



STATE OF DELAWARE
**DEPARTMENT OF NATURAL RESOURCES AND
ENVIRONMENTAL CONTROL**

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**SURFACE WATER
DISCHARGES**

MEMORANDUM

TO: Lisa Vest, Hearing Officer, Office of the Secretary

THROUGH: Steven Smailer, Director, Division of Water *SS*
Jennifer S. Roushey, Environmental Program Administrator, Division of Water *JSR* 10/20/2022
Gordon Woodrow, Program Manager I, Surface Water Discharges Section *GJW* 10.19.22

FROM: Lydia Smith, Environmental Scientist II, Surface Water Discharges Section LJS 9/9/22

RE: **Technical Response Memorandum Regarding the June 30, 2021 Public Hearing on the Draft National Pollutant Discharge Elimination System (NPDES) CAFO General Permits (DE 0051250 & DE 5000N/11) for Concentrated Animal Feeding Operations (CAFOs)**

DATE: **September 9, 2022**

This Technical Response Memorandum (TRM) was prepared at the request of the presiding hearing officer to assist in the completion of the Hearing Officer's Report to the Secretary of the Delaware Department of Natural Resources and Environmental Control (Department). The TRM was prepared by the Surface Water Discharges Section (SWDS) and provides the information necessary to inform the final decision on the issuance of the Draft NPDES General Permit for Large, Medium, & Designated Non-Poultry & Diversified CAFOs – Manure Generation and Land Application Facilities (DE 0051250 or General Permit 3) and the renewal of the Draft NPDES General Permit for Large, Medium, & Designated Poultry CAFOs – Manure Generation Facilities Only (DE 5000N/11 or General Permit 1).

On March 31, 2021, the SWDS completed its review of the Draft NPDES General Permit for Large, Medium, & Designated Non-Poultry & Diversified CAFOs – Manure Generation and Land Application Facilities General Permit 3 (GP3).

On April 11, 2021, the SWDS placed a legal notice for the proposed Draft GP3 permit in the News Journal, the Delaware State News, and on the Department's website.

On May 11, 2021, the SWDS received a request for a public hearing on GP3 from Ms. Maria Payan, representing the Sussex Health & Environmental Network (SHEN).

Parallel to SWDS's efforts on the development of the GP3 draft, SWDS was also working towards the renewal of the NPDES General Permit for Large, Medium, & Designated Poultry CAFOs – Manure Generation Facilities Only (GP1) which was originally issued April 1, 2016 and expired on March 31, 2021. Due to the similarities between the draft permits and the likelihood that the public would have similar comments, questions, or concerns regarding both CAFO General Permits, SWDS scheduled a combined public hearing to address both GP3 and the renewal of GP1.

On May 30, 2021, the SWDS placed a legal notice for the public hearing on the issuance of the Draft GP3 permit and renewal of the Draft GP1 permit in the News Journal, the Delaware State News, and on the Department's website. Additionally, the SWDS notified Ms. Payan of the hearing date, time, and location via email.

The public hearing on the issuance of GP3 and the renewal of GP1 was held virtually on June 30, 2021 at 6:00 PM. During the public hearing, three individuals provided comment on the Draft GP3 issuance and Draft GP1 renewal. Additionally, the SWDS received written comment from three individuals.

During the SWDS's review of comments to prepare this *response to comments* document, the SWDS paraphrased and grouped similar comments together. Additionally, this TRM focuses on addressing the public comments and questions received that are directly related to the GP1 and GP3 permits.

- 1. Ms. Payan, representing SHEN, beginning on page 20 of the hearing transcript and in written form, submitted several comments to the SWDS. Comments include:**

Comment 1.a: "How will DNREC enforce the submittal of complete NOIs that include nutrient management plans?"

Response: All NOIs and nutrient management plans (NMPs) submitted to the SWDS and the Delaware Department of Agriculture (DDA) are reviewed for completeness and accuracy. If NOIs and/or NMPs are determined to be incomplete or do not meet Department regulatory requirements, the operation will not proceed through the permitting process or be issued a CAFO permit until it is determined that a complete permit application has been submitted. Operations missing information from their application will be notified and given a reasonable amount of time to provide the needed information.

Comment 1.b: "Why does DNREC allow a poultry facility to operate without an approved NOI and will this behavior extend to non-poultry facilities under the proposed NPDES General Permit?"

Response: Operations that fall below CAFO thresholds are regulated under the Delaware Nutrient Management Law if they exceed 8 animal units. When a farm is identified as meeting

the CAFO threshold, the SWDS and DDA take appropriate action to bring the farm into the CAFO program. Farms operating above the threshold have a duty to apply with a NOI and Nutrient Management and/or Animal Waste Management Plan. A farm with a submitted NOI cannot be permitted until all applicable documents have been reviewed and approved. However, it should be noted that any farm that has not yet received authorization under a CAFO General Permit is still subject to the Delaware Nutrient Management Law. Per 9.5.4.2 the NOI shall serve as a formal commitment by the CAFO owner or operator to comply with the standards established in these regulations.

See also Response 1.a.

Comment 1.c: “Has the USEPA reviewed the proposed non-poultry NPDES general permit with respect to the how Delaware fails to implement the public participation requirements of the Waterkeepers Decision?”

***Response:** The proposed Draft GP3 issuance and proposed Draft GP1 renewal have been reviewed by USEPA and approved to move forward with the public notice process. All general permits and operations applying for coverage under them must proceed through the public notice process. The public notice process is designed to allow the public to obtain prior knowledge of operations seeking coverage and the opportunity to provide comments and concerns prior to DNREC rendering a decision on permit authorization. Once advertised, copies of the CAFO General Permits are made available to the public upon request to DNREC and NOI applications for coverage under the general permits are available for review by contacting DDA. In accordance with 7 Del. C. Chapter 60 §6004 a public hearing is held on an application if a meritorious request for a hearing is received within the timeframe stated in the advertisement of the application.*

Comment 1.d: “Can a CAFO legally construct and operate without an approved NOI and if so, what state and/or federal regulation allows this to happen in Delaware?”

***Response:** The SWDS does not have permitting authority over the construction of CAFOs, although the CAFO regulations do set certain conditions on new sites, listed under 7 DE Admin Code 7201 Section 9.5.7. CAFO operations have a duty to apply for coverage as prescribed under Section 9.5.4.1. Newly constructed operations must submit a NOI at least 180 days prior to commencement of operations. In accordance with Section 9.5.4.2 of the Regulations, submission of a NOI serves as a formal commitment by the CAFO owner or operator to comply with the standards established in the Regulations. Therefore, as long as all applicable county and local approvals have been obtained, a CAFO can be constructed and go into operation prior to receipt of Notice of Coverage authorization from DNREC, assuming an NOI was submitted at least 180*

days prior to the CAFO going into operation and the CAFO abides by the standards established in the CAFO Regulations. See also Response 1.b.

Comment 1.e: “How many non-poultry livestock facilities does DNREC anticipate will be large enough to warrant coverage under the proposed NPDES General Permit?”

Response: At this time, 8 operations have submitted NOIs in anticipation of the GP3 becoming available. The SWDS has identified an additional 24 operations as potentially meeting the animal inventory threshold outlined in the CAFO regulations which may also require GP3 coverage. Upon issuance of the GP3, the identified facilities will be contacted to begin the permit application process.

Comment 1.f: “Why is DNREC proposing the non-poultry NPDES General Permit?”

Response: In accordance with federal (40 CFR §122.23) and state regulations (§7201.9.5.3), the Delaware CAFO Program must offer NPDES CAFO permit coverage for non-poultry farms meeting the following thresholds:

	Medium CAFO	Large CAFO
Cattle other than mature dairy cows or veal calves. Includes but is not limited to heifers, steers, bulls, and cow/calf pairs	300 to 999	>1,000
Mature Dairy Cattle (whether milked or dry cows)	200 to 699	>700
Swine each weighing over 55 pounds	750 to 2,499	>2,500
Swine weighing under 55 pounds	3,000 to 9,999	>10,000
Horses	150 to 499	>500
Sheep or lambs	3,000 to 9,999	>10,000
Turkeys	16,500 to 54,999	>55,000
Laying hens or broilers, if the AFO uses a liquid manure handling system	9,000 to 29,999	>30,000
Chickens except laying hens, non-liquid manure handling system	37,500 to 124,999	>125,000
Laying hens (if other than a liquid manure handling system)	25,000 to 81,999	>82,000
Veal calves	300 to 999	>1,000
Ducks (if the AFO uses other than a liquid manure handling system)	10,000 to 29,999	>30,000
Ducks (if the AFO uses a liquid manure handling system)	1,500 to 4,999	>5,000

Although Delaware does not have an abundance of non-poultry farms that meet this threshold, NPDES CAFO permit coverage is required for those farms that do. GP3 is therefore being proposed to meet regulatory requirements for coverage of non-poultry operations.

Comment 1.g: “How can DOA and DNREC monitor nutrient contributions from livestock facilities in the Chesapeake Bay watershed if they allow poultry and non-poultry CAFOs to construct and operate without submitting a nutrient management plan?”

***Response:** Delaware Title 3 § 2247 requires that all operations with more than 8 animal units or 10 acres upon which nutrients are applied must develop and implement a Nutrient Management Plan (NMP) or Animal Waste Management Plan (AWMP). NMPs must be written by a certified nutrient management consultant and are available for review through the Delaware Department of Agriculture's Nutrient Management program. Operations are monitored through inspections and annual reporting.*

Comment 1.h: “How many CAFOs are currently operating with an incomplete NOI and thus their operations have never been public noticed as required by 40 CFR 122?”

***Response:** 40 CFR 122 requires that all CAFOs be public noticed prior to permit issuance. No permits have been issued to CAFOs with an incomplete NOI or without public notice. Delaware has approximately 600 CAFOs that require permit coverage. The number of CAFOs in the process of permitting is always changing as the Department and DDA continue to move forward with CAFO Program implementation. The Department and DDA provide technical support to operations developing a complete NOI prior to public notice. This support helps operations to better understand their responsibilities under the permit, thereby improving permit compliance. See also Response 1.a.*

Comment 1.i: “If the NMP and AWMP are not part of the public record, how can the public review these documents to ascertain if they are adequate under the law and that the implementation of those plans will reliably prevent pollution to waters of the state?”

***Response:** As part of CAFO general permit applications, NMPs and AWMPs are available for review by the public at the Delaware Department of Agriculture office in Dover, DE as soon as the CAFO permit application is determined to be complete and accurate, and public notice of the application has occurred. All operations with more than 8 animal units, at the minimum, are subject to the Delaware Nutrient Management Law and are required to prepare a NMP or AWMP. These plans must be available for review by the Nutrient Management Program.*

Comment 1.j: “Why does USEPA allow Delaware to flagrantly ignore the Clean Water Act requirements for a NMP to be included in the NOI and thus available for public review?”

Response: Any questions for the USEPA must be submitted to the USEPA. Please note, however, that NMPs are included as part of the NOI application for CAFO General Permit coverage. A permit application is not considered complete until a NMP is received and reviewed. Permit applications are available for public review at DDA's Dover, DE office once public notice of the CAFO permit application has occurred.

Comment 1.k: "How many livestock facilities currently operating under an NPDES General Permit in Delaware have been required to have ground water monitoring?"

Response: Consistent with the federal CAFO regulations and program, Delaware's CAFO regulations and program do not require groundwater monitoring. Potential impacts to groundwater are minimized through the utilization of site-specific best management practices in the permit. Best management practices are routinely monitored to assure effectiveness.

Should the Department determine that groundwater monitoring is necessary to characterize an environmental impact at a CAFO, the Department can require groundwater monitoring on a case-by-case basis. See response to comment 1.ap.

Comment 1.l: "How many violations have resulted in DNREC requiring additional monitoring requirements? Would those additional requirements warrant the issuance of an individual NPDES permit?"

Response: At this time, the SWDS has not required additional monitoring beyond what is required by the permit at any facilities permitted under the NPDES CAFO program. The SWDS would consider issuing an individual permit should a general permit not be adequate for a particular operation. However, the purpose of the issuance of the General Permit 3 is to encompass those operations that do not fit under the GP1 or GP2 permits.

Comment 1.m: "If vegetative buffer strips are needed to prevent direct land application of livestock waste on waters of the state or immediately upgradient in intermittent stream channels and water courses – why would DNREC consider those buffer strips to be anything other than mandatory?"

Response: Direct application of manure or litter to surface water is not permitted under any regulations in Delaware. The utilization of vegetative buffer strips is not required at all CAFOs.

The CAFO permit requires that appropriate BMPs be put in place to be protective of the environment. Each facility is unique thus the specific BMPs utilized are determined by the certified nutrient management consultant on a site-by-site basis. Setbacks for application of manure near surface water and potable wells are included in the CAFO and Nutrient Management Regulations, based upon the State Technical Standards, which can be found at: <https://agriculture.delaware.gov/nutrient-management/publications-resources/>.

Comment 1.n: “Does this definition mean that the entire universe of BMP’s is not considered mandatory, only the BMP’s chosen by the facility to be included in their NMP/AWMP are mandatory?”

***Response:** The SWDS does not specify particular BMPs as mandatory in the permit. Each facility is unique and should be individually evaluated by a certified consultant writing the NMP or AWMP.*

Comment 1.o: “If DNREC wants the livestock facilities to use Best Management Practices, wouldn’t it be prudent to require they follow the most current standards and practices? Why does DOA not have updated versions of State Technical Standards?”

***Response:** The State Technical Standards are considered a minimum standard. As new technology becomes available, operations are encouraged to implement the latest best management practices. The current State Technical Standards were reviewed in 2017. After two rounds of public comments, all standards deemed in need of updates were approved by the Nutrient Management Commission in October of 2017. The approved State Technical Standards are located at: <https://agriculture.delaware.gov/nutrient-management/publications-resources/>.*

Comment 1.p: “Why hasn’t DOA pursued an updated version of the State Technical Standards for composting? Why is the NMP standard nearly a decade old? How can the public be confident that livestock wastes will be handled using best available technology and current understanding of antibiotic resistant bacteria and disease controls if the standards that are relied upon by DNREC and DOA are decades old?”

***Response:** The State Technical Standards are considered a minimum standard. Operations are encouraged to pursue the latest and most effective technologies applicable to their facility. Additionally, the State Technical Standards were last reviewed and approved in 2017. (See also Response 1.o)*

Comment 1.q: “How does DNREC monitor and enforce compliance with the Mid-Atlantic Nutrient Management Handbook during the operation of a livestock production facility?”

***Response:** The Mid-Atlantic Nutrient Management Handbook is not an enforceable document and is utilized as a referenced text in the State of Delaware for the nutrient management program. However, operations both with and without CAFO permit coverage are subject to facility inspections including evaluation of records of operation as requested by DDA or SWDS. Additionally, all operations must complete an annual report and submit it to DDA.*

Comment 1.r: “Referencing the page number of a rule is not a proper regulatory citation.”

***Response:** The purpose of this Technical Response Memorandum is to address comments pertaining to the content of GP1 and GP3. This comment was in reference to a citation in the State Technical Standards which is outside the scope of the CAFO permits.*

Comment 1.s: “Is this State Technical Standard used for all poultry processing plants and other facilities that process poultry processing plant waste and wastewater?”

***Response:** Processing plants and the associated wastewater are regulated under individual DNREC permits specific to the facility and not CAFO regulations. The purpose of this Technical Response Memorandum is to address concerns pertaining to the content of GP1 and GP3.*

Comment 1.t: “Why doesn’t this State Technical Standard identify DNREC as a regulator of livestock facilities in Delaware and provide reference to DNREC regulations on CAFOS?”

***Response:** The State Technical Standard is a set of state issued practice standards in the Nutrient Management Regulations. It is not specific to the CAFO program as it applies to operations outside of the CAFO regulations.*

Comment 1.u: “How does DNREC ensure that this State Technical Standard is implemented if the permit only requires the analytical result and not a description of how the soil samples were taken? Does DNREC look at the total land application acres for each parcel and

independently calculate the minimum number of soil samples that must be gathered to adequately represent the soil phosphorus levels?”

***Response:** Many factors impact the number of soil cores taken to make a representative sample. Operations in collaboration with their nutrient management consultants perform soil sampling based on site specific conditions to ensure optimal characterization of soils. Accurate soil tests are vital to determining fertility needs. It is an operation’s best interest to collect soil samples correctly to ensure crop needs are met. High soil phosphorus levels are mitigated using the regulatory Delaware Phosphorus Site Index.*

Comment 1.v: “If the State Technical Standard is restricted to dry manure systems, what is the appropriate NRCS standard to be used by facilities with a liquid manure system?”

***Response:** Natural Resources Conservation Service (NRCS) Practice Code 313, Waste Storage Facility is an approved practice in the State Technical Standards and includes liquid storage lagoons for liquid-based manure handling.*

Comment 1.w: “This standard contains numerous setback recommendations – does DNREC enforce these setbacks?”

***Response:** DNREC enforces the requirements of the permit. Required setbacks will vary for each permitted facility depending on the facility’s proximity to surface water and best management practices, like vegetative buffers on individual farms and fields. Should an operation be discharging without authorization, mandatory setbacks or other operational changes would be implemented.*

Comment 1.x: “How often does the DOA check their website links to make sure they are not broken? Without being able to see the standard, the public and industry would not know what is included in the standard or the date the standard was last updated.”

***Response:** The website is updated as new information is added. Any issues with the website identified by staff or the public are immediately addressed. The Department encourages the public to notify the DDA of any broken links discovered on their website so that the site information can be updated. The State Technical Standards on the DDA website are up to date.*

Comment 1.y: “What legal procedure is available for the public at large and the adversely impacted communities to obtain access to these records to evaluate the efficacy of the operator’s implementation of BMPs and determination whether the State Technical Standards are being followed correctly?”

***Response:** The Delaware Freedom of Information Act (29 Del. Code, Chapter 100), generally referred to as “FOIA,” ensures that the public has easy access to public records held by state agencies. Operational records are available by making a FOIA request through the Department of Agriculture at <https://www.usda.gov/ogc/office-information-affairs/foia-division>. As the primary CAFO record handler, operational records can be requested through the DDA FOIA process.*

Comment 1.z: “According to the data above, it took 10 years to increase the transport of dry poultry litter by as little as 3,000 dry tons. How will Delaware achieve an increase in transport from 17,388 to 45,734 this year (2021)? How will the reporting requirements of this General Permit be used to prove that the poultry litter has actually been transported outside of the Chesapeake Bay watershed?”

***Response:** Goals related to the transportation of manure outside of the Chesapeake Bay Watershed is not directly related to GP1 and GP3. However, operations are required to report quantity of manure exported and the name of the manure handler. The goal of the permit is to generate accurate records of responsible manure management. While exporting manure out of nutrient-rich areas is often a part of that management, it is not dictated by the permit itself. Data regarding movement of manure throughout the state is compiled after a review of the annual reports submitted to DDA. This information is often used to offer incentives to farmers within higher risk areas.*

Comment 1.aa: “The reporting requirements in D(2)(c) of the General Permit do not ask for the location where the poultry litter will be disposed, it requires only the contact name of the person and/or company “receiving” the poultry litter. What mechanism is used by the state to track the movement of this “received” poultry litter to determine how much is land applied within the watershed and how much is transported out of the watershed?”

***Response:** Permitted farms are responsible for the management of manure while it is on their property and under their control. When manure is exported from the facility, the proper handling and land application becomes the responsibility of the recipient. Delaware requires all farmers operating 10 or more acres to have an AWMP or NMP and they are required to report the origin and quantity of manure they move in their annual report.*

Comment 1.ab: “Does the Department of Agriculture retrieve the above mentioned data from the reporting requirements of this General Permit? If so, which requirements in this General Permit are specifically written to capture the appropriate “supplemental nutrient management practices”? How does the Department of Agriculture identify the number of implementation acres from record keeping requirements of this General Permit?”

Response: Operations must complete an annual report detailing the acreage under control and BMPs utilized. The General Permits do not identify specific nutrient management best practices. Each operation must develop a site-specific plan to address potential areas of concern related to topography, soil type, proximity to surface water, and other factors that may influence pollution concerns. The information drawn from annual reports is compiled to determine progress on water quality goals.

Comment 1.ac: “With respect to the trigger of an “increase of 25%” of the animal feeding capacity – does the state have scientific or other documentation that explains why an increase less than 25% would not be substantial and thus trigger public notice? How many times may the operator increase the animal feeding capacity by say 24.9% before the Secretary would decide that public notice is warranted?”

Response: Delaware’s CAFO regulations mirror the USEPA’s 25% substantial change requirement in the federal NPDES CAFO regulations. More than one increase in the animal feeding capacity over 24.9% during the coverage period of a CAFO permit (5 years) would require a public notice. Additionally, the Secretary of DNREC is authorized to make the determination, on a case-by-case basis, if any change to the NMP or AWMP should be considered a substantial change. If so determined, the increase would be subject to public review and comment as specified in sections 9.5.8.2 and 9.5.8.3 of Delaware’s CAFO regulations.

Comment 1.ad: “Could the operator increase the animal feeding capacity every year and never trigger public notice? Isn’t it true that under that scenario – every time the operator increased the animal feeding capacity the next time there is an expansion, the number of animals that would be considered less than or greater than 25% would be a larger number? When would the Secretary address the cumulative impacts of these allowed expansions and finally say – that amount of expansion warrants public notice?”

Response: See 1.ac above. Additionally, the Secretary of DNREC can make the determination, on a case-by-case basis, if any change to a NMP or AWMP should be considered a substantial

change and subject to public review and comment, as specified in sections 9.5.8.2 and 9.5.8.3 of Delaware's CAFO regulations.

Comment 1.ae: “How many facilities permitted under this General Permit have expanded? How many times did the Secretary determine that the amount of expansion warranted new “public review and notice”? How many facilities have expanded their animal feeding capacity without triggering new public notice?”

***Response:** At this time, no permitted facilities have made substantial increases to their operations after completing the permitting process.*

Comment 1.af: “How many of the facilities operating under this General Permit have received financial assistance to transport poultry litter waste “outside areas of excess”? Does the State used record keeping required under this General Permit to verify that the waste has been transported to these “outside areas of excess” and if so, what records help prove that the operator has contractual relations with someone that performs the transport? What data is available to the general public and adversely impacted communities to track this poultry litter waste from the point of generation to the point of land application?”

***Response:** The Nutrient Management Commission offers a cost share program to encourage operations to transport manure from farms in Delaware without land that can adequately utilize manure for fertility to farms that can use manure or alternative facilities, such as mushroom growers. This financial assistance is outside of the purview of the CAFO regulations and general permits. However, CAFO permitted operations are required to report manure generation, application, and exported quantities annually. The annual reports are available for the general public to review via the FOIA process.*

Comment 1.ag: “How is the public health and environment protected if the state only inspects less than 20% and, in some cases only 11% of the 197 permitted facilities under this General Permit? How many inspectors are available to inspect the 197 permitted facilities? Does the state perform a site inspection before the facility is permitted? Are the inspections referred to the USEPA evaluation considered to be annual compliance inspections and not initial site inspections? Does the state get paid by the USEPA to perform these NPDES inspections as part of the state delegation of the NPDES program?”

***Response:** The intention of this document is to address comments received pertaining specifically to the renewal of GP1 and the issuance of GP3. Questions pertaining to DNREC and DDA*

inspection programs are outside the scope of these permits. However, Delaware's CAFO regulations specify that all CAFOs are inspected a minimum of once within the five-year permit cycle. Inspecting 20% each year on average equals 100% during a 5-year permit cycle. High risk operations or those generating specific complaints may be inspected more frequently as needed. USEPA, DNREC, and DDA personnel are authorized to conduct inspections.

Comment 1.ah: "What is meant by the USEPA's comment that the state has committed to "bring the percentage of permitted CAFOs to 50% of the known universe"? What percentage of the known universe is the 197 currently permitted poultry facilities? Does that mean there are at the very least 197 facilities operating without a permit? How did this happen? Does the state regularly allow the construction of poultry facilities without a permit? Does the state have a list of the 150 facilities that could be permitted to meet this WIP milestone for 2020-2021? How many of those facilities have been identified this year and has the state received their permit applications to operate under this renewed General Permit?"

***Response:** The intention of this document is to address comments received pertaining to the renewal of GP1 and the issuance of GP3. Questions pertaining to other programs, such as the WIP milestones, is outside the scope of this document.*

Comment 1.ai: "Which state agency determines that the "production area is designed, constructed, operated, and maintained" satisfactorily to meet the requirements of this part of the General Permit? If the state only inspects less than 20% of the permitted facilities each year – how does the state determine that all facilities are being maintained and operated properly and thus in compliance with the Large Poultry Effluent Guidelines? How many facilities operating under this General Permit have been determined by the state to be properly "designed, constructed, operated, and maintained" and is there a written policy or forms used to make that determination? Does the inspector make the determination each time an inspection is performed? Does the inspector have training to read engineering designs and the ability to compare those designs to the structures at the permitted facilities? How much time does it take the inspector to determine that the facility under inspection has been properly operated? Properly maintained?"

***Response:** USEPA, DNREC, and DDA are all authorized to perform inspections. DDA is the primary inspection authority and follows specific protocols during the inspection. Under CAFO regulations (6.1.1.11 Entry and Evaluation), the Department, DDA, or another designated authority retains the right to enter the premises and review documentation with or without notification of the operation owner.*

Comment 1.aj: “Does either DDA or DNREC notify downstream landowners, residents, and/or the general public that a release/discharge/upset has occurred? What procedure is in place for the public to obtain documentation of all the releases from a permitted facility? Which state agency maintains the records of all releases/discharges/upsets? How many releases/discharges/upsets have been reported in the five years the General Permit was in effect? What were the causes for those releases/discharges/upsets? Did either DDA or DNREC issue Notices of Violation as a result of those events? Which agency is responsible to investigate reports made under this section of the General Permit? Which agency houses the documentation of the event and what procedure is available for the public to review those documents?”

***Response:** In accordance with Section 6.1.1.7.2 of Delaware’s CAFO regulations, each facility is required to document any discharge or upset from their production area. The public would be notified of a release/discharge/upset on a case-by-case basis as appropriate as determined by the Department. The Nutrient Management Program at DDA is the point of contact for operations handling production area upsets. Information regarding specific upsets is available to the public via the FOIA request process at <https://agriculture.delaware.gov/foia/>.*

Additionally, the public is encouraged to report observed pollutant discharges to the DNREC Environmental Hotline at 800-662-8802.

Comment 1.ak: “How many poultry CAFOs have submitted an incomplete NOI and are operating a large poultry CAFO without being fully permitted under this General Permit or an individual permit? Does the state convey that information to the USEPA during the milestone evaluations? What is the state’s policy on responding to public requests for information (FOIAs) and requests to access the public files for Large Poultry CAFOs? If the AWMP/NMP is incorporated into the NPDES CAFO permit (a federal permit issued by the State of Delaware), then what legal authority does the state have to deny public access to the files of a federally permitted facility?”

***Response:** Delaware reports all required metrics to USEPA. The process to review state records pertaining to the CAFO program follows state FOIA procedures. The DNREC FOIA process can be found at: <https://dnrec.alpha.delaware.gov/foia/>. The DDA FOIA process can be found at: <https://agriculture.delaware.gov/foia/>. See also Responses 1.h and 1.j.*

Comment 1.al: “In Part II A (2)(a), the General Permit states that the AWMP/NMP will be publicly available – so why does the DDA deny public access to these plans? How many of the currently permitted 197 facilities have changed their AWMP/NMP in the past five years? How

many times were those changes considered to be “not substantial” and did the DDA post public notice of those changes?”

Response: Operation AWMPs and NMPs permitted under CAFO regulations are available from the Department of Agriculture via a FOIA request (<https://agriculture.delaware.gov/foia/>). To date, no fully permitted operations have exceeded the 25% increase that would trigger a public notice.

Comment 1.am: “What type or amount of change is considered to be a “substantial change” to the AWMP/NMP according to DDA and the Secretary (see Part II A (2)(b) of the General Permit)? How many of the 197 currently permitted facilities changed their AWMP/NMP to such a degree that the Secretary has deemed it to be substantial? Did the DDA post public notice of opportunity for public review and comment?”

Response: An increase of 25% in acreage under control and/or livestock is deemed a substantial change. To date, no fully permitted operations have exceeded the 25% increase that would trigger a public notice.

Comment 1.an: “If the permittee plans to add an additional poultry house, does the DDA have a procedure to notify neighboring landowners and communities?”

Response: GP1 and GP3 do not have public notice requirements beyond those listed in Section 8.6.2.2.1 regarding substantial operational changes. Building permits are outside the purvey of this TRM and the CAFO regulations. Each county will have specific regulations regarding applying for building permits and notification of the issuance of building permits.

Comment 1.a0: “The General Permit in this section does not identify any site-specific BMPs that would be maintained and operated – are those site specific BMPs incorporated by reference and if so where is the language in the General Permit that accomplishes that?”

Response: The General Permits do not identify site-specific best management practices as it is general in nature. Each permittee’s operation is unique and therefore must design their BMPs according to the site-specific conditions at the facility. Additionally, technology is always changing and improving. Specifying a particular BMP in a five-year permit may discourage operations from utilizing the latest technology.

Comment 1.ap: “What does DDA and DNREC consider to be “all reasonable and necessary steps to minimize adverse impacts to groundwater” for poultry facilities operating under this General Permit? Does the permittee even have to identify the depth to groundwater at the production area? Has the DDA and/or DNREC ever investigated the possibility of groundwater contamination from poultry CAFOs operating under this General Permit? If so, what measures were taken to determine that groundwater quality standards have not been violated during the operation of poultry CAFOs under this permit?”

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

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

Comment 1.aq: “Considering the crop yields is a vital part of determining if there are sufficient acres of crops to utilize the nitrogen and phosphorus in the poultry litter waste at agronomic rates – and that the agronomic rate is the federal effluent guideline for CAFOs – how does the USEPA justify the non-public nature of that data?”

***Response:** Delaware Code addresses FOIA policies for all state agencies under Title 29. Per 10002.O.2, “trade secrets and commercial or financial information obtained from a person which is of a privileged or confidential nature” are exempt from the FOIA process. Crop yields fall under that definition and therefore are not available for public review. However, CAFO regulations (8.1.2) follow the USEPA’s decision to allow limited access to crop yields of permitted operations through the FOIA process. Operations are required to submit annual reports and include a statement from the owner or operator stating whether the operation met or exceeded the projected crop yields provided in the CAFO’s nutrient management plan.*

Comment 1.ar: “Why does DDA, DNREC, and the USEPA allow this major conflict between state and federal law to continue? Why hasn’t the Delaware Legislature remedied this legal conflict? Why would the USEPA convey delegation of the NPDES program to a state that has state law that conflicts with the very core of the NPDES permitting program – the effluent limitation guidelines for proper disposal of CAFO waste?”

Response: The Department is unclear about the commenter’s references to conflict in laws. All questions for the USEPA should be directed to the USEPA.

2. **Mr. Steck, representing the Delaware Coalition for Open Government, beginning on page 28 of the hearing transcript and in written form, submitted several comments to SWDS. Comments include:**

Comment 2.a: Mr. Steck indicated that “The June 30th public hearing and the notice for this hearing included a new topic not previously identified or put out in notice to the public for discussion: the RENEWAL OF DRAFT NPDES PERMIT FOR LARGE, MEDIUM & DESIGNATED POULTRY CAFOs – DE 5000N/11. This was not previously advertised or put out for public comment, unlike the DRAFT NPDES CAFO General Permit for Large, Medium, Designated Non-Poultry and Diversified CAFOs that was noticed on April 11, 2021 [Permit DE 0051250] and sought comments by May 11, 2021. In fact, a list of archived notices DNREC’s Div. Of Water including the April 11 notice of the DRAFT NPDES CAFO general permit [Permit DE 0051250] makes no mention of the proposed DRAFT NPDES CAFO PERMIT DE 5000N/11 - see attached list of notices (<http://dnrec.alpha.delaware.gov/dnrec-public-notice/water-archive/>). Therefore, the PROPOSED RENEWAL OF THE DRAFT NPDES CAFO PERMIT DE 5000N/11 was improperly included in the June 30th hearing. Further, the entire discussion of this proposed renewal should be stricken from this hearing record, as it was premature, given that there was no public notice seeking comments on or as a request for a hearing on the PROPOSED RENEWAL OF THE DRAFT NPDES CAFO PERMIT. Therefore, a new public notice for comments on and/or a request for a hearing on this PROPOSED RENEWAL OF THE DRAFT NPDES CAFO PERMIT DE5000N/11 should be issued and a new and separate hearing should be held on this permit if requested.”

Response: SWDS followed the legal requirements in Delaware law and in 40 CFR 124.10 for noticing the public hearing for GP 1 and GP 3 in the May 30, 2021 hearing legal notice. The Department is not required to advertise draft permits and/or permit applications separately from a planned public hearing and has often combined the public notice of these items when the subject of the permit is of great public interest. The public was provided with a 30-day window prior to the hearing and a 14-day window following the hearing to provide comments on the proposed renewal of the GP 1 permit. Additional legal notices for a public hearing beyond the

SWDS's May 30, 2021 legal notice and potentially having a second separate hearing are not required. Public Hearing requirements for NPDES permits are specified in 40 CFR 124.12.

Comment 2.b: Mr. Steck indicated that there are “issues” regarding the draft permit. Specifically, he states that the public hearing notice “misidentifies the title of Permit DE 5000N/11. The public notice states in paragraph 3: The Department intends to renew the Draft NPDES General Permit for Large, Medium, & Designated Poultry Concentrated Animal Feeding Operations (CAFO) - Manure Generation Facilities Only (DE 5000N/11).... However, something different appears when Draft Fact Sheet under Exhibit 1 Permit DE 5000N/11 is selected; the document shows the title NPDES CAFO GENERAL PERMIT LARGE, MEDIUM, & DESIGNATED POULTRY OPERATIONS WITH LAND APPLICATION [emphasis added].

Response: SWDS will adjust the document titles for consistency.

Comment 2.c: Mr. Steck stated that, “the State Technical Standards, the document is almost 10 years old and does not include current information.”

Response: The State Technical Standards are considered a minimum standard. They are periodically reviewed for completeness and to account for new technology advancements. The State Technical Standards were last reviewed and updated as needed in 2017. The State Technical Standards follow the same public notice process as the CAFO permits and were available twice for public comment before approval. See also Responses 1.o and 1.p.

Comment 2.d: Mr. Steck stated, “The facts sheets for the two permits discussed provide no guidance for a farmer, animal owner, farm manager, or other person involved in raising animals or running the operation as to completing the Notice of Intent (NOI). While basic requests for information are straightforward, like the location of a facility, there is no guidance for determining whether a person needs to file an NOI. For example, while the form lists the types of animals to consider, there is essentially no guidance or instruction for determining the number of animals that would trigger completing an NOI. Yes, the NOI form says to refer to the AWMP or NMP, but shouldn't the person know before they start this process - especially with respect to an NOI – whether they actually should be required to file this? Similarly, the fact sheets for CAFO permits don't even mention which species or size or number of animals that come under the permits. Common sense would say attach some basic information about species and quantity so a person knows whether to complete the NOI. If the starting point should be an AWMP or NMP, then it seems like stating that at the top of the NOI would be useful.”

Response: *The purpose of the fact sheets is to clarify requirements within the general permits. Page 9 of the Draft NPDES General Permit 3 lists the quantities of animals that fall under the CAFO regulations. Under Delaware Nutrient Management Law, farmers must include their livestock on their AWMP and/or NMP and annual report. These numbers can be compared to the table in the permit to determine the need for further inspection of animal inventory by DDA or if an NOI needs to be completed.*

Comment 2.e: **Mr. Steck stated that the State Technical Standards are not current and the document implies no final standards exist. He also asked the questions “why are they not part of this docket” and indicates that “if there are actually approved standards, why are they not part of this docket; this raises very serious issues with respect to how serious DNREC takes hearings and the public’s right to participate in reviewing documents. Moreover, what kind of quality controls and systems does DNREC use to ensure complete, accurate, and relevant documents are provided to the public?”**

Response: *The State Technical Standards can be reviewed by the public (<https://agriculture.delaware.gov/nutrient-management/publications-resources/>). The State Technical Standards are considered a minimum standard. As new technology becomes available, operations are encouraged to implement the latest best management practices. The current State Technical Standards were reviewed in 2017. After two rounds of public comments, all standards deemed in need of updates were approved by the Nutrient Management Commission in October of 2017.*

Comment 2.f: **Mr. Steck stated that, “It is unclear to which type of CAFO permit an NOI corresponds, given the state has three different CAFO permits – GP1, GP2, and GP3. The form should clarify if it applies to any permit type or which type if it does not apply to all.”**

Response: *The NOI is a general application for all three permits. The information provided on the form determines which permit category the operation falls into, based upon the number of acres and types of livestock indicated. The Departments use the information provided to assign the correct general permit to the operation.*

Comment 2.g: **Mr. Steck indicates that the NOI “form does not state whether manure includes litter.”**

Response: *The definition of manure in the CAFO regulations and Delaware’s CAFO permits states, ““ Manure” means fecal and urinary defecations of animals as referenced in §9.5.3.1.1 and §9.5.3.12, and may include, but is not limited to comingled spilled feed, bedding, soil, and compost.”*

In Department regulations, permits, and/or NOI’s, “litter” related to CAFOs is generally understood to consist of organic waste products from animals and includes manure, spilled feed, feathers, and bedding materials. Manure cannot be separated from litter thus any litter would also have to be considered manure.

As litter falls under the definition of manure, SWDS does not believe a separate definition for litter is needed in Department regulation or permits nor is additional clarification needed in the NOI.

Comment 2.h: **Mr. Steck indicated that there is no place on the form to document information about the CAFO permit once it is issued. The form should clearly include the CAFO permit number and date of issuance or approval and expiration date. If the argument is that each CAFO does not get its own permit, then there should be some unique identifier assigned to indicate that the NOI and relevant documents belong to the submitting entity.”**

Response: *The NOI is an application and not an indication of permit coverage. Operations that proceed through the permitting process and are granted coverage under the General Permits are issued individual identifiers that are used internally, as well as given a letter detailing their general permit coverage, expiration date, and expectation of renewal.*

Comment 2.i: **Mr. Steck stated that the Notice of Intent form “does not explain how DNREC and/or DDA handle animal feeding operations that fail to provide Animal Waste Management Plans (AWMPs) or Nutrient Management Plans (NMPs).”**

Response: *The NOI is an application and not an indication of permit coverage. Operations without a complete application are not eligible to move forward in the permitting process and therefore would not be granted permit coverage until all necessary documentation is received. NOIs submitted without an AWMP/NMP are incomplete and these documents are required to be submitted by the applicant prior to legal noticing and ultimately issuance of a CAFO permit.*

Comment 2.j: Mr. Steck stated related to the Department’s NOI that “the lack of a permit number and date of issuance can give the false impression the permit process is complete. The form as written – whether by design or omission – can lead someone to believe that no permit is required, which is not true. In fact, by having dedicated space on the NOI for a permit number – or some other unique identifier – and date of issuance/approval, the form will clearly indicate a permit is required and the lack of information is a clear signal the permit has either not been issued or the NOI is not complete. Either way, someone looking at an NOI missing a permit number and issuance/approval date should understand the NOI is incomplete and is a flag to ask about the permit number and date of issuance.”

***Response:** The NOI is an application and not an indication of coverage. The signature certification in the NOI states, “I agree to implement a nutrient (NMP) or animal waste management (AWMP) in accordance with the requirements of a general CAFO permit” and “I understand that this NOI is not officially complete for consideration of CAFO NPDES permit coverage until the submission of an AWMP and/or NMP is made to the Department of Agriculture.” The certification statement makes it clear that the NOI and a CAFO permit are two different items.*

Comment 2.k: Mr. Steck indicated he believes that the public lacks access to information and awareness of CAFO permits and related information and documents. Mr. Steck also stated, “Why isn’t there a website or some tables or spreadsheets? There’s outdated information in the DNREC secretary’s 2016 order on CAFOs but nothing more recent on DNREC’s website or DDA’s CAFO site. Why?”

***Response:** The Department’s CAFO website (<https://dnrec.alpha.delaware.gov/water/surface-water/npdes/animal-feeding/>) provides links to the permits, regulations, and fact sheets. The Department of Agriculture’s CAFO page offers the same information (<https://agriculture.delaware.gov/nutrient-management/cafo/>), as well as additional information on nutrient management in Delaware. Should a member of the public desire additional information on a particular facility, they may request those records via the FOIA process (<https://agriculture.delaware.gov/foia/>).*

Comment 2.l: Mr. Steck asked several questions related to the number of CAFOs in Delaware, how many animals by species and by county for each of the past 10 years, how many CAFOs have submitted the required AWMPs and/or NMPs for each of the past 10 years, how many CAFOs have submitted NOIs but not receive CAFO permits, how many inspections have been done in each of the last 10 years and how many violations were found in each of the last 10 years. Additionally Mr. Steck indicated that there are other questions regarding the volume of manure produced, what’s been done with the manure, etc.

Response: *The aforementioned information falls outside of the scope of information directly related to the issuance of GP1 and GP3 and this hearing. This information may be requested by completing a FOIA request through DDA (<https://agriculture.delaware.gov/foia/>) or DNREC (<https://dnrec.alpha.delaware.gov/foia/>). See also Response 1.ak.*

Comment 2.m: Mr. Steck stated, “There is a serious problem with transparency and accountability regarding the existence of CAFOs and their operations, especially with respect to manure output and the disposition of it. Under Delaware’s and the federal Freedom of Information Acts (FOIA), this information should be readily available. The permits acknowledge this, although making CAFO information available for review is not the same as making it readily accessible online. Given the recent experience with the pandemic and limited physical access and availability because of remote working just drives home the point why electronic access is important.”

Response: *All NPDES programs are moving to electronic reporting, per USEPA’s NPDES Electronic Reporting Rule (<https://www.govinfo.gov/content/pkg/FR-2015-10-22/pdf/2015-24954.pdf>). The CAFO program is in Phase 2. All Phase 2 programs are anticipated to report most permit related documentation electronically by December 21, 2025. The Department’s FOIA process has not stopped due to the pandemic and record requests can still be made online. Much of the information available through FOIA can be sent to the requestor via email.*

3. Mr. Podolske submitted several comments in written form to SWDS. Comments include:

Comment 3.a: Mr. Podolske stated, “It appears the proposed permits would allow CAFO’s to operate without an approved plan. CAFO’s should not be allowed to operate without a formal plan that has been reviewed and approved by the state.”

Response: *As part of the application process, applicants must submit to DDA or SWDS an NOI with their most up to date AWMP and/or NMP. Applicants cannot proceed through the permitting process without submitting the aforementioned information. The Delaware poultry industry long predates the CAFO program. Under Section 4.2, the act of submitting an NOI is a commitment to comply with the standards established under the Delaware CAFO regulations. See also Response 2.j.*

Comment 3.b: Mr. Podolske stated, “The records CAFO’s are required to keep should all be submitted to the state annually and available for public review. Accountability is only possible when records are publicly available and the Clean Water Act calls for records to be publicly available.”

***Response:** Operations are required to submit an annual report each spring detailing their nutrient usage for the prior year. Additionally, all operations are required to have their records available for inspection by DDA or SWDS. The information gathered is available as appropriate through the FOIA process.*

Comment 3.c: Mr. Podolske stated, “CAFO’s need to be audited on-site more often than just every five years. Since we now have fewer individual sites with larger operations on-site reviews should be feasible more frequently than when there were thousands of “mom and pop” operations.”

***Response:** Delaware CAFOs are audited a minimum of once in five years, per the Federal requirements. Additional inspections are performed at random or if warranted by a complaint or concern under the standard conditions of the General Permit (see 9.5.6.1.1.11 Entry and Evaluation).*

Division of Water – Surface Water Discharges Section Recommendation:

The draft CAFO General Permit 1 and draft General Permit 3 are complete and the applicable Department regulatory requirements have been met. The Department’s SWDS believes all public comments submitted regarding the General Permits have been satisfactorily addressed and that the draft permits are protective of human health and the environment while being consistent with applicable State and Federal regulations.

The SWDS recommends the reissuance of CAFO General Permit 1 for the renewal of NPDES Permit Number DE 5000N/11 and for the issuance of CAFO General Permit 3, NPDES Permit Number DE 0051250.