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VIA ELECTRONIC MAIL

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Collin O'Mara
Secretary
Delaware Department of Natural Resources and Environmental Control
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RE: Public Comments on Delaware's Proposed Draft CAFO Regulations

Dear Administrator Davis and Secretary O'Mara,

Thank you for the opportunity to comment on Delaware's proposed draft Concentrated Animal Feeding Operation (CAFO) rule (Proposed Rule), which, once implemented, must bring Delaware into compliance with the Environmental Protection Agency's (EPA) 2008 CAFO Rule¹ and ensure prevention, reduction, and elimination of animal waste pollutants entering Delaware's rivers and streams.

The vast majority of Delaware's stream segments are currently listed as impaired for one or more pollutants – most commonly pathogens and nutrients such as nitrogen and phosphorus.² EPA has identified CAFOs as a significant source of these pollutants in the state, observing that “[t]he geographic density of poultry growout facilities...has led to a substantial concentration of animal production activity and waste on the Delmarva peninsula,” and concluding that Delaware's CAFOs have “significantly” impacted water quality in the Chesapeake Bay and its

¹ Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision; Final Rule, 73 Fed. Reg. 70418 (Nov. 20, 2008) [hereinafter 2008 CAFO Rule].

² Delaware Department of Natural Resources and Environmental Control (DNREC), “Our Impaired Water Bodies,” <http://www.dnrec.state.de.us/water2000/Sections/Watershed/ws/impaired.htm>.

tributaries.³ EPA has further found that many of Delaware's poultry CAFOs currently do not meet Clean Water Act (CWA)⁴ requirements, as EPA sampling has identified discharges of pollutants from the state's poultry operations into waters of the U.S.⁵ Delaware's poultry CAFOs contribute to the creation of 1.6 *billion* pounds of litter each year on the Delmarva Peninsula alone,⁶ and Delaware's CAFO regulations must prevent this vast quantity of waste from continuing to pollute the region's sensitive and already damaged waterways.

Environmental Integrity Project (EIP) and Choptank River Eastern Bay Conservancy have an interest in Delaware's regulation of CAFOs. EIP is a national non-profit organization dedicated to advocating for more effective enforcement of environmental laws, including the federal CWA. EIP works to improve state and federal regulation of CAFOs and to improve water quality in the Chesapeake Bay watershed.

Choptank River Eastern Bay Conservancy is a non-profit membership organization dedicated to protecting the Choptank River watershed, which has its headwaters in Delaware. The Choptank Riverkeeper regularly patrols the Choptank River and its tributaries to identify and oppose illegal pollution, and water quality in the Choptank River is directly affected by CAFOs and other pollution sources in Delaware. The Conservancy and its grassroots members in Delaware and Maryland are adversely affected by CAFO pollution in Delaware, and will be affected by the outcome of Delaware's CAFO rulemaking process.

EIP and Choptank River Eastern Bay Conservancy have several concerns with Delaware's Proposed Rule: the rule strips the Department of Natural Resources and Environmental Control (DNREC) of its regulatory authority, does not effectively regulate CAFOs in the state, does not adequately protect water quality, and falls far short of complying with federal regulations. The final rule must address these inadequacies. Delaware should amend the rule to fully comply with the CWA, adequately protect Delaware's valuable natural resources, and make progress towards meeting the state's commitment to reducing its contribution of pollutants to the Chesapeake Bay watershed.

I. The DNREC lacks required authorities under the Proposed Rule

Pursuant to Delaware's delegation of CWA permitting authority from EPA, DNREC is the agency responsible for drafting, issuing, and enforcing National Pollutant Discharge Elimination System (NPDES) permits to Delaware dischargers. The Proposed Rule unlawfully vests NPDES program authority in the Delaware Department of Agriculture (DDA), thereby

³ Letter from Granta Y. Nakayama, EPA Assistant Administrator for Enforcement and Compliance Assurance to Edward Justice, President, Delaware Farm Bureau at 1-2 (Dec. 17, 2008) [hereinafter EPA OECA Letter], available at http://www.epa.gov/ocem/frcc/pdf/2008_09_delaware_fb_final_epa_response_121708.pdf.

⁴ 33 U.S.C. § 1251 et seq.

⁵ EPA OECA Letter at 3.

⁶ *Id.* at 2.

preventing DNREC from performing its mandatory duties and violating numerous provisions of the CWA and federal CAFO regulations.

a. The CWA and the 2008 CAFO Rule require DNREC to maintain authority to administer Delaware's CAFO permit program

Under EPA's CWA regulations, the Director of the state agency tasked with administering a delegated NPDES program must possess certain authorities. Absent these powers, the state program cannot meet its minimum obligations under federal law and the state risks losing its authorization from EPA. The Proposed Rule falls short of minimum federal requirements by misplacing NPDES program authority over CAFOs in DDA and removing it from DNREC. As a result, DNREC retains none of the essential powers EPA has directed it to exercise over CAFOs subject to NPDES permits.

All state-administered NPDES programs must vest authority to fully implement permit provisions, including CAFO permit provisions, in a designated state agency.⁷ Appropriately, the Surface Water Discharges Section of DNREC's Division of Water Resources is responsible for Delaware's entire NPDES program.⁸ DNREC and DDA acknowledge this in the Proposed Rule, stating that the agencies developed the rules "under DNREC's delegated authority."⁹ Thus, repeated references to the "Director" or "state Director"¹⁰ in EPA regulations refer to the DNREC Secretary exclusively. A comparison of EPA's CAFO regulations with Delaware's Proposed Rule shows that Delaware has disregarded this clear delineation of authority.

Moreover, although DNREC and DDA signed a Memorandum of Agreement¹¹ in 2000 intending to transfer the CAFO NPDES program from DNREC to DDA, as required by the state's Nutrient Management Law, EPA has not granted approval for such a transfer of authority. To the contrary, EPA has expressly noted the flaws in Delaware's nutrient management program, reaffirming in 2008 that it "has not approved Delaware's Nutrient Management Law as an authorized CWA NPDES CAFO program."¹²

b. The Proposed Rule unlawfully strips DNREC of all meaningful authority over CAFO regulation

As the sole authorized permitting agency, DNREC must possess numerous specific powers to regulate CAFOs; indeed, the Proposed Rule asserts that DDA will implement the

⁷ 40 C.F.R. § 123.25.

⁸ Surface Water Discharges Section: Delegation Authority, Delaware Dep't of Natural Resources and Envtl. Control, *available at*: <http://www.wr.dnrec.delaware.gov/Information/SWDInfo/Pages/DelegationAuthority.aspx>.

⁹ Proposed Rule Preamble.

¹⁰ 40 C.F.R. § 122.2.

¹¹ Memorandum of Agreement Between the Delaware Department of Agriculture and the Delaware Department of Natural Resource and Environmental Control (June 13, 2000).

¹² EPA OECA Letter at 4.

CAFO program “in conjunction with DNREC.”¹³ In actuality, however, DNREC’s role regulating CAFOs will be all but eliminated under the Proposed Rule, as the Rule unlawfully cedes DNREC’s authority to DDA and the Delaware Nutrient Management Commission (DNMC).

Because the DNREC Director must have all necessary authority to implement Delaware’s entire CAFO NPDES program,¹⁴ DNREC must have Delaware’s final say over permit approvals, the content of Nutrient Management Plans (NMPs), facility inspections, and enforcement actions. While this may not preclude collaboration with DDA, exclusive decision-making authority clearly cannot be handed to another agency without EPA approval.

Beyond generally requiring the designated state agency to have the authority to administer the entire NPDES program, including the CAFO NPDES permit program, federal CAFO regulations assign numerous powers and obligations to the authorized state agency’s Director, in this case the Secretary of DNREC. Specifically, EPA regulations establish that only the “Director” [of DNREC] has authority to (1) designate an AFO as a Small CAFO;¹⁵ (2) receive applications for individual CAFO permits;¹⁶ (3) review NMP documentation for Large unpermitted CAFOs;¹⁷ (4) administer CAFO General Permits by reviewing Notices of Intent (NOI) for coverage, determining whether an NOI satisfies permit requirements, facilitating public notice and comment, and authorizing permit coverage;¹⁸ (5) receive permitted CAFOs’ annual NMP reports;¹⁹ (6) determine the terms of CAFO NMPs, including information required, protocols, best management practices, and other conditions;²⁰ and (7) establish technical standards for nutrient management.²¹

Delaware’s Proposed Rule disregards these provisions in the federal regulations by *prohibiting* DNREC from participating in any significant CAFO program decision-making. The Rule unlawfully grants a long list of exclusive powers to DDA. For example, only DDA has authority to designate an AFO as a Small CAFO.²² In fact, even DDA may only designate a Small CAFO if its DNMC approves of the designation.²³ The DNMC also has sole authority to approve and define CAFO “Best Management Practices,”²⁴ which are the heart of the NMP.

¹³ *Id.*

¹⁴ 40 C.F.R. § 123.25.

¹⁵ 40 C.F.R. § 122.23(c)(1).

¹⁶ 40 C.F.R. § 122.23(d)(1).

¹⁷ 40 C.F.R. § 122.23(e)(2).

¹⁸ 40 C.F.R. § 122.23(h)(1).

¹⁹ 40 C.F.R. § 122.42(e)(4).

²⁰ 40 C.F.R. § 122.42(e)(5).

²¹ 40 C.F.R. §§ 412.4(c)(2); 123.36.

²² Proposed Rule at 9.5.4.2.

²³ *Id.*

²⁴ Proposed Rule at 9.5.3.

The Proposed Rule also fails to require unpermitted Large CAFOs to make nutrient management information available to the DNREC, instead only allowing DDA access to this information. It further only requires CAFOs to submit NOIs, NMPs, and NMP annual updates to the DDA.²⁵ Regardless whether DDA shares this information with DNREC in practice, the Proposed Rule could effectively stonewall DNREC from even accessing basic information about facilities it has been tasked with regulating.

Perhaps most troubling, the Proposed Rule vests sole authority to modify, terminate, revoke, or reissue a NPDES permit in the DDA²⁶ and further grants DDA exclusive authority to enforce NPDES permits by finding violations,²⁷ conducting inspections,²⁸ and assessing penalties.²⁹ DNREC may not even conduct a routine compliance inspection at a permitted facility.³⁰ This leaves DNREC powerless to perform the core functions of the NPDES program – to regulate dischargers by drafting, approving, issuing, and enforcing permits.

Taken together, these terms obviously belie the Proposed Rule’s assertion that DDA will jointly administer the CAFO NPDES program with DNREC. DDA and DNREC’s MOA notwithstanding, the CWA does not permit a scheme where the delegated permitting authority hands the reigns to a separate agency absent EPA approval. Delaware’s Proposed Rule presents a scheme devoid of accountability and entirely contrary to the state’s CWA obligations. The final rule must restore DNREC’s authority to regulate CAFOs, with DDA playing a supplementary role if any.

II. DDA has an insurmountable conflict of interest and lacks the technical expertise required to administer a NPDES program

DDA cannot reconcile its mission to “sustain and promote the viability of food, fiber, and agricultural industries in Delaware”³¹ with the obligations inherent in administering and enforcing the CWA for Delaware’s CAFOs. DDA’s duty to both promote and regulate the same industry poses an obvious, inherent conflict of interest, particularly considering the poultry industry’s dominant role in Delaware’s agricultural economy. By requiring DDA to choose between promoting the poultry industry and effectively enforcing permits that may adversely affect some CAFOs’ bottom line, the Proposed Rule asks the impossible. In all likelihood, water quality in the state will suffer as a result.

In contrast, DNREC’s stated mission is to “protect and manage the state's vital natural resources, protect public health and safety, provide quality outdoor recreation and to serve and

²⁵ Proposed Rule at 9.5.5.1.2, 9.5.7.1.7.1.

²⁶ Proposed Rule at 9.5.7.1.5.

²⁷ Proposed Rule at 9.5.7.1.11.3.

²⁸ Proposed Rule at 9.5.7.1.11.

²⁹ Proposed Rule at 9.5.10.1.

³⁰ Proposed Rule at 9.5.7.1.11.

³¹ Delaware Department of Agriculture, http://dda.delaware.gov/letter_Kee.shtml.

educate the citizens of the First State about the wise use, conservation and enhancement of Delaware's Environment.”³² This mission is clearly in line with the goals of the CWA. The CWA’s NPDES program is meant to further the statute’s goal of eliminating all discharges from point sources to waters of the U.S.³³ As the authorized agency with decades of experience administering NPDES permits, DNREC has the incentive and the expertise to effectively pursue this goal.

EPA has implicitly recognized DDA’s poor fit for administering the CAFO NPDES program, pointing out that despite DDA’s regulatory role under the state Nutrient Management Law, DDA’s program has failed to meet minimum federal requirements.³⁴ EPA reiterated that “the Delaware Department of Natural Resources and Environmental Control (DNREC) is authorized to administer the federal NPDES program and, as a condition of that authorization, has agreed to implement the program....”³⁵

III. The Proposed Rule will not adequately protect water quality

a. The Proposed Rule fails to require all discharging CAFOs to seek NPDES permits

The Proposed Rule does not impose a duty to apply for a NPDES permit on all CAFOs covered by the 2008 CAFO Rule. The federal regulations require every CAFO that discharges or proposes to discharge from either the production area or the land application area – whether large, medium, or designated – to seek NPDES permit coverage.³⁶ While the Proposed Rule adopts most of the federal rule’s language, however, it does not seem to impose a permit requirement on Medium and Designated CAFOs that discharge from land application areas.

The Rule imposes a duty to apply on all sizes of CAFOs with discharges of pollutants “originating from the CAFO,”³⁷ but does not clarify whether this means the production area alone, or both the production and application areas. Because the following provision addresses discharges from the land application area specifically, it seems this refers only to the production area. In discussing the duty to apply for facilities that discharge from land application areas, the Proposed Rule is under-inclusive in that it only requires permits of *Large* CAFOs whose discharges do not meet the agricultural stormwater exemption.³⁸ The final rule must clarify this language and expressly require all CAFOs that discharge or propose to discharge from land application areas to obtain NPDES permits.

³² Delaware Department of Natural Resources and Environmental Control, <http://www.dnrec.delaware.gov/Pages/AboutAgency.aspx>.

³³ 33 U.S.C. § 1251(a)(1).

³⁴ Letter from Benjamin H. Grumbles, EPA Office of Water Assistant Administrator to Congressman Michael N. Castle at 1 (Jan. 16, 2009).

³⁵ *Id.*

³⁶ 40 C.F.R. § 122.23(d)(1),(e).

³⁷ Proposed Rule at 9.5.5.1.1.

³⁸ Proposed Rule at 9.5.5.1.1.4.

b. Delaware should establish a presumption that all Large CAFOs discharge and require NPDES permits

Establishing a presumption that all Large CAFOs in Delaware discharge is essential if the state is to meet its CWA obligations and achieve real progress improving water quality. Moreover, such a presumption has support in existing case law and is consistent with the terms of the CWA. The Proposed Rule seeks to comply with the bare minimum of federal requirements, by only requiring those CAFOs that discharge or propose to discharge to seek NPDES permits.³⁹ In *Waterkeeper Alliance v. EPA*, the Court noted that, in defending its decision to require all Large CAFOs to apply for NPDES permits, EPA failed to argue for a rebuttable presumption that Large CAFOs *actually* discharge.⁴⁰ In raising the point, the Court signaled that if EPA were to implement such a presumption it could compel all Large CAFOs to either apply for a NPDES permit or to require that they prove that they meet the zero discharge effluent limitation.⁴¹ Although EPA did not establish this presumption in the 2008 CAFO Rule, Delaware can and should do so in its final rule.

A presumption that Large CAFOs actually discharge is not only appropriate, but also critical to any CAFO permitting scheme that aims to meaningfully protect the quality of Delaware's watersheds.⁴² As tailored to the Delaware permit, all AFOs that meet the Large size threshold in Section 9.5.4.1.1 of the Proposed Rule should be presumed to actually discharge and therefore be required to apply for a CAFO NPDES General Permit, unless the operator can satisfactorily demonstrate that they do not violate the zero discharge standard.

That agencies may establish evidentiary presumptions is a long settled principle of administrative law.⁴³ To determine the validity of given presumption, courts evaluate its "consistency with the Act and [...] rationality."⁴⁴ More specifically, there must be a "sound and

³⁹ Proposed Rule at 9.5.5.1. Though the Proposed Rule addresses EPA's regulations regarding CAFOs that propose to discharge, the final rule should expressly incorporate EPA's recent guidance explaining which practices will constitute a proposal to discharge. See EPA, Implementation Guidance on CAFO Regulations – CAFOs that Discharge or Are Proposing to Discharge (May 28, 2010), available at http://www.epa.gov/npdes/pubs/cafo_implementation_guidance.pdf.

⁴⁰ See *Waterkeeper Alliance v. EPA*, 399 F.3d 486, 506 (2d Cir. 2005). Throughout the remainder of this section (section "I") CAFO is used generically to mean a confined animal feeding operation, not as it is used in the Draft Permit, viz., as meaning only those AFOs that admit to discharging.

⁴¹ See *id.*

⁴² See 33 U.S.C. § 1370 (affirming that States may adopt effluent limitation, effluent standard, prohibition, pretreatment standard, or standard of performance, provided that it is not less stringent than the federal rule); see also *Homestead Mining Co. v. EPA*, 477 F. Supp. 1279, 1283-84 (S.D. 1979) (holding EPA may not disapprove standards for being too stringent; to do so would violate both the statute itself and the case law interpreting it).

⁴³ See e.g., *NLRB v. Baptist Hospital*, 442 U.S. 773, 787 (1979); See also *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 804-805 (1945).

⁴⁴ *NLRB v. Baptist Hospital*, 442 U.S. 773, 787 (1979) (citing *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978)).

rational connection between the proved and inferred facts.”⁴⁵ Importantly, regulatory presumptions are entitled to substantial deference.⁴⁶

There is a clear connection between the proved fact that a facility is a Large CAFO and the inferred fact that it actually discharges. Nationwide, Large CAFOs often do not have the enough land to absorb the manure that they produce, which is one of the leading causes of excess nutrient build-up.⁴⁷ As a result, a 1997 United States Department of Agriculture (USDA) study revealed that Large CAFOs contribute the lion’s share of excess nutrients that the industry generates.⁴⁸ Poultry operations are particularly problematic because of the unusually high volume of nutrients in poultry litter. According to EPA, while poultry operations contribute approximately 50% of total recoverable nitrogen, they are able to absorb less than ten percent of that amount through on farm use.⁴⁹ Not surprisingly, EPA has concluded that the unparalleled increase in excess nutrient levels in the mid-Atlantic and Southeast between 1982 and 1997 was “mostly the result of the number and concentration of large poultry and hog operations in those regions.”⁵⁰

In examining the vital Chesapeake Bay Watershed, a recent USDA analysis indicates that even if the local CAFO farmers fully utilized the crop and pasture land under their control for land application (which the report suggests they do not), only 40% of the manure nitrogen and 30% of the manure phosphorous could be absorbed.⁵¹ With so much excess nutrients being produced in this watershed, careful manure storage is essential to reducing nutrient-laden discharges. Yet, aerial surveillance photos of Large CAFOs in the region suggest that farmers pervasively stockpile chicken manure in enormous haphazardly constructed uncovered mounds. Runoff from these mounds during the next rain is all but inevitable.

Taken as a whole, this line of evidence led the *Waterkeeper* Court to declare, “In our view, the EPA has marshaled evidence suggesting that such a prophylactic measure [requiring all Large CAFOs to apply] may be necessary to effectively regulate water pollution from Large CAFOs.”⁵² At a very least, these data establish a rational connection between Large CAFOs and pollution discharges.

⁴⁵ *Id.*, at 787.

⁴⁶ *See Id.*, at 796 (Justice Brennan Concurring); *NLRB v. Los Angeles New Hospital*, 640 F.2d 1017, 1020 (9th Cir. 1981).

⁴⁷ *See* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7176, 7180 (Feb. 12, 2003) [hereinafter *2003 Federal Rule Preamble*].

⁴⁸ *Id.*

⁴⁹ *See 2003 Federal Rule Preamble*; *supra* note 30, at 7180.

⁵⁰ *Id.*

⁵¹ Marc Ribaud et al., *Manure Management for Water Quality: Costs to Animal Feeding Operations of Applying Nutrients to Land*, Agricultural Economic Report No. (AER-824), 37 (2003), available at <http://www.ers.usda.gov/publications/aer824/aer824d.pdf> (last visited July 31, 2008).

⁵² *Waterkeeper Alliance v. EPA*, _399 F.3d 486, 506 (2d Cir. 2005).

Furthermore, establishing a rebuttable presumption that Large CAFOs actually discharge would be clearly consistent with the goals of the CWA. The Act's stated objective is not merely to reduce, but to eliminate point source discharges to navigable waters.⁵³ Experience demonstrates that CAFO operators will not voluntarily subject themselves to regulations, and will therefore not apply for CAFO permits if they are not required to do so. In the preamble to the 2001 proposed rule, EPA noted that only about 2,500 of the 12,000 CAFOs that should have applied for permits had actually done so.⁵⁴ Based on the continued CAFO-related impairment of neighboring watersheds, EPA concluded that many of these large facilities were "actually discharging" and should have applied for a permit.⁵⁵ The Proposed Rule will not solve this problem, as it currently gives no guidance on what constitutes a proposal to discharge. Those facilities without documented discharges will have little incentive to seek permit coverage absent a regulatory presumption that they must.

In sum, a rebuttable presumption that requires large operations to apply for CAFO permits is not only consistent with the broad purposes of the CWA, but is necessary to comply with the *Waterkeeper* Court's mandate for regulation "in fact, not just in principle."⁵⁶ If Delaware does not establish such a presumption, the final rule should at the least establish that land application of CAFO waste in Delaware constitutes a "proposal to discharge," as the state's poultry operations currently produce more nutrients than they can land apply at agronomic rates.

c. The Proposed Rule allows land application setbacks less protective than federal minimum requirements

To ensure that land application of CAFO waste will not cause discharges of pollutants into waters of the U.S., the 2008 CAFO Rule imposed setback requirements. While the federal regulations allow states significant flexibility regarding setbacks between application fields and surface waters, Delaware's Proposed Rule fails to meet the minimum requirements and thus fails to adequately protect water quality. EPA offers three minimum setback options: (1) a 100-foot setback between application areas and any "down-gradient surface waters, open tile line intake structures, sinkholes, agricultural well heads, or other conduits to surface waters,"⁵⁷ (2) a 35-foot wide vegetated buffer where no waste application may take place;⁵⁸ (3) or an alternative practice that the CAFO operator has demonstrated will reduce pollutant runoff as well or better than the first two setback options.⁵⁹

⁵³ See 33 U.S.C. 1251(a) (1).

⁵⁴ National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 2963 (Jan. 12, 2001) [hereinafter *2001 Federal Rule Preamble*].

⁵⁵ See *2003 Federal Rule Preamble*; *supra* note 30, at 7180.

⁵⁶ *Waterkeeper Alliance Inc v. EPA*, 399 F.3d 486, 498 (2d Cir. 2005).

⁵⁷ 40 C.F.R. § 412.4(c)(5).

⁵⁸ 40 C.F.R. § 412.4(c)(5)(i).

⁵⁹ 40 C.F.R. § 412.4(c)(5)(ii).

The Proposed Rule significantly weakens these setback requirements. The Rule allows for a 100-foot setback from waters of the state, but fails to require any setback whatsoever from tile intakes, well heads, sinkholes, or other conduits to waters of the state.⁶⁰ Under this rule a CAFO operator could apply waste directly into a tile intake that would transport the waste directly to a protected water of the state; this obviously fails to meet the federal prohibition on land application area discharges. The Proposed Rule’s alternative setback provision also fails to meet federal requirements, by permitting operators to adopt “[a]ny additional approved compliance practices identified in the State Technical Standards.”⁶¹ The federal regulations clearly place the burden on the CAFO operator to prove that a compliance alternative will protect water quality as effectively as imposing a setback. Not only does the Proposed Rule remove this burden from the CAFO operator, it fails to even require the state to approve only alternatives that will protect water quality. The final rule must amend its setback provisions to meet or surpass federal requirements.

d. The final rule must better protect groundwater

As noted in the Proposed Rule, Delaware regulates point source discharges to groundwater, because groundwater is a water of the state.⁶² Thus the Proposed Rule purports to prohibit all groundwater discharges of CAFO wastes.⁶³ EIP and the Choptank Conservancy commend this effort to surpass minimum federal CWA requirements, as groundwater protection is essential to protecting both public health and surface water quality. However, the Proposed Rule does not ensure that CAFOs will not continue to discharge waste into groundwater, and consequently, does not adequately protect surface waters or public health.

EPA has documented pervasive nitrate contamination of groundwater:

“In ground water, pathogens and nitrates from manure can impact human health via drinking water. Nitrate contamination is more prevalent in ground waters than surface waters. According to the U.S. EPA, nitrate is the most widespread agricultural contaminant in drinking water wells, and nearly 2% of our population (1.5 million people) is exposed to elevated nitrate levels from drinking water wells”⁶⁴

From a public health perspective, there is no question that Delaware’s NPDES permits should require CAFOs and other potential dischargers to monitor groundwater. According to a U.S. Department of Interior Report, nitrate concentrations in water from the aquifer in

⁶⁰ Proposed Rule at 9.5.6.1.4.6.1.1.

⁶¹ Proposed Rule at 9.5.6.1.4.6.1.3.3.

⁶² Proposed Rule at 9.5.3.

⁶³ Proposed Rule at 9.5.8.2.5.3.

⁶⁴ Poultry Production Ag 101 U.S. EPA. <http://www.epa.gov/oecaagct/ag101/printpoultry.html>.

agricultural areas of the Delmarva Peninsula are among the highest (top 30 percent) in groundwater underlying agricultural areas in the nation.

As previously noted, poultry operations in the Delmarva Peninsula generate vast quantities of litter and nitrogen. Yet although CAFOs play a significant role in groundwater contamination, nothing in the Proposed Rule requires CAFO operators to monitor how severely they are contaminating groundwater or to take steps to minimize such contamination. The failure to require this sort of common sense precaution clearly contravenes good public policy. Nitrate contaminated drinking water poses serious risks to human health. Perhaps most notably, high levels of nitrates in drinking water can lead to “blue baby syndrome,” which causes developmental deficiencies and even death in severe cases.⁶⁵

Legally, there are strong grounds for compelling CAFO operators to monitor groundwater. Direct groundwater monitoring is a uniquely accurate means of detecting groundwater contamination.⁶⁶ Therefore, by failing to require CAFO operators to monitor groundwater, Delaware is foregoing the opportunity to gather accurate information about the amount and sources of groundwater pollution that CAFOs generate. Without this information, Delaware cannot realistically expect facilities to take measures to effectively minimize such contamination. As such, the failure to implement a groundwater monitoring scheme is unreasonable.

Furthermore, several circuits have held that groundwater discharges should be regulated under the NPDES program in those cases where groundwater discharges have been found to contaminate hydrologically connected navigable waters.⁶⁷ At the very least, this line of cases dictates that AFOs located above groundwater with a demonstrated hydrological connection to

⁶⁵ John P. Chastain, *Pollution Potential of Livestock, Manure. Engineering Notes*, Department of Agricultural Engineering, University of Minnesota, at 2 (1995), available at <http://www.bbe.umn.edu/extens/ennotes/enwin95/manure.html> (last visited July 31, 2008).

⁶⁶ Whereas monitoring soil surface conditions only detects superficial contamination and provides little meaningful feedback, groundwater monitoring can detect infiltration of animal waste into groundwater, where it may also contaminate hydrologic ally connected drinking water wells as well as surface waters and wetlands. Neal Wilson, *Soil Water and Groundwater Sampling*, 5-8, CRC Press (1995).

⁶⁷ See *Washington Wilderness Coalition v. Hecla Min. Co.*, 870 F.Supp. 983, 990-991 (E.D. Wash. 1994) (holding that allegations were sufficient to support a claim under the CWA because they alleged a hydrological connection between seepage into groundwater and the nearby surface waters of a creek and lake); *Sierra Club v. Colorado Refining Co.*, 838 F.Supp. 1428, 1434 (D. Colo. 1993) (holding that allegations that a defendant has and continues to discharge pollutants into the soils and groundwater beneath its property which then make their way to a navigable water through the groundwater state a cause of action under the CWA; *Williams v. Pipe Line Co. v. Bayer Corp.*, 964 F.Supp. 1300, 1320 (holding that discharge of petroleum into groundwater that is hydrologic ally connected to surface waters is a violation of the CWA); *Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169, 1180 (D. Idaho 2001) (holding that the CWA extends federal jurisdiction over groundwater that was allegedly polluted by a dairy that is hydrologic ally connected to surface waters that are waters of the United States).

navigable waters should undertake thorough groundwater monitoring. A failure to require these facilities to monitor groundwater discharges, which can contaminate surface waters, would plainly undermine the Act's goal of "eliminating" point-source discharges.⁶⁸

Moreover, because groundwater pollution frequently results in surface water pollution, the failure to monitor groundwater also creates the potential to undermine Delaware's Water Quality Standards and therefore, violates the CWA's requirement that NPDES permits may only be issued "where such permits *ensure* that every discharge of pollutants will comply with all applicable effluent limitations and standards."⁶⁹ Strong hydrologic connections between groundwater and surface water in the Chesapeake Bay region make Water Quality Standards violations particularly likely in Delaware. According to the U.S. Geological Survey (USGS), approximately half of the high nitrate concentrations in nontidal streams and rivers that contribute to the decline of fish populations in the Chesapeake Bay have been found to come from underground sources:

"These findings will have strong implications for the management of nitrates in the Bay," said USGS hydrologist Dr. Joseph Bachman, "Most past management practices have focused on the more obvious contributions of nitrogen from surface runoff." [...]

Our research in the Chesapeake Bay basin has shown that the average travel time of underground water, or 'ground water,' from when it enters the water table to when it discharges to a stream or river, is 10 to 20 years. The longest measured travel time was about 50 years... Even if tighter regulatory actions were able to eliminate the runoff of nitrate from the land surface, it will take decades for all of the nitrate to be flushed from the underground reservoirs or aquifers."⁷⁰

The Proposed Rule does nothing to give effect to its stated prohibition on CAFO discharges to groundwater or to ensure that groundwater discharges will not pollute surface waters. The final regulations must require groundwater monitoring to protect public health and ensure compliance with the CWA's zero discharge standard.

- e. The Proposed Rule fails to require adequate waste storage capacity

⁶⁸ See 33 U.S.C. § 1251(a) (1).

⁶⁹ *Waterkeeper Alliance v. EPA*, 399 F.3d, 486, 498 (2d Cir. 2005) (emphasis added); see also 33 U.S.C. § 1342(b) (requiring that state permitting programs "apply and insure compliance with, any applicable [effluent limitations and standards].").

⁷⁰ Underground Flow of Nitrate Complicates Chesapeake Bay Cleanup, USGS, Released: 12/9/1997. Available at <http://www.usgs.gov/newsroom/article.asp?ID=823>

In accordance with the federal zero discharge standard for CAFO production areas, EPA's regulations require CAFOs to implement a NMP that will "[e]nsure adequate storage of manure, litter, and process wastewater."⁷¹ Waste storage plans logically must be part of a CAFO's NMP, because whether a facility has adequate waste storage will depend on animal numbers, available application land, and proposed spreading dates.

The Proposed Rule fails to appreciate the relationship between waste storage and nutrient management, as it imposes a blanket requirement that all CAFOs must have only four months of waste holding capacity.⁷² To meet federal requirements to minimize land application area runoff and prevent all discharges from the production area, Delaware's permitting authorities must evaluate each CAFO's storage capacity on a case-by-case basis, in conjunction with its NMP. Simply assuming that every CAFO will appropriately dispose of its waste at least three times per year is not realistic, supported by any evidence in the rule, or protective of water quality.

f. Delaware must not allow excessive or uncovered poultry solid waste stockpiling or "field staging"

The Proposed Rule allows 14 days for uncovered stockpiled poultry solid waste in the production area, and up to 90 days for uncovered stockpiled poultry solid waste on an application field, which the rule refers to as "field staging."⁷³ The Proposed Technical Standards for field staging do not require that these huge manure piles either be covered before land application or placed on a pad,⁷⁴ though several months of exposure to precipitation and wind will almost certainly lead to nutrient leaching and runoff. Any stockpile or field staging discharges would be subject to EPA enforcement actions, as the responsible operations would likely be in violation of the CWA.

Quite simply, poultry solid waste should not be stockpiled in the open on bare ground. To avoid discharge and water contamination, litter should be stored in a covered shed with a concrete floor. A less expensive solution requires coverage with a tarpaulin (or other impervious material). A proper storage system will minimize the potential for groundwater contamination as well as runoff.

Given the current state of academic research and field experience, it is unacceptable for Delaware to continue allowing CAFO operators to maintain uncovered, uncontained manure stockpiles for any number of days. Recent research indicates uncovered litter stockpiles are associated with higher groundwater nitrate and runoff orthophosphate concentrations.⁷⁵ Other

⁷¹ 40 C.F.R. § 122.42(e)(1)(i).

⁷² Proposed Rule at 9.5.3, defining four months of storage as "adequate storage."

⁷³ Proposed Rule at 9.5.3.

⁷⁴ Delaware Nutrient Management Program, Temporary Field Staging, http://dda.delaware.gov/nutrients/Draft_TechStandards/Temp%20Field%20Storage.pdf.

⁷⁵ Gary K. Felton et al., *Nutrient Fate and Transport Associated with Poultry Litter Stock Piles*, ASDE Meting Paper No. 032251, at 25.

studies have indicated that temporary litter storage systems can be affordable for growers and provide meaningful environmental benefits.⁷⁶ At a very minimum, operators should be required to cover all stockpiles with a tarpaulin.

In line with these studies, NRCS has unequivocally declared that “manure removed from poultry houses should be stored in a covered shed until it can be applied to crops or otherwise utilized.”⁷⁷ Significantly, NRCS does not differentiate between AFOs that propose to discharge and those that claim not to: they simply state that manure from poultry operations as whole should be contained. There is no valid reason for Delaware to differentiate along these artificial lines either.

The present approach in the Proposed Rule plainly violates the zero discharge standard set by the EPA.⁷⁸ In the absence of certainty that Delaware’s waterways are unaffected by runoff and transportation of nutrients and contaminants from open field stockpiles and field staging, the precautionary principle must be applied so as to require that poultry solid waste be stored in sheds and, if there is overflow and temporary storage is required in the field, that it be covered and appropriately located.

Finally, the open storage allowances that the Proposed Rule grants to CAFOs violate section 1342 of the CWA. As the *Waterkeeper* Court insisted, 33 U.S.C. § 1342(b) “allows states to distribute NPDES permits only where, *inter alia*, the state permitting programs ‘*apply, and insure compliance with, any applicable [standards].*’”⁷⁹ The open storage limit violates this mandate because it will be impossible for Delaware to determine for how long the litter has been stored. Without this information, Delaware will have no way to verify compliance with this rule. As a result, the open storage allowance necessarily creates the sort of “impermissibly self-regulatory regime” that the *Waterkeeper* Court invalidated.⁸⁰ The only way to remedy this problem is to require that all stored manure stacks be covered, regardless of the expected storage time and regardless whether the stacks are located in the production area or on an application field.

g. The final rule must account for pollutants other than nutrients, including pathogens and arsenic

In addition to nutrients, it is crucial that Delaware give attention to other potential risks associated with poultry solid waste constituents, which include arsenic, pathogenic bacteria, antibiotic resistant bacteria, and residues of the drugs that are added to poultry food. According

⁷⁶ Thomas A. Costello, *Systems for Temporary, Low-Cost Storage of Dry Poultry Litter*, ASAE Meeting Paper 01-2274 at 7.

⁷⁷ NRCS, *Environmental Checklist for Poultry Operations*, Oct. 2007, available at, ftp://ftp-fc.sc.egov.usda.gov/DE/technical/resource_planning_tools/poultry_operations_checklist_10_30_07.pdf

⁷⁸ See 40 C.F.R. §§ 412.31, 412.32, 412.33, 412.35, 412.44, 412.46 (setting a zero discharge standard from production areas of new and existing CAFOs).

⁷⁹ *Waterkeeper v. EPA*, 399 F.3d 486, 498 (2d Cir. 2005) (citing 33 U.S.C. § 1342(b) (emphasis added)).

⁸⁰ *Waterkeeper*, 399 F.3d 486, at 498.

to EPA, pathogens rank second highest in the list of pollutants of concern for rivers and streams, behind siltation and *ahead* of nutrients.⁸¹ Pathogen contamination is far from benign: over 150 pathogens are associated with risks to human health.⁸² Though livestock waste contains several of these pathogens, the Proposed Rule completely ignores the issue of pathogen control for all livestock sectors other than ducks.

Mounting evidence shows that the application of animal waste as fertilizer, even in compliance with an approved NMP, will not effectively reduce fecal coliform and other pathogen pollution from CAFOs. For example, the Michigan Department of Environmental Quality (MDEQ) recently undertook a study of the biological and water chemistry in two creeks that drain a large dairy.⁸³ The dairy applies waste as fertilizer to fields that drain into the creek, and does so according to the terms of an NPDES permit and a comprehensive nutrient management plan.⁸⁴ Samples were gathered at numerous stations over several months, and spanning numerous precipitation events.⁸⁵ Sampling for *E. coli* revealed numerous violations of water quality standards and high levels of *E. coli*, especially following rain events.⁸⁶ MDEQ researchers found that “[m]anure management activities of Hartford Dairy appear to be contributing to extreme increases in *E. coli* concentrations in Pine Creek during rainfall event. However, the investigation did not discover high levels of nutrients in the farm drainage.⁸⁷ The implication of this initial study is that nutrient management planning that achieves successful agricultural utilization of manure nutrients will provide insufficient treatment of *E. coli* and other enteric pathogens.

Recognizing the serious health risk that pathogens contamination poses, the CWA explicitly instructs the Administrator to set Best Control Technology (BCT) based effluent limitations for at least one pathogen, namely fecal coliform.⁸⁸ In *Waterkeeper*, the Court declared the EPA’s failure to set BCT standards for fecal coliform to be a violation of the CWA. The Court wrote: “The Act requires that the EPA select the best pollutant control technology for reducing pathogens and we must enforce that requirement.” Accordingly, the Court instructed to EPA to directly address pathogens in its final rule. A failure to include such requirements in the

⁸¹ *Id.* at 15.

⁸² 2001 *Federal Rule Preamble*, *supra* note 39, at 2977 (stating land application of animal manure creates a comparable risk of pathogen contamination as would land application of human sewer sludge).

⁸³ Michigan Department of Environmental Quality, Water Bureau, Staff Report, *A Biological and Water Chemistry Survey of Mill and Pine Creeks in the Vicinity of the Hartford Dairy Concentrated Animal Feeding Operation, Berrien and Van Buren Counties, Michigan, July through September 2005*, (MI/DEQ/WB-06/035).

⁸⁴ *Id.* at 2.

⁸⁵ *Id.* at 8.

⁸⁶ *Id.* at 9.

⁸⁷ *Id.* at 12.

⁸⁸ See 33 U.S.C. § 1314(a) (4) (listing fecal coliform as a conventional pollutant subject to regulation); 33 U.S.C. § 1311(b) (2) (E) (requiring the promulgation of BCT standards for pollutants).

Proposed Rule itself would also violate the CWA's instruction that NPDES permits only be issued where compliance with all local water quality standards can be assured.⁸⁹

The final rule should also include requirements for monitoring and controlling arsenic. The U.S. Geological Survey has estimated that between 250,000 and 350,000 kg of arsenic stemming from poultry litter are annually applied to land in the U.S.⁹⁰ Not surprisingly, scientific studies report elevated soil arsenic levels in fields where poultry litter has been applied.⁹¹ This form of arsenic leaches readily and threatens to contaminate groundwater resources.⁹² Arsenic is a known carcinogen and is recognized as such by myriad government agencies, including the EPA.⁹³ For this reason, NRCS guidelines issued to assist in the design of a CNMP state: "Federal and State regulations do not address the heavy metal [including arsenic] content associated with agricultural by-products. In developing a CNMP, the build-up of salt and heavy metals should be tracked through soil testing."⁹⁴ The Proposed Rule fails to incorporate this NRCS guideline or to otherwise address arsenic contamination through state Technical Standards. The final rule should therefore be amended to require soil testing for arsenic according to NRCS recommendations.

As a threshold matter, we note that we believe that Delaware should require CAFOs to go beyond soil testing and directly monitor groundwater for arsenic. Groundwater monitoring is uniquely suited for detecting contamination and should be implemented wherever possible.

h. The final rule must more effectively regulate the transfer of waste to third parties

With almost 7% of total U.S. broiler production located on the Delmarva Peninsula, where 600 million chickens produce 1 billion kilograms of waste annually, the region's CAFOs produce far more waste than operators can manage by way of land application.⁹⁵ Given the excessive amounts of waste generated by the CAFO industry throughout Delaware, CAFO operators will increasingly seek to transfer poultry waste to nearby unpermitted crop farms.

The Proposed Rule contains a gaping loophole: CAFO operators can avoid regulation by

⁸⁹ See 40 CFR 122.4(d) (2005) (prohibiting the issuance of NPDES permits when the imposition of the specified conditions cannot ensure compliance with the applicable water quality requirements of all affected states); see also 33 U.S.C. 1311(b) (1) (c) (identifying the achievement of state water quality standards as one of the Act's central objectives).

⁹⁰ See Nachman, Kevin E. et al., *Arsenic: a Potential Roadblock to Animal Waste Management Solutions* 1123 (citing D.W. Rutherford et al., *Environmental Fate of Roxarson In Poultry Litter Part II: Mobility of Arsenic in Soil Amended with Poultry Litter*, 37 ENVTL SCI TECH. 1515 (2003)).

⁹¹ *Id.* (citing G. Gupta & S. Charles, *Trace Elements in Soils Fertilized with Poultry Litter*, 78 Poultry Sci. 1695 (1999)).

⁹² *Id.* (citing D.W. Rutherford et al., *Environmental Fate of Roxarson In Poultry Litter Part II: Mobility of Arsenic in Soil Amended with Poultry Litter*, 37 ENVTL SCI TECH. 1515 (2003)).

⁹³ *Id.* at 1124.

⁹⁴ Natural Resources Conservation Service, National Planning Procedures Handbook, available at http://www.nrcs.usda.gov/technical/afo/cnmp_guide_600.54.html.

⁹⁵ Arsenic: A Roadblock to Potential Animal Waste Management Solutions. *Supra*, FN 111.

transferring waste to third parties. Although the Proposed Rule requires CAFO operators to retain minimal information about the volumes of waste transferred and the parties to whom they transfer it, as well as providing the recipient with manure nutrient information,⁹⁶ the Rule does not hold the CAFO operator responsible for discharges that occur after the waste leaves the premises. Without such liability, the Proposed Rule creates a considerable incentive to send waste to unpermitted farms (so-called “off site” farms). Without oversight, it is likely that poultry litter that is transferred to off site farms is applied without any concern for controlling pathogens and heavy metals, and with only the most minimal consideration of nutrients.

Transferring waste to these unregulated off site farms seriously compromises the effectiveness of the Proposed Permit and contravenes the Clean Water Act’s goal of eliminating discharges to navigable waters.⁹⁷ Several other states have responded to this problem by implementing manifesting requirements that track the transfer and use of the waste. These manifests contain detailed information about the waste recipient and its nutrient content, as well as a certification by the recipient that s/he will apply the waste responsibly.⁹⁸ In addition, the regulations prohibit Large CAFO owners from transferring waste to recipients who are suspected to improperly apply, store or dispose of the waste.⁹⁹ Some states, such as Michigan, have written these requirements into the CAFO permit itself.¹⁰⁰ Delaware should incorporate equally stringent manifest requirements into the final rule.

NRCS guidelines provide: “Where waste materials are to be spread on land not owned or controlled by the producer, the waste management system plan (or CNMP), of which waste utilization is a component, shall document the amount of waste to be transferred and *who will be responsible for the environmentally acceptable use of the waste.*”¹⁰¹ In its current form, the Proposed Rule does not require either the recipient or the CAFO operator to claim responsibility for the “environmentally acceptable use of the waste.” No one is liable for environmental violations that result after the waste leaves the permitted farm. The Proposed Rule must be

⁹⁶ Proposed Rule at 9.5.7.2.2.1.3.

⁹⁷ See 33 U.S.C. 1251(a) (1).

⁹⁸ See e.g. Michigan Department of Environmental Quality, Large Concentrated Animal Feeding Operations General Permit, Permit No. MIGI101191000, at 13, available at <http://www.deq.state.mi.us/documents/deq-water-mpdes-generalpermit-MIG019000.pdf>; Wisconsin Department of Natural Resources, Animal Feeding Operations, NR 243.142, available at <http://dnr.wi.gov/runoff/pdf/ag/cafo/NR243.pdf>; Virginia Regulatory Town Hall, *Notice of Intended Regulatory Action: Virginia Pollution Abatement (VPA) Permit Regulation for Poultry Waste Management*, (Oct. 19, 2007), available at http://www.townhall.state.va.us/L/GetFile.cfm?File=E:%5Ctownhall%5Cdocroot%5C103%5C2525%5C4398%5CAgencyStatement_DEQ_4398_v1.pdf

⁹⁹ See *id.*

¹⁰⁰ See Michigan Department of Environmental Quality, *Large Concentrated Animal Feeding Operations General Permit*, Permit No. MIGI101191000, at 13, available at <http://www.deq.state.mi.us/documents/deq-water-mpdes-generalpermit-MIG019000.pdf>

¹⁰¹ NRCS Conservation Practice Standard, *Waste Utilization*, § 633-3 (emphasis added), available at <http://efotg.nrcs.usda.gov/references/public/IL/633.pdf>.

amended to address this problem: either the CAFO operator or the waste recipient needs to be held liable for any environmental violations that occur as a result of the waste. A failure to make this change, despite the NRCS guidelines and the evidence presented above, would be arbitrary and capricious.

i. CAFOs must undertake increased monitoring activities

The final rule should require operators of CAFOs to monitor receiving waters. Particularly for the majority of Delaware CAFOs discharging into impaired waters, absent this type of monitoring neither Delaware nor the operator will be able to determine whether production area practices or land application activities are causing receiving waters to exceed water quality objectives. In the event of a discharge, permittees must be required to report flow rate, volume, and duration of any discharge, the amount of precipitation (if any) received on the day of the discharge and the preceding seven days; results of a grab sample of the discharge analyzed for pH, BOD5, total suspended solids, total coliform, fecal coliform, total or Kjeldahl nitrogen, and phosphorus.

Although the Proposed Rule requires CAFOs to make a limited report following a discharge event, the requirements do not go far enough. The Rule requires a description of the discharge and flow path and an estimate of the spill's volume.¹⁰² However, it does not require any follow-up water quality monitoring. Rather, the Rule requests sampling results and analysis of the discharge "if any."¹⁰³ This optional approach to water monitoring, even following an illegal discharge, fails to protect water quality or to hold CAFOs accountable for their land application practices. Relatedly, the rule should also require immediate notification of any discharges; the current requirement to report spills within 24 hours¹⁰⁴ does not allow for adequate response by the permitting agency.

During times when CAFO operators do *not* observe a discharge, they should still be required to regularly conduct baseline monitoring in the receiving waters both upstream and downstream of the production and land application areas. Operators should submit the results of monitoring with the annual NMP report and DNREC should use the sampling to evaluate whether the CAFO is meeting the zero discharge standard in its permit.

While the Proposed Rule partially takes water quality impacts into consideration, it should be revised to provide meaningful monitoring requirements and water quality based operational limitations. Despite agriculture's widespread contribution to impaired rivers and streams in the Chesapeake bay watershed, the Proposed Rule makes no effort to implement controls on manure application that are based on the environmental impacts of manure land application. Farmers who apply animal manure, whether from their own CAFOs or imported

¹⁰² Proposed Rule at 9.5.7.1.7.2.1.

¹⁰³ Proposed Rule at 9.5.7.1.7.2.4.

¹⁰⁴ Proposed Rule at 9.5.7.1.7.2.

from another facility, must determine manure application rates that are linked to tangible reductions in nutrient loading in streams and rivers. Furthermore, NMPs for these facilities must include additional measures to reduce and/or control run-off and groundwater infiltration in order to prevent further nutrient flows to impaired waters.

Finally, the Proposed Rule currently places the burden of proof to demonstrate that a particular facility causes impairment on the state. As this comment will discuss, the Rule complicates this process by limiting the state's right to conduct site inspections. The final rule should reverse this burden: a CAFO in an impaired watershed should be presumed to be contributing to impairment unless it can demonstrate through monitoring that it does not.

IV. The Proposed Rule lacks required authorities and a coherent scheme for CAFO inspections and enforcement actions

Even if DNREC were empowered to administer the Proposed Rule according to the state's CWA authorization from EPA, the Rule would not give the agency adequate authority to inspect CAFOs and take enforcement actions for program violations. The Proposed Rule authorizes DDA to inspect permitted CAFOs, but prohibits the agency from conducting unannounced inspections unless the DDA Secretary determines "there may be a violation of [the CAFO] regulations."¹⁰⁵ This scheme provides Delaware's permitting agencies with inadequate inspection authority under the CWA.

Federal regulations require that state NPDES program compliance officers "shall have authority to enter any site or premises subject to regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with the State program..."¹⁰⁶ Prohibiting the permitting authority – in this case DNREC – from conducting routine or complaint-based inspections without notice undermines the agency's ability to accurately assess compliance with NPDES permits.

The Proposed Rule's inspection provisions further fail to satisfy minimum federal requirements, because the Rule provides no plan of any kind to routinely monitor or inspect permitted CAFOs. The CWA requires authorized states to create and implement a "program for periodic inspections of the facilities and activities subject to regulation" that will, among other things, "[d]etermine compliance or noncompliance with issued permit conditions and other program requirements."¹⁰⁷

The Proposed Rule completely fails to establish any program to periodically inspect permitted CAFOs or otherwise ensure compliance with NPDES permits. The final rule must explain how the permitting authority will enforce permits through regular site inspections. This

¹⁰⁵ Proposed Rule at 9.5.7.1.11.3.

¹⁰⁶ 40 C.F.R. § 123.26(c).

¹⁰⁷ 40 C.F.R. § 123.26(b)(2).

inspection program should include a comprehensive checklist of permit requirements that inspectors can evaluate at each facility. At the very least, DNREC should inspect each permitted CAFO during each permit cycle. The failure to assess any permit application or renewal fee may hinder the permitting authority's ability to conduct regular inspections; the final rule should include permit fees sufficient to fund the cost of the permitting, inspection, and enforcement programs.

The Proposed Rule also falls short of providing permitting authorities the minimum enforcement powers required under federal law. DNREC must have authority "to restrain immediately and effectively any person by order or by suit in State court from engaging in any unauthorized activity which is endangering or causing damage to public health or the environment," and further must be able to assess civil penalties of at least \$5,000 per violation per day, and criminal penalties of at least \$10,000 per violation per day.¹⁰⁸

However, Delaware's Nutrient Management Law unlawfully limits the permitting agency's penalty authority. The Proposed Rule subjects violators to the fines and penalties set out in 3 Del.C. 2200 and 7 Del.C. 60 – Nutrient Management and Environmental Control, respectively.¹⁰⁹ Although 7 Del.C. 60 provides DNREC with adequate penalty authority under the CWA, the Proposed Rule allows the DDA Secretary to instead apply the weaker penalty provisions of 3 Del.C. 2200 at his or her discretion. This statute, the Nutrient Management Law, limits civil and administrative penalties to no more than \$1,000 per violation, and does not provide for criminal penalties at all.¹¹⁰ The Proposed Rule therefore fails to meet minimum federal requirements for enforcement powers.

V. Delaware should co-permit integrators with their poultry AFO contractors

Corporations such as Perdue and Tyson exercise substantial control over their contractor's production process and collect the profits generated. In light of their substantial stake in the venture, they should share in the liability that may result from illegal discharges. EPA has endorsed efforts to hold integrators liable for the pollution from their contractor CAFOs, specifically as part of an effective strategy to meet water quality goals for the Chesapeake Bay; EPA has in fact declared its intentions of initiating integrator liability enforcement actions in the Bay region.¹¹¹ In such cases, requiring integrators to obtain NPDES permits may in fact shield them from liability for failing to obtain a permit when their contractors violate the CWA.

¹⁰⁸ 40 C.F.R. § 123.27(a)(1),(3).

¹⁰⁹ Proposed Rule at 9.5.10.1.

¹¹⁰ 7 Del.C. 2280(a).

¹¹¹ EPA Office of Enforcement and Compliance Assurance, Chesapeake Bay Compliance and Enforcement Strategy at 4 (May 2010), available at <http://www.epa.gov/oecaerth/civil/initiatives/chesapeake-strategy-enforcement.pdf>.

Large corporate integrators micro-manage all aspects of the production process at the contracted facility. For instance, contracts generally guarantee an integrator the ability to select and provide feed; control the pick-up and delivery of animals; and enter and inspect the grower's facility with access to all equipment, facilities and areas used by the grower in connection with contract performance.¹¹² Despite integrators' intensive oversight of the production process, it is the individual farmers who pay for the development of waste management systems and are responsible to state and federal authorities for any related violations.¹¹³

Unfortunately, due to the low wages that these farmers typically earn,¹¹⁴ they often cannot afford to implement environmentally protective systems for handling the waste that they produce.¹¹⁵ Making matters worse, because contracted farmers are often unable to control the feed, they cannot take effective steps to reduce the quantity of nutrients or arsenic produced. This arrangement is not only unfair, but also inefficient: if contracted farmers are wholly liable for the costs associated with water pollution, the integrators who control their operations will have no incentive to minimize the extent of such pollution. By co-permitting integrators, Delaware could create a sensible incentives scheme.

Co-permitting integrators would be an equitable step and would also be likely to lead to the development of more cost-effective waste management systems. A letter written by the Southern Environmental Law Center has summarized this argument as follows:

“Corporate integrators are generally large, multi-million dollar companies that are in a better position to finance research and development into new waste management practices and improved feed and processing. The integrators, which benefit from economies of scale, also can more easily establish regional transportation networks and build large-scale manure processing, composting or electricity-generating facilities.”¹¹⁶

In sum, shifting some of the burden from contracted facilities to the integrators (via co-permitting) would not only satisfy general notions of fairness by reducing the burden on those who can least afford it, but would also likely reduce the cost of minimizing water pollution to the industry as whole.

It is especially instructive to examine section 1316 of the Clean Water Act, which directs EPA or state permitting authorities to develop and implement BACT for new CAFOs. Owners

¹¹² See Southern Environmental Law Center, *Comments on Propose NPDES General Permit for Swine Operations*, 24, 2001. [Hereinafter *Southern Environmental Law Center*].

¹¹³ *See id.*

¹¹⁴ *See id.* at 24 (citing Thu and Durrenberger, ed., Pig, Proits and Rural Communities, SUNY (1998)).

¹¹⁵ *See id.*

¹¹⁶ *Southern Environmental Law Center, supra* note 114, at 25.

or operators are required to comply with the BACT standards.¹¹⁷ Owner or operator is specifically defined as “any person who owns, leases, operates, *controls or supervises* a source.”¹¹⁸ In light of the degree of control that integrators exercise over the contracted facilities, integrators could clearly be classified as an “operator” under the Clean Water Act.

Perhaps equally instructive, in a case that turned on the meaning of the word “operate” as used in the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), the Supreme Court wrote: “[a]n operator is simply someone who directs the workings of, manages, or conducts the affairs of a facility.”¹¹⁹ The Court specified that, “[t]o sharpen the definition for purposes of CERCLA’s concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution.”¹²⁰ The Court, while considering the liability of a parent corporation for the actions of a subsidiary, instituted a “direct operation” test that turns on the “degree and detail” of a corporation’s decision making and actual activities.¹²¹

Notably, in applying this test to define the meaning of “operate” in another environmental statute, the Emergency Planning and Community Rights to Know Act (EPCRA), the Sixth Circuit recently declared that the poultry integrator Tyson Foods, Inc., was “clearly an operator” of several contracted poultry facilities in Kentucky because it manages and directs many of the operations related to the venting of ammonia.¹²² Supporting its decision to grant summary judgment on this issue, it wrote: “no reasonable juror could differ on this issue.”¹²³

The District Court for the District of Maryland recently adopted this approach under the CWA, denying Perdue’s motion to dismiss a CWA claim. The court will allow the claim against Perdue to proceed, and concluded that integrators who exercise sufficient control over contractors may be held liable as CWA “operators.”¹²⁴

VI. The Proposed Rule violates public participation requirements

The Proposed Rule violates federal public participation requirements, both by allowing permitted CAFOs to keep critical NMP information confidential and by attempting to restrict CWA citizen suit rights. The final CAFO regulations must require actual crop yields to be made

¹¹⁷ See 33 U.S.C. § 1316(b)(3).

¹¹⁸ 33 U.S.C. § 1316(a)(4). (emphasis added).

¹¹⁹ *United States v. Best foods*, 524 U.S. 51, 66-67 (1998).

¹²⁰ *Id.*

¹²¹ See *id.* at 73.

¹²² *Sierra Club v. Tyson Food, Inc.*, 299 F. Supp. 2d 693, 720 (Ky. West. Dist. 2003).

¹²³ *Id.* at 721.

¹²⁴ Memorandum on Motions to Dismiss, *Assateague Coastkeeper et al. v. Alan and Kristin Hudson Farm et al.*, Civil Action WMN-10-cv-0487 (D. Md. Jul. 21, 2010) .

public, and must clarify that citizens may initiate a CWA citizen suit to allege violations of the regulations that constitute violations of federal law.

a. The final rule must allow public review of the entire NMP and all annual updates

The Proposed Rule improves significantly on Delaware's current nutrient management regulations, in that it generally incorporates the 2008 CAFO Rule's requirements that NMPs be made part of the NPDES permit and be made publicly available.¹²⁵ However, the Proposed Rule does not go far enough to meet all requirements in EPA's regulations. Section 9.5.9.1, Public Access to Information, states that "[a]ll information pertaining to permit issuance, reissuance, modification, revocation, or termination, including NOIs... [and] [a]nnual reports... shall be available for review by the public,"¹²⁶ but then adds the caveat that "crop yields provided and contained in annual reports shall be confidential and non-public to the maximum extent permitted under Delaware law."¹²⁷

Merely requiring that CAFO operators make public whether or not they exceeded their NMP's projected crop yields falls short of the express federal requirement that permitting authorities must allow "public review of both the NMP and the terms of the NMP."¹²⁸ Thus, while the actual crop yields reported in a CAFOs NMP may not constitute "terms of the NMP" that the public may enforce as effluent limitations in a NPDES permit, they nonetheless must be made available for public review. Under Delaware's Proposed Rule, CAFO operators may use actual crop yields to determine a field's realistic yield goals.¹²⁹ This in turn will directly affect projected nutrient uptake on a given field, and the allowed manure application rate on that field. The final rule must ensure the public's right to scrutinize actual yields and how they are used to determine waste application rates.

Moreover, EPA has clarified what does and does not qualify as Confidential Business Information, and actual crop yields reported to update an NMP do not qualify. Federal regulations plainly state that claims of confidentiality for information required in NPDES forms, including attachments required to supply additional information under 40 C.F.R. § 122.21, will be denied.¹³⁰ Section 122.21 includes CAFO NMPs, whose annual reports must specifically include "[t]he actual crop(s) planted and actual yield(s) for each field."¹³¹ Delaware may not shield any aspect of NMPs or annual reports from public review.

b. The final rule may not limit CWA citizen suit rights

¹²⁵ Proposed Rule at 9.5.7.1.6. and 9.5.9.1.

¹²⁶ Proposed Rule at 9.5.9.1.

¹²⁷ *Id.*

¹²⁸ 2008 CAFO Rule at 70440.

¹²⁹ Proposed Rule at 9.5.3.

¹³⁰ 40 C.F.R. § 122.7 (2010).

¹³¹ 40 C.F.R. § 122.42(e)(4)(viii).

The Proposed Rule further violates federal public participation requirements by requiring citizens who allege that a CAFO has violated the NPDES regulations to follow the DDA's administrative complaint process, pursuant to the state's Nutrient Management Law.¹³² The CWA, however, grants citizens the right to "commence a civil action...against any person...who is alleged to be in violation" of a NPDES permit.¹³³

Delaware issued the Proposed Rule pursuant to DNREC's delegated CWA authority, not DDA's authority under the state's Nutrient Management Law. It appears that DDA is attempting to extend the reach of its authority under the Nutrient Management Law by incorporating that law's nutrient management provisions into various provisions of the Proposed Rule. As previously discussed, however, these provisions impermissibly limit DNREC's authority to implement the NPDES program and establish technical standards for nutrient management, and must also be amended. The DDA and DNMC simply have no authority to adjudicate CWA claims, and Delaware may not enact any rule that limits citizen suit rights under the CWA.

VII. The Proposed Rule is not ripe for public comment

DNREC and DDA have acted prematurely by proposing the draft CAFO regulations before finalizing the draft Nutrient Management Program State Technical Standards.¹³⁴ These standards will provide virtually all of the substance in every permitted CAFO's NMP, and yet have essentially been incorporated into the Proposed Rule before even being written. The public cannot effectively exercise its right to comment on the Proposed Rule without knowing exactly what technical standards for nutrient management the CAFO permits issued pursuant to the Rule will require.

DNREC and DDA must initially provide opportunity for public comment on the nutrient standards and finalize those standards; the agencies should then re-issue amended draft CAFO regulations for more meaningful public comment. Without knowing what best management practices, waste application requirements, and nutrient management standards a CAFO operator will be held to, citizens cannot evaluate whether the Proposed Rule will meet the 2008 CAFO Rule's zero discharge standard for production areas¹³⁵ or its requirement to "minimiz[e] nitrogen and phosphorus movement to surface waters" from land application areas.¹³⁶

VIII. Conclusion

¹³² Proposed Rule at 9.5.10.3.

¹³³ 33 U.S.C. § 1365(a)(1).

¹³⁴ Delaware Department of Agriculture, http://dda.delaware.gov/nutrients/NM_TechStandards.shtml.

¹³⁵ See 40 C.F.R. §§ 412.31, 412.32, 412.33, 412.35, 412.44, 412.46 (setting a zero discharge standard from production areas of new and existing CAFOs).

¹³⁶ 40 C.F.R. § 412.4(c)(1).

EIP and the Choptank River Eastern Bay Conservancy respectfully submit these comments for DNREC and DDA's consideration. We also hereby incorporate by reference the public comments submitted by the Mid-Atlantic Environmental Law Center. In commenting it is our intention to provide valuable input and information that will enable the state of Delaware to comply with the CWA and ensure the protection and restoration of the state's waters for current and future generations.

While Delaware's CAFO NPDES permit program need not exactly mirror the federal program, it must be at least as stringent as the federal program and must comply with the terms of EPA's delegation of NPDES program authority to DNREC. These comments describe areas in which Delaware's Proposed Rule has not met these minimum federal requirements and must be revised. If you have any questions regarding these comments, please feel free to contact Tarah Heinzen at (202) 296-8800 ext. 4441.

Sincerely,

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