

**NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
GENERAL PERMIT FOR DISCHARGES FROM CONCENTRATED
ANIMAL FEEDING OPERATIONS (CAFOs) IN OKLAHOMA
NPDES PERMIT NO. OKG010000**

RESPONSE TO COMMENTS

RECEIVED ON THE SUBJECT DRAFT NATIONAL POLLUTANT DISCHARGE
ELIMINATION SYSTEM (NPDES) PERMIT IN ACCORDANCE WITH
REGULATIONS LISTED AT 40 CFR 124.17

ISSUING OFFICE: U.S. Environmental Protection Agency
Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

PERMIT ACTION: NPDES General Permit Reissuance

Unless otherwise stated, citations to 40 CFR refer to promulgated regulations listed at
Title 40, Code of Federal Regulations, revised as of July 1, 2011.

DOCUMENT ABBREVIATIONS

In the document that follows, various abbreviations are used. Common abbreviations are as follows:

BO	Biological Opinion
BAT	Best available technology economically achievable
BMP	Best management practices
BPT	Best practicable control technology currently available
CAFO	Concentrated animal feeding operation
CFR	Code of Federal Regulations
CNMP	Comprehensive nutrient management plan
CWA	Clean Water Act
DMR	Discharge monitoring report
EA	Environmental assessment
EAB	Environmental Appeals Board
EAP	Emergency action plan
ELG	Effluent limitations guidelines
EPA	United States Environmental Protection Agency
ESA	Endangered Species Act
FONSI	Finding of no significant impact
FR	Federal Register
FWS	United States Fish and Wildlife Service
HUC	Hydrologic unit code
HQW	High Quality Water
NEPA	National Environmental Policy Act
NMP	Nutrient management plan
NOI	Notice of intent
NOT	Notice of termination
NPDES	National Pollutant Discharge Elimination System
NRCS	United States Department of Agriculture-Natural Resources Conservation Service
OAC	Oklahoma Administrative Code
ODAFF	Oklahoma Department of Agriculture, Food, and Forestry
ODEQ	Oklahoma Department of Environmental Quality
ORW	Outstanding resource water
OWRB	Oklahoma Water Resource Board
RPM	Reasonable and prudent measure
SWS	Sensitive water supply
TMDL	Total maximum daily load
WQBEL	Water quality-based effluent limitation

SUBSTANTIAL CHANGES FROM DRAFT PERMIT

Change 1: The Part I.D.5 limitation on coverage that addressed the Endangered Species Act (ESA) was removed from the permit. Part I.D.11 of the draft permit has been moved to Part I.D.5 of the final permit.

Change 2: The phrase, “propose to discharge” as it regards to a CAFO’s duty to apply for permit coverage, has been removed from the permit. This change is consistent with the holding in *National Pork Producers Council v. EPA*, 635 F.3d 738 (5th. Cir. 2011).

Change 3: Part I.D.7 has been modified based on the first condition of certification made by Oklahoma Department of Environmental Quality (ODEQ) under Section 401 of the Clean Water Act (CWA).

Change 4: Part I.D.8 of the permit has been revised to address ODEQ’s second condition of certification under Section 401 of the CWA. Part I.D.8 of the proposed permit has subsequently been moved to Part I.D.9 of the final permit.

Change 5: A limitation on permit coverage has been added to Part I.D.11 to address any CAFO that is located within an Ozark cavefish watershed.

Change 6: Part II.A.3.c has been amended to incorporate the requirements of ODEQ’s third condition of certification under Section 401 of the CWA.

Change 7: Based on ODEQ’s fourth condition of certification under Section 401 of the CWA, the phrase “domestic wastewater discharges” has been removed from Part II.A.6.

Change 8: The Water Quality-Based Reduction Plan requirement of Part II.A.3.c has been removed from the permit.

Change 9: EPA has added Part I.H to address the procedure for a change in ownership.

Change 10: Part I.D.10 and Part I.E.9 of the final permit have been amended to clarify that new sources must submit an EID, not a previous EPA National Environmental Policy Act (NEPA) review document, with their notices of intent (NOIs).

Change 11: EPA has modified Part III.A.7.d of the permit to require that manure sampling be conducted annually prior to land application. EPA has also modified Part III.A.3.e of the permit to require the use of sampling protocols established by the Oklahoma NRCS and Oklahoma State University to clarify the “representative sample” requirement of Part III.A.7.d.

Change 12: The proposed corrective action requirement proposed as Part II.A.3.d has been clarified to address discharges to impaired waters and has been moved to Part II.A.3.a.iv.

Change 13: 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 14: EPA has revised Part I.E to clarify the NOI and NMP requirements of the permit, including those for any facility that received authorization to discharge under the 1993 CAFO general permit. For facilities that comply with Part I.E.2, authorization under the 1993 CAFO

permit is automatically continued until coverage is granted under this permit or coverage is otherwise terminated.

Change 15: Part II.A.5.c has been amended to clarify that there shall be no unauthorized dry weather discharges from land application sites.

Change 16: Part II.A.2.b.vi of the permit has been modified to clarify EPA's intention to protect jurisdictional surface waters from discharges through groundwater.

Change 17: The retention facility minimum design standards in Part II.A.2.a.viii have been modified to include the liner requirements of Part III.D.1, as appropriate. Requirements of this section of the permit that address "structural breakage" and the embankment design standard have also been modified.

Change 18: 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 19: EPA has revised Parts II.A.4.f and III.A.7.e of the permit to clarify that soil samples shall be taken at least once every three (3) years. Part II.A.4.f of the permit has also been revised to clarify that soil sampling shall include an analysis of both nitrogen and phosphorus.

Change 20: Part II.A.4.g of the permit has been amended to clarify that wastewater conveyance lines should be inspected periodically for leaks.

Change 21: 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 22: Part III.D.8.a has been modified to include Emergency Action Plan (EAP) requirements that address training, prevention, and mitigation. Issues associated with fire and personal injury have been removed from this section of the permit.

Change 23: Parts III.D.8.a.iv-vi have been added to the permit to address EAP requirements related to conveyance pathways, chain of command, and bypass.

Change 24: Part III.A.7.e has been modified to incorporate Oklahoma State University Extension guidance for soil sampling. The terms "small areas" and "large areas" and sample area size requirements have been removed from this section of the permit.

Change 25: EPA has removed the separate sample requirement from Part III.A.7.d. The permit will instead rely on sampling protocols established by OK NRCS and Oklahoma State University, which are now included in Part III.A.3.e of the permit.

Change 26: 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 27: Part III.D.5 has been modified to require operators to notify State and Federal wildlife agencies, and EPA within 48 hours 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.

Change 28: Monitoring and reporting requirements addressing fish kills have been added to Part III.D.5 of the permit.

Change 29: The periodic training requirement proposed in Part III.D.7 of the permit has been modified to an annual training requirement.

Change 30: The areas of concern with endangered species requirements identified in Part III.D.8 have been modified.

Change 31: Part III.D.8.c has been modified to clarify metals sampling requirements, and to include metals analysis for arsenic, cadmium, chromium, mercury, lead, and nickel.

Change 32: Part III.D.8.d has been added to the permit to require metals sampling of soils.

Change 33: Part III.D.8.e has been added to the permit to address riparian buffers for land application in areas of concern with endangered species requirements.

Change 34: EPA has modified Parts IV.B.5 and VI.D.4 of the permit to clarify that monitoring results must be reported to EPA on either the electronic or paper Discharge Monitoring Report (DMR) approved formats.

Change 35: Parts IV.A and IV.B have been modified to incorporate terms and conditions for Reasonable and Prudent Measure (RPM) 1 of the USFWS's BO.

Change 36: ODEQ has been removed from Parts IV.A and V.1 of the permit and replaced with Oklahoma Department of Agriculture, Food, and Forestry (OADFF).

Change 37: Parts IV.B.3 and IV.B.5 have been modified to require sample collection within 30 minutes of initial discharge or as soon as practicable after the first 30 minutes with documentation.

Change 38: The EPA Region 6 mailing address has been corrected in Part V.1 of the permit.

Change 39: EPA has modified Part III.D.1.c of the permit to allow for other appropriate measures to be used in lieu of leak detection systems or monitoring wells.

Change 40: EPA has modified Part V.1 of the permit to require that annual reports be submitted on January 31 as opposed to basing the due date on the NOI submittal date.

Change 41: EPA has modified Part V.1 of the permit to clarify that Net DMR may be used to submit annual reports electronically.

Change 42: Part V.1 has also been modified to include a reporting requirement to the FWS for permittees that are located within designated sensitive watersheds identified in Part III.D.8 of the permit and use hard copy reports.

Change 43: 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 44: The reference to facility closure requirements has been removed from the Notice of Termination (NOT) certification statement. It has been moved to the body of the NOT to notify CAFOs that the closure requirements of Part III.B of the permit must be fulfilled as appropriate.

Change 45: EPA has amended the final permit to include appendices F and G, which address frequently asked questions regarding the general permit and an NMP checklist, respectively.

STATE CERTIFICATION

Letter from Jon L. Craig, Director, Water Quality Division, ODEQ to Miguel I. Flores, Director, Water Quality Protection Division, EPA Region 6, dated June 24, 2009.

DISCUSSION OF STATE CERTIFICATION

Conditions of Certification

In ODEQ's water quality certification letter dated June 24, 2009, ODEQ provided the following conditions of certification:

Condition 1: In accordance with Oklahoma's Water Quality Standards (OAC 785:45-5-25, OAC 785:46-13-4, and OAC 785:46-13-5), certification is denied for proposed new discharges which were not existing on June 11, 1989 located in any of the following areas:

- a. Any new discharge located within the entire watershed of any waterbody designated Outstanding Resource Water (ORW) in Oklahoma's Water Quality Standards.
- b. Any new discharge to any waterbody designated High Quality Water (HQW) in Oklahoma's Water Quality Standards.
- c. Any new discharge to any waterbody or watershed designated Sensitive Water Supply (SWS) in Oklahoma's Water Quality Standards.

Condition 2: In accordance with Oklahoma's Water Quality Standards (OAC 785:45-5-25, OAC 785:46-13-4, and OAC 785:46-13-5), certification is denied for any existing discharge as of June 11, 1989 in any of the following areas if any additional pollutant loading above that existing on June 11, 1989 is proposed:

- a. Facilities discharging anywhere within the entire watershed of any waterbody designated Outstanding Resource Water (ORW) in Oklahoma's Water Quality Standards.
- b. Facilities discharging to any waterbody designated High Quality Water (HQW) in Oklahoma's Water Quality Standards.
- c. Facilities discharging to any waterbody or watershed designated Sensitive Water Supply (SWS) in Oklahoma's Water Quality Standards.

Condition 3: Certification is denied for any overflow of manure, litter or process wastewater allowed by Part II.A.1 of the permit which would result in a violation of Oklahoma's Water Quality Standards (OAC 785:45).

Condition 4: Certification is denied for any domestic wastewater discharge allowed by Part II.A.6 of the permit. Domestic wastewater discharges are regulated by the Oklahoma Department of Environmental Quality (OAC 252:641).

RESPONSE TO COMMENTS RECEIVED ON DRAFT PERMIT

EPA received a number of comments during the public comment period from March 25, 2009 to May 26, 2009.

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

Jean Public via email dated March 25, 2009
Leo Byford via email dated March 25, 2009
Oklahoma Department of Agriculture, Food, and Forestry (ODAFF) via letters dated April 2, 2009 and April 23, 2009
Crawford Farms, Inc. via email dated April 23, 2009
Enviro-Ag Engineering via email dated April 23, 2009
U.S. Fish and Wildlife Service (USFWS) via email dated April 23, 2009
Oklahoma State University (OSU) via emails dated April 24, 2009 and May 26, 2009
Pride Feeders, LP via fax dated May 20, 2009
Oklahoma Farm Bureau (OFB) via email dated May 21, 2009
Premium Beef Feeders, LLC via fax dated May 21, 2009
Tri-State Feeders, Inc. via fax dated May 21, 2009
Diary Producers of New Mexico (DPNM) via email dated May 22, 2009
Karen Brewer, via fax dated May 22, 2009
Murphy-Brown LLC via email dated May 22, 2009
Seaboard Foods via email dated May 22, 2009
Texas Cattle Feeders Association (TCFA) via email dated May 22, 2009
The Hanor Company of Wisconsin, LLC via email dated May 22, 2009
The Maschhoffs via email dated May 22, 2009
Wheeler Brothers Grain Company (WBG) via email dated May 22, 2009
Hitch Enterprises (Jason Hitch) via email dated May 26, 2009
Hitch Enterprises (Patricia Burt) via email dated May 26, 2009
JBS Five Rivers Cattle Feeding LLC via email dated May 26, 2009
Oklahoma Pork Council (OPC) via email dated May 26, 2009
Robert Bergner via email dated May 26, 2009
Tyson Foods, Inc. via email dated May 26, 2009
Richard Robinson via email dated May 31, 2009

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

PART I – PERMIT AREA AND COVERAGE**Comments Regarding Permit Coverage**

Comment 1: EPA should clarify exactly which CAFOs are required to have general permit coverage.

Response 1: Any operation that meets the definition of a CAFO and discharges pollutants to waters of the United States must seek authorization to discharge under a National Pollutant Discharge Elimination System (NPDES) permit. See Part VII of the final permit for the

definition of a CAFO. Unless excluded by Part I.D or I.F of the permit, such a CAFO may apply for coverage under the general permit. Otherwise, such a CAFO must apply for an individual NPDES permit.

Comments Regarding Transfer of Ownership

Comment 2: Several commenters requested that EPA include provisions that allow for the transfer of the general permit authorization from an existing owner/operator of the facility to a new owner/operator, without requiring submission of a notice of termination (NOT) and new NOI/NMP. Transfer of permit coverage should be allowed provided that the new operator agrees to abide by the terms and conditions of the existing NMP. Multiple commenters specified that EPA should include language that requires the new owner/operator to submit a certification statement regarding (1) no changes to the facility, (2) concurrence with the information submitted in the previous owner's NOI, and (3) an understanding that the NMP will be followed. This transfer process will provide for a smooth transition and will not penalize the new owner/operator in situations where no structural or operations changes are proposed to a CAFO. Another commenter noted that while there are provisions in Part VI.D.3 relating to the transfer of permits, it would be much clearer if it is addressed in Part I.

Response 2: EPA agrees with the commenters that the transfer of permit coverage should be allowed where no structural or operational changes are proposed. EPA has added Part I.H to allow for transfer of permit coverage due to a change in ownership as described in 40 CFR 122.61(b).

Comments Regarding Limitations on Coverage

Comment 3: Several commenters asked that EPA clarify that "past history of non-compliance" only includes those types of non-compliances resulting in formal enforcement action and does 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 3: Part I.D.2 was included in the proposed permit to implement 40 CFR 122.28(b)(3)(A), which identifies non-compliance with the conditions of a general NPDES permit as a case where an individual NPDES permit may be required. 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. 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.

Comment 4: Section 7(a)(2) of the ESA requires federal agencies to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of any federally-listed threatened or endangered species or result in the destruction or adverse modification of designated critical habitat. Under the ESA, it is the responsibility of the federal action agency to determine the effects of their action on federally-listed species or designated critical habitat. Parts I.D.5 and III.D.5 of the draft permit do not clearly identify how EPA or the applicant would determine if their CAFO discharges would adversely affect federally-listed species. The EPA should conduct an effects analysis that examines effects on water quality and listed species within

the action area. The analysis should consider the environmental baseline, including upstream CAFOs and AFOs that may affect water quality within the action area. All indirect, interrelated and interdependent effects should be assessed (all defined in 50 CFR 402.02). This analysis should include, but not be limited to, effects from required lagoon management (including wastewater conveyance line operation), spills or accidents, “bypass” provisions, and wastewater run-off from application fields (including those discharges considered “agriculturally exempt”). The cumulative effects of multiple CAFOs located within watersheds occupied by federally-listed species must be considered. To comply with Parts I.D.5 and III.D.5, EPA would need to demonstrate that the implementation of required measures for all CAFOs covered by this general permit would avoid all potential for take, including overflow from lagoons and dry weather discharges resulting from required effluent management of the CAFO. Some conditions listed in Part III.D.8 are effective at minimizing take, but are likely not adequate to completely avoid take of federally-listed species in Oklahoma. Those species to be evaluated in EPA’s assessment should include the Arkansas River shiner (*Notropis girardi*), Gray bat (*Myotis grisescens*), Interior least tern (*Sterna antillarum*), Leopard darter (*Percina pantherina*), Neosho madtom (*Noturus placidus*), Ozark cavefish (*Amblyopsis leptodon*), Ouachita-rock pocketbook (*Arkansia wheeleri*), scaleshell (*Leptodea leptodon*), winged mapleleaf (*Quadrula fragosa*), and whooping cane (*Grus Americana*).

Response 4: EPA recognizes its ESA Section 7(a)(2) obligation with regards to issuance of the General Permit for Discharges from CAFOs in Oklahoma. In consultation with the U.S. Fish and Wildlife Service (USFWS), EPA developed its biological evaluation (assessment) of the effects of permit issuance on federally-listed threatened and endangered species and designated critical habitat. That assessment, utilizing the best available information, was forwarded to the USFWS (Tulsa Ecological Field Services Office), along with additional information subsequently requested by the USFWS.

On September 15, 2010, the USFWS initiated formal consultation on the proposed permitting action. Due to the conclusion of formal consultation with the USFWS and finalization of its Biological Opinion (BO) on December 14, 2011, EPA has removed Part I.D.5 from the permit. Additionally, consultation between EPA and the USFWS has resulted in the addition and modification of certain permit conditions designed with consideration for listed species and critical habitat. The development and implementation of these conditions is described by EPA’s biological evaluation and the USFWS’s BO.

Portions of the final permit that have been incorporated as an outcome of consultation with the USFWS include Parts I.D.11, III.D.5, III.D.8, IV.A, IV.B, V.I, and VI.D.4 and are discussed throughout this document.

EPA would like to note that as an outcome of EPA’s consultation with the USFWS, any CAFO seeking NPDES permit coverage that is located within an Ozark cavefish watershed has been excluded from coverage under this general permit and must instead apply for individual permit coverage. See Part I.D.11 of the permit. Therefore, the counties of Ottawa, Delaware, and Mayes are no longer included in the areas of concern listed in Part III.D.8.

Additionally, in order to implement the terms and conditions for the implementation of RPMs established in the USFWS’s BO, the Agency will monitor the number of CAFOs that have been authorized under this permit. If the number of authorizations reaches the numbers presented in the BO, the EPA will notify the USFWS and deny further authorizations pending conclusion of a reinitiated consultation provided that EPA is the permitting authority.

Comment 5: 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 5: EPA would like to clarify that Part I.D.7 of the draft permit addressed CAFOs that discharge to waters designated by the State as Tier 3 and Tier 2 for antidegradation purposes. Part I.D.9 of the final permit addresses new dischargers to water quality impaired waters. The limitation for coverage in Part I.D.9 applies to “new dischargers,” as defined by 40 CFR 122.2. CAFOs covered under the expired 1993 permit are excluded from the Part I.D.9 limitation for coverage, as they have previously received a finally effective NPDES permit for discharges.

Comment 6: The citation under Part I.D.7(a) should be changed to 131.12(a)(3) instead of 131.13(a)(3), and the citation under Part I.D.7(b) should be changed to 131.12(a)(2) instead of 131.12(a).

Response 6: EPA has modified Parts I.D.7 and I.D.8 to incorporate Conditions 1 and 2 of the State’s water quality certification. The suggested changes are no longer necessary as the citations for federal regulations in the draft permit are no longer included in these limitations on permit coverage. See “Discussion of State Certification” above.

Comment 7: One commenter proposed that Part I.D.7.a be modified to state, “. . .prevents any discharge that contains nitrogen or phosphorus in concentrations that would cause exceedences of the nitrogen and phosphorus Total Maximum Daily Load (TMDL) for the impaired reach.”

Response 7: As previously mentioned, Part I.D.7 does not address water quality impaired waters. See Response 5. Part I.D.9 of the final permit addresses new dischargers to water quality impaired water. 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 Oklahoma’s 2008 §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.9 will remain as proposed. See Parts I.D.7.c and II.A.3.a of the final permit for requirements regarding TMDLs.

Comment 8: Several commenters expressed concern with a blanket prohibition on general permit coverage for Tier 2 or 3 waters that applies to entire watersheds. It was noted that some of these watersheds can be quite large and using the entire watershed standard would greatly limit the ability of CAFOs in Eastern Oklahoma, in particular, to obtain coverage. Two commenters stated that there is a degree of uncertainty associated with classification of Tier 3 and Tier 2 waters in the State of Oklahoma, while another commenter cited concerns regarding the “political” nature of Scenic Rivers. The Oklahoma legislature has the power to name any river as a Scenic River. This designation does not have to be based on science, but merely the whims of the legislature. One commenter also noted that if the State continues with the current trend of adding Tier 2 waters, the general permit will become a tool that can be utilized by fewer and fewer producers who can qualify for it.

Response 8: Under CWA section 401(a)(1), EPA may not issue a permit until a certification is granted or waived in accordance with that section by the State in which the discharge originates or will originate. According to 40 CFR 124.53(e), State certification shall include conditions which are necessary to assure compliance with the applicable provisions of CWA sections 208(e), 301, 302, 303, 306, and 307 and with appropriate requirements of State law. Per 40 CFR

124.55(a)(2), EPA cannot issue a final permit unless the final permit incorporates the requirements specified in certification under 40 CFR 124.53(e). The State's Water Quality Certification of this permit included two conditions that address the State's antidegradation policy. See "Discussion of State Certification" above. EPA has amended I.D.7 and I.D.8 to incorporate Conditions 1 and 2 of the State's Water Quality Certification.

The comment has been noted in the administrative record. However, EPA is not able to make changes to the permit in response to this comment.

Comment 9: Multiple commenters recommended that EPA be consistent with Oklahoma water quality standards language that only denies certification "...for any additional loading associated with discharges from existing facilities..." Existing facilities in Tier 3 or Tier 2 waters are eligible for coverage under the general permit. One commenter stated that exceptions should be made to the coverage limitation of Part I.D.7 for CAFOs with discharges to water-bodies designated as Tier 2 or Tier 3, which have been in existence prior to June 25, 1992, the effective date of the Oklahoma Water Quality Standards (OAC 785:45) and/or which have obtained the 1993 CAFO general permit OK010000 issued by EPA Region 6. Anti-degradation should apply only to those discharges commencing their operation after that date. The permit should maintain the language found in Appendix A: State Specific Permit Language for the State of Oklahoma of the 1993 CAFO permit. This commenter went on to state that exceptions to the Limitations on Coverage should also be made to those CAFOs that discharge or potentially discharge to water-bodies designated as High Quality Water (HQW) or Sensitive Water Supplies (SWS), which have or do not have the 1993 CAFO general permit, and which have been in existence prior to the dates such designations of HQW or SWS were adopted into the Oklahoma Water Quality Standards. Anti-degradation should only be applied after those water-bodies have been upgraded to the high quality status (of HQW or SWS).

Response 9: Parts I.D.7 and I.D.8 have been amended to incorporate Conditions 1 and 2 of the State's Water Quality Certification. See "Discussion of State Certification" and Response 8 above. While this comment has been noted in the administrative record, EPA is not able to make further changes to the permit in response to this comment.

Comment 10: One commenter suggested that EPA consider local topography and distance from Tier 2 or Tier 3 waters and provide general permit coverage where a discharge would not reach Tier 2 or Tier 3 waters.

Response 10: Parts I.D.7 and I.D.8 have been amended to incorporate Conditions 1 and 2 of the State's Water Quality Certification. See "Discussion of State Certification" and Response 8 above. While this comment has been noted in the administrative record, EPA is not able to make changes to the permit in response to this comment.

Regarding the latter part of the comment, EPA would like to note that only CAFOs that discharge to waters of the United States must seek authorization to discharge under a National Pollutant Discharge Elimination System (NPDES) permit. See Response 1.

Comment 11: Several commenters stated that the general permit needs to include a provision for CAFOs located within Tier 2 and Tier 3 waters to obtain coverage under the general permit provided that the CAFO prepares and implements an EAP as part of an approved NMP.

Response 11: Parts I.D.7 and I.D.8 have been amended to incorporate Conditions 1 and 2 of the State's Water Quality Certification. See "Discussion of State Certification" and Response 8

above. While this comment has been noted in the administrative record, EPA is not able to make changes to the permit in response to this comment.

Comment 12: Several commenters expressed concern about the additional burden of seeking permit coverage in Tier 3 and Tier 2 watersheds. One commenter noted that there is no explanation as to why producers in watersheds of waterways designated “Outstanding Resources Water,” “High Quality Water,” “Sensitive Public and Private Water Supplies,” or “Scenic Rivers” are not eligible for coverage under the general permit. The commenter also stated that poultry producers in these watersheds are already required to have NMPs by State law. These NMPs are written according to the Oklahoma NRCS 590 standard. EPA should confirm that these NMPs are sufficient to protect these watersheds and should not require the burdensome individual permit process for those desiring coverage. General permit coverage in these areas is preferred, and will ensure compliance and consistency with the pre-existing State law which has already made sure that NMPs are in place. One commenter also noted that Oklahoma CAFO laws and rules do not prohibit issuing licenses to CAFOs in Tier 2 or 3 watersheds. If they are not prohibited in state or federal law, there is no reason to prohibit them in this permit.

Response 12: Parts I.D.7 and I.D.8 have been amended to incorporate Conditions 1 and 2 of the State’s Water Quality Certification. See “Discussion of State Certification” and Response 8 above. While this comment has been noted in the administrative record, EPA is not able to make changes to the permit in response to this comment.

Comment 13: Two commenters requested that EPA provide producers with a map illustrating Tier 3 and Tier 2 watersheds, so that a producer can determine whether his/her farm is within these designated areas. One of the commenters submitted a map from the Oklahoma Water Resources Board of the areas receiving special consideration in the general permit, which includes Tier 3 watersheds with Scenic Rivers and Outstanding Resource Waters and Tier 2 waterbodies with High Quality Water and Sensitive Public and Private Water Supplies.

Response 13: A map that illustrates Outstanding Resource Waters, High Quality Waters, and Sensitive Water Supplies would become outdated if the Oklahoma Water Resource Board (OWRB) were to designate additional waterbodies after the issuance of this permit. This action would require a major modification to the permit. EPA believes that it is more appropriate for the permit to reference Outstanding Resource Waters, High Quality Waters, and Sensitive Water Supplies as designated in Oklahoma’s Water Quality Standards. CAFO owners and operators should rely directly on these standards to make determinations related to the requirements of Parts I.D.7 and I.D.8 of the permit. However, EPA notes that Oklahoma’s Water Quality Standards (Chapter 45) and Ancillary Reference Maps for Water Quality Management Basins in Chapter 45, Appendix A may be found online at <http://www.owrb.ok.gov/util/rules/rules.php#ch45>.

Comment 14: Several Oklahoma rivers that support federally-listed species have reaches listed as impaired (CWA, 303d list). Such impairments include enterococcus bacteria, *Escherichia coli*, fecal coliform, and oxygen demand. Although it is EPA’s intention to ensure impairment thresholds are not exceeded by implementing the requirements of Part I.D.8, the USFWS is not confident that these requirements would necessarily avoid the exceedance of certain thresholds, particularly Total Maximum Daily Loads. Many pathways leading to wastewater discharge have been identified, some of which are accidental and not covered by this permit. However, by allowing additional CAFO operators with the potential to discharge within an impaired watershed, the likelihood of both permitted and accidental discharges would increase.

Response 14: EPA would like to note that Part I.D.8 of the proposed permit has been moved to Part I.D.9 of the final permit. The permit coverage limitations of Part I.D.9 are intended for new dischargers, as opposed to new sources, that are already operating within impaired watershed areas. See Response 5. EPA does not, through its CWA authorities, regulate whether CAFOs may exist; rather, this NPDES permit addresses the pollutants in authorized discharges. Any discharges that are not in compliance with the permit are not authorized by this permitting action, as noted by the commenter.

EPA would also like to clarify that CAFO operators with the mere “potential to discharge” are not required to seek coverage under this NPDES permit. See Response 1. Any discharges, other than agricultural stormwater discharges, from a CAFO that does not seek permit coverage would be a violation of the CWA and are beyond the scope of this permitting action.

EPA believes that the permit coverage limitations for new dischargers to water quality impaired waters are an appropriate measure to ensure water quality protection. Similar requirements have been successfully implemented in other permitting actions such as the “2008 Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activity (MSGP).” No changes have been made to the permit in response to this comment.

Comment 15: Part I.D.8 should be limited to water quality impaired waterbodies on the CWA 303(d) list, where the segment is impaired for nitrogen or phosphorus.

Response 15: As previously mentioned, Part I.D.8 of the proposed permit has been moved to Part I.D.9 of the final permit. EPA does not concur with the proposal to restrict Part I.D.9 to water quality impaired waterbodies where the segment is impaired for nitrogen or phosphorus. See Response 7. The requirement of Part I.D.9 will remain as proposed.

Comment 16: Several commenters stated that Part I.D.8 should be clarified by replacing the term “new discharge” with the term “new source.” The limitation on coverage under the general permit for CAFOs located in impaired waterbodies should only apply to those CAFOs defined as “new sources.” Many of the CAFOs in Oklahoma have obtained permit coverage under the 1993 general permit. These CAFOs should be eligible for coverage under the new general permit as well. New source CAFOs are those facilities that commenced construction after April 14, 2003.

If EPA retains the term “new discharger” subsection 8 should be clarified to limit applicability to those segments impaired by pollutant(s) that may be present at a CAFO and where the most current EPA approved 303(d) List of Impaired Waters identifies “animal feeding operations (Source ID#4) as one of the “potential sources.”

One commenter went on to state that this section unfairly penalizes operators who, in good faith, attempted to obtain permit coverage from EPA Region 6 at a time when Region 6 was not issuing permits for CAFOs. If these facilities have been operating, under the regulation of state law, they should not be considered new dischargers for purposes of this general permit. According to Oklahoma’s 2008 305(b) Integrated Water Quality Report, Enterococcus, *Escherichia coli*, and fecal coliforms are listed in the top four pollutants impairing Oklahoma’s rivers and streams. This impairment is spread across the State and is not limited to one specific area. The commenter has been concerned that livestock production will be blamed for water quality impairments due to pathogens, when in fact there are several sources of the pollutants named above. The commenter has commented on proposed Total Maximum Daily Loads about the concern that the water quality standard for pathogens is inappropriate, and asked that letters to Karen Miles dated September, 17, 2007, and Derek Smithee dated September 15, 2004, be submitted into the

administrative record. The commenter urged EPA to take into consideration that the State's pathogen criteria are in question when it reviews applications from new dischargers to water quality impaired waters.

Response 16: As previously mentioned, Part I.D.8 of the proposed permit has been moved to Part I.D.9 of the final permit. This limitation for coverage was included in the proposed permit to incorporate federal NPDES regulation at 40 CFR 122.4(i), which applies to both new sources and new dischargers, as defined by 40 CFR 122.2. The Agency notes that these requirements would have applied to any permitting action and are not applied only to this permit.

EPA maintains that the term "new discharger" is used appropriately in this permit limitation. 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 (see Response 5).

EPA intends that the owner or operator of a new discharger should evaluate whether they will be discharging into a water segment which does not meet applicable water quality standards or is not expected to meet those standards. If a new discharger to a water quality impaired water determines that the pollutants for which the water is impaired are not present in the facility's discharge, then the only action required is to document and retain this finding in the NMP. See Part I.D.9.b of the final permit.

EPA does not agree with the commenters that this limitation of coverage should only apply where animal feeding operations are identified as a potential source of water quality impairment. The prohibition of 40 CFR 122.4(i) does not consider whether a type of discharger is listed as a potential source on the 303(d) List of Impaired Water, but rather if the new discharger discharges into a water segment which does not meet applicable water quality standards.

The letters referenced above have been added to the administrative record. This portion of the comment appears to be directed at TMDLs and the State's water quality standard for pathogens. This permit incorporates and implements approved TMDLs and State water quality standards. EPA cannot change water quality standards or TMDLs through this permit action.

No changes have been made to the permit in response to this comment.

Comments Regarding Application for Coverage

Comment 17: Several commenters noted that the adoption of the federal CAFO regulations in 2008 necessitated the issuance of a hybrid general permit by EPA Region 6. A CAFO is no longer able to submit an NOI and receive provisional or near-immediate coverage under the general permit. The existing Region 6 CAFO general permit issued in 1993 includes a provision in Part I.F which states, "The conditions of an expired permit continues in force until the effective date of a new permit (40 CFR 122.6)." Given the hybrid application for public comment and review now stipulated by the 2008 CAFO rules, the commenters requested that EPA consider an existing/permitted CAFO to be covered under the 1993 general permit up to the time that EPA takes final action to issue or deny general permit coverage for the CAFO under the new general permit – this will become "the effective date of the new permit." One commenter stated that it would be appropriate to state or provide provisions where a submittal, or some portion of the NMP, will provide for a stop gap measure and still provide some permit protection in that time frame and provide a deadline as to when the completed NMP is to be provided to the permitting authority.

Response 17: EPA has modified Part I.E with the addition of Part I.E.2 to clarify that for any facility that received authorization to discharge under the 1993 CAFO general permit and complies with the requirements of Part I.E.2, authorization under the 1993 CAFO permit is automatically continued until coverage is granted under this permit or coverage is otherwise terminated. The requirements of Part I.E.5 of the proposed permit have been moved to Part I.E.1.b of the final permit to further clarify the NMP requirement of the permit.

Comment 18: Several commenters noted that requiring the permittee to submit a completed NMP within 90 days is not realistic due to the work load of professionals competent to consult for CAFOs. Multiple commenters suggested that the application period be extended to 180 days.

Response 18: 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 Parts I.E.2 and I.E.3 is an appropriate amount of time to allow for NOI submittal to the Director.

Furthermore, the nine elements of the NMP were established in 40 CFR 122.42(e)(1) in the 2003 CAFO Rule. These elements were unaffected by the *Waterkeeper* decision and were unchanged in the 2008 CAFO Rule. Furthermore, this permit was proposed on March 25, 2009. The Agency believes that there has been adequate time for most CAFOs to have developed a draft NMP for their facility that would have required only minor revisions once the requirements of the permit were finalized. Therefore, the 90-day timeframe will remain in the permit as proposed.

To further assist CAFO owners/operators with this effort, EPA has also amended the final permit to include appendices F and G, which address frequently asked questions regarding the general permit and an NMP checklist, respectively.

Comment 19: Multiple commenters requested that EPA review comments, respond to comments, and make a determination on general permit coverage within 60 days after the close of the public comment period.

Response 19: EPA will make efforts to grant general permit coverage in a timely manner. However, without knowing what issues may be raised in a particular case EPA does not believe that it is appropriate to include a specific timeline for this process in the permit. No change has been made in response to this comment.

Comment 20: Several commenters encouraged EPA to provide a specific provision in the general permit for applicants to be an active participant in the review and response of any public comments received during the public notice of NOIs/NMPs. Multiple commenters additionally requested that EPA include a clearly defined process for dispute resolution in the event of a public comment that raises questions about a facility's NOI or NMP, especially when the permittee and EPA cannot agree on changes. For example, a CAFO may have a well-established history of crop yield and nutrient requirements that are different than textbook values (i.e., nitrogen requirement of 250 lbs/acre vs. 200 lbs/acre). A public comment may be submitted that suggests a nitrogen requirement of 225 lbs/acre. If EPA agrees with the commenter and the permittee disagrees, a defined process in the general permit for dispute resolution will provide a means of moving the process forward.

Response 20: EPA does not typically include applicants or any other persons in the review and response of public comments received during public notice of permitting actions but could ask

clarifying questions to help formulate decisions. Any dispute resolution would occur after a final permit decision has been issued. The process to appeal an NPDES permit is established in 40 CFR 124.19. Persons affected by an NPDES general permit may either challenge the general permit in court or apply for an individual NPDES permit under 40 CFR 122.21 as authorized in 40 CFR 122.28 and then petition the Environmental Appeals Board (EAB) for review as provided by 40 CFR 124.19. No change has been made in response to this comment.

Comment 21: Several commenters noted that the changes adopted in the national CAFO regulations in 2003 and 2008 will require review and public comment of Nutrient Management Plan/Pollution Prevention Plan components. The commenters recommended that EPA create a streamlined process that would allow operators to make business and environmental management decisions in a timely manner.

Response 21: The timeliness of EPA's review and approval of NMPs is very much dependent on the quality and completeness of the NMPs submitted by the CAFOs seeking permit coverage. NMP preparers should carefully review the entire permit and familiarize themselves with its requirements. To assist in the development of complete NMPs, EPA has included an NMP checklist as Appendix G of the final permit.

The process used in this general permit is similar to the procedure used to make draft EPA Region 6 individual NPDES permits available for public comment. EPA believes that the process established for individual permits can be used effectively to fulfill the public participation requirements established by the 2008 Final CAFO Rule. EPA notes that this approach has been successfully implemented with the 2009 NPDES General Permit for Discharges from CAFOs in New Mexico (NMG010000).

Comment 22: Several commenters requested that EPA specify that time frames outlined in the permit are "calendar days."

Response 22: EPA would like to clarify that all time frames in the final permit are "calendar days," not "business days." EPA believes that it is commonly understood that "days" without qualification refers to calendar days and making such a statement in the permit is not necessary.

Comments Regarding NEPA Review for New Sources

Comment 23: The NEPA analyses (that resulted in a Finding of No Significant Impact (FONSI)) performed for the 1993 general permit are sufficient and no additional NEPA-related analyses are necessary to grant general permit status to CAFOs in Oklahoma and New Mexico.

Response 23: 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 confusions on this issue by indicating new sources could submit a previous EPA NEPA review document in lieu of an EID. Part I.D.10 and Part I.E.9 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 24: Several commenters stated that the NEPA requires that federal agencies undertake an environmental review (which may result in a Finding of No Significant Impact or “FONSI” or an Environmental Impact Statement or “EIS”) prior to taking any “major federal action” that may affect the environment. The CWA excludes NPDES issuance from NEPA requirements, except for the construction of “new sources.” New source CAFOs are those facilities that commenced construction after April 14, 2003. The draft general permit provides that any new source CAFO seeking coverage under the general permit must obtain a FONSI or EIS from EPA prior to submitting an NOI. For a general permit, however, EPA’s permit issuance (major federal action) occurs prior to the submittal of the NOI, when the general permit is issued in final form after the close of the public comment period. Since the EPA and CAFO industry representatives have consulted informally with the USFWS prior to issuance of the draft general permit and during the public comment period, no NEPA review is required when a CAFO submits its NOI for general permit coverage. The commenters requested that this be clarified by EPA in the general permit.

In addition, for an expansion of an existing facility there is no requirement for a CAFO to submit information to EPA for determination of new source, especially in cases where it is clear that the expansion does not meet the definition of new source. In the preamble of the 2003 CAFO rule, EPA explained that “simply extending existing housing structures by constructing new housing adjacent to existing housing is not typically considered a new source.” The commenters recommended that EPA remove any reference to requiring information of expansion of an existing facility be submitted to EPA for determination of new source.

Response 24: 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 CFR §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.

As for new source expansions of existing CAFOs, nothing in the permit provisions these commenters reference suggests EPA will make “new source” determinations in a manner inconsistent with its regulations or interpretive preamble statements. EPA is entitled to determine in the first instance whether a particular facility expansion is a new source under those regulations and interpretations. This final permit retains this reporting requirement.

Comments Regarding Individual Permits

Comment 25: One commenter asked that EPA clarify what the “defined time frame” is for operators to submit a required individual NPDES permit.

Response 25: EPA may require any facility authorized under the general permit to apply for, and obtain, an individual permit. EPA will notify the operator, in writing, that an application for an individual permit is required and will define the time frame in which an individual application must be submitted. EPA will determine this time frame on a case-by-case basis, consistent with 40 CFR 122.28(b)(3).

PART II – EFFLUENT LIMITATIONS AND STANDARDS

Comments Regarding Production Area Limitations and Permit Conditions

Comment 26: The standards for pollution are much too low for CAFOs and their influence on global warming is extremely over the line. CAFOs should be subject to clean water and clean air laws.

Response 26: This general permit is consistent with the federal NPDES regulations at 40 CFR 122 and 412, as revised by the 2003 and 2008 CAFO rules, and is issued under the authority of the CWA. This comment appears directed at the NPDES CAFO regulations rather than falling within the scope of the draft general permit for CAFOs in Oklahoma. EPA cannot change the NPDES regulations through this permit. EPA would also like to clarify that clean air regulations are beyond the scope of this permit.

Comment 27: The overflow from treatment lagoons that may occur during wet weather from high precipitation (e.g., those events that are greater than a 24-hour, 25-year rain) is the only discharge authorized by the proposed permit. USFWS has had multiple meetings with the EPA and the CAFO industry to identify “conservation measures” (CMs) that may be necessary to reduce the frequency of these discharges from CAFOs in this permit. As discussed in those joint meetings, USFWS recommends increasing the storage capacity of waste retention structures to minimize overflow events. This can be accomplished by implementing one or more measures which include construction of secondary retention structures (to be used for emergency abatement), additional water conservation practices, lowering the freeboard reference gauge (if capacity allows) and/or retrofitting existing structures.

Response 27: Design and operation requirements in the final permit are intended to minimize the frequency and volume of wet weather lagoon discharges. As an extra measure of protection to waters of the United States found within ESA areas of concern, implementation of an EAP is required in Part III.D.8.a of the permit so that an operator experiencing any sort of release, authorized or not, will perform steps to further minimize the likelihood of CAFO waste reaching waters of the United States where listed aquatic species occur. No changes have been made to this permit in response to this comment.

Comment 28: Multiple commenters noted that the 1993 general permit included provisions for discharges due to chronic rainfall events, even if those chronic events did not meet the definition of a 25-year, 24-hour storm event. The following language from the 1993 general permit should be retained in the new general permit: “Process waste pollutants in the overflow may be discharged to waters of the U.S. whenever rainfall events, either chronic or catastrophic, cause an

overflow of process waste water from a facility designed constructed and operated to contain all process generated waste waters plus the runoff from a 25-year, 24-hour rainfall event for the location of the point source. There shall be no effluent limitations on discharges from retention structures constructed and maintained to contain the 25-year, 24-hour storm event if the discharge is the result of a rainfall event which exceeds the design capacity and proper maintenance. Retention structures shall contain all process wastewaters plus the 25-year, 24-hour storm event.” One commenter added that even the best managed facility has no control over rainfall amounts. It is possible that a facility that was designed, constructed, and managed to accommodate a 100-year, 24-hour storm event could be challenged by chronic rainfall events.

Response 28: 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 29: Several commenters requested that EPA retain language from the existing 1993 general permit which reads, “Runoff from manure storage piles must remain onsite.” Depending on the farmer and crop rotation, demand for manure can be seasonal, which may require temporary storage of manure outside the drainage area of the retention structure using a berm around the manure storage area to retain runoff. (Part II.A.2.b.vii)

Response 29: 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 30: No mention of a liner requirement is made in Part II.A.2.a.viii of the permit. State liner requirements should be added to the litany of minimum design standards found here. A reference to Part III.D.1.b might also be noted here. For soil liners, the State allows hydraulic conductivities of no greater than 1×10^{-7} cm/sec (See OAC 35:17-4-11(a)(3) and 35:17-3-13(a)(3)).

Response 30: The retention facility minimum design standards listed in Part II.A.2.a.viii have been modified to include the liner requirements of Part III.D.1, as appropriate. EPA would like to note that Part III.D.1.b of the permit already requires liners to be constructed to have hydraulic conductivities no greater than 1×10^{-7} cm/sec. For documentation of no significant leakage, in-situ materials are also required to meet the same minimum criteria for hydraulic conductivity. See Part III.D.1.a of the final permit.

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 31: One commenter questioned the meaning of “structural breakage” in relationship to lagoons and collection systems in Part II.A.2.a.viii. The commenter suggested replacing this term with “no leakage” or “sound structural integrity.”

Response 31: In Part II.A.2.a.viii, the term “structural breakage” has been replaced with “structural problems or leakage.”

Comment 32: The retention facility embankment design standard (Part II.A.2.a.viii), which states that “...layers no more than 6 inches thick and compacted at optimum moisture content...” would be nearly impossible to achieve. The layers should be no more than 6 inches thick after compaction. Moisture content will need a range such as + or - 2% and a minimum compaction rate such as 95% Standard Proctor (ASTM D-698).

Response 32: Part II.A.2.a.viii(b) has been modified to state that “the embankment shall be constructed in lifts or layers no more than 6 inches thick after compaction at a minimum compaction effort of 95% Standard Proctor Density (ASTM D698) at -2% to +2% optimum moisture content.”

Comment 33: Several commenters requested that Part II.A.2.a.x of the general permit recognize that not all freshwater run-on can be diverted out of the drainage area of the retention structures. As such, EPA should continue to recognize (similar to Part III.A.3.b) that run-on should be diverted “as appropriate.” And, in cases where the run-on cannot be diverted, the volume must be taken into consideration during the design of the CAFO’s retention structure capacity. An additional sentence could read, “In cases where it is not feasible to divert clean water from the production area, the retention structures should include sufficient volume for the additional clean water runoff.”

Response 33: EPA concurs with the commenters that Part II.A.2.a.x is inconsistent with 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 34: Several commenters stated that Part II.A.2.b of the proposed permit should retain a retention structure/land application provision from the 1993 permit to give CAFO owner/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. The provision from the 1993 permit reads, “It shall be considered ‘Proper Operation and Maintenance’ for a facility which has been properly operated, and that is in danger of imminent overflow due to chronic or catastrophic rainfall, to discharge wastewaters to land application sites for filtering prior to discharging to waters of the U.S.” This provision should be maintained in

the new permit. One commenter noted that representatives of the enforcement division within EPA Region 6 told industry representatives that they would prefer these actions be taken in an effort to preserve the retention structure.

Response 34: 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. This 1993 permit provision was not included in the final permit due to modifications of the CAFO ELGs brought about by the 2003 CAFO Rule (See Response 28). EPA has instead addressed bypasses and the mitigation requirements of releasing bypasses to vegetated fields for filtering or to secondary containment in Part VI.A.10.

Comment 35: One commenter questioned how the linear approach could be used and still meet the condition that manure must be analyzed annually and the application rates adjusted annually (Part III.A.3.g.i(B)). The commenter went on to ask if the rate changes, will this constitute a significant change in the NMP.

Response 35: Part III.A.3.g.i(A) of the permit requires that any permittee selecting the linear approach to address rates of application must include in the NMP submitted to EPA the maximum application rate from manure, litter, and process wastewater for each crop, field, and year covered by the NMP. Part III.A.3.g.i(B) requires that CAFOs using this approach recalculate these application rates at least once a year. Both of these requirements are in accordance with 40 CFR 122.42(e)(5)(i)(A) and (B). As stated in Part III.A.6.a of the permit, the annual calculations of application rates for manure, litter, and process wastewater as required in Part III.A.3.g.i(B) (for the Linear Approach) are not considered to be changes to the NMP that must be submitted to EPA.

Comments Regarding Land Application

Comment 36: Accidental discharges resulting from wastewater pipeline breaks have the potential for catastrophic impacts, particularly during dry weather conditions. Part II.A.4.g states that equipment used for land application of manure, litter, or processed wastewater must be inspected periodically for leaks. It should be made clear within this section that “equipment” includes all wastewater conveyance lines. Additionally, we recommend that inspections be conducted on a weekly basis (rather than “periodically”) similar to required weekly inspections of lagoons, to minimize the chances of accidental discharge.

Response 36: EPA agrees with the commenter that wastewater conveyance lines should be considered as equipment used for land application of manure, litter, or process wastewater. Part II.A.4.g of the permit has been amended to clarify that wastewater conveyance lines should be inspected periodically for leaks.

The requirement for periodic inspection is consistent with the best management practice (BMP) specified in 40 CFR 412.4(c)(4), and EPA believes that its use is appropriate in this NPDES permit action. While no change has been made to the permit in response to this comment, EPA recommends inspections every time the equipment is used.

Comments Regarding Land Application Water Quality-Based Effluent Limitations and Standards (WQBELS)

Comment 37: Several commenters stated that they are opposed to the provision for a water quality based reduction plan (Part II.A.3.c) since the general permit already contains provisions for proper design, construction, operation and maintenance of facilities for runoff control. If, upon review of a chronic rainfall discharge, EPA determines that the facility failed to comply with provisions of the general permit, only then should EPA consider requiring an additional plan. This requirement should be deleted from the general permit.

Response 37: Part II.A.3 has been amended to incorporate the requirement of Condition 3 of the State's Water Quality Certification. See "Discussion of State Certification" and Response 8 above. This condition is more stringent than the proposed Water Quality-Based Reduction Plan provision. The Water Quality-Based Reduction Plan requirement of Part II.A.3.c has been removed from the permit.

EPA has also made modifications to Part II.A.3 to clarify the proposed corrective action requirement. This requirement has been modified 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. This corrective action requirement has been moved from Part II.A.3.d to Part II.A.3.a.iv of the permit.

Comment 38: Multiple commenters suggested that EPA should recognize that for a CAFO that has been properly constructed, operated and maintained land application equipment in accordance with and documented in the NMP, an accidental dry weather discharge to waters of the U.S. from land application areas would be a reportable discharge but should not be considered an unauthorized discharge by the general permit.

Response 38: 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 39: For the purposes of conducting and recording daily inspections of water lines, several commenters encouraged EPA to allow the owner/operator the option of recording this action on the Weekly Report. Other state CAFO permits allow for "date(s) of repair" and "location of broken water line(s)" to be noted on the Weekly Report. It is not feasible to conduct a daily inspection of all water lines at large CAFOs, especially in open-lot cattle operations. However, most broken water lines are immediately noticed by pen riders, equipment operators and feed truck drivers. Those water lines are repaired as soon as possible to conserve water and minimize mud conditions and ponding water. The commenters encouraged EPA to allow recordation of these activities on the Weekly Report.

Response 39: 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. While no changes have been made to the water line inspection requirement of Part II.A.2.a.ii, EPA would like to note that Footnote 2 of Table IV-A states that, “[v]isual inspections should take place daily during the course of normal operations. The completion of such inspection should be documented in a manner appropriate to the operation. Some operations may wish to maintain a daily log. Other operations may choose to make a weekly entry, when they update other weekly records that required daily inspections have been completed.”

Comments Regarding Discharges to Groundwater that is Connected to Surface Water

Comment 40: Several commenters suggested that the inclusion of groundwater in the permit exceeds the jurisdiction of EPA. The agency has failed to show any nexus between livestock production within Oklahoma and groundwater quality to warrant inclusion of groundwater under the permit. One commenter stated that Part II.A.2.b.vi should not apply where a hydrologic connection of groundwater does not impair the surface waters of the U.S. (Parts II.A.2.b.v, II.A.2.b.vi, III.D.1)

Response 40: 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.vi 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 CFR 122.44(k)(3)) remain in the final permit without amendment.

Comment 41: Because Oklahoma law includes groundwater as a water of the state, Part II.A.2.b.vi should be revised as: “There shall be no discharge of manure, litter, or process wastewater form retention or control structures to groundwater with or without a direct hydrologic connection to surface waters of the United States and to the waters of the State of Oklahoma.”

Response 41: The CWA provides EPA no authority to regulate discharges to groundwater *per se* in an NPDES permit action, but discharges to surface waters of the United States *through* groundwater are subject to such regulation. *Compare, e.g., Exxon Corporation v. Train*, 554 F.2d 1310, 1329 (5th Cir. 1979) *with United States v. Earth Sciences, Inc.*, 599 F.2d 368 (10th Cir. 1979); *Idaho Rural Council v. Bosma*, 143 F.Supp. 2d 1169 (D.Id. 2001). Part II.A.2.b.vi of the permit is thus directed at protecting surface waters, not groundwater.

PART III – SPECIAL CONDITIONS

Comments Regarding NMPs

Comment 42: All licensed/registered poultry and swine farms are already required to have an NMP by Oklahoma rules. It is unclear whether a producer that wants to obtain permit coverage can submit an existing NMP that has been developed pursuant to State law. EPA should allow

the submittal of NMPs currently accepted and utilized under current Oklahoma law if a producer desires coverage under the EPA general permit.

Response 42: EPA recognizes that other federal and state agencies, such as USDA-NRCS and ODAFF, require written plans that are similar to the NMP required by this permit. A plan that is prepared in accordance with Oklahoma NRCS technical guidance may be submitted to the EPA in lieu of an NMP, so long as the plan meets all requirements of this NPDES CAFO general permit.

Comment 43: The EPA proposes in this permit to require an NMP for each CAFO as well as the testing of wastes and soils to verify assimilation rates and capacities. The NMP requirement contained in this permit limits the application of nitrogen and phosphorus to agronomic rates based on the crop demand. The NMP is similar to the Comprehensive Nutrient Management Plan (CNMP) developed by the NRCS. The NMP and CNMP are based on models that predicted crop uptake of nutrients and allow nutrients to be applied at 125% crop demand. However, this nutrient loading model should be verified by the EPA to determine if it is sufficiently protective of groundwater in porous soils (e.g. sandy soils) that contribute to surface waters in Oklahoma.

Response 43: NMPs in this permit utilize the Oklahoma NRCS Conservation Practice Standard Code 590 (Nutrient Management) for the determination of land application rates. The Code 590 specifies that when applications of manure or other organic by-products are planned, a field-specific assessment of the potential for phosphorus transport from the site shall be completed using the Oklahoma Phosphorus Assessment Worksheet (Exhibit 2, Tables 8 and 9 of the Code 590). This worksheet takes into account whether application fields are located in watersheds with a waterbody identified as Nutrient Limited by the Oklahoma Water Resource Board in Appendix A of the Oklahoma Water Standards and as designed in 785:45-5-29 of Oklahoma's Water Quality Standards. The Code 590 identifies application rates for fields located within Nutrient Limited Watersheds (Exhibit 2, Table 9).

EPA believes that the Code 590 meets the minimum nutrient management technical requirements specified in 40 CFR 412.4(c)(2). However, a CAFO can be directed by EPA to apply for an individual permit if it is determined that coverage under this general permit is not sufficient to protect surface water quality (See Part I.F). An individual permit could be used to develop appropriate site specific requirements to address such concerns.

No changes have been made in response to this comment.

Comment 44: One commenter recognized the need to review and accept comment on NMPs, but noted that this is a general permit and NMPs should not be used in a fashion that essentially makes every application an individual application for a permit.

Response 44: 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 45: Multiple commenters noted that the content of NMPs was clearly established in the federal CAFO rule and Region 6 should rely on the federal rule rather than adding additional requirements for NMPs that are unsupported and go beyond the jurisdiction of EPA.

Response 45: Any permit issued to a CAFO must require the implementation of an NMP that, at a minimum, contains the 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 has not been modified to address this comment.

Comment 46: An additional sentence should be added to Part III.A.3.b to clarify that, “In cases where it is not feasible to divert clean water from the production area, the retention structures should include sufficient volume for the additional clean water runoff.”

Response 46: Part III.A.3.b has been modified to clarify that retention structures must include adequate storage capacity for clean water that is not diverted. See Response 33.

Comment 47: Contaminants such as metals, antibiotics, medications, pesticides, and hormones are routinely used as feed additives or treatments for animals. These contaminants can pass through the animal and be present in the manure, litter, and wastewater retention structures. The wastewater retention structures (usually lagoons) are not specifically designed to treat these contaminants. Some of these contaminants (such as the metals) are only partially water soluble and can accumulate in the sludge of lagoons. Nutrient Management Plans (NMPs) typically are designed for nutrients, but do not address other components or contaminants in the waste and do not require testing for them. EPA should address testing and adequate treatment for all components of the waste and contaminants stored in retention structures. (Part III.A.3.c)

Response 47: EPA believes that the provisions of Part III.A.3.c fulfill the requirements of 40 CFR 122.42(e)(1)(v), which addresses the proper disposal of chemicals and other contaminants handled on-site. No changes have been made to the permit in response to this comment.

However, EPA would like to note that all CAFOs that discharge to watersheds specified in Part III.D.8 of the final permit are required to sample land applied sludge and agitated wastewater for the metals selenium, copper, zinc, arsenic, cadmium, chromium, mercury, lead, and nickel.

Comment 48: Some setback distances specified in the Oklahoma NRCS Conservation Practice Standard, Nutrient Management Code 590 or in Oklahoma Statutes and rules are more stringent than the proposed requirements. The commenter recommends that the following sentence be added to the proposed language: “If setback distances specified in Oklahoma NRCS Conservation Practice Standard, Nutrient Management Code 590 or in Oklahoma Statutes and rules are more stringent than 100 feet (further than 100 feet), or other additional setbacks are established in the Code 590 or in Oklahoma Statutes and rules, these setbacks shall be observed.”

Response 48: EPA notes that Parts II.A.2.b.v and III.D.6 of the permit already address the protection of private and public drinking water wells in accordance with, “...State regulations or health codes, or State issued permits for that facility.” Other setback requirements established in the Oklahoma Statutes and rules address the establishment of CAFOs in proximity to residences, State parks, and incorporated municipalities. EPA believes that it is beyond the scope of the

NPDES permit program to regulate pre-construction activities. No changes have been made to the permit in response to the comment. However, EPA notes that CAFOs have a separate obligation to comply with more stringent state and local requirements. See Part VI.A.5 of the permit.

Comment 49: The NRCS Nutrient Management 590 standard for application of animal manure and other organic by-products are not adequate to protect sensitive watersheds, federally-listed species, or promote natural restoration of waters impaired by excess nutrients. These standards advocate land application of additional manure or organic by-products, even if soil tests indicate phosphorus levels are above the threshold which would likely lead to significant levels of phosphorus in runoff. There should be an upper limit set for phosphorus application, which the USFWS recommends be at or near the threshold limit of crop uptake. The NRCS Nutrient Management 590 standard for phosphorus may be adequate for most areas, but they are site specific standards that only partially address the watershed effects and potential problems related to high densities of CAFOs. The 590 standards allow continued applications of animal waste or nutrients in soils that test up to 400 lbs per acre of phosphorus. For example, most soils in the Little River drainage of southeastern OK would naturally have less than 100 lbs per acre of phosphorus. If a high percentage of that watershed was allowed to build up to 400 lbs per acre of phosphorus, the natural levels would be nearly quadrupled. If the nutrient levels in a watershed are increased by an order of magnitude four times higher than natural levels, clearly there will be adverse effects on water quality, aquatic organisms, and aquatic habitats. When assessing the potential impacts of CAFOs, the percentage of the watershed affected needs to be considered. Nutrient loading problems such as those related to over application of poultry litter in eastern OK need to be avoided because they create long term problems that are difficult, time consuming, and expensive to treat. (Part III.A.3.f)

Response 49: The Oklahoma NRCS Conservation Practice Standard 590 (Nutrient Management) utilizes a phosphorus assessment worksheet. See Response 43. The Oklahoma Phosphorus Assessment Worksheet is a field-specific assessment of the potential for phosphorus transport from the land application site. In addition to soil test results, this assessment also considers site-specific characteristics including application method, erosion rate, and the distance of application to surface waters. EPA believes that this is an adequate assessment method and that its use in the permit is appropriate. No changes have been made to the permit in response to this comment.

Comment 50: The requirements of Part III.A.3.f.i-iv, which are related to the land application rates, are already a component of the NMP. These provisions do not match the requirements of the CAFO Rule. There is no reason to list this individually, as it merely creates confusion and could force a producer to use the linear approach for NMPs as opposed to the narrative approach.

Response 50: 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 51: Several commenters stated their support of EPA's recognition of the need for flexibility for CAFOs to implement an NMP that is dynamic and allows many adjustments to be made onsite, without the need for additional review by EPA and notice and comment. One commenter stated that the terms "narrative" and "linear" are confusing and wondered if this the best EPA could do in planning manure/wastewater application. (Parts III.A.3.g.i and III.A.3.g.ii)

Response 51: The terms “narrative” and “linear,” and the approaches to address rates of application that they represent were established in the revised NPDES CAFO regulation (73 FR 70418), which became effective on December 22, 2008. Part III.A.3.g.i and III.A.3.g.ii are consistent with the requirements of the federal NPDES regulations for CAFOs at 40 CFR 122.42(e)(5)(i)(A) and (B). EPA cannot change the NPDES regulations through this permit.

Comment 52: Part III.A.6.a of the permit references “III.A.3.g.ii(C).” There is no (C). That section (A.3.g.ii) ends with (B).

Response 52: The reference to “III.A.3.g.ii(C)” in Part III.A.6.a has been changed to “III.A.7.f.” Parts V.2.j and V.2.l(ii) have also been modified to reference Part III.A.7.f.

Comment 53: Several commenters voiced opposition to the requirements of Part III.A.6.a of the permit. The commenters recommended that only substantial NMP changes should be submitted to the EPA for review, as opposed to all changes. CAFOs should only notify EPA non-substantial changes made during a calendar year with the required Annual Report. One commenter asked that EPA clarify “any” change to the NMP will require review by the permitting authority regarding the narrative approach of nutrient application. The idea of a narrative approach to management should allow for changes which occur due to natural disasters.

Response 53: 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, EPA would like to note that the 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 54: Many of the requirements of Part III.A.7 are repeating information or requirements provided in earlier sections of the permit. This is common throughout the proposed permit. EPA should limit the repetition as much as possible to provide greater clarity and ease of understanding for the permit. Specifically, items 7.a-7.c are duplicative of provisions in Part III.A.3.a-c.

Response 54: 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 55: The State’s testing requirements for manure/wastewater for different animal species are less stringent than or as stringent as the proposed languages, while requirements for soil testing are more stringent than the languages. Oklahoma statutes (Section 10-9.7 of Title 2, subsections D and E) applied to Poultry Feeding Operations indicate that soils and manure are to

be applied in non-nutrient limited watersheds or in areas of non-vulnerable ground waters are to be sampled once every three years, and soils and manures in nutrient limited watersheds and in areas of nutrient vulnerable ground waters are to be sampled once per year. While Oklahoma rules (OAC 35:17-4-9(e)(3) and (4) applied to CAFOs require soil testing once a year, and manure/wastewater testing once every three years, the rules applied to LMFOs (large swine CAFOs) require once a year testing for both soil and manure/wastewater [per OAC 35:17-3-11(e)(3) and (4)]. The commenter recommended that soil testing requirements in the permit be in accordance with State statutes and rules. Part IV.C Table IV-A should be modified to reflect this.

Response 55: Federal NPDES regulations at 40 CFR 412.4(c)(3) require that manure be analyzed a minimum of once annually and that soil be analyzed a minimum of once every five years. EPA cannot make the manure analysis requirement of the NPDES general permit less stringent than the requirement of 40 CFR 412.4(c)(3). Additionally, Part III.A.7.e of the proposed permit required that “the sampling frequency for manure, litter, and process wastewater and soil shall be consistent with the Oklahoma NRCS Conservation Practice Standard Code 590 (Nutrient Management).” The Oklahoma NRCS 590 Standard requires that soil samples be taken at least once every three (3) years. EPA believes that the soil sampling requirements of 40 CFR 412.4(c)(3) and the state nutrient management technical standard are sufficient. No changes have been made to the permit in response to this comment.

Comment 56: Multiple 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. A literal interpretation of Part III.A.7.d could create a situation where CAFO permittees cannot comply. The time necessary to collect, ship, analyze at the laboratory and receive results could take 2-3 weeks. The phrase “as close to the time of application as possible” should be replaced with “prior to manure application. At a minimum, manure must be sampled annually.” In addition, this section requires, “separate samples...represents a different animal type, size, age, diet, manure storage, production period...that could affect nutrient values.” CAFO operations generate manure that is fairly consistent in volume and quality, unless significant operational changes are made at the facility. As such, this provision should be replaced with, “Manure samples shall be representative of current operational conditions at the facility. In cases where significant changes have been made that may affect the nutrient characteristics of the manure, an additional sample will be collected and analyzed.” Another commenter suggested that Part III.A.7.d be modified to read, “...Manure sampling and analysis shall be conducted prior to land application. Manure sampling shall be sampled and analyzed in accordance with the NMP. The sample shall be sent...”

Response 56: 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 planned land application event each calendar year of permit coverage. Annual manure, litter, and process wastewater sampling requirements already exist in the permit and need not be restated.

EPA has removed the separate sample requirement from Part III.A.7.d. The permit will instead rely on sampling protocols established by OK NRCS and Oklahoma State University or equivalent methods identified in the NMP, which are now included in Part III.A.3.e of the permit.

Comment 57: In Part III.A.7.d of the permit, the term “Representative samples” should be more clearly defined to ensure that samples are taken according to a randomized design. Also, the number of samples should be specified, depending on lagoon size. An adequate number of samples should be collected to provide data that can be sufficiently analyzed statistically.

Response 57: EPA has modified Part III.A.3.e of the permit to require the use of sampling protocols established by the Oklahoma NRCS and Oklahoma State University or equivalent methods to clarify the “representative sample” requirement of Part III.A.7.d. See Response 56.

Comment 58: 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 58: EPA has removed the separate sample requirement from Part III.A.7.d. The permit will instead rely on sampling protocols established by OK NRCS and Oklahoma State University, which are now included in Part III.A.3.e of the permit. See response 56.

Comment 59: Sampling the soils for phosphorus should be conducted at least every three years, or more often if the crop rotation changes. Part III.A.7.e of the proposed general permit requires CAFO operators to comply with the 590 standards, but the EPA’s five year requirement contradicts those standards (which recommend at least every three years). Accumulations of phosphorus in the land application fields should be closely monitored because phosphorus concentrations in soils diminish relatively slowly over time. Most harvested crops will remove under 20 lbs of phosphorus per acre in a year, thus it would take several years to remove 100 or more lbs per acre of excess phosphorus.

Response 59: Federal NPDES regulations at 40 CFR 412.4(c)(3) require that soil be analyzed a minimum of once every five years. Part III.A.7.e of the permit requires that “the sampling frequency for manure, litter, and process wastewater and soil shall be consistent with the Oklahoma NRCS Conservation Practice Standard Code 590 (Nutrient Management).” The current Oklahoma NRCS 590 Standard requires that soil samples be taken at least once every three (3) years. While the proposed permit incorporated by reference the current Oklahoma NRCS 590 Standard 590 soil sampling requirement, EPA has revised Parts II.A.4.f and III.A.7.e of the permit to clarify that soil samples shall be taken at least once every three (3) years. Part II.A.4.f of the permit has also been revised to clarify that soil sampling shall include an analysis of both nitrogen and phosphorus.

Comment 60: Provide a specific reference for “Oklahoma NRCS or Oklahoma State University Extension guidance” in Part III.A.7.e.

Response 60: The reference to “Oklahoma NRCS or Oklahoma State University Extension guidance” has been removed from Part III.A.7.e. Part III.A.3.e of the permit has been revised to include sampling protocols established by OK NRCS and Oklahoma State University or equivalent methods. See Response 56.

Comment 61: The size of the land management units (LMUs) not to exceed 20 acres cannot be achieved under a center pivot. The size of the LMU should be determined by the nutrient management application methods and management practices. Leaving the 20 acre requirement in the permit would cause immediate compliance issues which are unnecessary and cumbersome.

Response 61: This requirement has been removed from the permit. However, Part III.A.3.e has been modified to include soil sampling protocols equivalent to the Oklahoma State University Extension Fact Sheet F-2207 “How to Get a Good Soil Sample.”

Comment 62: Define “small areas” and “large areas” in Part III.A.7.e, so that it is clear to the operator how many soil samples must be taken.

Response 62: EPA agrees with the commenter that the use of undefined terms, such as “small areas” and “large areas,” could lead to confusion regarding the soil sampling requirements of the permit. The terms “small areas” and “large areas” have been removed from Part III.A.7.e. This section has been amended to require a minimum of 20 soil cores for each sample area, regardless of size, based on soil sampling guidance outlined in the Oklahoma State University Extension Fact Sheet F-2207 “How to Get a Good Soil Sample.”

Comment 63: Several commenters noted that Part III.A.7.e provides for flexibility by the producer and/or consultant to determine site-specific soil sampling parameters. The commenters appreciated the recognition by EPA that modern day production systems can encompass many acres and management of individual land application areas is uniform. As such, soil sampling should be considered in a manner that is representative of the land application area, whether large or small, based on standards adopted by the Oklahoma NRCS.

Response 63: The comment has been noted in the administrative record. See Responses 60, 61 and 62.

Comment 64: Several commenters requested that EPA clarify the time period for which CAFO operators should develop an NMP as a component of the facility’s permit application. Specifically, an initial NMP should be developed “using the most recent annual soil, manure and wastewater analysis available at the time a permit application and NMP are submitted to the EPA.” Additionally, EPA should stipulate that the NMP represent at least one crop being grown or planned for the calendar year in which the CAFO operator is applying for coverage under the general permit. The crops outlined in the calendar year for which a permit application is submitted will represent “year 1.”

For CAFOs that choose to use the narrative approach, only complete nutrient rate application calculations would be required for the crop being grown or planned to be grown during the calendar year of permit application. CAFO operators may choose to project nutrient rate applications for years 2 through 5, or they may choose to list the potential crops to be grown on each land application area, inclusive of the potential range of yield goals and range of crop nutrient requirements.

Response 64: Both the linear and narrative rate approaches require the CAFO operator to develop an NMP that projects for each field and for each year of permit coverage the crops to be planted, crop rotation, crop, crop nutrient needs, expected yield, amount of nitrogen and phosphorus to be land applied, and the projected amounts of manure, litter, and process wastewater to be applied. However, each approach is different in identifying which of these projections would be required to be “terms of the NMP.” See 40 CFR 122.42(e)(5) and section III.C.3(c)(iii) of the preamble to the 2008 Final CAFO Rule. 73 FR 70418 (Nov. 20, 2008).

For example, under the narrative rate approach crops to be planted in each field or any other uses such as pasture or fallow fields (including alternative crops) are designated by 40 CFR 122.42(e)(5)(ii)(A) as terms of the NMP. However, while the projected amount of manure, litter, or process wastewater to be applied must be provided in the NMP, it is not a term of the NMP. See 40 CFR 122.42(e)(5)(ii)(C).

No changes have been made to the permit in response to this comment.

Comments Regarding Facility Closing Requirements

Comment 65: Part III.B.1.c.(2) should be revised as follows to comply with the State's closure requirements: "removes all manure, wastewater and sludge and refill the structure with clean water to preserve the integrity of synthetic or earthen liner. Sludge material from LMFO has to be analyzed pursuant to EPA's bio-solids testing parameters."

Response 65: EPA believes that the requirements of Part III.B.1.d are sufficient to address the disposal of waste from closed structures. No changes have been made to the permit in response to this comment.

Comment 66: To ensure that closure is conducted in an environmentally protective manner, it is important to build some flexibility into the timelines and plans for lagoon closure. Twelve months may not be adequate time given individual farm-specific circumstances (i.e., purely evaporative waste treatment systems and the availability of sufficient land for land application of all waste at agronomic rates at closure.) The time allowed for closure should be proposed by permittees on a case-by case basis.

Response 66: 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 67: Part III.B.1.d should be revised as follows to comply with the State's closure requirements: "All closure of lagoons and other earthen or synthetic lined basins must be consistent with Oklahoma NRCS Conservation Practice Standard Code 360 (Closure of Waste Impoundments) and State of Oklahoma closure requirements per OAC 35:17-4-21 for CAFO and OAC 35:17-3-25 for LMFO."

Response 67: EPA believes that the requirements of Part III.B.1.d are sufficient to address the closure of lagoons and other surface impoundments. No changes have been made to the permit in response to this comment.

Comment 68: Several commenters supported the inclusion of closure provisions in the general permit but requested that EPA maintain the reference to Oklahoma NRCS Code 360.

Response 68: The comment has been noted in the administrative record.

Comment 69: The commenter suggests the following monitoring well requirement be added to Part III.B.1: "Facilities equipped with ground water monitoring wells around the impoundments must be monitored for three years after closure."

Response 69: EPA believes that the requirements of Part III.B are sufficient to address the closure of lagoons and other surface impoundments. No changes have been made to the permit in response to this comment.

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

Comment 70: Several commenters stated support for the provisions for recording the date, name and amount of manure removed by a third party, recognizing that in many cases the address of the third party is the custom manure hauler. The commenters also 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 70: 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.

Comments Regarding Endangered Species Requirements

Comment 71: Final concurrence by USFWS regarding this has not been issued. It does not seem appropriate to proceed without full concurrence by all federal agencies and not go back and change this permit in response to USFWS. The issue of “takings” from a discharge is important to the permittee and should be established in the permit up front.

Response 71: The proposed requirements of Part III.D.8 of the permit were developed during informal consultation with the USFWS. Additions and revisions to these requirements have been made to ensure compliance with the terms and conditions for the implementation of reasonable and prudent measures (RPMs) established in the USFWS’s Biological Opinion (BO). However, the incidental take of endangered species is not established in the permit itself. For more information on incidental take of federally-listed species associated with this permitting action, please refer to the USFWS’s BO. See Response 4.

Modifications have been made to Parts IV.A and IV.B of the permit to require reporting of the duration of any discharge and information regarding the implementation of EAPs. Discharge notification requirements have also been modified to include USFWS for facilities operating within designated sensitive watersheds. Additional modifications to the permit that have been made to ensure compliance with the terms and conditions for the implementation of RPMs and are discussed elsewhere in this document.

Comment 72: Multiple commenters suggested that the notification requirements of Part III.D.5 be revised by striking the words “fish, wildlife.” It is appropriate to notify USFWS of losses of migratory birds and endangered species. However, this notification should only apply to species under the USFWS’s jurisdiction.

Response 72: 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.

In accordance with the USFWS's BO, Part III.D.5 has also been modified to include monitoring and reporting requirements for fish kills. See also 40 CFR 122.49.

Comment 73: Part III.D.5 should be removed from the permit. There are other federal laws that cover required reporting for takings of endangered species. Including this in the NPDES permit is duplicative.

Response 73: See Responses 72. No changes have been made to the permit in response to this comment.

Comment 74: Are all the HUC 11 watersheds listed of significance in the protection of endangered or threatened species? The reasons for such listing should be specified. The watersheds of main streams/rivers/lakes..., where those HUC 11 watersheds belong to, should be stated for easier identification. Are all of those watersheds covered by the Water Quality Management Segments listed in table 2 of the Appendix B of the current Oklahoma Water Quality Standards (OAC 785:45)? It is recommended that the affected watersheds, including those located in Ottawa, Delaware, and Mayes Counties be listed in the similar format of that in table 2.

Response 74: The 11 digit Hydrologic Unit Code (HUC) watersheds listed in Part III.D.8 were used to identify areas of concern with endangered species requirements during section 7 consultation with USFWS. The 11 digit HUC watersheds are used to delineate drainage to water bodies occupied by aquatic federally-listed species. EPA believes that using 11 digit HUC watersheds to identify areas of concern is appropriate as they are also established in the BO issued by the USFWS. The Agency would like to note that in the final BO issued December 14, 2011, that USFWS modified the list of 11 digit HUC watersheds and the Ottawa, Delaware, and Mayes Counties are no longer included in the areas of concern. See Response 4. The final permit has been modified to include the 11 digit HUC watersheds identified by the final BO.. EPA has also replaced the proposed map in Appendix D with the maps and HUC tables included in the final BO.

Comment 75: One commenter stated that confusion is created by state and federal agencies using different criteria to describe the same areas of the state. The State of Oklahoma uses a waterbody identification system which identifies waterbodies by water quality management basins. There are seven management basins in Oklahoma, therefore, the waterbody identification numbers begin with 1, 2, 3, 4, 5, 6, and 7. This identification system is accessible because it is tied directly to waters listed in Appendix A of the Oklahoma Water Resources Board's water quality standards (Chapter 45), as well as Oklahoma's list of impaired waterbodies (303(d) list). The U.S. Fish and Wildlife watersheds of concern to endangered species are identified using the United States Geological Survey's 11 digit Hydrologic Unit Codes. This is not a user friendly system. It would be helpful for all state and federal agencies to use the same watershed/waterbody identification system, which we recommend to be the State's water quality management basins identification system.

Response 75: See Response 74. No changes have been made to the permit in response to this comment.

Comment 76: The Emergency Action Plan should cover more than protection of endangered and threatened species; it should also provide for the protection of public health, property and environment. Thus, it would be more appropriate to put this section, Part III.D.8.a and b under a new item, Part III.D.9 “Emergency Response Plan,” with subsections a and b included. All languages in this section referring to the Emergency Action Plan should be replaced with Emergency Response Plan. If the Emergency Response Plan is to be listed under a new subsection D.9 as recommended, then language shall be added under D.8 to indicate that CAFOs located in the areas stated in D.8 are required to develop such an Emergency Response Plan specified in D.9.

Response 76: This permit requirement is based upon the EAP concept utilized in NRCS comprehensive nutrient management plans (CNMPs). The purpose of this requirement is to address the protection of endangered or threatened species in the permit area. No changes have been made to the permit in response to this comment.

Comment 77: The following additional requirements should be added to the EAP: 1) Employees involved with waste management of CAFO operations shall be trained in implementation of the EAP. 2) In the case of a wastewater spill, measures should be outlined to prevent the spill from discharging into Oklahoma Waters. 3) If a discharge does occur, measures should be outlined to minimize its effects to Oklahoma Waters. 4) The EAP should be incorporated into the NMP.

Response 77: EPA agrees with the commenter that employee training in implementation of the EAP is appropriate and has included this requirement in Part III.D.8.a. In its BO, USFWS established terms and conditions for the implementation of RPMs that required that this training be annual and that it should include the identification of individuals responsible for implementing certain actions during a spill response. EPA has further modified Part III.D.8.a to implement these terms and conditions of the BO. Additionally, Parts III.D.8.a.iv-vi have been added to the permit to address conveyance pathways, chain of command, and bypass, as required by the terms and conditions of the BO. EPA has also modified Part III.D.7 of the permit to require annual training to ensure consistency with the permit requirements of Part III.D.8.a.

As stated in Part III.D of the Fact Sheet, the goal of the EAP is to prevent to the extent possible any spills or releases from migrating off the site. The Fact Sheet goes on to state that the EAP should include reasoned procedures to be implemented in the event of a release or spill that might reach and subsequently harm listed threatened and endangered species or designated critical habitat, and that the EAP is to be submitted to EPA for review as an element of the NMP. Part III.D.8.a has been modified to clarify that an EAP must address measures to prevent spills from discharging into waters of the United States and measures to minimize the effects of a discharge to waters of the United States. EPA has also added the requirement that the EAP shall be submitted to EPA for review as an element of the NMP.

While EPA has not provided a template for CAFO owners/operators to use in the development of their EAPs, the Region would like to provide the following example plans:

<http://www.nm.nrcs.usda.gov/technical/water/cnmp/cnmp-sample-plan/emergency-action-plan-safety-precautions.doc>

http://www.agri.ohio.gov/public_docs/forms/LEPP/PTO%203900-002.pdf

<http://cals.arizona.edu/animalwaste/nrcstools/CNMP.pdf>

Comment 78: Multiple commenters stated that the development of an EAP for CAFOs located in close proximity to waterbodies of concern is an appropriate measure. The basic elements of the

EAP proposed in the general permit appear to provide a CAFO operator with clear direction on the site-specific measures that must be taken into consideration during the development of the EAP. These include: emergency contacts and phone numbers; recovery equipment and where it is located; and action plans for discharge from contaminant structure, discharge during pumping or discharge during transport. However, issues associated with emergency response due to fire and/or personal injury is beyond the scope of an environmental EAP. Those areas are addressed in employee safety programs and are outside the scope of EPA's authority under the CWA.

Response 78: EPA agrees with the commenters that in the context of this NPDES permit, the focus of the EAP is to minimize the environmental impact of manure, litter, and process wastewater discharges, spills, or other related mishaps. Issues associated with fire and personal injury have been removed from Part III.D.8.a.

Comment 79: One commenter expressed support for the EAP as long as EPA maintains the language in Part III.D.8.a that states, "BMP(s) to reach this goal may include, but are not limited to."

Response 79: EPA would like to note that Part III.D.8 does not include language that states, "BMP(s) to reach this goal may include, but are not limited to." No changes have been made in response to this comment.

Comment 80: Discharges can occur as a result of an accident (e.g., pipeline break or lagoon leak, etc.). This type of discharging, while not permitted, could have the potential for catastrophic impacts (e.g. fish kills in the downstream receiving water body) in that they may occur during dry weather. Discharges from pipeline spills and accidents have occurred at CAFOs in the past and would be expected to occur in the future. This permit seeks to reduce these potential impacts with provisions that require automatic emergency cut-off system for wastewater conveyance lines run by a pump.

Response 80: The comment has been noted in the administrative record.

Comment 81: Several commenters recommended the deletion of Part III.D.8.c requirements related to metals sampling of sludge and/or slurry from wastewater retention structures. Multiple commenters supported a well-designed and executed research study for metals at CAFOs, but not the use of the permit as a means to conduct research. These commenters offered to provide letters of support for a research proposal and assistance with securing cattle feedyards to cooperate in a research study on metals. These recommendations were agreed upon during a meeting that included USFWS, EPA, and livestock organizations on Feb. 13, 2009, at the Oklahoma Farm Bureau offices in Oklahoma City. Two commenters stated that EPA headquarters decided not to include metals sampling in the federal rule and EPA Region 6 should follow that decision. EPA Region 6 should review the submitted comments and the response to comments from the federal CAFO rule on this issue.

Response 81: EPA does not oppose the use of a research study to evaluate the contamination of soil and water by metals through land application of manure, litter, and process wastewater. However, EPA believes that it is appropriate to include monitoring requirements in the permit until further research is conducted. 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 both informal and formal Section 7 consultation with the USFWS, is intended to generate data for use in future permit actions. If recovered data show the

commenters 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 82: One commenter stated that he is unaware of any evidence to suggest that metals emitted from CAFOs with liquid manure handling systems pose any threat to endangered species. The only conceivable situation in which metals concentrations could be high enough to raise a concern is in sludge removed from lagoons after many years of treatment and storage. A “slurry” is any material with liquid properties that contains suspended solids. This section is worded such that a producer would have to sample for metals every time anything is taken from a lagoon, holding pond, or waste storage structure. The commenter suggested changing the wording to, “sampling of sludge during periodic clean-out of treatment lagoons for the metals...”

Response 82: EPA agrees with the commenter that Part III.D.8.c requires clarification. If waste retention structures are agitated prior to land application of process wastewater, metals sampling and analysis shall be conducted annually. Annual metals sampling and analysis is not required for retention structures that are not agitated prior to land application. In this instance, metals sampling is only required if sludge from the bottom of the waste retention structure is removed and land applied. EPA has amended Part III.D.8.c to reflect this clarification.

Comment 83: The permit requires metals testing of the soils. If this is a preemptive attempt to potentially satisfy USFWS without their full input and concurrence of this permit, should be eliminated until they speak for themselves.

Response 83: The proposed permit required metals testing of waste materials from retention structures prior to land application. Metals testing of soils was not required by the proposed permit. This requirement was added to the final permit to implement a conservation recommendation established in the USFWS’s Biological Opinion (BO).

Comment 84: Please define slurry as referenced. What percent solids does this term include?

Response 84: The term “slurry” has been removed from Part III.D.8.c and no longer appears in the permit. Therefore, a definition is not necessary. See Response 82.

Comment 85: The requirement of developing and implementing the sampling of sludge and/or slurry from wastewater retention structure for the metals selenium, copper, and zinc prior to land application of any such materials (Part III.D.8.c) seems to go beyond the intent. Slurries should not be included since many facilities agitate their lagoons before or during pumping to reduce the sludge accumulation over time. The concern about metals is from accumulation of sludge over a long period of time in the bottom of the lagoon. Omitting slurries should correct this problem and keep the original intent of checking sludge for metals. The sludge in most cases will not be removed until the lagoon is closed or rejuvenated.

Response 85: See Response 82.

Comment 86: One commenter recommended testing for arsenic, cadmium, copper, chromium, mercury, lead, nickel, selenium, and zinc when sludge or slurries from wastewater retention structures are applied to land application areas. These metals are used as feed supplements and can accumulate in waste retention structures. The general permit should specify methods and quality control measures for collecting and analyzing the samples. However, simply testing sludges for metals prior to land application does not provide any protection for fish and wildlife resources. The soils that would receive land applications of sludges or slurries need to be tested

for the same metals as well, so that land applications could be designed to keep soil concentrations below threshold effect levels. Soil samples should be taken by random design with enough samples collected to provide data that can be sufficiently analyzed statistically. The NMP should include testing for metals and methods of land application prescribed to avoid hazardous concentrations of metals in the environment. Similar standards have already been developed for land application of municipal sludge.

Response 86: EPA has revised Part III.D.8 to include arsenic, cadmium, chromium, mercury, lead, and nickel. EPA has also revised the sampling requirements of III.D.8.c. See Response 82.

Metals testing for soils was added to the final permit to ensure compliance with the terms and conditions for the implementation of reasonable and prudent measures (RPMs) established in the USFWS's Biological Opinion (BO). See Response 83.

Comment 87: Multiple commenters suggested that the term "slurry" be removed from Part III.D.8.c and EPA clarify that "sludge" is referring to "material removed from the bottom of a runoff control structure or lagoon that is handled in a solid or semi-solid state, where land application is accomplished through mechanical spreading on the surface." Some commenters suggested an additional sentence to clarify that, "This provision does not apply to land application of manure or wastewater by pumps." Other commenters suggested that the term "land application" be defined. This will ensure clarity that the metals sampling provisions for sludge are applicable when applied to land owned or operated by the CAFO. The USFWS is only concerned with metals where it may result in a long-term accumulation of certain constituents due to repeated application on the same tract(s) of land owned or operated by the CAFO.

Response 87: See Response 82. EPA would like to clarify that manure, litter, or process wastewater that is transferred to other persons is subject only to the requirements of Parts III.C, IV.C, and V.2.c of the permit.

Comment 88: Multiple commenters requested that EPA clearly state the protections afforded to the CAFO owner/operator for implementing the additional measures, namely an Emergency Action Plan and metals analysis of sludge. Additional costs will be incurred by the CAFO regarding these provisions. For a CAFO owner/operator to properly evaluate the costs and benefits of the endangered species requirements, EPA must outline the limitations of general permit, if any, and the added protections the CAFO will receive if they choose to get permit coverage.

Response 88: CAFO owners and operators that are granted coverage under this permit are authorized to discharge to waters of the United States. However, these facilities must be operated in accordance with the effluent limitations, monitoring requirements, and other provisions set forth in the permit. This includes the requirements of Part III.D.8 for any CAFO operating within the areas of concern with endangered species requirements.

In its BO, the USFWS determined that incidental take of Arkansas River shiner, leopard darter, Ouachita rock pocketbook, scaleshell, and winged mapleleaf was anticipated in the form of harm and harassment due to wastewater discharges permitted by this permitting action. Take exemption is only applicable for discharges described in the *Description of the Proposed Action* section of the BO that are in compliance with the general permit, the Federal Clean Water Act and State of Oklahoma water quality standards.

Comment 89: As discussed during our joint meetings with EPA and CAFO industry representatives, we recommend that a riparian buffer zone with a minimum width of 160 feet be established adjacent to water bodies occupied by aquatic listed species. (NRCS Conservation practice Standard Code 391 titled Riparian Forest Buffer and/or Code 390 titled Riparian Herbaceous cover; Riparian Area Management Handbook 1998). For a map of Oklahoma's aquatic federally-listed species, go to <http://www.fws.gov/southwest/es/oklahoma/Documents/ListedAquaticsMapOct08.pdf>.

Response 89: This requirement was added to Part III.D.8.e of the permit to ensure compliance with the terms and conditions for the implementation of reasonable and prudent measures (RPMs) established in the USFWS's BO.

Comment 90: To ensure that conditions of the permit within "Areas of Concern with Endangered Species Requirement" are being met, one commenter recommended that the EPA, in addition to their ongoing inspections, randomly inspect at least 10 percent of the permitted operations within this area. Inspections should include all required records including proper implementation of the NMP, EAP, and required conditions. This additional measure should be explained in the general permit.

Response 90: The comment has been noted in the administrative record. However, EPA's future enforcement activities are outside of the scope of this permitting action. No change has been made to the permit in response to this comment.

Comments Regarding Spills

Comment 91: Multiple comments requested EPA to clarify the permit requirements for spills. Two commenters stated that "spills" should be defined and quantified, and noted that ODAFF currently requires only spills over 100 gallons or that leave the property to be reported. One commenter suggested eliminating the requirement to report all "spills."

Response 91: 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.

Comment 92: All spills must be reported to EPA and ODAFF instead of EPA and ODEQ.

Response 92: See Response 91.

Comment 93: Several commenters stated that EPA's authority over pollutants from CAFOs is for a pollutant that enters waters of the United States. Multiple commenters stated that the term "spill" is not appropriate and will result in confusion and multiple interpretations of the terms and conditions of the general permit. The commenters recommended that EPA clearly define the term "discharge" and remove the term "spill" from the permit. Another commenter noted that while spill prevention and response procedures are important to preventing discharges, it is beyond EPA's CWA jurisdiction to require that all spills be reported to EPA. Spills that do not reach waters of the U.S. are not discharges under the CWA and should not be subject to any reporting requirements.

Response 93: 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 Responses 40 and 91.

Comment 94: EPA should define the terms spill and discharge. Discharge should be defined as “a release of regulated constituents that flow into waters of the U.S.,” and spill should be defined as “a release of regulated constituents that remain on the CAFO property.”

Response 94: EPA has clarified the intention of the requirements of Part III.D.3. See Response 93. No changes have been made to the permit in response to this comment.

Comments Regarding Other Special Conditions

Comment 95: Groundwater contaminated from lagoons, or land applications of CAFO wastes that are hydraulically connected to surface water could result in surface water contamination. The permit requires that all lagoons shown to have a hydrological connection to surface water be lined to prevent seepage. The permit also requires that waste to fields be applied according to the NRCS Nutrient Management 590 standards, which will minimize, but not necessarily alleviate potential discharges to groundwater.

Response 95: The comment has been noted in the administrative record.

Comment 96: Several commenters suggested that the provision of Part III.D.6 exceeds the federal CAFO Rule and the CWA. The CWA and federal CAFO rule address contamination of surface water – not “drinking” water. The word “drinking” should be changed to “surface.”

Response 96: 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 97: Leak detection systems and monitoring wells are very expensive and may not be feasible in some circumstances, and in many cases there may be alternatives to the use of monitoring wells. Therefore, Part III.D.1.c should also include “other investigative devices or methods.”

Response 97: EPA has modified this section to allow for other appropriate measures to be used in lieu of leak detection systems or monitoring wells.

Comment 98: Three commenters noted that the permit states that a schedule must be developed for liquid waste removal from the retention structure(s). Given the unpredictable frequency and amount of rainfall a location may receive and the variance of crop emergence and growth stage, it is impossible to predict the timing of land application events. A “schedule” for dewatering is not feasible. However, the commenters agreed with the need to have dewatering equipment

available, ready for use, and operational in accordance with the inspections required by the general permit.

Response 98: EPA recognizes that a schedule for liquid waste removal from retention structures would be subject to change due to factors that are outside of the facility's control, such as amount of rainfall. However, EPA believes that it is appropriate to include such a schedule in the NMP for planning purposes. No changes have been made to Part III.D.2 in response to this comment.

PART IV – DISCHARGE MONITORING AND NOTIFICATION REQUIREMENTS

Comments Regarding Notification of Discharges

Comment 99: ODEQ is mentioned as the contact agency in Part IV.A of the permit instead of ODAFF.

Response 99: ODEQ has been replaced with ODAFF as the contact agency in Part IV.A of the permit.

Comments Regarding Monitoring Requirements for All Discharges from Retention Structures

Comment 100: The words “overflow or other” should be deleted from Part IV.B. The CWA provides authority to regulate discharges. “Overflows” that do not reach waters of the U.S. are not discharges.

Response 100: According to federal NPDES CAFO regulations at 40 CFR 412.2(g), 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 by the structure.” The term “overflow” is used properly in Part IV.B as it describes a type of discharge. No change has been made to the permit in response to this comment.

Comment 101: Multiple commenters requested the removal of pH and temperature from the list of parameters for discharge monitoring. The commenters asserted that field measurements for temperature and pH would be difficult if not impossible for the average livestock producer to achieve. Several commenters based the request on consistency with the 1993 permit and federal CAFO regulations. Another commenter noted that 40 CFR 136 stipulates a 15 minute holding time for pH measurements and that the pH analyzer be calibrated prior to use. A CAFO owner/operator would not be able to meet the 15 minutes withholding time because it could take up to or more than 15 minutes to calibrate the pH meter. The pH and temperature of manure does not fluctuate like discharges from Public Owned Treatment Works. Additionally, few producers currently own the necessary equipment to measure pH. This would be an added expense for producers to purchase equipment that they don't know how to use and that they likely will never be required to use.

Response 101: EPA believes that monitoring requirements for temperature and pH are necessary in order to account for the influence of these parameters on ammonia toxicity. Therefore, the monitoring requirements of Part IV.B.1 will remain in the permit as proposed.

Comment 102: Several commenters requested that the words “of obtaining knowledge of the discharge” be added after “within 30 minutes” in Part IV.B.3.

Response 102: EPA has modified Part IV.B.3 of the permit to require sample collection within 30 minutes of initial discharge or as soon as practicable after the first 30 minutes. If applicable, the permittee must document why it was not possible to take samples within the first 30 minutes. Part IV.B.5 of the permit has also been modified to require the permittee to include this documentation with the monitoring results submitted to EPA.

Comment 103: Part IV.B.4 should be modified to read “if conditions are not safe or feasible for sampling...” It is possible that the flow pattern of a discharge may be so shallow that it would not be “feasible” to obtain a sample.

Response 103: 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 104: Several commenters requested that EPA minimize the burden on CAFO operators by allowing the use of a common document for technical, recordkeeping, and reporting requirements. One commenter suggested that the general permit should attempt to be as similar in its record keeping requirements as those required by ODAFF. Another commenter recommended that EPA develop a record keeping document of system that allows one set of records to serve the needs of EPA and ODAFF. Multiple commenters stated that the EPA CAFO general permit should include a provision authorizing the use of Pollution Prevention Plans, NRCS Animal Waste Management Plans, NRCS Nutrient Management Plans, or other federally and/or state recognized documents that can demonstrate compliance with the provisions the NMP required by the general permit.

Response 104: EPA recognizes that this NPDES permit, ODAFF CAFO licenses, 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 ODAFF CAFO licenses, NPDES CAFO permits, and CNMPs, so long as the requirements of the NPDES CAFO permit are fulfilled. See Response 42. EPA has modified Parts IV.B.5 and VI.D.4 of the permit to clarify that monitoring results must be reported to EPA on either the electronic or paper Discharge Monitoring Report (DMR) approved formats.

Comment 105: One commenter noted that discrepancies exist between monitoring and record keeping requirements in the ODAFF CAFO permit and the proposed NPDES general permit. The commenter suggested that the Oklahoma Cooperative Extension could play a role in developing consistent record keeping systems for both permits. The Oklahoma Cooperative Extension developed record books for the 1993 general permit. Two years ago, a graduate student at OSU worked with a focus group of dairy, beef feedlot, and swine producers to determine their preferences in record keeping systems.

Response 105: As stated above, EPA does not oppose the use of a common CAFO recordkeeping book that combines reporting requirements for NPDES CAFO permits and ODAFF CAFO licenses so long as the requirements of the NPDES CAFO permit are fulfilled.

Comment 106: Several commenters suggested that EPA simultaneously review comments received on the draft general permits for Oklahoma and New Mexico and make revisions to both

permits that minimize the differences in the technical, recordkeeping, reporting, standard conditions and special provisions included in the permits.

Response 106: The New Mexico and Oklahoma CAFO general permits are two separate permitting actions. EPA cannot solely rely on comments made on the New Mexico permit to make revisions to the Oklahoma permit. The comment has been noted in the administrative record. However, no changes have been made to the permit in response to this comment.

Comment 107: Multiple 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. Two commenters suggested that the weather conditions should include daily high temperature, daily low temperature, and cloud cover (clear, partly cloudy, mostly cloudy or overcast). Another commenter noted that CAFOs already keep records related to rainfall at the facility. The commenter recognized the need to track conditions during land application, but suggested that it is possible that there will not be a person on the ground at a specific location 24 hours prior to and 24 hours after land application.

Response 107: 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 108: EPA should allow all permit records to be kept in a central location or on the farm site, whichever option better suits a permittee's operating and good record keeping practices. This flexibility should also be applied to the NMP requirement of Part III.A.5.

Response 108: Federal NPDES regulations require each CAFO to maintain on-site a copy of its site-specific NMP. See 40 CFR 412.37(c). No change has been made to the permit in response to this comment.

Comment 109: Under the Permit and Nutrient Management Plan section, the second row in that cell says "In addition records must be maintained that the development and implementation of the NMP is in accordance with the minimum practices defined in 40 CFR 122.42(e)." This is a redundant requirement that merely generates another record for us to keep. The NMP by its nature will reflect how it was developed and is being implemented. If the NMP is accepted by EPA as part of its review, then this requirement is already being met. There is no reason for this requirement.

Response 109: 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.

PART V – ANNUAL REPORTING REQUIREMENTS

Comments Regarding Reporting

Comment 110: ODEQ is mentioned as the agency to receive the facilities' annual reports. Part V.1 should be changed to the following:

ODAFF: Agricultural Environmental Management Services
Oklahoma Department of Agriculture, Food and Forestry
P.O. Box 528804
Oklahoma City, OK 73152-8804

Response 110: ODEQ has been replaced with ODAFF in Part V.1 as the agency to receive annual reports. EPA has also corrected the Part V.1 mailing address for EPA Region 6 to the following:

EPA Region 6: Compliance Assurance and Enforcement Division
Water Enforcement Branch (6EN-W)
U.S. EPA, Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

Part V.1 has also been modified to include a reporting requirement to the FWS for permittees that are located within designated sensitive watersheds identified in Part III.D.8 of the permit and use hard copy reports. This requirement has been included to incorporate a conservation recommendation of the USFWS's BO.

Comment 111: Several 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. Multiple commenters supported a requirement that all annual reports be due at the same time every year and suggested that the permit require submittal of the Annual Report by March 1 of each year. The report would include information from Jan.-Dec. of the previous year. Another commenter suggested that EPA allow the CAFO to determine the 12 month time frame for reporting.

Response 111: 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. EPA has also modified Part V.1 of the permit to clarify that permittees may use Net DMR to submit annual reports electronically.

PART VI – STANDARD PERMIT CONDITIONS

Comment 112: The words "or sludge use or disposal" should be deleted from Part VI.A.14, as the words make the provision unclear. CWA authority applies to discharges. Sludge use that does not cause a discharge is not a violation of this permit.

Response 112: Federal regulations at 40 CFR 122.41 contain conditions that apply to all NPDES permits. The "duty to mitigate" requirement of Part VI.A.14 is taken directly from 40 CFR 122.41(d). No change has been made to the permit in response to this comment.

Comment 113: Several commenters stated that CAFOs adhere to very stringent biosecurity restrictions to protect the health of animals. A provision should be added to the permit clarifying

that EPA will abide by all biosecurity provisions currently in place on CAFOs. Oklahoma regulatory agencies and the United States Department of Agriculture recognize the importance of biosecurity and they comply with these provisions as part of their regular inspections. One commenter suggested adding a new section to Part VI.A.15 that states “the director or authorized representative shall comply with all reasonable health and biosecurity requirements in place on the facility.” The commenter clarified that this comment refers to regular inspections, not emergency responses.

Response 113: 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, a requirement for the Director or authorized representatives to comply with the health and biosecurity requirements in place on the facility is outside the scope of the permitting action.

Comment 114: Provisions VI.B.1 and 2 are repetitive of provisions 13 and 14 in Part VI.A and should be deleted. Provision VI.B.3 should be renumbered as VI.A.16 and Part VI.B be deleted in its entirety. Part VI.C.1 is redundant of the requirement in VI.A.15 and should be deleted.

Response 114: 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.

Comment 115: Several commenters noted that Part VI.C.4 states that “Records of monitoring information shall include: a. The date, exact place, and time of sampling or measurements.” One commenter stated that the time for some samples is not relevant and is not recorded. For example, soil samples are not time sensitive. There is no reason to require a “time taken” for these types of samples. Multiple commenters added that “time” of sample collection should only be required for those samples and analytical constituents that have maximum holding times that must be met from the time of sample collection to the time of laboratory analysis.

Response 115: Federal regulations at 40 CFR 122.41 contain conditions that apply to all NPDES permits. See Response 112. The requirement of Part VI.C.4 is taken directly from 40 CFR 122.41(j)(3). No change has been made to the permit in response to this comment.

Comment 116: The first sentence of Part VI.D.3 should be rewritten to read: “This permit may be transferable after notice to EPA.”

Response 116: Federal regulations at 40 CFR 122.41 contain conditions that apply to all NPDES permits. See Response 112. The requirement of Part VI.D.3 is taken directly from 40 CFR 122.41(l)(3). No change has been made to the permit in response to this comment.

APPENDICES

Comments Regarding Appendix A

Comment 117: “Notice of Intent” should be added to the title of Appendix A, Application Form 2B, as it is listed as such in the Table of Contents of the permit. Otherwise, a statement should be made in the text of the permit, to the effect that Form 2B is used as the Notice of Intent for this general permit.

Response 117: “Notice of Intent” has been added to the title of Appendix A.

Comments Regarding Appendix B

Comment 118: The NOT is usually completed when a facility is going out of business and will need its lagoons closed. However, a NOT could also be used if a facility had a CAFO permit, but is constructed in such a way so that they believe that they will not discharge and choose to submit a Certification of No Discharge instead. They will need to discontinue their permit, but will still be in operation. This form mentions that they will fulfill the facility closure requirements of OKG010000. Should this form be amended to reflect the scenario above or another form developed to be used in such cases?

Response 118: EPA intends that CAFOs covered under this permit use the NOT regardless of their reason for terminating permit coverage. The reference to facility closure requirements has been removed from the certification statement and has been moved to the body of the NOT to notify CAFOs that the closure requirements of Part III.B of the permit must be fulfilled as appropriate. EPA has also 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 Appendix E

Comment 119: The word “from” should be deleted from the title of Appendix E.

Response 119: EPA has deleted the word “from” from the title of Appendix E.

Comments Regarding Additional Appendices

Comment 120: Maps of nutrient limited watersheds and nutrient vulnerable groundwater should be added to the permit as appendices.

Response 120: A map that illustrates nutrient limited watersheds would contain watersheds that are identified as “nutrient limited” at the time of permit issuance. If the OWRB were to designate additional watersheds as “nutrient limited,” the map would become outdated and could require a major modification to the permit. Therefore, EPA believes that it is more appropriate to rely on a direct reference to 785:45-5-29 and Appendix A of Oklahoma’s Water Quality Standards. Oklahoma’s Water Quality Standards can be found online at <http://www.owrb.ok.gov/util/rules/rules.php#ch45>. No changes have been made to the permit in response to this comment.

OTHER COMMENTS

Comments Regarding the Fifth Circuit Court of Appeals Decision

Comment 121: EPA should consider waiting to finalize the draft permit until the ongoing Fifth Circuit Court of Appeals decision is reached in the *Nation Pork Producers Council and American Farm Bureau Federation v. EPA*, Case No. 08-61093. It is possible that additional changes may be made to the final general permit as a result of the Fifth Circuit decision. This would reduce the burden and confusion for producers whom desire permit coverage but might have to apply twice if EPA moves forward with finalizing the general permit prior to the decision.

Response 121: On March 15, 2011, the U.S. Court of Appeals for the Fifth Circuit issued its decision in *National Pork Producers Council et al. v. EPA*, which involved challenges to EPA's 2008 amendments to CWA permit regulations for CAFOs. The 2008 rule required CAFOs that "discharge or propose to discharge" to apply for NPDES permits. The court upheld EPA's authority to impose a duty to apply on CAFOs that "discharge," but ruled that EPA is not authorized under the CWA to require CAFOs that "propose to discharge" to apply for NPDES permits. Therefore, requirements for CAFOs that propose to discharge to seek permit coverage have been removed from the general permit. However, EPA would like to note that coverage under this permit is available to CAFOs that might want to proactively seek coverage for future discharges, regardless of whether or not they have had a past discharge. The Agency also notes that in its BO dated December 14, 2011, that the USFWS uses the phrase "CAFOs that discharge or propose to discharge." EPA will interpret this as "CAFOs that seek authorization to discharge under an NPDES permit" in its implementation of the BO.

Comments Regarding Self Certification of No Discharge

Comment 122: Several commenters requested that EPA describe the option for a CAFO to self-certify no discharge in the general permit. This will help ensure that CAFO owners/operators are fully informed of their options to (1) operate without permit coverage, (2) operate without permit coverage and self certification of no discharge, (3) seek coverage under the CAFO general permit, (4) obtain an individual NPDES permit. One commenter stated that while self-certification does not provide permit coverage and is not "technically" part of this general permit, it is impossible for a CAFO owner/operator to fully consider the options available to them without knowing the requirements and benefits of self-certification.

Response 122: The option to self-certify no discharge is outside of the scope of this permitting action. No changes have been made to the permit in response to the comment.

Comments Regarding Alternative Technology

Comment 123: One commenter stated that the permit is not necessary because he has developed technology that would permanently correct the types of issues addressed in the permit and would prevent contaminants from being discharged into waters. The commenter went on to say that he has previously contacted EPA regarding this issue, but the Agency is not interested in processes that address waste.

Response 123: This general permit is consistent with the federal NPDES CAFO regulations at 40 CFR 122 and 412, as established by the 2003 and 2008 CAFO rules. This comment appears directed at the NPDES CAFO regulations rather than falling within the scope of the draft general

permit for CAFOs in Oklahoma. EPA cannot change the NPDES regulations through this permit. See Response 26.

However, EPA would like to note that a CAFO that discharges must seek authorization to discharge under an NPDES permit (See Response 1). EPA intends that the CAFO operator should make an objective assessment of the operation to determine whether the CAFO will discharge. Part of this objective assessment would include an evaluation of the technology utilized by the CAFO for waste management.

Comments Regarding Changes Made to the General Permit in Response to Comments

Comment 124: If the terms and conditions of the proposed permit are to be changed as a result of public comments made, the changes should be clearly made in the permit either by changes in language, by footnotes or by appendix to the permit rather than by including them in the Response to the Comments. The permittees or public usually refer to the permit for its specific terms and conditions to follow or implement instead of looking in the document of Response to Comments to seek answers!

Response 124: EPA would like to clarify that the response to comments does not contain the terms and conditions of the final permit. In accordance with 40 CFR 124.14(a)(1), the response to comments specifies which provisions of the draft permit have been changed in the final permit decision, and the reasons for the change. Permittees and the public should refer to the final permit itself for the effluent limitations, monitoring requirements, and other provisions necessary for permit compliance.

Comments Regarding Conditions of the 1993 General Permit

Comment 125: Several commenters stated that the 1993 general permit has been effective in protecting the water quality of Oklahoma and encouraged EPA to maintain a strong focus on the existing terms and conditions of the 1993 general permit.

Response 125: The comment has been noted in the administrative record.

Comments Regarding Permit Issuance

Comment 126: The current CAFO General Permit has been expired for 11 years. The EPA should dot all the “i’s” and cross all the “t’s” prior to issuing a permit. Based on comments from the public meetings, the permitted entities still have many questions and concerns that are not/have not been addressed in this permit. This will lead to confusion between the permitting/regulated/enforcement areas and tie up valuable resources trying to sort these things out.

Response 126: The comment has been noted in the administrative record.

Comments Regarding Limitations on 3rd Party Lawsuits

Comment 127: 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 127: EPA does not have authority to include such provisions in a permit that would circumvent the Citizen Suit provision of CWA § 505.

Comments Regarding the Fact Sheet

Comment 128: Part II.A.1 of the Fact Sheet should be corrected to read “Part II.A.I.b” instead of “Part II.A.1.B.”

Response 128: The comment has been noted in the administrative record.

Comment 129: Does “tier 2 water” mean High Quality Water (HQW) as defined under section “Application of Anti-degradation Policy” of Oklahoma Water Quality Standards (OAC 785:45-3-2)? What about water with tier 2.5 designation? The characteristics of these waters should be clearly presented in Part II.A.3 of the Fact Sheet.

Response 129: Oklahoma Water Quality Standards identify Tier 2 protection as the maintenance and protection of High Quality Waters and Sensitive Water Supplies [OAC 785:46-13-4]. EPA would like to clarify that the term “Tier 2.5” was unintentionally included in the Fact Sheet. This term is not present in the proposed or final permit.

Comment 130: Please clarify the meaning of the following sentence in Part II.A.3 of the Fact Sheet: “This requirement is based on the water quality standard exceedance frequency for aquatic life...”

Response 130: The Water Quality-Based Reduction Plan has been removed from the permit (see Response 37).

Comment 131: Part II.A.4.f of the Fact Sheet states that CAFOs must analyze manure a minimum of once annually. State Rules do not require manure testing every year for all CAFOs. The requirements for Manure testing for most CAFOs, except large swine CAFOs (or LMFO), and for Poultry Feeding Operations (PFO) located in non-nutrient limited watersheds or non-nutrient vulnerable ground waters are once every three years. Manure testing for LMFO, and for PFO located in nutrient limited watersheds or nutrient vulnerable ground water are once every year.

Response 131: The comment has been noted in the administrative record. See Response 55.

Comment 132: Part II.A.5.c of the Fact Sheet should be changed from “Federal regulations [40 CFR 122.22(d)] require permit limitations to control all pollutants which may be discharged at a level with will cause,...” to “...a level which will cause...”

Response 132: The comment has been noted in the administrative record.

Comment 133: Part III.A.2 of the Fact Sheet states that “When the Director authorizes the CAFO owner or operator to discharge under the general permit...” Conditions, under which CAFOs may discharge, should be specified; as they have to adhere to No Discharge mode under normal operation conditions.

Response 133: By definition, an NPDES permit is an authorization, license, or equivalent control document issued by EPA to implement the requirements of the federal NPDES regulations. See 40 CFR 122.2. A permit is typically a license for a facility to discharge a specified amount of a pollutant into a receiving water under certain conditions. In this case, owners and operators of

CAFOs in Oklahoma which are granted permit coverage are authorized to discharge on condition that they operate their facility in accordance with effluent limitations, monitoring requirements, and other provisions set forth in the permit.

Comment 134: Purdue University's Manure Management Planner (MMP) is very versatile and could be used in developing an NMP for either the narrative approach or the linear approach.

Response 134: EPA agrees with the commenter that Purdue University's Manure Management Planner (MMP) could be used to develop an NMP for either the narrative approach or the linear approach.

Comment 135: In Part III.7(f) of the Fact Sheet, "CAFOs using the Narrative Approach" should be modified. This sentence seems to be incomplete and does not go along with the other points.

Response 135: The comment has been noted in the administrative record.

Comment 136: The national NMP template jointly developed by the USDA, EPA and Purdue University does not include closure requirements. These requirements should be included in the template.

Response 136: The comment has been noted in the administrative record, but modification of the template is outside the scope of the permitting action.

Comment 137: The requirements of Oklahoma's closure rules need to be included in the EPA's closure requirements. The Oklahoma lagoon closure rules for CAFOs can be found in OAC 35:17-4-21. Swine Feeding Operations (SFO) lagoon closure requirements can be found at OAC 35:17-3-25.

Response 137: The comment has been noted in the administrative record. See Response 67.

Comment 138: Part III.D of the Fact Sheet discusses requirements to address the protection of threatened or endangered species in the area where a CAFO is located. It further states that an EAP should be developed by the CAFO to describe procedures that will be implemented in the event of a spill or discharge and will prevent the spill or discharge from leaving the site and harming endangered species. While the protection of threatened or endangered species is critical and required by law, the commenter believes that the EAP should also address the protection of public health, property and the environment. The national NMP template under section 3, Farmstead Safety and Security, referred to this emergency plan as the Emergency Response Plan instead of Emergency Action Plan. The term "Emergency Response Plan" should be used consistently, both in the NMP National Template as well as in the permit.

Response 138: The comment has been noted in the administrative record. See Response 76.

Comment 139: ODEQ is mentioned in Part IV.A of the Fact Sheet as the Oklahoma contact agency for reporting a discharge of manure, litter or process wastewater. The contact should be ODAFF at 1-800-235-9877 or 405-522-5892.

Response 139: ODEQ has been replaced with ODAFF as the contact agency in Part IV.A of the permit. See Response 99.

Comment 140: A CAFO's annual report should be sent to ODAFF and not ODEQ.

Response 140: The comment has been noted in the administrative record. See Response 110.

Comment 141: In Part VI of the Fact Sheet, “discharge” is misspelled.

Response 141: The comment has been noted in the administrative record.