

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

U.S. ENVIRONMENTAL PROTECTION AGENCY REGION 6

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

SUBSTANTIVE CHANGES FROM DRAFT PERMIT

Change 1: The permit Part I.D.3. was clarified to exclude eggs from coverage.

Change 2: The permit Part I.D.6, II.A.3.b, and Appendix E are added to resolve the website link concern about Tier 2 and 3 water identification.

Change 3: The permit Part I.D.8 has been modified to reference the effective date of April 14, 2003, for the CAFO New Source Performance Standard.

Change 4: For clarification the Permit Part I.E.4. has been changed to say “EPA, as permitting authority, reserves the right to take appropriate enforcement actions for any unpermitted discharges...”

Change 5: The permit Part I.E.8 has been updated to require Notice of Intent (NOI) and Nutrient Management Plan (NMPs) submittals to be sent to NMED.

Change 6: The 7 day public review and comment for NOIs resulting from transfer of ownership of a facility covered by permit provided in Part I. E.9 has been removed.

Change 7: The permit Part I.H. Change of Ownership requirements have been clarified

Change 8: The permit Part II.A.2.a.v regarding equipment inspection deficiencies has been clarified with added language specifying deficiencies not corrected in 30 days to be explained.

Change 9: The permit Part II.A.2.a.vi has been revised to clarify in the permit the requirements of 40 CFR 122.42(e)(1)(ii) regarding mortality handling.

Change 10: A new Part II.A.5.a.ii is inserted in the permit to require calibration of land application equipment to be performed at least annually and in accordance with procedures and schedules established in the CAFO's nutrient management plan for all equipment.

Change 11: Part I.B. and Parts II.A.3.a.i., II.A.3.a.ii., and II.A.3.b.of the permit are revised to add the phrase “proposes to discharge,” which was inadvertently deleted from the proposed permit, to those CAFO who can apply for the permit.

Change 12: Added specificity to Part II.A.5.b.ii to better define the permit prohibition for land application prior to imminent rain events.

Change 13: In Part II.A.2.a.viii, the term “structural breakage” has been replaced with “structural problems or leakage.”

Change 14: The permit language at Part III.A.2.c has been revised to reflect the public participation regulations at 40 CFR 122.23(h).

Change 15: The permit Part III.A.3.d was clarified to say that planners must use the NRCS nationally approved erosion-prediction technology to assess the risk of soil loss.

Change 16: The permit Part III.A.3.g.iii. has been changed to incorporate additional information to be submitted with map, if present.

Change 17: The permit Part III.A.4, has been changed to require NMPs to be “signed and certified.”

Change 18: The permit Part III.A.3.g.iii(C) has been corrected to Part III. A.3.g.ii (A).

Change 19: The permit Part III. B. The facility closure requirement has been revised.

Change 20: The permit Permit Part III.C.1.b. has been changed to require the telephone number of the recipient of transferred manure, litter, or process wastewater.

Change 21: The permit Permit Part III.D.3 has been cross referenced to Part IV.A.

Change 22: The permit Part IV.A.1, has been changed to require documentation of any actions taken to stop the release and the any amount recovered from the release.

Change 23: Selenium, copper and zinc monitoring requirements have been added to the Part IV.C. Table.

Change 24: Items pertaining to the rain gauge in Part IV.A.2 and Part IV.A.3 have been deleted. The items under Part IV.A are renumbered from 1 through 4. A new Part IV.A.2. has been added for clarification .

Change 25: The permit Part V.A. of the permit now includes the revised annual report due date, changing from 31st day of January to 31st day of March.

Change 26: EPA has also added additional clarification to Part V.A., along with Part VI.D., for consistency with the September 24, 2015, electronic reporting rule.

Change 27: The regulatory definition for new source is added to the Part VII of the permit.

Change 28: A new definition in Part VII has been added for Storage Period.

Change 29: Comment to the fact sheet is noted. EPA is adding the appropriate weblink to the fact sheet at Part III.A.3.g(ii) New Mexico State University Soil Test Interpretation Report (590 Nutrient Management Jobsheet) and the Manure Management Planner.

STATE CERTIFICATION

Letter from James Hogan, Bureau Chief, Surface Water Quality Bureau (NMED), to William K. Honker, Director, Water Quality Protection Division (EPA) dated April 15, 2015.

DISCUSSION OF STATE CERTIFICATION

Conditions of Certification

In New Mexico Environment Department's (NMED) certification letter dated April 15, 2015, NMED certified to Mr. Bill Honker, EPA, Region 6, Water Division Director, that the discharge will comply with the applicable provisions of Sections 208(e), 301, 302, 303, 306 and 307 of the CWA and with appropriate requirements of State law and offered additional comments that were not Conditions of Certification.

OTHER LEGAL REQUIREMENTS

EPA's Approach to Compliance with the Regulatory Flexibility Act for General Permits
The Regulatory Flexibility Act, 5 U.S.C. 601 et seq, requires that EPA prepare a regulatory flexibility analysis for regulations that have a significant impact on a substantial number of small entities. The permit reissuance today is not a "rule" subject to the Regulatory Flexibility Act. EPA prepared a regulatory flexibility analysis on the promulgation of the 2003 NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for concentrated animal feeding operations (CAFOs) on which many of the permit's effluent limitations are based. In 2013, EPA completed review of the Guidelines and Standards pursuant to section 610 of the Regulatory Flexibility Act (RFA) and concluded that (1) there is a continued need for the CAFO regulations,

and (2) revisions to minimize the regulations' impacts on small entities are not warranted at this time.

The Endangered Species Act (ESA) of 1973 requires Federal Agencies such as EPA to ensure, in consultation with the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (also known collectively as the "Services"), that any actions authorized, funded, or carried out by the Agency (e.g., EPA issued NPDES permits authorizing discharges to waters of the United States) are not likely to jeopardize the continued existence of any Federally-listed endangered or threatened species or adversely modify or destroy critical habitat of such species (see 16 U.S.C. 1536(a)(2), 50 CFR 402 and 40 CFR 122.49(c)). Today's permit is consistent with the ESA section 7(a)(2) consultation between EPA-Region 6 and the USFWS – Albuquerque Field Office, concluded on November 17, 2015.

RESPONSE TO COMMENTS RECEIVED ON DRAFT PERMIT

EPA received a number of comments during the public comment period from February 7, 2015 to March 2, 2015. The State of New Mexico Environmental Department (NMED) received an extension to April 15, 2015, for certified comments.

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

New Mexico Environment Department (NMED) via mail date April 15, 2015
New Mexico Farm & Livestock Bureau date February 12, 2015
New Mexico Department of Agriculture (NMDA) dated February 17, 2015
Texas Cattle Feeders Association (TCFA) via email dated March 2, 2015
Socially Responsible Agriculture Project, the New Mexico Environmental Law Center, Animal Legal Defense Fund, Sierra Club – Rio Grande Chapter, Amigos Bravos, Lea County Concerned Citizens, Rio Valle Concerned Citizens, and Mesquite Community Action Committee (SRAP) date March 2, 2015
Enviro Compliance Services, Inc. date March 2, 2015
Erika Brotzman date February 26, 2015

GENERAL COMMENTS

Comment 1: A commenter expressed appreciation to EPA Region 6 management and staff for their efforts to reissue a general permit for CAFOs in New Mexico and stated that NPDES authorization for CAFOs in New Mexico has proven to be an efficient and effective process for regulating CAFO activities since the first general permit was issued by EPA Region 6 in 1993. The commenter contended that a general permit remains the best option to protect waters of the U.S. for both permittees and the agency although revisions to the federal Effluent Limitation Guidelines (ELG) and federal CAFO regulations have substantially modified the content, scope and administrative process facilities seeking coverage under a CAFO general permit.

Response 1: The comment has been noted in the administrative record.

Comment 2: Commenters expressed concern that EPA's proposed changes to the Concentrated Animal Feeding Operations (CAFO) General Permit adversely affect their operations. The commenters are opposed EPA's proposed changes as they add a burdensome layer of unnecessary regulations.

Response 2: The changes included in the proposed permit are made consistent with and ensure compliance with the Clean Water Act and its associated federal regulations and the Clean Water Act or are made to clarify permit requirements.

Comment 3: A commenter thanked EPA Region 6 for hosting a public meeting in Roswell, New Mexico on Feb. 10, 2015, and expressed appreciation for meeting with EPA management, permit staff and legal counsel, helped to clarify requirements in the proposed general permit which in turn has allowed development of more meaningful comments.

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

Comment 4: I oppose this permit reissuance until the permit, permit conditions, monitoring requirements, and enforcement procedures for violation of the permit are made readily available, easily accessible and easy to find online for the public, regulated community, and regulators.

Response 4: The comment is noted. The issuance of this permit complies with the public participation regulations found at 40 CFR 124.10 and 124.11 and the official permit documents are available upon request. No change is made to the permit.

Comment 5: The commenters ask EPA to revise the draft permit so that all requirements are applicable to all CAFOs, because there is no reason why (1) soil, manure, and wastewater analysis, (2) operation and maintenance record keeping requirements, (3) land application documentation, and (4) manure transfer documentation should not be maintained by all of New Mexico's CAFOs. Without this documentation, EPA is in no position to monitor the pollution from CAFOs. As the Draft Permit applies to all CAFOs, EPA should not exempt any CAFOs from the reporting requirements.

Response 5: Reporting requirements are required by all facilities in accordance with the final CAFO regulations. This final CAFO rule at 73 FR 70418, dated November 20, 2008, establishes that only CAFOs that discharge or propose to discharge are required to seek NPDES coverage. No changes is made to the permit.

Comment 6: A commenter questioned EPA's response to public comment, specifically regarding permit non-compliance and evaluation of continued coverage when a facility has caused ground water contamination or caused excessive flies and odors without taking action to minimize the problems.

Response 6: Non-compliance with permit conditions is a matter for EPA’s Compliance and Enforcement Division. EPA can deny permit coverage to non-compliant permittees; however, such denial is within EPA’s discretion and any EPA decision is made on a case-by-case basis. No change is made to the permit.

PART I – PERMIT AREA AND COVERAGE

Comments Regarding Application and Eligibility

Comment 7: New Mexico Environmental Department (NMED) commented that in the proposed permit, in Part I.D.6, EPA refers permittees to EPA’s website for antidegradation purposes and incomplete information was provided. NMED suggested NMED’s website for a more accurate assessment of the antidegradation status of waters around the State and provided links to the NMED Surface Water Quality Bureau Mapper at <https://gis.web.env.nm.gov/SWQB/>, a listing of impaired waters can also be accessed on NMED’s website at: <http://www.nmenv.state.nm.us/swqb/MAS/#CWA>., and the NMED SWQB’s antidegradation policy may be found here: <http://www.nmenv.state.nm.us/swqb/Planning/WQMP-CPP/> (Appendix A to the Continuing Planning Process.) NMED offered assistance at SWQB at 505-827-0187 to permittees in determining the antidegradation tier of the water they would potentially discharge to.

Response 7: EPA is adding Appendix E to the permit and adding the following language to the permit Parts I.D.6 and II.A.3.b to resolve the website link concern raised by the commenter and to provide clarification:

See the list of Tier 2 and 3 waters in Appendix E or a permittee may call the New Mexico Environment Department Surface Water Quality Branch at 505-827-0187 if you need assistance determining the antidegradation tier of the water.

Comment 8: A commenter stated that in the proposed fact sheet, in Part I.E (Application for Coverage), EPA discusses removing eligibility for new source CAFOs for coverage under this permit. In the discussion, EPA states, “An existing CAFO with a significant expansion that is constructed after the effective date of the 2003 CAFO effluent guideline revisions will be ineligible for coverage under the general permit.” For clarity, commenter requests that EPA place the exact date referred to in this section.

Response 8: EPA agrees to the commenter’s request. The Permit Part 1.D.8 has been modified to reference the effective date of **April 14, 2003** for the CAFO New Source Performance Standard.

Comment 9: NMED noted that in the proposed permit, in Part I.E.4, it states, “The Permitting Authority reserves the right to take appropriate enforcement actions for any unpermitted discharges.” NMED suggests “Permitting Authority” be changed to “EPA”.

Response 9: For clarification the Permit Part I.E.4. has been changed to read: “EPA, as permitting authority, reserves the right to take appropriate enforcement actions for any unpermitted discharges require the telephone number.

Comment 10: A commenter stated EPA issued a rule in 2003, which would have required CAFOs not discharging pollutants into federally regulated waters to apply for permits; but since the United States Court of Appeals for the Second Circuit set aside key provisions of the CAFO rule, not all CAFOs have been required to get permits (Concentrated Animal Feeding Operations, 2008). Under the previous 2009 permit, new or expanding CAFOs have been able to apply for general permits and not required to apply for individual permits.

Response 10: While operations meeting the definition of new source could be established in New Mexico during the 5-year permit term, EPA is choosing to address the new source performance standards for CAFOs subject to 40 CFR 412.46 on a case-by-case basis. Should multiple new sources pursue permit coverage, EPA can consider a permit modification. The permit retains coverage ineligibility for CAFOs meeting the definition of new source under 40 CFR Parts 122.2 and 122.29, as well as the option for these operations to apply for individual permit coverage. EPA has revised the permit to add the phrase “proposes to discharge,” which was inadvertently deleted from the proposed permit, to those CAFO who can apply for the permit. Those additions are made in the permit Part I.B. and Parts II.A.3.a.i., II.A.3.a.ii., and II.A.3.b.

Comment 11: A commenter noted that according to Executive Order 13563, “...each agency must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs... (Executive Order, 2011).” This proposed permit reissuance makes for an uncertain business environment in New Mexico, given that the changes in Waters of the United States (WOTUS) and this permit are not yet settled. The proposed changes to WOTUS could significantly expand the number of CAFOs required to obtain permits, which is complicated by the fact that ‘New Sources’ may potentially discharge into a newly jurisdictional WOTUS and will not be covered under the General Permit.

Response 11: EPA doesn’t anticipate significant expansion in the number of CAFOs seeking permit coverage. No CAFO permit must apply for permit coverage unless it is discharging or proposes to discharge. If a particular facility, based on a final ruling defining “Waters of the US”, found itself discharging to a surface water not previously considered a water of the US, the facility can apply for individual permit coverage if it is a new source. Any operation that meets

the definition of new source is subject to new source performance standards for CAFOs in 40 CFR 412.46. No change is made to the permit.

Comment 12: Several commenters requested currently existing, un-permitted operations, be allowed to submit an NOI to apply for coverage under the general permit, since timing of an existing operations decision to seek permit coverage should not exclude submittal of an NOI for coverage.

Response 12: EPA believes that it is appropriate to require individual permit coverage of new or expanding CAFOs who meet the definition of New Source found in 40 CFR 122.29. To date no such operations are known to have occurred in New Mexico. EPA believes that the most appropriate way to address the new source performance standards for CAFOs subject to 40 CFR 412.46 is on a case-by-case basis. The requirement for an individual permit is retained and no changes are made.

Comment 13: A commenter expressed concern that removal of new source eligibility makes the permit more stringent and will adversely affect agriculture in New Mexico. Therefore, they request that EPA strike language that would eliminate eligibility for new agricultural operations, such as dairies, from establishing in the state of New Mexico. The commenter supports allowing all 'New Sources' to apply and continue to be eligible for coverage over the next five years under the NPDES General Permit. They request that 'New Sources' not be required to apply for individual permits. This would provide a measure of certainty for new operations entering the market in New Mexico and allow for all parties to respond to the outcome of the WOTUS decision once it is made.

Response 13: EPA is addressing "new sources" on a case-by-case basis; therefore, EPA has removed general permit eligibility for CAFOs meeting the new source definition and conditions established in 40 CFR 122.2 and 40 CFR 122.29. New source CAFOs remain eligible for individual permit coverage. EPA may reconsider its approach to supplement the existing NEPA documents, and could modify the permit in the future or include new sources in future EPA-issued general permits for discharges associated with CAFO located in New Mexico. No change is made to the permit.

Comment 14: New Mexico Environmental Department (NMED) requested that in Part I.E.1.a, owners/operators of CAFOs submit an NOI and an NMP to the Director (USEPA) and concurrently submit those documents to NMED. The NMED mailing address can be added to Part I.E.8, as stated below:

Email: Bruce.Yurdin@state.nm.us

**Mailing Address: Program Manager, NMED SWQB
Point Source Regulation Section**

PO Box 5469, Santa Fe, NM 87502

Response 14: Permit Part I.E.8 has been updated to require NOI and NMPs submittals to NMED as NMED requested.

Comment 15: Commenters requested clarification and expressed preference for facilities with current general permit coverage to only submit changes to the NMP, in lieu of the entire NMP. This request is specific to permittees whose NMP information is the same as what was submitted for the 2009 General Permit.

Response 15: The requirements for coverage under the general permit Part I.E include submittal of an NOI and an NMP that meet the signatory and certification requirements at Part VI.E and VI.F. Applicants should be sure to incorporate any new general permit requirements into the revised NMP. Since both the NOI and NMP with an updated signature and certification are essential for public notice, both must be sent to EPA for coverage under the new permit. A document summarizing any changes to an NMP since the previous authorization, along with the updated NMP, could expedite authorization. Requirement for electronic submittal of the NOI and NMP should avoid the need to re-print documents. No change is made to the permit.

Comment 16: A commenter stated that the 30-day public review and comment period for new or changed NOIs provided additional regulation, created higher hurdles for acquiring a CAFO General Permit, are inconvenient, and can be costly and detrimental to CAFOs.

Response 16: The 2008 final CAFO rules established procedures for public review of and comment on the NOI and NMP following the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The 30-day comment period is consistent with other draft permit comment period timing established by 40 CFR 124.10. No change is made to the permit.

Comment 17: EPA received several comments on change of ownership procedures in Part I.H, ranging from seeking to increase change of ownership public notification from 7 days to 30 days, to recommending replacement of the currently proposed requirement with language from the Oklahoma CAFO general permit issued by EPA Region 6 on Feb. 1, 2012.

Response 17: Regulations at 40 CFR 122.63(d) provide for a minor modifications to allow for a change in ownership or operational control of a facility where the Director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Director. Minor modification do not require public review. For regulatory consistency, EPA has made the following changes to the permit.
Replace proposed Part I.H.1 through 3 with:

- 1. Coverage under this permit may be automatically transferred to a new**

permittee if:

- a. **The current permittee notifies the Director in writing at the address specified in Part I.E.8 at least 30 days in advance of the proposed transfer date in Part I.H.1.b;**
 - b. **The notice includes a written agreement between the existing and new permittee containing a specific date for transfer of permit responsibility, coverage, and liability between them. The notice shall include a signed statement from the new permittee certifying that they:**
 - i) **have personally examined and are familiar with the information submitted in the existing permittee's NOI and NMP,**
 - ii) **believe that the information is true, accurate and complete, and**
 - iii) **that they agree with the existing permittee that the facility meets the eligibility requirements established in Part I of the permit and that they will comply with any applicable terms, conditions, or other requirements developed in the process of meeting these eligibility requirements; and**
 - c. **The Director does not notify the existing permittee and the new permittee of his or her intent to modify or revoke and reissue permit coverage.**
 - d. **At all times, the CAFO shall be operated in accordance with the approved NMP and comply with all permit conditions.**
2. **Upon transfer of ownership for a permitted facility, the new owner must submit a Notice of Intent. The existing owner must submit a Notice of Termination within 30 days of the transfer of ownership. Written documentation of the date of transfer of operational control and permit responsibility, signed by both parties, must be retained and provided upon request.**
 3. **Coverage under this permit is not transferrable to a new permittee if the new permittee cannot fully comply with the terms, conditions and other requirements of the existing permit, including the enforceable requirements of the NMP. When coverage is not transferrable, the new owner seeking permit coverage must apply to EPA in accordance with Part I.E. Within 30 days of the transfer of ownership, the existing owner must submit a Notice of Termination.**

AND,

In Part I.E.9., remove “or 7-day public review and comment for NOIs resulting from transfer of ownership of a facility covered by this permit provided no changes are made to the existing NMP...”

Comment 18: A commenter stated that the general permit requirement for CAFOs to submit information to EPA for a determination as to whether or not an expansion might be considered a “new source” does not have a sound legal basis and that Part I.E.10 should be removed from the proposed general permit. The commenter questioned validity of this requirement stating that CAFO expansions typically will not qualify as “new sources” and that many expansions will plainly not meet the criteria set forth at 40 C.F.R. § 122.29(b). The information requirement is also vague, in that the Draft fails to specify what information is required and when the information should be submitted.

Response 18: The commenter has cited the applicable regulatory and preamble language. EPA believes that if the facility expands, as described by the federal regulations at 40 CFR 122.29, the facility will require new source review. EPA will continue to evaluate facilities’ expansions for applicability of new source performance standards. EPA is providing additional clarity to Part I.E. of the permit by adding the suggestion that a CAFO operator may coordinate with EPA regarding facility expansions prior to NOI submittal.

Comment 19: A commenter notes that regarding facility expansion, this term should be defined as a 25% or greater increase in the number of animals confined at the facility. This will provide definite guidance to permittees as to when an expansion has occurred.

Response 19: Part 1.E.10. of the permit addresses new source expansion. EPA is denying the commenter request that the permit create a definition of a new source different from 40 CFR 122.2 and new source criteria separate from 40 CFR 122.29(a) and (b). No change to the permit is made.

Comment 20: A commenter suggested aligning Section I.G of the permit with the fact sheet by adding a statement that administrative continuance of the permit will only apply to those facilities that have an approved NOI prior to the expiration date.

Response 20: Part I.G. of the permit currently states, “If you were authorized to discharge under this permit prior to the expiration date, any discharges authorized under this permit will automatically remain covered by this permit.” No change to the permit is made. The fact sheet is updated to reflect this requirement.

PART II – EFFLUENT LIMITATIONS AND STANDARDS

Comment 21: Part II.A.2.a.v of the proposed permit states, “Correct any deficiencies that are identified in daily and weekly inspections as soon as possible.” The commenter suggests that a deadline should be given for corrective actions, such as “as soon as possible, but no longer than 14 days after detection.”

Response 21: Rather than limit the operator to 14-days for correcting deficiencies identified during inspections, the final permit retains the timeline and documentation for correction of deficiencies as stated in Table IV-A NPDES Large CAFO Permit Record Keeping Requirements for operation and maintenance. Table IV-A mirrors the ELG regulations at 40 CFR § 412.37(a) and § 412.37(b)(3) which require documentation of all corrective actions taken and that deficiencies not corrected within 30 days be accompanied by an explanation of the factors preventing immediate correction.

EPA is providing clarifying language in the final permit Part II.A.2.a.v:

- v. Correct any deficiencies that are identified in daily and weekly inspections as soon as possible. **Document all corrective actions taken and explain why deficiencies not completed within 30 days were not immediately corrected.** A written record of all deficiencies and corrective actions shall be made available to EPA or NMED upon request.

Comment 22: EPA received a comment that Part II.A.2.a.vi. requirements for mortality disposal do not address storm water runoff and runoff controls, such as proper compost design, liners, covered rendering pickup containers, and other technology used to prevent contaminated storm water runoff.

Response 22: Part III.A of the permit requires the NMP to “specifically identify and describe practices that will be implemented to assure compliance with the effluent limitations and special conditions of this permit (Parts II.A and III.A).” Mortality management is one of the nine specific requirements of the NMP per 40 CFR 122.42(e)(1) conditions that EPA will include as a site specific permit condition after review and public notice of each NOI and NMP. Part II.A.2.a.vi is revised to clarify in the permit the requirements of 40 CFR 122.42(e)(1)(ii):

- vi. **Properly dispose of dead animals within three (3) days unless otherwise provided for by the Director. Mortalities must not be disposed of in any liquid manure, storm water, or process wastewater storage or treatment system that is not specifically designed to treat animal mortalities. Mortalities must be handled in such a way as to prevent the discharge of**

pollutants to surface water, unless alternative technologies pursuant to 40 CFR 412.31(a)(2) and approved by the Director are designed to handle mortalities.

Comment 23: EPA received comments regarding the design standard used for construction and operation of CAFOs covered by the general permit. One commenter objected to the 25-year 24-hour design, while another approved of the permit differentiation between new/modified facilities and existing facilities.

Response 23: In developing the CAFO effluent limitations guidelines, EPA considered the current state of technology for animal feeding operations and assessed cost as well as benefit in achieving the available technology. The design standard established by EPA for existing large CAFOs housing horses and sheep (40 CFR 412, Subpart A) and cattle (40 CFR 412, Subpart C – excludes veal calves) is a prohibition for dry weather discharges and the requirement for the CAFO to be designed, constructed, operated, and maintained to a 25-year 24-hour storm event standard. New CAFO operations also comply with this standard, as reflected in the permit. The effluent guidelines do not require CAFOs to modify or replace all existing impoundments. The permit continues previous requirements that existing impoundments are properly maintained and show no sign of breakage (Part II.A.2.a.viii), that impoundment liners are designed and maintained in accordance with NRCS design specifications (Part II.D.1.b) and liners are evaluated on-site by an NRCS Engineer or Professional Engineer a minimum of once per five years, as well as assessed for liner damage within 30-days of damage occurring (Part II.D.1). Unless an NRCS Engineer or Professional Engineer certifies that an existing impoundment will not discharge impounded process wastewater into surface water via a hydrologic connection, the impoundment will require installation of an engineered liner, to be compliant with the permit requirements (Part II.D.1.a). Furthermore, the permit prohibits any discharge from a CAFO covered by the general permit from causing a surface water quality impairment. No change is made to the permit.

Comment 24: One commenter questioned if erosion of berms is considered ‘structural breakage’ or if the EPA means a complete breach of the berm (see Part II.A.2.a.viii) and asked why the absence of structural breakage equaled ‘properly constructed.’ Additionally, the commenter suggested that berm evaluation was not the only factor determining whether an impoundment was properly constructed.

Response 24: The final permit does continue the previous permit requirements that existing impoundments are properly maintained and show no sign of breakage (Part II.A.2.a.viii), that impoundment liners are designed and maintained in accordance with NRCS design specifications (Part II.D.1.b) and liners are evaluated on-site by an NRCS Engineer or Professional Engineer a minimum of once per five years, as well as assessed for liner damage within 30-days of damage

occurring (Part II.D.1). A discharge from a CAFO that is not properly designed, constructed, operated and maintained is a violation of the permit. **In Part II.A.2.a.viii, the term “structural breakage” has been replaced with “structural problems or leakage.”**

Comment 25: EPA received comments about storm water handling requirements of the permit. Although not included as a water quality certification requirement, the NMED commented that the permit should expressly prohibit “clean” storm water contacting production areas, which includes lagoons, runoff ponds, liquid impoundments, and settling basins (see definition at Part VII, Production area). Another commenter raised concerns that storm water from un-guttered structures, common at New Mexico dairies, was not properly considered by the permit.

Response 25: The permit reflects 40 CFR § 122.42(e)(1)(iii) of the CAFO regulations which state, “...*the nutrient management plan must, to the extent applicable, ... (iii) Ensure that clean water is diverted, as appropriate, from the production area*”. EPA certainly encourages CAFO operators to divert “clean” storm water in such a way as to avoid contact with manure, animals, raw material or other wastes (see definition at Part VII, Production area), thereby avoiding adding storm water to the waste handling system. However, EPA recognizes diverting all clean water is not always possible, so the condition “as appropriate” in the effluent guideline is included in the permit. While Part III.A.3.b of the permit requires the NMP to ensure that clean water is diverted,” as appropriate,” additional water volume not diverted, whether clean or in contact with production waste must be considered by the design and operation of the CAFO, including land application. As required in the permit Part II.A.2.vii, the NMP must identify specific records that will be maintained on site for five years that ensure adequate storage of manure, litter, and process wastewater (see Parts III.A.3.a and b), and must include the volume for solids accumulation, design treatment volume, total design volume, and approximate number of days of storage capacity (see Table IV-A in Part IV). The depth marker in any impoundment, indicates design capacity as it must clearly indicate the minimum capacity necessary to contain the runoff and direct precipitation of the design storm. No changes are made in response to these comments.

Comment 26: A commenter expressed concern over allowance in the permit Part II (A)(2)(b)(iv) for construction in the 100-year floodplain, due to the severe, violent, and destructive flooding of arroyos, experienced during New Mexico monsoon season.

Response 26: EPA acknowledges the commenter’s concern regarding construction of the CAFO within a floodplain. As noted under Part II.A...”The following effluent limitations apply to facilities covered under this permit.” EPA’s authority regarding CAFO construction only extends to whether the CAFO is eligible for coverage under this general permit. As described at Part II.A.2.b.iv, only if the facility is protected from inundation and damage that may occur during that flood event will EPA consider authorizing coverage under the general permit. No change is made to the permit.

Comment 27: Several commenters noted improper references to eggs in the permit.

Response 27: All references to eggs have been removed from the permit except for Definitions in Part VII, which remain unchanged.

Comment 28: Several commenters expressed concern regarding the wording in the Permit Part II (A)(2)(a)(xi) that seems to allow a facility to expand without notifying the EPA and providing calculations, engineering designs, and an amended nutrient management plan.

Response 28: EPA issued the 2008 CAFO regulations, which require changes to the NMP to be reported to the Director, in order for the Director to determine whether or not the changes require revising the terms of the NMP. A facility expansion is considered a change to the NMP and is subject to Part III. A.6. of the permit. No change is made to the permit.

Comment 29: A commenter suggested alternative equivalent agronomic rate nutrient management evaluations systems other than Practice 590 should be allowed, stating that the 590 is “too restrictive” and “does not lend itself very useful to grazing systems.” The commenter raised concern that New Mexico NRCS [Natural Resources Conservation Service] may be considering moving away from 590 toward another practice for its CNMPs [Comprehensive Nutrient Management Plans], creating conflict with the CAFO permit.

Response 29: The standard used in the General Permit reflects the current New Mexico NRCS use of the Conservation Practice Standard 590. No change is made to the permit.

Comment 30: EPA received comments on leak detection needs, with thoughts on calibration, operation, and maintenance of equipment on land application sites. One commenter recommended changes to Part II.A.4.g, to add language requiring the calibration of equipment used for land application in addition to requiring inspections to assess for leaks from said equipment, while another commenter recommended requiring leak detection inspections at the onset of using the equipment for land application and each day it is used until the equipment is idled.

Response 30: The permit Part II.A.4.g provides that equipment used for land application of manure, litter, or process wastewater including wastewater conveyance lines, must be inspected quarterly or in between crop rotations (whichever comes first) for leaks. This frequency ensures routine checks for leaks and proper operation of the land application equipment. No change is made to the permit with regards to land application leak inspection. EPA is adding a new Part II.A.5.a.ii to the permit to require calibration of land application equipment. Existing paragraph ii. is renumbered as iii and the new Part II.A.5.a.ii. now reads:

ii. Calibration of land application equipment shall be performed at least annually in accordance with procedures and schedules to be described for all equipment in the CAFO's nutrient management plan.

Comment 31: One commenter stated that Part II (A)(4)(h) requirement for a setback of 100 feet to waters of the US usually implies that there will be some sort of vegetation that would filter any contaminated stormwater runoff prior to entering waters of the US. The commenter concluded that scarce vegetation occurs in New Mexico vegetation and cannot be relied upon to remove pollutants. The commenter is concerned that the permit does not acknowledge that the 100 feet may not guarantee that the land application is not occurring in alluvial soils hydrologically connected to the waters of the US.

Response 31: The setback requirement incorporated in the permit at Part II (A)(4)(h) comes from the effluent guidelines at 40 CFR 412(4)(c)(1)(ii)(5) finalized in the 2008 CAFO rulemaking. The permit at Part II (A)(4)(h) require that manure, litter, or process wastewater must not be applied closer than one-hundred (100) feet to any down-gradient water of the United States, open tile line intake structures, sinkholes, agricultural well heads, or *other conduits* [emphasis added] to waters of the United States. Additionally, Part III.A.3.d. requires the permittee's NMP to identify appropriate site specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the United States and specifically, to minimize the runoff of nitrogen and phosphorus. Each CAFO covered by this permit must implement the site specific conservation practices determined by the Permitting Authority to be a term of this permit, as specified in the CAFO's permit authorization notice. These practices may include, but are not limited to, residue management, conservation crop rotation, grassed waterways, strip cropping, vegetated buffers, riparian buffers, setbacks, terracing, and diversions. No change is made to the permit.

Comment 32: Additional specification was recommended regarding the permit Part II.A.5.b.ii (Prohibitions) requirement, "The permittee should avoid land applying prior to imminent rain events." The commenter recommended changing "should" to "shall" and further defining imminent.

Response 32: EPA agrees that more specificity can be added to better define the permit prohibition found at Part II.A.5.b.ii. The following revision is made to the permit:

- ii. Waste shall not be applied to land when the ground is frozen, saturated with water, or during rainfall events. **The permittee shall not land apply if precipitation capable of producing runoff and erosion is forecast by the National Weather Service or other reputable weather service organizations to occur within 24 hours of the time of the planned application.**

Comment 33: Comments were raised on the proposed permit Part II (A)(4)(h) setbacks of 100 feet, 35 feet, or a compliance alternative. Questions specific to compliance alternatives include a request for specific alternatives to be added to permit language as well as concerns that use of an

alternative would deny the public meaningful information. One comment proposed monitoring wells be exempt from wellhead setback requirements.

Response 33: As noted by the commenters, the general permit provides for setbacks of 100 feet, 35 feet, or an alternative. EPA included this technical requirement through the CAFO rulemaking process. It is clear from the rule's administrative record that EPA has built flexibility into the regulations that can appropriately be used for ensuring compliance by New Mexico CAFOs seeking permit coverage. For instance, EPA noted in rulemaking that, in some cases, a CAFO may be able to demonstrate to the permitting authority that no setback is necessary based on site-specific conditions, such as when the surface water is located up-gradient from the area of manure application. However, as noted in our response regarding the New Mexico Dairy Rule at Comment 52, permittees covered under the NPDES general permit may have separate duties to comply with state groundwater regulations and additional operational requirements. We would expect to work closely with the New Mexico Environment Department in reviewing and approving any compliance alternative requested by a CAFO. No change is made to the permit.

Comment 34: A commenter expressed concern that proposed changes in the permit Part III.D.8., requiring CAFOs in Bernalillo, Chavez, Eddie, Sandoval, San Juan, and Valencia Counties to develop Emergency Action Plans [EAPs] and perform additional soil sampling would complicate the permitting process and lead to permittee extinction.

Response 34: The EAP requirements in the proposed permit are unchanged from the previous permit issued in 2009. Part II.D.8 of the permit resulted from EPA's federally required endangered species consultation with the US Fish and Wildlife Service on the effects of the 2009 general permit issuance. The permit requirements are intended to provide additional protections to certain species federally listed as threatened and endangered or habitat federally designated as critical, after EPA and the Service determined those species and habitat might be adversely affected by a CAFO operating under the general permit. No change is made to the permit.

PART III – SPECIAL CONDITIONS

Comments Regarding Developing and Implementing NMPs

Comment 35: A comment to Permit Part III (A)(2)(c) raised concern that public notice on the EPA website is insufficient notice where people living near CAFOs have no internet connection, access to computers, or awareness of the need to check the EPA website continuously. The commenter requested EPA provide notice to adjacent landowners by certified mail and post the notice in both English and Spanish in the local newspapers for at least two weeks.

Response 35: The 2008 CAFO final rule requires the permitting authority to make the NMP and NOI or application publicly available (as with any NPDES permit application) for comment. EPA uses website posting as a cost effective mechanism to reach the general public regarding

NOIs. Any interested party can also contact EPA, Region 6, NPDES Permits and TMDLs Branch to be placed on a mailing list to receive notice of New Mexico permits available for public review and comments. No change is made to the permit.

Comment 36: A commenter raised concern about possible harm to CAFO facilities and/or employees when the entire NOI/NMP packet is posted to the web, as it may contain information (and confidential business information; CBI). The commenter recommends only web posting a summary document that encompasses the required elements of the NMP. The commenter acknowledges that the complete NOI/NMP packet would be available for public review, upon request.

Response 36: It is EPA's intent to provide access to the public. We are unaware of any instances of harm to CAFOs from posting of NOIs/NMPs but acknowledge the need to ensure that CBI is not improperly released. The permit language at Part III.A.2.c is revised to reflect the public participation regulations at 40 CFR 122.23(h):

- c. **When the Director makes a preliminary determination that the notice of intent is complete in accordance with the requirements of §§ 122.21(i)(1) and 122.42(e), the Director will notify the public of the Director's proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's NMP and the draft terms of the NMP to be incorporated into the permit. The notice will also provide the opportunity for a public hearing on the NOI and draft NMP in accordance with 40 CFR 124.11 and 12.**

Comment 37: A commenter suggested that EPA add specifics for determining erosion potential in Part III.A.3.d., since EPA specifies the use of modeling programs (e.g. RUSLE2, SEDCAD, SEDIMOT, etc.) in other permits to determine erosion potential, and also allows the evaluation of BMPs such as vegetated buffers, setbacks, terracing, etc., to evaluate what will best reduce erosion from the site.

Response 37: Part III.A.3.d requires the NMP to identify measures used to limit erosion and pollutant runoff where areas have the potential to contribute pollutants to waters of the United States. The New Mexico NRCS 590 (see Appendix D) prescribes that planners use the current NRCS-approved nitrogen, phosphorus, and soil erosion risk assessment tools to assess the risk of nutrient and soil loss. The current NRCS nationally approved erosion-prediction technology for water erosion technology utilizes the Revised Universal Soil Loss Equation, Version 2 (RUSLE2). We have revised the final sentence (bold-face) in Part III.A.3.d for added clarification:

Where these areas have the potential to contribute pollutants to waters of the United States, the NMP shall identify measures used to limit erosion and pollutant runoff **using NRCS approved risk assessment tools for nitrogen, phosphorus, and erosion losses, as specified by the New Mexico NRCS Conservation Practice Standard 590 (Nutrient Management) (see Appendix D of this permit).**

Comment 38: NMED commented about the permit Part III requirement to include a map of the facility. NMED believes this is a valuable tool, especially during compliance inspections, to quickly show the important pollution prevention activities occurring at the site. EPA specifies basic items that should be on the map. NMED would also like to see the following items included:

- a. 100 year flood plain;
- b. Locations of storage/retention facilities;
- c. Locations of animal confinement areas;
- d. Locations of Waters of the US;
- e. Locations of litter/manure storage;
- f. Locations of mortality management areas;
- g. Directions of flow across the facility, drainage features and clean water diversion structures;
- h. Land application setback requirements;
- i. Areas of significant soil erosion;
- j. Locations of soil sampling, groundwater wells, etc.
- k. Chemical storage areas; and locations of sumps and equipment storage.

Response 38: EPA agrees with the commenter the above list information is good to have if such information is available. **Permit Part III.A.3.g.iii. has been changed to incorporate the commenter's request.**

Comment 39: Part III (B)(1)(c) includes impractical requirements to maintain fresh water in an impoundment in New Mexico just to protect a liner in case the operator wants to use the impoundment in the future. All impoundments that are not plastic lined must be removed as a part of closure. This section is only appropriate if the impoundment has a plastic liner.

Response 39: Part III.B. has been revised to read as follows:

B. Facility Closure Requirement

- 1) **The following conditions shall apply to the closure of manure, litter, or process wastewater storage and handling structures:**
 - a) **No manure, litter, or process wastewater storage and handling structure shall be abandoned.**

- b) **Manure, litter, or process wastewater storage and handling structures, shall be maintained at all times until closed in compliance with this section.**
- c) **All closures of impoundments must be consistent with New Mexico NRCS Conservation Practice Standard Code 360 (Closure of Waste Impoundments) and any applicable state and local requirements. Consistent with this Practice Standard Code 360, the permittee shall remove all waste materials to the maximum extent practicable and dispose of them in accordance with the permittee's NMP, unless otherwise authorized by EPA.**

Comment 40: What type of chemicals would be allowed to enter the waste handling system?

Response 40: Based on the requirements of Part III.A.3.c. and Part III.A.7.c of the permit, chemicals should not enter the waste handling system unless the waste handling is designed to treat such chemicals. The permit contains a requirements for surface water quality protection. No change is made.

Comment 41: NMED stated in the proposed permit, in Part III.A.4 (Signature), NMED believes that the language should say “signed and certified” when referring to the signatory requirements for completing an NMP.

Response 41: EPA agrees with the commenter that Part III.A.4 can be clarified to be consistent with signatory and certification requirements spelled out in Part VI. E and VI.F.

Permit Part III.A.4, has been revised to incorporate that NMPs must be “signed and certified”

Comment 42: Several commenters suggested that NMP Changes in Permit Part III (A) (6) (a) – the public has the right to review the calculations used to generate the amended NMP and thus should be submitted to the Director.

Response 42: In order to comply with the Second Circuit’s holding while affording CAFO owners and operators maximum flexibility to make adjustments consistent with the terms of the NMP during the period of permit coverage, EPA developed the linear and narrative rate approaches. As discussed in the preamble to the 2008 CAFO Rule, the annual reporting requirements of the CAFO were established to allow flexibility for CAFOs that land apply manure, litter and process wastewater. The EPA developed approaches to allow CAFO operators maximum flexibility to anticipate adjustments that may be required during the course of implementing an NMP and to make adjustments consistent with the terms of the NMP during the period of permit coverage, without the need for permit modification and a formal public notice process. Therefore, the federal regulation at 40 CFR 122.42(e) (6) (i) do not require annual calculations to be submitted when NMPs are changed. **Please note that the reference of Part**

III.A.3.g.iii(C) has been corrected to Part III. A.3.g.ii (A). No other change to the permit is needed.

Comment 43: Comments regarding “Substantial” Changes to NMP in Part III (A)(6)(c) and (d) of the permit, raise concern that the public cannot be adequately involved where EPA determines a change is ‘not substantial’ The commenter finds paragraph (b) provides some context of what would be considered substantial and thus triggers paragraph (d), but finds no examples of what would trigger paragraph (c) and the determination on non-substantial.

Response 43: In 2005, *Waterkeeper Alliance v. EPA*, the Second Circuit Court of Appeals held that the terms of a CAFO’s site-specific NMP must be made available to the public for review. Following the *Waterkeeper* decision, the EPA issued the 2008 CAFO regulations, which require changes to the NMP to be reported to the Director, in order for the Director to determine whether or not the changes require revising the terms of the NMP. Not all changes in an NMP necessitate revision to the terms of the NMP that were incorporated into the permit issued to the CAFO; therefore, a permit modification may not always be necessary. When the Director determines that the changes are non-substantial, such changes can be implemented without the opportunity for public comment. Part III (A) (6) (b) of the permit provides a list of substantial changes that would require an opportunity for public comment. The Director retains the authority to determine what is considered a non-substantial change. A robust discussion of the decision-making EPA followed when establishing these rules for substantial versus non-substantial changes can be found at 73 FR 70453 – 70455. No change is made to the permit.

Comment 44: A commenter stated that in the proposed permit, in Part III.A.6.c (Changes to the NMP), the permit states, “revise the terms of the permit based on the site specific NMP...” The commenter suggested that “permit” be changed to “permit authorization letter.”

Response 44: The term “permit authorization letter” is not defined in NPDES regulations. Part III.A.6.c is directly quoted from the 2008 regulations at 40 CFR 122.42(e)(6)(ii)(A). The process described for non-substantial changes will be a minor modification to the permit, following requirements at 40 CFR 122.63(d). No change is made to the permit.

Comment 45: Land Application Calculations at Part III (A)(7)(d) need to be clear that the results of the sampling would be used to determine the land application rates and thus the sampling should be done with enough advance so that the lab results would be available prior to land application.

Response 45: Part V.2.h through l reflect the annual reporting requirement for the manure, process wastewater, and soils testing. For CAFOs using narrative approach, the results from the required analysis determine subsequent land application. No changes are made to the permit.

Comment 46: A commenter suggested monitoring wells for CAFO production areas (includes impoundments) and land application areas. The commenter suggested wells be positioned to specifically target the source of the pollution (e.g. lagoon, field, corral area), its flow, and at appropriate depths to detect this pollution before it reaches drinking water supplies or surface waters. The commenter stated that monitoring wells and leak detection were the best line of defense and EPA can learn from the industry's efforts to undo meaningful monitoring in the Dairy Rule matter. The commenter suggested EPA should also require monitoring well and leak detection information be gathered quarterly and made publicly available. Lastly, the commenters expressed concern about the permit requirement at Part III.D.1.c, which requires a permittee who is notified by the State or EPA that a direct hydrological connection to waters of the United States exists for the contamination of surface waters or drinking water to install a leak detection system or monitoring wells, or take other appropriate measures in accordance with that notice. The commenter stated that the option for "other appropriate measures," would be the go-to option for EPA and for industry, would rob the public of the meaningful data and preventative functions of monitoring wells, and should be deleted.

Response 46: In its final CAFO rulemaking, EPA considered and rejected explicit national requirements for certain CAFOs to address possible discharges to surface water that travel via ground waters with a direct hydrologic connection. EPA rejected national requirements, in part because pollutant discharges from CAFOs to surface water via a groundwater pathway are highly dependent on site specific variables, such as topography, climate, distance to surface water, and geologic factors such as depth of groundwater, soil porosity and permeability, and subsurface structure. The New Mexico CAFO general permit includes the provision for EPA, as permitting authority, to require site specific measures where hydrologic connection is of concern. Any permit requirements for monitoring wells, leak detection, or other appropriate measures, would be public noticed with the NOI and NMP. No change is made to the permit. The interaction of EPA's federal CAFO regulations and permit and the state of New Mexico's Dairy Rule is discussed at Response 51.

Comment 47: Manifesting Waste. Part III.C.1.b – should require the phone number as well.

Response 47: The Permit Part III.C.1.b. has been changed to require the telephone number of the recipient of transferred manure, litter, or process wastewater to be retained.

Comment 48: The transfer of manure was raised as a concern, with a commenter request for EPA to revise Part III (C)(1)(c) of the permit to require proof of certification to custom haul and properly apply the transferred manure, with the intent of ensuring that final disposition of the manure/wastewater would not cause impairment to waters of the US?

Response 48: Permit requirements at Part III.C., Part IV, and the NRCS 590 Practice Standard in Appendix A all require the CAFO to provide a nutrient assessment of transferred manure, as well

as record and annually report transferred manure quantities. While representative nutrient information regarding transferred manure can encourage proper use and disposal, the CAFO regulations reflected in the permit are consistent with the current CAFO regulations regarding transferred manure. No change is made to the permit.

Comment 49: A commenter suggested the proposed permit Part III.D.3 should be cross referenced to Part IV.A.

Response 49: The Permit Part III.D.3. has been cross-referenced to Part IV.A.

Comment 50: In the proposed permit Part IV.A.3, this language assumes that the release referenced here was caused solely by a rain event.

Response 50: There is no assumption associated with this monitoring and reporting requirement. Should a CAFO have a release, the facility must include the rainfall amount measured in the rain gauge for the date when making discharge notification. No change is made to the permit.

Comment 51: Several commenters recommend alignment of the New Mexico CAFO general permit requirements with state groundwater protection requirements found in New Mexico's Dairy Rule (NMAC 20.6.6). Commenters listed several differences between the CAFO permit and Dairy Rule including differing requirements for impoundment liners, impoundment freeboard, and groundwater monitoring. One commenter recommended that the permittee use the most restrictive criterion or method in those instances when the CAFO permit (NMG010000) and the Dairy Rule require different structural or operational criteria or methods.

Response 51: EPA agrees that the permittee shall follow the most restrictive criterion or method where the NPDES permit and New Mexico Dairy Rule differ. Although federal CAFO rules may overlap other federal, state, or local government rules, CAFO regulations are designed to support and complement the array of voluntary and other programs implemented by USDA, EPA, and the states. CAFO regulations accommodate differences in state-specific requirements and provide flexibility to allow state and local rules to be stronger than the federal CAFO regulations (see 40 CFR 123.25(a)). No change is made to the permit.

Comment 52: EPA received comments concerning permit requirements for hydrologic connections, including concern that permit Part III.D.1.a language "no significant leakage" is contrary to the Clean Water Act's strict liability scheme. Several comments recommended adding additional liner requirements, monitoring wells and leak detection requirements to the general permit regardless of verification of existing hydrologic connection.

Response 52: Part II.D.1.c of the permit includes the requirement included in the Region 6 CAFO general permit since 1993 that, “ If notified by the State or EPA that a direct hydrological connection to waters of the United States exists for the contamination of surface waters or drinking water, the permittee shall install a leak detection system or monitoring wells, or take other appropriate measures in accordance with that notice.” Hydrologic connection requirements and restrictions were considered as an option during the CAFO effluent guideline development and rulemaking; however, no technology requirements was included in the currently applicable guidelines, finalized 2003 through 2008. Site specific surface water quality concerns can be identified during NOI and NMP review and permit conditions to address those issues can be developed. Authorization to discharge under the general permit occurs only after public notice of the specific operation’s permit conditions. No changes to the permit are made.

PART IV. DISCHARGE MONITORING AND NOTIFICATION REQUIREMENTS

Comment 53: In the proposed permit, in Part IV.A, EPA should require information on the actions taken to stop the release and the amount recovered from the release.

Response 53: EPA has revised the permit Part IV.A.1. to read:

- 1. A description of the discharge, its cause, and any actions taken to stop the release. Include a description of the flow path to the receiving water body, an estimate of the flow and volume discharged, and an estimate of any recovered volume.**

Comment 54: Should the rain gauge requirement be moved to Part II.A.2.a.ix from Part IV.A.2?

Response 54: EPA agrees with the commenter regarding the Part IV.A.2 requirements. Items pertaining to the rain gauge in Part IV.A.2 and Part IV.A.3 that are also in Part II.A.2 are deleted. The items under Part IV.A are renumbered from 1 through 4. The new Part IV.A.2 with clarification now reads:

- 2. The date of the rain event and the **daily** rainfall amount as recorded by the rain gauge noted in Part II.A.2.a.ix. **Rainfall amounts will be reported** to the nearest half (½) of an inch.**

Comment 55: In the proposed permit, in Part IV.B, should “manure and/or wastewater storage or retention structure” be replaced by “production area” since the release may be from other parts of the facility? This also is an issue in Part IV.B.3

Response 55: The permit conditions in Part IV.B are requirements for the manure and/or wastewater storage or retention structure only, while the CAFO effluent guideline limitations at 40 CFR 122.42(e)(4)(vi) require the annual reporting of the summary of all manure, litter and

process wastewater discharges from the production area, as reflected in the permit Part V.2.f. No change is made to the permit.

Comment 56: In the proposed permit, in Part IV.C, NMED suggests that since this table summarizes all inspection, monitoring and recordkeeping requirements, another section should be added that addresses the requirement to add selenium, copper and zinc monitoring to this permit.

Response 56: **Selenium copper and zinc monitoring are added to Part IV.C. table.**

PART V. ANNUAL REPORTING REQUIREMENTS

Comment 57: Given the extensive and comprehensive recordkeeping and reporting requirements that are now in effect in all states with NPDES CAFO permits, we respectfully request the EPA extend the Annual Report due date from Jan. 31 to March 31 of each year."

Response 57: Part V.A. of the permit is revised to extend the annual report due date from 31st day of January to **31st day of March**. EPA has also added additional clarification to Part V.A., along with Part VI.D., for consistency with the September 24, 2015, electronic reporting rule.

PART VII. DEFINITIONS

Comment 58: Additional definitions should be added to Part VII, for the following terms: "process wastewater", "clean storm water run-on", "new source", and "imminent rain event."

Response 58: Process wastewater is a regulatory definition that is included in the permit. The terms clean water run-on and imminent rain event are no longer in the permit. The regulatory definition for new source is added to the permit.

New Source means any building, structure, facility, or installation from which there is or may be a "discharge of pollutants," the construction of which commenced:

- (a) After promulgation of standards of performance under section 306 of CWA which are applicable to such source, or**
- (b) After proposal of standards of performance in accordance with section 306 of CWA which are applicable to such source, but only if the standards are promulgated in accordance with section 306 within 120 days of their proposal.(40 CFR122.2)**

Comment 59: Commenter requested clarification at Part II.A.1.ii, regarding the term "storage period" and expressed concern that storage period meant to address one 25 year, 24 hour storm event may not account for large storms that may occur in quick succession (all of which may be equivalent to one 25 year/24 hour event) that may cause an overflow at a facility. Commenter asks for definition of storage period in Part VII.

Response 59: The effluent guideline limitation requirements to be considered by the CAFO pertaining to the storage period are at Part II.A.1.ii.A through H. The appropriate storage period for a facility is developed using case-by-case evaluation and is the basis of the proposed nutrient utilization strategy for each facility specific NMP. While the minimum storage period for livestock and poultry manures is not specifically defined by the federal CAFO regulations, we are adding the NM NRCS definition to Part VII of the permit:

Storage Period means the maximum length of time anticipated between emptying events. The minimum storage period shall be based on the timing required for environmentally safe waste utilization considering the climate, crops, soil, equipment, and local, state, and federal regulations. (NM NRCS Conservation Practice Standard 313 for Waste Storage Facilities, dated July 2011)

Comment 60: Commenters sought clarification on how mortality composting, as well as silage storage piles, are addressed in the permit. A specific concern about storm water runoff from these activities was raised.

Response 60: Per 40 CFR 122.23(b)(5), the term manure is defined to include manure, bedding, compost and raw materials or other materials commingled with manure or set aside for disposal. Therefore, any mortalities composted in manure would be covered under the definition of manure. As noted in Response 23, mortality management specifics will be submitted in each NMP and disposal must avoid liquid manure, storm water or process wastewater storage system that is not specifically designed to handle mortalities. No change is made to the permit.

“Production Areas” and “Process wastewater” are defined in Part VII of the permit. These definitions describe silage as a raw material and any water contacting raw materials as process wastewater, with permit requirements in Parts II and III dedicated to the proper handling of process wastewater. No additional changes are needed.

Comment 61: A commenter noted that the definition of process wastewater includes ‘eggs’, while poultry facilities are not eligible for coverage under this General Permit and suggested making clear that egg-laying facilities are not eligible for coverage.

Response 61: EPA notes commenters concerns and has added specification at Part I.D.3 excluding eggs.

FACT SHEET

Comment 62: In the proposed fact sheet, in Part III.A.3.g(ii)(D), EPA lists resources available and appropriate for developing a narrative rate approach in the NMP. **The first link (<http://www.nm.nrcs.usda.gov/technical/water/nmafo.html>) does not appear to work and should be replaced with a working link. The second link (<http://www.agry.purdue.edu/mmp>) should be updated to the new link – <http://www.purdue.edu/agsoftware/mmp>.**

Response 62: Comment to the fact sheet is noted. EPA is adding the following to the fact sheet at Part III.A.3.g(ii) :

EPA Region 6 has determined that the New Mexico State University Soil Test Interpretation Report (590 Nutrient Management Jobsheet) (see https://efotg.sc.egov.usda.gov/references/public/NM/JS590_2015.xlsm) and the Manure Management Planner (see <http://www.purdue.edu/agsoftware/mmp>) are acceptable processes for developing a narrative rate approach in New Mexico.