

**RESPONSE TO COMMENTS ON THE PROPOSED NATIONAL POLLUTANT
DISCHARGE ELIMINATION SYSTEM (NPDES) GENERAL PERMIT FOR
DISCHARGES FROM CONCENTRATED ANIMAL FEEDING OPERATIONS
(CAFOs) IN NEW MEXICO (NMG010000)**

U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 6

RECEIVED ON THE SUBJECT DRAFT NPDES PERMIT IN ACCORDANCE WITH
REGULATIONS LISTED AT 40 CFR 124.17

SUBSTANTIAL CHANGES FROM DRAFT PERMIT

Change 1: Based on NMED condition of certification under section 401 of the Clean Water Act, Part III.A.8 of the permit has been changed to require the use of a certified specialist to develop, modify, review, and/or approve the nutrient management plan.

Change 2: Part III.A.3.h has been added to the permit to require that the nutrient management plan (NMP) include site maps of the production and land application areas.

Change 3: Part II.A.2.a.x has been modified to include the term “as appropriate.” Part II.A.2.a.x and Part III.A.3.b have also been modified to clarify that retention structures must include adequate storage capacity for clean water that is not diverted.

Change 4: EPA has removed Part III.A.3.f.i-iv from the permit and has modified Part III.A.3.f to require that the NMP include any additional information necessary to assess the adequacy of the application rates included in the NMP.

Change 5: EPA has modified Part III.A.7.d of the permit to require that manure sampling be conducted annually prior to the first land application event of each year of permit coverage and to allow for representative sampling protocols to be established in the NMP.

Change 6: The spills reporting requirement has been removed from Part III.D.3 of the permit and was replaced with a requirement to document spills and clean-up activity.

Change 7: Part III.D.3 of the permit has been modified to state that handling procedures and storage for any toxic and other pollutants must be specified in the NMP.

Change 8: EPA has modified Part III.D.1.c to state that any mechanical or structural damage to the liner must be evaluated by a Natural Resources Conservation Service (NRCS) Engineer or Professional Engineer and that the permittee shall have a NRCS Engineer or Professional Engineer review documentation.

Change 9: The infiltration monitoring requirement of Part III.D.1.c has been modified to be based on a direct hydrological connection to waters of the United States. EPA has also modified this section to allow for other appropriate measures to be used in lieu of leak detection systems or monitoring wells.

Change 10: EPA has modified the permit to require that annual reports be submitted to EPA and NMED on January 31 as opposed to basing the due date on the NOI submittal date.

Change 11: Parts VI.B.1, VI.B.2, and VI.C.1 have been removed from the permit as they are repetitive of provisions found elsewhere in the permit.

Change 12: EPA has added Part I.H to address the procedure for a change in ownership.

Change 13: The Water Quality-Based Reduction Plan requirement of Part II.A.3.c has been removed from the permit.

Change 14: EPA has modified Part III.C to exclude amounts less than 10 tons per year to a single recipient from the transfer of manure, litter, and process wastewater recordkeeping requirement.

Change 15: EPA has removed the notification requirement from Part III.D.8.a and will rely on the notification requirement of Part III.D.5, which has been modified to require notification within 48 hours.

Change 16: The proposed corrective action requirement proposed as Part II.A.3.d has been clarified to address discharges or proposed discharges to impaired waters and has been moved to Part II.A.3.a.iv.

Change 17: EPA has modified Part IV.A of the permit to require CAFOs to orally report the discharge of pollutants to waters of the United States to NMED.

Change 18: Part I.D.8 and Part I.E.8 of the final permit have been amended to clarify that new sources must submit an Environmental Impact Document (EID), not a previous EPA National Environmental Policy Act (NEPA) review document, with their NOIs.

Change 19: Part II.A.5.c has been amended to clarify that there shall be no unauthorized dry weather discharges from land application sites.

Change 20: EPA has clarified Part I.E.1.a.i to state that for any facility that received authorization to discharge under the 1993 CAFO general permit and complies with the 90-day NOI timeframe, authorization under the 1993 CAFO permit is automatically continued until coverage is granted under this permit or coverage is otherwise terminated.

Change 21: EPA has amended Part I.E.8 to clarify that the applicant must submit to EPA information describing an expansion so that EPA may determine if the expansion is a new source.

STATE CERTIFICATION

Letter from Glenn Saums, Acting Chief, New Mexico Environment Department (NMED) to Miguel I. Flores (EPA), dated February 20, 2009.

DISCUSSION OF STATE CERTIFICATION

Conditions of Certification

(1) In New Mexico Environment Department's (NMED) pre-certification letter dated February 20, 2009, NMED provided the following condition of certification (summarized here):

NMED Surface Water Quality Bureau (SWQB) believes that there is reasonable potential under this permit for discharges to exceed water quality standards (WQS), including general standards, unless best management practices (BMPs) incorporated in the nutrient management plan (NMP) are developed by qualified personnel. Therefore, CAFOs located in New Mexico (except Indian Country) must use a "Certified Conservation Planner – CNMP" and "Certified Specialists – CNMP" to develop and/or modify the NMP required by the permit, and the NMP must include documentation that the person who developed and/or modified the NMP met the qualification of a certified planner/specialist. NMP planners must be certified by New Mexico USDA-NRCS or a USDA-NRCS sanctioned organization as a "Certified Conservation Planner – CNMP" or an alternate, equivalent certification program developed by NMED.

RESPONSE TO COMMENTS RECEIVED ON DRAFT PERMIT

EPA received a number of comments during the public comment period from January 21, 2009 to February 20, 2009.

EPA received letters or emails from the following individuals or entities:

New Mexico Environment Department (NMED) via mail date February 20, 2009
US Fish and Wildlife Service (USFWS) dated February 20, 2009
Bureau of Reclamation - Albuquerque Area Office (BR) dated February 20, 2009
New Mexico Department of Agriculture (NMDA) dated February 19, 2009
Dairy Producers of New Mexico (DPNM) via email dated February 20, 2009
Seaboard Foods (SF) via email dated February 20, 2009
Oklahoma Farm Bureau (OFB) via email dated February 20, 2009
Texas Cattle Feeders Association (TCFA) via email dated February 20, 2009
Oklahoma Pork Council (OPC) via email dated February 20, 2009
Amigos Bravos (AB) dated February 19, 2009

EPA has consolidated similar comments and categorized comments into the topic headings listed below.

PART I – PERMIT AREA AND COVERAGE

Comments Regarding Duty to Apply

Comment 1: The duty to apply provision in the permit (i.e., for CAFOs that discharge or propose to discharge) is not sufficient to ensure that discharging CAFOs seek permit coverage and, thus, to protect water quality. The permit language is unclear regarding what constitutes a CAFO that "discharges or proposes to discharge." Categories of Large CAFOs for which evidence of actual or proposed discharge is strong should be required to obtain permit coverage.

Response 1: The requirement in this permit for CAFOs that discharge or propose to discharge is derived from the recently revised NPDES CAFO regulation at 40 CFR 122.23(d)(1). 73 FR 70418 (Nov. 20, 2008). Comments regarding whether this is the appropriate requirement under the CWA for which CAFOs must seek permit coverage are beyond the scope of this general permit. The permit applicability and application provisions in the EPA general permit for CAFOs in New Mexico are fully consistent with these federal NPDES CAFO regulations. Under the general permit, a CAFO that discharges or proposes to discharge pollutants to waters of the United States must apply for NPDES permit coverage, and if eligible, may seek to be covered under the general permit.

For further discussion of the requirement for CAFOs that discharge or propose to discharge to seek permit coverage, see the preamble to the 2008 final CAFO rule at 73 FR 704,23-25.

Comment 2: EPA must require all CAFOs that claim not to discharge to demonstrate that they are non-discharging CAFOs. Section 308(a) of the Clean Water Act provides EPA with legal authority and establishes EPA's duty to require CAFOs to submit information demonstrating that they do not discharge. The commenter asserted that the voluntary no discharge certification option in the 2008 final CAFO rule is ineffective and urges EPA to require a mandatory certification process for non-discharging CAFOs.

Response 2: The comment appears directed at the revised NPDES CAFO regulation (73 FR 70418), which became effective on December 22, 2008, rather than falling within the scope of the draft general permit for CAFOs in New Mexico. The opportunity for public comments to be submitted on the proposed voluntary no discharge certification option concluded April 7, 2008, after EPA published a Supplemental Notice of Proposed Rulemaking (73 FR 12,321). EPA cannot change the NPDES regulations through this permit. Consistent with the requirements of the federal NPDES regulations for CAFOs at 40 CFR 122.23(d), this permit requires CAFOs that discharge or propose to discharge to seek permit coverage, although any CAFOs eligible for coverage may choose to submit an NOI. This permit is consistent with the federal regulations in that it does not impose requirements on CAFOs that do not discharge or propose to discharge and therefore are not required to submit an NOI for coverage under this permit. EPA Region 6 can request information from such CAFOs on a case-by-case basis, as discussed below.

EPA agrees with the commenter that section 308 of the CWA confers on EPA broad authority and discretion to request information. However, EPA does not agree that the CWA mandates EPA to require all unpermitted CAFOs to certify that they do not discharge or propose to discharge. Rather, under section 308(a), the EPA Administrator has discretion to require information (including establishing and maintaining records and making reports) from "the owner or operator of a point source" as he may reasonably require; . . . "whenever" it is "required to carry out the objective" of the Act. Under section 308 and the NPDES program, permitting authorities have significant authority to collect information needed to determine CAFO compliance with the CWA. Section 308(a)(3). Neither the provisions of this general permit or the 2008 final rule limit this authority, which permitting authorities may use as they find reasonably necessary to ensure that all discharging CAFOs have NPDES permit coverage.

Comment 3: The commenter supports requiring permits only for CAFOs that discharge or propose to discharge.

Response 3: The comment has been noted in the administrative record.

Comments Regarding Transfer of Ownership

Comment 4: Two commenters requested the addition of language to Part I of the permit allowing permit coverage to be transferred with a transfer of ownership in circumstances where the change in ownership is the only change to the operation. Both commenters suggested that the new owners be required to report acquisition of the facility and state that they will continue to follow the NMP and permit conditions. One commenter more specifically suggested that the new owner be required to report (1) no changes to the facility, (2) concurrence with the information submitted in the previous owner's Notice of Intent, and (3) an understanding that the NMP will be followed. This language is necessary to ensure timely permit coverage for new owners of an existing operation where no structural or operational changes are proposed.

Response 4: EPA agrees with the commenters that the transfer of permit coverage should be allowed where no other changes to the NMP or terms of the permit are necessary. EPA has added Part I.H to allow for a minor modification of permit coverage due to a change in ownership as described in 40 CFR 122.63(d).

EPA would like to note that if permit coverage is not transferred, the current permittee must submit a Notice of Termination (NOT) to EPA in accordance with Part I.C. EPA has modified Part I.G of the permit to clarify that termination of permit coverage is not complete until EPA informs the facility that such a request has been granted.

Comments Regarding Limitations on Coverage

Comment 5: Coverage under the general permit should be made available to swine, duck, poultry and veal operations in the event that these types of operations are established in New Mexico during the permit term.

Response 5: EPA believes that it is appropriate to require individual permit coverage of duck, swine, poultry, and veal operations. No such operations are known to be located in New Mexico. While these operations could be established in New Mexico during the 5-year permit term they would be considered new sources. EPA believes that the most appropriate way to address the new source performance standards for CAFOs subject to 40 CFR 412.46 is on a case-by-case basis. The requirement for an individual permit is retained.

Comment 6: Three commenters expressed concern regarding the limitation for permit coverage for CAFOs discharging to Tier 3 waters. One commenter suggested that this limitation could be used as a "zoning" tool to prevent CAFOs from locating or operating in a watershed by petitioning to have receiving waters designated as Outstanding Natural Resource Waters. The commenters requested that EPA replace the existing limitation on permit coverage with language allowing CAFOs discharging to Tier 3 waters to be covered under the general permit if they prepare and implement an Emergency Action Plan.

Response 6: Tier 3 waters are high quality waters that do not allow any degradation with few site specific exceptions. EPA believes that requirements for authorized discharges to waters designated as Outstanding Natural Resource Waters should be evaluated on a case-by-case basis. Therefore, CAFOs that seek permit coverage for discharges to such waters must apply for individual permit coverage.

Comment 7: One commenter noted that the definition of “newly defined CAFOs” includes operations that were excluded from the definition of “CAFO” prior to April 13, 2003, and questioned whether this means that existing CAFOs covered under the expired 1993 permit are excluded from the limitation for coverage in Part I.D.7.

Response 7: The limitation for coverage in Part I.D.7 applies to “new dischargers,” as defined by 40 CFR 122.2. CAFOs covered under the expired 1993 permit are excluded from this limitation for coverage, as they have previously received a finally effective NPDES permit for discharges.

Comment 8: Two commenters proposed that the limitation on coverage for new dischargers to water quality impaired waters be modified such that it applies only to discharges containing nitrogen or phosphorus. One commenter further specified that the limitation should be for discharges containing nitrogen and phosphorus in concentrations that would cause an exceedance of a receiving water’s nitrogen or phosphorus Total Maximum Daily Load.

Response 8: EPA does not concur with the proposal to restrict the limitation on coverage for new dischargers to water quality impaired waters to discharges containing nitrogen or phosphorus. Nutrients are not the only probable causes of impairment noted in New Mexico’s 2006 §303(d) list of water quality limited segments that have the potential to be present in discharges from CAFOs. The requirement of Part I.D.7 will remain as proposed.

Comment 9: EPA should prohibit all discharges from CAFOs to impaired waters by denying CAFOs authorization to discharge to impaired waters or by imposing a strict, zero discharge standard on CAFOs located in impaired watersheds. If discharges to impaired waters are allowed, such discharges should be below established water quality criteria.

Response 9: EPA believes that the requirements of Part I.D.7 are appropriate to address discharges to impaired waters. The requirement of Part I.D.7 will remain as proposed.

Comment 10: “Past history of non-compliance” should only include those types of non-compliance resulting in formal enforcement action and should not include Administrative Orders; discharges that complied with the terms of the general permit; or other minor violations that were resolved by the CAFO owner/operator.

Response 10: EPA would like to clarify that a CAFO with a past history of non-compliance is not automatically excluded from general permit coverage. EPA has proposed to determine the eligibility of such facilities for general permit coverage on a case-by-case basis. If a facility is notified by the EPA that they are ineligible for general permit coverage on the basis of Part I.D.2, the facility must apply for an individual permit if the facility discharges or proposes to discharge. EPA would also like to clarify that Administrative Orders, such as Administrative Orders without penalty (AOs) and Administrative Orders with Penalty (APOs), are formal enforcement actions. EPA believes that this limitation on coverage is appropriate and Part I.D.2 will remain as proposed.

Comments Regarding NEPA Review for New Sources

Comment 11: The NEPA review conducted for the 1993 general permit, which resulted in a Finding of No Significant Impact, is sufficient for all CAFOs seeking coverage under the permit and no additional NEPA analyses are necessary for new source CAFOs.

Response 11: EPA Region 6 issued an Environmental Assessment (EA) and Finding of No Significant Impact (FNSI) in connection with issuance of 1993 CAFO permits, but also performed subsequent NEPA review on individual NOIs submitted by a “new source” CAFO under those general permits. Under that tiered approach, Region 6 considered potential environmental impacts then generally associated with CAFOs when it initially issued the general permits, then focused on potential site-specific impacts in the subsequent NEPA review of each “new source” CAFO submitting an NOI. EPA thus completed NEPA review under that permit only on new source CAFOs constructed prior to the permits’ expiration in 1998. Only CAFOs on which construction commenced after promulgation of the 2003 NSPS are now considered “new sources,” however, and EPA Region 6 has thus performed prior NEPA review on no new source seeking coverage under today’s permit.

The draft permit may have contributed to confusion on this issue by indicating new sources could submit a previous EPA NEPA review document in lieu of an Environmental Impact Document (EID). Part I.D.8 and Part I.E.8 of the final permit have thus been amended to clarify that new sources must submit an EID, not a previous EPA NEPA review document, with their NOIs. An EIS or EA issued by another federal agency on a specific “new source” CAFO may be incorporated in an EID submitted to EPA, however.

Comment 12: Two commenters pointed out that NEPA requires an environmental review prior to taking any “major federal action” and that in the case of the permit, the major federal action (adoption of the general permit) occurs prior to a CAFO’s NOI submittal. The commenters suggest that EPA’s consultation with the U.S. Fish and Wildlife Service prior to issuance of the draft permit and during the public comment period precludes any requirement for a NEPA review prior to a CAFO submitting an NOI for permit coverage.

Response 12: The federal action subject to NEPA review in this matter is EPA’s authorization of discharges of pollutants by “new sources” and that NEPA review need only be completed before EPA issues such an authorization. See CWA § 511(c)(1). EPA thus has substantial discretion in structuring the framework and timing of its NEPA review in this matter where today’s “issuance” action does not itself authorize discharges. In contrast to the framework Region 6 employed under the 1993 permit described above, EPA Region 6 will perform a single NEPA review on each NOI it receives from a new source. Until that review occurs, the Region will not authorize discharges by a new source under this general permit.

Requirements for NEPA review and Endangered Species Act (ESA) consultation are imposed by separate statutes and are not coextensive. ESA consultations are frequently integrated with Agency NEPA review in accordance with 40 C.F.R. §1502.25, but consultation under ESA §7(a)(2) does not itself achieve compliance with NEPA §102(2)(C). EPA consultation with the U.S. Fish & Wildlife Service on today’s permit action does not thus “preclude” NEPA review of new source discharge authorizations the Agency may propose in accordance with the terms of the general permit.

Comment 13: Two commenters observed that the preamble to the 2003 CAFO rule explains that “extending housing structures by constructing new housing adjacent to existing housing is not typically considered a new source.” One of these commenters recommended that EPA remove any reference to requiring information on the expansion of an existing facility be submitted to EPA for a determination of a new source.

Response 13: 40 CFR 122.29(b) sets forth the criteria for EPA to apply when considering whether a facility expansion makes a source a “new source” for NPDES permitting purposes. The

preamble statement (at 68 FR 7200) these comments reference provides an example of a type of facility expansion that would not itself be typically considered a "new source." As also indicated in the preamble, however, a similar expansion might be considered a "new source" under some circumstances, e.g., if it required independent production and waste handling processes. The final permit continues to require that applicants submit information on facility expansions. EPA has amended Part I.E.8 to clarify that the applicant must submit to EPA information describing an expansion so that EPA may determine if the expansion is a new source.

Comments Regarding Application for Permit Coverage

Comment 14: Three commenters suggested that the 90-day timeframe for NOI or permit application submittal be extended, and two of these suggested using 180 days to allow adequate time for NMP development and staff training given the limited pool of qualified consultants to prepare NMPs. The commenters additionally suggested that this modification will allow EPA to process early submittals and confirm permit coverage to minimize any gap in permit coverage for existing CAFOs.

Response 14: The 90-day timeframe for NOI submittal is consistent with the requirements of other NPDES general permits issued by EPA, including the 1993 CAFO general permit and the 2008 general permits for stormwater discharges from construction and industrial activities. EPA believes that the proposed 90-day timeframe described in Part I.E.1 is an appropriate amount of time to allow for NOI submittal to the Director. Therefore, the 90-day timeframe will remain in the permit as proposed. EPA has clarified Part I.E.1.a.i to state that for any facility that received authorization to discharge under the 1993 CAFO general permit and complies with the 90-day timeframe, authorization under the 1993 CAFO permit is automatically continued until coverage is granted under this permit or coverage is otherwise terminated.

Comment 15: Under the proposed permit requirements, many operators will develop and submit a CNMP prepared in accordance with New Mexico NRCS technical guidance in lieu of an NMP that will meet the relevant requirements of 40 CFR 122 and 412. To avoid confusion and potentially duplicative paperwork, Parts I.E.1.b and I.E.5 of the permit should specify that an NMP or CNMP that meets the relevant provisions in 122.42 and 412 must be developed and submitted.

Response 15: EPA agrees with the commenter that a CNMP prepared in accordance with New Mexico NRCS technical guidance may be submitted to the EPA in lieu of an NMP, so long as the CNMP meets all requirements of the NPDES CAFO permit. However, EPA believes that noting this in the administrative record is sufficient to avoid confusion and making such a statement in the permit is not necessary.

Comment 16: The permit should require the operator to submit a site map, including the production and land application areas, flow direction, outline of drainage areas to the process wastewater retention or control structures, structural controls, and surface water bodies.

Response 16: Item II-C of Application Form 2B (Appendix A of the permit) requires the submission of a topographic map of the entire operation, which includes the production area and land under the operational control of the CAFO operator where manure, litter, and/or wastewater are applied. However, EPA concurs with the commenter that an additional site map should be required. EPA notes that previous CAFO permits issued in EPA Region 6 require such maps. Therefore, Part III.A.3.h has been added to the permit and requires that the NMP include site maps of the production and land application areas.

Comments Regarding Individual Permits

Comment 17: Part I.E.3 of the proposed permit implies that CAFOs are not eligible to apply for individual permits. Region 6 should clarify whether this is the case. In addition, it should clarify that an individual permit application is appropriate for seeking an individual permit, and that an NOI is required when seeking coverage under this general permit.

Response 17: EPA agrees that individual permit application is appropriate for CAFOs seeking an individual permit, and does not intend to deny CAFOs individual permit coverage when such permits are appropriate. Several CAFOs have submitted individual applications since 1998 when general permit coverage was no longer available. EPA anticipates that these facilities will elect to obtain general permit coverage under this permit. EPA has modified Part I.E.3 to clarify that CAFOs that have submitted an application for individual permit coverage prior to the issuance of the general permit must submit an NOI if they are now seeking general permit coverage.

PART II – EFFLUENT LIMITATIONS AND STANDARDS

Comments Regarding Production Area Limitations and Permit Conditions

Comment 18: The permit should not allow discharges from CAFOs even if caused by a storm event greater than a 25-year, 24-hour event at a properly designed, constructed, operated, and maintained operation. The 25-year, 24-hour storm design standard is not sufficiently protective of water quality, is contrary to the original intent and language (Section 101(a)) of the Clean Water Act, violates New Mexico's narrative water quality standards for nutrients, and will result in non-attainment of New Mexico's designated uses.

Response 18: The Clean Water Act prohibits discharges from point sources except as in compliance with an NPDES permit or other specific provisions of the Act. See CWA section 301(a). EPA notes that regulations, effluent guidelines and standards, and permits that authorize point sources to discharge are common throughout the NPDES program. Permit provisions authorizing discharges must take into account many factors such as economic achievability, cost-effectiveness and water quality standards of receiving streams. This permit is consistent with the effluent limitations guidelines and standards for Large CAFOs, which provide that there shall be no discharge of manure, litter, or process wastewater pollutants into waters of the United States from the production area, except if precipitation causes a discharge and the production area is designed, constructed, operated, and maintained to contain all manure, litter, and process wastewater including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event and in accordance with the measures and records required by 40 CFR 412.37(a) and (b). This is not an exemption for all discharges that occur as a result of the 25-year, 24-hour storm. Only discharges that occur when the permitted CAFO meets all of the above requirements would be authorized by the permit.

Comment 19: The permit should clarify that the requirements of both Part II.A.1.a.i and II.A.1.a.ii must be met for a CAFO to have an allowable discharge.

Response 19: EPA has modified Part II.A.1.a.i to clarify that the requirements of both Part II.A.1.a.i and II.A.1.a.ii must be met for a CAFO to have an allowable discharge.

Comment 20: The permit should retain the 1993 General Permit provisions for discharges due to chronic rainfall events.

Response 20: The effluent limitations of the 1993 permit were established to be consistent with 1974 regulatory Best Available Technology (BAT) requirements established in 40 CFR 412 – Feedlots Point Source Category. These requirements did not allow discharges of pollutants from CAFOs into the Nation’s waters except when a chronic or catastrophic storm caused an overflow from a facility that had been designed, constructed, and operated to contain manure, process wastewater and runoff resulting from a 25-year, 24-hour storm. The Effluent Limitations Guidelines and Standards (ELGs) for CAFOs (40 CFR 412) were revised by the 2003 CAFO Rule.

The BAT and Best Practicable Control Technology Currently Available (BPT) requirements of 40 CFR Subparts C and D established by the 2003 CAFO Rule state that whenever precipitation causes an overflow of manure, litter, or process wastewater, pollutants in the overflow may be discharged into United States waters provided the production area is designed, constructed, operated, and maintained to contain all manure, litter, and process wastewater including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event. These requirements were not changed by the 2008 Final CAFO Rule and have been used to establish the requirement of Part II.A.1.a.i. The 1993 General Permit provisions for discharges due to chronic rainfall events are no longer appropriate and no changes will be made to the permit.

Comment 21: Two commenters suggested that because it is often difficult or impossible to completely divert and isolate outside surface drainage from the production area, and because the federal rule and other parts of the permit only require diversion “as appropriate,” EPA should soften the language in II.A.2.a.x to be more consistent with the language in III.A.3.a. One commenter further suggested that Part II.A.2.a.x and Part III.A.3.b of the permit be modified to require that the volume of run-on not diverted must be considered when designing the CAFO’s retention structure capacity.

Response 21: EPA concurs with the commenters that Part II.A.2.a.x is inconsistent with the 2008 CAFO Final Rule, as well as other parts of the permit. Part II.A.2.a.x has been modified to include the term “as appropriate.” Part II.A.2.a.x and Part III.A.3.b have also been modified to clarify that retention structures must include adequate storage capacity for clean water that is not diverted.

Comment 22: EPA should retain language from the 1993 permit requiring that runoff from manure storage piles be retained onsite to address temporary storage of manure outside the drainage area and allow for retention of runoff from temporary storage areas within berms.

Response 22: The 1993 permit required that runoff from manure storage piles be retained on site and that the procedures documented in the pollution prevention plan ensured that the handling and disposal of wastes complied with this requirement. EPA believes that this requirement is addressed in Part II.A.6.a of the proposed permit, which states that the NMP must identify process wastewater discharges from outside the production area, including byproducts (such as manure) that have been deposited outside the production area. This requirement would allow for the use of berms or other means to retain runoff from temporary storage of manure outside the drainage area of the retention structure, so long as the practice is included in the NMP.

Comment 23: The permit should retain the retention structure/land application provision from the 1993 permit to give CAFO owners/operators the option to implement mitigation practices that minimize the volume of overflow from a retention structure when the structure is in danger of

imminent overflow by discharging wastewaters to land application sites for filtering before discharging to waters of the United States

Response 23: Language was included in the 1993 permit to encourage the use of pasture or crop lands to “filter” discharges prior to entering a water of the United States as a management practice for facilities in danger of imminent discharge prior to discharging to waters of the United States. EPA believes that Part VI.A.10 of the permit sufficiently addresses bypasses and includes the mitigation requirement of releasing bypasses to vegetated fields for filtering or to secondary containment. It is important to note that any such releases that result in discharges to waters of the US are not authorized permit discharges.

Comments Regarding Land Application

Comment 24: EPA should clarify that lands that are not owned, rented or leased by a CAFO, but are in close proximity to a CAFO and are used to manage manure, litter and process wastewater from the CAFO, often under a formal or informal contract or other arrangement with the CAFO, constitute land application areas under the operational control of the CAFO owner/operator. A number of New Mexico CAFOs (primarily dairies) operate in this manner and such clarification will prevent a potential loophole in regulatory requirements. See proposed permit Part II.A.4, II.A.5, Part V.2.e, and Part VII (definition of land application).

Response 24: EPA recognizes that fields being used for land application of process wastewater may be owned or operated by neighboring farmers who may actually operate the retention structure pumping operations to irrigate crops on the recipient’s fields, perhaps under a formal or informal contractual or other agreement with the permittee. Such fields would be required under the regulations found at 40 CFR 122.42 and 412.4 to be included in the permitted CAFO’s develop and implement a nutrient management plan (NMP). Making the land owner the applier does not relieve the CAFO operator from the responsibility that the process wastewater is appropriately utilized for agricultural purposes. These fields are an integral part of the operation of the CAFO in that the CAFO operator will determine when and how much manure is applied to fields though not owned, rented or leased by the CAFO. Operational control of the land includes situations where a farmer releases control over the land application area and the CAFO determines when and how much manure is applied to fields not otherwise owned, rented, or leased by the CAFO to another entity. Any precipitation-related discharge of manure, litter, or process wastewater from these fields would qualify for the statutory agricultural stormwater exception if the application is done in accordance with site specific nutrient management practices that ensure the appropriate utilization of the nutrients contained in the manure, litter, and process wastewater as specified in 40 CFR 122.42(e)(1)(vi)-(ix).

Comment 25: One commenter requested that EPA clarify that all CAFO owners or operators seeking coverage under the general permit must develop, submit, and implement an NMP. The commenter observed that Part II.A.4 implies that an NMP may only be required for CAFOs that apply manure, litter, or process wastewater to land under the permitted CAFO’s ownership or operational control.

Response 25: EPA has modified Part II.A.4 to remove the implication that an NMP is only required for CAFOs that apply manure, litter, or process wastewater to land under the permitted CAFO’s ownership or operation control. Part I.E of the permit requires that an NMP be submitted with the application for permit coverage and Part III.A states that the permittee shall develop, submit, and implement a site specific NMP. EPA believes that the requirements of Part

I.E and Part III.A, along with the modification to Part II.A.4, clearly require that all CAFO operations seeking permit coverage must develop, submit, and implement an NMP.

Comment 26: Two commenters suggested that dry weather discharges from a CAFO that has properly constructed, operated, and maintained land application equipment should not be prohibited but should be reportable discharges.

Response 26: EPA believes that in most instances, a CAFO that meets technology-based permit limits for land application areas will eliminate all or most dry weather discharges. However, if such discharges remain, this water quality-based effluent limit (WQBEL) is necessary to ensure that water quality standards will not be violated by authorized discharges from any facility covered by the state-wide general permit. While the dry weather discharge prohibition has not been removed from the permit, Part II.A.5.c has been amended to clarify that there shall be no unauthorized dry weather discharges from land application sites.

Comments Regarding Inspections and Recordkeeping

Comment 27: Daily inspections of all water lines for large CAFOs or those with multiple wells could substantially increase labor costs and necessitate the creation of excessive data records that do not result in an environmental benefit. The requirement also exposes a CAFO to liability for a violation consisting of a single omission of a daily record. Two commenters requested that the water line inspection and record keeping requirement be changed from daily to weekly.

Response 27: 40 CFR 412.37(a)(1) requires routine visual inspections of the CAFO production area, and states that there must be, at a minimum, daily inspections of water lines, including drinking water or cooling water lines. No changes have been made to the water line inspection requirement of Part II.A.2.a.ii.

Comment 28: EPA should clarify the requirement to maintain records for five years. Must the records be maintained for the five-year permit term or for five years after the permit expires?

Response 28: Neither is technically correct. All records generated by permitted CAFOs under 40 CFR 122.42(e)(2)(i) must be retained for five years from the date the record is generated. EPA has modified Part II.A.2.a.vii to clarify that records must be maintained for five years from the date that the records are created.

Comments Regarding WQBELs

Comment 29: Two commenters requested removal of the Water Quality-Based Reduction Plan requirement. The commenters asserted that such a plan is unnecessary as a general requirement for CAFOs that are designed, constructed, operated, and maintained for the 25-year, 24-hour storm. The commenters suggested that EPA consider requiring such a plan only for facilities that failed to comply with the general permit and that have had a discharge as a result of a chronic storm event. One additional commenter asked under what circumstances will WQBELs be required? What are the scientific assumptions used for determining water quality implications? What are the desired water quality outcomes?

Response 29: The Water Quality-Based Reduction Plan requirement of Part II.A.3.c has been removed from the permit.

A state-wide general permit must assure that State water quality standards will not be violated by authorized discharges from any facility covered by that permit. Technology-based effluent limitations, such as the effluent limitations guidelines in 40 CFR 412, are not always sufficiently stringent to ensure that authorized discharges meet water quality standards. In such cases, WQBELs are designed to ensure that water quality standards are met.

In the 2008 Final CAFO Rule, EPA clarified that discharges from CAFOs that are not exempt from CWA permitting requirements as agricultural stormwater discharges are subject to NPDES requirements, including WQBELs. WQBELs have been included in the permit with respect to discharges from land application areas under the control of a CAFO (Part II.A.5.c) and production area discharges (Part II.A.3) where technology-based effluent limitations are not sufficient to meet water quality standards. The desired outcome of these requirements is to ensure that no authorized discharges from CAFOs will violate State water quality standards. (see Response 26)

Comments Regarding Corrective Action

Comment 30: One commenter stated that EPA should clarify the requirement in II.A.3.d to take corrective action for discharges that cause or contribute to an exceedance of water quality. This commenter asserted that the provisions of the proposed permit that are referenced (II.A.3.a) do not specify what corrective action must be taken. Another commenter argued that the permit should require immediate corrective actions, rather than allow 6 months to 1 year for developing and implementing a Water Quality-Based Reduction Plan. This commenter stated that Parts II.A.3.c and d should clarify that discharges resulting from storm events smaller than the 25-year, 24-hour event, and discharges that cause or contribute to an exceedance of water quality standards, are permit violations.

Response 30: EPA concurs with the commenters that the proposed corrective action requirement requires clarification. EPA has modified this requirement to clarify that if at any time the facility becomes aware, or EPA determines, that a discharge to an impaired water has occurred or is proposed to occur and the requirements of Part II.A.3.a.i-iii have not been addressed, the facility must take corrective action to fulfill the requirements of Part II.A.3.a.i-iii. The corrective action requirement has been moved from Part II.A.3.d to Part II.A.3.a.iv of the permit. EPA does not believe that a clarification of permit violations is appropriate and such a statement has not been added to the permit.

The Water Quality-Based Reduction Plan has been removed from the permit (see Response 29).

Comments Regarding Discharges to Groundwater that is Connected to Surface Water

Comment 31: The prohibition of discharges from control structures to groundwater with a direct hydrologic connection to surface waters of the United States exceeds the jurisdiction of the EPA. The Agency has not shown a connection between livestock production and groundwater quality.

Response 31: Pursuant to CWA sections 402 and 502(12), NPDES permits may authorize or prohibit additions of pollutants to jurisdictional surface water from a point source. That a point source may transmit the pollutants to those surface waters through directly connected groundwater does not deprive EPA of jurisdiction over that addition. As shown by its implementing provisions in Part III.D of the draft permit, the prohibition at issue in this comment is intended to protect jurisdictional surface waters from discharges through groundwater, not to protect groundwater quality *per se*. To further clarify that intent, Part II.A.2.b of the final permit

now states "[t]here shall be no discharge of manure, litter, or process wastewater from retention or control structures to surface waters of the United States through groundwater with a direct hydrologic connection to such waters." The provisions of Part III.D (which are necessary to assure compliance with that prohibition pursuant to CWA section 402(a)(2) and 40 C.F.R. 122.44(k)(3)) remain in the final permit without amendment.

Comment 32: One type of discharge that poses potential environmental impacts is discharges via groundwater that is hydrologically connected to surface water. Such discharges are prohibited under this permit.

Response 32: The comment has been noted in the administrative record.

Comments Regarding Other Topics

Comment 33: Part II.A.5.a.i, that requires identification of areas with a high potential for erosion, and provides that where these areas have the potential to contribute pollutants to waters of the United States, measures to limit erosion and pollutant runoff must be identified, should be modified. Runoff from highly erodible areas always has the potential to contribute pollutants to waters of the United States.

Response 33: EPA disagrees with the commenter that runoff from highly erodible areas always has the potential to contribute pollutants to waters of the United States. The requirements of Part II.A.5.a.i are intended to ensure that erosion does not contribute pollutants to discharges to waters of the United States. EPA will maintain the stipulation that Part II.A.5.a.i only applies to areas that have the potential to contribute pollutants to waters of the United States.

Comment 34: In Part II.5.a.ii, the language addressing irrigation uses the terms "reduce or minimize" to address several conditions. The term "reduce" should be removed, since it has a different meaning than "minimize" and is less protective.

Response 34: EPA concurs with the commenter and the term "reduce" has been removed from Part II.5.a.ii.

Comment 35: Is NPDES permitting the proper setting for regulating the deadline for the disposal of animal mortalities? The three day requirement is generous. Is an animal a pollutant of concern?

Response 35: NPDES permits issued to CAFOs are required by 40 CFR 122.42(e)(1)(ii) to ensure proper management of mortalities (i.e., dead animals). Furthermore, 40 CFR 412.37(a)(4) requires that mortalities must not be disposed of in any liquid manure or process wastewater handling system, and must be handled in such a way as to prevent the discharge of pollutants to surface waters. The three-day deadline for the disposal of animal mortalities was included in the previous permit, and EPA believes that it is an appropriate measure to help ensure proper mortality management.

Comment 36: When and how did the 100-foot setback become a requirement? What is the basis for this requirement?

Response 36: The 100-foot setback requirement is required by 40 CFR 412.4 as a best management practice (BMP) for land application of manure, litter, and process wastewater. This requirement was established in the 2003 CAFO Rule and was unchanged by the 2008 Final

CAFO Rule. The CAFO Rules and their supporting documents can be accessed at <http://cfpub1.epa.gov/npdes/afo/aforule.cfm>.

Comment 37: Playa lakes provide essential habitat and water to wildlife in arid and semi-arid environments. Playa lakes should be protected.

Response 37: The comment has been noted in the administrative record.

PART III – SPECIAL CONDITIONS

Comments Regarding NMPs

Comment 38: Two commenters questioned the NMP public review and comment provisions. One noted that public comments may be subjective. The first commenter questioned the directive to revise NMPs based on comments if the comments are not based on scientific evidence. The second commenter asserted that NMPs should not be reviewed and made publicly available in a fashion that essentially makes every application for the general permit an “individual” application for a permit.

Response 38: In *Waterkeeper Alliance et al. v. EPA*, 399 F.3d 486-504 (2d Cir. 2005) the U.S. Court of Appeals for the Second Circuit vacated the 2003 CAFO Rule insofar as the rule allowed permitting authorities to issue NPDES permits to CAFOs without providing for adequate public participation in the development, revision, and enforcement of nutrient management plans. The public review and comment process is necessary to meet the requirements of the *Waterkeeper* decision and the 2008 Final CAFO Rule. The NMP public review and comment provisions will remain in the permit as proposed.

Comment 39: Region 6 should rely on the federal CAFO rule rather than adding additional requirements for NMPs that are unsupported and go beyond the jurisdiction of the EPA.

Response 39: Any permit issued to a CAFO must require the implementation of a NMP that, at a minimum, contains the best management practices (BMPs) specified in 40 CFR 122.42(e)(1)(i)-(ix). The definition of BMPs in the NPDES regulations (40 CFR 122.2) includes both practices and procedures to be implemented by a permittee. Part III.A.3 was developed to include the minimum practices, as well as the procedures necessary to achieve each of these practices, required to meet the applicable effluent limitations and standards. EPA does not concur that the procedures included in Part III.A.3 are unsupported and go beyond its regulations. Part III.A.3 will not be modified to address this comment.

Comment 40: The minimum NMP requirements for supporting the development of site specific terms (III.A.3.f.i-iv) are already a component of the NMP. This section should be removed to prevent confusion and could force a producer to use the linear approach.

Response 40: EPA agrees with the commenter that the minimum NMP requirements for supporting the development of site specific terms (Part III.A.3.f.i-iv) are already addressed elsewhere in the permit. EPA has removed Part III.A.3.f.i-iv from the permit and has modified Part III.A.3.f to require that the NMP include any additional information necessary to assess the adequacy of the application rates included in the NMP.

Comment 41: Many of the requirements for implementing NMPs in Part III.A.7 are duplicated elsewhere in the permit. Repetition should be eliminated.

Response 41: The permit provisions found at Part III.A.3 and Part III.A.7 are not duplicative. The permit requirements found in Part III.A.3 describe, in addition to the site-specific minimum content of the NMP to implement the applicable effluent limitations and standards, other additional content, as applicable. The permit requirements found in Part III.A.7 describe the requirements for implementing the nutrient management plan developed in compliance with the applicable requirements found in Part III.A.3.

Comment 42: Two commenters appreciated EPA's recognition of the need for flexibility in implementing NMPs without additional agency review and public notice by incorporating the narrative rate approach into the permit.

Response 42: The comment is noted in the administrative record.

Comment 43: Two commenters suggested that the permit be modified to require CAFO operators to submit substantial changes to NMPs, rather than requiring them to submit all changes to NMPs, and to require non-substantial changes to be recorded and reported with the Annual Report.

Response 43: Any permit issued to a CAFO must require the procedures stated in 40 CFR 122.42(e)(6) when a CAFO owner or operator makes changes to the CAFO's NMP previously submitted to the Director. The procedure states that the permittee must provide the Director with the most current version of the CAFO's NMP and identify changes from the previous version. The Director must review the revised NMP to ensure that it meets the requirements of 40 CFR 122 and 412, and must determine whether the changes to the NMP necessitate revision to the terms of the NMP incorporated into the permit. If revision to the terms of the permit is necessary, the Director must determine whether such changes are substantial changes. EPA may not defer determination of what constitutes a substantial change to the permittee. No changes have been made in response to this comment. However, results of calculations made during the period of permit coverage using either the linear approach or the narrative rate approach to calculate the amount of manure, litter, or process wastewater to be applied are not considered to be changes to the NMP that must be submitted to the Director.

Comment 44: Two commenters proposed modifications to the permit language to require manure sampling and analysis to be conducted prior to land application and in accordance with the NMP. The proposed modifications delete the requirement to sample as close to the time of application as possible and the requirement to collect separate samples from each manure storage site. The commenters suggested manure should be sampled at least annually and prior to application. The commenters asserted that it is well documented that CAFO-generated manure is consistent in volume and chemistry. One commenter suggested replacing the requirement for collecting separate manure samples from each storage site with language requiring that manure samples be representative of current operational conditions and that additional samples be analyzed where operational changes have been made that may affect the nutrient characteristics of the manure.

Response 44: EPA recognizes the need for an adequate amount of time between sampling and land application to obtain and interpret the results of manure analyses. EPA has modified the permit to require that manure sampling and analysis be conducted annually prior to the first land application event for each year of permit coverage.

EPA does not agree with the general statement that CAFOs generate manure that is consistent in chemistry. However, EPA does recognize that the need for separate samples taken from each

manure storage site is dependent on site-specific factors. EPA believes that this should be addressed in the representative sampling protocol established in the NMP, and has removed the separate sample requirement from the permit itself. EPA supports the use of NM NRCS, NMED, or New Mexico State University Extension manure sampling guidance, if available.

Comment 45: The commenter appreciated the flexibility allowed in the permit for soil sampling to be conducted in a manner that is representative of the land application area.

Response 45: The comment is noted in the administrative record.

Comment 46: The NMP should be required to include a preventive maintenance schedule and require records similar to expired permit Part III.B.2.f.(3) in compliance with 40 CFR 122.42(e)(1)(i).

Response 46: Part III.A.3.a of the permit requires that the NMP and each CAFO covered by the permit must ensure adequate storage of manure, litter, and process wastewater, including procedures to ensure operation and maintenance of the storage facilities. EPA believes that this requirement, along with the recordkeeping requirements of Part II.A.2.a.vii, fulfill the maintenance requirements of 40 CFR 122.42(e)(1)(i). No changes have been made in response to this comment.

Comment 47: One type of discharge that poses potential environmental impacts is land application. The permit requires the use of an NMP, and the testing of wastes and soils. The NMP is similar to a CNMP used by USDA NRCS. Both the NMP and CNMP are models that require that any land application be at agronomic rates. The NMP allows nutrients to be applied at 125% of crop demand. The NMP nutrient loading model should be verified to determine if it is sufficiently protective of groundwater in porous soils that contribute to surface waters in New Mexico.

Response 47: NMPs in this permit utilize the New Mexico NRCS Conservation Practice Standard Code 590 (Nutrient Management) for the determination of land application rates. The Code 590 specifies that the planned rates of nitrogen and phosphorus application shall be determined based on the Phosphorus Index (PI) Rating for New Mexico. Soil permeability is considered in determining runoff class, which is one of several characteristics that influence the PI.

The commenter may be confusing NMED-Ground Water Quality Bureau (GWQB) Discharge Permits (DPs) for CAFOs with EPA's surface water discharge permit. NMED Ground Water permits require that the total nitrogen in effluent that is applied to a crop which is harvested shall not exceed by more than 25 percent the maximum amount of nitrogen reasonably expected to be taken up by the crop. A GWQB DP is issued under the authority of the New Mexico Water Quality Act and is not a NPDES permit. No changes have been made in response to this comment.

Comments Regarding Facility Closure Requirements

Comment 48: The permit needs to provide flexibility for timelines and plans for lagoon closure. The commenter suggested that the time allowed for closure should be proposed by the permittee on a case-by-case basis.

Response 48: Part III.B.1.e of the permit states that, unless otherwise authorized by EPA, completion of closure for lagoons and other earthen or synthetic lined basins shall occur as promptly as practicable after the permittee ceases to operate or, if the permittee has not ceased operations, twelve (12) months from the date on which the use of the structure ceased. The proposed requirements allow for flexibility in that EPA may grant extensions to closure deadlines on a case-by-case basis. The timelines for closure will remain in the permit as proposed.

Comment 49: The commenter supported the inclusion of closure provisions in the general permit but requests that EPA maintain the reference to New Mexico NRCS Code 360.

Response 49: The comment has been noted in the administrative record.

Comments Regarding Requirements for the Transfer of Manure, Litter and Process Wastewater to Other Persons

Comment 50: Two commenters suggested including an exception to the manure transfer record keeping requirements for small amounts transferred (less than 10 tons per year to a single recipient, or manure transferred in small loads; incidental amounts given away by pick-up truck load).

Response 50: EPA concurs with the commenters that it is appropriate to exclude small amounts from the recordkeeping requirement of Part III.C. EPA has modified Part III.C to state that amounts less than 10 tons per year to a single recipient need not be recorded.

Comment 51: One commenter supported not regulating off-site management of CAFO-generated manure, litter and process wastewater.

Response 51: The comment has been noted in the administrative record.

Comments Regarding Endangered Species and Emergency Action Plan (EAP)

Comment 52: Multiple commenters requested removal of the requirement to analyze soil samples for metals, citing language from the Preamble to the 2003 final CAFO rule stating that limiting manure application to nitrogen- or phosphorus-based rates will sufficiently limit application of metals and that the setback requirements in the rule will minimize the potential runoff of metals. One commenter also cited personal communication with a USDA agronomist who indicated that land application of manure at a nitrogen- or phosphorus-based rate and maintenance of soil pH would prevent metals toxicity. The commenter asserted that BMPs implemented to minimize soil loss combined with the visible effects on crops of metal toxicity should preclude a requirement to analyze soil samples for metals. Two commenters supported a research study for metals at CAFOs but suggested that the general permit is an inappropriate means for the collection of monitoring data.

Response 52: EPA authority for inclusion of sampling and reporting requirements in NPDES permits is provided by CWA sections 308(a)(1)(A) and 402(a)(2). This permit requirement, developed in informal consultation with the U.S. Fish and Wildlife Service, is intended to generate data for use in future permit actions. If recovered data show the comments are correct in asserting there is no need for this sampling effort, this requirement may be eliminated in subsequent iterations of this general permit.

Comment 53: Under the EAP requirements, is notification of dead or injured wildlife required regardless of whether a spill has occurred? Is notification required for all wildlife mortalities or only threatened or endangered species? The requirement that a CAFO must notify wildlife agencies if any dead or injured wildlife are found should be revised to address only those animals that are included on the endangered species list.

Response 53: EPA concurs that the notification requirements of Part III.D.5 and Part III.D.8.a require clarification. EPA has removed the notification requirement from Part III.D.8.a and will rely on the notification requirement of Part III.D.5, which applies to all permittees.

EPA has modified Part III.D.5 of the permit to clarify that notification is required if any dead or injured threatened or endangered species or protected migratory birds are observed in or on receiving waters following a discharge or on the facility's land application areas at any time. Under some circumstances, agricultural or waste treatment system operations "take" birds protected under the Migratory Bird Treaty Act or animals listed as endangered or threatened under the Endangered Species Act and may thus violate federal law. See, e.g., *United States v. FMC Corporation*, 742 F.2d 902 (2d Cir. 1978) *United States v. Rollins*, 706 F.Supp. 742 (D. Idaho 1989). This permit provision enables investigation of situations in which such takes may have occurred and implementation of corrective actions as necessary and/or appropriate. EPA has also been added to the list of agencies that must be notified in the event of any dead or injured threatened or endangered species or protected migratory birds.

Comment 54: The concern regarding selenium, copper and zinc from feed becoming a pollutant of concern through land application has only gone through informal consultation with U.S. Fish and Wildlife Service (FWS) and is incomplete. Will there be formal notice and comment if these draft permit requirements are altered or deleted?

Response 54: Generally, alteration of a proposed permit term requires no additional opportunity for comment if the final condition is a logical outgrowth of the one proposed. In the instant case, neither comments on the proposed permit nor further consultation with FWS resulted in alteration of the proposed monitoring requirement. Accordingly EPA need not consider whether or not reproposal is necessary in this instance.

Comment 55: One type of discharge that poses potential environmental impacts is overflow from treatment lagoons during wet weather events. Under the proposed permit, BMPs must be used by CAFOs in watersheds that contain threatened or endangered species, and a CAFO discharge-related fish kill must be reported to FWS within 48 hours.

Response 55: Part III.D.5 has been modified to require FWS notification within 48 hours.

Comment 56: FWS supports sampling wastes and soil for metals because this will determine if unacceptable levels of metals are accumulating as a result of repeated land application.

Response 56: The comment has been noted in the administrative record.

Comment 57: Three commenters supported the requirement for an Emergency Action Plan (EAP) provided that the language in Part III.8.a that states "BMP(s) to reach this goal may include, but are not limited to ..." is also retained. One commenter further specifies that the following basic elements of the EAP be listed in the general permit: emergency contacts and phone numbers, recovery equipment (available onsite to mitigate a discharge), and action plans for discharge from a containment structure, discharge during pumping, or discharge during transport.

Response 57: The comment has been noted in the administrative record. While the above suggested basic elements have not been incorporated into the permit, EPA is not opposed to their inclusion in a CAFO's EAP.

Comments Regarding Spills

Comment 58: Two commenters questioned the need or authority for a provision related to "spills" since the general permit regulates discharges to waters of the United States, rather than spills that are contained on site at the CAFO. One commenter proposed including permit language requiring spill remediation and documentation to replace the reporting requirement in the draft general permit.

Response 58: The requirements of Part III.D.3 are intended to ensure that spills do not contribute pollutants to discharges to waters of the United States. As previously stated, NPDES permits may prohibit additions of pollutants to waters of the United States (see response 31). However, EPA concurs with the commenter that requiring documentation is more appropriate than a reporting requirement. EPA has removed the reporting reference to Part IV of the permit and replaced it with a requirement to document spills and clean-up activity.

Comment 59: Part III.D.3 of the proposed permit does not include a requirement to provide a list of significant materials or a requirement to document materials handling and storage procedures in the NMP. In all cases, if significant materials are used, stored or disposed, spills should be addressed. Materials handling procedures and storage must be specified in the NMP. The permit should require that all spills and cleanup be documented.

Response 59: Part III.D.3 of the permit has been modified to state that handling procedures and storage for any toxic and other pollutants must be specified in the NMP. EPA has also removed the reporting reference to Part IV of the permit and replaced it with a requirement to document spills and clean-up activity (see Response 58).

Comments Regarding Other Special Conditions

Comment 60: In Parts III.D.1.a and b, the proposed permit requires documentation (direct hydrologic connection) by an NRCS engineer or a P.E. However, Part III.D.1.c allows some documentation (liner maintenance and periodic site evaluation) to be done by a P.E. or a qualified groundwater scientist. One commenter asserted that these latter evaluations should be done by an NRCS engineer or a New Mexico P.E. Another commenter requested that the list of persons who may document no direct hydrologic connection include "qualified groundwater scientists," consistent with the 1993 permit.

Response 60: EPA agrees that Part III.D.1 should have consistent documentation requirements. EPA has modified Part III.D.1.c to state that any mechanical or structural damage to the liner must be evaluated by a NRCS Engineer or Professional Engineer and that the permittee shall have a NRCS Engineer or Professional Engineer review documentation.

Comment 61: Based on the Second Circuit Court's decision in *Waterkeeper et al. v EPA* that EPA does not have the authority to require CAFOs to apply for a permit based on a potential discharge, one commenter asserted that EPA also does not have the authority to require a CAFO to install a leak detection system or monitoring wells based on the potential for contamination of surface waters or drinking water. Such a system can only be required where monitoring data show a

hydrologic connection from an improperly lined lagoon to a water of the United States. Another commenter noted that installing leak detection systems or monitoring wells if a potential exists for contamination of surface waters or drinking water may not be feasible in some circumstances and would create a financial burden. EPA should allow “other investigative devices or methods” to be used.

Response 61: EPA concurs that the requirements of Part III.D.1.c should be updated based on the *Waterkeeper* decision. The infiltration monitoring requirement of Part III.D.1.c has been modified to be based on a direct hydrological connection to waters of the United States. EPA has also modified this section to allow for other appropriate measures to be used in lieu of leak detection systems or monitoring wells.

EPA would also like to clarify the proposed tree root zone requirement of Part III.D.1.c. EPA has modified this provision to state that “no tree shall be allowed to grow such that the root zone would intrude or compromise the structure of the liner.”

Comment 62: The requirement that manure, litter, and process wastewater handling, treatment, and management not result in the contamination of drinking water exceeds EPA’s authority under the Clean Water Act. Two commenters suggested that the reference to “drinking water” in Part III.D.6 be changed to “surface water.” One commenter suggested removal of the reference to “drinking water in Part III.D.1.c.”

Response 62: Requirements referring to drinking water were brought forward from the 1993 permit. These requirements were originally included in the 1993 permit in order to protect the sources of surface water from the leakage of pollutants through unlined retention structures.

Since the issuance of the 1993 permit, EPA has observed that many liners leak and discharge to groundwater which eventually discharges to surface water, via a hydrologic connection. Discharges of manure, litter, or process wastewater from retention or control structures to surface waters of the United States through groundwater with a direct hydrologic connection to such waters also results in the contamination of drinking water sources. References to drinking water will remain in the permit as proposed.

Comment 63: Part III.D.7 requires regular employee training and provides that the permittee determine training frequency and that the NMP shall identify dates for such training. EPA should clarify that training frequency must at a minimum be once per year and that it can be more frequent when appropriate.

Response 63: EPA believes that it is appropriate for the frequency of employee training to be determined on a case-by-case basis. Therefore the requirement of Part III.D.7 will remain in the permit as proposed.

Comment 64: The 2008 CAFO rule has weakened the permitting process by reducing the number of CAFOs that require permits and by allowing certification for new facilities that may pose a high risk for discharges. The commenter is deeply concerned about the impacts to Bureau of Reclamation project waters as a result of the siting, design, construction, operation, and maintenance of CAFOs in close proximity to floodplains. The commenter recommended that siting requirements be included in the general permit. Many non-point source guidance documents offer assistance in this area.

Response 64: EPA believes that it is beyond the scope of the NPDES permit program to regulate pre-construction activities. Therefore, EPA will not be adding siting requirements to the permit.

PART IV – DISCHARGE MONITORING AND NOTIFICATION REQUIREMENTS

Comments Regarding Notification of Discharges

Comment 65: The commenter requested the addition of language to require CAFOs to orally report discharges to New Mexico Environment Department.

Response 65: EPA has modified Part IV.A of the permit to require CAFOs to orally report the discharge of pollutants to waters of the United States to NMED.

Comments Regarding Monitoring Requirements for All Discharges from Retention Structures

Comment 66: Several commenters requested the removal of pH and temperature from the list of parameters for discharge monitoring. Two commenters based the request on consistency with the 1993 permit or federal CAFO regulations. Two commenters asserted that field measurements for temperature and pH would be difficult if not impossible for the average livestock producer to achieve.

Response 66: EPA believes that monitoring requirements for temperature and pH are necessary in order to account for the influence of these parameters on ammonia toxicity (see Subsections L and M of 20.6.4.900 NMAC). Therefore, the monitoring requirements of Part IV.B.1 will remain in the permit as proposed.

Comment 67: Discharge sampling requirements should be required within 30 minutes of obtaining knowledge of the discharge event, not within 30 minutes of the event itself.

Response 67: EPA does not concur with the commenter that discharge samples should be required within 30 minutes of obtaining knowledge of the discharge event. Therefore, Part IV.B.3 will remain in the permit as proposed.

Comment 68: Part IV.B.4 should be revised to allow for situations where conditions for sampling are not “feasible” (in addition to “safe”), such as when the flow pattern of a discharge is so shallow that it is not feasible to obtain a sample.

Response 68: EPA does not concur with the commenter that it is necessary to modify Part IV.B.4 to address conditions where sampling is not feasible. The Industrial Stormwater Monitoring and Sampling Guide, March 2009 (EPA 832-B-09-003) provides guidance on how to concentrate sheet flow for sampling.

Comments Regarding General Inspection, Monitoring, and Record Keeping Requirements

Comment 69: Two commenters requested coordinating similar permit requirements. One commenter requested that EPA work with the commenter and enter into a memorandum of understanding with New Mexico Environment Department (NMED) and USDA/NRCS to develop a common record-keeping book that could be used by CAFOs to satisfy the record keeping requirements of the NPDES permit, the NMED Groundwater Discharge permit, and USDA/NRCS CNMP requirements since these include many common elements. This commenter

also note that the requirements for the State of New Mexico Environment Department Ground Water Discharge Permit, with which New Mexico dairy operators must comply, are equivalent to the NMP required under the EPA General Permit. Another commenter supported a single permit, and single recordkeeping system that coincides with the New Mexico groundwater permitting and recordkeeping. Two sets of requirements make compliance complex and burdensome.

Response 69: EPA recognizes that this NPDES permit, NMED-GWQB-DPs, and USDA-NRCS CNMPs have common requirements. EPA does not oppose the use of a common CAFO recordkeeping book that combines management plans and reporting requirements for NMED-GWQB Discharge Permits, NPDES CAFO permits, and CNMPs, and would accept this common plan as an NMP so long as the requirements of the NPDES CAFO permit are fulfilled. EPA believes that an acceptable common plan could be created by the CAFO and does not believe it to be necessary to enter into a memorandum of understanding with USDA-NRCS and NMED.

A GWQB DP is issued under the authority of the New Mexico Water Quality Act and is not a NPDES permit. EPA does not have the authority to combine the GWQB DP with the NPDES CAFO permit.

Comment 70: The requirement to maintain records that the NMP was developed and implemented in accordance with minimum practices in 40 CFR 122.42(e) is redundant of other aspects of the permit; the NMP itself will reflect how it was developed and is being implemented.

Response 70: Table IV-A does not create new requirements for permittees. Rather it is a tool for summarizing the recordkeeping requirements that arise under different parts of the permit for the benefit of the permitting authority, permittee and inspector. Permitted CAFOs are required to keep and maintain records of implementation and management of the NMP. After considering this comment, EPA did provide some clarification to the provision in Table IV-A that generated the concern.

Comment 71: Two commenters requested clarification on the requirement for documenting weather conditions at the time of land application and for 24 hours prior to and following application.

Response 71: 40 CFR 412.37(c)(3) requires documentation of weather conditions at the time of application and for 24 hours prior to and following application. EPA believes that it is appropriate for the CAFO to determine the weather conditions that should be reported to fulfill this requirement based on site-specific information. EPA notes that Managing Manure Nutrients at Concentration Animal Feeding Operations, December 2004, provides rainfall amounts as an example of a weather condition that could be reported to fulfill the requirement of 40 CFR 412(c)(3).

Comment 72: Part IV.C does not appear to document the requirement for the CAFO owner/operator to conduct and record weekly inspections pursuant to II.A.2.a.i (storm water diversion devices, runoff diversion structures, and devices channeling contaminated stormwater to the wastewater and manure storage structure) and II.A.2.a.iv (the manure, litter, and process wastewater impoundments). IV.C., Table IV-A partially addresses the latter.

The permit should require each CAFO to conduct and record an annual comprehensive site inspection, including timely corrective actions taken. The requirements should be similar to expired permit Part III.B.2.f.(6)(C).

Response 72: The 1974 regulatory requirements established in 40 CFR 412 – Feedlots Point Source Category did not address inspection or record keeping requirements. Site inspection and recordkeeping requirements were included in the 1993 permit to ensure that the pollution prevention plan was up to date and accurate, and that the Agency had access to records of permit compliance. The Effluent Limitations Guidelines and Standards (ELGs) for CAFOs (40 CFR 412) were revised by the 2003 CAFO Rule to include inspection and recordkeeping requirements. EPA believes that inspection and recordkeeping requirements based on 40 CFR 412.37, along with the other requirements of the permit, achieve the goal of the site inspection requirement of the previous permit. The site inspection requirement of the 1993 permit has not been added to this permit. It should be noted that Part II.A.2.a.v of the permit requires timely corrective actions.

The Operation and Maintenance section of Part IV.C, Table IV-A has been modified to include the inspection requirements of Parts II.A.2.a.i and II.A.2.a.iv.

Comment 73: One type of discharge that poses potential environmental impacts is accidental discharges. Under the proposed permit, routine inspections are required to minimize such discharges.

Response 73: The comment has been noted in the administrative record.

PART V – ANNUAL REPORTING REQUIREMENTS

Comments Regarding Reporting

Comment 74: How do the 12 required reporting elements differ from previous reporting requirements?

Response 74: The 1993 permit did not include annual reporting requirements. Annual reporting requirements for CAFOs were established by the 2003 CAFO Rule and the 2008 Final CAFO Rule, and were incorporated into this permit to fulfill 40 CFR 122.42(e)(4).

Comment 75: Two commenters suggested that basing each CAFO's annual report due date on the NOI submittal date could be confusing and overly burdensome to producers that have multiple operations with different due dates. One commenter recommends that the producer be allowed to determine the reporting timeframe. Both commenters supported a requirement that all annual reports be due at the same time every year.

Response 75: EPA recognizes that basing each CAFO's annual report due date on the NOI submittal date could be confusing and burdensome to producers that have multiple operations. Therefore, EPA has modified the permit to require that annual reports be submitted to EPA and NMED on January 31.

PART VI – STANDARD PERMIT CONDITIONS

Comments Regarding Standard Conditions

Comment 76: The commenter suggested the addition of language to require that the Director or authorized representative shall comply with all health and biosecurity requirements in place on the facility.

Response 76: EPA recognizes the importance of biosecurity and that failing to take appropriate steps to prevent disease transmission could result in severe financial impacts on CAFOs. For this reason, it is common practice for EPA personnel to follow a facility's health and biosecurity requirements where appropriate. Additionally, EPA personnel comply with the December 2001, "Routine Biosecurity Procedures for EPA Personnel Visiting Farms, Ranches, Slaughterhouses and Other Facilities with Livestock and Poultry" guidance document. This guidance was developed in coordination with the USDA NRCS, USDA Animal and Plant Health Inspection Service (APHIS), and the Food and Drug Administration. However, EPA does not believe that it is appropriate to include a requirement for the Director or authorized representatives to comply with the health and biosecurity requirements in place on the facility.

Comment 77: Provisions VI.B.1 and 2 are repetitive of provisions VI.A.13 and 14 and provision VI.C.1.c is repetitive of the requirement in VI.A.15; all of these repetitive provisions should be deleted. The commenter suggested that provision VI.B.3 be renumbered as VI.A.16 and Part VI.B be deleted.

Response 77: EPA agrees with the commenter that certain provisions of Part VI are unnecessarily repetitive. Parts VI.B.1, VI.B.2, and VI.C.1 have been removed from the permit. Parts VI.A.13 and VI.A.14 have been modified to capture necessary language from Parts VI.B.1 and VI.B.2. Part VI.B.3 has been renumbered as Part VI.B as opposed to moving the provision to Part VI.A and deleting Part VI.B.

OTHER COMMENTS

Comments Regarding Burden/Economic Impact

Comment 78: One commenter supported all regulatory actions that reduce the cost, time and paperwork burden in complying with federal regulations.

Response 78: The 2003 CAFO rule had a universal duty to apply requirement which required all CAFOs to obtain NPDES permit coverage. The revised rule changes the duty to apply requirement so only CAFOs that discharge or proposed to discharge must seek NPDES coverage. EPA projects that CAFO operators and permitting authorities will collectively experience a reduction in total annual administration burden of 25,500 hours as a result of the regulatory revisions to address the court decision. Labor burden is projected to undergo a net decrease in administrative costs of \$0.5 million annually.

Comment 79: The fact sheet is 27 pages long, which suggests that the permit is burdensome, but the fact sheet does not provide the specific information needed to assess the impacts to operations.

Response 79: Stakeholders were given the opportunity to request clarification or additional information regarding the impact of the proposed permit on CAFOs during the public comment period. Public meetings were also held in Roswell, NM on February 9, 2009 and in Albuquerque, NM on February 10, 2009 to provide NPDES stakeholders an opportunity to informally discuss the permit with EPA.

Comment 80: EPA should perform an economic analysis for medium and large CAFOs.

Response 80: The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the

Administrative Procedures Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, such as medium and large CAFOs, based on the Small Business Administration (SBA) size standards at 13 CFR 121.201. After considering the economic impacts of the regulations on small entities, EPA has determined the rule will not have a significant adverse economic impact on a substantial number of small entities. The final rule did not change the substantive requirements for CAFO operators or increase the net paperwork burden faced by facilities compared to the burden impact imposed under the 2003 CAFO rule. Some CAFOs will face increased permitting costs due to the new NMP provisions, while others will face reduced costs due to the changes in the duty to apply. However, these paperwork cost changes are generally small and do not rise to the level of a significant adverse economic impact on a substantial number of operators.

Comment 81: If a CAFO is not eligible for the general permit, what are the additional regulatory burdens associated with complying with an individual permit?

Response 81: CAFOs that seek NPDES individual permit coverage must submit NPDES Application Form 2B for Concentrated Animal Feeding Operations and their NMPs to the Director, and must fulfill all NEPA and ESA requirements prior to permit issuance. Many of the requirements of an individual permit will be common with the requirements of the general permit. However, there may be additional site specific requirements depending on what caused the facility to be ineligible for general permit coverage.

Comments Regarding Comment Deadline

Comment 82: One commenter requested an extension of the 2/27/09 comment deadline. The public meetings held were not well publicized and would be better located closer to New Mexico CAFOs.

Response 82: The public comment period for the permit ended on February 20, 2009. EPA did not grant an extension of this deadline. As previously stated, public meetings were held in Roswell, NM on February 9, 2009 and in Albuquerque, NM on February 10, 2009. The public meeting locations and dates were selected with input from CAFO industry representatives in the State. The meetings were noticed in the *Albuquerque Journal* and *Roswell Daily Record* on February 3, 2009. In setting locations for meetings EPA must consider that the regulated community is not the sole stakeholder in the CAFO permit. EPA must also consider the participation of private citizens and State/Federal Agencies in the planning of public meetings.

Comments Regarding Which CAFO Rules Apply

Comment 83: Which rules apply to CAFOs in New Mexico: the 1993-1998 permit; the 2003 CAFO rule (which has postponed necessary adjustments until 2/27/2009); or the 2008 rule (which won't be "regulated" until 2/27/2009)?

Response 83: The 1993 CAFO permit will be void upon issuance of the proposed 2009 permit. The portions of the 2003 CAFO rule that were unaffected by the 2005 *Waterkeeper* decision are in effect as well as the 2008 Final Rule.

Comments Regarding Waters of the United States

Comment 84: How does EPA define "waters of the United States"?

Response 84: Defining "waters of the United States" is beyond the scope of this permit action.

Comments Regarding Notice of Receipt of NOI

Comment 85: The U.S. DOI Bureau of Reclamation would appreciate being notified when an NOI is received for a discharge from a new or existing CAFO into waters of the United States that could impact Reclamation's project waters or works (identified on map attached to comments).

Response 85: A CAFO's NOI, NMP, and draft terms of the NMP to be incorporated into the permit will be published on the EPA Region 6, Water Quality Protection Division internet site (<http://www.epa.gov/earth1r6/6wq/6wq.htm>) during the 30-day public review and comment period. The commenter can also request to be placed on the mailing list for notification of New Mexico NPDES permitting actions by contacting Ms. Diane Smith using one of the following methods: Mail: Environmental Protection Agency, Water Quality Protection Division (6WQ-NP), 1445 Ross Ave., Suite 1200, Dallas, TX 75202; telephone number: (214) 665-2145; email address: smith.diane@epa.gov.

Comments Regarding Limitations on 3rd Party Lawsuits

Comment 86: One commenter expressed concern that CAFOs operating in compliance with the permit remain vulnerable to 3rd party lawsuits and proposed language to be included in the permit to prohibit filing of 3rd party lawsuits against CAFOs that are in compliance with the permit.

Response 86: EPA does not have authority to include such provisions in a permit.

Comments Regarding Groundwater Impacts From Dairies

Comment 87: One commenter cited reports and stated a general concern regarding the impact of dairy operations on groundwater in New Mexico.

Response 87: The comment has been noted in the administrative record.