commission.

#### **1.0 Authority, Purpose and Scope**

1.1 Authority. These regulations are promulgated pursuant to the authority provided by 3 Del. C. §2200 et.al. and 7 Del. C. §6000 et.al, and 40 CFR 122 and 412.

1.2 Purpose. The purpose of these regulations is to establish requirements for certain animal feeding operations defined as a Concentrated Animal Feeding Operation (CAFO) in order to protect water quality from activities associated with CAFO management, to sustain and provide a profitable agricultural industry and to help meet or exceed federally mandated water quality standards.

1.3 Scope. CAFOs, as defined in §2.0 or as designated in §3.2 of these regulations are point sources subject to NPDES CAFO permitting requirements. Once an animal feeding operation (AFO) is defined as a CAFO for one type of animal, the NPDES requirements for CAFOs apply to all animals as referenced in these regulations that are held in confinement at the operation and all manure, litter and process wastewater generated by those animals or the production of those animals.

**2.0 Definitions** – A list a applicable terms and definitions is provided

**3.0 Applicability** – The "applicability" section describes which type of AFO is also a CAFO

**4.0 Application for Coverage** – This section directs which CAFOs should apply for a NPDES CAFO permit or in other words as a "duty to apply". It also describes what should be included in the "Notice of Intent" or CAFO application.

**5.0 Nutrient Management Plans or Animal Waste Management Plans** – "For purposes of compliance with these regulations a nutrient management plan or animal waste management plan shall be written by a certified nutrient consultant in accordance with State Technical Standards." The required contents of those plans are further described within this section.

**6.0 Terms and Conditions of CAFO NPDES Permits** – "Each owner or operator covered by these regulations shall meet or exceed the minimum conditions or terms of a NPDES CAFO permit that consists of the following and applicable contents." The minimum standard conditions and terms for CAFO permits according to animal type are further described within this section.

**7.0 Criteria for New CAFO Facilities** – Specific terms and conditions for new CAFOs is described within this section, including siting criteria.

**8.0 Public Access to Information, Public Notice for NOIs and Draft NPDES CAFO Permits, Public Comments, Public Hearings for NOIs and NPDES CAFO Permits** – The public review process, as well as the process for public access to information is described within this section.

**9.0 Enforcement, Fines, and Penalties** – The general enforcement and fine structure is stated, but is spelled out in greater detail in other State Codes ("established in 3 Del. C. §2200 and 7 Del. C. Ch. 60").

**10.0 Effective Date** - These regulations shall become effective October 11, 2010.

The submitted comments varied widely in perspective and desired outcome. Many of the comments questioned definitions contained in the regulations. The Environmental Integrity Project questioned the appropriateness of managing a CAFO program through the Department of Agriculture and also brought into question the Memorandum of Agreement between DDA and DNREC. Some commenters such as, the Mid-Atlantic Environmental Law Center, the Environmental Integrity Project, and the Delaware Nature Society, believed that the regulations did not go far enough to protect water quality while other commenters, such as the Farm Bureau, Mr. Henry Johnson, and the DACD, believed the regulation went too far and may place undue burden on the regulated community.

In order to appropriately respond to comments received during the public comment period, the record was reopened to receive "Response to Comments" documents from the DNREC and DDA staff. I requested "Response to Comments" memos from Larry Towle (DDA), Jennifer Walls, Brian Churchill and Robert Underwood (DNREC). Those memos have been submitted to the Hearing Officer and are included in the public record (See Appendix A with attachments and Appendix B). Mr. Towel's two memos

(draft and final) are found in Appendix B. An additional memo from all four technical staff along with attachments, are found in Appendix A.

#### **IV. RESPONSE TO COMMENTS DISCUSSIONS AND REASONS**

The DNREC, DDA, DNMC, EPA and others have worked diligently over the last eighteen months to draft CAFO Regulations which meet the intent of the federal law and regulations. The majority of the Draft CAFO Regulations mirror the federal regulations, however; there were points of discussion which all parties agreed to before finalizing the document for public notice through submission to the Delaware Registrar of Regulations on June 15, 2010. The best science available was used to inform our discussions, as was input from the regulated community. There was a concerted effort to develop regulations which meet the federal intent, protect water quality, and provide practical implementation methods that will enhance compliance. Please refer to Appendix A and Appendix B for details of the Departments' "Response to Comments."

It is important to review the entire "Response to Comments" portion of the report found in Appendices A and B; however, some of the important issues to note here relate to definitions, regulatory authority, monitoring and enforcement, setback requirements, and stockpiling and field staging of poultry litter.

Regarding comments related to definitions used in the draft regulation it is important to note that all definitions were vetted with EPA prior to incorporation in the public hearing

version of the regulations. It is the opinion of the technical staff that the draft definitions meet the intent of the Federal regulations and in most cases mirror federal definitions.

The Environmental Integrity Protect raised objections to the technical ability, appropriateness, and potential effectiveness of DDA to manage, monitor and enforce the Delaware CAFO program and regulations. Federal regulatory programs are commonly adjusted to meet the unique needs and dynamics of the local jurisdictions. The partnership outlined in the MOA between DDA and DNREC has worked extremely well since 2000. The regulations are jointly promulgated so that both Departments have authority to monitor and enforce them. DNREC retains the right and ability to issue fines, violations, and conduct inspections under Title 7, Chapter 60 of the Delaware Code and will use such authority if DDA fails to meet its responsibilities to protect water quality through the monitoring and enforcement of the Draft CAFO Regulations. To date, DDA has been managing Delaware's CFO program including permit review, monitoring and enforcement. As of September, 2010, there are 372 Notices of Intent from CAFO operations in Delaware.

The respective duties of each Department as spelled out in the MOA are briefly stated in Section I of this document and the MOA is included in this report as an attachment to Appendix A. In addition, both Departments realize that Delaware's Nutrient Management Law was not drafted to meet the now expanded federal directives for CAFOs and that is why the Draft Regulations have been developed and proposed for promulgation. The Delaware Draft CAFO Regulations are a part of the overall NPDES Program, which is administered by the Department of Natural Resources and

Environmental Control. The draft proposed regulations meet the intent of the Federal 2008 CAFO rule. As stated previously in this report, DDA and DNREC plan to draft a new MOA to further clarify roles and responsibilities of each agency. The new MOA will be effective by the date of implementation of these draft regulations.

DDA has a long history of implementing regulations which protect water quality as well as protect the health and well being of the citizens of Delaware. DDA's mission statement is "...to sustain and promote the viability of food, fiber, and agricultural industries in Delaware through quality services that protect and enhance the environment, health, and welfare of the general public."

Some commenters objected to the alternative setback requirements provided within the regulations. Please refer to Appendix A for more detail, including a study performed by University of Delaware and DNREC staff which demonstrates the effectiveness of the alternative setback strategy presented in the draft regulations. As is the case with the federal CAFO regulations, farm owner/operators may still propose additional alternate setback requirement, but they must demonstrate that those practices are as effective as the approved setback requirements stated within the regulations. The draft regulations meet the intent of the federal directives.

Some commenters objected to the use of "field staging" in the application area for up to ninety days. The DNMC, DDA, DNREC, and the University of Delaware sponsored and performed field studies concerning the environmental impact of the practice of "field staging" poultry manure/litter in the field prior to its application as fertilizer. The study

reference in Appendix A and included as Attachment 2 concludes that properly managed and staged poultry litter will not cause nutrient runoff.

As stated previously, it is important to review both Appendix A and B for the full "Response to Comments" submitted by the technical staff of DDA and DNREC. The staff have expressed that within the context of Delaware's specific circumstances including: the MOA; research related nutrient handling; the Delaware Nutrient Management Law; and the demonstrated successful history of cooperation between the DNMC, DDA and DNREC that the Draft regulations meet the intent of the federal requirements and in some cases exceed specific requirements.

After conferring with Legal Counsel, I recommend the following change to the preamble of the regulations:

*"The Delaware Department of Agriculture (DDA) will ~~administer~~ manage these regulations in conjunction with DNREC."*

The recommended change more appropriately expresses the legal framework under which the CAFO regulations are to be implemented in Delaware. In my opinion, the change is not substantive in the sense that it does not trigger the requirement to re-propose the change. In addition, the effective date presented in the originally public noticed regulations should be updated to present the new effective date which resulted from the additional one month needed to review of public comments, thus changing the effective date from October 11, 2010 to November 11, 2010.

## **V. RECOMMENDED FINDINGS AND CONCLUSIONS**

Based on the record developed, I find and conclude that the record supports approval of the proposed regulations as set forth at the public hearing, with recommended minor changes, as final regulation. In conclusion, I recommend the Secretary of The Department of Natural Resources and Environmental Control, and the Secretary of Agriculture adopts the following findings and conclusions:

- 1.) The Department of Natural Resources and Environmental Control and Department of Agriculture (Departments) have jurisdiction under their statutory authorities and in accordance with the current Memorandum of Agreement between the two agencies to make determinations in this proceeding;
- 2.) The Departments provided adequate public notice of the proceeding and the public hearing in a manner required by the law and regulations;
- 3.) The Departments held a public hearing in a manner required by the law and regulations;
- 4.) The Departments considered all timely and relevant public comments in making its determination, see Appendix A and B;
- 5.) The Draft CAFO Regulations (or 7201 Regulations Governing the Control of Water Pollution, Section 9.5) set forth at the public hearing with the minor recommended changes as reflected in Appendix C are advisable, adequately supported, not arbitrary, and are consistent with the applicable laws and regulations. Consequently, the proposed regulations with minor edits (See Appendix C) should be approved as final regulations as promptly as possible and

be allowed to go into effect ten days after publication in the next available issue of the *Delaware Registrar of Regulations*; and that

6.) The Departments shall implement the proposed regulations (found in Appendix C) as final regulations to the *Delaware Registrar of Regulations* for publication in its next available issue and shall provide written notice to regulated community through various means such as public notice, meetings, letters, and website notification.