

HEARING OFFICER'S REPORT

TO: The Honorable Shawn M. Garvin
Cabinet Secretary, Department of Natural Resources and Environmental Control

FROM: Lisa A. Vest
Regulatory Specialist, Office of the Secretary
Department of Natural Resources and Environmental Control

RE: Draft National Pollutant Discharge Elimination System (“NPDES”) General Permits (GP1 - DE 0051250 and GP3 - DE 50000N/11) for Concentrated Animal Feeding Operations (“CAFOs”) (Hearing Docket No. 2021-P-W-0013)

DATE: May 25, 2023

I. BACKGROUND AND PROCEDURAL HISTORY:

A virtual public hearing was held on Wednesday, June 30, 2021, at 6:00 p.m. via the State of Delaware Cisco WebEx Meeting Platform by the Department of Natural Resources and Environmental Control (“DNREC” or “Department”) to receive comment on the issuance of two General Permits related to the National Pollutant Discharges Elimination System (“NPDES”) Concentrated Animal Feeding Operations (“CAFO”) Program. A CAFO Permit is a point source permit authorized by the Federal Clean Water Act (“CWA”) that is required by both Federal and State regulations for CAFOs that discharge pollutants into waters of the State, including streams or drainage ditches.

Specifically, DNREC intends to renew the Draft NPDES General Permit for Large, Medium, and Designated Poultry CAFOs – Manure Generation Facilities Only (“DE 5000N/11,” “General Permit 1,” or “GP1”), and to issue a Draft NPDES General Permit for Large, Medium and Designated Non-Poultry and Diversified CAFOs – Manure Generation and Land Application Facilities (“DE 0051250,” “General Permit 3,” or “GP3”). The Department intends to issue both these General Permits, under which CAFO operations may seek discharge authorization.

The Department has the statutory basis and legal authority to act with regard to the development of the aforementioned General Permits, pursuant to: 40 CFR 122, *EPA Administered Permit Programs: the National Pollutant Discharge Elimination System*; 40 CFR 123, *State Program Requirements*; 40 CFR 412.4, *Best Management Practices (BMPs) for Land Application of Manure, Litter, and Process Wastewater*; 7 DE Admin. Code 7201, *Regulations Governing the Control of Water Pollution*, specifically, Section 9.5 (herein referred to as Delaware's "CAFO Regulations"); 3 *Del.C.* Ch. 22 (herein referred to as Delaware's "Nutrient Management Regulations"); the *State Technical Standards* (as developed by the State of Delaware's Nutrient Management Commission); and as provided for under 7 *Del.C.* Ch. 60.

In the State of Delaware, DNREC and the Delaware Department of Agriculture ("DDA") cooperate in implementing the CAFO Program at the State level. The purpose of General Permits such as GP1 and GP3 (also referred to herein as "CAFO Permits") is to regulate activities at CAFOs involving the management of nutrients and to help improve and maintain the quality of Waters of the State. Applicable farms will be subject to certain effluent limitations and conditions under Section 9.5 of 7 DE Admin. Code 7201, *Regulations Governing the Control of Water Pollution*.

To serve as background regarding this specific area of permitting by the Department, an Animal Feeding Operation ("AFO") is defined as a facility where animals other than aquatic are stabled or confined, and fed or maintained, for a total of 45 days or more in any 12-month period. The animal confinement areas do not sustain crops, vegetation, foliage growth, or post-harvest residues in the normal growing season. Two or more AFOs under common ownership are considered a single AFO for the purposes of determining the number of animals in an operation.

In Delaware, all AFOs with eight animal units or more fall under the DDA Nutrient Management Regulations (an animal unit is equivalent to 1,000 pounds). These AFOs are required to develop an animal waste management plan, according to Delaware's Nutrient Management Regulations. Such operations that land apply livestock waste are required to develop a nutrient management plan that covers both the livestock and land management.

In contrast to an AFO, Federal regulations qualify a CAFO by the number of animals at any such operation. A lower limit of 37,500 chickens means most commercial poultry operations in Delaware will fall under the CAFO Regulations. If an operation has multiple species, one of which meets the qualifications for a CAFO, then all species will fall under the CAFO regulations, and the CAFO would be considered diversified.

The Delaware CAFO Program is the State regulatory program that issues NPDES permits to CAFOs. The program is overseen by the United States Environmental Protection Agency (“EPA”) and implemented jointly by DNREC and DDA. The Department is responsible for issuing the CAFO Permits with regard to the regulatory component of the program. The DDA is the primary point of contact for the regulatory community, and is responsible for conducting inspections, collection documentation, and reviewing animal waste management and nutrient management plans.

The Department breaks down its CAFO Program into three General Permits under which various operations can apply for coverage:

- General Permit 1 (Large, Medium, and Designated Poultry CAFOs - Manure Generation Facilities only);
- General Permit 2 (Large, Medium and Designated Poultry CAFOs - Facilities with Land Application of Manure); and
- General Permit 3 (Large, Medium, and Designated Non-Poultry and Diversified CAFOs - Manure Generation and Land Application Facilities).

As noted previously, the purpose of the aforementioned public hearing held by the Department on June 30, 2021, was to receive comment on the reissuance of Draft General Permit 1 (representing the largest CAFO population in Delaware) for the renewal of NPDES Permit Number DE 5000N/11, and for the issuance of Draft General Permit 3 (representing the smallest CAFO population in Delaware), NPDES Permit Number DE 0051250. The Department’s General Permit 2 is still active, and therefore not open for public comment at this time.

Operations covered under the CAFO Program are required to adhere to certain following effluent limits. For Large CAFO Effluent Limitations, there is to be no discharge of manure, litter, or processed wastewater pollutants to Waters of the State from the production area, except in the case of a precipitation event exceeding a 25-year, 24-hour rainfall event; *and* the production area is to be maintained and operated in accordance with the measures and records required by the CAFO Regulations. For Medium and Designated CAFO Effluent Limitations, operations must adhere to all best management practices (“BMPs”) addressed in the animal waste management and/or nutrient management plan concerning management activities of the manure, litter, or processed wastewater, in accordance with the State Technical Standards.

An important aspect of compliance is maintaining an up-to-date Animal Waste Management Plan (“AWMP”) and/or Nutrient Management Plan (“NMP”). Such plans are required to contain the following nine (9) components, at a minimum: (1) manure, litter, and processed wastewater storage procedures; (2) mortality management procedures; (3) clean water diversion systems; (4) no livestock directly in contact with Waters of the State; (5) chemical and contaminant disposal practices; (6) buffers and other runoff BMPs; (7) manure, litter, and processed wastewater and soil testing protocols; (8) manure, litter, and processed wastewater application protocols; and (9) records of implementation.

With regard to the permitting process for CAFOs in Delaware, applicants must submit a Notice of Intent (“NOI”), along with their AWMP and/or NMP, and topographical maps of their production area. All complete applications are then publicly noticed to be covered under the CAFO NPDES General Permits, as referenced above. A formal Public Notice is advertised in two newspapers for one day, and available on the Department’s website during the 30-day public comment period. Upon completion (without comment) of the 30-day period, applicants receive a letter granting permit coverage. The permit is good for five (5) years. If a meritorious request for a public hearing is received during the 30-day public comment period, then the Department will proceed accordingly and hold the requested public hearing, pursuant to the protocols set forth on the DNREC Public Hearing webpage.

On March 31, 2021, the Department's Division of Water, Surface Water Discharges Section ("SWDS") completed its review of the Draft GP3. On April 11, 2021, the SWDS published Legal Notice for the proposed Draft GP3 in the *News Journal*, the *Delaware State News*, and on DNREC's website. On May 11, 2021, the SWDS received a request for a public hearing on GP3.

Parallel to the efforts regarding the development of the Draft GP3, the SWDS was also working towards the renewal of the GP1. The GP1 was originally issued April 1, 2016, and subsequently expired on March 31, 2021. Due to the similarities between the GP1 and the GP3, and the likelihood that the public would have similar comments, questions, or concerns regarding both CAFO General Permits, the SWDS scheduled a combined public hearing to address both the issuance of GP3 and the renewal of GP1. On May 30, 2021, the SWDS published Legal Notice advertising that the Department had scheduled a public hearing to be held on June 30, 2021, regarding (1) the renewal of the proposed Draft GP1 and (2) the issuance of the proposed Draft GP3 in the *News Journal*, the *Delaware State News*, and on DNREC's website. Accordingly, the public hearing was held on June 30, 2021.

Department staff and members of the public attended the public hearing held on June 30, 2021. Comments were received verbally from the public at the time of the public hearing, and additional written comments were received during the post-hearing phase of this matter. The hearing record ("Record") remained open for receipt of public comment through July 15, 2021. All comments were posted on the DNREC hearing web page dedicated to this matter. Proper notice of the hearing was provided as required by law.

The Division of Water's experts in the SWDS subsequently provided responses to the aforementioned comments received by the Department, pursuant to this Hearing Officer's request for the same, in the Technical Response Memorandum ("TRM") dated September 9, 2022. The TRM is discussed herein in greater detail below.

II. SUMMARY OF THE PUBLIC HEARING RECORD:

The Record consists of the following documents:

(1) The official verbatim Transcript of Proceedings from Wilcox & Fetzer, Ltd., generated from the public hearing of June 30, 2021;

(2) Six (6) exhibits (with all noted subparts) identified as the Department's Exhibits regarding the proposed GP1 and GP3, as referenced above, introduced by responsible Department staff at the aforementioned hearing, and marked accordingly as "Dept. Exh. 1-6" (note: the Department's exhibits include both Draft CAFO Permit GP1 and GP3);

(3) Copy of the written comments received via email from Mr. Lew Podolske, dated July 14, 2021, as identified on the hearing web page dedicated to this matter under the "Public Comments" section;

(4) Copy of the written comments received via email from Joseph Meyer, authorized representation of the Sussex Health and Environmental Network, dated July 15, 2021, as identified on the hearing web page dedicated to this matter under the "Public Comments" section;

(5) Copy of the written comments, with attachments, received via email from Mr. Keith Steck, dated July 15, 2021, as identified on the hearing web page dedicated to this matter under the "Public Comments" section;

(6) Technical Response Memorandum ("TRM") prepared by the Department's Division of Water, SWDS, dated September 9, 2022. The Department's TRM, is expressly incorporated into this Report and attached hereto as Appendix "A."

The Department's persons in the Division of Water, SWDS, Lydia Smith, Environmental Scientist II, and Gordon Woodrow, Program Manager I, developed the Record with the relevant documents in the Department's files.

As noted above, and at the request of this Hearing Officer, the technical experts in the Department's Division of Water prepared the aforementioned TRM to (1) specifically address the concerns associated with the development of both GP1 and GP3, as set forth in the public comments received by the Department; and (2) offer conclusions and recommendations regarding this pending permitting matter for the benefit of the Record. The TRM provides a summary of the public comments received by the Department in this matter and offers detailed responses to the same.

I find that the aforementioned TRM, as provided by the Department's experts in the Division of Water, addresses the areas of concern voiced by the public comments received by the Department in this permitting matter, and provides responses to those comments in a balanced manner, accurately reflecting the information contained in the Record. Accordingly, the Department's TRM of September 9, 2022, is attached hereto for the Secretary's review as Appendix "A," and is hereby expressly incorporated herein. Additionally, the Draft CAFO GP1 (for the renewal of NPDES Permit Number DE 5000/11) and Draft CAFO GP3 (for the issuance of NPDES Permit Number DE 0051250), are also attached hereto as Appendices "B" and "C," respectively, and are expressly incorporated herein as well.

III. RECOMMENDED FINDINGS AND CONCLUSIONS:

Currently pending before the Department are two Draft General Permits (GP1 and GP3), under which CAFO operations in the State of Delaware may seek discharge authorization. As set forth above, DNREC proposes to reissue GP1 (for the renewal of NPDES Permit Number DE 5000N/11), and to issue GP3 (NPDES Permit Number DE 0051250). I find that the Department is required to take such actions regarding the aforementioned General Permits, for the reasons noted above.

I further find that the Draft GP1 and Draft GP3 are complete, and that the applicable Federal and State regulatory requirements have been met with regard to this matter, including, but not limited to, the following:

- 40 CFR 122, *EPA Administered Permit Programs: The National Pollutant Discharge Elimination System*;
- 40 CFR 123, *State Program Requirements*;
- 40 CFR 412.4, *Best Management Practices (BMPs) for Land Application of Manure, Litter, and Process Wastewater*;
- 7 DE Admin. Code 7201, *Regulations Governing the Control of Water Pollution*, specifically, Section 9.5 (herein referred to as Delaware’s “CAFO Regulations”);
- 3 *Del.C.* Ch. 22 (herein referred to as Delaware’s “Nutrient Management Law”);
- The *State Technical Standards* (as developed by the State of Delaware’s Nutrient Management Commission); and
- as provided for under 7 *Del.C.* Ch. 60.

In reviewing the applicable statutes and regulations, as well as weighing public benefits of this project against potential detriments, the Department’s experts in the Division of Water have concluded that the proposed Draft GP1 and Draft GP3 comply with all applicable federal and state laws and regulations. Upon approval by the Secretary, the CAFO General Permits that would be issued by the Department would be protective of public health and the environment while being consistent with all applicable State and Federal regulations.

The Department’s TRM acknowledges the comments received from the public concerning the development of both Draft GP1 and Draft GP3, and thoroughly responds to the same. It should be noted that the comments received by the Department in this matter were very specific in nature, including (but not limited to) the following areas of concern:

- public availability of CAFO applications;
- CAFO construction, operation, and monitoring (to ensure compliance and minimize environmental impacts);

- ensuring that the standards utilized in the CAFO Program (i.e., NMPs, BMPs, *State Technical Standards*) are adequate (or are in need of update);
- CAFO reporting requirements; and
- enforcement of the requirements of Delaware CAFO Permits in general.

Some comments received from the public fell outside of the Department's permitting authority with regard to CAFO matters. The TRM acknowledged receipt of such comments by the Department, and responded to the same by (1) noting that such comments involved issues outside the scope of Delaware CAFO permitting, and thus are not germane to this specific hearing matter; and (2) encouraging the public to contact each county directly (for concerns regarding building permit requirements) and/or the applicable regulatory agency (for concerns regarding compliance with EPA or DDA-specific regulatory requirements) for further information.

For the purposes of brevity, this Report defers to the attached TRM in its entirety for a comprehensive understanding of the concerns raised in the public comments received by the Department in this matter, as well as the Department's formal responses to the same, as provided by the technical experts in the Department's Division of Water.

I find that the Division of Water's TRM offers a thorough review of all aspects of the Draft CAFO General Permits (both GP1 and GP3) as set forth above, addresses those concerns germane to the subject matter of the aforementioned public hearing held by the Department in this matter, and responds to them in a balanced manner, accurately reflecting the information contained in the Record.

The Record developed in this matter indicates that the Department's experts in the Division of Water have concluded that the Draft GP1 and GP3 are (1) complete and comply with all statutes and regulations that govern such permitting actions; and (2) have weighed the public benefits of the issuance of these General Permits against potential detriments and have recommended approval of the same.

I further find and conclude that the Record supports approval of the Department's renewal of CAFO GP1 for the renewal of NPDES Permit Number DE 5000/11, and for the issuance of CAFO GP3, NPDES Permit Number DE 0051250, as set forth above. The CAFO General Permits to be issued by the Department will be consistent with the finalized Draft Permits prepared by the Department's experts in the Division of Water, to ensure continued protection of public health and the environment, and consistent with the Record developed in this matter.

Accordingly, this Report recommends approval of CAFO GP1 for the renewal of NPDES Permit Number DE 5000N/11, and the issuance of CAFO GP3, NPDES Permit Number DE 0051250, consistent with the finalized CAFO Draft Permits prepared by the technical experts in the Department's Division of Water, and consistent with the Record developed in this matter.

Further, the Department concludes and specifically directs the following:

1. The Department has jurisdiction, as provided for under 7 DE Admin. Code 7201, *Regulations Governing the Control of Water Pollution*, 3 Del.C. Ch. 22, 7 Del.C. Ch. 60, and all other relevant statutory authority as set forth herein, to make a final determination on the aforementioned Draft CAFO General Permits (GP1 and GP3) developed by the Department's experts in the SWDS, after holding a public hearing, considering the public comments, and all information contained in the Record generated in this matter;
2. The Department provided proper public notice of the aforementioned Draft CAFO General Permits, and of the public hearing held on June 30, 2021, and held the hearing to consider any public comments that may be offered on the same, in a manner required by the law and regulations;

3. The Department considered all timely and relevant public comments in the Record, as established in the Department's TRM of September 9, 2022, and the finalized Draft CAFO General Permits, all of which have now been expressly incorporated into the Record generated in this matter;
4. The Department has carefully considered the factors required to be weighed with regard to the issuance of the Draft CAFO General Permits, and finds that the Record supports approval of the same;
5. The Department shall reissue CAFO GP1, for the renewal of NPDES Permit Number DE 5000N/11, and shall issue CAFO GP3, NPDES Permit Number DE 0051250, consistent with the finalized Draft Permits prepared by the Department's Division of Water, and consistent with the Record developed in this matter;
6. Furthermore, the finalized CAFO General Permits shall include all conditions as set forth in the Department's TRM, to ensure that the same are protective of human health and the environment, while being consistent with applicable State and Federal regulations;
7. The Department has an adequate Record for its decision, and no further public hearing is appropriate or necessary; and
8. The Department shall serve and publish its Order on its internet site.

/s/Lisa A. Vest
LISA A. VEST
Regulatory Specialist

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Appendix A: TRM (09/09/2022)

Appendix B: Draft CAFO GP1 (for the renewal of NPDES Permit Number DE 5000/11)

Appendix C: Draft CAFO GP3 (for the issuance of NPDES Permit Number DE 0051250)