Secretary's Order No.: 2011-W-0042

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

Date of Issuance: October 15, 2011

Effective Date of Regulations: November 11, 2011

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 August 1, 2011 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, USEPA delegated to the DNREC the authority to administer and enforce the NPDES program. In 1999, Delaware enacted the Nutrient Management Law which created the Delaware Nutrient Management Commission, housed in the Delaware Department of Agriculture (DDA) and established 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. The actions initiated by the two State Agencies 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 withdrawal of Delaware's delegated authority to administer this NPDES program.

In 2003, USEPA 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 2nd Circuit Court of Appeals ruled the CAFO rules did not comply with the 1972 Clean Water Act. To meet the 2nd Circuit Courts ruling, USEPA 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 2010 *7201 Regulations Governing the Control of Water Pollution, Section 9.5* were a result of that effort.

It become apparent during the initial redrafting of the regulations in 2010, through comments received during that regulation promulgation process and further examination of the then current MOA by DDA and DNREC staff that the MOA (written in 2000) needed to be rewritten to provide further clarity related to the roles of each agency. A new 2010 MOA is now in effect and compliments these amended draft regulations. The new December 2010 MOA more accurately expresses the authorities, roles, and responsibilities of the two agencies. 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 USEPA, and will issue individual permits. This MOA set the framework for joint (DDA and DNREC) promulgation of the 2011 amended Draft CAFO regulations under statutory authorities in Del. C., Title 3, Chapter 22, and Del. C., Title 7, Chapter 60.

After promulgation of the 2010 *7201 Regulations Governing the Control of Water Pollution, Section 9.5*, USEPA informed DNREC and DDA that the 2010 version was not adequate to satisfy US Environmental Protection Agency criteria. Beginning in January of 2011, DNREC and DDA reinitiated discussions with USEPA to resolve the points of difference between the state agencies and our federal partners. The 2011 amended *Draft 7201 Regulations Governing the Control of Water Pollution, Section 9.5* are the result of those discussions to achieve equal to status with new approved federal directives, and will most effectively and efficiently address nutrient pollution considering Delaware's particular circumstances

As stated before, a new MOA was signed between DDA and DNREC in December 2010. Discussions with USEPA concerning Delaware's CAFO regulations recommenced in early 2011. Through a series of meetings, DNREC, DDA and USEPA discussed the points of difference and resolved terms of agreement over the next five

months; the 2011 amended *Draft 7201 Regulations Governing the Control of Water Pollution, Section 9.5* are the result of those discussions.

The DNREC and DDA published the complete revised *Draft 7201 Regulations Governing the Control of Water Pollution, Section 9.5* in the August 1, 2011 Delaware Register of Regulations. A Public Hearing was held at the Delaware Department of Agriculture building in Dover, on August 25, 2011, and the final regulations will be promulgated on November 11, 2011. In addition to the public hearing, the regulations were presented to the Delaware Nutrient Management Commission at their July 2011 monthly meeting and were they voted in support of the regulation revisions. Members of DDA staff also presented the 2011 revised regulations to the Delmarva Poultry Industry (DPI) environmental committee on August 11, 2011.

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, 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" (Appendix C) portion of the Report; some of the more important issues raised, relate 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 new 2010 MOA; research related to nutrient handling (including documents concerning field staging in the record, and documents related to setbacks which were included in the 2010 amendments of CAFO Regulation Hearing Officer's Report and are incorporated by reference into the record); and the demonstrated successful history of cooperation between 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, are well supported by the record developed by the Departments and adopt the Report (with Appendices and Attachment) 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 2010 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 August 25, 2011;

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 recommendation, and record, are adopted and provide additional reasons and findings for this Order;

6.) The amendments in the Draft Regulations should be adopted as final regulations because they enable the delegated program and are in the best interests of the regulated community and the environment, and the amendments are well supported by documents in the record; and

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 7, 2011

I. BACKGROUND

This Report considers proposed amended regulations entitled "Regulations Governing the Control of Water Pollution, Section 9.5", **(see Appendix B)** which the Department of Natural Resources and Environmental Control, and the Department of Agriculture drafted and published in the August 1, 2011 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 withdrawal 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 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 2nd Circuit Court of Appeals ruled the CAFO rules did not comply with the 1972 Clean Water Act. To meet the 2nd 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 2010 *Draft 7201 Regulations Governing the Control of Water Pollution, Section 9.5* were a result of that effort.

It become apparent during the initial redrafting of the regulations in 2010, through comments received during that regulation promulgation process and further examination of the then current MOA by DDA and DNREC staff that the MOA (written in 2000) needed to be rewritten to provide further clarity related to the roles of each agency. A new 2010 MOA **(see Exhibit 1)** is now in effect and compliments these amended draft

regulations. The new December 2010 MOA more accurately express the authorities, roles, and responsibilities of the two agencies. In accordance with the 2010 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 2011 amended Draft CAFO regulations under statutory authorities in Del. C., Title 3, Chapter 22, and Del. C., Title 7, Chapter 60.

After promulgation of the 2010 *Draft 7201 Regulations Governing the Control of Water Pollution, Section 9.5*, EPA informed DNREC and DDA that the 2010 version was not adequate to satisfy US Environmental Protection Agency criteria. Beginning in January of 2011, DNREC and DDA reinitiated discussions with EPA to resolve the points of difference between the state agencies and our federal partners. The 2011 amended *Draft 7201 Regulations Governing the Control of Water Pollution, Section 9.5* are the result of those discussions to achieve equal to status with new approved federal directives, and will most effectively and efficiently address nutrient pollution considering Delaware's particular circumstances

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 in 2010 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, and the final regulations were promulgated on November 11, 2010.

The above is important to note because the 2011 regulation revisions are very minor in comparison to the 2010 regulatory effort and represent a continuation of the process begun in 2009. As stated before, a new MOA was signed between DDA and DNREC in December 2010. Discussions with EPA concerning Delaware's CAFO regulations recommenced in early 2011. Through a series of meetings, DNREC, DDA and EPA discussed the points of difference and negotiated terms of agreement over the next five months; the 2011 amended *Draft 7201 Regulations Governing the Control of Water Pollution, Section 9.5* are the result of those discussions.

The DNREC and DDA published the complete revised *Draft 7201 Regulations Governing the Control of Water Pollution, Section 9.5* in the August 1, 2011 Delaware Register of Regulations. A Public Hearing was held at the Delaware Department of Agriculture building in Dover, on August 25, 2011, and the final regulations will be promulgated on November 11, 2011. In addition to the public hearing, the regulations were presented to the DNMC at their July 2011 monthly meeting and were they voted in support of the regulation revisions. Members of DDA staff also presented the 2011 revised regulations to the Delmarva Poultry Industry (DPI) environmental committee on August 11, 2011.

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 August 1, 2011 Delaware Registrar of Regulations. The public hearing record contains a sixteen page verbatim transcript **(see Appendix A with Exhibits 1 through 6)** 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 August 1, 2011 to August 31, 2011 with the public hearing held 7:00 pm on August 25, 2011, 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. Mr. Robert Underwood (DNREC) entered both the 2011 MOA **(Exhibit 1)** and the revised 2011 revised *Draft 7201 Regulations Governing the Control of Water Pollution, Section 9.5,* **(Exhibit 2)** into the record. Mr. Underwood also entered the Senate Bill 26 **(Exhibit 3)** into the record which codified the 2011 MOA. Mr. Underwood further entered into the record a letter **(Exhibit 4)** from Mr. Shawn Garvin, EPA Region III Administrator, dated August 19, 2011, in which Mr. Garvin communicates that "EPA has evaluated the proposed regulatory amendments and has determined that they meet the applicable Federal regulations governing CAFOs found in 40 C.F.R. Parts 122 and 412. If the regulations are promulgated as proposed, EPA expects to approve the regulations immediately upon their becoming effective." To aid understanding of the regulatory revision by the public in attendance, Mr. Larry Towle (DDA) described the proposed regulatory revision using a power point presentation (Exhibit 5). No individuals or representatives of non-governmental organizations presented information or comments during the public hearing. Post-hearing, the Environmental Integrity Project **(Exhibit 6)** submitted written comments before the end of the public comment period. In addition, the public hearing transcript, marked **(Appendix A)**, was entered into the record post hearing.

As stated before, the proposed revised Draft CAFO Regulations are also a part of the public record **(Exhibit 2 and Appendix B)**. Revisions to the Draft CAFO Regulations are very briefly summarized as follows:

1. Amend 7 Del. Admin. C. § 7201-9.5.2.1, Definition of "Department"
The revised definition of "Department" is as follows: "means the Delaware Department of Natural Resources and Environmental Control which shall administer the program with the assistance of the Delaware Department of Agriculture."

2. Amend 7 Del. Admin. C. § 7201-9.5.2.1 , Definition of "Secretary"
The revised definition of "Secretary" is as follows: "means the Secretary of the Delaware Department of Natural Resources and Environmental Control (or his/her designee), who shall administer the program with the assistance of the Secretary of the Delaware Department of Agriculture (or his/her designee)."

3. Amend 7 Del. Admin. C. § 7201-9.5.2.1 , Definitions of "New Source"
This revised definition is imported from 7 Del. Admin. C. § 7201-2.0, with the addition of a sentence to address Delaware's specific siting criteria and is as follows: "means any building, structure, facility or installation from which there is or may be a discharge of pollutants, the construction of which commences:
• After promulgation of standards of performance under §306 of the Act which are applicable to such source; or
• After proposal of standards of performance under §306 of the Act which are applicable to such source, but only if the standards are promulgated within 120 days of their proposal.
In addition, any building, structure, facility or installation constructed after the effective date of these regulations must also meet the siting criteria described in §7.0 of these regulations."

4. Amend 7 Del. Admin. C. § 7201-9.5.2.1 , Definitions of "New Discharge"
This definition is imported from 7 Del. Admin. C. § 7201-2.0, except the fourth bullet point out of five bullet points on "indirect discharger" is deleted. The revised definition is as follows: "means any building, structure, facility or installation:
• Which prior to August 13, 1979, had not discharged pollutants;
• Which had never received a final effective NPDES permit for discharges at that site;
• From which there is or may be a new or additional discharge of pollutants; and
• Which does not fall in the definition of "new source".

5. Amend 7 Del. Admin. C. § 7201-9.5.3.2 , Designation of a CAFO
This revision deletes the reference to the Nutrient Management Commission and is as follows: "The Secretary or his designee may designate any AFO as a CAFO upon determination that it is a significant contributor of pollutants to Waters of the State."

6. Amend 7 Del. Admin. C. § 7201-9.5.5.1.4.6.1.1, Conduits to Surface Waters Setback
There was concern about setbacks from conduits to surface waters and as a result the following statement has been added to the revised regulations: "(Unless the CAFO exercises one of the compliance alternatives provided for in paragraphs [9.5.]5.1.4.6.1.2, or [9.5.]5.1.4.6.1.3, of this section, manure, litter and process wastewater may not be applied closer than 100 feet to any down-gradient surface waters, open tile intakes structures, sinkholes, agricultural well heads or other conduits to surface water .)" Delaware opted to incorporate the federal language in our state regulations rather than draft a policy statement to communicate the setback requirements.

7. Amend 7 Del. Admin. C. § 7201-9.5.6.1.1.11, Entry and Evaluation
This revision removes any ambiguity over unannounced inspections and is as follows:
"The owner and operator may or may not be notified in advance of entry and evaluation. Entry and evaluation shall be in accordance with any biosecurity requirements of the individual or commodity industry involved. As a general practice DNREC and DDA will provide advance notice of inspections; however, in order to ensure compliance, unannounced inspections may be performed.

8. Amend 7 Del. Admin. C. § 7201-9.5.7.0, New Source Siting
The word "siting" is added in § 9.5.7.0 and § 9.5.7.1.1., to cross reference with the definition of "New Source." See below:

7.0 Criteria for Siting New CAFO Facilities.

7.1 New CAFOs not permitted prior to the effective date of these regulations shall meet the following criteria:

7.1.1 New Source Siting Determination

EIP was the only commenter to the 2011 revised regulations. EIP previously questioned the definitions used in the 2010 version of the regulations. Their concerns were addressed with the 2011 revisions. The Environmental Integrity Project also 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. DNREC and DDA addressed those 2010 comments with the December 2010 version of the MOA.

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) and Robert Underwood (DNREC). That memo has been submitted to the Hearing Officer and is included in the public record **(See Appendix C).**

IV. RESPONSE TO COMMENTS DISCUSSIONS AND REASONS

The DNREC, DDA, and EPA have worked diligently over the last nine months (and for two years prior) to draft revised CAFO Regulations which meet the intent of the federal law and regulations. The revised Draft CAFO Regulations basically 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 July 15, 2011. 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 C** for details of the Departments' "Response to Comments." It is important to review the entire "Response to Comments" portion of the report found in **Appendix C**; 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. EIP expressed support of the revised definitions.

EIP expressed concern that the setback criteria for conduits to surface waters conveyed within the revised regulations does not meet the intent of the Federal law and regulations. DDA and DNREC staff disagree with this contention and believe that the language within the revised regulations does allow for operator setback options (as do the federal regulations), but does require a setback from conduits to surface waters when applying manure and/or processed wastewater in the application area. The draft regulations meet the intent of the federal directives.

EIP also 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 C** and included as **Attachment 1** concludes that properly managed and staged poultry litter will not cause nutrient runoff. In addition, an environmental checklist developed by NRCS for Maryland and Delaware was referenced by the Environmental Integrity Project, stating that NRCS had guidelines that stated poultry waste should be covered until used whenever possible. This was in reference to EIP's objection to "Temporary Field Staging" in the land application area. This checklist does not include the land application area, so has been taken out of context. NRCS's standard on manure utilization references field staging of manure, but does not reference when it should be covered, but states proper stacking criteria and if it needs to be covered, provides cover criteria.

EIP contends that the revised CAFO regulation "violates public participation requirements." The proposed regulations attempt to balance public participation requirements with the need to protect private business practices. DDA and DNREC staff believes that the language within the revised 2011 CAFO regulation does allow for public access to relevant and important information while protecting confidential business information.

EIP expressed that the revised 2011 CAFO regulation is not "ripe for public comment." It appears this belief is based on the erroneous contention that the State Technical Standards are a part of the CAFO regulation. The State Technical Standards do inform the revised *Draft 7201 Regulations Governing the Control of Water Pollution, Section 9.5,* **(Exhibit 2)** and are referenced throughout the regulation, but are not a part of the regulation. The Technical Standards are policy/guidance documents and as such are always open for public review and comment, and may be amended at any time with peer review approval. There is a standing committee which recently reviewed all the Technical Standards and drafted amendments and new standards as needed. EIP is the first agency outside the Technical Standards Committee to submit official comments this year. EIP's comments have been referred to that committee and the committee has communicated that they will consider EIP's comments and respond to them appropriately.

As stated previously, it is important to review **Appendix C** for the full "Response to Comments" submitted by the technical staff of DDA and DNREC. The staff has 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.

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 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 2011 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 C;

5.) The Draft CAFO Regulations (or 7201 Regulations Governing the Control of Water Pollution, Section 9.5) set forth at the public hearing as reflected in **Appendix B** are advisable, adequately supported, not arbitrary, and are consistent with the applicable laws and regulations. Consequently, the proposed regulations **(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 B)** 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.