



STATE OF DELAWARE  
DEPARTMENT OF NATURAL RESOURCES  
AND ENVIRONMENTAL CONTROL

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OFFICE OF THE  
SECRETARY

**Secretary's Order No. 2016-W-0008**

**Re: Approving Draft National Pollutant Discharge Elimination System General Permit No. DE 5000N/11 for Large, Medium, and Designated Poultry Concentrated Animal Feeding Operations with No Land Application of Manure**

**Date of Issuance: March 30, 2016**

**Effective Date: March 30, 2016**

**Background and Procedural History**

Pursuant to 7 Del. C. §§6003, 6004(b), and 6006(4) and 3 Del. C. §§2200 et seq. and other relevant authority, the Secretary of the Department of Natural Resources and Environmental Control ("DNREC") and the Secretary of the Department of Agriculture ("DDA")<sup>1</sup> jointly issue this Order after a December 3, 2015 public hearing. The Departments held the public hearing on a draft National Pollutant Discharge Elimination System ("NPDES") general permit, Permit No. DE-5000N/11 ("General Permit"). This General Permit would be issued upon application to eligible Large, Medium, and Designated Poultry Concentrated Animal Feeding Operations with no land application of manure. ("Poultry CAFOs").<sup>2</sup>

<sup>1</sup> Hereinafter the DNREC and the DDA are referred to as the "Departments."

<sup>2</sup> The CAFO Regulation allows general NPDES permits to be issued based upon animal categories and the number of animals. The Permit considered in this Order applies to animal feeding operations with either chickens or turkeys classified as CAFOs either because of their number of animals or by the Departments' designation, and the CAFO does not apply manure to the land.

*Delaware's Good Nature depends on you!*

The experts within the DNREC Division of Water, Surface Water Discharge Section (“SWDS”) and the DDA’s Nutrient Management Program (“NMP”) jointly prepared the Permit pursuant to Section 9.5 of Delaware’s *Regulations for the Control of Water Pollution, 7 DE Admin. Code 7201* (“CAFO Regulation”)<sup>3</sup> in order to allow Poultry CAFOs to use Section 9.5’s general NPDES permit procedure to obtain a NPDES permit rather than use the individual NPDES permit procedures.

On October 28, 2015, the Departments had published in two newspapers legal notice of the Permit and that a public hearing would be held in order to consider public comments. Notice also was posted on the Departments’ web sites. The Departments’ presiding hearing officer, Robert P. Haynes, presided over the public hearing, which was attended by approximately thirteen members of the public and approximately ten staff members from the Departments. The Record includes written comments jointly submitted by the Mid-Atlantic Environmental Law Center and the Food and Water Watch (together referred to as “MAELC”) and by the Chesapeake Bay Foundation (“CBF”). At the public hearing, the SWDS and the NMP staffs made presentations, and one member of the public spoke on behalf of the groups ‘Socially Responsible Agriculture’ and ‘Protect our Indian River.’ This person’s comments also adopted the MAELC’s comments.

This Order considers the Record, as established by the attached Hearing Officer’s Report (“Report”). The SWDS/NMP Technical Response Memorandum (“TRM”) attached to the Report recommends certain clarifications to the Permit and one small change based on the public comments, and the NMP/SWDS provided a Revised General Permit attached to the TRM that reflects the TRM’s recommendations. The TRM also

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<sup>3</sup> The Departments jointly adopted the CAFO Regulation in Secretary’s Order No. 2011-W-0043 issued October 15, 2011 and published in the November 1, 2011 *Delaware Register of Regulations*.

explains thoroughly and in detail why the other public comments do not support any other changes to the Revised Permit. The Report recommends approval of the SWDS/NMP Revised General Permit based upon the recommendation of the TRM.

### **Findings of Fact**

The Departments find that the Record supports adopting the Report's findings of fact to the extent they are consistent with this Order. The Departments find that the Record supports approving the Revised General Permit for use in the NPDES permitting of Poultry CAFOs. The Report reviews the Record that includes the public comments and exhibits presented at the December 3, 2015 public hearing and the post-hearing TRM. After a thorough review of the Record, the Departments find that the Revised General Permit is well-supported by the Departments' experts in the SWDS and the NMP.

The Departments find that the Revised General Permit will provide Poultry CAFOs with an alternative procedure to obtaining NPDES permit coverage than the current NPDES individual permit procedure.<sup>4</sup> This alternative will impose less of an administrative burden on farmers than the NPDES individual permit's procedures. Thus, the Revised General Permit approved by this Order could benefit the estimated 77 Large Poultry CAFOs and 262 Medium Poultry CAFOs eligible to receive the Revised General Permit approved by this Order.

In addition, the Revised General Permit will allow the Departments to avoid preparing individual NPDES draft permits for each individual application, which will result in administrative efficiency. Thus, Poultry CAFOs and the Departments will be

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<sup>4</sup> See Section 6.0 of the *Regulations Governing the Control of Water Pollution*, 7 DE Admin. Code 7201

able to avoid the more burdensome individual NPDES permit procedure and instead may now use the general NPDES permit procedure based upon the Revised General Permit.

The Departments find the Revised General Permit properly follows the CAFO Regulation, and identifies the Poultry CAFOs eligible to use the general NPDES permit procedure. The Departments find this identification of eligible Poultry CAFOs is reasonable and well supported in the Record based upon the Departments' technical expertise.

The Revised General Permit relies on the Departments' existing regulation of Poultry CAFOs. Section 2201(1) of the Delaware Nutrient Management Law ("DNML"), which assigns to DDA and the Delaware Nutrient Management Commission ("DNMC") the authority to "regulate those activities involving the generation and application of nutrients in order to help improve and maintain the quality of Delaware's ground and surface waters and to meet or exceed federally mandated water quality standards..." *3 Del. C. §2201(1)*. Section 2248 expressly directs the joint regulation of CAFOs under the NPDES program and cites the CAFO Regulation. Moreover, the EPA also has approved the Departments' joint regulation of CAFOs under the NPDES permitting program. Thus, the Departments find that the Revised General Permit is consistent with the law's joint agency regulation of Poultry CAFOs under the NPDES program.

The Revised General Permit requires all Poultry CAFOs to have an Animal Waste Management Plan ("AWMP"), which is prepared by an individual certified in Delaware to prepare AWMPs. The AWMP requires a CAFO to follow the State Technical Standard's best management practices ("BMP") to protect Delaware waters from any

unpermitted discharge of manure, litter, and process wastewater. The Departments finds that this coordinated regulation, whereby a Poultry CAFO's AWMP is incorporated into the NPDES permit, is reasonable and well-supported by the CAFO Regulation, which, in turn, is consistent with the DNML's joint NPDES regulation of CAFO by the DNREC and the DDA.

The Departments find that the Revised General Permit will improve the protection of Delaware waters by requiring Poultry CAFOs to meet the Effluent Limitation Guidelines ("ELGs") as set forth in Section C of the Revised General Permit. The ELGs for Large Poultry CAFOs require that no manure, litter or process wastewater be discharged from the Poultry CAFOs' production areas under almost all operating conditions. This Section C allows Large Poultry CAFOs to discharge only when there is extraordinary precipitation, and that the production area be designed, constructed, operated and maintained to contain all manure, litter and process wastewater plus runoff and direct precipitation from a 25 year 24 hour rainfall event. *See* Section 9.5.6.4.1.1.1.2 of the CAFO Regulation. Similarly, Section C requires all Medium and Designated Poultry CAFOs operate according to their site specific AWMPs. Thus, the Departments find that the Revised General Permit's terms will help protect Delaware's waters from the risk of water pollution from Poultry CAFOs with unpermitted discharges and will allow Poultry CAFOs with General Permits to comply with the EPA required NPDES permitting of CAFOs.

The Revised General Permit allows NPDES permit coverage to Poultry CAFOs that submit a completed Notice of Intent ("NOI") form submitted pursuant to Section 9.5.4.1 of the CAFO Regulation. Each Poultry CAFO's NOI will include specific details

and have an AWWP attached. The Department finds that the Revised General Permit's use of a completed NOI as an application for the Revised General Permit approved by this Order is consistent with the CAFO Regulation. Hence, the Departments find that no additional information should be required from a Poultry CAFO other than the information in a NOI.

In sum, after considering the public comments, as discussed below, the Departments find that the Revised General Permit is consistent with the CAFO Regulation and hereby approve it.

### **Reasons and Conclusions**

Based upon the above findings of fact, the Departments conclude that the Revised General Permit should be approved to allow Poultry CAFOs to be regulated under the NPDES general permit procedures. The Record supports this conclusion following the discussion of the issues raised by the public comments summarized in the TRM, as adopted by the Report. The TRM's and the Report's analysis and discussion are adopted to the extent they are consistent with this Order.

The positions presented in the public comments are summarized as follows: 1) the MAELC seeks to include "propose to discharge" in the General Permit's Section 4.0 "Duty to Apply;" 2) the MAELC comment that the General Permit should include a presumption of a discharge for Poultry CAFOs; 3) the MAELC comment that the General Permit should require groundwater and surface water monitoring; 4) the MAELC comment that the Departments should require Poultry CAFOs to provide additional information in their NOIs; 5) the MAELC comment that any poultry CAFOs that would discharge into Exceptional Recreational or Ecological Significance ("ERES") waters

should only be regulated by an individual NPDES permit and should not be allowed to use the Section 9.5 general permit procedures; 6) the MAELC comment that Poultry CAFOs should pay a permit fee; 7) the MAELC comment that the General Permit should be revised because it fails to include specific requirements for best management practices; 8) the CBF comment that the Departments will require more resources to achieve NPDES compliance; 9) the CBF comment that the Phosphorous Site Index Technical Standard and the Nutrient Management Regulations should be updated to reflect manure that is exported by a CAFO for use at another location; 10) the CBF comment that the General Permit should regulate ammonia emissions; 11) the CBF comment that the Permit should require additional information on where manure will be transported and require its recipients to have a nutrient management plan; and 12) the CBF comment that the Permit should require zero discharges from Medium CAFOs similar to the standard that the Permit requires for Large CAFOs.

The Report and SWDS/NMP TRM discuss the above issues in detail. Except for the first issue, which the NMP/SWDS adopted and reflected in Revised General Permit, the Departments conclude that the remaining issues raised in the public comments do not support modifying the Revised General Permit. The public comment on issue one was reflected in the Revised General Permit's revision to Section 4.0 by including the phrase "propose to discharge" The public comment on issue four was reflected in the Fact Sheet on how to access topographic maps. The Departments conclude that these changes are reasonable and consistent with the CAFO Regulation, as noted in the TRM.

Other than the two public comments discussed above, the Departments conclude that the other public comments that seek additional changes to the Revised General

Permit should be rejected. Many of these changes would be inconsistent with the CAFO Regulation. The Departments, based upon the TRM, conclude that the SWDS and the NMP experts have provided well-supported and sound reasons to reject the public comments' attempt to change the Revised General Permit. Indeed, most of the public comments seek to amend the CAFO Regulation. Moreover, as pointed out in the Report, the Departments cannot, in this proceeding, make any change to the CAFO Regulation, which must be done separately in a regulation proceeding and not in this permitting proceeding. The other issues that seek to increase the resources to administer the NPDES program's regulation of CAFOs and seek to impose fees for a general NPDES permit for CAFOs also cannot be addressed in this permit proceeding because they are not the subject of a decision on a NPDES general permit.

The Departments conclude that the Revised General Permit fully complies with the current CAFO Regulation and that there is no reason to warrant reconsideration of the CAFO Regulation.

The Departments enter the following conclusions:

1. The Departments have jurisdiction under their state and delegated federal authority pursuant to their MOA and their respective statutory authorities in *7 Del. C. Section 6001 and 6006*, and *3 Del. C. §§2200 et seq.* to adopt the Revised General Permit for use in the NPDES general permit procedure for Poultry CAFOs pursuant to the CAFO Regulation;

2. Pursuant to *7 Del. C. Sections 6003, 6004, and 6006*, the Departments provided public notice by publication of a legal notice in two newspapers of the General Permit and

that the Departments would receive public comments on it during a public comment period and at the December 3, 2015 public hearing.

3. The Departments provided the required public comment period for written public comments and held a public hearing in a manner consistent with the Departments authority and the applicable regulations in order to provide the public with an opportunity to comment on the General Permit;

4. The Departments considered all timely and relevant public comments in making this determination on the Permit, and this Order that adopts the Revised General Permit for use in the NPDES general permitting of Poultry CAFOs;

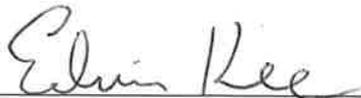
5. The Departments adopt the Report to the extent it is consistent with this Order, including the Report's adoption of the SWDS and the NMP positions as set forth in the TRM;

6. The Revised General Permit will allow the Departments to regulate Poultry CAFOs under the NPDES program based upon the CAFO Regulation, and provide Poultry CAFOs with another procedure to obtain a NPDES permit that EPA requires; and

7. The Departments shall publish this Order on their web sites and provide such public notice of the Order as required by the law and their applicable regulations.



David S. Small, Secretary of Delaware Department of Natural Resources and Environmental Control



Edwin Kee, Secretary of the Delaware Department of Agriculture

## HEARING OFFICER'S REPORT

To: The Honorable David S. Small  
Secretary, Department of Natural Resources and Environmental Control  
The Honorable Edwin Kee  
Secretary, Department of Agriculture

From: Robert P. Haynes, Esquire  
Presiding Public Hearing Officer

**Re: Draft National Pollutant Discharge Elimination System General Permit No. DE 5000N/11 for Large, Medium, and Designated Poultry Concentrated Animal Feeding Operations with No Land Application of Manure**

Date: February 24, 2016

### I. PROCEDURAL HISTORY

This proceeding considers the draft National Pollutant Discharge Elimination System ("NPDES") general permit, Permit No. DE 5000N/11 ("Permit"), which will be available to Large, Medium, and Designated Poultry<sup>1</sup> Concentrated Animal Feeding Operations ("Poultry CAFOs") that do not land apply manure. The Permit was prepared by the Delaware Department of Agriculture's ("DDA") Nutrient Management Program ("NMP") and the Delaware Department of Natural Resources and Environmental Control's ("DNREC") Division of Water, Surface Water Discharges Section ("SWDS") (hereinafter jointly referred to as "SWDS/NMP"), which exercise shared NPDES regulatory authority over CAFOs pursuant to a 2010 Memorandum of Agreement ("MOA").

The Permit implements the NPDES general permit regulation of CAFOs, which the DDA and the DNREC jointly authorized in the Secretary's Order No. 2011-W-0043 issued October 15, 2011. Secretary's Order No. 2011-W-0043 approved a new NPDES

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<sup>1</sup> The Permit would regulate chicken and turkey CAFOs.

regulation, Section 9.5 ‘Concentrated Animal Feeding Operation’ (“CAFO Regulation”) within Delaware’s *Regulations Governing the Control of Water Pollution, 7 DE Admin. Code 7201* (“Water Quality Regulations”). The CAFO Regulation provided Delaware CAFOs with a NPDES general permit procedure as an alternative to NPDES regulation by a NPDES individual permit authorized by Section 6.0 of the DNREC Regulation 7201. *7 DE Admin. Code 7201*.

On April 28, 2015, the United States Environmental Protection Agency (“EPA”) approved the Permit, subject to further review of any changes.

On September 1, 2015, the Delaware Nutrient Management Commission (“DNMC”) reviewed the Permit.<sup>2</sup>

The SWDS/NMP had legal notices of the Permit and its Fact Sheet published in the October 28, 2015 issues of *The News Journal* and the *Delaware State News* and notice also was posted on the Departments’ web sites. This public notice provided the public with the opportunity to provide public comments in writing or at a December 3, 2015 public hearing at the DDA offices.

The Departments received two written public comments, and at the public hearing only one person provided public comments, which adopted one of the written comments. The public comment period closed at the conclusion of the public hearing.

I requested technical assistance from the Departments’ experts SWDS/NMP, who prepared the attached joint Technical Response Memorandum (“TRM”). The TRM

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<sup>2</sup> The DNMC’s regulatory role is established by the *Delaware Nutrient Management Law, 3 Del. C. Chap. 22*. (“DNML”). The DNMC has the Departments’ Secretaries as ex officio members, and the DNML provides for the Departments’ roles in the NPDES regulation of Delaware’s CAFOs, and as reflected in the MOA.

recommends minor revisions to the Permit, fully discusses the public comments, and provides a revised Permit (“Revised Permit”) consistent with the recommendations in the TRM. The TRM recommends adopting one of the changes advocated in a public comment, and fully and thoroughly explains why the remaining public comments should not be adopted. The TRM also provides for the Record the current estimated number of Poultry CAFOs eligible to obtain the Permit. I consider the Record, as established herein, supports a final decision to approve the Revised Permit.

## **II. SUMMARY OF THE RECORD<sup>3</sup>**

This Report establishes the following record: 1) the verbatim transcript of the public hearing; 2) the documents identified as exhibits, including those identified as exhibits at the public hearing, is set forth in Appendix A hereto; and 3) this Report, the attached TRM and any documents referenced in this Report and the TRM.

At the public hearing, I made introductory remarks on the hearing’s agenda, the hearing’s procedure and its subject matter. The SWDS representative, Brian Churchill, Environmental Scientist, then spoke and introduced the DDA’s Secretary, the Honorable Ed Kee, DDA Environmental Scientist Ben Coverdale, DDA NMP Administrator Chris Brosch, and DNREC SWDS Program Manager Bryan Ashby. Mr. Churchill provided for the record the following exhibits:

- Ex. 1-the October 28, 2015 legal notice of the Draft Permit,
- Ex. 2-the Fact Sheet for the Draft Permit;
- Ex. 3-the Draft Permit;
- Ex. 4-the Notice of Intent’s application for general NPDES permit coverage of Poultry CAFOs;
- Ex. 5- joint comments from the Mid-Atlantic Environmental Law Center and Food and Water Watch (hereinafter jointly referred to as the “MAELC”) the MAELC comments; and
- Ex. 6- written comments from the Chesapeake Bay Foundation (“CBF”).

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<sup>3</sup> This summary does not determine any factual accuracy.

The MAELC comments are summarized as follows: 1) the Permit's Section 4.0's Duty to Apply of the Permit should be changed to include "propose to discharge." 2) the Permit should include a presumption of a discharge for Poultry CAFOs; 3) the Permit should require groundwater and surface water monitoring; 4) the Permit should change a Poultry CAFO's Notice of Intent ("NOI") to include additional information in order to apply for the Permit; 5) the Permit should not be used for Poultry CAFOs that would discharge into waters that DNREC has designated Exceptional Recreational or Ecological Significance ("ERES"); 6) the Poultry CAFOs should pay a permit fee; and 7) the Permit should require site specific requirements for best management practices ("BMP").

The CBF comments are summarized as follows: 1) the Departments require more resources to achieve NPDES compliance; 2) the Departments should update the Phosphorous Site Index Technical Standard and amend the Nutrient Management Regulations to regulate manure CAFOs exported to other locations; 3) the Permit should regulate ammonia air emissions; 4) the Permit should be amended to require information on where a CAFO transports its manure and to require the recipients of the manure to have a nutrient management plan; and 5) the Permit should be amended to require Medium CAFOs to be regulated by the same limits as Large CAFOs.

Chris Brosch next spoke and discussed how the Permit would allow NPDES regulation of Poultry CAFOs. He estimated that 455 Delaware Poultry CAFOs would be eligible to obtain a general NPDES permit. He indicated that 76 Large Poultry CAFOs and 255 Medium Poultry CAFOs already had submitted a NOI towards obtaining a general NPDES permit to be approved by this proceeding.

The one member of the public who spoke was Maria Payan, who represented two groups, 'Socially Responsible Agriculture' and 'Protect our Indian River.' Her comments adopted MAELC's comments.

As noted above, the SWDS/NMP experts provided a response to the public comments in the TRM, which thoroughly reviews the MAELC and the CBF comments. The SWDS/NMP TRM discusses in detail each of the changes sought by the MAELC and CBF comments, and provides good, well-supported reasons why the Permit should not be revised based upon the public comments except for one change advocated by MAELC. The SWDS/NMP recommended revising the Permit with MAELC's minor change, which added "propose to discharge" to the Permit's Section 4.0. The SWDS/NMP also clarified in the Permit that Poultry CAFOs to be regulated by the general NPDES permit include Large, Medium and Designated CAFOs with chicken and turkeys animal feeding operations ("AFO") and that do not land apply manure. The SWDS/NMP provided a Revised Permit to reflect their final recommendations.

The Record also includes the EPA's April 28, 2015 approval of the Permit, subject to continuing oversight of any change to it.

### **III. FINDINGS OF FACT**

The Record supports finding that Delaware has 77 Large Chicken CAFOs, 262 Medium Chicken CAFOs, no Turkey CAFOs, and no Designated Poultry CAFOs as of January 2016 when SWDS/NMP prepared its TRM that could be eligible to obtain the Permit. I find that the Record supports the Departments approving the Revised Permit, and I recommend the Departments approve the Revised Permit to allow Poultry CAFOs to use the NPDES general permit procedure established by the CAFO Regulation.

The Record supports finding that NMP already has received NOIs from 30 Large Chicken CAFOs and from 96 Medium Chicken CAFOs.<sup>4</sup> The Departments' final approval of the general NPDES permit for Poultry CAFOs should increase Poultry CAFOs submitting NOIs to the NMP. Thus, the increased NPDES permitting of Poultry CAFOs will result in their compliance with EPA's NPDES permit requirement, which also will protect Delaware's water from water pollution from Poultry CAFOs that do not have NPDES permits.

The SWDS/NMP properly determined in the Revised Permit and the TRM that the general NPDES permit should be made available to Poultry CAFOs, which includes Large, Medium and Designated chickens and turkeys CAFOs that do not land apply manure. I find that the SWDS/NMP's determination to use the general NPDES permit procedure for the Poultry CAFOs is reasonable and well-supported by the SWDS/NMP experts based upon their considerable specialized knowledge and experience in regulating Poultry CAFOs. Accordingly, I recommend that the Revised Permit be adopted as consistent with Section 9.5.3 of the CAFO Regulation, which sets forth the specific animal categories and the number of animals within each category to be regulated by a general NPDES permit for CAFOs. Thus, the Revised Permit is consistent with the CAFO Regulation's for the chicken and turkey Large, Medium and Designated CAFOs.

EPA requires Poultry CAFOs in the State of Delaware that discharge or propose to discharge to waters of the state to apply for NPDES permits. The Revised Permit will

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<sup>4</sup> In addition, the NMP received NOIs from 5 chicken AFOs with less than the 37,500 chickens required for general NPDES permit coverage for Medium CAFOs. The Departments could regulate these smaller AFOs as CAFOs by designating them CAFOs as provided by the CAFO Regulation's designation procedure.

regulate Poultry CAFOs based upon best management practices, as established by an Animal Waste Management Plan (“AWMP”) that must be submitted with a NOI and must be prepared by a person certified by Delaware for preparing AWMPs pursuant to the DNMC’s regulation under the DNML. I find that this complies with the CAFO Regulation and recommend the Departments adopt the Revised Permit to protect Delaware water by Poultry CAFOs using AWMPs to control the discharge of pollutants from manure, litter and process wastewater.

I find that on April 28, 2015, the EPA approved the Permit for use in Delaware. This resulted in the Departments seeking public comment through the NPDES public participation process beginning with the October 28, 2015 publication of legal notices in two newspapers and on the Departments’ web sites, which commenced a public comment period for written comments that ended at the conclusion of the December 3, 2015 public hearing. I find that the Departments’ public participation fully satisfies the NPDES regulatory requirements for public participation.

The EPA will have a further opportunity to review the general permit that the Departments approve as a result of this public hearing process. I find that the Revised Permit does not materially change the Permit. I recommend that the Departments approve the Revised Permit as consistent with the CAFO Regulation and the NPDES public participation process.

I find that the Revised Permit will allow Poultry CAFOs to use general permitting procedure, as opposed to submitting an application for an individual NPDES permit pursuant to the procedures set forth in Section 6.0 of the *Regulations Governing the Control of Water Pollution, 7 DE Admin. Code 7201*. The general NPDES permit

procedures provide a less burdensome method for the Departments and the permittees to obtain NPDES permit coverage that the EPA requires for Poultry CAFOs.

The Revised Permit relies on the Departments' existing regulation of Poultry CAFOs. Section 2201(1) of the Nutrient Management Law assigns to DDA the authority to "regulate those activities involving the generation and application of nutrients in order to help improve and maintain the quality of Delaware's ground and surface waters and to meet or exceed federally mandated water quality standards..." 3 Del. C. §2201(1). Section 2248 expressly directs the joint regulation of CAFOs under the NPDES program and cites the CAFO Regulation. Moreover, the EPA also has approved the Departments' joint regulation of CAFOs under the NPDES permitting program. Thus, the Departments find that the Approved Permit is consistent with the law's joint agency regulation of Poultry CAFOs under the NPDES permitting program.

The joint NPDES regulation of Poultry CAFOs will rely on the Animal Waste Management Plans ("AWMP") prepared for each Poultry CAFO. The AWMP apply the State Technical Standard's best management practices ("BMP") to protect Delaware waters from manure, litter, and process wastewater discharges. I find that this coordinated regulation is reasonable and well-supported by the CAFO Regulation. I recommend that the Departments adopt the Revised Permit as consistent with the DNML as administered by the DNMC and the NMP.

I find that the Revised Permit will protect Delaware waters by requiring Poultry CAFOs to meet the Effluent Limitation Guidelines ("ELGs") as set forth in Section C of the Revised Permit. The ELGs for Large Poultry CAFOs' require that no manure, litter or process wastewater be discharged from the Poultry CAFOs' production areas under

almost all operating conditions. This Section allows Large Poultry CAFOs to a discharge only when there is extraordinary precipitation, and that the production area was designed, constructed, operated and maintained to contain all manure, litter and process wastewater plus runoff and direct precipitation from a 25 year 24 hour rainfall event. *See* Section 9.5.6.4.1.1.2 of the CAFO Regulation. Similarly, this Section regulates a Medium Poultry CAFO by requiring compliance to its AWMP. Thus, I find that the Revised Permit's terms will protect Delaware's waters from the risk from water pollution from Poultry CAFOs and will allow effective NPDES regulation of Poultry CAFOs to ensure the protection of Delaware's waters consistent with the DNML as administered by the DNMC and the NMP. Hence, I recommend approval of the Revised Permit.

I find that the Revised Permit is reasonable and well-supported because it allows NPDES permit coverage to Poultry CAFOs that submit a completed Notice of Intent ("NOI") form submitted pursuant to Section 9.5.4.1 of the CAFO Regulation. Each Poultry CAFO's NOI will include each specific details and have an AWMP attached. I find that the Revised Permit's use of a completed NOI is consistent with the CAFO Regulation. Hence, I find that a completed NOI provides the Departments with all the information from Poultry CAFOs necessary and required by the CAFO Regulation.

I find that reducing the administrative burden to the Departments and the Poultry CAFOs is beneficial to increase agricultural production while also protecting water quality. The benefits will occur from increased NPDES permitting of Poultry CAFOs, which will allow them to comply with the EPA requirement that all CAFOs that discharge or propose to discharge obtain a NPDES permit. The general NPDES permits

issued to Poultry CAFOs will allow them to operate under limits designed to protect Delaware's waters from pollution.

The Departments' experts in the SWDS and the NMP developed the Revised Permit to regulate Poultry CAFOs based upon an AWMP, which applies best management practices, as set forth in the State Technical Guidelines, to control discharges of pollutants into Delaware waters. I find that the Revised Permit properly will regulate Poultry CAFOs under the NPDES program in cooperation with the NMP's regulation under the NML and the Departments' MOA.

In sum, I find that the Revised General Permit should be approved as consistent with the CAFO Regulation, after considering the public comments discussed below that seek changes to the Permit.

#### **IV. REASONS AND CONCLUSIONS**

Based upon the above findings of fact, I conclude that the Revised Permit should be used to allow Poultry CAFOs to be regulated under the NPDES general permit procedures. The Record supports this conclusion based upon the discussion of the issues raised by the public comments in the TRM, as adopted by this Report. The TRM reflects the Departments' experts who provided a detailed and thorough analysis of the public comments.

I recommend that the Departments not make any change to the Permit except as reflected in the SWDS/NMP Revised Permit. The positions presented in the public comments that seek additional changes to the Revised Permit are summarized below: 1) the Permit should include a presumption of a discharge; 2) the Permit should require groundwater and surface water monitoring; 3) the NOIs should require more information

from Poultry CAFOs; 4) the Permit should not be used by any poultry CAFOs that would discharge into waters that DNREC has classified as Exceptional Recreational or Ecological Significance (“ERES”); 5) the Departments should require that the Poultry CAFOs should pay a permit fee to obtain a general NPDES permit; 6) the Permit should be revised to include specific requirements for best management practices for Poultry CAFOs; 7) the Departments should have more resources to achieve NPDES compliance of Poultry CAFOs; 8) the Departments should update the Phosphorous Site Index Technical Standard and the Nutrient Management Regulations should be updated to reflect manure that is exported by a CAFO for use at another location; 9) the Permit should regulate ammonia air emissions; 10) the Departments should require additional information on where the Poultry CAFOs manure will be transported and require its recipients to have a nutrient management plan; and 11) the Permit should be revised to require Medium CAFOs to have the same zero discharge limits established for Large CAFOs.

The above issues were fully and thoroughly reviewed and discussed by the SWDS/NMP TRM, which recommends not making any of the changes advocated by MAELC or CBF except for the changes to Section 4.0 and access to the topographic maps. . I agree with the TRM and recommend that the Departments not adopt any of the proposed changes in the public comments except for the one change reflected in the Revised Permit. This change revised Section 4.0 to include “propose to discharge,” which is consistent with the CAFO Regulation. Similarly, SWDS/NMP adopt the change to add access to topographical maps. Delaware CAFO regulations do not require topographic maps as part of the NOI process, however Federal CAFO regulations do, and

in light of the federal requirement, information on how to access topographic maps will be added to the Fact Sheet of the permit. I can add little more to the TRM's discussion, particularly since the SWDS and the NMP have the expertise with the NPDES regulation of CAFOs. The TRM details the expert technical response to each of the issues raised by the MAELC and the CBF in their comments and provides sound reasons why each public comment should not be adopted as a change to the Revised Permit.

I conclude that most of the MAELC and CBF comments represent an improper collateral challenge to the CAFO Regulation. The CAFO Regulation was issued in 2011 and may no longer be challenged and, as a regulation, has the same force and effect as a law. Indeed, the Departments are bound by the CAFO Regulation in their administration of the general NPDES permit for Poultry CAFOs in this proceeding.

From my perspective, the Departments issue the CAFO Regulation to allow all CAFOs to seek a NPDES permit using the general NPDES procedures. The SWDS/NMP developed the Revised Permit based upon specific permitting requirements for Poultry CAFOs consistent with the CAFO Regulation. The Poultry CAFOs represent the largest type of CAFOs in Delaware. The CAFO Regulation's general permit procedure allows for the classification of similar CAFOs and I agree that the SWDS/NMP experts properly determined that Poultry CAFOs should be regulated by the same NPDES general permit. I conclude that the Poultry CAFOs should be regulated by the Revised Permit because of the CAFO Regulation's same treatment of chicken and turkey CAFOs.

Consequently, I recommend that the Departments reject the public comments that seek additional changes to the Revised Permit. The TRM provides ample justification to the rejection of the MAELC and CBF positions. I conclude that the Revised Permit fully

complies with the current CAFO Regulation, and recommend that the Departments approve the Revised Permit to implement the NPDES general permitting of Poultry CAFOs that do not land apply manure, which represent the largest class of CAFOs in Delaware.

I recommend that the Departments enter the following:

1. The Departments have jurisdiction under their state and delegated federal authority pursuant to their MOA and their respective statutory authorities in *7 Del. C. Section 6001 and 6006*, and *3 Del. C. §§2200 et seq.* to adopt the Revised Permit for use in the NPDES general permit procedure for Poultry CAFOs pursuant to the CAFO Regulation;

2. Pursuant to *7 Del. C. Sections 6003, 6004, and 6006*, the Departments provided public notice by publication of a legal notice in two newspapers of the Permit and that the Departments would receive public comments on it during a public comment period and at the December 3, 2015 public hearing.

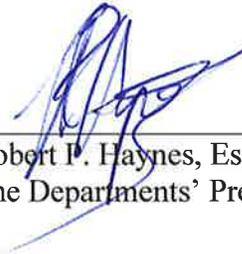
3. The Departments provided the required public comment period for written public comments and held a public hearing in a manner consistent with the Departments authority and the applicable regulations in order to provide the public with an opportunity to comment on the General Permit;

4. The Departments considered all timely and relevant public comments in making this determination on the Permit, and this Order that adopts the Revised Permit for use in the NPDES general permitting of Poultry CAFOs;

5. The Departments adopt the Report to the extent it is consistent with this Order, including the Report's adoption of the SWDS and the NMP positions as set forth in the TRM;

6. The Revised Permit will allow the Departments to regulate Poultry CAFOs under the NPDES program based upon the CAFO Regulation, and provide Poultry CAFOs with another procedure to obtain a NPDES permit that EPA requires; and

7. The Departments shall publish this Order on their web sites and provide such public notice of the Order as required by the law and their applicable regulations, and as they determine appropriate.



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Robert P. Haynes, Esq.  
The Departments' Presiding Hearing Officer

**MEMORANDUM**

**TO:** Robert P. Haynes, Esq., Senior Public Hearing Officer

**THROUGH:** Bryan Ashby, Environmental Program Manager II  
Brian Churchill, Environmental Scientist IV  
Chris Brosch, Nutrient Management Program Administrator

**FROM:** Ben Coverdale, Environmental Scientist III  
Lauren Torres, Environmental Scientist III

**RE:** Technical Response Memorandum Regarding the Draft CAFO NPDES General Permit for Large, Medium, & Designated Poultry CAFOs That Do Not Land Apply Manure

**DATE:** January 26, 2016

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This Technical Response Memorandum was prepared at the request of the presiding hearing officer to assist in the preparation of Hearing Officer's Report to the Secretaries of the Delaware Department of Natural Resources and Environmental Control (DNREC) and the Delaware Department of Agriculture (DDA) (jointly referred to as Departments).

The DDA's Nutrient Management Program (NMP) in conjunction with the DNREC's Surface Water Discharges Section (SWDS) legal noticed a draft Concentrated Animal Feeding Operation (CAFO) National Pollutant Discharge Elimination System (NPDES) General Permit for Large, Medium, and Designated Poultry CAFOs without Land Application (referred to herein as General Permit), Permit No. DE 5000N/11. The General Permit was written to implement the *Regulations Governing the Control of Water Pollution*, Section 9.5 (CAFO Regulations), which in turn was promulgated pursuant to DNREC Regulations; the Delaware Nutrient Management Regulations, and the Delaware Nutrient Management Law. This Regulation was approved in Secretary's Order No. 2011-W-0041 issued October 15, 2011 and was published in the Delaware Register of Regulations on November 1, 2015 to go into effect November 11, 2011. In addition, since the NPDES program is subject to federal overview, the Environmental Protection Agency (EPA) approved the CAFO Regulation on November 11, 2011, and approved the draft General Permit on 4/29/15. On October 28, 2015, the Departments had published legal notice of the General Permit and a public hearing to receive public comments on it in the News Journal, the Delaware State News, and on DDA's and DNREC's websites on October 28, 2015.

On December 3, 2015, a public hearing was held at the Delaware Department of Agriculture located at 2320 S. DuPont Highway, Dover, DE 19901, which approximately 13 persons attended in addition to the Departments' staff.

The record from the public hearing includes The Mid-Atlantic Environmental Law Center (MAELC) and Food & Water Watch timely submitted joint written comments. In addition, the Chesapeake Bay Foundation (CBF) timely received comments were included in the record. The only speaker from the public, at the hearing, referenced the previously submitted MAELC written comments.

This TRM also clarifies and revises the General Permit, provides additional factual information requested by the presiding officer, responds to the written public comments from MAELC and CBF, and supports the Departments' approval of a revised General Permit consistent with this TRM.

The General Permit is revised to clarify the types of poultry CAFOs to be regulated based upon 9.5.3 of the Delaware CAFO Regulations. Turkeys, laying hens or broilers (if the AFO uses a liquid manure handling system), and laying hens (if other than a liquid manure handling system) will be classified as poultry CAFOs for the purposes of this General Permit. This change is reflected in Part 1.A.1 of the General Permit. This clarification is based upon the lack of any duck CAFOs in Delaware and that duck CAFOs are regulated in Section 9.5.6.5 differently than other poultry CAFOs.

The General Permit also is revised to accept the public comment change to the same Section to include "Propose to Discharge."

In addition, the presiding hearing officer requested information in the record on the number of the various animal CAFOs that would be subject to this General Permit based upon known Notice of Intents received and estimated other CAFOs that would also be subject to the General Permit. The information below represents the total number of NOIs received by the Department as of 1/26/16 for coverage under this General Permit:

- 30– Large Chicken CAFO NOIs
- 96– Medium Chicken CAFO NOIs
- 5 – Chicken CAFO NOIs received with animal number threshold < 37,500
- 0 – Turkey CAFO NOIs
- 0 – Laying hens or broilers (using a liquid manure handling system) CAFO NOIs
- 1– Laying hens (other than a liquid manure handling system) CAFO NOIs

The estimated universe for large and medium poultry CAFOs that do not land apply manure (specifically chicken farms that produce dry manure only) includes 77 large and 262 medium CAFOs. These figures represent the total number of NOI submissions received under the framework of an Individual Permit. The State of Delaware and EPA collectively decided that the General Permit approach initially should be implemented for chicken and turkey animal categories, which represent the majority of Delaware's CAFOs. This change required DNREC and DDA to have farms apply under the new General Permit NOI.

The following responds to MAELC and CBF as jointly developed by the DDA's Nutrient Management Program and the DNREC's Surface Water Discharges Section.

**The MAELC and FWW concerns with the General Permit included the following:**

- Failure to meet minimum state requirements for the duty to apply for a NPDES permit
- Failure to establish a presumption of discharge for certain CAFOs
- Lack of groundwater monitoring
- Lack of surface water monitoring
- Failure of the Notice of Intent to meet minimum federal requirements
- Failure to require individual NPDES permits for CAFOs discharging into ERES waters
- Lack of permit fee
- Omission of specific state requirements and best management practices for all relevant provisions within the permit

**I. The Proposed General Permit Falls Short of Minimum State Requirements for the Duty to Apply for a NPDES Permit**

The General Permit fails to meet the requirements for the duty to apply for a NPDES permit under state regulations. Part I.A.1 of the General Permit states, "Large and Medium Poultry CAFO's in Delaware *that discharge* to Waters of the State shall have a NPDES CAFO discharge permit." (emphasis added). However, state regulations require a large or medium CAFO to apply for a NPDES permit if they discharge or *propose to discharge*. Pursuant to Delaware regulations, "[a]ny owner or operator of a Large, Medium, or Designated CAFO who does not have an effective NPDES CAFO permit has a duty to apply for a NPDES CAFO permit when:

9.5.4.1.1.1 Pollutants originating from the CAFO are discharged or *proposed to discharge directly or indirectly into Waters of the State; or*

9.5.4.1.1.2 Pollutants originating from a CAFO are discharged into Waters of the State caused by handling of animal mortalities or manure; or

9.5.4.1.1.3 Pollutants originating from a CAFO are *proposed for discharge as a result of the design, construction, operation or maintenance of a CAFO such that a discharge will occur.*" (emphasis added).

EPA's 2010 Implementation Guidance on CAFO Regulations – CAFOs That Discharge or Are Proposing to Discharge (2010 Guidance) provides the proper interpretation of the “propose to discharge” permitting and holds that a “CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur.” Like Delaware, Maryland also maintains this “propose to discharge” permitting requirement. That standard, as applied in Maryland, has resulted in every CAFO being permitted because all of the facilities in Maryland, like those in Delaware are “designed, constructed, operated, or maintained such that a discharge will occur.”

The proposal to discharge initiates the requirement for a Large or Medium CAFO owner or operator to apply for a NPDES permit and must be included in the General Permit. Thus, the General Permit is inconsistent with current state regulations and allows CAFOs to discharge before they apply for the General Permit.

**RESPONSE: SWDS/NMP Agree to this Change and Recommend the Draft Permit be Revised to Reflect Poultry CAFOs that Propose to Discharge**

DNREC acknowledges that 7 Del. Admin. C. 9.5.4 addresses the Duty to Apply for CAFOs. The DNREC and the DDA will add “propose to discharge” into Part I.A.1 of the General Permit.

Part I.A.1 will now read as follows:

Large and Medium Poultry CAFO's in Delaware that Discharge or Propose to Discharge to Waters of the State shall have a NPDES CAFO discharge permit issued by DNREC under both State and Federal permitting authority.

**II. Delaware Should Establish a Presumption of Discharge for Certain CAFOs**

To regulate all CAFO dischargers and establish an effective duty to apply standard, DNREC must include provisions in its General Permit that create a presumptive discharge for certain CAFO operations. The 5<sup>th</sup> Circuit in *Natl. Pork Producers Council v. EPA* confirmed that “at base, a discharging CAFO has a duty to apply for a permit.” While some aspects are no longer applicable following *Pork Producers*, EPA's 2010 Guidance provides a strong starting point for DNREC to conduct objective assessments of whether CAFOs discharge based on the conditions or practices at CAFOs that can lead to illegal discharges in Delaware.

The 2010 Guidance explains that some conditions that lead to CAFO discharges – including proximity to waters of the U.S., whether the CAFO is upslope from waters of the U.S., climatic conditions, and drainage of the production area – are “beyond the operator's control,” such that

DNREC can support a factual determination that all CAFOs with these conditions are dischargers with a duty to apply for a NPDES permit.

EPA's 2010 Guidance also discusses ventilated poultry confinement houses as sources of production area discharges of contaminated process wastewater, as these systems can directly discharge pollutants such as manure dust, litter, ammonia, and feathers into nearby waters of the U.S. or conduits to jurisdictional waters, such as production area ditches or channels. Because these systems cause ongoing discharges at many facilities, CAFOs venting pollutants from their confinement houses have a duty to apply for a NPDES permit if an objective assessment indicates that any of the pollutants reach waters of the U.S.

As the Michigan Department of Environmental Quality cited in its comments to EPA's 2008 proposed CAFO rule:

The USEPA frequently uses the phrase "in an unlikely event of a discharge from certified CAFO." We do not agree that such a discharge would be "unlikely." Michigan's experience is that virtually all CAFOs with lagoons and/or land application have discharges... To date, the CAFOs in Michigan determined not to discharge are those that are not proximate to surface waters, have their CAFO waste sheltered from the elements... and have particularly well managed facilities. Even these situations must be carefully assessed on a facility specific basis, as we have found some operation that meet these criteria, did in fact have a discharge. For one such poultry CAFO with dry manure storage inside and no land application, we documented a discharge twice in one month as a result of dust and subsequent storm water runoff, with high pollutant concentrations in the discharge (especially biochemical oxygen demand, *E. Coli* and ammonia).

DNREC must conduct an objective assessment of whether poultry CAFOs discharge based on the conditions or practices at CAFOs in Delaware in order to determine which conditions and/or practices require a presumption of discharge. At a minimum, DNREC should establish presumptions that large CAFOs located directly upslope from a water of the U.S., located in a floodplain, discharging into a water of the U.S. via ventilation system, or that are located in the watershed of a waterway impaired by nitrogen, phosphorus, or bacteria, discharge and require a permit.

**RESPONSE: SWDS/NMP DO NOT AGREE THAT THE GENERAL PERMIT SHOULD BE REVISED TO INCLUDE ANY CHANGE THAT REQUIRES A PRESUMPTION OF A DISCHARGE BECAUSE THE CAFO REGULATION DOES NOT IMPOSE THAT PRESUMPTION.**

It is the intent of the DNREC and the DDA to implement and enforce the Delaware CAFO Regulations as such. The regulations detail the duty to apply requirements for Large and Medium CAFOs.

9.5.6.4.1.1 - 9.5.6.4.1.1.1.1 of the Delaware CAFO Regulations states "there shall be no discharge of manure, litter or process wastewater pollutants to Waters of the State from the *production area* of Large Swine, Poultry and Veal Calves NPDES CAFOs" (emphasis added). 9.5.6.4.1.1.1.1 goes on to more clearly define what constitutes the *production area* specific to poultry farms. The animal confinement area includes the areas inside the poultry confinement houses and end pads. Manure storage and waste containment areas include storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles.

The Effluent Limitations section of the General Permit address discharges of manure, litter or process wastewater pollutants to Waters of the State from the production area. The Delaware CAFO Regulations do not regulate air emissions from poultry houses. The dust and feathers from the fans do not classify as manure, litter or process wastewater, thus do not meet the intent of the governing regulations. Ammonia air emissions are not regulated through the Clean Water Act and do not meet the intent of this CAFO NPDES Permit which is focused on water quality. Air emissions would be regulated under the Clean Air Act (CAA).

Through its on-farm inspections, Delaware takes into consideration site specific factors at individual farms in order to conduct a thorough objective assessment. Elements assessed include, but are not limited to, poultry house proximity to surface waters, farm swale drainage engineering, management of manure storage and handling, etc. Best Professional Judgment (BPJ) is used based upon the EPA NPDES Permit Writers Manual for Concentrated Animal Feeding Operations, February 2012.

### **III. The General Permit Must Better Protect Groundwater and Track Groundwater Discharges**

Because it applies to all waters of the state, the General Permit also regulates discharges to groundwater. Thus the General Permit purports to prohibit all discharges of poultry CAFO wastes from the production area to groundwater. This is a commendable step towards protecting all of Delaware's water resources from a major source of pollution, but lacks the groundwater monitoring required to enforce this provision and prevent illegal discharges.

Groundwater quality protection from CAFO waste contamination is essential to protecting both public health and surface water quality. Delaware poultry CAFOs produce enormous quantities of nitrogen-rich litter, which commonly leads to excess nitrate levels in ground and surface water due to leaching and runoff. This nutrient loading comes not only from improper land application practices, but also exposed manure stockpiles, drainage and ventilation systems, and the mere handling of litter on site. Nitrate contaminated drinking water poses serious risks to human health. Perhaps most notably, high levels of nitrates in drinking water can lead to "blue baby syndrome," which causes developmental deficiencies and even death in severe cases.

Consequently, EPA has established a health-based maximum contaminant level (MCL) of 10 mg/L for nitrates. Poultry litter also contains coliform bacteria and known human pathogens, which can leach into groundwater.

DNREC's most recent assessments of groundwater quality across the state have documented concerning rates of nitrate contamination. In 2014, DNREC found nitrate levels above the 10 mg/L MCL in 8.8% of wells sampled, and in 2012 the agency found MCL exceedances in 12% of wells. Moreover, the documented nitrate contamination is concentrated in Sussex County, which is also the county with Delaware's highest livestock density. This contamination is not solely associated with poultry litter land application practices. To the contrary, production area discharges to groundwater are also responsible for dangerous levels of nitrate contamination.

EPA has found that "[m]easured nitrate levels in ground water beneath Delaware poultry houses have been as high as 100 mg/L," or ten times the MCL.

Therefore, from a public health perspective, there is no question that Delaware's NPDES permits should require CAFOs to monitor production area groundwater in order to demonstrate compliance with the General Permit's discharge prohibition. Yet despite the already-widespread contamination of Delaware ground and surface waters by poultry litter pollutants, the General Permit does not obligate CAFO operators to monitor how severely they are contaminating groundwater or to take steps to minimize such contamination. The failure to require this sort of common sense precaution clearly contravenes good public policy, and the final General Permit must address this fundamental deficiency.

The lack of groundwater monitoring in the General Permit also renders the Permit insufficient under federal law, because this groundwater contamination directly contributes to surface water nitrogen pollution. Nearly half (40%) of stream flow nationally "is derived from ground water flow as base flow," according to EPA. Because such hydrologically connected groundwater directly affects surface water quality, EPA has consistently explained, and courts in several federal circuits have held, that groundwater discharges should be regulated under the NPDES program in those cases where groundwater discharges have been found to contaminate hydrologically connected navigable waters. Moreover, because groundwater pollution frequently results in surface water pollution, the failure to monitor groundwater also creates the potential to undermine Delaware's Water Quality Standards and therefore violates the CWA's requirement that NPDES permits may only be issued "where such permits *ensure* that every discharge of pollutants will comply with all applicable effluent limitations and standards.

Strong hydrologic connections between groundwater and surface water in the Chesapeake Bay region make unpermitted discharges and Water Quality Standards violations particularly likely in Delaware. According to the U.S. Geological Survey (USGS), approximately half of the high

nitrate concentrations in nontidal streams and rivers that contribute to the decline of fish populations in the Chesapeake Bay have found to come from underground sources:

“These findings will have strong implications for the management of nitrates in the Bay,” said USGS hydrologist Dr. Joseph Bachman, “Most past management practices have focused on the more obvious contributions of nitrogen from surface runoff.” [...]

Our research in the Chesapeake Bay basin has shown that the average travel time of groundwater, or ‘ground water,’ from when it enters the water table to when it discharges to a stream or river, is 10 to 20 years. The longest measured travel time was about 50 years...Even if tighter regulatory actions were able to eliminate the runoff of nitrate from the land surface, it will take decades for all of the nitrate to be flushed from the underground reservoirs or aquifers.

A failure to require these facilities to monitor groundwater discharges, which can contaminate surface waters, would plainly undermine the Act’s requirement to ensure compliance and its goal of “eliminating” point-source discharges. The General Permit does nothing to give effect to its stated prohibition on CAFO discharges to groundwater or to ensure that groundwater discharges will not pollute surface waters. The final Permit must require groundwater monitoring for nitrates, pathogens, and other indicator pollutants associated with poultry litter to protect public health and ensure compliance with the CWA’s zero discharge standard for CAFO production areas.

**RESPONSE: SWDS/NMP DO NOT AGREE THAT THE GENERAL PERMIT SHOULD BE REVISED TO REQUIRE ANY ADDITIONAL MONITORING NOT REQUIRED BY THE CAFO REGULATION**

Water quality monitoring is not required by the Delaware CAFO Regulations. Monitoring for CAFOs is technology based and objectively assessed to ensure compliance with the zero discharge standard. Monitoring requirements for CAFOs as outlined by the EPA NPDES Permit Writers Manual include: manure sampling and recordkeeping requirements found in Part I.D. of the General Permit. If discharges occur, the monitoring requirements are outlined in Part I.F.1 in the General Permit.

There are various components of the permit that address measures to reduce environmental impacts to surface and groundwater found in Part II.A. Management Requirements and Responsibilities. Part II.A.4-8 in the permit addresses general housekeeping practices, layout housekeeping practices, proper operation and maintenance, discharge minimization, and duty to mitigate. These management requirements address the need for proper manure and mortality handling to reduce any environmental impacts associated with routine management activities that occur on a daily basis at any poultry farm.

#### **IV. The General Permit Must Better Protect Surface Water and Track Surface Water Discharges**

The Clean Water Act permitting provisions require that NPDES permits contain conditions on data and information collection and reporting, to “ensure compliance” with the Act. The accompanying federal CWA regulations make clear that appropriate monitoring for CWA compliance is a required component of any state-issued NPDES permit. For example, 40 C.F.R. § 122.48 holds that *all* permits shall specify “[r]equirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods.” EPA’s CWA regulations for state NPDES programs require that “each NPDES permit shall include” monitoring requirements “[t]o assure compliance with permit limitations,” including “[t]he mass (or other measurement specified in the permit) for each pollutant limited in the permit; [t]he volume of effluent discharged from each outfall; or [o]ther measurements as appropriate.”

Furthermore, 40 C.F.R. §122.44(a)(2) provides that pollutant monitoring waivers can be granted for 40 C.F.R. Subchapter N pollutants, which includes fecal coliform and biochemical oxygen demand, only where “the discharger has demonstrated through sampling and other technical factors that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger.” Moreover, Section 308 of the CWA provides that “whenever [it is] required to carry out the objective” of the CWA, a permitting agency “(A) shall require the owner or operator of any point sources to...(iii) install, use, and maintain such monitoring equipment or methods...as may reasonably be require[d].”

Delaware CAFOs are point sources subject to these permitting provisions, and persistent pollution from these sources has demonstrated that facility-level effluent monitoring on or adjacent to production areas is necessary to meet the objectives of the CWA. The General Permit contains wholly inadequate monitoring requirements that cannot assure compliance with the Act or the permits themselves, and cannot assist DNREC in determining which best management practices (BMPs) best prevent production area discharges from CAFOs. Rather than require effluent monitoring at CAFOs, the General Permit only requires CAFOs to analyze the nitrogen and phosphorus content of manure annually. This information does not provide any information relevant to the CWA’s requirement that NPDES permits must ensure compliance with water quality standards or EPA’s CAFO Effluent Guidelines requirements to prevent production area discharges.

Despite the ongoing contribution of nutrients to the impaired Bay watershed by CAFOs, the commenters are unaware of a single instance where any CAFO has been required to monitor its discharges. In place of this failed approach, DNREC should require all CAFOs regulated under the General Permit to conduct regular water sampling for nitrogen, phosphorus and fecal coliform where wastewater flows off the CAFO via drainage ditches or in other locations identified by the facility’s certified nutrient management planner.

**RESPONSE: SWDS/NMP DO NOT AGREE THAT THE GENERAL PERMIT SHOULD BE REVISED BECAUSE THE EFFLUENT LIMITS ARE CONSISTENT WITH THE CAFO REGULATION**

9.5.6.4.1 of the Delaware CAFO Regulations define Effluent Limits for Large Swine, Poultry, and Veal Calves NPDES CAFO Permits. The regulations do not require numerical Effluent Limits that are found in most other NPDES permits because poultry farms do not generate liquid manure. In addition, the absence of numerical Effluent Limitations in this General Permit is due in part because poultry CAFOs with dry manure do not have defined discharge outlets designed to carry liquid effluent to a receiving surface water body. Part of the Effluent Limitations as defined by the Delaware CAFO Regulations require Large Poultry CAFOs to achieve those Effluent Limits by the application of best practicable control technology currently available (BPT), best conventional pollutant control technology (BCT), or best available technology economically achievable (BAT). The BAT approach is utilized for the implementation of on-farm Best Management Practices (BMP) to address and mitigate environmental concerns arising from manure generation and handling. Common poultry farm BMPs include, but are not limited to, Manure Storage Structures (MSS), Compost Structures (composters), Heavy Use Area Pads (HUAPs) located on poultry houses and MSS, tree plantings to help capture dust and feather emissions from house fans, etc. The farm's Animal Waste Management Plan (AWMP) written by a licensed Delaware consultant identifies these BMPs that are implemented on each poultry farm. In the absence of numerical Effluent Limitations due in part because of dry manure, the poultry CAFOs form of monitoring consists of a yearly manure sample analysis. This manure sample analysis is to be provided to the receiver of the manure prior to relocation from the poultry farm generating the manure. The manure receiver would be required to utilize the results of the manure analysis when determining nutrient application rates in accordance with a nutrient management plan thus reducing potential surface water impacts.

**V. The Inspection Scheme Provided For In the General Permit is Deficient**

In the state regulations and the General Permit, permits are mostly enforced through self-inspection and monitoring. For example, under 7 Del. Admin. Code §7201-9.5.6.4.3, permittees are responsible for collecting samples and making visual inspections of the facility. DNREC and DDA are only required to conduct one inspection per five years that the NPDES permit is valid. CAFOs need to be held accountable and the reliance on self-inspection is inadequate to protect Delaware's waterways from pollutant discharge. DNREC and DDA must conduct inspections on a regular basis – more than once every five years – in order to adequately ensure compliance with the General Permit.

Furthermore, under 7 Del. Admin. Code §7201-9.5.6.1.1.11.2, “[a]s a general practice DNREC and DDA will provide advance notice of inspections; however, in order to ensure compliance, unannounced inspections *may* be performed.” (emphasis added). When inspections are only completed once every five years, and they are almost always announced, permittees have ample

time to clean up their act for the inspection. It is almost impossible to adequately monitor compliance with the General Permit in such circumstances. Therefore, the inspection scheme is deficient and must be strengthened to ensure permit compliance.

**RESPONSE: SWDS/NMP DO NOT AGREE THAT THE GENERAL PERMIT SHOULD BE REVISED BECAUSE THE INSPECTION PROCESS IS BASED UPON THE CAFO REGULATION**

Part II.A.9 of the CAFO permit states "The permitted facility shall have a minimum of one (1) site visit within the five (5) year duration of this permit from the Department." Given the budgetary and staffing constraints at both DDA & DNREC, both agencies agreed to inspect the CAFO at a minimum, once every five years. This does not mean that more frequent, and possibly unannounced inspections could not be performed.

**VI. The Notice of Intent Does Not Meet Minimum Federal Requirements**

The Notice of Intent only contains six of the nine elements required under Federal regulations. Under federal law, a Notice of Intent for a General Permit must include the following nine elements:

- 1) Name of the owner and operator;
- 2) Facility location and mailing address;
- 3) Latitude and Longitude of production area;
- 4) Topographic map;
- 5) Specific information regarding the number and type of animals and whether they are house in open confinement or housed under roof;
- 6) Type of manure containment and storage;
- 7) Total number of acres available for land application;
- 8) Estimated amounts of manure, litter, and wastewater generated and transferred; and
- 9) Nutrient Management Plan, in accordance with 40 C.F.R. § 122.42, 40 C.F.R. Part 412, and 40 C.F.R. § 412.4(c).

The state regulations are not as explicit as to what elements each NOI must contain. Delaware state regulations only require that a general permit NOI include:

“9.5.4.4.1 The trade name of the CAFO, type of business (corporation, sole proprietorship, partnership, etc.), if any, the name of the owner and operator, mailing address for the owner and operator, and emergency address or description of the location of the CAFO including the closest road name intersection of the CAFO. 9.5.4.4.2 Annual operation data for the CAFO in accordance with State Technical Standards to include, but not limited to animal type(s), number of animals confined, estimated manure, litter and process wastewater generation by type per year, manure storage capacity, manure storage system, estimated amount of manure transported

off-site, animal mortality system, process wastewater system generated, where applicable, and total number of acres under control of the CAFO and available for land application. 9.5.4.4.3 A copy of the Nutrient Management Plan or Animal Waste Management Plan meeting the requirements described in § 9.5.5 of these regulations shall be submitted with the NOI to the Department in the method specified on the NOI form.”

While the NOI form incorporated into the General Permit does technically meet state requirements, it does not meet minimum federal requirements. The CWA prohibits state regulation to be less stringent than the federal regulations. The NOI form does not include the latitude and longitude of the production area, a topographic map, or specific information regarding the housing of animals, as required under 40 C.F.R. § 122.21. The omission of any of these elements renders the NOI incomplete and, invalid under federal regulations.

Not only are these elements required, but they are necessary for a fully informed decision making and public participation process. The latitude and longitude of the production area is important for determining which waterbodies are affected by the CAFO operations; therefore, when assessing the permit application, latitude and longitude must be known by both the agency and citizens. Additionally, a topographic map shows the contours of land, which is necessary for determining the flow of water off of the production area. Such flow will determine if and how the facility discharge and runoff is flowing into a waterway. Finally, information related to the housing of animals is crucial to the proper implementation and enforcement of both federal and state discharge requirements. Pursuant to EPA’s 2010 Guidance, the “[m]anagement of pollutants from confinement houses, including consideration of type of confinement houses,” is a factor that should be considered when DNREC is assessing whether a CAFO is discharging or will propose to discharge. Consequently, not only is the NOI deficient under federal regulations, but it is also inadequate for the proper review of a CAFO discharge under a NPDES permit.

**RESPONSE: SWDS/NMP DO NOT AGREE THAT THE GENERAL PERMIT SHOULD BE REVISED BECAUSE THE NOTICE OF INTENT IS CONSISTENT WITH THE CAFO REGULATION.**

Elements addressed in MAELC comments (latitude & longitude of the production area and specific information regarding the housing of animals) are repetitious to include on the NOI since this information is readily available in the AWMP. The General Permit NOI satisfies all requirements found in 9.5.4.4 of the Delaware CAFO Regulations. EPA acknowledged that the latitude & longitude and specific information regarding the housing of animals required by the NOI as per Federal requirements could appear in the AWMP since the plan must accompany the NOI to be considered a complete permit application. Topographical maps will be accessed using online sources such as USGS.gov, with the latitude & longitude provided in the AWMP. Delaware CAFO regulations do not require topographic maps as part of the NOI process. However Federal CAFO regulations do, and in light of the federal requirement, information on how to access topographic maps will be added to the Fact Sheet of the permit. The NOI was

approved by EPA as part of the General Permit supporting documents. The EPA wrote a letter to the DNREC on April 29, 2015 officially closing its review of the draft permit.

### **VII. The General Permit Should Require Individual NPDES Permits for CAFOs Discharging or Proposing to Discharge Into ERES Waters**

For some facilities, a general permit is insufficient to adequately protect the waters into which they discharge. For such facilities, the requirement of an individual permit is necessary to ensure that pollutant discharges are monitored and limited to the extent that is necessary to protect receiving waters.

Pursuant to state regulations, 7 Del. Admin. Code § 7401-5.1, existing uses “shall be maintained and protected.” Additional protection is required for Exceptional Recreational or Ecological Significance Waters (ERES Waters). ERES waters are “important, unique, or sensitive from a recreational and/or ecological perspective, but which may or may not have excellent water quality. Such waters shall normally have regional significance with respect to recreational use (fishing, swimming and boating), or have significant or widespread riverine, riparian, or wetland natural areas. DNREC must take “appropriate action to cause the systematic control, reduction, or removal of existing pollution sources, and the diversion of new pollution sources, away from ERES waters.

In order for DNREC to comply with the requirements of existing use protection for ERES waters, DNREC needs to take additional action to prevent the degradation of such waterways. Due to minimal inspection requirements under this General Permit, it is near impossible to protect ERES waters from unknown discharges. Only an individual NPDES permit can ensure the maintenance and protection of ERES waters, as well as move towards a reduction and removal of CAFO discharges into these waters altogether.

### **RESPONSE: SWDS/NMP DO NOT AGREE THAT THE GENERAL PERMIT SHOULD BE REVISED BECAUSE THE GENERAL PERMIT PROVIDES NPDES PERMIT COVERAGE PURSUANT TO THE CAFO REGULATION, WHICH ALSO ALLOWS THE OPTION OF INDIVIDUAL PERMITS TO BE ISSUED**

It has been the consensus of EPA, DNREC, and DDA that a General Permit is most appropriate for permitting poultry CAFOs with dry manure. DNREC reserves the right to issue individual permits to any poultry CAFO that poses an increased environmental impact or is determined through inspections and subsequent enforcement actions that an individual permit is appropriate.

### **VIII. The General Permit Should Include a Permit Fee to Help Pay For the Costs of Issuing and Enforcing the NPDES CAFO Permit Program**

Lack of resources is often an excuse used by federal and state agencies for their failure to implement and enforce regulations. While funding is limited, such strain cannot be used to forgo proper agency action when the agency has the ability to obtain additional funding from the regulated industry. For these reasons, DNREC should include a permit fee in the General Permit.

According to EPA's August 2015 *Delaware Animal Agriculture Program Assessment*, the 2013 budget for the NPDES CAFO program was only \$70,326. With almost 400 CAFOs requiring NPDES permits and approximately 260 large and medium CAFOs requiring this General Permit alone, the current funding is inadequate to ensure proper implementation and compliance with the NPDES CAFO program. The necessity for more funding and resources is demonstrated by the minimal inspection requirements – limited to one inspection per five-year permit period. Income from the permit fees would allow the agencies to increase the frequency of inspections, resulting in increased compliance assurance and increased enforcement when violations are discovered during the course of inspections.

CAFO facilities requiring NPDES permits can and should pay a permit fee. Such a fee would aid the agencies' ability to inspect, monitor, and enforce the CAFO regulations and permits and to further protect the environment. It is the permittees that should be covering the costs of the permitting program, not the agencies or the taxpayers.

**RESPONSE: SWDS/NMP PROGRAM DO NOT AGREE WITH INCLUDING A FEE REQUIREMENT IN THE GENERAL PERMIT, BUT THE CAFO REGULATIONS ALLOW COST RECOVERY.**

It has been determined by DNREC that a fee will not be imposed on Delaware poultry CAFOs for this General Permit at this time. The DNREC's fee structure for permits are established in a statute. Most of the existing permit fees have remained unchanged since 1991. The CAFO program does not have a permit fee in the existing statute.

#### **IX. The General Permit Should Specify State Requirements and Best Management Practices for All Relevant Provisions**

The Current version of the General Permit simply incorporates by reference the majority of permit requirements. This requires an individual to not only parse through the state regulations and State Technical Standards, but also to figure out which provisions apply to facilities applying for this General Permit. The permit itself should lay out the monitoring, recordkeeping, and reporting requirements referenced in Part II.D, the notification requirements referenced in Part II.F, as well as specify the necessary Best Management Practices applicable to the General Permit pursuant to State Technical Standards, developed by DDA. Inclusion of such information will provide for less uncertainty as to the permit requirements and allow for more informed public participation.

**RESPONSE: SWDS/BMP DO NOT AGREE THAT THE GENERAL PERMIT SHOULD BE REVISED BECAUSE THE GENERAL PERMIT ALREADY REQUIRES THE INFORMATION REQUIRED TO REGULATE A GENERAL PERMIT FOR COMPLIANCE**

The AWMP, written by a Delaware licensed Nutrient Consultant, identifies what BMPs are appropriate for individual farms. These BMPs are identified in the farm's AWMP. Any resource concerns noted by the consultant shall be addressed with BMP implementation to reduce any environmental impact. The AWMP is the farmer's guideline concerning these matters.

The General Permit does address monitoring, recordkeeping, and reporting requirements. This information is found in Part I.D (Monitoring, Recordkeeping, and Reporting Requirements) and Part I.F (Notification Requirements). The specific numerical reference from the Delaware CAFO Regulations corresponds with the requirements listed after those requirements. For example, in Part I.D.2, there are specific references to sections in the CAFO Regulations. Part I.D.2(a-d) spell out the requirements found in the CAFO Regulations that are referenced in the paragraph above (Part I.D.2).

In addition, as part of DDA's inspection process, the agency provides the farmers with a complete copy of the Delaware CAFO Regulations. The farmer can reference the regulations if needed.

**The Chesapeake Bay Foundation, Inc. (CBF) has reviewed the draft Permit and submits the following comments:**

**I. Delaware must devote more resources to compliance.**

The EPA review of Delaware's Animal Agriculture Programs highlighted deficiencies in assessing compliance with Delaware's Nutrient Management and CAFO programs. Achieving strong compliance with these programs is critical to ensure that appropriate practices are being implemented, especially those that are needed for Delaware to achieve its pollution load reductions under the Chesapeake Bay TMDL. Consequently, as Delaware moves forward with its general permitting of CAFO facilities it is essential that it devotes the resources needed to properly implement and enforce the program.

**RESPONSE: SWDS/NMP DO NOT CONSIDER THIS COMMENT AS PROPOSING ANY CHANGE TO THE GENERAL PERMIT**

This comment does not seek any change to the General Permit. Nevertheless, the Delaware Nutrient Management Program as of December 2015 has 4 Full-Time Equivalent (FTEs)

dedicated to job functions including but not limited to the Delaware Nutrient Management Law & Regulations and the Delaware CAFO Regulations. The Nutrient Management Program has increased staffing levels since 2010 to dedicate increased resources towards enforcement and compliance efforts. The Nutrient Management Program staffing levels have doubled since 2010 for positions directly responsible for the programmatic responsibilities of the Delaware Nutrient Management Program and the Delaware CAFO NPDES Permitting Program. The DNREC and the DDA are taking the appropriate measures towards ensuring adequate resources are dedicated towards programmatic compliance.

## **II. Delaware should update the Phosphorus Site Index in its Nutrient Management Program to include the best available science.**

Integral to the CAFO permitting process is the State's Nutrient Management Regulations. In its 2012 review of Delaware's Technical Standards for CAFOs, EPA recommended that Delaware revise the Phosphorus Site Index (PSI) Technical Standard and Nutrient Management Regulations to ensure that soils with very high phosphorus levels do not receive additional phosphorus because there is a high risk of phosphorus loss from these sites. In addition, Maryland recently revised its PSI to include the best science about phosphorus transport and risk. We suggest that Delaware move forward to incorporate a similar approach into its nutrient management program. We recognize the proposed General Permit is for poultry operations that do not land apply manure; however, as their manure will be used by other producers, it is imperative that the PSI is applied in a manner that is protective of water quality.

### **RESPONSE: SWDS/NMP DO NOT AGREE TO CHANGE THE GENERAL PERMIT TO REFLECT LAND APPLICATION OF MANURES BY OTHERS NOT SUBJECT TO THE GENERAL PERMIT**

This comment seeks to impose in the General Permit an obligation on how manure may be used by others not subject to this General Permit, namely, others who may use manure to land apply at other farms that the CAFO Regulation does not regulate by the General Permit. The General Permit is written specifically based on the CAFO Regulation for poultry CAFOs that do no land apply manure (no-land operations). The manure that is generated from these no-land poultry farms is either relocated to a field suitable for land application purposes or utilized as part of an approved alternative use technology. Manure that is relocated from a no-land poultry farm is accounted for in the receiving farmer's nutrient management plan as part of crop specific fertilizer recommendations. Manure that is relocated through the Delaware Nutrient Management Program's Manure Relocation Cost Share Program has specific requirements concerning the phosphorus levels of the intended receiving land application field. The manure must be relocated to a receiving field that has a soil Phosphorus FIV level of 150 or less.

Delaware has committed to reviewing the current Phosphorus Site Index (PSI) as part of Delaware's Phase II Watershed Implementation Plan (WIP). The State of Delaware may adjust

requirements through the PSI with sufficient agronomic and environmental scientific data that is adopted by the University of Delaware and accepted as the most current and valid science available.

**III. New poultry CAFOs covered by the General Permit must implement control technologies to prevent a new pollutant load of nitrogen from ammonia emissions.**

As a federally-authorized NPDES permit, the General Permit must ensure that ammonia emissions from new poultry CAFOs do not allow for a new load of nitrogen pollution. CWA regulations prohibit state agencies from issuing NPDES permits to “a new source or new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.” 40 C.F.R. § 122.4(i).

Ammonia “is responsible for approximately one-third of the total nitrogen atmospheric emissions that eventually end up as loads to the Bay,” and these ammonia sources are “predominately agricultural.” In particular, studies have shown that ammonia emissions from poultry houses – like those located on the Eastern Shore – can deliver substantial amounts of nitrogen to nearby waterways, potentially exacerbating systems already suffering from eutrophication (i.e., contributing to a violation of water quality standards). In addition to the approximately 260 operations that will be covered under this General Permit, the Delaware Department of Agriculture “expects [ ] about 80 new [poultry] houses to be built in Delaware from 2015 to 2020.”

There are technologies that can dramatically reduce ammonia emissions from poultry houses, including litter additives, biofilters, and improved ventilation systems. The General Permit should require these technologies on new facilities in addition to the New Source Performance Standards described in section 7 of Delaware’s CAFO Regulations. Title 7, Del. Admin. Code § 7201.9.5.7. DNREC has the authority to impose additional BMPs to control ammonia emissions as stated in the draft Permit. Draft Permit, Part I.A. 2. (“The Department may require additional BMP’s to minimize phosphorus and nitrogen transport to waters of the state as a requirement of this permit.”). CBF urges DNREC to exercise this authority and require that all new poultry CAFOs covered by this General Permit implement additional BMPs to ensure no net increase in nitrogen deposition from ammonia emissions.

**RESPONSE: SWDS/NMP DO NOT AGREE THAT THE GENERAL PERMIT SHOULD BE REVISED FOR EMISSIONS NOT INCLUDED IN THE CAFO REGULATION**

Part I.A.2. in the General Permit addresses additional BMP’s that may be required by the Department (DNREC & DDA) to minimize phosphorus and nitrogen transport to waters of the

state. The additional BMP's identified by the draft permit include, but are not limited to: Nutrient Management Compliance; Soil Conservation and Water Quality Plans; Heavy Use Poultry Area Pads; Livestock Waste Structures; Manure Relocation; Poultry Waste Structures; Mortality Composters; Streamside Grass Buffers; Streamside Forest Buffers; Wetland Restoration, and; Shoreline Erosion Control. The draft permit does not specifically state that DNREC has the authority to impose additional BMPs to control ammonia emissions. Part I.A.2. identifies additional BMP's that may be imposed at the farm level, and it does not explicitly detail BMP's directly associated with ammonia emissions.

9.5.6.4.1.1 - 9.5.6.4.1.1.1 of the Delaware CAFO Regulations states "there shall be no discharge of manure, litter or process wastewater pollutants to Waters of the State from the *production area* of Large Swine, Poultry and Veal Calves NPDES CAFOs". (emphasis added) 9.5.6.4.1.1.1 goes on to more clearly define what constitutes the *production area* specific to poultry farms. The animal confinement area includes the areas inside the poultry confinement houses and end pads. Manure storage and waste containment areas include storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles.

The Effluent Limitations section of the General Permit address discharges of manure, litter or process wastewater pollutants to Waters of the State from the *production area*. The Delaware CAFO Regulations do not regulate air emissions from poultry houses. The dust and feathers from the fans do not classify as manure, litter or process wastewater, thus do not meet the intent of the governing regulations. Ammonia air emissions are not regulated through the Clean Water Act and do not meet the intent of this CAFO NPDES Permit which is focused on water quality. Air emissions would be regulated under the Clean Air Act (CAA).

#### **IV. The General Permit should require information about the ultimate destination of transported manure as well as a requirement for manure recipients to have a nutrient management plan.**

The draft Permit includes the list of information that shall be maintained at the manure-generating CAFO when manure is sold or given to a third party. Draft Permit, Part I.D.2.c.

CAFO permittees should also keep track of the location where the litter, manure, or process wastewater will be used. The recipient should provide information to the permittee about the locality in which he/she intends to utilize the waste (i.e., nearest town or city and zip code), and the name of the stream or waterbody that is nearest to the waste utilization site.

In addition, CAFO permittees need documentation that recipients of its manure, litter, or wastewater have an up-to-date, certified nutrient management plan. We recommend that when a poultry grower transfers to another person more than a specified amount of poultry waste (e.g. 10 tons) in any 365-day period, the recipient needs to provide written acknowledgment that they have an up-to-date, certified, nutrient management plan. If the person receiving waste is a

poultry waste broker/hauler, then he/she shall certify in writing that each end user to whom he/she transfers the poultry waste in any 365-day period has an up-to-date, certified, nutrient management plan.

This information should be included in each CAFO permittee's annual report along with the information required by Delaware's CAFO Regulations. *See* Title 7, Del. Admin. Code § 7201.9.5.6.1.1.7.1 (listing required content of annual reports including "name, address and organization of person(s) receiving and/or responsible for utilizing the manure.").

**RESPONSE: SWDS/NMP DO NOT AGREE THAT THE GENERAL PERMIT SHOULD BE REVISED TO INCLUDE RECORDING KEEPING REQUIREMENTS NOT INCLUDED IN THE CAFO REGULATION**

The Delaware CAFO Regulations address the recordkeeping requirements concerning manure export and the draft Permit was written to encompass those same standards.

The elements required in Part I.D.2 of the draft Permit reflect the requirements found in 7 Del. Admin. C. §7201-9.5.6.4.3.1.1 and §9.5.6.4.3.1.3 of the CAFO Regulations for Large CAFOs and 7 Del. Admin. C. §7201-9.5.6.6.2.1.1 and §9.5.6.6.2.1.3 of the CAFO Regulations for Medium CAFOs. These address the recordkeeping requirements for new and existing Large CAFOs and Medium CAFOs. This logic also applies to the annual reporting requirements detailed in 7 Del. Admin. C. §7201.9.5.6.1.1.7.1 of the CAFO Regulations.

**V. Medium CAFOs covered by the General Permit should be held to a "zero discharge" effluent limitation.**

CBF urges DNREC to impose the same "zero discharge" standard on Medium poultry CAFOs as the draft Permit currently imposes on Large poultry CAFOs. This change would be consistent with Maryland's Animal Feeding Operation (AFO) General Permit which requires "[n]o discharge of pollutants to surface waters of the State" from both CAFOs *and* State-permitted MAFOs (Maryland Feeding Operations). Although the draft Permit requires Medium poultry facilities to operate according to all BMPs and Technical Standards, the General Permit should mirror the requirements for Large CAFOs and also state that these practices are required in order to ensure "no discharge of manure, litter or process wastewater pollutants" to waters of the State. Explicitly prohibiting any discharge from Medium CAFOs covered by the General Permit is consistent with Delaware's goals to achieve significant reductions from the agriculture sector.

**RESPONSE: SWDS/NMP DO NOT AGREE THAT THE GENERAL PERMIT SHOULD BE REVISED TO IMPOSE LIMITS ON MEDIUM CAFOS CONTRARY TO THE CAFO REGULATION**

7 Del. Admin. C. §7201.9.5.6.4.1 of the CAFO Regulations defines the Effluent Limits for Large Swine, Poultry and Veal Calves NPDES CAFO Permits. The Delaware CAFO Regulations do not define specific Effluent Limitations to Medium CAFOs. The DNREC and the DDA wrote the draft Permit according to the regulatory requirements outlined in the Delaware CAFO Regulations. In the absence of defined Effluent Limitations for Medium CAFOs, the poultry CAFO is required to operate according to all applicable BMPs addressed in the Animal Waste Management Plan implemented at the farm.

NPDES Permit Number DE 5000N/11  
Effective Date: [Insert date]  
Expiration Date: [Insert date]

GENERAL PERMIT AUTHORIZATION FOR CAFOs TO DISCHARGE UNDER THE  
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM  
AND THE LAWS OF THE  
STATE OF DELAWARE

(LARGE, MEDIUM, & DESIGNATED POULTRY CAFOS – MANURE GENERATION FACILITIES ONLY)

Pursuant to the provisions of the Federal Water Pollution Control Act, as amended by the Clean Water Act of 1977 (33 U.S.C. 1251 et seq.) (hereinafter referred to as "the Act"); 3 *Del.C.* §2200, Nutrient Management (Delaware Nutrient Management Law) and 7 *Del.C.* §6000, Environmental Control; and the National Pollutant Discharge Elimination System (NPDES) Permit Program regulations for Concentrated Animal Feeding Operations (CAFOs) which were promulgated pursuant to those statutes: 7 Del. Admin. C. §7201-9.5, *Regulations Governing the Control of Water Pollution*, (CAFO Regulations), the Department of Natural Resources and Environmental Control (hereinafter referred to as DNREC), hereby authorizes **Large, Medium, & Designated Poultry Concentrated Animal Feeding Operations (CAFOs)** registered under this General Permit to discharge in accordance with all limitations, monitoring and record keeping requirements and other permit conditions as set forth in Part I, II and III hereof.

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## Part I

### A. GENERAL DESCRIPTION OF DISCHARGES AND FACILITIES

1. Large, Medium, and Designated Poultry CAFO's in Delaware that Discharge or Propose to Discharge to Waters of the State shall have a NPDES CAFO discharge permit issued by DNREC under both State and Federal permitting authority.
2. Total Maximum Daily Load (TMDL):

Permit requirements are consistent with existing and applicable Total Maximum Daily Loads (TMDLs) for impaired water bodies. The permittee shall continue to implement all BMPs currently in place and shall implement any additional BMPs required by the permittee's AWMP/NMP and this permit. The Department may require additional BMP's to minimize phosphorus and nitrogen transport to waters of the state as a requirement of this permit. For Large and Medium Poultry CAFOs within the Chesapeake Bay watershed, BMPs have been identified in Delaware's Phase II Watershed Implementation Plan (WIP) as specific production area practices to meet Agricultural Waste Load Allocations (WLAs). Such BMPs may include, but are not limited to: Nutrient Management Compliance; Soil Conservation and Water Quality Plans; Heavy Use Poultry Area Pads; Livestock Waste Structures; Manure Relocation; Poultry Waste Structures; Mortality Composters; Streamside Grass Buffers; Streamside Forest Buffers; Wetland Restoration, and; Shoreline Erosion Control.

### B. REGULATORY AND SUPPORTING DOCUMENTS

The permittee's CAFO shall be conducted in accordance with the following documents:

1. DNREC's 7 Del. Admin. C. §7201-9.5, the CAFO Regulations; 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.
2. Memorandum of Agreement between the Delaware Department of Agriculture (DDA) and the Delaware Department of Natural Resources and Environmental Control (DNREC) dated December 16, 2010;
3. The Delaware Department of Agriculture's Nutrient Management Regulations, 3 Del. Admin. C. §1201;
4. The Delaware Nutrient Management Law, 3 Del. C. §2200;
5. The facility's Animal Waste Management Plan (AWMP) or Nutrient Management Plan (NMP).; and
6. The facility's Notice of Intent (NOI).

### C. EFFLUENT LIMITATIONS

Each permittee is authorized to discharge from the facility in accordance with the conditions set forth in this permit, including Part I.C.1 and Part I.C.2 of this permit, from the date noticed of permit coverage, lasting through the expiration date of this General Permit. Violations of any of the following Effluent Limitations may result in enforcement action in accordance with Part II.A.21. of this permit.

1. Large Poultry Effluent Limitation Guidelines (ELG's)
  - a. In accordance with 7 Del. Admin. C. §7201-9.5.6.4.1.1.1 of the CAFO Regulations,

there shall be no discharge of manure, litter or process wastewater pollutants to Waters of the State from the production area.

- b. In accordance with 7 Del. Admin. C. §7201-9.5.6.4.1.1.1.2 of the CAFO Regulations, whenever precipitation causes an overflow of manure, litter or process wastewater, the overflow may be discharged into Waters of the State if:
  - i. The production area is designed, constructed, operated, and maintained to contain all manure, litter, and process wastewaters plus the runoff and direct precipitation from a 25-year, 24 hour rainfall event; and
  - ii. The production area is operated in accordance with the measures and records required in 7 Del. Admin. C. §7201-9.5.5.0 of the CAFO Regulations.
- c. If the Secretary determines that a discharge from the production area is an "Upset" in accordance with Part II.A.23, the discharge shall not be a violation of the Effluent Limitations in this permit.

2. Medium & Designated Poultry Effluent Limitations

- a. The permittee shall operate according to all Best Management Practices (BMPs) addressed in the Animal Waste Management Plan (AWMP) and/or the Nutrient Management Plan (NMP) concerning management activities of manure, litter, or process wastewater in accordance with the State Technical Standards.
- b. If the Secretary determines that a discharge from the production area is an "Upset" in accordance with Part II.A.23, the discharge shall not be a violation of the Effluent Limitations in this permit.

**D. MONITORING, RECORDKEEPING, AND REPORTING REQUIREMENTS**

1. The permittee shall maintain records of implementation that address the nine (9) minimum required elements of its site specific AWMP/NMP for six (6) years in accordance with the State Technical Standards. The permittee shall also maintain a copy of the "Notice of Intent & Application for Coverage" and a copy of the most current AWMP/NMP at the CAFO with this issued NPDES CAFO Permit.
2. The permittee shall operate and comply with all applicable requirements in 7 Del. Admin. C. §7201-9.5.6.4.3.1.1 and §9.5.6.4.3.1.3 of the CAFO Regulations for Large CAFOs or 7 Del. Admin. C. §7201-9.5.6.6.2.1.1 and §9.5.6.6.2.1.3 of the CAFO Regulations for Medium CAFOs. The permittee shall maintain records of implementation for six (6) years at the CAFO in accordance with State Technical Standards. Applicable records of implementation in the production area include:
  - a. Records indicating mortality management to include number disposed and method of disposal. The total number of mortality disposed may be documented with integrator developed mortality sheets, integrator settlement sheets, or any other recording of the information.
  - b. Records of manure storage activities, length of storage, amount stored, and maintenance of manure storage facilities.
  - c. If manure, litter or process wastewater is sold or given to other persons for disposal or utilization, the following information shall be maintained at the CAFO generating the manure, litter or process wastewater:
    - i. The date of manure, litter or process wastewater removal.
    - ii. Name of receiver and contact information.

- iii. Quantity (tons/gallons) of manure, litter or process wastewater removed.
  - iv. A copy of the most recent manure, litter and process wastewater nutrient analysis shall be given to the receiver on or before the date of transfer.
  - d. Records of implementation in the land application area are not applicable to this facility because the permittee does not propose land application of manure. Land application of manure is not permitted on any land that is under the direct control of the permittee unless the AWMP is revised to a NMP to account for such land applications of manure in accordance with Part II.A.2.a. and Part II.A.16. of this permit.
3. Manure testing shall be performed annually in accordance with the State Technical Standards. Records of the annual manure analysis must be retained by the permittee and also provided to the DDA each year as an attachment to the annual report submission.
  4. If sampling and/or monitoring is performed, samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity. Sampling and monitoring records shall include the date, place, and time of sampling or measurements, and the individuals who performed the sampling or measurements. The facility responsible for analysis of the sample shall document the date of the analysis, the individual who performed the analysis, the analytical techniques/methods used, and the results of such analysis in accordance with 7 Del. Admin. C. §7201-6.41.2.
  5. The permittee shall comply with all annual reporting requirements and conditions and shall submit to the DDA an annual report that summarizes its activities and operations for the previous calendar year. The report shall be submitted on or before March 1<sup>st</sup> of each calendar year. The annual report shall include the information required in 7 Del. Admin. C. §7201-9.5.6.1.1.7.1 of the CAFO Regulations. A copy of the annual report and supporting documents must be retained by the permittee.
  6. If for any reason a discharge occurs, the permittee shall follow the guidance in Part I.F.1. of this permit.
  7. Violation of the Effluent Limitations in Part I.C. of this permit may result in additional monitoring requirements. In accordance with 7 Del. C. § 6019, the Department may ensure compliance with this permit through voluntary compliance measures such as warnings, notices, educational means or other enforcement actions.

#### **E. SCHEDULES OF COMPLIANCE**

None (N/A)

#### **F. NOTIFICATION REQUIREMENTS**

1. The permittee shall follow emergency notification procedures in accordance with 7 Del. Admin. C. §7201-9.5.6.1.1.7.2 of the CAFO Regulations. If for any reason there is a discharge of pollutants from the permittee's CAFO, the permittee shall verbally notify the DDA (Nutrient Management Program) at 1-800-282-8685 and the DNREC Emergency Response Branch at 1-800-662-8802 within 24 hours of becoming aware of the discharge and document the incident in writing within five (5) days. The information to be provided shall include:
  - a. A description of the discharge and cause, including a description of the flow path to the receiving waters, an estimate of the flow and volume discharged;
  - b. The period of discharge, including exact dates and times and if not corrected, the anticipated time the discharge is expected to continue and the steps being taken to reduce, eliminate and prevent recurrence of the discharge;

- c. If the discharge was caused by precipitation event(s), the amount of rainfall, as measured with a rain gauge at the site.
  - d. Results of any sampling and analysis of the discharge, if available.
2. If for any reason the permittee anticipates noncompliance with this permit, the permittee shall, as soon as possible, give advance notice to the DDA of any activity which may result in the noncompliance.
  3. The permittee shall report instances of other noncompliance with this permit to the DDA as soon as possible. The DDA will then determine a method of compliance with the permittee and document any instance of noncompliance.

#### G. DEFINITIONS

1. **“Animal Feeding Operation”** or **“AFO”** means a facility (other than an aquatic animal production facility) where the following conditions are met: (1) Animals (other than aquatic) as referenced in 7 Del. Admin. C. §§7201-9.5.3.1.1 and 9.5.3.1.2 of the CAFO Regulations that have been, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period; and (2) the animal confinement areas do not sustain crops, vegetation, forage growth or post-harvest residues in the normal growing season. (3) Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals in an operation, if the production areas adjoin each other or if the AFOs use a common area or system for the disposal of wastes. (For example, facilities or production areas that are commonly managed, co-located and share manure storage systems are considered a single AFO. A poultry operation with many facilities in a single location or address is deemed a single AFO).
2. **“Animal Waste Management Plan”** means a plan written in accordance with State Technical Standards that documents and recommends a combination of conservation practices and management measures for the handling, storage, treatment and management of any or all of the following for use in connection with animal wastes, manures, composted dead animals, or process wastewater from any animal feeding operation.
3. **“Applicant”** means any person seeking and or required to obtain a CAFO NPDES permit.
4. **“Apply,” “applying,”** or any variation of the word **“apply,”** as it relates to the application of nutrients, means the human controlled mechanical conveyance of nutrients to land for the purpose of applying organic or inorganic nutrients.
5. **“Application Area”** means land under the control of an AFO owner or operator, whether it is owned, licensed, or leased to which manure, litter or process wastewater from the production area is or may be applied.
6. **“Best Management Practices”** or **“BMP”** means those practices that have been approved by the Delaware Nutrient Management Commission and meet State Technical Standards. Best Management Practices (BMPs) are recommended activities which enhance agronomic results, benefit the environment, and prevent or reduce pollution to Waters of the State. BMPs are not to be interpreted as mandatory implementation actions of a plan (e.g., Pre-side dress Soil Nitrate Test, cover crops, vegetative buffer strips, litter additives, manure incorporation, timing/method, etc.) unless specified in the NMP, AWMP, or site-specific practices described in 7 Del. Admin. C. §7201-9.5.5.0 of the CAFO Regulations.

7. **“Best Professional Judgment” or “BPJ”** means the method used by permit writers to develop technology-based NPDES permit conditions, in those circumstances where there is no applicable effluent limitation guideline, on a case-by-case basis using all reasonably available and relevant data
8. **“Certified Nutrient Consultant”** means a person who is approved by the Delaware Nutrient Management Commission to engage in the activities of advising or consulting with another person who is required to have a certificate under the Delaware Nutrient Management Regulations, regarding the formulation, application, or scheduling of organic or inorganic nutrients within Delaware. Provided however any employee of any Federal, State or local government agency or the University of Delaware, or other organization duly recognized by the Commission for such purpose, who provides advice or consultation in his capacity as such an employee, without compensation, shall not be deemed to be a nutrient consultant unless such advice and consultation constitutes a direct and substantial part of a Nutrient Management Plan developed pursuant to these regulations.
9. **“Concentrated Animal Feeding Operation” or “CAFO”** means an animal feeding operation (AFO) subject to the terms and conditions of 7 Del. Admin. C. §7201-9.5.3.1 of the CAFO Regulations and defined as a “Large CAFO”, or a “Medium CAFO”, or “Designated” as a CAFO in accordance with 7 Del. Admin. C. §7201-9.5.3.2 of the CAFO Regulations.
10. **“Department”** means the Delaware Department of Natural Resources and Environmental Control who shall administer the program with the assistance of the Delaware Department of Agriculture.
11. **“Department of Agriculture”** means the Delaware Department of Agriculture (DDA).
12. **“Department of Natural Resources and Environmental Control”** means the Delaware Department of Natural Resources and Environmental Control (DNREC).
13. **“Discharge of a Pollutant” or “Discharge”** means the addition of any pollutant or combination of pollutants, to State Waters or the ocean, from any source or activity other than a vessel or other floating craft when being used as a means of transportation and in compliance with the Clean Water Act. This definition includes, but is not limited to additions of pollutants into State Waters from: (1) Surface runoff that is collected or channeled by man; (2) Discharges through pipes, sewers, and other conveyances which do not lead to a treatment works; and (3) Discharges through pipes, sewers, or other conveyances, leading into a treatment works other than a publicly owned treatment works (POTW).
14. **“Effluent Limitation”** means any restrictions, prohibitions, or permit requirements established under State or Federal law, including but not limited to, standards of performance for new sources, Best Management Practices or BMPs, effluent standards and ocean discharge criteria on the quantities, rates, and concentrations of the chemical, physical, biological, or other constituents discharged into State Waters.
15. **“Land Application Area”** is equivalent to “Application Area”
16. **“Layout”** means the time between a flock of birds leaving the farm for processing and a new flock entering the farm.

17. **“Manure”** means fecal and urinary defecations of animals as referenced in 7 Del. Admin. C. §§7201-9.5.3.1.1 and 9.5.3.1.2 of the CAFO Regulations, and may include, but is not limited to comingled spilled feed, bedding, soil, and compost.
18. **“New Source”** 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 the CAFO Regulations must also meet the criteria described in §7.0 of the CAFO Regulations.
19. **“NPDES”** or **“National Pollutant Discharge Elimination System”** means the national program for issuing, modifying, revoking and reissuing, terminating, monitoring and enforcing permits for the discharge of any pollutant or combination of pollutants and imposing and enforcing pretreatment and sludge requirements pursuant to the Clean Water Act.
20. **“Notice of Intent”** or **“NOI”** means the form used to serve as a notification of the intention of the facility identified on the form to adhere to the provisions of the CAFO Regulations.
21. **“Nutrient Management Plan”** or **“Plan”** means a plan written by a certified nutrient consultant in accordance with State Technical Standards to manage the amount, placement, timing and application of nutrients in order to reduce nutrient loss or runoff and to maintain the productivity of soil when growing agricultural commodities and turf grass.
22. **“Nutrients”** means nitrogen, phosphorus, and any other elements necessary for or helpful to plant growth.
23. **“Operator”** means any person in control of, or having responsibility for, the operation of the CAFO.
24. **“Overflow”** means the discharge of manure or process wastewater resulting from the filling of wastewater or manure storage structures beyond the point at which no more manure, process wastewater, or storm water can be contained in the structure.
25. **“Owner”** means any person who owns a CAFO.
26. **“Person”** means any individual, partnership, association, fiduciary, corporation, or any organized group of persons, whether incorporated or not.
27. **“Pollutant”** means for the purposes of these regulations any substance, which causes or contributes to, or may cause or contribute to, the degradation of water, and soil resources. Examples may include, but are not limited to excess nutrients, chemicals, toxic substances, industrial, municipal or agricultural wastes, etc.
28. **“Process Wastewater”** means any water directly or indirectly used in the operation of an AFO including, but not limited to spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits; direct contact swimming, washing, or spray cooling of animals; dust control; or any water which comes into contact with any

manure or litter, bedding, or any other raw material or intermediate or final material or product used in or resulting from the production of animals or poultry or direct products (e.g., milk, eggs).

29. **“Production Area”** means, unless otherwise modified in 7 Del. Admin. C. §7201-9.5 of the CAFO Regulations, that part of an AFO that includes the “animal confinement area”, the “manure storage area”, the raw materials storage area and the “waste containment areas”, egg washing or processing facility and any area used in the storage, handling, treatment or disposal of mortalities. Animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milk rooms, milking centers, cow yards, barnyards, medication pens, walkers, animal walkways, and stables. Manure Storage Area includes but is not limited to lagoons, runoff ponds, storage sheds, and stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. Waste Containment Area includes but is not limited to settling basins, and areas within berms and diversion which separate uncontaminated storm water.

As further defined in 7 Del. Admin. C. §7201-9.5.6.4 of the CAFO Regulations the production area for Large Poultry CAFOs means that part of an AFO that includes the “animal confinement area”, the “manure storage area”, the raw materials storage area and the “waste containment areas”, egg washing or processing facility and any area used in the storage, handling, treatment or disposal of mortalities. Animal confinement area includes the areas inside the poultry confinement houses and end pads in accordance with State Technical Standards. Manure storage and waste containment areas include storage sheds, and stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles.

Delaware interprets the above clarified definition of Production Area to apply to both Medium and Large Poultry operations which meet the definition of a CAFO and have a duty to apply for coverage under this General Permit.

30. **“Secretary”** 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).
31. **“State Nutrient Management Law”** means the law and associated regulations authorized in 3 *Del. C.* §2200 et.al.
32. **“State Nutrient Management Program”** or **“SNMP”** means all the nutrient management program elements developed by the Delaware Nutrient Management Commission, whether or not reduced to rules or regulations.
33. **“State Technical Standards”** means those technical standards established by the Secretary and in consultation with a collaborative group of technical experts representing technical resources and endorsed by the Delaware Nutrient Management Commission. State Technical Standards are available at the DDA.
34. **“State Waters”** or **“Waters of the State”** means all water, on the surface and under the ground, wholly or partially within, or bordering the State, or within its jurisdiction including but not limited to: (1) waters which are subject to the ebb and flow of the tide including, but not limited to, estuaries, bays and the Atlantic Ocean; (2) all interstate waters, including interstate wetlands; (3) all other Waters of the State, such as lakes, rivers, streams (including

- intermittent and ephemeral streams), drainage ditches, tax ditches, creeks, mudflats, sand flats, wetlands, sloughs, or natural or impounded ponds; (4) all impoundments of waters otherwise defined as Waters of the State under this definition; (5) wetlands adjacent to waters (other than waters that are themselves wetlands) identified in the above four statements. (6) Waste and storm water treatment systems or waste storage structures including, but not limited to, treatment ponds or lagoons designed to meet the requirements of the Clean Water Act (other than cooling ponds which otherwise meet the requirements of this definition) are not "State Waters" or "Waters of the State."
35. **"Stockpiling"** means the temporary location of manure piles in the production area for no more than 14 days unless the manure/litter is located under cover in an approved manure storage structure. Stockpiling must be conducted and positioned in accordance with State Technical Standards.
36. **"Storm Water Treatment System"** means a system of vegetative, structural, and other facilities or measures that control the volume, conveyance and rate of storm water runoff, and manage water quality impacts of storm water runoff. This may include constructed wetlands developed for the purpose of storm water runoff management.
37. **"Upset"** means an exceptional incident in which there is unintentional and temporary noncompliance with technology based permit Effluent Limitations because of factors beyond the reasonable control of the permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.
38. **"Vegetated Buffer"** means a permanent strip of dense perennial vegetation naturally occurring or established parallel to the contours of and perpendicular to the dominant slope of the field for the purposes of slowing water runoff, enhancing water infiltration, and minimizing the risk of any potential nutrients or pollutants from leaving the field and reaching surface waters. For the purposes of the CAFO Regulations, vegetated buffers will be measured from the top of the bank of the water body that is being buffered.
39. **"25-Year, 24-Hour Rainfall Event"** means the runoff event produced by a storm having an annual probability of occurrence of 4%, as defined by the National Weather Service Technical Paper Number 40, "Rainfall Frequency Atlas of the United States"(as amended), equivalent to regional or state rainfall probability information developed there from, or a rain event resulting in 6.0 inches of rainfall for New Castle county, 6.5 for Kent county and 6.7 for Sussex county in a 24-hour period.

## Part II

### A. MANAGEMENT REQUIREMENTS AND RESPONSIBILITIES

#### 1. Duty to Comply

Failure to comply with the terms of this permit or the CAFO Regulations shall constitute a violation and shall be grounds for enforcement action as provided in 3 *Del. C.* §2200 et.al. and 7 *Del. C.* §6000 et.al. The Department may seek voluntary compliance with a warning, notice or other educational means. However, the law does not require that such voluntary means be used before proceeding with enforcement. Violations may be subject to, and enforced by the Environmental Protection Agency (EPA) through the Federal Clean Water Act of 1977.

#### 2. Requirement to Implement a Site Specific Animal Waste Management Plan or Nutrient Management Plan

A CAFO owner or operator under this permit shall implement and fully comply with the AWMP/NMP as described in 7 *Del. Admin. C.* §7201-9.5.5.0 of the CAFO Regulations developed by a Delaware certified nutrient consultant that contains site specific Best Management Practices necessary to meet the requirements of this permit and applicable Effluent Limitations and standards as specified in the CAFO Regulations. The AWMP/NMP submitted by the applicant for coverage is incorporated into this NPDES CAFO Permit and any violation of its terms shall constitute a violation of the NPDES CAFO permit.

- a. Anytime changes to an AWMP/NMP occur, the new updated plan and/or addendum to the plan must be submitted to DDA. The permittee shall provide the DDA with the revised/updated CAFO's AWMP/NMP within 90 days of any update, and shall identify changes from the previous version. The DDA will review the revised AWMP/NMP to ensure it meets the requirements of the regulations and the standards as described in the State Technical Standards, and will determine whether the changes to the AWMP/NMP require revision to the terms of the NPDES CAFO Permit issued to the CAFO. If revision to the terms of the AWMP/NMP is not necessary, the DDA will notify the CAFO owner or operator and upon such notification the CAFO may implement the revised AWMP. If the DDA determines that the changes to the terms of the AWMP/NMP are not substantial, the Secretary will make the revised AWMP/NMP publicly available and include it in the permit record, revise the terms of the AWMP/NMP incorporated into the permit, and notify the owner or operator and inform the public of any changes to the terms of the AWMP/NMP that are incorporated into the permit.
- b. A substantial change to the NPDES CAFO Permit will be determined by the Secretary. Changes determined to be substantial are subject to public review and comment. The Secretary may include the changes to the incorporated Animal Waste Management Plan in the NPDES CAFO Permit, and will notify the owner or operator and the public of the final decision concerning revisions to the terms and conditions of the NPDES CAFO Permit. A substantial change includes, but is not limited to, an annual increase in the facility's animal feeding capacity greater than 25% and/or any change to the operation that presents a risk of nitrogen and phosphorus runoff as determined by the Secretary constitutes a substantial change.

If the permitting authority decides that the changes that have been implemented do not ensure compliance with state and federal regulations, the permittee would be subject to enforcement under 7 *Del. Admin. C.* §9.5.9.1 of the CAFO Regulations.

#### 3. Planned Alterations/Additions to the Permitted Facility

The permittee shall give notice to the Secretary through the DDA /DNREC as soon as possible of any planned physical alterations or additions to the permitted facility. Notification is only required when one or more of the following conditions are satisfied:

- a. New poultry houses are to be constructed at the permitted facility.
- b. The alteration or addition meets criteria of a "New Source" in accordance with 7 Del. Admin. C. §9.5.7.0 of the CAFO Regulations.
- c. The alteration or addition changes the location of discharge points, if any.

4. General Housekeeping Practices

The permittee shall have manure residue and litter residue adequately cleaned up on a reasonable and necessary basis.

5. Layout Housekeeping Practices

The permittee shall have manure residue and litter residue adequately cleaned up from the exterior area(s) of the poultry house(s) as soon as practically possible after bird movement not to exceed 14 days.

6. Proper Operation and Maintenance

The permittee shall at all times maintain in good working order and operate as efficiently as possible all BMP's installed or used by the permittee for water pollution control to achieve compliance with the terms and conditions of this permit. Proper operation and maintenance includes, but is not limited to, good housekeeping practices, appropriate chemical storage and handling, proper handling and storage of manure, and proper handling of mortalities as addressed in the AWMP or NMP.

7. Discharge Minimization

The permittee must take immediate steps to stop, contain, and adequately clean up any discharge resulting from manure, litter, and/or process wastewater that materially adversely affect surface water. Additionally, the permittee shall take all reasonable and necessary steps to minimize any adverse impacts to groundwater.

8. Duty to Mitigate

The permittee shall take all reasonable steps to minimize any adverse impact to Waters of the State, human health or the environment resulting from noncompliance with this permit.

9. Right of Entry

Pursuant to 7 Del. C. §6024; The Secretary, or the Secretary's duly authorized designee, in regulating water pollution, air pollution, solid waste disposal or any other matter over which he or she has jurisdiction pursuant to this chapter, may enter, at reasonable times, upon any private or public property for the purpose of determining whether a violation exists of a statute or regulation enforceable by him or her, upon given verbal notice, and after presenting official identification to the owner, occupant, custodian or agent of said property.

The permittee shall allow the right of entry to the Secretary of the DNREC, the Secretary of Agriculture, the EPA Regional Administrator, or their authorized representatives, jointly and severally, upon the presentation of his or her credentials.

In accordance with 7 Del. Admin. C. §7201-9.5.6.1.1.11.1 of the CAFO Regulations, the Secretary, or authorized designee, shall be authorized to evaluate implementation of the permit and furthermore be allowed to:

- a. Enter and inspect the CAFO;
- b. Have access to and copy, at reasonable times, any records required to be kept under the terms and conditions of this permit; and
- c. Sample or monitor any soil, manure, litter, process wastewater, Waters of the State, and discharges from the site.

Any sampling and/or monitoring undertaken will be performed as prescribed in Part I.D.4 supra.

Additionally, in accordance with 7 Del. Admin. C. §7201-9.5.6.1.1.11.2 of the CAFO Regulations, the owner or 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 the DDA/DNREC will provide advance notice of inspections; however, in order to ensure compliance, unannounced inspections may be performed.

The permitted facility shall have a minimum of one (1) site visit within the five (5) year duration of this permit from the Department.

#### 10. Property Rights

The issuance of a NPDES CAFO permit under the requirements of the CAFO Regulations does not convey any property rights of any sort, nor any exclusive privileges, nor does it authorize any injury to private property, nor any invasion of personal rights, nor any infringement of Federal, State, or local laws or regulations.

#### 11. Duty to Provide Information Requested by the Department

The permittee shall furnish to the DDA/DNREC, within a reasonable time, any information which the DDA/DNREC may request to determine compliance with this permit or to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit. The permittee shall also furnish, upon request, copies of records required to be kept by this permit.

#### 12. Duty to Provide Information Found to be Missing or Inaccurate

When the permittee discovers that it failed to submit any relevant facts in a permit application or that it submitted any incorrect information in any permit application or in any report to the DDA/DNREC, it shall promptly submit such facts or information.

#### 13. Signatory Requirements

All applications, reports, or information submitted to the DNREC or the DDA shall be signed and certified in accordance with 7 Del. Admin. C. §7201.

#### 14. Public Access to Information

All information pertaining to this NPDES CAFO permit issuance, reissuance, modification, revocation or termination, including NOIs, attachments including the AWMP/NMP, comments received by the public, and draft NPDES CAFO permits shall be available for review by the public. Annual reports, including without limitation a statement by the owner or operator stating whether or not the owner or operator met or exceeded the projected crop yields provided in the CAFO's NMP, shall be available for review by the public, provided that the actual crop yields provided and contained in annual reports shall be confidential and non-public to the maximum extent permitted under Delaware law. The crop yields provided and contained in annual reports may be used for data compilation in an aggregated form, and such data compilation in an aggregated form may be made public. Information transmitted by the Secretary to EPA shall be subject to appropriate Federal regulations. Knowingly making

any false statement in any such report may result in the imposition of criminal penalties as provided for under 7 *Del.C.* §6013.

15. Reapplication for a Permit

Duty to maintain NPDES CAFO Permit coverage; no later than 180 days before the expiration of the NPDES CAFO Permit, the owner or operator shall submit an NOI to renew its NPDES CAFO Permit, unless the CAFO has ceased to operate as a CAFO, or will not discharge or propose to discharge upon the expiration of the NPDES CAFO Permit.

In the event that a timely and sufficient reapplication has been submitted and the Department is unable, through no fault of the permittee, to issue a new permit before the expiration date of this permit, the terms and conditions of this permit are continued and remain fully effective and enforceable.

16. Modification, Termination, or Revocation and Reissuance

This permit may be modified, terminated or revoked and reissued in whole or in part, during its term, for cause by the Secretary. The filing of a request for permit modification, or revocation and reissuance, or termination, or a notification of any changes or anticipated noncompliance does not stay any permit condition. In the event that the Department's *Regulations Governing the Control of Water Pollution*, CAFO Regulations or any applicable Federal regulations are revised, this permit may be reopened and modified accordingly after notice and opportunity for a public hearing.

17. Permit Transfer

This permit is not transferrable to any person, except after notice to and with the concurrence of the Secretary; the owner or operator may request a NPDES CAFO Permit transfer by:

- a. Notifying the DDA/DNREC in writing at least 30 days prior to the proposed transfer; and
- b. The permittee submits to the DDA/DNREC a written agreement signed by all parties to the transfer, containing a specific date for transfer of permit responsibility, coverage and liability to the new permittee. The written agreement shall expressly acknowledge the current permittee is responsible and liable for compliance with the terms and conditions of this permit up to the date of transfer and the new permittee is responsible and liable for compliance from that date on; and
- c. The DDA/DNREC, within 30 days of receipt of the notification of the proposed transfer, will notify the current permittee and the new permittee of the Secretary's intent to modify, to revoke and reissue, or terminate the permit and require that a new application be submitted.

The permittee is encouraged to provide as much advanced notice as possible of any proposed transfer, to allow sufficient time for the Department to modify this permit to identify the new permittee and to incorporate such other requirements as may be necessary under the Law.

18. Cease Permit Coverage

The owner or operator may request to cease NPDES CAFO permit coverage by submitting a request in writing to the DDA/DNREC with a justification for the request. The justification shall explain why the owner or operator no longer has a duty to apply for NPDES CAFO permit coverage. The Secretary will approve or deny the request within 180 days.

19. Out of Operation Structure(s)

In the event that structure(s) are taken out of production, the following closing procedures must occur:

- a. The permittee must notify the DDA/DNREC;
- b. A total clean out of the structure(s) must be performed in order to remove out of operation structure(s) from this permit; and
- c. Visual verification of the total clean out will be performed and documented by the DDA/DNREC.

In the event that all structure(s) are being taken out of production, the additional following closing procedure must occur to cease permit coverage:

- d. The permittee must follow the guidelines provided in Part II.A.18 of this permit.

If manure is not removed from the structure(s) then the structure(s) will be considered manure storage buildings and therefore remain under NPDES CAFO permit coverage.

20. Severability

If any provision of this permit is held invalid, the remainder of this permit shall not be affected. If the application of any provision of this permit to any circumstance is held invalid, its application to other circumstances shall not be affected.

21. State Laws, Enforcement, Fines, and Penalties

Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties to which the permittee is or may be subject under 7 *Del.C.* §6000 and 3 *Del.C.* §2200, or any other State law or regulation.

Whoever violates this permit and/or the CAFO Regulations shall be subject to the fines and penalties established in 3 *Del.C.* §2200 and 7 *Del.C.* §6000 at the discretion of the Secretary and appropriate Court.

The discharge of any pollutant more frequently than, or at a level in excess of that identified and authorized herein shall constitute a violation of the terms and conditions of this permit. The violation of any Effluent Limitation or of any other condition specified in this permit is a violation of 7 *Del.C.* §6000. Violations may be subject to, and enforced by the Environmental Protection Agency (EPA) through the Federal Clean Water Act.

22. Need to Halt or Reduce Activity Not a Defense

Owners and operators may not use as a defense in an enforcement action that it would have been necessary to halt or reduce the permitted activity in question to maintain compliance with the conditions of this permit.

23. Upset

An upset constitutes an affirmative defense to an action brought for noncompliance with such technology based permit Effluent Limitations if the requirements of the following paragraph are met.

Conditions necessary for a demonstration of upset: A permittee who wishes to establish the affirmative defense of upset shall demonstrate, through properly signed, contemporaneous operating logs, or other relevant evidence that:

- a. An upset occurred and that the permittee can identify the cause(s) of the upset;
- b. The permitted facility was at the time being properly operated in accordance with Part II.A.6. of this permit; and
- c. The permittee submitted notice of the upset in accordance with the Noncompliance Notification section of this permit (Part I.F.1.).
- d. The permittee complied with any remedial measures in accordance with the Duty to Mitigate section of this permit (Part II.A.8).

Burden of proof: In any enforcement proceeding the permittee seeking to establish the occurrence of an upset has the burden of proof.

Effective Date: [Insert Date]  
Expiration Date: [Insert Date]

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**Part III**

**A. SPECIAL CONDITIONS**

None (N/A)